

## Chapter 25

### Road Improvements in Conjunction with Land Development

#### 25-100 Introduction

This chapter examines the authority of localities to require road improvements in conjunction with land development. The history of the responsibility for building and maintaining roads in counties, the dedication of rights-of-way, rights of access to public roads, and the law pertaining to abandoning and discontinuing the maintenance of roads, are discussed in chapter 24. Transportation planning in the comprehensive plan and rezoning processes are discussed in chapters 9 and 10, respectively.

#### 25-200 The authority to seek road improvements as a condition of a zoning approval

Virginia's zoning enabling statutes reflect the legislative balancing of the frequently competing interests of individual property rights and the police power interests of the public as promoted by reasonable restrictions on individual property rights. *Board of Supervisors of Fairfax County v. Horne*, 216 Va. 113, 215 S.E.2d 453 (1975). The exercise of the zoning power in a particular manner must be duly authorized by appropriate enabling legislation. *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975); *Board of Supervisors of Fairfax County v. Snell Construction Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974).

In Virginia Code § 15.2-2283, the General Assembly has identified several purposes of zoning which are related to roads and transportation:

- To provide for convenience of access.
- To reduce or prevent congestion in the public streets.
- To facilitate creating a convenient, attractive and harmonious community.
- To facilitate providing adequate transportation and other public requirements.
- To protect against danger and congestion in travel and transportation.

Despite these several purposes related to roads and transportation, the courts have been unwilling to find that a locality is enabled to *require* off-site improvements as a condition of approval of a land use matter.

#### 25-210 The authority to require a landowner to make or contribute to off-site road improvements through zoning regulations

A locality is enabled to impose reasonable regulations that apply to each zoning district. The Virginia Supreme Court in *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975), held that a county may not require a landowner to dedicate land and make off-site road improvements through the zoning regulations applicable to the zoning district.

In *Rowe*, 28 landowners challenged the rezoning of their property to a particular commercial district whose regulations required that the landowners, upon development of their property, dedicate the outer 55 feet of their land contiguous to a state highway for a service road, including curbs, sidewalks and a landscaped median strip. The district regulations also required the landowners to construct the service road in accordance with applicable VDOT standards and to maintain the median. The need for the service road was substantially generated by public traffic demands rather than by any proposed development of the landowners. With respect to the requirement that landowners dedicate a portion of their land, the Court said:

Our enabling statutes delegate no such power. Moreover, Article I, § 11, of the Constitution of Virginia expressly and unequivocally provides ‘that the General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation.’ The dedication requirement . . . offends that constitutional guarantee, and we hold that it is invalid.

*Rome*, 216 Va. at 138-139, 216 S.E.2d at 208-209.

With respect to the requirement that landowners construct the service road and maintain the median, the Court said:

The Board cites nothing in the constitution, enabling statutes, or case law of Virginia which empowers the sovereign to require private landowners, as a condition precedent to development, to construct or maintain public facilities on land owned by the sovereign, *when the need for such facilities is not substantially generated by the proposed development*. The private money necessary to fund the performance of such requirements is ‘property,’ and we hold that such requirements violate the constitutional guarantee that ‘no person shall be deprived of his life, liberty, or property without due process of law . . .’ [citation omitted] (italics added)

*Rome*, 216 Va. at 139-140, 216 S.E.2d at 209.

*Rome* remains the controlling law in Virginia on this issue. However, other authority exists beyond a locality’s zoning ordinance. A locality may provide in its subdivision ordinance for the voluntary funding of off-site road improvements. *Virginia Code* § 15.2-2242(4). 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 at least one impact fee service area in its comprehensive plan. *Virginia Code* § 15.2-2317. These localities may establish road impact fees under Virginia Code § 15.2-2317 *et seq.*

#### **25-220 The authority to require a landowner to make or contribute to off-site road improvements as a condition of approval of a rezoning**

The conditional zoning statutes (Virginia Code §§ 15.2-2296 through 15.2-2303.3) empower localities to enact zoning ordinances that may include and provide for the voluntary proffering of reasonable conditions. Proffers are discussed at length in chapter 11. Accepting proffers for off-site road improvements are permitted in those localities operating under the enabling authority in Virginia Code §§ 15.2-2298 or 15.2-2303 (such as Albemarle County). *See section 11-310 for a discussion of the voluntariness of proffers. See sections 10-361 and 10-362 for a discussion as to whether a rezoning request may be denied because of inadequate public facilities.*

Absent express enabling authority to *require* certain improvements as a condition to a rezoning, a locality is not authorized to require a landowner to make or contribute to off-site road improvements. *See Rinker v. City of Fairfax*, 238 Va. 24, 381 S.E.2d 215 (1989). However, it may accept proffers that would require the landowner to make or contribute to off-site road improvements to address the impacts from a rezoning. In that situation, the need for those improvements is substantially generated by the proposed development.

#### **25-230 The authority to require an applicant for a special use permit to make or contribute to off-site improvements as a condition of approval**

When approving a special use permit, the governing body (or the BZA, when enabled) is authorized to impose reasonable conditions to address impacts caused by the proposed use. *Virginia Code* § 15.2-2286(A)(3). However, a locality does not have the authority to require the construction of off-site road improvements unless the need for those improvements is substantially generated by the proposed development.

In *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984), the board sought to impose a special use permit condition that required the applicant to build a right-turn lane and a service road and dedicate the

land to the county. The evidence established that the use, an expanded nursery, would draw approximately 25 customers a day; the daily traffic on the existing road in front of the nursery was 35,000 vehicles.

In holding that the county did not have the authority to require the improvements it sought as a condition of approval of the special use permit, the Virginia Supreme Court stated that it found nothing in the enabling legislation for special use permits “which empowers the Board to impose the road dedication and construction requirements which it claimed it was empowered to impose.” The Court added:

[E]ven if we assume that the Board had the authority, in a proper case, to impose such a condition, it could not do so in this case because the dedication and construction requirements were unrelated to any problem generated by the use of the subject property.

*Cupp*, 227 Va. at 594, 318 S.E.2d at 414.

Because special use permits, like rezonings, are legislative actions, the *Cupp* court relied heavily on its earlier decision in *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975). Under *Cupp*, a condition requiring an off-site improvement would have been permissible only if the need for the improvement was *substantially generated* by the project. Compare with *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435, 258 S.E.2d 577 (1979) (no authority to require off-site improvements as a condition of site plan or subdivision plat approval, even if the need for the improvements is substantially generated by the project).

## **25-300 The authority to require road improvements as a condition of subdivision plat or site plan approval**

There is no express or implied authority in the enabling legislation authorizing a locality to require off-site road improvements as a condition of subdivision plat or site plan approval. See *Virginia Code* §§ 15.2-2241, 15.2-2242, and 15.2-2243.

The case law below reflects a consistent theme that zoning decisions, not the subdivision or site plan process, are the place and time at which density and traffic considerations are to be addressed. By the time a project reaches the subdivision plat or site plan stage, it is too late.

### **25-310 A locality may require on-site road-related improvements as a condition of subdivision plat and site plan approval**

Before examining the scope of a locality’s authority to require off-site improvements to public roads, it is useful to understand the locality’s authority to require on-site road improvements. Virginia Code § 15.2-2241 identifies the on-site road improvements that a locality may require as a condition of approval of a subdivision plat or a site plan:

- *Coordination of streets*: The coordination of streets within and contiguous to the subdivision with other existing or planned streets within the general area, including within existing or future adjacent subdivisions, or contiguous to adjacent subdivisions, as to location, widths, grades and drainage. *Virginia Code* § 15.2-2241(2). This authority “does not imply authority to charge a private landowner for the expense of reconstructing public highways.” *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435, 441, 258 S.E.2d 577, 581 (1979).
- *Installation of new streets*: The extent to which and the manner in which on-site streets will be graded, graveled or otherwise improved. *Virginia Code* § 15.2-2241(4).
- *Dedication of rights-of-way*: The dedication for public use of any right-of-way located within the subdivision or section thereof, including any street, curb and gutter as part of a public system. *Virginia Code* § 15.2-2241(5).
- *Vehicular ingress and egress*: Site-related improvements for vehicular ingress and egress, including traffic signalization and control. *Virginia Code* § 15.2-2241(5).
- *Public access streets*: Site-related improvements for public access streets. *Virginia Code* § 15.2-2241(5).

These provisions, as a whole, place the responsibility for establishing a new on-site road system on the developer. They are consistent with the powers retained by counties under the Byrd Road Act in its present form discussed in chapter 24, which allows counties to retain the power to establish new roads which, upon their establishment, become part of the secondary road system. *Virginia Code § 33.2-705 et seq.*

The requirement of on-site improvements needs to be guided by clear and objective standards. In *Mountain Venture Partnership v. Town of Lovettsville Planning Commission*, 26 Va. Cir. 50 (1991), the planning commission denied a preliminary subdivision plat for a 194-unit townhouse development on three grounds, one of which was because the subdivision's two access points did not provide safe and convenient access onto the adjoining public road. Absent objective regulatory standards to determine what is required for an access to be safe, and absent any concerns by VDOT, the court found that the planning commission's denial of the plat on this ground was arbitrary and capricious, stating:

The Virginia Department of Transportation (VDOT), one of the referring agencies, raised no concern about the safety of the street arrangement for the townhouse section of Avonlea. There is no Town ordinance concerning the number of vehicular trips which a subdivision may be allowed to generate. There is no ordinance regulating the number of townhouse units per entrance to a public street. There is no ordinance relating design criteria for streets to the number of vehicles passing over a street. VDOT raised no objection to the entrances from the townhouse area of Avonlea onto the public street . . .

*Mountain Venture*, 26 Va. Cir. at 62.

The court then elaborated on its concerns about the absence of objective standards to control the decision as to whether the access points were safe:

With no ordinance to guide the Planning Commission, if this reason were valid, then an applicant with a subdivision such as Avonlea would be at the mercy of the Planning Commission. Its whim could determine whether a preliminary plat is approved or denied. While one of the purposes of a subdivision ordinance is to promote the safety of the public. . . , such purpose does not give a planning commission the authority to deny a preliminary plat which conforms to the requirements of the applicable ordinance for the sole reason that in its opinion alone, the subdivision would create a public safety problem.

*Mountain Venture*, 26 Va. Cir. at 62.

As noted above, neither VDOT nor any other reviewing agency had raised safety concerns about the access points.

Under the reasoning of *Mountain Venture*, concerns about safe and convenient access need to be established by the application of objective standards pertaining to traffic volume and design or be supported in writing from VDOT expressing concerns about traffic volume, design, or both. In holding that the commission's disapproval of the subdivision plat was improper, the *Mountain Venture* court noted that when the land at issue was rezoned to its current density, the rezoning "clearly put the Town and all its officials on notice that Mountain Venture could seek approval for as many as 194 townhouse units."

### **25-320 The authority to require a developer to make or contribute to off-site road improvements as a condition of subdivision plat approval**

Virginia Code § 15.2-2243 authorizes localities to require a developer to pay the *pro rata* share of the cost of providing reasonable and necessary off-site sewerage, water and drainage facilities if the need for such facilities are required, at least in part, by the development. There is no similar provision for off-site road improvements. Virginia Code § 15.2-2242(4) is the only enabling authority that speaks to off-site road improvements. It authorizes the locality to provide "for the *voluntary* funding of off-site road improvements and reimbursements of advances by the

governing body.” The courts have consistently rejected any attempts by localities to expand the authority of localities to require off-site road improvements beyond what the General Assembly has expressly enabled.

In *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435, 258 S.E.2d 577 (1979), the Virginia Supreme Court considered whether the county could require a subdivider, as a condition of approval of a subdivision plat, to pay the cost of making certain improvements to widen two secondary roads abutting the property. With respect to one of the roads, the evidence showed that at the time of trial the traffic on the road was only 400-900 vehicles per day; that by 1982 the subdivision would account for 45% to 47% of the more than 7,000 vehicles estimated to then be using the road. It was noted that “the need was established for the road improvements.” *Hylton*, 220 Va. at 439, 258 S.E.2d at 580. The parties stipulated that the plat complied with all applicable statutes and ordinances, except for its failure to show that Hylton would pay the cost of improving the two roads that abutted the property.

The Virginia Supreme Court held that there was no authority in the predecessors to Virginia Code §§ 15.2-2241 and 15.2-2242, either express or necessarily implied, that enabled the county to require a subdivider to construct improvements to existing roads, or to pay a *pro rata* share of the cost of those improvements. The Court further stated:

Neither the enabling statutes nor local ordinances provided the County with express authority to exact of Hylton construction costs for portions of Routes 640 and 643. Nor do we find any necessarily implied authority for that purpose. Authorization under the enabling zoning statute to assure adequate access to a residential planned community does not imply authorization to exact payment for improvement of existing public highways. Similarly, the authority granted by the statute to localities to coordinate streets within and contiguous to a subdivision with other existing or planned streets does not imply authority to charge a private landowner for the expense of reconstructing public highways. . .

...

Although nothing in the [Byrd Road Act] expressly precludes a county from requiring a developer to construct needed secondary road improvements, this omission does not itself suffice to authorize such power. Ever since 1932, financing the construction, repair and maintenance of the State primary and secondary highway systems has constituted a major function of our State government.

*Hylton*, 220 Va. at 440-441, 258 S.E.2d at 580-581.

*Hylton* remains the controlling law in Virginia on this issue. A locality has no authority to require off-site improvements as a condition of site plan or subdivision plat approval, even if the need for the improvements is substantially generated by the project. *Compare with Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984) (authority to require off-site improvements as a condition of special use permit approval only if the need for the improvements is substantially generated by the project). A developer may always agree with a locality to construct off-site road improvements and, unless the written agreement was entered into under duress, the developer will be bound by that agreement. *Board of County Supervisors of Prince William County v. Sie-Gray Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542 (1985).

In *Smith v. Board of Supervisors of Culpeper County*, 22 Va. Cir. 82 (1990), the subdividers sought to create a 28-lot subdivision on a 58.6 acre tract of land. Although the subdivision plat complied with the requirements of the county’s subdivision ordinance, the board of supervisors denied the plat because of a staff assessment that traffic on the main road of access to the subdivision “would be increased beyond its safe carrying capacity if 28 lots were approved and developed.” *Smith*, 22 Va. Cir. at 83. The assessment was generated to address a requirement of the subdivision ordinance that the “safe carrying capacity” of off-site secondary roads impacted by a proposed subdivision be evaluated. A related section of the subdivision ordinance provided that when the forecast traffic on the road exceeded its safe carrying capacity (determined from a formula based on road conditions, traffic counts,

and projected traffic from the subdivision), the subdivision plat was to be disapproved. The subdividers were told that the plat would be approved if they made off-site improvements to the road. In the alternative, the subdividers were told that a 15-lot subdivision would be approved without improvements to the road since fewer lots would not overburden the road. In holding that the county had no authority to require the subdividers to improve a public road without their agreement, the Culpeper County circuit court stated:

The County seeks to control the volume of traffic on a public road until improved by withholding or conditioning subdivision approval. Control of the volume of traffic to the extent development of subdivisions increases the volume of traffic is properly achieved under Virginia law by the zoning ordinances which may limit the density to which land may be developed. The subdivision law of Virginia does not address this end.

*Smith*, 22 Va. Cir. at 85.

As noted in section 25-310, in *Mountain Venture Partnership v. Town of Lovettsville Planning Commission*, 26 Va. Cir. 50 (1991), the planning commission denied a preliminary subdivision plat for a 194-unit townhouse development on three grounds. One of those grounds was that the subdivider would not pay a lump sum fee to make off-site road improvements. VDOT had not requested any improvements to the road at issue. Relying on *Hylton*, the circuit court found that this reason for disapproval was not properly based on any lawful requirement of the town's subdivision or zoning ordinances.

In *Rackham v. Vanguard Limited Partnership*, 34 Va. Cir. 478 (1994), the abutting owners of a 55-lot subdivision challenged the county's approval of a subdivision plat, claiming that it was approved contrary to law. The subdivision would be accessed via a secondary road, described as "a narrow, unimproved prescriptive easement approximately ten feet in width" that bisected the abutting owners' lands. As part of its application, the subdivider filed a proposal as to how future improvements to the road might be completed if and when the decision was made to make the improvements. The county accepted the commitment of the subdivider to voluntarily contribute towards the improvements to the off-site road. The planning commission reviewed the proposed improvements to the road under what is now Virginia Code § 15.2-2232, and denied the plat on the finding that the proposed improvements were inconsistent with the features shown on the existing comprehensive plan. The commission also disapproved the plat on the ground that the off-site road was inadequate to handle the increase in traffic generated by the subdivision. As authorized by the county's subdivision ordinance, the county's director of planning, zoning and community development thereafter approved the plat, and on appeal by the neighbors, the board of supervisors affirmed the approval by the director. The abutting owners sought to establish that the planning commission's decision was correct.

In considering the applicability of the comprehensive plan to the planning commission's review of the subdivision plat, the circuit court first identified the false premise upon which the planning commission's decision had been based – that the comprehensive plan could serve as the basis for the disapproval of a subdivision plat – holding that the "comprehensive plan may not [serve] as a basis for denial of a subdivision which is otherwise in conformity with duly adopted standards, ordinances, and statutes." *Rackham*, 34 Va. Cir. at 479. The court then discussed the other basis upon which the commission had disapproved the subdivision plat – the inadequacy of the off-site road to handle the increase in traffic generated by the subdivision. The court quickly dispensed with this issue, stating that the need for future off-site road improvements was not a relevant consideration to preliminary subdivision plat approval. The court also rejected the abutting owners' claim that the subdividers' voluntary contribution towards the road improvements was invalid as an improper exercise of the board of supervisors' powers and constituted a public taking for a private purpose.

### **25-330 The authority to require a developer to make or contribute to off-site road improvements as a condition of site plan approval**

Although the subdivision cases discussed in section 25-320 apply to site plans as well, at least one case has considered the authority of a locality to require a developer to make or contribute to off-site road improvements as a condition of site plan approval.

In *Potomac Green Associates Partnership v. City Council of City of Alexandria*, 761 F. Supp. 416 (E.D. Va. 1991), *reversed on other grounds*, 6 F.3d 173 (4<sup>th</sup> Cir. 1993), the city required, as a condition of site plan approval, that the applicant construct two additional lanes on the George Washington Memorial Parkway which was adjacent to the applicant's property. The district court first reviewed the enabling authority for off-site improvements, which is now found in Virginia Code § 15.2-2243 and which is limited to sewerage, water and drainage facilities, and concluded that there "is no *express* authorization for a developer of land to make off-site improvements at his expense to the surrounding highways." *Potomac Green*, 761 F. Supp. at 421 (italics added). Then, citing *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975), *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984), and *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435, 258 S.E.2d 577 (1979), the court concluded that there was no *implied* authority to require private landowners to build additional lanes on public roads as a condition of site plan approval.

#### **25-340 The authority to require a developer to dedicate lands for a road shown on a locality's plan as a condition of subdivision plat or site plan approval**

As part of the transportation planning process, future road alignments will inevitably be shown on a locality's plans. This section briefly examines whether the locality may require the dedication of lands for the road as a condition of subdivision plat or site plan approval. The issue is closely related to the issues considered by the Virginia Supreme Court in *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975), *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435, 258 S.E.2d 577 (1979), and *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984).

In *Butler v. City Planning Commission of the City of Winchester and the City of Winchester*, 2 Va. Cir. 450 (1977), the landowner's subdivision plat was denied by the city because it failed to recognize the 25-foot setback lines that applied to a proposed "southern loop" planned to be constructed across the landowner's property, "the obvious result of which would require the subdivider to dedicate that portion of the 'Loop' to public use." The court noted that, nationally, the general rule seemed to be that the subdivider may be required to donate "only that portion of the land to be divided as may be needed for the public uses that will result from the activities specifically and uniquely attributable to the proposed development." *Butler*, 2 Va. Cir. at 451-452, quoting *McQuillin, The Law of Municipal Corporations*, § 25.146a, p. 433 (3d Ed. Revd. 1976). In other words, the requirement for the dedication of streets "must substantially relate to the projected needs of the proposed development." *Butler*, 2 Va. Cir. at 452. With respect to the plat under consideration, the court held that the city's denial of the subdivision plat was improper because it "could scarcely be said that the primary purpose of the 'Loop' would be to the benefit of the residents of the subdivision . . . Although it will no doubt provide some access to the subdivision, the main purpose is to carry through traffic from other portions of the city across the petitioner's land." *Butler*, 2 Va. Cir. at 453.