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Virginia Subdivision Law: An Unreasonable Burden On The Unwary

VIRGINIA SUBDIVISION LAW: AN UNREASONABLE BURDEN ON THE UNWARY

Virginia statutory provisions concerning the subdivision of land[1] are inadequate because no guarantee exists that particular homeowners will be relieved from assuming the unexpected burden of street maintenance.[2] While dedicated and accepted subdivision streets located within cities or towns are maintained by the respective local authorities,[3] complications arise when concern is focused on subdivision developments outside municipalities.

Although subdivision streets are conveyed to the respective county,[4] there is no legal obligation imposed upon county governments to maintain those roadways. Three factors support this proposition. First, the Virginia Code contains provisions for the maintenance of roads by the Commonwealth[5] and by municipalities.[6] How-

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[1] VA. CODE § 15.1-430(1) (Cum. Supp. 1976) provides that a subdivision is either a division of a parcel of land into three or more lots, each less than five acres in area, for the purpose of transferring ownership or building development, or any division of land which necessitates construction of a new street. This definition may be altered in the subdivision ordinance enacted by a municipality or county. *Id.* The only limitation upon local government redefinition of the composition or regulation of a subdivision is that the local governing unit must use that power and discretion reasonably in light of local conditions and circumstances. Board of Supervisors v. Georgetown Land Co., 204 Va. 380, 383-84, 131 S.E.2d 290, 292-93 (1963).

[2] *See* text accompanying notes 15-24 *infra*. Homeowners have no obligation or duty to maintain subdivision streets, "absent an appropriate covenant in the deed by which their land was acquired." Letter from J. Westwood Smithers, Jr., Assistant Attorney General of the Commonwealth of Virginia (on file in Washington and Lee *Law Review* office) [hereinafter cited as Assistant Attorney General's Letter]. However, if no government body will maintain the streets, *see* text accompanying notes 5-11 *infra*, the homeowner will be forced to assume the burden of maintenance if any street repairs are to be made at all. This situation might lead to potential tort liability for the homeowner if his faulty maintenance caused harm or injury. *Cf.* Tugman v. Riverside and Dan River Cotton Mills, 144 Va. 473, 132 S.E. 179 (1926) (landlord without duty to repair may be liable for negligence if he voluntarily repairs and subsequently creates a dangerous condition).

[3] Before a town becomes responsible for maintaining subdivision streets, the process of dedication and acceptance must have occurred. For an explanation of the dedication procedure, see text accompanying notes 25-42 *infra*. Once a town has accepted a dedication, it must maintain the dedicated streets. Ocean Island Inn, Inc. v. City of Virginia Beach, 216 Va. 474, 477, 220 S.E.2d 247, 250 (1975). *See* note 24 *infra*.

[4] *See* note 19 *infra*.

[5] VA. CODE § 33.1-69 (Repl. Vol. 1976) provides that the state shall maintain all roads within the state secondary highway system.

[6] VA. CODE § 15.1-889 (Cum Supp. 1976) states that a municipal corporation may maintain roadways within the municipality.

ever, there is no Code provision relating to county road maintenance. The complete absence of any provision regarding county maintenance implies that county governments have no such duty. Second, the Code mandates that counties shall neither impose any road taxes nor contract any indebtedness for road construction or maintenance.[7] Third, the primary intent of the Byrd Road Law of 1932, which is still in effect, is to relieve counties of any road maintenance and improvement burden.[8] Furthermore, the state is obligated to maintain county subdivision roads only if certain state construction requirements are met.[9] In contrast, to gain approval of the subdivision plan, the subdivider must only fulfill county road specifications. Those county specifications need not be equivalent to the specifications necessary for the state to accept the road for maintenance purposes.[10] Therefore, situa-

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[7] VA. CODE § 33.1-225 (Repl. Vol. 1976) provides that counties shall not levy county road taxes nor contract any further indebtedness for the maintenance of roads. Thus, the Code renders county financing of street maintenance impossible. The prior indebtedness that may be satisfied by county road taxes consists of certain sinking fund obligations to retire bond indebtedness established prior to the enactment of the statute in 1932. *See* 1932 Va. Acts, ch. 415, at 873-74. An exception to the statute's prohibition on county road taxes is created under circumstances where suburban conditions exist. VA. CODE § 33.1-225 (Repl. Vol. 1976). Suburban conditions are created by the overflow of population adjacent to a city containing 10,000 or more inhabitants. *See* Va. Code § 33.1-225 (Repl. Vol. 1976) and § 15.1-1101 (Repl. Vol. 1973).

[8] The preamble to the Byrd Road Law states that the purpose of the act is to relieve counties of the burden of maintenance and improvement of streets, roads, bridges, landings and wharves. 1932 Va. Acts, ch. 415, at 872. *See* County of Henrico v. City of Richmond, 177 Va. 754, 15 S.E.2d 309 (1941). *See* note 44 *infra*.

[9] A county road must be included within the state secondary highway system for the state to have a maintenance burden. *See* VA. CODE § 33.1-69 (Repl. Vol. 1976); note 11 *infra*. To reach secondary highway status, state specifications must be met. For an example of state secondary highway specifications, see note 10, *infra*.

[10] The specifications for inclusion into the state highway system frequently are more detailed than those found in county subdivision ordinances. Comparison of the Rockbridge County Subdivision Ordinance with the state requirements for secondary highway status provides an example.

The state has employed a procedure for determining the amount of vehicles that travel the street each day in order to determine the street's proper base and pavement design. For streets that will be utilized by 250 vehicles or less per day, the minimum base and subbase required by the state depends upon the material used, but a non-concrete base and subbase must have a depth of at least six inches. If the amount of daily traffic is between 250 and 400 vehicles per day, then a total base and subbase depth of six to eight inches is required. Five categories based upon the quantity of traffic have been developed by the state, with each succeeding category increasing the depth requirements of the base and subbase. Letter of J.E. Harwood, then Deputy Commissioner and Chief Engineer of the State Department of Highways to the Boards of Supervisors of All Counties in the Secondary System, establishing standards for qualification within the State Secondary System (Oct. 3, 1968) (letter on file at the

tions may arise where no government body would be bound to maintain the subdivision roads.[11]

The result of the Virginia statutory scheme can be extremely vexing and financially burdensome for an unwary homeowner because he may become responsible, as a practical matter, for any necessary maintenance of the subdivision streets.[12] This situation may develop even though there has been a dedication and subsequent acceptance of the streets for public use by the proper governing body,[13] and a transfer of the streets in fee simple to the local government.[14]

The worst possible situation for the subdivision homeowner might develop in the following manner. A professional developer wishes to develop a subdivision in the county beyond the limits of any incorporated town. To realize this venture, the developer must comply with the statutory requirements concerning subdivisions. Virginia requires

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In contrast, the Rockbridge County Subdivision Ordinance requires only a base of five inches in depth of stone, gravel, or "other satisfactory stabilizing material approved by the State Highway Department," regardless of the expected vehicle traffic. Subdivision Ordinance of Rockbridge County, Virginia Appendix A, § (d). Likewise, Roanoke County only requires that the "[b]ase for pavement shall be at least . . . 5 inches in depth and be of stone, gravel, or other satisfactory stabilizing material meeting State Highway Department Specification." Roanoke County Land Subdivision Ordinance § IX B. Thus, a subdivision street may fulfill the subsurface requirements of the county subdivision ordinance but fail to meet state requirements.

[11] No governing body has a legal obligation to maintain a county subdivision road if it does not meet the specifications for inclusion within the state highway system. Assistant Attorney General's Letter, *supra* note 2. *See* text accompanying notes 5-9 *supra*.

[12] *See* note 2 *supra*.

[13] Subdivision streets generally become public roads by the process of dedication and acceptance. *See* text accompanying notes 15-17, 25-29 *infra*.

[14] VA. CODE § 15.1-478 (Cum. Supp. 1976). *See* note 19 *infra*. The Code appears redundant by requiring a subdivider to dedicate the streets for public use prior to plat approval, even though recordation of the plat will automatically transfer the fee to the county. *See* text accompanying notes 15-17 *infra*; note 19 *infra*. Title to the streets will ultimately vest in the county under either method. *See* note 43 *infra*. One possible explanation for this profusion of methods is that Virginia might require an acceptance before a statutory dedication is completed and the accepting government body becomes responsible for street maintenance. *See* text accompanying notes 26-37 *infra*. This reasoning may permit an official act of acceptance prior to recordation so that the succeeding statutory dedication immediately will be complete. Such a procedure is reasonable for municipalities, since they have a potential duty to maintain. However, the need for acceptance of county roads is unreasonable, as counties have no duty to maintain whatsoever. *See* text accompanying notes 5-8 *supra*, 38-41 *infra*. Thus, the Code's imposition of a dedication and acceptance requirement prior to plat approval, as well as a requirement of statutory dedication upon recordation, appears unnecessary for county subdivision streets.

all counties and municipalities to adopt ordinances regulating the subdivision of land,[15] to which the developer must adhere for his plat to gain approval by the county authorities.[16] The subdivision ordinances, encompassing many detailed requirements, must particularly include provisions for the dedication and acceptance of streets for public use.[17] The plat is then submitted to county authorities for their approval.[18] Assuming that all county specifications have been followed and the plat has been approved, the developer then records the plat. This recordation transfers the land upon which the streets lie to the county in fee simple.[19] Houses are subsequently built on the subdivision parcels and sold.

When the streets eventually require maintenance, the homeowners will probably contact their local public authorities. Only then might they discover the possibility that no public authority is legally bound to maintain the streets. If the county subdivision ordinance contains standards inferior to those necessary for inclusion within the state highway system, and the subdivision was built pursuant to the county standards, the state will not maintain the roads. Since the county has no duty to maintain,[20] the substantial cost of any maintenance will be borne by the homeowner.[21] This burden arises even though the streets have probably been dedicated and accepted by the county as a public way,[22] and title to the streets has passed to the

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[15] VA. CODE § 15.1-465 (Cum. Supp. 1976) provides that "[t]he governing body of any county or municipality shall adopt an ordinance to assure the orderly subdivision of land and its development." If a county subdivision ordinance does not require minimum state specifications and thus fails to ensure the maintenance of subdivision roads, it is questionable whether the ordinance provides for "orderly" development.

[16] VA. CODE § 15.1-475 (Cum. Supp. 1976).

[17] VA. CODE § 15.1-466 (f) (Cum. Supp. 1976).

[18] VA. CODE § 15.1-475 (Cum. Supp. 1976).

[19] VA. CODE § 15.1-478 (Cum. Supp. 1976) provides that "[t]he recordation of such plat shall operate to transfer, in fee simple, to the respective counties and municipalities in which the land lies such portion of the premises platted as is on such plat set apart for streets, alleys, or other public use . . . ." Since the fee to the streets is always transferred to the county or town upon the developer's recordation of his plat, the subsequent homeowners will never own the fee to the streets they may be forced to maintain, assuming the recordation acts as a complete dedication. *See* text accompanying notes 26-41 *infra*.

[20] *See* text accompanying notes 4-8 *supra*.

[21] If a subdivision street is poorly constructed and cannot be accepted by the State Highway Department for maintenance purposes, then the adjoining landowners usually cooperate to maintain the streets. Assistant Attorney General's Letter, *supra* note 2. However, those landowners generally have no legal duty to maintain. *See* note 2 *supra*.

[22] The current statute requires that "[a] subdivision ordinance shall include . . .

county in fee simple.[23] Virginia's statutes consequently conflict with the widely recognized principle that the accepting public authority bears the duty to maintain.[24]

A review of the general law regarding subdivision roads is necessary to highlight the Virginia statutory oversight. Subdivision streets usually become public roads by dedication of the streets for public use by the landowner and subsequent acceptance by the proper governing authorities.[25] The Virginia Supreme Court has held that the filing or recordation of a subdivision plat constitutes an offer of dedication.[26] While acceptance is normally required for common law dedi-

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regulations . . . that apply to or provide: . . . (f) For the acceptance of dedication for public use of any right-of-way located within any subdivision . . . only if the owner or developer" assumes the responsibility of street construction costs to the satisfaction of the governing body. VA. CODE § 15.1-466(f) (Cum. Supp. 1976). This statute may be interpreted in two ways. First, if the "construction costs" requirement is met, then the local government must accept the dedication. This interpretation is supported by dictum from the Virginia Supreme Court in Board of Supervisors v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975). The court stated that the statute "would support an inference that local governing bodies . . . are empowered to require an offer *and acceptance* of dedication for access roads and other public facilities as the price of property development." *Id.* at 138 (emphasis added). Since the county must now require an acceptance of a dedication, and an acceptance will have occurred if a proposed subdivision plan is allowed to proceed to development, then all subdivision streets constructed subsequent to this statute must have been accepted.

Alternatively, the statute may be interpreted as providing the governing body with discretion to accept a dedication only if the developer has assumed construction costs to the governing body's satisfaction. The former interpretation compels acceptance while the latter does not. However, acceptance will be implied if the road has been sufficiently subjected to public use. Ocean Island Inn, Inc. v. City of Virginia Beach, 216 Va. 474, 477, 220 S.E.2d 247, 250 (1975). Furthermore, acceptance will be implied if government action has occasioned the installation of public utility lines in or across the roadways. *Id.* Hence, under either interpretation of the statute, an acceptance of the dedication probably has occurred.

[23] *See* note 19 *supra*.

[24] If the appropriate governing body has accepted a dedication of streets, the burden of maintaining those streets is usually placed on the accepting public authorities. 2 G. THOMPSON, REAL PROPERTY, § 372, at 493 (Repl. Vol. 1961) [hereinafter cited as THOMPSON]; *see* 11 E. MCQUILLEN, MUNICIPAL CORPORATIONS, § 33.44, at 738-39 (3d ed. rev. 1964) [hereinafter cited MCQUILLEN]. The Virginia Supreme Court has recently reaffirmed this principle, stating that "[s]ince a completed dedication imposes the burden of maintenance and potential tort liability upon the public, a dedication does not become complete until the public or competent public authority manifests an intent to accept the offer." Ocean Island Inn, Inc. v. City of Virginia Beach, 216 Va. 474, 477, 220 S.E.2d 247, 250 (1975). Intent to accept may be manifested expressly or impliedly. *Id. See* note 22 *supra*.

[25] THOMPSON, *supra* note 24, § 369, at 461-71; § 372, at 492.

[26] Recordation of a subdivision plat and the subsequent sale of lots constitutes a common law offer of dedication. Ocean Island Inn, Inc. v. City of Virginia Beach, 216

cations,[27] formal acceptance by public authorities is not always necessary if the dedication occurs pursuant to statute.[28] Many jurisdictions impose a requirement of acceptance, even if there has been a statutorily compelled dedication, before any liability for road maintenance can be imposed upon the accepting government.[29] Although the Virginia cases are ambiguous,[30] acceptance of a statutory dedication may be necessary before a dedication is complete and the accepting public authority becomes responsible for the maintenance of the subdivision streets.

The Virginia Supreme Court has not commented on the current statutory dedication provision, although it has construed its forerunners. Under former dedication statutes,[31] the court held that although recordation created a public right of passage over the subdivision streets, the streets would not be considered county roads until they had been accepted by county authorities.[32] Those decisions are not fully determinative of the acceptance issue, however, because the former statutes technically did not create a statutory dedication. While recordation created a public right of passage,[33] it failed to result in the transfer of the underlying fee to a specific public body.[34]

Va. 474, 477, 220 S.E.2d 247, 250 (1975). *See, e.g.*, Nash v. Pendleton, 183 Ark. 339, 35 S.W.2d 1002 (1931); Volpe v. Marina Parks, Inc., 101 R.I. 80, 220 A.2d 525, 529 (1966).

[27] THOMPSON, *supra* note 24, § 372, at 493.

[28] State courts disagree as to whether acceptance is necessary when the dedication is compelled by statute. For a collection of cases concerning the necessity of acceptance after statutory dedication, *see* MCQUILLEN, *supra* note 24, § 33.44, at 737.

[29] In those jurisdictions where an acceptance is necessary to complete a dedication imposed by statute, the presence of a statute that transfers the fee upon recordation neither operates as an acceptance nor imposes any maintenance liability. People *ex rel.* Tilden v. Massieon, 279 Ill. 312, 116 N.E. 639 (1917); Ramstad v. Carr, 31 N.D. 504, 154 N.W. 195 (1915). *See* MCQUILLEN, *supra* note 24, § 33.44, at 737-39.

[30] *See* note 32 *infra*; text accompanying notes 33-37 *infra*.

[31] VA. CODE § 5219 (1919); VA. CODE § 2510a(3) (1904).

[32] *See* Genheimer v. Crystal Spring Land Co., 155 Va. 134, 154 S.E. 489, 491 (1930); Washington-Va. Ry. Co. v. Fisher, 121 Va. 229, 92 S.E. 809 (1917). The *Genheimer* court stated that the vesting of the rights of the public was conditional upon the "acceptance of the street by the county or city." 155 Va. at 141, 154 S.E. at 491. In *Fisher*, the court held that acceptance by county authorities was necessary before the platted streets became county roads or highways. 121 Va. at 234, 92 S.E. at 811.

[33] VA. CODE § 5219 (1919) provided in part that the "recording of such plat . . . create[s] a public easement or right of passage over such portion of the premises platted . . . set aside for streets . . . ." VA. CODE § 2510(a)(3) (1904) contains the same wording. For a comparison with the language in the present Code, see note 19 *supra*.

[34] *See* Cottrell Real Estate, Ins. & Loan Co. v. Hampton Roads Ry. & Elec. Co.,

The preceding statutes are analogous to the present one, in that they required the dedication of subdivision streets for public use, and an acceptance by public authorities was required for a complete dedication. Likewise, the prior decisions may provide guidance as to how Virginia courts will interpret the current dedication statute.

Further support for the contention that acceptance is necessary to complete a statutory dedication comes from a recent Virginia Supreme Court decision, *Board of Supervisors v. Rowe*,[35] where the court discussed both the acceptance-of-dedication statute and the transfer-of-the-fee-upon-recordation provision. The court noted that local governments may require "an offer and acceptance of dedications . . . as the price of property development," without further mentioning the effect of the recordation statute.[36] This language might nullify the recordation statute as a means for causing a complete dedication without acceptance. In addition, now that counties and municipalities must include an acceptance-of-dedication provision in their subdivision ordinances,[37] the significance of the *Rowe* language might be to solidify the dedication and acceptance procedure as the sole method for effecting a complete dedication.

Conversely, the underlying policy for requiring acceptance is that governing units should not be held responsible for repairs and maintenance of unaccepted roads.[38] This policy argument is not applicable to Virginia county subdivision roads because there is no county maintenance duty that the act of acceptance would trigger.[39] Therefore, acceptance arguably is not necessary when the concern is county subdivision roads, and the statutory dedication alone, which transfers the fee to the county upon recordation,[40] is sufficient to create a public road.[41] Even if acceptance were necessary, county officials

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7 VA. LAW REG. 476, 480 (Warwick County Cir. Ct. 1901); note 43 *infra*.

[35] 216 Va. 128, 216 S.E.2d 199 (1975).

[36] 216 Va. at 138, 216 S.E.2d at 208.

[37] VA. CODE § 15.1-466(f) (Cum. Supp. 1976). *See* note 22 *supra*. This amended section mandates that subdivision ordinances shall include dedication and acceptance procedures. Prior to the amendment, the statute merely stated that subdivision ordinances may include dedication and acceptance regulations.

[38] *See* Ocean Island Inn, Inc. v. City of Virginia Beach, 216 Va. 474, 477, 220 S.E.2d 247 (1975); Ramstad v. Carr, 31 N.D. 504, 154 N.W. 195, 202 (1915) (*citing* E. MCQUILLEN, MUNICIPAL CORPORATIONS, § 1577 (1st ed. 1904)).

[39] The county has no duty to maintain roadways under any circumstances, *see* text accompanying notes 5-8 *supra*, so acceptance by the county board of supervisors would fail to effectuate the policy's purpose.

[40] *See* note 19 *supra*.

[41] Aside from policy considerations, authority exists for the proposition that the statutory dedication alone is sufficient to create a public road, rendering acceptance

probably have accepted the dedication anyway, either expressly or impliedly.[42]

Under the statutory dedication procedure, the Virginia developer conveys the subdivision streets in fee to the county.[43] Thus, the dedicated streets become public roads. Under the statutory scheme, all public county roads may be embraced in the secondary highway system,[44] which the state is obligated to maintain.[45] However, this blanket inclusion of all public roads into the secondary system is subject to qualification. The state will accept and maintain only those county roads meeting necessary minimum state standards.[46]

Because state specifications may be different from and more burdensome than the requirements imposed by county subdivision ordinances,[47] the statutory scheme results in a confusing situation concerning the maintenance of the streets within a county subdivision. The subdivision may have met all necessary county specifications and the fee to the streets may have been transferred to the county through the process of recordation. Nevertheless, the county has no duty to maintain.[48] Furthermore, the Commonwealth will maintain the streets only if its construction specifications are fulfilled. If the secondary highway system standards are stricter than the applicable county standards, and the subdivision streets are built to the less stringent county standards, the state will not be required to provide

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irrelevant. The Attorney General's office has issued an opinion in regard to a transfer of title by recordation of a subdivision plat. According to the opinion, the county need not perform any further act for the dedication to be complete. OP. ATT'Y GEN. OF VA. 243 (1966). This opinion has been interpreted as meaning that "after approval of the plat, no further overt act is required by county or city officials *to complete the dedication*." OP. ATT'Y GEN. OF VA. 330 (1975) (emphasis added).

[42] *See* note 22 *supra*.

[43] In contrast to common law dedication, which fails to alter legal ownership, a statutory dedication carried out by the act of recordation involves a direct conveyance of the legal title to the municipality or county. 4 H. TIFFANY, REAL PROPERTY, § 1105, at 600 (3d ed. 1975).

[44] VA. CODE § 33.1-67 (Repl. Vol. 1976) provides that "[t]he secondary system of State highways shall consist of all of the public roads . . . in the several counties of the State not included in the State Highway System . . . ." Originally enacted in 1932 as the Byrd Road Law, the purpose of the statute was to relieve counties from the maintenance, construction, and improvement of roadways. To accomplish this goal, a secondary system of state highways, controlled and directed by the State Department of Highways, was developed. *See* 1932 Va. Acts, ch. 415, at 872. *See also* County of Henrico v. City of Richmond, 177 Va. 754, 15 S.E.2d 309 (1941).

[45] VA. CODE § 33.1-69 (Repl. Vol. 1976). *See* note 5 *supra*.

[46] VA. CODE § 33.1-72(c), (d) (Repl. Vol. 1976). *See* note 9, 10 *supra*.

[47] *See* note 10 *supra*.

[48] *See* text accompanying notes 4-8 *supra*.

maintenance. Thus, no government, either state or local, will be obligated to maintain the subdivision streets. Although the road is open to public use and the homeowner does not own the street, he may have to pay the substantial costs of maintenance and repair if the street is to be maintained at all.[49]

Homeowners may upgrade subdivision streets to meet minimum state standards, but at considerable expense. Financial relief, however, is available if certain conditions exist.[50] Under the Virginia statute, if the subdivision street was platted and recorded prior to July 1, 1958, is open and utilized by automobiles, and has at least three families per mile, it is eligible for inclusion in the state secondary system with no cost to the landowners.[51] However, the county must contribute one-half of the cost necessary to improve the streets so as to meet minimum state standards.[52] If the county does meet one-half of the cost, the state will supply the other half.[53] Dollar limitations on state funds and restrictions on "mileage available" in each county further limit the scope of this method of inclusion.[54] These limitations significantly affect the viability of this inclusion process.[55]

A different means for achieving secondary highway status exists for those streets which meet the vehicle use and mileage requirements[56] and which were recorded on a plat between July 1, 1958, and July 1, 1975. The abutting homeowners personally may have to finance the improvements necessary to become part of the secondary

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[49] *See* note 2 *supra*.

[50] VA. CODE § 33.1-72(c), (d) (Repl. Vol. 1976).

[51] VA. CODE § 33.1-72(a), (c) (Repl. Vol. 1976).

[52] VA. CODE § 33.1-72(c) (Repl. Vol. 1976).

[53] *Id.* Impliedly, if the county refuses to contribute one-half of the necessary funds, then the state need not provide any funds or assistance to the homeowner.

[54] VA. CODE § 33.1-72(c), (d) (Repl. Vol. 1976). The funding and mileage limitations are part of the State Department of Highway's rural addition policy. The annual mileage limtation is "1 1/4% of the existing Secondary mileage of a particular county at the end of the preceding calendar year, while the funding limitation is 2% of the initial allocation of funds for use on the Secondary System in such county." Letter from A.S. Brown, State Secondary Roads Engineer for the Virginia State Department of Highways & Transportation (on file in Washington and Lee *Law Review* office).

[55] These limitations impose two substantial obstacles to inclusion in the state secondary system. If the county fails to contribute half of the necessary revenue, the subdivision streets arguably are denied inclusion and therefore state maintenance. *See* note 53 *supra*. Even if the county provides the appropriate funding, the additional mileage and financial limitations imposed by the state are so restrictive that the subdivision streets may not qualify for inclusion in the state system. The practical effect of these qualifications on inclusion is to leave the street outside the state system and the homeowner without public maintenance.

[56] *See* text accompanying note 51 *supra*.

system. The total cost of such improvements is to be funded either by county revenue or a special assessment of the landowners on the street in question or a combination of both.[57] The special assessment may not be employed, however, unless seventy-five per cent of the affected homeowners consent.[58] Each landowner's assessment of up to one-third of the current value for tax purposes of his abutting property demonstrates the potential magnitude of the costs generated by the improvements.[59] These substantial costs limit the effectiveness of the assessment method for attaining secondary highway status.[60]

Moreover, neither method for inclusion within the secondary system is available if the county has not adopted a subdivision ordinance that requires adherence to state specifications as a precondition for plat approval.[61] In those counties not applying the minimum state specifications, the total cost to meet the state standards presumably must be assumed by the homeowners.[62]

The subdivision homeowner may still be responsible for the total cost necessary to include the street within the state secondary system even in counties that have adopted state specifications in their subdivision ordinances. The statutory provisions cover only those streets platted and recorded prior to July 1, 1975.[63] Any street platted and

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[57] VA. CODE § 33.1-72(d) (Repl. Vol. 1976) provides that an appropriate street may be recommended for and included into the state secondary highway system if the county "agrees to contribute from county revenue and/or the special assessment of the landowners on the new street in question the cost to bring the new street up to the necessary minimum standards for acceptance . . . ."

[58] *Id.* The county officials cannot decide to bring a street into the secondary system and subsequently assess the abutting landowners without having previously gained the landowners' ratification.

[59] *Id.* The value of the abutting property can be quite substantial in a contemporary subdivision. Assuming a conservative figure of $30,000, such a landowner may be assessed up to $10,000 for improving the streets to state minimum specifications. If a large quantity of improvement is necessary and few landowners are involved, the assessment would become exorbitant.

[60] Limitations with regard to mileage available in the county for inclusion into the secondary system and state funding restrictions also reduce the plausibility of the assessment method. *Id. See* note 54 *supra.*

[61] VA. CODE § 33.1-72(b) (Repl. Vol. 1976).

[62] Since the methods of inclusion into the state secondary system which partially or totally negate the homeowner's costs are statutorily provided only for streets in counties with subdivision ordinances containing state specifications, no such cost abatement is available in counties not containing those state requirements. Therefore, homeowners in those counties cannot rely on any statute to reduce their costs, and would have to pay the total cost if they wish to have their streets included in the state secondary system.

[63] VA. CODE § 33.1-72 (Repl. Vol. 1976).

recorded after that date, but before the county adopted state specifications in its subdivision ordinance, is not covered by the statute. Under these circumstances, the homeowner will be forced to assume the total cost of necessary improvements, since the county may neither contract any indebtedness for road maintenance nor levy a road tax[64] unless done for the purpose of including within the secondary system a street platted and recorded prior to July 1, 1975.[65] Thus, under the current scheme the homeowner is left with two costly alternatives: continuous homeowner maintenance or street improvements sufficient to meet the minimum state specifications. Either result seems incompatible with the fact that the county owns the underlying fee to the streets.[66]

The Virginia statutory scheme for subdivision street maintenance makes little sense in regard to county subdivisions.[67] To require the developer to convey the fee to the streets while simultaneously forcing the subsequent homeowner to maintain the streets seem incongruous with widely recognized legal principles concerning the transfer of a right-of-way to a governing body for public use.[68] Furthermore, the purchasing homeowner who has had to mortgage his property probably has little equity available to finance either street maintenance or

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[64] VA. CODE § 33.1-225 (Repl. Vol. 1976). *See* note 7 *supra*.

[65] VA. CODE § 33.1-72(f) (Repl. Vol. 1976).

[66] *See* note 43 *supra*.

[67] A major difficulty with analyzing the statutory scheme is the absence of any system for recording Virginia legislative history. One anomalous facet of the subdivision statutes is that upon recordation the fee is transferred to the county, while the state is the only government body with a potential duty to maintain. VA. CODE § 15.1-478 (Cum. Supp. 1976) and VA. CODE §§ 33.1-67, -69 (Repl. Vol. 1976). *See* text accompanying notes 4-8 *supra*; notes 19 and 44 *supra*. An examination of prior statutory schemes fails to shed light on the problem. The Byrd Road Law was established primarily to relieve counties of the burden of maintenance. 1932 Va. Acts, ch. 415, at 872. Prior to that act the counties were responsible for road maintenance. *See* GEN. LAWS OF VA. § 1976 (1923); VA. CODE §§ 944-a(1) and (21) (1904). Beginning in 1923, the Virginia Code specifically required transfer of the underlying fee of subdivision streets to the Commonwealth. GEN. LAWS OF VA. § 5222-3 (1923). In contrast, since 1946, the Code has required transfer of the fee to the respective county or municipality. VA. CODE § 5225(f) (Cum. Supp. 1946); *see* note 19 *supra*. Thus, from 1923 to 1932, the state obtained the fee to subdivision streets while the county had the responsibility to maintain them. The opposite situation has been in force since 1946. The only period when both ownership right and maintenance duty were placed in one governing body was from 1932 to 1946, when both the right and the duty were vested in the state. The reason for this separation of ownership and maintenance duty is not apparent, and the division would seem to foster complications that could presently plague county subdivision homeowners. *See* text accompanying notes 15-24 *supra*.

[68] *See* note 24 *supra*.

the possibly substantial improvements necessary to gain acceptance into the state secondary highway system.[69] The burdens imposed upon county subdivision homeowners by the present Virginia scheme are significant and probably more than the purchasing homeowner expected.

Modification of Virginia laws for the responsibility of maintaining county subdivision streets appears necessary. Inconsistencies regarding both the division of street ownership and responsibility of maintenance,[70] and the methods available to homeowners for including subdivision streets within the state secondary highway system,[71] should be eliminated. More importantly, certain Code provisions should be revised to provide for a more reasonable statutory scheme concerning subdivision street maintenance.[72]

Three possible modifications could relieve subdivision homeowners from the difficulties created by the present Virginia Code. First, the fee to the subdivision streets could be transferred upon recordation to the state instead of the county.[73] Simultaneously, a provision should be drawn either negating the necessity for acceptance of a statutory dedication of county subdivision roads or mandating acceptance if appropriate conditions exist.[74] This alteration would insure that the street would be statutorily dedicated to and accepted by the Commonwealth, which would then be obligated to provide necessary maintenance.[75] Although this modification circumvents the

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[69] The average homeowner who has recently purchased in a subdivision often will have applied most of his savings to the down payment and probably will be in debt to lending institutions. Indeed, banks and loan companies frequently loan from 75% to 90% of the purchase price. These potential consequences of acquiring a subdivision home do not leave the equity that may be required to finance street maintenance or improvements. *See* note 59 *supra*.

[70] *See* note 67 *supra*.

[71] *See* text accompanying notes 50-65 *supra*.

[72] A Subdivision ordinance is a zoning regulation and therefore must both be reasonable and promote the public health, safety and welfare. Board of County Supervisors v. Carper, 200 Va. 653, 660, 662, 107 S.E.2d 390, 395, 396 (1959). A subdivision ordinance that fails to impose any duty of street maintenance on some governing body arguably is unreasonable and fails to promote public health, safety and welfare.

[73] The modified statute would generally provide that upon recordation of a subdivision plat, the streets within the subdivision would be transferred in fee simple to the state or respective municipality for public use. *Cf.* VA. CODE § 15.1-478 (Cum. Supp. 1976) (recordation transfers the streets to the respective county or municipality). *See* note 19 *supra*.

[74] These conditions should not be extensive and could be limited to assurances of payment of construction costs as found in the present Code. *See* note 22 *supra*.

[75] The acceptance by the state of a dedication of streets imposes a burden upon the state to maintain them. THOMPSON, *supra* note 24 § 372, at 493. Hence, mandatory

necessity for inclusion within the secondary highway system, it raises an additional problem. The state is not likely to accept the responsibility of road maintenance on such a broad scale without qualifications. Therefore, the state might subsequently limit the roadways it will maintain, with such limitations possibly being similar or equivalent to those now imposed for acceptance into the secondary system.[76] Hence, the county subdivision homeowner may well have achieved nothing through this statutory modification. Alternatively, a completely different highway scheme might be introduced, whereby certain roads could be designated as county roads as opposed to state roads.[77] Additional provisions would bind the county to maintain all county roads,[78] including streets in county subdivisions. However, since Virginia counties have not had the duty of maintenance since 1932,[79] this plan may not be economically feasible or desirable for the counties.[80]

Finally, the Commonwealth could require that all county subdivision ordinances adopt the specifications necessary for state secondary highway status.[81] This last alternative may well be the most efficient

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dedication to and acceptance of the fee by the state would place the responsibility of maintenance with the state. This would alleviate the problem created by the Virginia Code's failure to require any county maintenance. VA. CODE § 33.1-225 (Repl. Vol. 1976). *See* text accompanying notes 4-8 *supra*.

[76] *See* note 10 *supra*.

[77] An example of such a statutory scheme is found in the New Jersey Code, where state highway routes are specifically delineated. N.J. STAT. ANN. § 27.6-1 (West 1966). Those routes are to be maintained by the State Highway Department. N.J. STAT. ANN. § 27:5B-1 (West 1966). Further provisions allow the county to acquire county roads. N.J. STAT. ANN. § 27:16-2 (West 1966).

[78] The parallel example in the New Jersey Code, placing the duty of maintenance of county roads on the county, is found in N.J. STAT. ANN. §§ 27:16-5, -6 (West 1966).

[79] *See* text accompanying notes 4-8 *supra*; note 67 *supra*.

[80] In conjunction with this plan, the current Virginia statute forbidding the imposition of county road taxes should probably be changed. *See* note 7 *supra*. Hence, the homeowner may suffer an immediate increase in his tax burden without gaining the advantage of adequate road repairs, since the county initially will lack sufficient repair equipment and management experience.

[81] A similar idea was introduced in the Virginia Legislature in 1974. H.B. 879, 1974 Session. The bill proposed a Minimum Statewide Subdivision Standards Act. In preparing the standards, the State Secretary of Commerce and Resources was to consult with various state agencies, including the Department of Highways. This input would result in uniform minimum subdivision standards, designed to be applied statewide. *Id.* The bill was not passed by the legislature. One difference between that bill and the proposed alternative is that the proposed alternative only applies minimum subdivision requirements to county ordinances. Moreover, under the proposed alternative, state secondary highway specifications would be definitely stipulated as the minimum requirement.

and convenient of the three methods discussed.[82] No change in fee ownership would be necessary and a suitable statewide subdivision standard would be created. While the initial cost for these more stringent requirements would ultimately be borne by the subdivision homeowner in the form of higher real estate prices, the homeowner still gains through this method.[83] The responsibility of maintenance then would rest with the state,[84] relieving the homeowner of the unwelcome surprise of personally having to finance the upkeep and repair of the subdivision roads. Likewise, this method benefits the homeowner in an inflationary economy. Although he indirectly bears the costs of including the subdivision streets in the state secondary system, such costs would be lower at the time of purchase than several years later when repair and maintenance become necessary. Therefore, by meeting the state specifications at the time of purchase, the homeowner can reduce the effect of inflationary spiral.

While other alternatives and statutory schemes could be employed to alleviate the present maintenance problem of Virginia county subdivision streets, the easiest means to relieve homeowners of those difficulties may be a statute requiring all county subdivision ordinances to adhere to state secondary highway specifications. Regardless of which alternative may be the wisest, Virginia should adopt a reasonable and practical scheme that will alleviate the present unreasonable burden placed on county subdivision homeowners.

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[82] This proposed modification would have no retroactive effect, leaving current county subdivision homeowners in their present situation. To combat this problem, additional alterations should be made in the Virginia subdivision scheme. Statutes regarding the funding of improvements necessary for state secondary highway inclusion must be included, with access to state and county revenue provided for all those subdivision homeowners who previously purchased lots under a county ordinance which did not match state specifications. This would be merely an expansion of a method already existing under the Code, possibly with some of the imposed limitations either reduced or discontinued. *See* text accompanying notes 51-54 *supra*.

[83] The developer must immediately pay the higher cost of adhering to more rigid state standards in order to gain approval of his subdivision plat. These costs will ultimately be paid by the homeowners though, as the developer distributes his costs in the form of increased sale prices for subdivision lots.

[84] Since the county subdivision street would meet state specifications, it would be able to acquire state secondary highway status. The state then will have a statutory duty to maintain. VA. CODE § 33.1-69 (Repl. Vol. 1976). *See* note 5 *supra*.