



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II  
Attorney General

August 2, 2013

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

The Honorable Phillip P. Puckett  
Member, Senate of Virginia  
Post Office Box 924  
Tazewell, Virginia 24651-0924

Dear Senator Puckett:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issues Presented

You present several questions regarding abandonment and conveyance of county bridges. First, you ask whether Buchanan County (“the County”) lawfully may abandon bridges that are in need of repair or replacement, and, whether the County would retain liability after such abandonment. You further ask whether, under § 33.1-165 of *the Code of Virginia*, a sale of such a bridge to one or more private parties who intend to continue to use it would meet the statutory consideration requirement. In particular, you ask whether the County would fulfill the statutory consideration requirement if it made a monetary payment to the private purchasers of such a bridge at the time of conveyance. Finally, you ask whether § 33.1-165 contemplates a private or public sale of such a bridge.

## Response

It is my opinion that the County may abandon a bridge that is neither in the State Highway System nor the secondary highway system if the bridge is no longer necessary or if abandonment would serve the public interest. It further is my opinion that upon such abandonment, the bridge’s ownership normally will revert to the owner of the underlying fee, if any such owner exists. In addition, it is my opinion that if the County owns the fee, it lawfully may convey the bridge property to a private party in exchange for consideration by either a public or private sale, and, that such consideration may include the County’s making of a monetary payment to the purchaser. Finally, I am unable to opine whether the County would retain liability following its abandonment of a bridge needing repair or replacement, as such determination of liability would depend on specific facts existing at the time of occurrence of injury or damage.

## Background

You relate that the Federal Highway Administration has required the County to inspect all bridges within the County’s road and bridge system pursuant to the National Bridge Inspection Standards.<sup>1</sup> To reduce

---

<sup>1</sup> Your inquiry cited former 23 U.S.C. § 151, which Congress repealed by Act July 6, 2012, P.L. 112-141, Div A, Title I, Subtitle E, § 1519(b)(1)(A), 126 Stat. 575, effective 10/1/2012. Nevertheless, 23 U.S.C. § 144, entitled, “National bridge and tunnel inventory and inspection standards,” sets forth requirements relating to the inventory and inspection of bridges throughout the country, and for the development by the states of corrective action plans for the

costs to county residents, the Buchanan County Board of Supervisors (“Board”) is exploring the abandonment of bridges in need of repair or replacement to reduce costs. Once abandonment occurs, the County plans to consider conveyance of the bridges to private parties.

### Applicable Law and Discussion

Article 12, Chapter 1, of Title 33.1 of the *Code of Virginia*<sup>2</sup> sets forth procedures for localities to pursue the abandonment of county roads, which by inference would include bridges thereof, that are not part of the State Highway System or the secondary system.<sup>3</sup> The governing body of a county may abandon a section of road that is not part of the State Highway System or the secondary system if such road is deemed no longer necessary for public use by the governing body.<sup>4</sup> After a notification process that allows petitioners to request public hearing, the governing body may abandon the road if it finds either that no public necessity exists or that the public interest would be served best by abandonment.<sup>5</sup> The determination may be appealed to the circuit court of the county by any petitioner or the governing body of the locality.<sup>6</sup> The circuit court may order the road to remain open if any appealing party would be deprived of access to a public road.<sup>7</sup> As a result of an abandonment, the road segment “shall cease to be a public road . . . subject to the rights of owners of any public utility installations which have been previously erected therein.”<sup>8</sup>

You report that the federal authorities have required compliance with mandates applicable to the inspection and evaluation of the structural integrity of bridges.<sup>9</sup> As your request implies, a lawfully abandoned bridge no longer would be subject to such requirements, as it would neither be “essential to protect the safety of the traveling public,” nor needed to “allow for the efficient movement of people and goods on which the economy of the United States relies.”<sup>10</sup>

Should the Board abandon a section of road pursuant to §§ 33.1-157 or 33.1-166.1, it may convey the County’s ownership interest in it.<sup>11</sup> Note, however, that if the County’s interest is an easement originally acquired by condemnation or dedication of land for use as a public highway, then

---

rehabilitation of structurally deficient bridges. *See also* 23 CFR 650.401, *et seq.*, (setting forth regulations pertaining to these federal statutory mandates).

<sup>2</sup> VA. CODE ANN. §§ 33.1-156 through 33.1-167 (2011).

<sup>3</sup> The roadways comprising the “State Highway System, sometimes referred to as the primary system of state highways” and the “secondary system of state highways” are respectively defined at § 33.1-25 and § 33.1-67. The bridges to which you refer for purposes of your inquiry are located upon “county roads,” generally defined as those “maintained by a county and not part of the secondary system, and...not parts of the State Highway System[.]”

<sup>4</sup> VA. CODE ANN. § 33.1-157 (2011).

<sup>5</sup> Section 33.1-161 (2011).

<sup>6</sup> Section 33.1-162 (2011).

<sup>7</sup> *Id.*

<sup>8</sup> Section 33.1-163 (2011).

<sup>9</sup> *See* 23 U.S.C. § 144(b), (d) and (h). *See also* 23 CFR §650.401, *et seq.*

<sup>10</sup> 23 U.S.C. § 144(a)(1)(A); *see* VA. CODE ANN. § 33.1-163 (2011).

<sup>11</sup> Section 33.1-165 (2011) provides in part that

When any road abandoned as above provided is deemed by the governing body no longer necessary for the public use, it shall so certify such facts upon its minutes and it may authorize the sale and conveyance in the name of the county a deed or deeds conveying such sections, either for a consideration or in exchange for other lands that may be necessary for the uses of the county[.]

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. In the absence of evidence to the contrary, the fee is presumed to be in the abutting land owners. If the highway is the boundary line between different tracts, the presumption is that the reversion to each owner is to the center of the highway.<sup>[12]</sup>

In the event the County owns the underlying fee, it may sell the property without limitation as to the buyer, subject to the procedural due process limitations provided by law.<sup>13</sup>

As to the conditions for such conveyance, you inquire regarding the adequacy of consideration and, specifically, whether the County may “pay a relatively small monetary payment...to the grantee(s) in light that the bridge is in a defective condition at the time of conveyance.” You additionally note that “[f]ull disclosure would be made to the grantee(s) with the understanding that the conveyance would relieve the County of repair and/or replacement costs along with future inspection costs.”<sup>14</sup> The statute requires only that the “sale or conveyance . . . [be] either for a consideration or in exchange for other lands that may be necessary for the uses of the county.”<sup>15</sup> Virginia law broadly defines contractual consideration, and it generally may be termed “as ‘the . . . motive . . . or impelling influence which induces a contracting party to enter into a contract,’” or “as the ‘reason or material cause of a contract.’”<sup>16</sup> Thus, while the County should determine and document the consideration for, and the perceived benefits to the parties to the conveyance, I find no *per se* legal impediment to the County making a monetary payment to the purchaser of the fee in the abandoned road segment containing the bridge structure.

With respect to whether the conveyance may be a public or private sale, § 33.1-165 neither specifies nor places limitation upon the nature of the conveyance transaction. It does state that the action of the governing body “shall not be subject to § 15.2-1800.” The latter statute, at subsection B, generally sets forth a locality’s responsibility with respect to the sale of real property, and permits the disposal of such realty by

---

This enabling authority is subject to a prescribed notice requirement to adjacent landowners, and the further requirement of a hearing before the governing body if such a landowner requests it. Should it therein “appear that such section of road should be kept open for the reasonable convenience of such landowner, or the public, then such section of road shall not be conveyed[.]” *Id.* See also § 33.1-157 *et seq.*

<sup>12</sup> *Bond v. Green*, 189 Va. 23, 32, 52 S.E.2d 169, 173 (1948). See also 1984 Op. Va. Att’y Gen 145, 147 (“[U]nless the county owns the underlying fee, the board of supervisors is ordinarily without power to sell and convey the land pursuant to § 33.1-165 . . . Only when the county owns the underlying fee would it have the power to sell and convey the land that was once part of the abandoned roadway.”).

<sup>13</sup> Section 33.1-165 (2011).

<sup>14</sup> I make no comment herein upon the wisdom of a local policy to abandon, then convey to private parties, county road bridges that are in need of structural repair or replacement. This opinion relates only to the specific legal issues about which you inquire.

<sup>15</sup> *Id.*

<sup>16</sup> *Hughes v. Cole*, 251 Va. 3, 13-14, 465 S.E.2d 820, 827 (1996) (favorably quoting *Black’s Law Dictionary* 306 (6th ed. 1990)). See *Smith v. Mountjoy*, 280 Va. 46, 53, 694 S.E.2d 598, 602 (2010) (“Consideration is, in effect, the price bargained for and paid for a promise. It may be in the form of a benefit to the party promising or a detriment to the party to whom the promise is made.”) (Virginia citations omitted); *Alexakis v. Mallios*, 261 Va. 425, 430, 544 S.E.2d 650, 654 (2001) (“A promise to forebear the exercise of a legal right is adequate consideration to support a contract.” (Virginia citation omitted)). See also *discussion Atlantic & Danville R’wy Co. v. Hooker*, 194 Va. 496, 510-11, 74 S.E.2d 270, 280 (1953).

public or private sale after public hearing.<sup>17</sup> Because the terms of § 33.1-165 specifically address the sale of abandoned roadway segments, as opposed to the more general provisions of § 15.2-1800(B), I conclude that the County may use its discretion to determine whether a public or private sale would be most beneficial for the County, and that it need not conduct any public hearing beyond that required by the terms of § 33.1-165.<sup>18</sup>

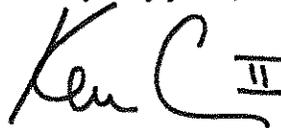
Finally, based upon the specific facts at hand, I must decline to offer an opinion as to what, if any, liability may arise when a bridge in need of repair or replacement is abandoned.<sup>19</sup> Any assessment of potential liability would be based on the particular facts presented in each proposed abandonment including, without limitation, such factors as the current condition of the bridge (including whether it may constitute a nuisance), the appropriate signage or barricading to be placed upon the bridge structure, the language and adequacy of disclosures to the persons to whom the bridge property is conveyed, the identification of foreseeable potential users of the abandoned bridge, how such persons' access to public roads might be affected by the abandonment, the means and abilities of individual property owners to repair and maintain the bridge, and the location of the bridge relative to population centers. The assessment of such factors should be undertaken by the County and its attorney on a case-by-case basis.

### Conclusion

Accordingly, it is my opinion that the County may abandon a bridge that is neither in the State Highway System nor the secondary highway system if the bridge no longer is necessary or if abandonment would serve the public interest. It further is my opinion that upon such abandonment, the bridge's ownership normally will revert to the owner of the underlying fee, if any such owner exists. In addition, it is my opinion that if the County owns the fee, it lawfully may convey the bridge property to a private party in exchange for consideration by either a public or private sale, and, that such consideration may include the County's making a monetary payment to the purchaser. Finally, I am unable to opine whether the County would retain liability following its abandonment of a bridge needing repair or replacement, as such determination of liability would depend on specific facts existing at the time of occurrence of injury or damage.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II  
Attorney General

---

<sup>17</sup> Section 15.2-1800 provides that “. . . any locality may sell, at public or private sale, exchange, lease as lessor, mortgage, pledge, subordinate interest in or otherwise dispose of its real property . . . provided that no such real property, whether improved or unimproved, shall be disposed of until the governing body has held a public hearing concerning such disposal.”

<sup>18</sup> “[E]stablished principles of statutory construction require that ‘when one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails.’” *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting *Va. Nat'l Bank v. Harris*, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979)).

<sup>19</sup> The Attorney General “refrain[s] from commenting on matters that would require additional facts[.]” 2010 Op. Va. Att’y Gen. 56, 58.