

Chapter 24

Roads

24-100 Introduction

This chapter considers a range of topics pertaining to *roads* which, as that term is used here, generally refers to publicly maintained roads in counties that are in the secondary system of state highways.¹ The chapter begins with a history of the responsibility for building and maintaining roads in counties, and concludes with private road-related 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 state 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 33.2 of the Virginia Code. Virginia Code § 33.2-326 places the control, supervision and management of secondary highways on the Virginia Department of Transportation ("VDOT") and the Commissioner of Highways. Virginia Code § 33.2-326 also expressly withholds from counties the powers conferred to VDOT. *For a further discussion of Virginia Code § 33.2-326, see section 24-230.*

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 § 33.2-324.* The counties of Arlington and Henrico are exceptions – their roads are not in the secondary system of state highways and they maintain them.

The Commonwealth also has control over the construction and maintenance of roads in the primary highway system, including arterial highways. *Virginia Code § 33.2-310 (state highway system).*

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, 171 S.E. 521 (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.*

See Commonwealth v. Kelly, 49 Va. 632, 1851 Va. LEXIS 76, 1851 WL 2684 (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.

¹ As used in this chapter, the terms *roads*, *streets*, and *highways* are interchangeable unless otherwise noted. As part of the 2014 recodification of Title 33.1 of the Virginia Code, many prior references to *roads* in Title 33.1 have been changed to *highways* in Title 33.2.

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, 258 S.E.2d 577 (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, 15 S.E. 309 (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.

Hylton, 220 Va. at 441, 258 S.E.2d at 581.

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 Commissioner of Highways, and withholds that authority from counties

Section 2 of the Byrd Road Act is now codified in Virginia Code § 33.2-326. That section places the control, supervision and management of secondary roads on VDOT and the Commissioner of Highways, and provides in part:

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

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 § 33.2-326 also expressly withholds from counties the powers conferred to VDOT, as follows:

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

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 § 33.2-705 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 § 33.2-705*), there are several exceptions, including the following:

- A county may accept gifts of money, property, or services to be used on secondary roads. *Virginia Code* § 33.2-702.
- A county may contribute from its revenue or the special assessment of the landowners on the road in question one-half of the cost to bring certain roads up to the necessary minimum standards for acceptance by VDOT into the secondary system. *Virginia Code* § 33.2-335.

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 secondary highway system. Depending on the evidence, these roads may maintain their status as public roads. The question will turn on whether the road was offered for dedication and accepted as a public road under the common law, as discussed in section 24-320.

24-250 Current requirements for the acceptance of secondary roads

Until recently, many developments were built with limited ingress and egress, with interconnectivity to adjoining lands often completely missing. In 2007, Virginia Code § 33.2-334 was adopted and it directed the Commonwealth Transportation Board to promulgate secondary street acceptance requirements (“SSAR”) the board deemed necessary or appropriate to achieve the safe and efficient operation of the Commonwealth’s transportation network. *Virginia Code* § 33.2-334(A). The state law, as well as the regulations, have evolved over the past several years. The regulations are codified at 24 VAC 30-92-10 *et seq.* VDOT’s guidance document, “Secondary Street Acceptance Requirements” (2011) is here: http://www.virginiadot.org/info/secondary_street_acceptance_requirements.asp.

24-300 The dedication of right-of-way

There appear to be three recognized methods by which the public may acquire the right to use land for a public road: “(1) by condemnation, (2) by continuous and adverse use by the public accompanied by some official recognition thereof, and (3) by dedication of the land by the owner to public use coupled with acceptance of the dedication by proper authorities. [citation omitted]” *Jones v. King*, 37 Va. Cir. 404, 406 (1995). This section analyzes only the second and third methods, and considers both the common law and the statutory authority pertaining to the dedicating land for public roads.

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, 592 S.E.2d 56 (2004). In order to facilitate the creation of public roads 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*.

Dedication “is an appropriation of land by its owner for the public use.” *Greenco Corp. v. City of Virginia Beach*, 214 Va. 201, 203, 198 S.E.3d 496, 498 (1973), quoted in *Mulford v. Walnut Hill Farm Group, LLC*, 282 Va. 98, 106, 712 S.E.2d 468, 12 (2011); *City of Norfolk v. Meredith*, 204 Va. 485, 489, 132 S.E.2d 431, 434 (1963) (“[a] dedication is the setting aside of land, or of an interest therein, to public use”). A *right-of-way* is a right belonging to a party to pass over land of another. *Ryder v. Petrea*, 243 Va. 421, 416 S.E.2d 686 (1992). Thus, a *public right-of-way* is the right of the public to pass over land of another.

The burden of proof is on the person seeking to establish a road as a public road “to establish the existence and location of this public road with reasonable certainty.” *White v. Reed*, 146 Va. 246, 251, 135 S.E. 809, 810 (1926) (holding that the plaintiffs failed to satisfy their burden of proof where, though there was a court order pertaining to the road, there was no report of the road commissioner, no plat showing the location or width of the road, the right

of way claimed did not follow the course indicated in the petition, the evidence was otherwise confusing and there was “no evidence from which it can be confidently inferred that the location of the public road referred to was identical with the ancient right of way”).

24-310 A history of the law of dedication

Knowledge of the history of the law of dedication over the years is essential in order to determine whether a purported public right-of-way was properly dedicated because the law in effect at the time of the dedication governs the dedication’s validity. For example, if faced with a document from 1937 with the notation: “Offered for dedication for public use,” one must know the law of dedication in 1937 to determine whether the dedication was valid. 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, 306 S.E.2d 889 (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 road, 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, 294 S.E.2d 866 (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 user of requisite character. *Ocean Island Inn v. City of Virginia Beach*, 216 Va. 474, 220 S.E.2d 247 (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, 87 S.E.2d 756 (1955).

Beginning in 1887, the General Assembly enacted a series of laws relating to dedications of roads 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 roads 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 *Payne v. Godwin*, 147 Va. 1019, 133 S.E. 481 (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 roads 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.

24-320 Common law dedication, accomplished by an offer and an 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 24-340. 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, 500 S.E.2d 797 (1998). A common law dedication requires both an offer of dedication and its acceptance by the locality, either formally or by implication. *Brown v. Tazewell County Water and Sewerage Authority*, 226 Va. 125, 306 S.E.2d 889 (1983).

No writing or other special form of conveyance is required; unequivocal evidence of an intention to dedicate is sufficient. *Moore*, supra. Until the public accepts the dedication, it is a mere offer to dedicate. *Moore*, supra.

There is a significant difference between accepting a common law offer to dedicate an *urban* road as compared to a *rural* road. The two terms do not appear to be defined in the case law. Most of the published opinions appear to pertain to rural roads.

24-321 Accepting an offer to dedicate an urban road

Accepting an offer of dedication of an urban road 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 v. Moore*, 255 Va. 523, 530, 500 S.E.2d 797, 801 (1998).

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. *Moore, supra*. The doctrine only applies to urban roads. *McNew v. McCoy*, 251 Va. 297, 467 S.E.2d 477 (1996).

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. *Moore*, 255 Va. at 530, 500 S.E.2d at 801; see *Ocean Island Inn v. City of Virginia Beach*, 216 Va. 474, 477, 220 S.E.2d 247, 250-251 (1975). In *Moore*, 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 the requisite character, particularly because it failed to show the duration of the usage or its frequency over any period of time.

In *3232 Page Avenue Condominium Unit Owners Association v. City of Virginia Beach*, 284 Va. 639, 735 S.E.2d 672 (2012) (not a road case), the issue was whether the evidence was sufficient to establish an implied dedication of a public easement over Cape Henry Beach. The owners association asserted that, in order to establish an implied dedication, the city had to prove that the use by the public was adverse to and exclusive of the use and enjoyment of the property by the association, citing *City of Staunton v. Augusta Corporation*, 169 Va. 424, 193 S.E. 695 (1937) for that proposition. The Virginia Supreme Court affirmed the circuit court's finding that a public easement had been dedicated. The Court distinguished *City of Staunton* because public use was the only evidence of either dedication or acceptance in that case. In the instant case, the Court concluded that there was ample evidence that the public had used the beach since 1926, the city had patrolled and maintained the beach for over 30 years, and the association had never objected to the city's exercise of dominion and control over the beach.

The common law dedication of a public right of way in an urban street does not necessarily extinguish any preexisting private easements. *Old Dominion Boat Club v. Alexandria City Council*, 286 Va. 273, 749 S.E.2d 321 (2013). In *Old Dominion*, the boat club was the successor in interest to a 1789 deed that granted an easement over what became Wales Alley to provide "for the more easy communication with the public main Streets and the river . . ." In a separate case, the circuit court had found in 2010 that Wales Alley had been dedicated to the public through over one hundred years of public use and the exercise of dominion and control over it by the city. The circuit court in *Old Dominion* ruled that the boat club's easement in Wales Alley had been dedicated, along with the fee simple interest, to the city. On appeal, the Virginia Supreme Court held that there was insufficient evidence to establish that the boat club's preexisting private easement had been expressly or implied dedicated to public use and that changing Wales Alley to a public street did not result in a cessation of the purpose of the boat club's private easement but, instead, merely facilitated the easement in continuing to fulfill its ongoing purpose. *Old Dominion Boat Club*, 286 Va. at 284-285, 749 S.E.2d at 328.

24-322 Accepting an offer to dedicate a rural road

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, 450 S.E.2d 156 (1994), quoted in *McNew v. McCoy*, 251 Va. 297, 467 S.E.2d 477 (1996).

The general rule is that accepting an offer of dedication of a rural road must appear as a matter of record. In *White v. Reed*, 146 Va. 246, 252, 135 S.E. 809, 810 (1926), the Virginia Supreme Court stated the settled rule that:

Public highways should be matters of public record, and identified with such reasonable certainty as to apprise the public of their location, and supply them with the means of knowing to what extent they may travel along without becoming trespassers; and also to make known to individuals how much and what portions of their land have been appropriated to public use.

Thus, the search is for some record evidence of not only the location, but also the public nature, of the road. Where record evidence is inconclusive, other evidence will be required.

1. A public rural road may be established by public use combined with official recognition thereof; public use alone is insufficient

The Virginia Supreme Court in *Stanley v. Mullins*, 187 Va. 193, 200-201, 45 S.E.2d 881, 885 (1948) summarized the longstanding law in Virginia as to whether use of a road by the public establishes it as a public road:

In *Gaines v. Merryman*, 95 Va. 660, 663-4, 29 S.E. 738, it is said:

“The law with respect to public highways is well settled. In the case of *Commonwealth v. Kelly*, 8 Gratt. (49 Va.) 632, it was held that ‘the mere user of a road by the public for however long a time will not constitute it a public road; that a mere permission to the public, by the owner of the land, to pass over a road upon it, is, without more, to be regarded as a license, and revocable at the pleasure of the owner; that a road dedicated to the public must be accepted by the county court upon its records, before it can be a public road; and that if a county court lays off a road, before used, into precincts, or appoints an overseer or surveyor for it, thereby claiming the road as a public road, and if, after notice of such claim, the owner of the soil permits the road to be passed over for any long time the road may be well inferred to be a public road.’” [citations omitted]

In *Bradford v. The Nature Conservancy*, 224 Va. 181, 198-199, 294 S.E.2d 866, 875 (1982), the Virginia Supreme Court explained the requirements for a road to be dedicated to the public and why mere use by the public is insufficient evidence of acceptance to establish a rural road as a public road:

In order for a road to be dedicated to the public, there must be an offer made by the landowner and an acceptance by the public. *Harris v. The Commonwealth*, 61 Va. 648 (20 Gratt.) 833 (1871). While a dedication may be implied from the acts of the owner, these acts must be unmistakable to show the intention of the landowner to permanently give up his property. *West Point v. Bland*, 106 Va. 792, 794, 56 S.E. 802, 804 (1907).

This Court has long recognized that what may amount to a dedication in an urban area will not serve the same purpose in a rural one. *Commonwealth v. Kelly*, 49 Va. 700 (8 Gratt.) 632 (1851). This is because landowners in rural areas frequently allowed roads to be opened through their property without intending a dedication to the public. *Id.* at 635. Just as important, the government might not have any intention to accept the road and be responsible for its maintenance. Thus, before a rural road can be dedicated, there must be a formal acceptance by the public. *Lynchburg Traction Co. v. Guill*, 107 Va. 86, 57 S.E. 644 (1907).

Therefore, in order for a common law dedication of a rural road to be complete, there must be: (1) either a written or express offer to dedicate or unequivocal evidence of an intention to dedicate; and (2) a formal acceptance or express assertion of dominion over the road by a public authority. *E.S. Chappell & Son, Inc., v. Brooks*, 248 Va. 571, 574, 450 S.E.2d 156, 158 (1984) (a “formal acceptance or express assertion of dominion over the road by public authority is required before dedication of a rural road is complete”); *Burks Brothers of Virginia v. Jones*, 232 Va. 238, 248, 349 S.E.3d 134, 140 (1986); *see Dykes v. Friends of the C.C.C. Road*, 283 Va. 306, 720 S.E.2d 537 (2012) (circuit court erred in finding that the road in issue was a public road solely by virtue of its long and continuous use by the

general public and recognition of that use by the county). Rural roads cannot be accepted by implication. *McNew v. McCoy*, 251 Va. 297, 300, 467 S.E.2d 477, 479 (1996) (“the doctrine of implied acceptance only applies in urban areas”). Express acceptance would be in the form, for example, of a resolution by the appropriate governing body. *Brown v. Tazewell County Water and Sewerage Authority*, 226 Va. 125, 129-130, 306 S.E.3d 889, 891 (1983); see *Dykes, supra* (the board of supervisors’ acknowledgement in 1941 by a then owner of the property to maintain a gate and cattle guard where the road in issue intersected with a state road was “clearly not a formal acceptance” of the road in issue as a public road). The express exercise of dominion over the road can be in the form of paving and maintaining the road or installing and maintaining public utilities. See, e.g., *The Barter Foundation, Inc. v. Widener*, 267 Va. 80, 90, 592 S.E.2d 56, 61 (2004) (pertaining to a street in a town). 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 circuit 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. *Id.* at 415.

In *Bradford*, the Court held that although the plaintiffs presented evidence that the roads in question were used by the public, there was no evidence the county ever accepted the roads, either by making an entry on the public records or by assuming the duty to maintain them.

2. Virginia Code § 33.2-105 establishes the standards for prima facie evidence that a road is a public road

Virginia Code § 33.2-105 provides how a person may establish that a road is a public road by recognition of the public use:

When a way has been worked by highway officials as a public highway and is used by the public as such, proof of these facts shall be prima facie evidence that the same is a public highway. And when a way has been regularly or periodically worked by highway officials as a public highway and used by the public as such continuously for a period of 20 years, proof of these facts shall be conclusive evidence that the same is a public highway. 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 30 feet.

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

In summary, Virginia Code § 33.2-105 requires evidence that the road was worked by highway officials as a public road and that it has been used by the public for a period of 20 years or more as such.

In *Mulford v. Walnut Hill Farm Group, LLC*, 282 Va. 98, 712 S.E.2d 468 (2011), the Virginia Supreme Court held that the owner of a landlocked parcel failed to establish that an ancient roadway was a public road. Although there was evidence that the roadway was in use before the American Revolution and that it had been constructed at some point as a plank road, there was no evidence that it was a public road. One expert speculated that the road was probably planked by private landowners who wanted to make the roadway accessible to their properties, and that it may have been re-planked by Civil War troops. However, there was no evidence that the roadway had been worked by road officials or that it had been used continuously by the public for at least 20 years. There also was no evidence from the county court records or board of supervisors’ minutes recognizing the road as a public road prior to the Byrd Road Act.

In *Burks Bros. of Virginia v. Jones*, 232 Va. 238, 349 S.E.2d 134 (1986), the Virginia Supreme Court held that a trail was not a public road in the absence of evidence that the requirements for a common law dedication were satisfied, even though the trails were used by the public. The Court noted that although the trail had been improved and

maintained by the Civilian Conservation Corps and the Virginia Forest Service in the past, these public agencies were not “road officials” (now, “highway officials”) within the meaning of Virginia Code § 33.2-105.

In *Kullgren v. Sleeter*, 202 Va. 507, 118 S.E.2d 514 (1961), the Virginia Supreme Court concluded that the evidence supported the chancellor’s finding that a road was a public road where there was evidence that the road had been worked under the supervision of one of the overseers of roads in the Mt. Gilead District of Loudoun County. The overseer was the father of one of the witnesses who testified that he worked the road under his father’s supervision and that he and his team were paid for their work by public authority.

3. How the courts have considered deeds, maps, and court orders as evidence

As time passes, and we move farther away from the adoption of the Byrd Road Act and the establishment of statutory dedication under modern subdivision laws, it becomes more difficult to establish a rural road as a public road under the common law. Where eyewitnesses are no longer alive and records that the roadway was worked by road officials have been lost or destroyed, deeds, maps and court orders are the types of evidence that may be presented though none of them, standing alone, may satisfy the burden of proof.

The courts will not presume a dedication or acceptance by the proper authority because records have been lost or destroyed. *White v. Reed*, 146 Va. 246, 251, 135 S.E. 809, 810 (1926), quoting *Gaines v. Merryman*, 95 Va. 660, 665, 29 S.E. 738, 740 (1898). If public records are lost or destroyed, then deeds may provide some relevant evidence. As summarized in *Kinton v. Jolly*, 21 Va. Cir. 132, 137-138 (1990):

Should public records, which are required with rural roads, be destroyed or lost, then the effect of such loss is to change the mode of proof as to their contents and to dictate admission of secondary evidence in the place of an exemplification of the record. *White v. Reed*, 146 Va. 246, 135 S.E. 809 (1926). Such secondary evidence includes “ancient” deeds and maps, deeds between third parties, and declarations in deeds to parties in the action. *Kepler v. City of Richmond*, 124 Va. 592, 98 S.E. 747 (1919).

A deed between third parties to a road has been “held competent upon the question of the location and existence of the way as a matter of public and general interest upon which reputation is admissible.” *Kepler v. City of Richmond*, 124 Va. 592, 98 S.E. 747 (1919), citing 1 Elliott on Roads and Streets, Section 198. Such evidence is not entitled to much weight and may be “rebutted by very slight evidence of a more definite character.” *Kepler*, 124 Va. 607 (1919), citing Greenleaf on Evidence, Section 139. Recitals of fact in a deed or deed of trust are prima facie evidence of those facts. Va. Code Ann. Section 8.01-389 (1984).

Thus, at most, deeds provide rebuttable evidence about the location and existence of a road, but are not evidence that the road was a public road. See *Jones v. King*, 37 Va. Cir. 404, 408 (1995). In *Kinton*, the circuit court held that, even assuming that the public records had been lost, the plaintiffs failed to establish a public road through the deeds of some of the defendants where the deeds referenced “Old Richmond or Mill Road.” *Kinton*, 21 Va. Cir. at 138. The court said that the plaintiffs had “merely established that a road existed” but that they had failed to prove “use by the public with acquiescence of the owner.” *Id.*

Maps may or may not provide evidence of the express exercise of dominion over a road by a public authority. A road’s absence from a VDOT map of public roads does not appear to be determinative as to whether it is a public road. See *Bond v. Green*, 189 Va. 23, 34, 52 S.E.2d 169, 174 (1949) (the fact that VDOT maps “do not include a county road does not alone establish a discontinuance or abandonment of such road as a public highway”); *Kertulla v. Candea*, 68 Va. Cir. 414, 415 (2005) (the “failure of the Commonwealth to accept the road for maintenance in 1932 does not defeat” the conclusion that the roadway at issue in that case was a public road). A locality’s maps may provide some evidence as to whether a road is a public road. In *Mulford v. Walnut Hill Farm Group, LLC*, 282 Va. 98, 712 S.E.2d 468 (2011), the Virginia Supreme Court held that the owner of a landlocked parcel failed to establish that an ancient roadway was a public road. In so holding, the Court noted that in 1921, in conjunction with road funding from the Commonwealth, the county created a map of its roads and the roadway in issue did not appear on that

map. In *Kinton*, the plaintiffs offered county maps in support of showing the existence of a county road. The circuit court said that “such maps although probative, are not sufficient to establish either governmental dominion or public use under § 33.1-184 [now, § 33.2-105].” *Kinton*, 21 Va. Cir. at 135.

The creation of a road by court order does not, in and of itself, establish the road as a public road. See *White v. Reed*, 146 Va. 246, 249-251, 135 S.E. 809, 809-810 (1926). “A court order establishing a public road, without more, does not create a public road in perpetuity.” *Kiefer v. Mikovch*, 68 Va. Cir. 505, 508 (2004). In *Kiefer*, landowners sought to establish that a “gravel lane” was a public road, relying on an 1890 court order creating a public road as shown on a survey plat. The circuit court concluded that the landowners failed to establish that the gravel lane existed as a public road, concluding that there was no evidence that a road was ever established over the designated lines shown on the plat, the location of the gravel lane did not coincide with the alignment shown on the plat, there was no evidence that the county or the state ever maintained the gravel lane or made those travelways part of the secondary system of state highways, and there was no evidence to show where the purported public road existed in relation to present property lines.

24-330 Statutory dedication accomplished by recording a map (1887-1945)

The law in Virginia from 1887 through 1945 allowed what was known as “dedication by map.” As noted in section 24-310, the Virginia Supreme Court has consistently held that dedication by map was irrevocable by the dedicator, the rights of the public were merely inchoate (*i.e.*, not fully completed or developed), and that the dedication was not complete until accepted by a competent public authority. *The Barter Foundation, Inc. v. Widener*, 267 Va. 80, 592 S.E.2d 56 (2004); *Payne v. Godwin*, 147 Va. 1019, 133 S.E. 481 (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; and 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.” *Widener*, 267 Va. at 92, 592 S.E.2d at 62. 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.

24-340 Statutory dedication accomplished by recording 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 comply with the subdivision laws in effect at the time of recording. *Ryder v. Petrea*, 243 Va. 421, 416 S.E.2d 686 (1992). Strict compliance is required because a proper recordation of a subdivision plat vests the locality with fee simple ownership of the roads shown on the plat. *Brown v. Tazewell County Water and Sewerage Authority*, 226 Va. 125, 306 S.E.2d 889 (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 roads. See *Washington-Virginia Railway Co. v. Fisher*, 121 Va. 229, 92 S.E. 809 (1917), cited in 1978-79 Va. Op. Atty. Gen. 253.

24-341 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 roads shown thereon, the requirement of prior approval by a competent public authority is indispensable. *Brown v. Tazewell County Water and Sewerage Authority*, 226 Va. 125, 306 S.E.2d 889 (1983). The recorded subdivision plat 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 the portion of the premises 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 state highway system until it is accepted by VDOT.

24-342 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 use reflected in the plat. *Ocean Island Inn v. City of Virginia Beach*, 216 Va. 474, 220 S.E.2d 247 (1975).

The doctrine of partial assumption assumes a situation where a subdivision plat contains several roads. *Hurd v. Watkins*, 238 Va. 643, 385 S.E.2d 878 (1989). In that situation, if the locality accepts enough of the platted roads without saying that its acceptance is limited, then it will be deemed to have accepted all of them. *Hurd, supra*.

24-343 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, 385 S.E.2d 878 (1989).

Virginia Code § 15.2-2265 provides “but nothing contained in this article shall affect any right of a subdivider 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*. Thus, a subdivider may record restrictive covenants, or reserve such a right, that apply to a publicly dedicated road only if 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 language of Virginia Code § 15.2-2265 quoted above does not contemplate reserving the right to restrict at a later date property which is publicly dedicated. *Beacom, supra, citing Hurd, supra*.

24-400 Abandoning and vacating roads

The ancient maxim of the common law, “Once a highway, always a highway,” controls in Virginia unless and until the publicly maintained road is abandoned or vacated in the manner prescribed by statute or by nonuser. *Bond v. Green*, 189 Va. 23, 52 S.E.2d 169 (1949). Public roads may be abandoned by either the state highway procedures under Virginia Code § 33.2-909 *et seq.* or, if the roads were created by a subdivision plat, by vacating the subdivision plat or a portion thereof (and the public roads shown thereon), pursuant to Virginia Code § 15.2-2270 *et seq.*

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, 192 S.E.2d 768 (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, 32, 52 S.E.2d 169, 173 (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 §§ 33.2-909 (abandonment of roads in secondary system) and 33.2-924 (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, 152 S.E.2d 54 (1967), referring to what is now Virginia Code § 33.2-924 (applicable to abandonment of roads not in the secondary system).

Abandonment Procedures and Their Key Characteristics			
Virginia Code Section	When Procedure Used	Key Finding	Other
33.2-909	Road is in the secondary system of state highways	Road is “to be no longer necessary for the uses of the secondary state highway system”	Public <i>disuse</i> is the key consideration as to necessity
33.2-912	Road is in secondary system that has been altered or a 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
33.2-915	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
33.2-923	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 Commissioner of Highways 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

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).

24-410 Abandonment where road in secondary system deemed to be no longer necessary

Virginia Code § 33.2-909 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 state highway system.” *Virginia Code § 33.2-909*.

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 the 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, 489, 416 S.E.2d 695, 699 (1992). The exercise of the power of abandonment is predicated upon public disuse. *Board of Supervisors of Fairfax County v. Horne*, 215 Va. 238, 208 S.E.2d 56 (1974). Scenic value alone can be sufficient 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 § 33.2-909 for specific notice, petition, hearing and other requirements.

24-420 Abandonment where road in secondary system has been altered or new road serves same citizens

Virginia Code § 33.2-912 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 Commissioner of Highways. The scope of the abandonment is limited to the extent of the alteration, but no further. *Virginia Code § 33.2-912*.

The board’s authority under Virginia Code § 33.2-912 is broader than its authority under Virginia Code § 33.2-909. 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, 241, 208 S.E.2d 56, 59 (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, 101 S.E.2d 540 (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 § 33.2-912 for specific notice, petition, hearing and other requirements.

24-430 Abandonment where state-owned road not in secondary system deemed to be no longer necessary

Virginia Code § 33.2-915 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 § 33.2-915*. Abandonment under this procedure may be initiated either by the board (*Virginia Code § 33.2-915*) or upon the petition of any person desiring to have the road abandoned. *Virginia Code § 33.2-917*. In considering the abandonment of any section of road under this section, due consideration must be given to the historic value, if any, of the road. *Virginia Code § 33.2-915*.

See Virginia Code §§ 33.2-915 through 33.2-922 for specific notice, petition, hearing, and other requirements.

24-440 Abandonment where state-owned road not in secondary system has been altered or new road serves same citizens

Virginia Code § 33.2-923 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 § 33.2-923*.

See Virginia Code § 33.2-923 for specific notice, petition, hearing, and other requirements.

24-450 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 33.2 of the Virginia Code (discussed in sections 24-410 through 24-440). If no lot has been sold in a subdivision, the plat or a portion 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 or a portion thereof is 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 a portion thereof may be vacated by an instrument or by an ordinance as explained above. *Virginia Code § 15.2-2272*. If the plat or a portion thereof is vacated, roads within the secondary system are abandoned, provided: (1) the land shown on the plat or portion thereof to be vacated was the subject of a rezoning or special use permit application approved following public hearings; (2) the Commissioner of Highways 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 special use permit condition.

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*.

The vacation of a subdivision plat also is discussed in section 22-800.

24-500 Discontinuance of public maintenance of a road

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, 152 S.E.2d 54 (1967). Thus, the

determination divests VDOT of control of the road. *2000 Va. AG LEXIS 6* (concluding also that persons who voluntarily maintained a discontinued road were not entitled to reimbursement).

Virginia Code § 33.2-908 provides that only the Commonwealth Transportation Board may discontinue the maintenance of a road in the secondary state highway system, either on its own motion or on a 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 a 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 “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 a discontinued road is abandoned, 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, 61 S.E.2d 65 (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 § 33.2-908, 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 § 33.2-911*.

24-600 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, 154 S.E. 579 (1930), *cited in 1985-86 Va. Op. Atty. Gen. 81*.

Landowners 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, 263 S.E.2d 45 (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, 290 S.E.2d 834 (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, 207 S.E.2d 870 (1974); *Wood v. Richmond*, 148 Va. 400, 138 S.E. 560 (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, 297 S.E.2d 718 (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*; see Virginia Code § 25.1-230.1(B), providing that in a condemnation proceeding, the body determining just compensation shall include in its determination of damage to the residue any loss in market value of the remaining property from lost access caused by the taking or damaging of the property.

This common law right can be restricted only pursuant to specific statutory authority or by the exercise of the locality's police power. *See Azalea Corp. v. City of Richmond*, 201 Va. 636, 112 S.E.2d 862 (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 road improvements. Three general rules emerge:

Summary of the Rules Pertaining to Access to a Public Road	
Nature of Access	General Rule
Direct access extinguished	Compensable as a taking if no other direct access exists
Direct access obstructed because of change of grade	If all direct access is extinguished, compensable as a taking if no other direct access exists; mere change of grade obstructing some, but not extinguishing all, access is likely not compensable
Direct access reduced or limited	Generally is not compensable; frustration of landowner's plans for development or future use is not compensable

These rules are discussed in sections 24-610, 24-620 and 24-630. *See also Virginia Code § 25.1-230.1 for discussion of compensation for loss of access and lost profits in calculating compensation in a condemnation proceeding.*

24-610 Direct access extinguished

The complete extinguishment of direct access to an abutting public road is compensable where there is no other direct access. *State Highway and Transportation Commissioner v. Dennison*, 231 Va. 239, 343 S.E.2d 324 (1986) (installation of unbroken curbing extinguished direct access to residue and was compensable); *State Highway and Transportation Commissioner v. Linsly*, 223 Va. 437, 290 S.E.2d 834 (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).

24-620 Direct access obstructed because of change of grade

The extinguishment of direct access that results from a change of grade and damage may be compensable. *City of Richmond v. Kingsland Land Corporation*, 157 Va. 619, 162 S.E. 194 (1932) (direct access to Lombardy Street extinguished when road lowered 18 feet); *Nelson County v. Loving*, 126 Va. 283, 101 S.E. 406 (1919) (abutting private property was damaged when road lowered several feet, requiring landowner to construct retaining walls and stairs).

A mere change of grade, without more, does not entitle the landowner to damages. In *Town of Galax v. Waugh*, 143 Va. 213, 129 S.E. 504 (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 landowner's 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.

24-630 Direct access reduced or limited

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, 357 S.E.2d 531 (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, 207 S.E.2d 870 (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, 195 S.E.2d 880 (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, 138 S.E. 560 (1927) (reduction of direct access points from two to one for purposes of traffic control and public safety was not compensable); *Close v. City of Norfolk*, 2013 WL 5305309 (Va. Cir. Ct. 2013) (city's restricted access to the plaintiffs' business while city upgraded sewer system in city street was not compensable because barriers erected to protect public safety were reasonable, did not prohibit access but were merely an inconvenience, and the evidence showed that any times when access was blocked, the blockage was caused by contractors or other third parties, not the city); *State Highway Commissioner v. 1619 Associates*, 6 Va. Cir. 108 (1984) (in ruling on a motion *in limine*, the court said that closing 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 the frustration of a landowner's plans for development or future use is not in itself compensable. *Lanier Farm, Inc., supra*. In addition, discontinuing 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, 152 S.E.2d 54 (1967).

24-700 Private roads in Albemarle County and the further subdivision of parcels on those roads

Private roads have four key features that distinguish them from public roads: (1) the land on which the roads are built is privately owned; typically the owners of the lots abutting the private road own the underlying fee interest to its centerline 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 road have an easement allowing the owners of the lots to use the road; (3) private roads are maintained by the landowners under a maintenance agreement or by a homeowners' association under restrictive covenants; and (4) private roads are not necessarily designed or constructed to VDOT standards.

Although the Albemarle County Subdivision Ordinance authorizes private roads to be approved in the development areas, this section focuses on private roads in the rural areas.

24-710 Albemarle County's regulation of private roads

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

The planning commission may approve a private road in the rural areas if: (1) the private road would alleviate significant degradation to the environment, as compared to a public road 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 road. The subdivision agent may approve a private road in the rural areas if the subdivision is a family subdivision or a two-lot subdivision and the private road will serve only those lots and will be the sole and direct means of access to a public road. *Albemarle County Code § 14-232(B)*.

In considering a private road, 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 roads, the planning commission and the subdivision agent are to consider that private roads are intended to be the exception to public roads.

24-720 The rights of owners of lots served by a private road

This section examines whether planning commission approval of a private road in the rural areas is required when a lot served by the private road is proposed to be subdivided, and the private road 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 road. However, there is nothing inherent in the private status of a road serving a subdivision lot that prohibits further division of such a lot.

24-721 The subdivision ordinance does not prohibit further division of a lot without county approval of the private road; exception

One issue that has arisen in the past is whether the further division of a lot served by a private road requires re-approval of the private road. To answer this question, the history of the county's private road regulations must be considered. Until 1998, the private road 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 road. In addition, the early private road regulations in the subdivision ordinance had numerous private road design classifications based on the number of lots served (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 road was "deemed a subdivision." However, this section *never* required re-approval of the private road. 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 road 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 road when a subdivision lot served by the private road was further subdivided. There are two exceptions discussed in section 24-724 below.

24-722 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 landowners 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. However, absent an express restriction on further subdivision and assuming that the county's zoning regulations can be satisfied, any lot 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, 239 S.E.2d 106 (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.

24-723 An increase in the use of a private road resulting from further subdivision of one of the lots served by the private road probably does not burden the underlying easement held by the lot owners

With certain exceptions discussed in section 24-724 below, planning commission re-approval of a private road is not required.

When a lot within a subdivision is proposed to be further subdivided, existing landowners in the subdivision may complain that the further subdivision of a lot served by the private road would overburden the easement that grants a right of passage over the road. Generally, the further subdivision of land served by a private road will not overburden an easement. In *Shooting Point LLC v. Wescoat*, 265 Va. 256, 576 S.E.2d 497 (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]

Shooting Point LLC, 265 Va. at 266, 576 S.E.2d at 502-503.

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 the *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 road will not be found to overburden the easement.

See, also, section 25-320 for a discussion of the authority to require a developer to make or contribute to improvements to off-site public roads as a condition of subdivision plat approval.

24-724 Two situations in which the county can require re-approval of a private road

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

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