

**00-018**

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

**MOTOR VEHICLES: POWERS OF LOCAL GOVERNMENTS.**

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

**No requirement, as prerequisite to enforcement of Virginia's traffic laws, that subdivision street in municipality be constructed according to standards established by Department of Transportation and accepted into state secondary highway system. Municipality would be immune from liability for failure to erect or maintain traffic control devices on subdivision streets that are not compliant with Department standards and have not been accepted into state secondary highway system. When streets in municipality are accepted into state secondary highway system by dedication, municipality would not be liable for injury sustained by pedestrian from fall on unpaved or unfinished street or curb.**

Mr. Randall R. Hamilton  
Town Attorney for the Town of Berryville

October 31, 2000

You inquire regarding the enforcement of the traffic laws of the Commonwealth on streets intended for motor vehicular use by the public in a subdivision in the Town of Berryville.

You advise that a developer has recorded a subdivision plat, approved by the Town of Berryville, showing streets intended for motor vehicular use by the public. You state that the developer is required to construct the streets in the subdivision in accordance with standards established by the Virginia Department of Transportation. You note that, after construction of the streets according to the Department's standards, the Department will maintain the streets and authorize the placement of appropriate traffic control devices, and school buses will transport children to and from school.

You advise that the streets are not yet compliant with Transportation Department standards, and that the public is using the streets for vehicular

travel without the aid of traffic control devices. You relate that the town is concerned that it may be liable for accidents occurring on streets lacking traffic control devices and on unpaved or unfinished streets and curbs. In addition, you advise that law enforcement personnel has refused to enforce traffic laws until the streets have been completed according to Department standards and have been accepted into the secondary system of state highways. They do not consider such streets to be public streets until they have been accepted by the Department into the state secondary highway system.

You first ask whether, as a prerequisite to the enforcement of the Commonwealth's traffic laws, the subdivision streets must be constructed in accordance with standards established by the Virginia Department of Transportation and accepted into the secondary system of state highways.

Section 15.2-2265 of the *Code of Virginia* provides:

The recordation of an approved plat shall operate to transfer, in fee simple, to the respective localities in which the land lies the portion of the premises platted as is on the plat set apart for streets, alleys or other public use and to transfer to the locality any easement indicated on the plat to create a public right of passage over the land.... Nothing in this section shall obligate the locality, association or authority to install or maintain such facilities unless otherwise agreed to by the locality, association or authority.

When the authorized officials of a locality within which land is located, approve in accordance with the subdivision ordinances of the locality a plat or replat of land therein, then upon the recording of the plat or replat in the circuit court clerk's office, all rights-of-way, easements or other interest of the locality in the land included on the plat or replat, except as shown thereon, shall be terminated and extinguished, except that an interest acquired by the locality by condemnation, by purchase for valuable consideration and evidenced by a separate instrument of record, or streets, alleys or easements for public passage subject to the provisions of § 15.2-2271 or § 15.2-2272 shall not be affected thereby.

A 1973 opinion of the Attorney General responds to the question whether the recordation of a plat before adoption of a subdivision ordinance operates to transfer streets shown on the plat, in fee simple, to the locality pursuant to § 15.2-2265.<sup>1</sup> The opinion concludes that

the recordation of a plat in a [locality], in the absence of a subdivision ordinance, does not of itself operate to transfer the streets in fee simple to the [locality]. Such a recordation, in the absence of any reservation, merely creates a public easement in the streets. When the [locality] accepts the dedication of the plat the streets are transferred in fee simple to the [locality].<sup>12]</sup>

The opinion also concludes that "the adoption of a subdivision ordinance would constitute an acceptance of the dedication of the streets indicated on the plat."<sup>3</sup> In addition, the 1973 opinion responds to the question of when streets shown on a recorded plat become "highways" as defined in § 46.2-100.<sup>4</sup> The opinion concludes that "streets on a recorded subdivision plat become public easements at the time of recordation and as such are 'highways' within the meaning of this section."<sup>5</sup> Finally, a 1978 opinion responds to the question whether certain traffic laws apply to the roads in a subdivision in a county owned either by the developer or a property owners' association.<sup>6</sup> The opinion concludes that "[a]ny reference in Title [46.2] to traffic infractions committed on highways has no applicability to roads not falling within the definition of highways."<sup>7</sup>

Section 46.2-100 defines the term "highway" to include "the entire width between the boundary lines of every way or place open to the use of the public for purposes of vehicular travel in the Commonwealth." In 1980, the Supreme Court of Virginia held that "evidence of accessibility to the public for free and unrestricted use gave rise to a prima facie presumption that the streets of [an apartment complex] were highways within the definition of [§ 46.2-100]."<sup>8</sup> When there is such free and unrestricted use of an area by vehicular traffic, the traffic laws of the Commonwealth apply to such area.<sup>9</sup>

In addition, § 46.2-1307 permits the governing body of a locality to "adopt ordinances designating the private roads, within any residential development containing 100 or more lots, as highways for law-enforcement purposes."<sup>10</sup> A 1988 opinion of the Attorney General concludes that, when such an ordinance is adopted by the local governing body, private roads and streets may be considered to be "highways" for the purposes of enforcement of the implied consent provisions of § 18.2-268(b).<sup>11</sup>

Finally, there are several rules of statutory construction applicable to your request. The primary goal of statutory construction is to ascertain and give effect to the intent of the legislature.<sup>12</sup> In addition, "the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."<sup>13</sup> When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in

the statute.<sup>14</sup> The General Assembly is presumed to be aware of the law existing at the time it adopts a statute.<sup>15</sup>

The interpretation of the laws of the Commonwealth in the prior opinions of the Attorney General remain valid. In addition, the General Assembly has made no substantial change to the applicable statutes since the opinions were issued. "The legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view."<sup>16</sup> Accordingly, I concur with these prior opinions that, as a prerequisite to the enforcement of Virginia's traffic laws, it is not necessary that a street be constructed in accordance with standards established by the Department of Transportation and actually accepted into the secondary system of state highways.

You next ask whether the Town of Berryville is subject to liability for failure to erect or maintain traffic control devices on subdivision streets that are not compliant with Transportation Department standards and have not been accepted into the state secondary highway system.

The test for determining a municipality's<sup>17</sup> immunity under the facts you provide is well-established:

In Virginia a municipal corporation is clothed with a two-fold function—one governmental and the other proprietary. A municipality is immune from liability for failure to exercise or for negligence in the exercise of its governmental functions. It may be liable, just as a private individual or corporation, for the failure to exercise or for negligence in the exercise of its proprietary functions.<sup>[18]</sup>

A "governmental function" is "expressly or impliedly authorized by constitution, statute, or other law and ... is carried out for the benefit of the general public," whereas a "proprietary function" is performed for the benefit of the municipality rather than the general public.<sup>19</sup> The doctrine of sovereign immunity extends to municipalities in their exercise of governmental, rather than proprietary, functions.<sup>20</sup>

"The rule that Virginia follows is that the regulation by municipalities of traffic on their streets constitutes the exercise of a discretionary governmental function."<sup>21</sup> The Supreme Court has held that a city, in maintaining its traffic signals, was engaged in a governmental function of regulating traffic, and it was immune from liability for its negligence in failing to repair a malfunctioning signal that allegedly caused a plaintiff's injury.<sup>22</sup> The Court has also held:

Traffic lights, blinking lights, warning signals, roadway markings, railings, barriers, guardrails, curbs, and like devices are all designed to control and regulate traffic and to insure its orderly and safe flow on the streets. A determination of the need for such devices and the decision to install or not to install them calls for the exercise of discretion on the part of the city. In the exercise of that discretion and in making a judgment, the city is performing a governmental function and is not liable for its negligent performance of the function.<sup>[23]</sup>

The regulation of the flow of traffic by means of such traffic control devices constitutes "the exercise of a discretionary governmental function."<sup>24</sup> A municipality is immune from liability for failure to exercise a governmental function.<sup>25</sup> Consequently, I must conclude that the Town of Berryville would be immune from liability for failure to erect or maintain traffic control devices on subdivision streets that are not compliant with Transportation Department standards and have not been accepted into the state secondary highway system.

Your final question is whether the Town of Berryville would be liable for injuries resulting from a fall on an unpaved or unfinished street or curb.<sup>26</sup>

A dedication is the setting aside of land, or of an interest therein, to public use—"a form of transfer by an owner to the public of the fee or a lesser interest in land."<sup>27</sup> Recordation of a subdivision plat and the sale of lots in the subdivision evidence an intent to make the platted streets available for public use and constitute the common law offer of dedication.<sup>28</sup> When streets are accepted by the Department of Transportation into the state secondary highway system, the Department not only exercises control and jurisdiction over the streets, but also is responsible for their maintenance, since individual members of the public have no property rights in the roadway.<sup>29</sup> A completed dedication imposes upon the Department not only the burden of maintenance,<sup>30</sup> but also the burden of potential tort liability.<sup>31</sup> Section 33.1-79 permits the Department of Transportation to take into the secondary highway system those streets in towns with 3,500 or less inhabitants.

You state that the developer has recorded a subdivision plat approved by the Town of Berryville showing streets intended for motor vehicular use by the public. Furthermore, you advise that the public is using the streets for vehicular travel. When streets in the Town of Berryville are accepted into the secondary system of state highways by dedication, I am of the opinion that the town would not be liable for any injury sustained by a pedestrian from a fall on an unpaved or unfinished street or curb.

<sup>1</sup>1973-1974 Op. Va. Att’y Gen. 341 (citing repealed § 15.1-478, revised as § 15.2-2265).

<sup>2</sup>*Id.* at 342.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.* (citing repealed § 46.1-1(10), revised as § 46.2-100).

<sup>5</sup>*Id.*; *see also* 1963-1964 Op. Va. Att’y Gen. 15, 16.

<sup>6</sup>1977-1978 Op. Va. Att’y Gen. 178, 179.

<sup>7</sup>*Id.* at 179 (citing repealed Title 46.1, revised as Title 46.2); *see also* Prillaman v. Commonwealth, 199 Va. 401, 100 S.E. 2d 4 (1957) (holding that service station lot is not "highway" used by public for vehicular travel in state).

<sup>8</sup>Kay Management v. Creason, 220 Va. 820, 832, 263 S.E.2d 394, 402 (1980) (citing repealed § 46.1-1(1)), *quoted in* Furman v. Call, 234 Va. 437, 440, 362 S.E.2d 709, 711 (1987).

<sup>9</sup>*See* Kay Management v. Creason, 220 Va. at 823-32, 263 S.E.2d at 400-02.

<sup>10</sup>You provide no information indicating whether the town has a subdivision ordinance or the number of lots within the subdivision.

<sup>11</sup>1987-1988 Op. Va. Att’y Gen. 275, 276.

<sup>12</sup>*See* Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); 1993 Op. Va. Att’y Gen. 237, 239.

<sup>13</sup>Turner v. Commonwealth, 226 Va. at 459, 309 S.E.2d at 338.

<sup>14</sup>*See* 2A Norman J. Singer, Sutherland Statutory Construction § 47.23 (5<sup>th</sup> ed. 1992 & Supp. 1999) ("*Expressio unius est exclusio alterius.*"); Op. Va. Att’y Gen.: 1992 at 145, 146; 1989 at 252, 253. *See, e.g.,* Cape Henry v. Natl. Gypsum, 229 Va. 596, 331 S.E.2d 476 (1985) (five-year statute of limitation encompassing makers and suppliers of ordinary building materials used for realty improvement excludes manufacturers or suppliers of machinery or equipment).

<sup>15</sup>*See* Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913); 1995 Op. Va. Att’y Gen. 130, 131 (General Assembly, in amending statute, had full knowledge of existing law and construction placed upon it

by courts, and intended to change then-existing law); *see also* 1996 Op. Va. Att’y Gen. 51, 52 (General Assembly, in repealing one statute and enacting another, had full knowledge of existing law and construction placed upon it by Attorney General, and intended to change then-existing law).

<sup>16</sup>*Deal v. Commonwealth*, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983).

<sup>17</sup>Section 15.2-102 provides that the term "[m]unicipality[ ]" ... and words or terms of similar import shall be construed to relate only to cities and towns."

<sup>18</sup>*Fenon v. City of Norfolk*, 203 Va. 551, 555, 125 S.E.2d 808, 811 (1962).

<sup>19</sup>*Black’s Law Dictionary* 704, 1235 (7<sup>th</sup> ed. 1999).

<sup>20</sup>*See, e.g., Freeman v. City of Norfolk*, 221 Va. 57, 266 S.E.2d 885 (1980) (city, in constructing public streets, acts in governmental capacity and exercises discretionary function for which it is not liable; in maintaining its streets, city acts in proprietary capacity by keeping streets in safe condition for travel); 1986-1987 Op. Va. Att’y Gen. 141, 146.

<sup>21</sup>*Freeman v. City of Norfolk*, 221 Va. at 59, 266 S.E.2d at 886.

<sup>22</sup>*Transportation, Inc. v. Falls Church*, 219 Va. 1004, 1006, 254 S.E.2d 62, 64 (1979).

<sup>23</sup>*Freeman v. City of Norfolk*, 221 Va. at 60, 266 S.E.2d at 886.

<sup>24</sup>*Taylor v. City of Charlottesville*, 240 Va. 367, 371, 397 S.E.2d 832, 835 (1990) (quoting *Freeman v. City of Norfolk*, 221 Va. at 59, 266 S.E.2d at 886).

<sup>25</sup>*Fenon v. City of Norfolk*, 203 Va. at 555, 125 S.E.2d at 811.

<sup>26</sup>In responding to your final inquiry, I must assume that the dedication to which you refer is complete. Furthermore, I note that the population of the town is under 3,500. Finally, I must also assume that the curb to which you refer is an integral part of the street.

<sup>27</sup>*May v. Dewey*, 201 Va. 621, 629, 112 S.E.2d 838, 844 (1960).

<sup>28</sup>*Ocean Island Inn v. Virginia Beach*, 216 Va. 474, 477, 220 S.E.2d 247, 250 (1975).

<sup>29</sup>*See, e.g.*, Highway Commissioner v. Howard, 213 Va. 731, 195 S.E.2d 880 (1973) (abutting landowner has no property right in continuance or maintenance of highway traffic flow past his property); Highway Commissioner v. Nettleton, 213 Va. 26, 189 S.E.2d 377 (1972) (plaintiffs were entitled only to reasonable and adequate access to road dedicated for use as public highway).

<sup>30</sup>Section 15.2-2268 provides that localities are not obligated to pay for street "grading or paving" or curb "improvements or construction."

<sup>31</sup>Ocean Island Inn v. Virginia Beach, 216 Va. at 477, 220 S.E.2d at 250.