



COMMONWEALTH of VIRGINIA

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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 a private road within the Valley Heights subdivision of Russell County. Specifically, you ask whether and how Russell County may fund improvements for a private road in order for the road to be accepted into the secondary system of state highways. Additionally, you inquire as to the removal of a restrictive covenant prohibiting the use of public funds to improve the road.

Response

It is my opinion that § 33.1-72.1 of the *Code of Virginia* provides the requirements and funding options to improve a road to be taken into the secondary system of highways by the Virginia Department of Transportation ("VDOT"). It is further my opinion that whether the covenant described in your letter would be an impediment to acceptance into the secondary system of state highways requires a determination of fact that is beyond the scope of this opinion.¹

Background

You relate that a privately-owned road in the Valley Heights subdivision of Russell County is in need of repair. The Russell County Board of Supervisors ("Board") would like to add the road to the secondary system of state highways in order to shift the maintenance burden to VDOT. Roads must meet certain standards, however, prior to acceptance into the secondary system of state highways. You indicate that although the Board would like to consider using public funds to pay for repairs bringing the road up to such standards, a restrictive covenant on the property prohibits the use of public funds to improve the road.

¹ "Attorneys General consistently have declined to render official opinions on specific factual matters . . ." 2009 Op. Va. Att'y Gen. 80, 81 (further citation omitted).

Applicable Law and Discussion

Section 33.1-72.1 of the *Code of Virginia* provides for the addition of certain streets to the secondary system of highways. The statute specifically provides that

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 . . . shall take such street into the secondary system of state highways^[2]

Such acceptance by VDOT is dependent upon the satisfaction of certain conditions. These conditions include that the street meet the following requirements:

(i) has a minimum dedicated width of 40 feet or (ii) in the event of extenuating circumstances as determined by the Commissioner of Highways, such street has a minimum dedicated width of 30 feet at the time of such recommendation. In either case such streets must easements appurtenant thereto which conform to the policy of the Commonwealth Transportation Board in respect to drainage However, no such street shall be taken into and become a part of the secondary system of state highways unless and until any and all required permits have been obtained and any outstanding fees, charges, or other financial obligations of whatsoever nature have been satisfied or provision has been made, whether by the posting of a bond or otherwise, for their satisfaction.^[3]

Section 33.1-72.1(F) sets forth the various funding options available to counties to make the improvements necessary for a road to be accepted into the secondary system of state highways.⁴ These options include general county funds, rural addition funds, and private funds.⁵ The statute authorizes the Board to make a determination as to the funds that should be used.⁶ Russell County, its attorney, and VDOT should review § 33.1-72.1 in light of the specific private property rights involved to determine whether and how it should improve this road.⁷

You also ask about landowner options to remove the restrictive covenant on the property. Based on the description provided, the restrictive covenant prohibits the use of public funds to maintain or repair the roadway. Many factors affect the ability of lot owners or Russell County to remove this covenant, including the existence of a homeowners' association, ownership of the road, and other covenants affecting the road or surrounding property. Because the particulars involved in such factors are not before me, I am unable to provide an opinion on the options specific to the Valley Heights subdivision as you

² VA. CODE ANN. 33.1-72.1(E) (2011).

³ *Id.*

⁴ Section 33.1-72.1(F).

⁵ *See id.*

⁶ *See id.*

⁷ "Attorneys General historically have declined to render official opinions when the request: (1) requires the interpretation of a matter reserved to another entity, (2) does not involve a question of law; (3) involves a matter currently in litigation; or (4) involves a matter of purely local concern or procedure." 2009 Op. Va. Att'y Gen. 138, 141 (further citation omitted).

present them.⁸ Nevertheless, I note that Russell County also might consider using its power of eminent domain to remove the covenant.⁹

Conclusion

Accordingly, it is my opinion Russell County may request that VDOT accept a road into the secondary system of state highways and expend funds to improve such a road in accordance with § 33.1-72.1. It is further my opinion that whether the covenant described in your letter would be an impediment to acceptance into the secondary system of state highways requires a determination of fact that is beyond the scope of this opinion.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General

⁸ This Office traditionally has refrained from commenting on matters requiring additional facts to resolve. *See, e.g.*, 2010 Op. Va. Att’y Gen. 56, 58.

⁹ *See* VA. CODE ANN. § 15.1-1901 (Supp. 2013) (providing authority to localities to exercise eminent domain). The procedures for condemning land are set out at VA. CODE ANN. §§ 25.1-200 through 25.1-251 (2011 & Supp. 2013). *See* § 15.2-1902 (2012). *See also* § 15.2-1905 (2012) (establishing special condemnation procedures for counties). The courts have recognized that the right to eminent domain includes the right to condemn covenants. *See, e.g.*, *Minner v. City of Lynchburg*, 204 Va. 180, 191, 129 S.E.2d 673, 680-81 (1963) (enjoining the City of Lynchburg from building a road on property that was subject to a covenant prohibiting roads while specifically stating that “[t]his does not mean, however, that the city cannot construct the street . . . It may acquire this right by eminent domain. . . .”). Nonetheless, the County would have to pay just compensation if it chose to condemn the covenant. *See* VA. CONST. art. I, § 11; VA. CODE ANN. § 25.1-230 (2011).