Examining Title to Streets â?? Part I

Description

The day starts off bad . . . the alarm was too soft, the coffee maker didnâ??t work, you got cut off on the freeway by a muscle car with an â??As a Matter of Fact, I Do Own the Roadâ?• bumper sticker[1], and your parking space was occupied when you did get to the office . . . and goes downhill from there. Critical to your officeâ??s best customerâ??s next development is clear title to a redevelopment parcel honeycombed with streets and alleys. The title insurance policy provided by the customer takes exception to â??Right, title and interest in and to that portion of the insured land lying within the bounds of streets and alleys as shown on plat of survey,â?• so you know youâ??ll be doing a full examination. Where do you begin?

As Fraulein Maria suggested in â??The Sound of Music,â?•[2] â??Start at the Very Beginning . . . a very good place to start.â?•[3] Given that the English settlement at Jamestown dates to 1607, and letâ??s not forget there were occupants when the English arrived, plan on a 60-year title examination NOT being sufficient. What are some of the mile markers you may encounter during your examination, and how will they impact your work?

The most recent milestone to consider occurred in 1946. Acts of Assembly 1946, ch 369. (What did I say about 60-year examination periods?) In that year, the predecessor version of a statute still in force was amended to alter the effect of a recorded subdivision plat.

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 . . . . Virginia Code Ann. Â§15.2-2265.

For the statute to be operative, the locality must have enacted a subdivision ordinance as authorized by the statute. (Do you know when your jurisdictions enacted their first version of a subdivision ordinance?) Your review of the plat should reveal compliance with the statute, the earliest version of which required: three or more lots; known or permanent monumentation; and a statement of consent signed and acknowledged by the owners.[4] The ownerâ??s consent may appear on the plat itself, or on a separate writing (which may be designated as a deed of dedication, ownerâ??s consent, or even just a corporate resolution), recorded in the land records. Streets intended to remain private may be evidenced by a reservation of the fee simple title, which may appear on the plat or in a separate document (possibly within restrictive covenants-imposed lot by lot as the lots were conveyed, one of which was a reservation of the fee in the streets).

As noted above, recordation of an approved subdivision plat after 1946 vested a fee simple title in the locality. Between 1922 and 1946, recordation of a subdivision plat complying with the requirements of the statute vested a fee simple title in the Commonwealth. Prior to 1922, recordation of a subdivision plat operated â??to create a public easement or rite of passage over such portions of the premises platted, as is set apart for streets or other public use . . . â??[5] The earliest version of the subdivision act was effective March 5, 1888, with amendments in 1918, 1924, 1928 and 1930 extending its

application to additional cities, towns and counties. (or not . . . Arlington County was specifically excluded from the operation of the 1928 and 1930 amendments.)[6] After 1946, in addition to three or more lots, monumentation, and an ownerâ??s consent, the statute also required that a subdivision plat be prepared by a licensed surveyor or civil engineer and that it be approved by the local governing body before recordation.[7][8] (Acts of Assembly, 1946, Ch. 369)

What are the rules if there was no subdivision ordinance, or if the requirements of the statute or ordinance were not satisfied? A subdivision plat that did not otherwise comply with the statutory requirements still operated to create a public easement or right to passage over streets shown on plat. *Brown v. Tazewell County Authority*, 226 Va. 125, (1983). It should come as no surprise that the general rules established by the common law were used in drafting the first subdivision statute.

When lands are laid off into lots, streets and alleys and a map or plat thereof is made and recorded, all lots sold and conveyed by reference thereto, without reservation, carry with them as appurtenant thereto the right to the use of the easement in such streets and alleys necessary to the enjoyment and value of said lots. *Payne v. Godwin*, 147 Va. 1019, 1024 (1926) and cases cited.

In *Ryder v. Petrea*[9], the court found non-compliance with the subdivision plat act resulted in no dedication to the public. However, the lot ownerâ??s private rights of access over the rights of way shown on the plat were upheld. The court noted the â??plat shows the easement as a right-of-way and not a street or alley. In our opinion, that makes no difference. A â??streetâ?? is a â??way.â??â?•

Since the common law also required a definite and certain grantee to take an interest in the land, the doctrine of dedication regularized the rights of the public, a most indefinite and uncertain grantee. Dedication hinges on the contract principles of offer and acceptance, so the appearance of a street on a recorded plat might be an offer for use as a public street, but absent acceptance, may never rise beyond a private way. In an urban community, acts implying acceptance may be recognized by the courts, but in rural communitiesâ?? dedications should be formally accepted by the governing body. *Burks Bros. of Va. v. Jones*, 232 Va. 238 (1986). Once accepted, the dedication is complete and irrevocable. *Greenco Corp. v. Virginia Beach*, 214 Va. 201 (1973) and cases cited.

How can the examiner find evidence of acceptance? An approval by the City Engineer or County Surveyor may appear on an otherwise seemingly non-compliant plat. The governing body may have passed a resolution at one of its regular meetings accepting the dedication; or authorizing an application to the Commonwealth (formerly the Department of Highways or the Highway Commissioner; today the Department of Transportation) for acceptance of the street or road into the state secondary system. (It is far easier to find such in a well indexed set of governing body minutes, which will be found in the Clerkâ??s Office of the locality, rather than in the Clerkâ??s Office of the Circuit Court.) In some localities you may see signs on the street identifying the line of demarcation between private and public maintenance by stating â??end of state maintenance.â?• In some localities, the publicly maintained streets are indicated by street signs of one color, and privately maintained streets by signs of a different color.

It bears repeating that the common law rule and the non-compliant plat dedicated only a public easement or rite of passage. Who owned the underlying fee simple? The answer, unsurprisingly, is â??It depends.â?• Especially with old subdivisions in what is today the urban core, but which at the time of platting were â??out in the booniesâ?• or at least the suburbs, a 60-year title examination is not only not going to answer the question, but it will also not even reach the question. (Forget that this article is

about streets, if youâ??re examining title to property subdivided for residential development in the late 1800s or early 1900s, and you havenâ??t found any recorded restrictions during an examination period that follows the 60-year rule, common sense should tell you that you probably havenâ??t gone back far enough, which is a reason to extend the search past the customary default examination period. But I digress . . . and rant.)

In other situations, the land records appear to be silent as to the title to the street (no conveyances found, no reservations), and the courts applied a commonsense rule of construction.

The rule almost universally recognized is that, in the absence of restricting or controlling words showing a contrary intention, a conveyance of land bounded on a public highway or street which has been dedicated by the owner of the land for public use conveys a fee to the center of the highway or street, subject only to an easement of passage in the public. *Heller v. Woodley*, 202 Va. 994, 998 (1961) and cases cited.

The Supreme Court in *Ettinger v. Oyster Bay II Community Property Ownersâ?? Association*, 296 Va. 280, 819 S.E.2d 432 (2018), reaffirmed a legal rule in Virginia, which provides that a conveyance of property bound by a road includes a conveyance of title in the property to the centerline of the road, unless a contrary intent is clearly shown.

Another mode of creating streets that may be encountered by the examiner will parallel the usual title examination procedures for properties that are not streets. Governmental bodies can purchase land upon which to build streets or take the land using their power of eminent domain. In either event, the examiner is on more familiar ground.

The examiner would review the deed to ascertain the interest in the title that was conveyed and the boundaries. The examination would be continued back in time to verify the acquisition was from the owner of that interest. The examiner needs to pay particular attention to the phrasing of the interest conveyed or taken.

To appreciate a title interest established by prescription, it may help if the examiner enjoys novels by James Michener.[10] Such title interests are not created, per se, they evolve over time, and through community relationships.[11] This is perhaps the most taxing examination the examiner will face (with the possible exception of a direction to go back to a royal grant), since the examination needs to extend far enough back in time to predate the existence of the street.[12] Since most landowners are more concerned with the land they can use, the nature and extent of their interest in land they canâ??t use (because the public is busy walking or riding up and down it) often receives little attention in their title documents. The examiner may be guided by such slight mentions as on, along or adjoining â??the road to Erewhonâ?•[13] or â??to a street lately agreed to be established though the lands of Nehwon[14].â?• Particularly in rural communities, this may be the most common sort of road or street the examiner will encounter.

Since a prescriptive interest in a way shown on a plat or referenced in a deed is in the nature of a â??public easement or rite of passage,â?• to use the language of the first statutory enactment attempting to codify the common law, it bears repeating that the â??publicâ?• nature of a road does not mean the fee simple title is vested in the public, or the locality. Deeds need to be read, and construed, taking into account this potential bifurcated interest. Your underwriter may wish to know additional facts: how is the way evidenced, when did it first appear in the land records, how does it appear in the land

records (plat, deed, combination?), has it been recognized by either the dominant or servient interest holder; has it been accepted by the local government? The answer to these (and other) questions will have a bearing on whether a title insurance policy can be issued with no exception for lack of access, or with a particular means of access endorsement (the ALTA 17 series, for example).

Since these prescriptive easements grew by use into existence, how wide were they? As early as October 1748 (22 George II), an act was passed by the General Assembly, to take effect June 10, 1751, prescribing thirty feet as the standard width for public roads, and that requirement has been adhered to in the general statutes of the Commonwealth down to the present time. 3 Henningâ??s Stat. at Large, 392-94; 6 Idem., 64-65; Va. Code, 1904, sec. 944a (2). *Terry v. McClung,* 104 Va. 599, 602, 52 S.E. 355, 356 (1905). The Byrd Act[15] is a statutory presumption that continues to set the default width at 30 feet. Any dimensions stated in the conveyancing instruments or shown in the plats of record, may serve to rebut the presumption.

Another facet the examiner needs to be aware of is that a local government, in the process of widening or straightening a prescriptive right of way, may acquire the underlying fee interest in what was a prescriptive right of way. The examiner should be particularly cognizant of this possibility if the deed describes the expansion area with particularity, but the body of the instrument also conveys the interest of the grantor to the centerline of the existing road. Language describing the take as â??x.xxx acres within the right of way and y.yyy acres of additional right of wayâ?• may also lead to this result. The conveyance is governed by the text of the deed, and not just the plan attached as an exhibit. If the road is widened on only one side, this can result in the seemingly contradictory result of the locality holding a fee simple title to a portion of the roadway, and the owner adjoining the road on its unimproved side holding title to the underlying fee simple interest out to its original centerline.

There is a Common Law maxim â??once a highway, always a highwayâ?• which applies to a public road in Virginia unless and until the road has been â??vacatedâ?• in the manner prescribed by statute or â??abandonedâ?• by nonuse. *Moody v. Lindsey*, 202 Va. 1, 115 S.E.2d 894 (1960), quoting *Bond v. Green*, 189 Va. 23, 30, 52 S.E.2d 169 (1949). See also *Payne v. Godwin,* 147 Va. 1019, 133 S.E. 481 (1926) and *Basic City v. Bell*, 114 Va. 157, 76 S.E. 336 (1912). Nonuse of an easement coupled with acts which evidence an intent to abandon . . . constitutes abandonment . . . . However, mere nonuse will not suffice to establish an abandonment.â?• *Hudson v. Pillow*, 261 Va. 296, 302, 541 S.E.2d 556, 560 (2001) (*internal quotations and citations omitted*). *The Barter Foundation v. Widener,* 267 Va. 80, 92-93, 592 S.E.2d 56 (2004). The examiner should not presume abandonment but may rely on a judicial finding in a suit in which all the interested parties have had an opportunity to be heard. It is axiomatic that the title to real estate is like a â??bundle of sticks.â?• The public easement or rite of passage is a stick separated from the rest of the bundle. Since your customer wants to build something on the street, what should you be looking for to evidence that the street is closed and that the title is vested as desired? While the specifics have changed over the decades, the general rules remain fairly constant. Weâ??ll go into those in the next issue.

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[1] Bumper Sticker available for purchase at: http://www.zazzle.com/matter+of+fact+gifts

[2] http://en.wikipedia.org/wiki/The_Sound_of_Music

[3] Music by Richard Rodgers. Lyrics by Oscar Hammerstein II (1959). https://kids.niehs.nih.gov/games/songs/movies/do-re-mi/index.htm

[4] Â§ 2510(a), Code of 1904.

[5] Â§2510a, Virginia Code of 1904; Â§Â§5217 to 5222, Virginia Code of 1942

[6] Amendment in 1918 â?? applicable only to cities with a population in excess of 100,000, and areas within 10 miles, Â§5222a, 1942 Code;
1924 â?? applicable to cities with a population of more than 150,000 and areas within five miles, Â§5222g, 1942 Code;
1928 â?? applicable to cities with populations of less than 100,000 and areas within three miles, Â§ 5222p, 1942 Code;
1930 â?? applicable to all incorporated cities and towns and areas within two miles, Â§5222y, 1942 Code. To determine if the Act would have been applicable to your jurisdiction, historic census data from 1790 to 2000 was found in 2015 at http://www.coopercenter.org/demographics/census-data

[7] Acts of Assembly, 1946, Ch. 369

[8] It happens rarely (only once to my knowledge), but what happens if the government official who signed off on the plat was not authorized to sign off? Total failure of subdivision. Fraud and forgery does not arise only within deeds, deeds of trust, releases or contracts recorded documents in the chain of title.

[9] 243 Va. 421, 416 S.E.2d 686 (1992)

[10] Michenerâ??s novel *Hawaii* begins â??Millions upon millions of years ago, when the continents were already formed and principal features of the earth had been decided, there existed, then as now, an aspect of the world that dwarfed all others. It was a mighty ocean . . . . Then one day, at the bottom of the deep ocean, along a line running two thousand miles from northwest to southeast, a rupture appeared in the basalt rock that formed the oceanâ??s bed. . . . The first living forms to arrive were inconspicuous, indeed almost invisible . . . . The years passed. The sun swept through its majestic cycles. The moon waxed and waned, tides rushed back and forth across the surface . . . â?? Michener, James. *Hawaii*. Random House (1959, 1974).

[11] Municipal law is also â??a rule of *civil conduct*.â?• This distinguishes municipal law from the natural, or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour, than those of mere nature and religion: duties, which he has engaged in by enjoying the benefits of the common union: and which amount to no more, than that he do contribute, on his part, to the subsistence and peace of the society. Tucker, St. George, *Blackstoneâ??s Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of*

Virginia. in five volumes. Philadelphia: William Young Birch and Abraham Small, 1803**.**

[12] For a published account of one of Virginiaâ??s historic roads, from Indian trail to bypassed byway, see Pawlett and Newton, â??The Route of the Three Notchâ??d Road: A Preliminary Report,â?• which can be found at http://www.virginiadot.org/VTRC/main/online_reports/pdf/76-r32.pdf.

[13] *Erewhon: or, Over the Range* is a novel by Samuel Butler which was first published anonymously in 1872. The title is also the name of a country, supposedly discovered by the protagonist. In the novel, it is not revealed where Erewhon is, but it is clear that it is a fictional country. Butler meant the title to be read as â??nowhereâ?• backwards even though the letters â??hâ?• and â??wâ?• are transposed. Erewhon, *Wikipedia.* http://en.wikipedia.org/wiki/Erewhon

[14] Nehwon [no when spelled backwards] is the fictional world created by Fritz Leiber in which his heroes, Fafhrd and the Gray Mouser, adventure. Nehwon, Wikipedia. http://en.wikipedia.org/wiki/Nehwon

[15] Virginia Code Â§33.1-184, to be recodified as Â§33.2-105 *https://web.archive.org/web/20150919123311/http://www.coopercenter.org/sites/default/files/u23/his*

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Category

1. Title Examination
2. Uncategorized

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