

Chapter 24

Roads

24-100 Introduction

This chapter considers a range of topics pertaining to roads which, as that term is used in this chapter, generally refers to publicly maintained roads in the secondary system of state highways. The chapter begins with a history of the responsibility for building and maintaining roads in counties, and concludes with private street issues in Albemarle County. In between, the chapter examines the dedication of rights-of-way, various issues pertaining to private property rights in relation to roads, a general discussion of the law pertaining to abandoning public rights-of-way and discontinuing the maintenance of roads and transportation planning. For a discussion of the authority of counties to require road improvements as a condition of development, see chapter 25.

24-200 The Commonwealth is responsible for building and maintaining public roads in Virginia's secondary highway system

The laws pertaining to the Commonwealth's public highways are found in Title 33.1 of the Virginia Code. Virginia Code § 33.1-69 places the control, supervision and management of secondary highways on the Virginia Department of Transportation ("VDOT") and the Transportation Commissioner. Virginia Code § 33.1-69 also expressly withholds from counties the powers conferred to VDOT. The secondary highway system consists of all of the public roads, causeways, bridges, landings and wharves in the counties of the Commonwealth that are not included in the state system of primary highways. *Virginia Code § 33.1-67*. As with secondary highways, the Commonwealth has control over the construction and maintenance of roads in the primary highway system, including arterial highways. *Virginia Code §§ 33.1-25 (state highway system), 33.1-28 (arterial highways)*.

In order to fully understand a county's authority to require the installation of, or improvements to, secondary roads as a condition of approval of a development, it is necessary to be familiar with the history of the secondary road system, and VDOT's responsibility toward those roads.

24-210 The local public road systems prior to 1932

Prior to 1932, local public roads were built and maintained by counties. This system was described as wasteful and unsuited to modern conditions. *Godwin v. Board of Supervisors of Nansemond County*, 161 Va. 494 (1933). In 1906, an act of the General Assembly resulted in the appointment of a State Highway Commissioner who was given general supervision over the construction and maintenance of roads. *Acts 1906, ch. 73*. In 1918, the General Assembly made a provision for a State highway system, which included most of the main traveled roads. *Acts 1918, ch. 10*. Secondary roads were not taken in, and remained under local authority. *Godwin, supra*.

24-220 The state system of secondary highways was established in 1932

In 1932, the General Assembly enacted the Byrd Road Act and abolished the local road systems and established a secondary system of state highways under the direction of the predecessor to VDOT. *Acts 1932, ch. 415*, cited in *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435 (1979). The Department's Commissioner was responsible for maintaining and improving, including constructing and reconstructing, the secondary roads. The manifest purpose of the Act was to relieve the county taxpayers of the cost of constructing and maintaining roads. *County of Henrico v. City of Richmond*, 177 Va. 754 (1941). Thus, since 1932, financing the construction, repair and maintenance of the State primary and secondary highway systems has constituted a major function of the State government.

The Virginia Supreme Court in *Hylton* summarized the centralized control of the secondary road system as follows:

The theory of centralized control in and allocation of funds by an objective arbiter presupposes that priorities for highway improvements will be established on a statewide basis in accordance with traffic demands scientifically ascertained, and will not comprise a disconnected assortment of decisions made under the influence of local pressures. Determination of the appropriate method or methods of funding highway projects is a policy decision affecting all areas of the State, a decision that is peculiarly within the exclusive province of the General Assembly.

The Byrd Road Act does not expressly preclude a county from requiring a developer to construct needed secondary road improvements. However, this omission does not by implication confer such a power on a county.

24-230 The Byrd Road Act in its present form grants authority over secondary roads to VDOT and the Transportation Commissioner, and withholds that authority from counties

Section 2 of the Byrd Road Act is now codified in Virginia Code § 33.1-69. That section places the control, supervision and management of secondary roads on VDOT and the Transportation Commissioner, and provides in part:

The control, supervision, management and jurisdiction over the secondary system of state highways shall be vested in the Department of Transportation and the maintenance and improvement, including construction and reconstruction, of such secondary system of state highways shall be by the Commonwealth under the supervision of the Commonwealth Transportation Commissioner.

One effect of this provision is that a county's interests in the rights-of-way were transferred to the Commonwealth by operation of law in 1932. Another section of the Act directed the Highway Commission to make and file maps of all public roads in the respective counties. *See section 24-240, recognizing that not all roads were taken into the state-maintained system.*

Virginia Code § 33.1-69 also expressly withholds from counties the powers conferred to VDOT, as follows:

The boards of supervisors . . . of the several counties . . . shall have no control, supervision, management and jurisdiction over such public roads, causeways, bridges, landings and wharves, constituting the secondary system of state highways.

Counties do, however, retain the power to establish new roads which, upon their establishment, become part of the secondary road system, and the power to alter or change the location of any road now in the secondary system. *Virginia Code § 33.1-229 et seq.* In addition, although a county may not levy taxes or contract any further indebtedness for the construction of, maintenance, or improvement of roads (*Virginia Code § 33.1-225*), there are several exceptions, including the following:

- A county may authorize its share of federal revenue-sharing funds to be used to supplement funds available for expenditure on secondary roads. *Virginia Code § 33.1-225.1.*
- A county may accept gifts of money, property or services to be used on secondary roads. *Virginia Code § 33.1-225.2.*
- A county may contribute from its revenue or the special assessment of the landowners on the street in

question one-half of the cost to bring certain streets up to the necessary minimum standards for acceptance by VDOT into the secondary system. *Virginia Code § 33.1-72.1*.

These exceptions merely authorize a county to expend funds on secondary roads in limited circumstances. They do not confer on the county the authority to require developers to expend funds on established roads.

24-240 The status of public roads not accepted by the Commonwealth for maintenance in 1932; establishing that a road is a public road

The Commonwealth did not accept all of the former county roads into the state system of secondary highways. Depending on the evidence, these roads may maintain their status as public roads.

In *Kertulla v. Candea*, 68 Va. Cir. 414 (2005), the road at issue had been identified for more than 150 years as a public road, deed descriptions of adjacent properties were identified with reference to the road, the county had acted upon and denied requests to adjust the alignment of the road, and the road had never been abandoned. The court found that “[f]requent, long, and continuous use of the road by the public, coupled with recognition by the county government,” supported the conclusion that the road was a public road, and that the “failure of the Commonwealth to accept the road for maintenance in 1932 does not defeat this conclusion.” The fact that VDOT maps do not include a county road does not alone establish that the road was discontinued or abandoned as a public road. *Bond v. Green*, 189 Va. 23 (1949).

Virginia Code § 33.1-184 delineates the evidentiary requirements to prove the existence of a public road:

When a way has been worked by road officials as a public road and is used by the public as such, proof of these facts shall be prima facie evidence that the same is a public road. And when a way has been regularly or periodically worked by road officials as a public road and used by the public as such continuously for a period of twenty years, proof of these facts shall be conclusive evidence that the same is a public road. In all such cases the center of the general line of passage, conforming to the ancient landmarks where such exist, shall be presumed to be the center of the way and in the absence of proof to the contrary the width shall be presumed to be thirty feet.

Nothing herein contained shall be construed to convert into a public road a way of which the use by the public has been or is permissive and the work thereon by the road officials has been or is done under permission of the owner of the servient tenement.

See, Lawrence v. National Fruit Prod. Co., 43 Va. Cir. 516 (1997) (evidence showed that no public right of passage existed over lane because the road was never generally maintained or officially recognized by the city as a public road) citing *Burks Bros. of Virginia v. Jones*, 232 Va. 238 (1986) (maintenance by CCC and Virginia Department of Forestry was not maintenance by “road officials”).

24-300 The rights of the public generally and abutting landowners to use public roads

Members of the public share a common right to use a public road, and this right cannot be restricted by arbitrary action of the local governing body. *See, Thompson v. Smith*, 155 Va. 367 (1930), *cited in 1985-86 Va. Op. Atty. Gen. 81*.

Property owners generally have a private right to use a road that abuts their property when the use of the abutting road is necessary to the enjoyment and value of the property. *City of Staunton v. Cash*, 220 Va. 742 (1980), *cited in 1985-86 Va. Op. Atty. Gen. 81*. In other words, abutting landowners have an easement of access to a public street. *State Highway and Transportation Commissioner v. Linsly*, 223 Va. 437 (1982). The exercise

of that right, however, is subject to the right of the locality to control the streets to promote the public safety and welfare. *Linsly, supra*; *State Highway and Transportation Commissioner v. Easley*, 215 Va. 197 (1974); *Wood v. Richmond*, 148 Va. 400 (1927) (pre-Byrd Road Act, holding that the city could require the removal of one of two driveways). A restraint upon the use of private property to promote the public welfare is a proper exercise of the police power and is not a taking requiring just compensation. *Linsly, supra*. For example, *entrances* and *curb cuts* may be reasonably regulated in the exercise of the police power. *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514 (1982). However, access may not be entirely denied, absent a *taking* for public use and the resulting constitutional necessity for the payment of just compensation. *Southland Corp. supra*.

This common law right can be restricted only pursuant to specific statutory authority or by the exercise of the county's police power. See, *Azalea Corp. v. City of Richmond*, 201 Va. 636 (1960), *cited in 1985-86 Va. Op. Atty. Gen. 81*. Virginia Code § 15.2-2267 is such statutory authority, enabling a board of supervisors to restrict ingress and egress on publicly used roads not in the secondary system that are used primarily for the inhabitants of a subdivision. The statutory prerequisites must be strictly complied with. *1985-86 Va. Op. Atty. Gen. 81*.

A long line of cases has considered the damage to private property caused by a change in access to private property resulting from public street improvements. Three general rules emerge:

Summary of the Rules Pertaining to Access to a Public Street	
Nature of Access	Rule
All direct access extinguished	Compensable as a taking if no other direct access
Obstruction of direct access resulting from change of grade	If all direct access is extinguished, compensable as a taking if no other direct access; mere change of grade obstructing some, but not extinguishing all access, likely not compensable
Reduction or limitation of direct access	Generally not compensable; frustration of landowner's plans for development or future use not compensable

These rules are discussed in sections 24-310, 24-320 and 24-330.

24-310 Extinguishment of all direct access

The complete extinguishment of direct access to an abutting public street is compensable where there is no other direct access. *State Highway and Transportation Commissioner v. Dennison*, 231 Va. 239 (1986) (installation of unbroken curbing extinguished direct access to residue and was compensable); *State Highway and Transportation Commissioner v. Linsly*, 223 Va. 437 (1982) (extinguishment of direct access and provision of indirect access via a service road was compensable); *Commonwealth Transportation Commissioner of Virginia v. Miners Exchange Bank*, 33 Va. Cir. 261 (1994) (elimination of two direct access points and replacing them with a dead-end service road providing indirect access was compensable); *Smith v. State Highway and Transportation Commissioner*, 4 Va. Cir. 223 (1984) (25-foot wide entrance located directly beside restaurant, too close to the highway right-of-way to allow traffic to reasonably enter or exit, was not reasonable; direct access was therefore extinguished and was compensable).

24-320 Obstruction of direct access resulting from a change of grade

Extinguishment of direct access resulting from a change of grade and damage may be compensable. *City of Richmond v. Kingsland Land Corporation*, 157 Va. 619 (1932) (direct access to Lombardy Street extinguished when street lowered 18 feet); *Nelson County v. Loving*, 126 Va. 283 (1919) (abutting private property damaged when street lowered several feet, requiring landowner to construct retaining walls and stairs).

Kingsland is most appropriately classified as an *extinguishment of direct access* case and, therefore, the landowner was entitled to damages. A mere change of grade, without more, does not entitle the landowner to

damages. In *Town of Galax v. Waugh*, 143 Va. 213 (1925), the elevation of the abutting street was raised several feet when it was improved, and the new elevation obstructed direct access to parts of the landowners building. The Virginia Supreme Court ruled that the landowner was not entitled to damages because the value of his property increased after the street was improved.

24-330 Reduction or limitation of direct access

The reduction or limitation of direct access to an abutting property generally is not compensable. *State Highway and Transportation Commissioner v. Lanier Farm, Inc.*, 233 Va. 506 (1987) (claim that a proposed entrance would have to be relocated to a less advantageous location was not compensable where direct access would be provided); *State Highway and Transportation Commissioner v. Easley*, 215 Va. 197 (1974) (curbing installed with two openings to allow direct access to the property was not compensable because there was no evidence that the openings in the curbing would not provide the abutting owner with reasonable access); *State Highway and Transportation Commissioner v. Howard*, 213 Va. 731 (1973) (median strip installed with no opening at the property's entrance resulted in an incidental non-compensable inconvenience); *Wood v. City of Richmond*, 148 Va. 400 (1927) (reduction of direct access points from two to one for purposes of traffic control and public safety was not compensable); *State Highway Commissioner v. 1619 Associates*, 6 Va. Cir. 108 (1984) (in ruling on a motion *in limine*, the court said that the closing of a crossover opposite the driveway of the property was not compensable).

The guiding rule in this line of cases reinforces the right of the locality and the State to control access to public streets and, where appropriate, to reduce or limit direct access. The Virginia Supreme Court has said that frustration of a landowner's plans for development or future use is not in itself compensable. *Lanier Farm, Inc.*, *supra*. In addition, discontinuance of maintenance of a public road does not deprive an owner of access to his or her land. *See, Ord v. Fugate, State Highway Commissioner*, 207 Va. 752 (1967).

24-400 The dedication of right-of-way

Because a definite and certain grantee was required in order to take land by conveyance or grant at common law, a landowner could not effectively convey or grant an interest in land to the general public as grantee. *The Barter Foundation, Inc. v. Widener*, 267 Va. 80 (2004). In order to facilitate the creation of public streets and other public areas for the benefit of the general public, the doctrine of dedication evolved and recognized the rights acquired by the public by estopping the dedicator from disputing those rights. *Widener, supra*. A *dedication* is the setting aside of land, or of an interest therein, to public use. *City of Norfolk v. Meredith*, 204 Va. 485 (1963). A *right-of-way* is a right belonging to a party to pass over land of another. *Ryder v. Petrea*, 243 Va. 421 (1992). Thus, a *public right-of-way* is the right of the public to pass over land of another.

This section considers both the common law and the statutory authority pertaining to the dedication of land for public roads.

24-410 A history of the law of dedication

In order to have a meaningful and useful understanding of the law of dedication, it is necessary to know what the law required when a particular offer of dedication was made. Thus, this history is not offered for its scintillating subtleties, but to provide the reader with an understanding of the possible effects of documents from, for example, 1937 with the notation: "Offered for dedication for public use." The following history is excerpted, with minor editorial changes, from the Virginia Supreme Court's opinion in *Brown v. Tazewell County Water and Sewerage Authority*, 226 Va. 125 (1983):

Dedication, at common law, was a grant to the public, by a landowner, of a limited right of use[] in his land. For a street, the offer is merely that of a public right of passage. No writing or other special form of conveyance was required; unequivocal evidence of an intention to dedicate was sufficient. Until the dedication was accepted by the public, it was a mere offer to dedicate, no matter how finally expressed. Prior to

acceptance, the offer to dedicate imposed no responsibilities upon the public and was subject to unilateral withdrawal at any time by the landowner. 2 *Minor on Real Property*, pps. 1696-1702 (F. Ribble 2d ed. 1928); see also, *Bradford v. Nature Conservancy*, 224 Va. 181 (1982). Acceptance could be formal and express, as by the enactment of a resolution by the appropriate governing body, or by implication arising from an exercise of dominion by the governing authority or from long continued public use of requisite character. *Ocean Island Inn v. City of Virginia Beach*, 216 Va. 474 (1975). If the land was dedicated to a particular public use and accepted, the public authorities were confined to that use and those necessarily attendant upon it or incidental thereto. 2 *Minor on Real Property*, supra, p. 1701; see, *Anderson v. Water Company*, 197 Va. 36 (1955).

Beginning in 1887, the General Assembly enacted a series of laws relating to dedications of streets and other public areas within platted, recorded subdivisions. Acts 1889-90 ch. 45, p. 35, Virginia Code 1919 § 5219, provided that the acknowledgement and recording of such a plat would operate to create a public easement or right of passage over streets shown on the plat. Nevertheless, the Virginia Supreme Court consistently held that although such “dedication by map” was irrevocable by the dedicator, the rights of the public were merely inchoate, and that the dedication was not complete until accepted by competent public authority. See, for example, *Payne v. Godwin*, 147 Va. 1019 (1926).

That statute was replaced in 1946 by the Virginia Land Subdivision Law (Acts 1946, ch. 369), which required that a subdivision plat be prepared by a licensed surveyor or civil engineer, that it be acknowledged by the owners, and that it be approved by the local governing body before recordation. It then provided that the recordation of the plat would operate to transfer the streets shown thereon to the county or city in fee simple. That statute was replaced in 1962 by what became Virginia Code § 15.1-478 and, with further revisions, what is now Virginia Code § 15.2-2265.

24-420 Common law dedication, accomplished by an offer and acceptance

A common law dedication is a dedication that is accomplished by a procedure other than the statutory procedure established under Virginia Code § 15.2-2265, which is discussed in section 24-430. At common law, dedication is a grant to the public, by a landowner, of a limited right of use in his land. *Brown v. Moore*, 255 Va. 523 (1998). A common law dedication requires both an offer of dedication and its acceptance by the county, either formally or by implication. *Brown v. Tazewell County Water and Sewerage Authority*, 226 Va. 125 (1983).

No writing or other special form of conveyance is required; unequivocal evidence of an intention to dedicate is sufficient. *Brown, supra*. Until the public accepts the dedication, it is a mere offer to dedicate. *Brown, supra*. The acceptance of an offer of dedication by the locality may be formal and express, such as by the adoption of a resolution by the governing body, by implication arising from an exercise of dominion by the governing authority, or from long continued public use of the requisite character. *Brown, supra*. The doctrine of implied acceptance applies when the public has made such long use of property offered for dedication as to render its reclamation unjust and improper. *Brown, supra*. The doctrine only applies in urban areas. *McNew v. McCoy*, 251 Va. 297 (1996). A formal acceptance or express assertion of dominion over the road by public authority is required before dedication of a rural road is complete. *E.S. Chappell & Son, Inc. v. Brooks*, 248 Va. 571 (1994), quoted in *McNew, supra*.

Acceptance by implication may be shown by governmental actions demonstrating the exercise of dominion over the property, such as by installing public utility lines in or across a road, opening and paving the road, and performing maintenance on the road. *Brown, supra*; see, *Ocean Island Inn v. City of Virginia Beach*, 216 Va. 474 (1975). In *Brown*, the Virginia Supreme Court found that evidence that the disputed property was passable by means of a four-wheel-drive vehicle and that some people crossed over the disputed property when traveling between two public roads, was insufficient to demonstrate long continued public use of requisite character, particularly since it failed to show the duration of the usage or its frequency over any period of time.

24-430 Statutory dedication accomplished by recordation of a map (1887-1945)

The law of Virginia from 1887 through 1945 allowed what was known as “dedication by map.” As noted in section 24-410, the Virginia Supreme Court has consistently held that dedication by map was irrevocable by the dedicator, the rights of the public were merely inchoate, and that the dedication was not complete until accepted by a competent public authority. *The Barter Foundation, Inc. v. Widener*, 267 Va. 80 (2004); *Payne v. Godwin*, 147 Va. 1019 (1926).

In *Widener*, the parties were landowners on both sides of a street that had been dedicated by map in 1944 along with two other streets. The street had never been improved, existed in a generally natural condition with trees and grass, and had been used minimally by the public over the years. Widener desired to use the street as an additional means of ingress and egress to its property; Barter claimed that the town had abrogated the dedication of the street through lack of use, and that it was the owner of the street free and clear of the dedication. The Virginia Supreme Court found that town had not manifested an intent to accept the dedication because of the three streets dedicated by map to public use in 1944, only one had been opened to public use and the town maintained only a portion of it; another street had been accepted by the town, though it had never been paved or opened to public use, and it remained in a more or less natural state. By contrast, there was express testimony that the town had not accepted the street at issue.

The effect of the town’s failure to accept the dedication in *Widener* was that it never assumed the duty to maintain the street. However, the Court went on to state: “[T]he general public had the right to use the property for passage in accord with the expressed intent of [the original subdivider’s] certificate and plat.” The Court concluded by holding that the occasional use of the street by the public and the town’s requirement that Widener obtain permission before clearing some of the vegetation was evidence of a requisite degree of dominion and control so as to find that the town had not abandoned the street.

See, *Commonwealth v. Kelly*, 49 Va. 632 (1851) and *Lawrence v. National Fruit Prod. Co.*, 43 Va. Cir. 516 (1997) for information about the law governing public roads in Virginia before the Civil War and the historical character of roads at that time.

24-440 Statutory dedication accomplished by recordation of a subdivision plat (1946-present)

The statutory dedication enabled by Virginia Code § 15.2-2265 applies only to subdivisions. In order for a statutory dedication to be effective, it must have complied with the subdivision laws in effect at the time of recording. *Ryder v. Petrea*, 243 Va. 421 (1992). Strict compliance is required because a proper recordation of a subdivision plat vests the locality with fee simple ownership of the streets shown on the plat. *Brown v. Tazewell County Water and Sewerage Authority*, 226 Va. 125 (1983).

For dedications other than those resulting from a recorded subdivision plat, some further action by the governing body is required to constitute acceptance of these properties as public streets. See, *Washington-Virginia Railway Co. v. Fisher*, 121 Va. 229 (1917), cited in *1978-79 Va. Op. Atty. Gen.* 253.

24-441 The rights and responsibilities transferred by a statutory dedication

Because mere recordation of a properly approved subdivision plat vests fee simple title in the governing body as to all streets shown thereon, the requirement of prior approval by competent public authority is indispensable. *Brown v. Tazewell County Water and Sewerage Authority*, 226 Va. 125 (1983). It subsumes and replaces the common-law requirement of acceptance after dedication. *Brown, supra*. It is the only protection the public has against liability thrust upon it, without its knowledge or consent, by a developer. *Brown, supra*.

Once the subdivision plat is recorded, title to that property dedicated for roads and other public use is transferred to the locality. *Virginia Code § 15.2-2265; 1978-79 Va. Op. Atty. Gen.* 253. Approval of the subdivision plat does not, however, imply acceptance of the obligation to maintain the roads.

1978-79 Va. Op. Atty. Gen. 253. Nor does mere recordation create that obligation. *Virginia Code* § 15.2-2268. Even though a road may be dedicated to public use, it does not become a road in the secondary system until it is accepted by VDOT. *See, Payne v. Godwin*, 147 Va. 1019 (1926).

24-442 The doctrine of partial assumption in a statutory dedication

If a governing body has accepted part of the roads appearing on a recorded plat and no “intention to limit the acceptance” is shown, the partial acceptance constitutes acceptance of all of the roads, provided the part accepted is sufficiently substantial to evince an intent to accept the comprehensive scheme of public user reflected in the plat. *Ocean Island Inn v. City of Virginia Beach*, 216 Va. 474 (1975).

The doctrine of partial assumption assumes a situation where a subdivision plat contains several roads. *Hurd v. Watkins*, 238 Va. 643 (1989). In that situation, if the locality accepts enough of the platted streets without saying that its acceptance is limited, then it will be deemed to have accepted all. *Hurd, supra*.

24-443 Reservations of rights by developers in a statutory dedication

Land that is identified on a plat as *reserved* is not offered for dedication; the concepts of reservation and dedication are inconsistent with one another. *Hurd v. Watkins*, 238 Va. 643 (1989). Since 1962, the statutory dedication of public roads transfers fee simple title to the local governing body without reservation of rights in the developers. *Burns v. Board of Supervisors of Stafford County*, 226 Va. 506 (1984). Prior to then, dedicators of streets could erect and maintain utility fixtures in those streets. *Burns, supra*.

Virginia Code § 15.2-2265 provides “but nothing contained in this article shall effect any right of a subdivision of land heretofore validly reserved.” This language means that reservations of property made prior to submitting the plat and invoking the statutory dedication are not prohibited. *Hurd, supra*. The language does not apply only to reservations made by a subdivider prior to the enactment of the predecessor to Virginia Code § 15.2-2265. *Hurd, supra*. A developer can neither record restrictive covenants, nor reserve such a right, that apply to a publicly dedicated road unless the covenants were “heretofore validly reserved” as provided in Virginia Code § 15.2-2265. *Cavalcade Homeowners Association v. Beacom*, 47 Va. Cir. 449 (1998). The quoted language does not contemplate reserving the right to restrict at a later date property which is publicly dedicated. *Beacom, supra, citing Hurd, supra*.

24-500 Abandonment and vacation

The ancient maxim of the common law, “Once a highway, always a highway,” controls in Virginia unless and until the publicly maintained road is vacated or abandoned in the manner prescribed by statute or by nonuser. *Bond v. Green*, 189 Va. 23 (1949). Public roads may be abandoned by either the state highway procedures under Virginia Code § 33.1-151 *et seq.*, or by vacating a subdivision plat (and the public roads shown thereon), pursuant to Virginia Code § 15.2-2270 *et seq.* This section also discusses the discontinuance of public maintenance of a road.

Citizens have no vested rights in a public road and once a road has been abandoned, the interest of the Commonwealth in the road as a way for public travel, and the interests of the persons who use them, are extinguished. *Board of Supervisors of Louisa County v. Virginia Electric & Power Co.*, 213 Va. 407 (1972). In other words, the section of a road that is abandoned is no longer a public road. *1987-88 Va. Op. Atty. Gen. 393*.

When a road over an easement is abandoned, “the land used for that purpose immediately becomes discharged of the servitude and the absolute title and right of exclusive possession thereto reverts to the owner of the fee, without further action by the public or highway authorities.” *Bond v. Green*, 189 Va. 23 (1949), *cited in Virginia Electric Power, supra*. In the absence of evidence to the contrary, the fee is presumed to be in the abutting landowners; if the road is the boundary line between different tracts, the presumption is that the reversion to each owner is to the center of the road. *Virginia Electric Power, supra*. If the Commonwealth or

the county owns the underlying fee, each has the power to sell and convey the land that was once part of the abandoned road, pursuant to the procedures in Virginia Code §§ 33.1-154 (abandonment of roads in secondary system) and 33.1-165 (abandonment of roads not in secondary system). *See, 1984-85 Va. Op. Atty. Gen. 145.*

State law cautions against abandoning a public road if its effect is to deprive any party of access to a public road. *See, Ord v. Fugate, State Highway Commissioner, 207 Va. 752 (1967)*, referring to what is now Virginia Code § 33.1-165 (applicable to abandonment of roads not in the secondary system).

The abandonment procedures may have a number of requirements, including: (1) a petition for abandonment; (2) posted and published notice, and notice to the Commonwealth; (3) a public hearing when required; (4) adoption of a resolution by the board of supervisors, making the requisite findings; (5) communication of the resolution to the Commonwealth; and (6) sale or conveyance of the publicly owned former right-of-way. Care must be taken to comply with all of the statutory requirements because failure to substantially comply with those requirements will invalidate the abandonment action. *1987-88 Va. Op. Atty. Gen. 391* (failure of county to comply with all notice requirements invalidated abandonment action where county failed to post notice at the front door of the county courthouse or to post notice on and along the road, where landowners in adjoining county used road as their only means of access).

Abandonment Procedures and Their Key Characteristics			
Virginia Code Section	When Procedure Used	Key Finding	Other
33.1-151	Road is in the secondary system of state highways	Road is “to be no longer necessary for the uses of the secondary system of highways”	Public <i>disuse</i> is the key consideration as to necessity
33.1-155	Road is in secondary system that has been altered or new road serves same citizens	There is a new road which serves the same citizens as the old road	Scope of abandonment is limited to the extent of the alteration
33.1-157	Public road that is not in the secondary system	Road is “to be no longer necessary for public use”	Due consideration is to be given to the historic value, if any, of the road
33.1-164	Public road that is not in the secondary system that has been altered or new road serves same citizens	There is a new road which serves the same citizens as the old road	Scope of abandonment is limited to the extent of the alteration
15.2-2271	Road established by subdivision plat; no lots within subdivision have been sold	Plat or portion thereof may be vacated by written instrument signed by all owners or by ordinance adopted by governing body	In determining whether to adopt ordinance, governing body should consider whether the owner of the property shown on the plat will be irreparably damaged by the vacation
15.2-2272	Road established by subdivision plat; lots within subdivision have been sold	Plat or portion thereof may be vacated by written instrument signed by all owners immediately adjoining or contiguous to vacated road, and all others whose access would be affected, or by ordinance adopted by governing body	In determining whether to adopt ordinance, governing body should consider whether the owner of the property shown on the plat will be irreparably damaged by the vacation Public roads in the secondary system will be deemed to be abandoned if vacated under this procedure, provided the plat or portion thereof has been the subject of a rezoning or special use permit, the Commonwealth Transportation Commissioner is notified of such in writing prior to the public hearing, and the vacation is necessary to implement a proffer or a special use permit condition

24-510 Abandonment where road in secondary system deemed to be no longer necessary

Virginia Code § 33.1-151 authorizes the board of supervisors, on its own motion or upon petition of any interested landowner, to cause any section of the secondary system to be abandoned altogether as a public road. In order to abandon a road under this section, the road must be deemed by the board “to be no longer necessary for the uses of the secondary system of highways.” *Virginia Code § 33.1-151*.

If the board is satisfied that no public necessity exists for the continuance of the section of the secondary road as a public road, or that the safety and welfare of the public would be served best by abandoning the section of road as a public road, it then enters an order in its minutes abandoning the section of road as a public road.

In determining whether a *public necessity* exists, the board is guided by the rule that the term is not used in the “sense of being absolutely indispensable to communications between two points, but with relation to the purposes for which public highways are established, namely, the reasonable accommodation of the traveling public.” *Kirby v. Town of Claremont*, 243 Va. 484 (1992). The exercise of the power of abandonment is predicated upon public disuse. *Board of Supervisors of Fairfax County v. Horne*, 215 Va. 238 (1974). Scenic value alone can be sufficient of itself to support a finding of public necessity. *Kirby, supra*. Excessive public use is an improper reason to support such a finding. *Horne, supra*.

See, Virginia Code § 33.1-151 for specific notice, petition, hearing and other requirements.

24-520 Abandonment where road in secondary system has been altered or new road serves same citizens

Virginia Code § 33.1-155 authorizes a board of supervisors to adopt a resolution declaring an old road in the secondary system abandoned when it has been or is altered and a new road which serves the same citizens as the old road is constructed in lieu thereof and approved by the Commonwealth Transportation Commissioner. The scope of the abandonment is limited to the extent of the alteration, but no further. *Virginia Code § 33.1-155*.

The board’s authority under Virginia Code § 33.1-155 is broader than its authority under Virginia Code § 33.1-151. In considering this broader authority, the Virginia Supreme Court has stated that “the General Assembly obviously recognized that, when a new road is constructed to replace an old road, there is only a minimal possibility that public use will be diminished and a strong probability that public use will be facilitated and the capacity for public use increased.” *Board of Supervisors of Fairfax County v. Horne*, 215 Va. 238 (1974).

The phrase, “a new road which serves the same citizens as the old road” is to be liberally construed and the board has wide discretion in its determination to abandon a road. *American Oil Co. v. Leaman*, 199 Va. 637 (1958). The exercise of the board’s power is subject to challenge only upon a showing of fraud or flagrant hardship evidencing abuse of discretion by the Board. *American Oil, supra, cited in Horne, supra*.

See, Virginia Code § 33.1-155 for specific notice, petition, hearing and other requirements.

24-530 Abandonment where state-owned road not in secondary system deemed to be no longer necessary

Virginia Code § 33.1-157 authorizes a board of supervisors to cause any state-owned road not in the secondary system of highways to be abandoned as a public road. In order to abandon a road under this section, the road must be deemed by the board “to be no longer necessary for public use.” *Virginia Code § 33.1-157*. Abandonment under this procedure may be initiated either by the board (*Virginia Code § 33.1-157*) or upon the petition of any person desiring to have the road abandoned. *Virginia Code § 33.1-159*. In considering the abandonment of any section of road under the provisions of this section, due consideration shall be given to the historic value, if any, of the road. *Virginia Code § 33.1-157*.

See Virginia Code §§ 33.1-157 through 33.1-163.1 for a specific notice, petition, hearing and other requirements.

24-540 **Abandonment where state-owned road not in secondary system has been altered or new road serves same citizens**

Virginia Code § 33.1-164 authorizes a board of supervisors to adopt a resolution declaring an old state-owned road not in the secondary system abandoned when it has been or is altered and a new road which serves the same citizens as the old road is constructed in lieu thereof and approved by the board. The scope of the abandonment is limited to the extent of the alteration, but no further. *Virginia Code § 33.1-164.*

See, Virginia Code § 33.1-164 for specific notice, petition, hearing and other requirements.

24-550 **Vacating road by vacating all or part of subdivision plat**

A road created by a subdivision plat may be vacated under the subdivision laws, rather than under the abandonment procedures in Title 33.1 of the Virginia Code and discussed in sections 24-510 through 24-540. If no lot has been sold in a subdivision, the plat or part thereof may be vacated either by obtaining approval of and recording an instrument that vacates the plat or a portion thereof, or by an ordinance adopted by the governing body. *Virginia Code § 15.2-2271.* If the plat is so vacated, all public rights in any road shown on the plat are extinguished, and title to the streets, alleys, and easements for public passage and other public areas laid out or described in the plat are reinvested in the owners, proprietors and trustees, if any.

If any lot has been sold in a subdivision, the plat or part thereof may be vacated by an instrument or by an ordinance as explained above. *Virginia Code § 15.2-2272.* If the plat is so vacated, roads within the secondary system are abandoned, provided: (1) the land shown on the plat or part thereof to be vacated was the subject of a rezoning or special use permit application approved following public hearings; (2) the Commonwealth Transportation Commissioner or his agent is notified in writing prior to the public hearing; and (3) the vacation is necessary in order to implement a proffered condition accepted by the governing body to implement a condition of the special use permit.

Upon vacation under Virginia Code § 15.2-2272, fee simple title to the centerline of any streets, alleys or easements for public passage so vacated is vested in the owners of abutting lots free and clear of any rights of the public or other owners of lots shown on the plat. *Virginia Code § 15.2-2274.* The title is subject to the rights of the owners of any public utility installations which have been previously erected therein. *Virginia Code § 15.2-2274.* If any street, alley or easement for public passage is located on the periphery of the plat, the title for the entire width thereof shall vest in the abutting lot owners. *Virginia Code § 15.2-2274.*

Vacation also is discussed in section 22-900.

24-600 **Discontinuance of public maintenance**

Discontinuance of a road is a determination only that it no longer serves the public convenience warranting its maintenance at public expense. *Ord v. Fugate, State Highway Commissioner, 207 Va. 752 (1967).* Thus, the determination divests VDOT of control of the road. *2000 Va. AG LEXIS 6* (concluding also that persons who voluntarily maintained discontinued road not entitled to reimbursement).

Virginia Code § 33.1-150 provides that only the Commonwealth Transportation Board may discontinue a road in the secondary system of State highways, either on its own motion or on petition of the board of supervisors.

Discontinuance does not eliminate the road as a public road or render it unavailable for public use. *Ord, supra.* Once discontinued, the road remains public road over which the County has exclusive jurisdiction.

Board of Supervisors of Albemarle County v. Ripper, 790 F.Supp. 632 (W.D.Va. 1992) (applying former law, road that was “eliminated” from the secondary system was not abandoned but its state-maintenance was discontinued, and such a road became a road a “county road”; court granted injunction to county ordering landowners to remove gate from road); *1978-79 Va. Op. Atty. Gen. 131* (road remains a public roadway until it is abandoned). Until that time, the public is entitled to the full and free use of all the territory embraced within the road in its full length and breadth. *Wray v. Norfolk & Western Railway Co.*, 191 Va. 212 (1950).

Notwithstanding *Wray*, the Attorney General has opined that a county could temporarily barricade a discontinued road as an exercise of its police powers and, conversely, could remove such a barricade. *1978-79 Va. Op. Atty. Gen. 131* (installation); *1986-87 Va. Op. Atty. Gen. 215* (removal). The Attorney General also has concluded that a county could barricade (presumably permanently) a public road to traffic where the road abutted a county landfill and the only other abutting landowner agreed to the closure, the road remained open from 8:00 a.m. to 4:30 p.m. weekdays and until noon on Saturdays, and the landfill caretaker was available on weekends and holidays to admit people wanting to visit cemeteries served by the road. *1974-75 Va. Op. Atty. Gen. 205*. This opinion is likely limited in application to the peculiar facts presented, and the Attorney General declined to find it to be controlling where a county proposed a complete bar to public access. *1978-79 Va. Op. Atty. Gen. 131*.

When a road in the secondary system is discontinued under Virginia Code § 33.1-150, the board of supervisors may by ordinance provide for use of the property for any of the following purposes: (1) hiking or bicycle trails and paths or other nonvehicular transportation and recreation purposes; (2) greenway corridors for resource protection and biodiversity enhancement, with or without public ingress and egress; and (3) access to historic, cultural, and educational sites. *Virginia Code § 33.1-152.1*.

24-700 Transportation planning

Virginia Code § 15.2-2200 declares the legislative intent of the General Assembly in adopting the laws pertaining to planning, zoning and the subdivision of land. The following passage highlights those statements most applicable to roads:

This chapter is intended to encourage localities to improve public health, safety, convenience and welfare of its citizens and to *plan for the future development of communities to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway . . . facilities. . .* and that the growth of the community be consonant with the efficient and economical use of public funds. (italics added)

In summary, Virginia Code § 15.2-2200 speaks to *planning* transportation systems for *future* development, and assuring that *new* community centers have adequate highway facilities.

In recent years the General Assembly has amended and added key pieces of enabling authority to require the coordination of transportation with development. One of those key pieces of legislation was adopted as Chapter 896 of the 2007 Acts of Assembly. In *Marshall v. Northern Virginia Transportation Authority*, 275 Va. 419 (2008), the Virginia Supreme Court held that the portion of the legislation that vested taxing authority in a regional transportation authority that was not a county, city, town or regional government and was not an elected body, was unconstitutional.

24-710 Under the comprehensive plan

Virginia Code §§ 15.2-2223 and 15.2-2224 require that the comprehensive plan designate the general or approximate location, character, and extent of each road and transportation improvement shown on the plan. In addition, the planning commission shall, in the preparation of a comprehensive plan, survey and study road and transportation improvements and their costs. A comprehensive plan must include a transportation plan that designates a system of transportation infrastructure needs and recommendations that may include the

designation of new and expanded transportation facilities and that support the planned development of the territory covered by the plan. *Virginia Code § 15.2-2223*. The transportation plan must include, as appropriate, but is not limited to, roadways, bicycle accommodations, pedestrian accommodations, railways, bridges, waterways, airports, ports, and public transportation facilities. *Virginia Code § 15.2-2223*. The transportation plan also should recognize and differentiate among a hierarchy of roads such as expressways, arterials, and collectors. *Virginia Code § 15.2-2223*. Upon request by the locality, VDOT is required to provide the locality with technical assistance in preparing the transportation plan. *Virginia Code § 15.2-2223*.

A comprehensive plan also must contain a map showing road and transportation improvements, including the cost estimates, of the road and transportation improvements to the extent that information is available from VDOT. *Virginia Code § 15.2-2223*. The plan must take into account the current and future needs of the residents in the locality while considering the current and future needs of the planning district within which the locality is situated. *Virginia Code § 15.2-2223*.

Localities with a population of 20,000 or more and a growth rate of 5% or more (between the next to last and last decennial census) or in localities with a growth rate of 15% or more must designate road impact fee service areas. *Virginia Code § 15.2-2320*. In addition, the comprehensive plan must include a road improvements plan showing the necessary road improvements within an impact fee service area and the schedule for those improvements. *Virginia Code § 15.2-2321*.

Virginia Code §§ 15.2-2222.1 and 15.2-2223 provide that, prior to adoption of any comprehensive plan or comprehensive plan amendment, a locality must submit the plan or amendment to VDOT for review and comment. VDOT must provide written comments on the proposed plan or amendment within 90 days after it is received. The comprehensive plan may include the designation of new and expanded transportation facilities and recommendations that support the planned development of the territory covered by the plan.

Virginia Code § 15.2-2239 requires that capital improvement programs include estimates of cost of each road and transportation improvement adopted as an amendment to a locality's comprehensive plan.

See 24 VAC 30-155-30 for the regulations for a traffic impact analysis required for a comprehensive plan or a comprehensive plan amendment.

24-720 In the rezoning process

Within 10 business days after a rezoning application is submitted, the locality must submit the proposal to VDOT if the proposal will substantially affect transportation on state-controlled highways. *Virginia Code § 15.2-2222.1(B)*. The rezoning application must include a traffic impact statement if required by local ordinance or VDOT regulations. *Virginia Code § 15.2-2222.1(B)*.

Within 45 days after its receipt of the traffic impact statement, VDOT must either provide written comment on the proposed rezoning to the locality or schedule a meeting with the locality's planning commission or other agent (to be held within 60 days after VDOT received the traffic impact statement) and the applicant to discuss potential modifications to the proposal to address concerns and deficiencies. *Virginia Code § 15.2-2222.1(B)*.

VDOT must complete its initial review of the rezoning proposal within 45 days, and its final review within 120 days, after it receives the rezoning proposal from the locality. *Virginia Code § 15.2-2222.1(B)*. If the locality has not received any comments from VDOT within the specified periods, it may assume that VDOT has no comments. *Virginia Code § 15.2-2222.1(D)*.

See 24 VAC 30-155-40 for the regulations for a traffic impact analysis and traffic impact statement required for a rezoning, and 24 VAC 30-155-60 for the required elements of a traffic impact statement.

24-730 In the development process

Within 10 business days after a final subdivision plat or site plan is submitted, the locality must submit the plat or plan to VDOT if it will substantially affect transportation on state-controlled highways. *Virginia Code § 15.2-2222.1(C)*. The plat or plan must include a supplement traffic analysis if required by local ordinance or VDOT regulations. *Virginia Code § 15.2-2222.1(C)*.

Within 30 days after its receipt of the plat or plan, VDOT must either provide written comment on the plat or plan to the locality or schedule a meeting with the locality's planning commission or other agent (to be held within 60 days after VDOT received the plat or plan) and the applicant to discuss potential modifications to the plat or plan to address concerns and deficiencies. *Virginia Code § 15.2-2222.1(C)*.

VDOT must complete its final review within 90 days after it receives the plat or plan from the locality. *Virginia Code § 15.2-2222.1(C)*. The submission of the plat or plan to VDOT tolls all times for local review under Virginia Code § 15.2-2259 until the locality has received VDOT's final comments. *Virginia Code § 15.2-2222.1(C)*. If the locality has not received any comments from VDOT within the specified period, it may assume that VDOT has no comments. *Virginia Code § 15.2-2222.1(D)*.

See 24 VAC 30-155-50 for the regulations for a traffic impact analysis and traffic impact statement required for subdivision plats, site plans and plans of development. See 24 VAC 30-155-60 for the required elements of a traffic impact statement.

24-800 Private streets in Albemarle County and the further subdivision of parcels on those streets

Private streets have four key features that distinguish them from public streets: (1) the land on which the streets are built is privately owned; typically the owners of the lots abutting the private street own the underlying fee interest to the centerline of a private street or it is owned by a homeowner's association (one exception for public roads: the state holds only a prescriptive easement of some public roads brought into the state-maintained system when the Byrd Road Act became effective in 1932); (2) the lots served by the private street have an easement allowing the owners of the lots to use the street; (3) private streets are maintained by the landowners under a maintenance agreement or by a homeowner's association under restrictive covenants; and (4) private streets are not necessarily designed nor constructed to VDOT standards.

Although private streets may also be approved in the development areas (*Albemarle County Code § 14-233*), this section focuses on private streets in the rural areas.

24-810 Albemarle County's regulation of private streets

The county's subdivision regulations allow subdivisions to be created with private streets under certain circumstances, and it regulates their approval, design and maintenance.

The planning commission may approve a private street in the rural areas if: (1) the private street would alleviate significant degradation to the environment, as compared to a public street in the same alignment; (2) the lots would be used for non-residential or non-agricultural purposes; or (3) the general welfare, as compared to the proprietary interests of the subdivider, would be better served by the private street. The subdivision agent may approve a private street in the rural areas if the subdivision is a family subdivision or a two-lot subdivision and the private street will serve only those lots and will be the sole and direct means of access to a public street. *Albemarle County Code § 14-232(B)*.

In considering a private street, the planning commission and the subdivision agent must not only find that the criteria in Albemarle County Code § 14-232 are satisfied, but also that the findings required by Albemarle County Code § 14-234(C) can be made. In addition, Albemarle County Code § 14-234(B) provides in part that in considering a request for approval of one or more private streets, the planning commission and the

subdivision agent are to consider that private streets are intended to be the exception to public streets.

24-820 The rights of owners of lots served by a private street

This section examines whether planning commission approval of a private street in the rural areas is required when a lot served by the private street is proposed to be subdivided, and the private street was previously approved under the subdivision ordinance.

There are three key rules that help identify the rights of owners of lots served by a private street. However, there is nothing inherent in the private status of a street serving a subdivision lot that prohibits further division of such a lot.

24-821 The subdivision ordinance does not prohibit further division of a lot without county approval of the private street; exception

One issue that has arisen in the past is whether the further division of a lot served by a private street requires re-approval of the private street. To answer this question, consider the history of the county's private street regulations. Until 1998, the private street regulations in the subdivision ordinance included the following sentence:

Any further subdivision of land involving additional use of such street shall be deemed a subdivision subject to the provisions of this chapter.

Former Subdivision Ordinance § 18-36(a).

This provision was particularly important to the county's regulation of subdivisions through the early 1980's. Before then, many divisions of land in the county's rural areas were exempt from the county's subdivision regulations, so it was important for the county to at least review a subdivision plat if the lots being created were going to be served by a private street. In addition, the early private street regulations in the subdivision ordinance had numerous private street design classifications based on the number of lots (as compared to the three classifications (1-2 lots, 3-5 lots, and 6 or more lots) in the current subdivision ordinance). The cited language from former Subdivision Ordinance § 18-36(a) only stated that a further subdivision of land served by a private street was "deemed a subdivision." To the extent this language was relied on as the authority to require re-approval of a private street in the past, the reliance was mistaken because that section *never* required re-approval of the private street. In addition, assuming for the sake of argument that former Subdivision Ordinance § 18-36(a) was the basis for requiring re-approval of a private street when a lot was further subdivided, this provision was eliminated when the subdivision ordinance was comprehensively amended in 1998. Therefore, there is no express language in the current or former versions of the subdivision ordinance that required re-approval of a private street when a subdivision lot was further subdivided. There are two exceptions discussed in section 24-824 below.

In the absence of express language in the subdivision ordinance, the county must refrain from imposing such a requirement by implication. Rules applied in other areas of real estate and land use law support this conclusion. *See, for example, Scott v. Walker*, 274 Va. 209 (2007) (in considering restrictive covenants, "the burden is on him who would enforce such covenants to establish that the activity objected to is within their terms," that covenants "are to be construed most strictly against the grantor and persons seeking to enforce them," and that "substantial doubt or ambiguity is to be resolved in favor of the free use of property and against restrictions"); *Donovan v. Board of Zoning Appeals*, 251 Va. 271 (1996) (the zoning ordinance "should not be extended [or restricted] by interpretation or construction beyond its intended purpose"); *Ramsey v. Board of Zoning Appeals of Front Royal*, 68 Va. Cir. 135 (2006) (the rule which prevails in most jurisdictions, at least in the absence of any statute to the contrary, is that since zoning ordinances "are in derogation of the common law and operate to deprive an owner of a use thereof which otherwise would be lawful, they should be strictly construed in favor of the property owner," citing 83 Am. Jur. 2d, Zoning and Planning, § 699, and *Young v. Town of Vienna*, 203 Va. 265 (1992) (revenue ordinance must be strictly construed)).

24-822 Generally, land that has been subdivided may be further subdivided

When a lot within a subdivision is proposed to be further subdivided, the typical complaint from other lot owners in the subdivision is that they purchased their lots with the expectation that the lots would be configured as they were when they were originally purchased. In fact, absent an express restriction on further subdivision and assuming that the county's zoning regulations can be satisfied, subdivision lots may be further subdivided.

In the absence of a general plan for development restricting lots to a certain size, a conveyance of lots by reference to a recorded map or plat does not in itself raise any implied covenant that the lots will remain as shown on the plat, or that they may not be later changed in size or further subdivided. *1979-80 Va. Op. Atty. Gen. 327*. However, when the necessary covenants or other terms and conditions restricting lot sizes are in the deed of conveyance itself, or otherwise in the chain of title, the resubdivision of originally platted lots is prohibited. *Friedberg v. Riverpoint Building Committee*, 218 Va. 659 (1977). The subdivision enabling legislation (*Virginia Code § 15.2-2240 et seq.*) does not require that a subdivider set forth restrictions on lot sizes in deeds or on plats. Thus, the recording of deeds and plats under those provisions does not in itself give rise to any implied covenant as to lot sizes. *1979-80 Va. Op. Atty. Gen. 327*. As a result, unless there is a general plan for the development restricting lot sizes in a subdivision, there is no covenant between subdivider and purchasers, or among purchasers, as to the lot sizes and the purchasers have no vested right in retaining the *status quo*. *1979-80 Va. Op. Atty. Gen. 327*.

Today, subdividers often record restrictive covenants that prohibit the further subdivision of the lots within the development.

24-823 An increase in the use of a private street resulting from further subdivision of one of the lots served by the private street probably does not burden the underlying easement held by the lot owners

With certain exceptions discussed in section 24-824 below, planning commission re-approval of a private street is not required.

When a lot within a subdivision is proposed to be further subdivided, an anticipated complaint from existing lot owners in the subdivision is that the further subdivision of a lot served by the private street would overburden the easement that grants a right of passage over the street. Generally, the further subdivision of land served by a private street will not overburden the easement. In *Shooting Point LLC v. Wescoat*, 265 Va. 256 (2003), a 176-acre lot was served by a 15 foot wide easement that was 0.3 miles long. The deed of easement did not impose any limitations on the use of the easement. At the time the easement was granted, both the 176-acre lot (the dominant estate) and the servient estate were in agricultural use. When the owner of the 176-acre lot proposed to create an 18-lot subdivision, the owner of the servient estate claimed, among other things, that the use resulting from the 18-lot subdivision would overburden the easement. The Virginia Supreme Court rejected this argument:

Generally, when an easement is created by grant or reservation and the instrument creating the easement does not limit its use, the easement may be used for "any purpose to which the dominant estate may then, or in the future, reasonably be devoted." [citations omitted]. However, this general rule is subject to the qualification that no use may be made of the easement, different from that established when the easement was created, which imposes an additional burden on the servient estate. [citations omitted]

The court went on to hold that the subdivision of the 176-acre Shooting Point lot into 18 residential lots was a purpose to which the dominant estate could be reasonably devoted, and that the proposed use of the easement would not impose an unreasonable burden on the servient estate. The court explained that, although the number of vehicles using the easement would increase substantially as a result of the proposed use, this fact demonstrated only an increase in *degree* of burden, not an imposition of an *additional* burden, on the servient

estate. Thus, in the absence of an express limitation (such as the prohibition of further subdivision contained in a recorded covenant), the further subdivision of a lot served by a private street will not be found to overburden the easement.

24-824 Two situations in which the county can require re-approval of a private street

There are two situations in which the county can require re-approval of a private street. First, the county can require re-approval of a private street if the street was designed to one applicable standard, and the subdivision will place the private street in a different design standard, *e.g.*, the private street was approved to serve three to five lots, and a re-subdivision of one of the lots will increase the number of lots served by the private street to six or more lots. Second, the county can require re-approval of the private street if the original private street approval was conditioned so as to expressly require re-approval if any lot served by the private street is further subdivided.

In the absence of an express subdivision regulation, a condition imposed when the private street was approved, or where the resubdivision of a lot served by the private street would require a private street having a different design standard, there is no basis to require a person proposing to resubdivide a lot served by a private street obtain re-approval of the private street.