

OP. NO. 05-057

HIGHWAYS, BRIDGES AND FERRIES: COMMONWEALTH TRANSPORTATION BOARD, ETC. – SECONDARY SYSTEM OF STATE HIGHWAYS.

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING – LAND SUBDIVISION AND DEVELOPMENT.

Authority for Department of Transportation to prohibit county from participating in rural addition program when county's subdivision ordinance does not require that all subdivision streets meet standards that qualify roads for acceptance into secondary system of state highways.

Mr. Martin M. McMahon
Montgomery County Attorney
September 6, 2005

Issue Presented

You ask whether § 33.1-72.1, which governs the "taking" of streets into the secondary system of state highways, authorizes the Department of Transportation to prohibit a county from participating in the Department's rural addition program¹ when such county's subdivision ordinance does not require that all subdivision streets meet or exceed the standards that qualify roads for acceptance into the Department's secondary system of state highways.

Response

It is my opinion that the Department of Transportation is authorized to prohibit a county from participating in its rural addition program when such county's subdivision ordinance does not require that all subdivision streets meet the standards that qualify roads for acceptance into the Department's secondary system of state highways.

Applicable Law and Discussion

Section 33.1-72.1 provides that:

B. "*County*," as used in this section, means a county in which the secondary system of the state highways is constructed and maintained by the Department of Transportation and which has adopted a local ordinance for control of the development of subdivision streets to the necessary standards for acceptance into the secondary system.

....

E. Whenever the governing body of a county recommends in writing to the Department of Transportation that any street in the county be taken into and become a part of the secondary system of the state highways in such county, the Department of Transportation thereupon, within the limit of available funds and the mileage available in such county for the inclusion of roads and streets in the secondary system, shall take such street into the secondary system of state highways for maintenance, improvement, construction and reconstruction if such

street, at the time of such recommendation, either: (i) has a minimum dedicated width of 40 feet or (ii) in the event of extenuating circumstances as determined by the Commonwealth Transportation Commissioner, such street has a minimum dedicated width of 30 feet at the time of such recommendation. In either case such streets must have easements appurtenant thereto which conform to the policy of the Commonwealth Transportation Board with respect to drainage. After the streets are taken into the secondary system of state highways, the Department shall maintain the same in the manner provided by law.

Prior opinions of this Office have concluded that § 33.1-72.1 implicitly requires that to comply with § 33.1-72.1 a subdivision ordinance must control all subdivision street development to the necessary standards for acceptance into the Department of Transportation's secondary road system.² The General Assembly enacted § 33.1-72.1 in response to the costly problems associated with accepting substandard roads into the state's secondary system.³ The purpose of § 33.1-72.1 is to husband the limited financial resources of the Department and spend them where they will be of greater benefit to the public.⁴ Thus, § 33.1-72.1 creates the framework to address the acceptance of substandard roads into the secondary system. Under the statutory framework, a county adopts a local ordinance that compels developers to build future subdivision streets to the standards of the state secondary system.⁵ In return, the Department accepts the county's established subdivision streets into the system.⁶ Thus, the county is helped with its current street problem in exchange for an assurance to the Department that the problem will not be allowed to occur in the future.⁷ Should § 33.1-72.1 be interpreted to permit a county's subdivision ordinance to include whatever exceptions the county desires, the Department's assurance of future control is lost.⁸ Accordingly, there is no authority in § 33.1-72.1 to make exceptions for local subdivision ordinances that control the development of some subdivision streets but fail to control other such streets.⁹

Article 6, Chapter 22 of Title 15.2, §§ 15.2-2240 through 15.2-2279, governs local subdivision ordinances. You note¹⁰ that § 15.2-2241 does not specifically state that a county's subdivision ordinance must require that all streets be designed and constructed to Department of Transportation standards. In the event that streets in a subdivision will not be constructed to meet the standards necessary for inclusion in the secondary system, you also note that § 15.2-2242(A)(3) provides that a county subdivision ordinance may require that a notation be placed on all subdivision plats and all approved deeds advising that the streets do not meet state standards and will not be maintained by the Department. You further note that the General Assembly has not recently amended § 33.1-72.1(B). Thus, you conclude that § 15.2-2242 implies that a subdivision street must meet Department standards before it is required to accept the street into the secondary system; however, you also conclude that § 15.2-2242 implies that a county's subdivision ordinance does not have to require that all subdivision streets meet Department standards to qualify for the Department's rural addition program.

A 1992 opinion of the Attorney General notes that a locality may effectively prohibit private streets in subdivisions by imposing mandatory dedication requirements and requiring that construction conform to Department of Transportation secondary highway standards.¹¹ In addition to the power to prohibit private ownership of subdivision streets, the General Assembly has expressly authorized localities to permit private streets in subdivisions and to prescribe standards for their construction.¹² The powers of localities to set construction standards for private subdivision streets, and to require a statement that private streets will not be maintained at public expense, were given to localities to enable them to protect themselves on an ongoing basis from concerns about the maintenance of private subdivision streets.¹³ Similarly, it is my opinion that the General Assembly enacted § 33.1-72.1 to allow the Department to protect itself from costs associated with upgrading substandard private subdivision streets after July 1, 1992. The Department may also set conditions for the acceptance of rural additions under § 33.1-72.1.¹⁴ The Department has interpreted § 33.1-72.1 to mean that a subdivision ordinance does not adequately control the development of subdivision streets unless the ordinance requires that all subdivision streets

brought into use after July 1, 1992, are constructed to the standards for acceptance into the secondary system of state highways.¹⁵ The Department's administrative interpretation concerning what constitutes adequate control of subdivision streets under § 33.1-72.1 is entitled to great deference.¹⁶ Prior opinions of the Attorney General defer to the interpretations of law by an agency charged with administering the law, unless the agency interpretation clearly is wrong.¹⁷

Conclusion

Accordingly, it is my opinion that the Department of Transportation is authorized to prohibit a county from participating in its rural addition program when such county's subdivision ordinance does not require that all subdivision streets meet the standards that qualify roads for acceptance into the Department's secondary system of state highways.

¹For purposes of this opinion, I assume that the phrase "rural addition program" means the process pursuant to § 33.1-72.1 by which a county may seek the addition of certain of its streets into the Department of Transportation's secondary system of state highways.

²See Op. Va. Att'y Gen.: 1983-1984 at 195, 196; 1986-1987 at 216, 216-17.

³See Op. Va. Att'y Gen.: 1983-1984, *supra* note 2, at 196; 1983-1984 at 192, 194.

⁴See 1981-1982 Op. Va. Att'y Gen. 193, 194.

⁵See Va. Code Ann. § 33.1-72.1(A) (LexisNexis Supp. 2004); *see also* 1983-1984 Op. Va. Att'y Gen., *supra* note 2, at 196.

⁶See § 33.1-72.1(E), (F); *see also* 1983-1984 Op. Va. Att'y Gen., *supra* note 2, at 196.

⁷See 1983-1984 Op. Va. Att'y Gen., *supra* note 2, at 196.

⁸*Id.*

⁹See 1986-1987 Op. Va. Att'y Gen., *supra* note 2, at 217.

¹⁰Any request by a county attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." Va. Code Ann. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).

¹¹See 1992 Op. Va. Att'y Gen. 53, 56 (interpreting § 15.1-466(A)(4), predecessor to §§ 15.2-2241 and 15.2-2242); 1987-1988 Op. Va. Att'y Gen. 204, 206 (interpreting § 15.1-466(A)(e), predecessor to § 15.1-466(A)(4)).

¹²See 1992 Op. Va. Att'y Gen., *supra* note 11, at 56.

¹³*Id.*

¹⁴See 1983-1984 Op. Va. Att'y Gen., *supra* note 3, at 193.

¹⁵See *generally* Va. Admin. Code tit. 24, ch. 91, 30-91-10 through 30-91-160 (West Supp. 2005) ("Subdivision Street Requirements"). In its subdivision street regulations, the Department defines

the term "private streets" to mean "subdivision streets that have not been dedicated to public use or that require the permission or invitation of a resident or owner to use the street. Such streets are not intended to be included in the secondary system of state highways." 24 Va. Admin. Code 30-91-10. Additionally, the Department "does not recognize any provision of an ordinance adopted by the governing body that exempts the development of streets from [the Subdivision Street Requirements] based on its definition of the term subdivision." 24 Va. Admin. Code 30-91-30(B). Finally, the Department "establishes the minimum standards that must be satisfied for new subdivision streets to be considered for maintenance by the department as part of the secondary system of state highways under its jurisdiction." 24 Va. Admin. Code 30-91-150(A)(2).

¹⁶ See Op. Va. Att'y Gen.: 2002 at 186, 187; 1998 at 91, 93-94 (noting that great deference should be given to administrative interpretation of statutes by agency charged with such responsibility).

¹⁷ See 2002 Op. Va. Att'y Gen., *supra* note 16, at 187.

[Back to September 2005 Opinion Index](#)