

99-091

**HIGHWAYS, BRIDGES AND FERRIES: COMMONWEALTH
TRANSPORTATION BOARD, ETC. – SECONDARY SYSTEM OF STATE
HIGHWAYS – ABANDONMENT AND DISCONTINUANCE OF ROADS IN
SECONDARY SYSTEM.**

Authority of Pulaski County board of supervisors to abandon Route 655. Discontinuance of portion of road by Department of Transportation, rather than abandonment as requested by board. Voluntary maintenance performed on discontinued road by Boy Scouts of America, Blue Ridge Council, is not reimbursable. Use or condemnation of original roadbed, should Department reclaim ownership of Route 655, is matter appropriately determined by Department and not Attorney General.

The Honorable H. Morgan Griffith
Member, House of Delegates
January 10, 2000

You ask several questions regarding an apparent abandonment of State Route 655, a secondary road in Pulaski County.

You relate that Old Route 655, located in Pulaski County, enters the Powhatan Boy Scout reservation. In 1944, the board of supervisors of Pulaski County passed a resolution requesting that the Virginia Department of Transportation abandon a 1.30 mile section of Route 655 existing in the secondary system of Pulaski County, because the road served no purpose and was practically impassable.

You advise that between 1944 and 1998, Pulaski officials and residents believed the road had been abandoned. The road has not been maintained, and much of the original roadbed has become covered with vegetation and is impassable to vehicular traffic. You indicate that in 1998, people began expressing uncertainty whether the road, in fact, was abandoned by the Department of Transportation.

You first ask whether the Department of Transportation's failure to maintain Route 655 since 1944 establishes that the secondary road has, in fact, been abandoned rather than discontinued by the Department.

In 1928, Virginia's roads were divided into the state highway system and county roads.¹ In 1932, the General Assembly established the secondary system of highways.² In 1940, the General Assembly amended and reenacted § 8 of the 1932 Act, prescribing that "[t]he jurisdiction and procedure for abandonment of roads in the secondary system of State highways, shall remain in the local road authorities as now provided by law."³ As early as 1926, statutory authority to abandon Route 655 rested with the board of supervisors of the locality rather than with the Department of Transportation:

In case of the abandonment of any section of road ... under the provisions of this act as a part of the State highway system, such section of road ... shall remain a public road ... as the case may be, unless abandoned or discontinued

as such under the provisions of this act ..., and subject to the authority of the board of supervisors or other local road authorities, as provided by law.^[4]

Several rules of statutory construction apply to your request. "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."⁵ Statutes should not be construed to frustrate their purpose.⁶ In addition, the use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive.⁷ Finally, when a statute creates a specific grant of authority,⁸ the authority exists only to the extent specifically granted in the statute.

Applying the above rules of statutory construction and the statutory provisions codified applicable in 1944, the Pulaski County board of supervisors had authority to abandon Route 655; however, the board actually only requested that the Department of Transportation abandon the road. The failure of the Department to maintain Route 655 does not impact upon abandonment of the road; rather, such action indicates only that its use was discontinued.⁹ Therefore, I am of the opinion that Route 655 has not been abandoned.

You next ask whether, if the road was discontinued rather than abandoned, the Boy Scouts of America, Blue Ridge Council, which has maintained Route 655, is entitled to reimbursement from the Commonwealth for any maintenance performed on the road by the Council.

A 1986 opinion of the Attorney General concludes that discontinuance of a road under § 33.1-150 of the *Code of Virginia* simply removes the road from the state system of secondary roads "and constitutes a determination that the road no longer warrants maintenance at public expense."¹⁰ Furthermore, in 1967, the Supreme Court of Virginia decided that

the discontinuance of a secondary road means merely that it is removed from the state secondary road system. Discontinuance of a road is a determination only that it no longer serves public convenience warranting its maintenance at public expense. The effect of discontinuance upon a road is not to eliminate it as a public road or to render it unavailable for public use.^[11]

A determination by the Department of Transportation that a road is discontinued divests the Department with control of the road. In addition, discontinuance of the road constitutes a determination by the Department that the road does not merit any further maintenance at public expense. Therefore, any maintenance performed on the road by the Blue Ridge Council was voluntary. Consequently, I must conclude that the Blue Ridge Council is not entitled to reimbursement for any maintenance it performed voluntarily on the road for the benefit of those using the Powhatan Boy Scout reservation.

Your last inquiry is whether the Department of Transportation, should it reclaim ownership of Route 655, must use the original roadbed or may the Department condemn that portion of the road which no longer follows the original roadbed.

Section 33.1-69 vests "[t]he control, supervision, management and jurisdiction over the secondary system of state highways ... in the Department of Transportation."¹² The Department has adopted regulations¹³ in accordance with the Administrative Process Act.¹⁴ The resident engineer is the Department official charged with the responsibility for making determinations and ultimately accepting streets into the secondary system of state highways.¹⁵

The Attorney General has declined to render official opinions pursuant to § 2.1-118 when the request (1) does not involve a question of law, (2) requires the interpretation of a matter reserved to another entity, (3) involves a matter currently in litigation, and (4) involves a matter of purely local concern or procedure.¹⁶ Also a request for an official opinion made pursuant to § 2.1-118 concerning the propriety of the actions of another entity interpreting matters reserved solely to it is not subject to review by the Attorney General and must be treated as the binding determination with regard to the matter.¹⁷

Based on the above, the Department of Transportation has exclusive jurisdiction over all roads in the secondary system of state highways. As a result, the Department has adopted regulations establishing requirements and setting forth the administrative procedures for reviewing and approving the addition of subdivision streets into the secondary system. Finally, the Department's resident engineer makes the final decision whether subdivision streets will be accepted into the secondary system. Consequently, I must respectfully decline to interpret the matter raised by your final question, as the Department of Transportation is the appropriate agency to make such determinations.

¹See 1928 Va. Acts ch. 159, at 568.

²See 1932 Va. Acts ch. 415, at 872.

³1940 Va. Acts ch. 271, at 434, 435.

⁴1926 Va. Acts ch. 212, § 2, at 394, 396-97. This language was in place at the time of the adoption of the 1944 resolution. See Va. Code Ann. § 1975oo (1942); see *also* § 1975t.

⁵Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

⁶See 1982-1983 Op. Va. Att'y Gen. 309, 311 (illogical result frustrates purpose of statute).

⁷See *Andrews v. Shepherd*, 201 Va. 412, 414, 111 S.E.2d 279, 281-82 (1959); see *also* *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); Op. Va. Att'y Gen.: 1998 at 56, 58; 1996 at 178, 178; 1991 at 238, 240; 1989 at 250, 251-52; 1985-1986 at 133, 134.

⁸See 2A Norman J. Singer, Sutherland Statutory Construction § 47.23 (5th ed. 1992 & Supp. 1999); Op. Va. Att'y Gen.: 1992 at 145, 146; 1989 at 252, 253; 1980-1981 at 209, 209-10.

⁹Board of Supervisors of Ablemarle County v. Ripper, 790 F. Supp. 632 (W.D. Va. 1992).

¹⁰1986-1987 Op. Va. Att'y Gen. 215, 215.

¹¹Ord v. Highway Commissioner, 207 Va. 752, 758, 152 S.E.2d 54, 59 (1967).

¹²Prior opinions of the Attorney General also note that § 33.1-69 vests control, supervision, management and jurisdiction over county roads (except those counties electing to withdraw entirely from the secondary system (see 1932 Va. Acts ch. 415, § 11, *supra* note 2, at 877-80)) in the Commonwealth Transportation Board and Commissioner. See 1972-1973 Op. Va. Att'y Gen. 119, 120; see also Op. Va. Att'y Gen.: 1995 at 203, 203-04; 1978-1979 at 132, 135 n.1; 1976-1977 at 102, 102; 1974-1975 at 200, 201; *id.* at 205, 205; 1973-1974 at 174, 175; *id.* at 175, 176.

¹³Tit. 24, ch. 90, VAC 30-90-10 to 30-90-380 (Law. Coop. 1996 & West Supp. 1999).

¹⁴Sections 9-6.14:1 to 9-6.14:25.

¹⁵24 VAC 30-90-60 (West Supp. 1999).

¹⁶See Op. Va. Att'y Gen.: 1997 at 10, 12; 1987-1988 at 69, 72; 1977-1978 at 31.

¹⁷See Op. Va. Att'y Gen.: 1997, *supra*, at 12; *id.* at 133, 134, and opinions cited at 135 n.7.