Examining Title to Streets â?? Part II

Description

Read part one here.

In the last issue, we explored the ways and means of creating streets. These included outright purchase by the locality, dedication of easements by older subdivision plats, dedication of a fee simple by modern subdivision plats, and prescriptive easements that evolved over history. 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.

The common law principles of dedication and acceptance indicate a two-step process. An offer of dedication (just like an offer to purchase) can be revoked by the offeror prior to its acceptance. An express acceptance may appear on the instrument offering to dedicate, or it may appear in a separate document recorded (or not) decades later. I remember one examination where I discovered a general acceptance of all streets shown on all plats recorded in the County land records which was enacted shortly before the county merged with a neighboring town to be become a city. In other examinations, an apparent omission of one of the steps was often utilized by a now deceased â??land salvagerâ?• in Virginia Beach, who would purchase the assets of defunct developer corporations from court appointed receivers. He would then attempt to remove the rights of the public by recording an express revocation of the portions of the offer which had not been accepted and improved (often 50-100 years after the fact). It is probably not a coincidence that several court cases addressing partial acceptance of dedications arose in the Virginia Beach area.

An easement burdening and benefitting a clearly identifiable group of properties could be terminated by the agreement of all the benefitted and burdened owners. In the case of a platted subdivision, that includes all the owners of all the lots, and not just the immediately adjacent lots and streets. *See Ryder v. Petrea*, 243 Va. 421, 416 S.E.2d 56 (2004).

The original plat act provided for alternate methods of vacation of streets: by action of the owners or by application to the municipality (in the same manner as used for county roads), although the early versions of the plat act allowed only the owners to vacate (or petition to vacate) the streets. The modern practice continues to provide options, but most modern developers seem to prefer the â??one stopâ?• shopping convenience of governmental action over the less convenient, and potentially more contentious, route of obtaining consent of all the owners.

Subdivision plats may be vacated prior to any sale of lots by reference to the plat pursuant to Virginia Code Â§ 15.2-2271, or after the sale of lots, pursuant to Virginia Code Â§ 15.2-2272. Prior to the sale of lots, the owner, with the consent of the governing body (or its authorized agent), may vacate the plat by a written instrument, which is recorded in the land records. If the owner proceeds by ordinance alone, there is a requirement of notice and public hearing, and that no facilities for which bonding was required were constructed during the prior five years. An aggrieved person may appeal the passage of the ordinance within 30 days in the local circuit court. If there is no appeal, or the ordinance is upheld

upon appeal, it may be (and title underwriters will likely require that it must be) recorded in the land records.

The execution and recordation of the ordinance of vacation shall operate to destroy the force and effect of the recording of the plat, or any portion thereof, so vacated, and to divest all public rights in and to the property and reinvest the owners, proprietors and trustees, if any, with the title to the streets, alleys, and easements for public passage and other public areas laid out or described in the plat. Virginia Code Â§ 15.2-2271.

In those cases where lots were sold, the general categories of options remain the same, although the details differ slightly. All the owners, with the consent of the governing body, may vacate the plat in writing. In cases involving drainage easements or street rights-of-way where the vacation does not impede or alter drainage or access for any lot owners other than those lot owners immediately adjoining or contiguous to the vacated area, the governing body shall only be required to obtain the signatures of the lot owners immediately adjoining or contiguous to the vacated area. Virginia Code Â§ 15.2-2272. This section is the only one which specifically states it may be used whether or not the plat was recorded under the current statutory scheme. The procedures of Â§ 15.2-2272 may also be used in connection with roads within the state secondary system, providing additional notices are sent to the Commonwealth Transportation Commissioner, and that the changes are conditions required by proffer accepted by the locality under Â§Â§ 15.2-2297 and 15.2-2298. Some localities record such proffers; others do not. The examiner may need to coordinate their efforts with those of the underwriters back in the office to determine if the transaction fits the statutory requirements.

The recordation of the instrument as provided under provision 1 of Â§ 15.2-2272 or of the ordinance as provided under provision 2 of Â§ 15.2-2272 shall operate to destroy the force and effect of the recording of the plat or part thereof so vacated, and to vest fee simple title to the centerline of any streets, alleys or easements for public passage so vacated in the owners of abutting lots free and clear of any rights of the public or other owners of lots shown on the plat, but subject to the rights of the owners of any public utility installations which have been previously erected therein. If any street, alley, or easement for public passage is located on the periphery of the plat, the title for the entire width thereof shall vest in the abutting lot owners. The fee simple title to any portion of the plat so vacated as was set apart for other public use shall be revested in the owners, proprietors, and trustees, if any, who signed the statement required by Â§ 15.2-2264 free and clear of any rights of public use in the same. Virginia Code Â§ 15.2-2274.

Underlying Â§ 15.2-2274 is the assumption that the underlying fee simple title was vested in the locality (which is the result of the modern plat act) or in the adjoining landowner (the common law rule). If the original developer reserved the fee in the streets, the locality cannot re-convey the fee simple title; it can only abandon the publicâ??s right to use the area for travel.

The above statutes vacate the plats which created the streets. There is another authorized procedure for cities and towns which alters or vacates only the right of way. Rights of way may be altered or vacated on the motion of the locality or any other person. Again, notice and hearing is required. If the applicant is requesting alteration or vacation to accommodate expansion or development of an existing or proposed business, the approval may be conditioned upon commencement of the proposed expansion or development, and the statute prohibits recording the ordinance until such time as the

condition is satisfied. Virginia Code Â§ 15.2-2006.

Another condition that may be imposed through the use of this section may limit its use, unless the applicant owns all the land adjoining the street to be vacated. The locality may require the purchase of the right of way to be vacated by the adjoining owner. If any abutting property owner does not pay for such ownerâ??s fractional portion within one year, or other time period made a condition of the vacation or abandonment, of the local government action to vacate or abandon, then the vacation or abandonment shall be void as to any such property owner. Virginia Code Â§ 15.2-2008. This could result in a continuing right to use the purportedly closed right of way by the non-paying owner, which may (or may not) interfere with the anticipated development. In some situations, a non-participating owner may have assigned its rights (and obligations) under the ordinance to the applicant owner.

Since the applicant and municipality have multiple statutory options to reach the goal of closing, abandoning, or vacating the street, the examiner should determine which option was used. As noted above, a proceeding under Â§ 15.2-2272 reads as if the result is automatic, while a proceeding under Â§ 15.2-2006 is clearly conditional. The ownership of the underlying fee simple title may factor into the examinerâ??s analysis as well. It is a better practice for the local government to identify the interest it holds, recite the authority for its action, and then convey it to the applicant by deed, rather than to make assumptions regarding the process, or the result of the process.

In those communities where it is not physically possible to pass the Grey Poupon from one McMansion kitchen window to the next, roads were more likely to come into being through prescription or acquisition (either by deed or eminent domain). As noted in the last issue, the requirements of dedication and acceptance are more stringently applied in a rural setting, where express acceptance is the default rule. *Burks Bros. of Va. v. Jones*, 232 Va. 238 (1986). Sometimes the only evidence of acceptance in the land records is a recorded copy of a petition of a group of landowners along a certain roadway requesting the extension of the public right of way to serve their properties.

The State Transportation Commissioner has the general authority to convey residual parcels of land acquired in connection with a road project that are not needed. Virginia Code Â§ 33.1-93, recodified as Â§ 33.2-1010 in 2014. The Virginia system of roadways has several subsystems over which the Commissioner has authority: the primary system (authority to convey is in Virginia Code Â§ 33.1-149, recodified as Â§ 33.2-907), the secondary system (authority to abandon and transfer (to the applicant or to the local government) is in Virginia Code Â§ 33.1-154, recodified as Â§ 33.2-913), and the interstate system (roads may be transferred from the primary or secondary systems via Â§ 33.1-52, recodified as Â§ 33.2-304; or transferred to the primary or secondary systems via Â§ 33.1-53, recodified as Â§ 33.2-305). Interstates, Limited Access Highways and Scenic Highways generally are part of the primary system. As noted above, the roads in the secondary system have â??sharedâ?• authority with the local government. Roads not in the State Highway System or Secondary system are generally administered by the local government. Especially when a fee simple interest was acquired to establish the road, a deed from the Commonwealth, or the locality, should convey title to the land.

Before the Commonwealth can convey a section of road there must be notice to the affected landowners, a meeting of the Transportation Commission, at which there is a finding (in writing) that the road is no longer necessary (Â§ 33.1-149 (as to primary system, recodified as Â§ 33.2-907); Â§ 33.1-154 (as to secondary system, recodified as Â§ 33.2-913)), and an authorization to sell. Land in the

secondary system may be transferred to the local government, whereupon it will remain a public road. The local government may convey sections of road no longer necessary following a similar notice, hearing and finding process (Â§33.1-165, recodified as Â§ 33.2-924). In most cases, the transfer does not disturb any public utility facilities which were installed in the roadway, and the examiner (or underwriter) should be alert to the presence of such utilities as evidenced by depiction on an earlier plat, or reservation in the ordinance or resolution approving discontinuance and sale.

Enough with the Ivory Tower foundational analysis. Letâ??s work through some hypotheticals to see how this is supposed to work.

General Fact Pattern: Lots and streets shown on a platted subdivision back in the late 1800â??s or early 1900â??s that were never developed. The streets are not included in the city system nor maintained. Lot lines shift by sales and the only access is the â??paperâ?• street. See images for representative samples.

Image A[1]

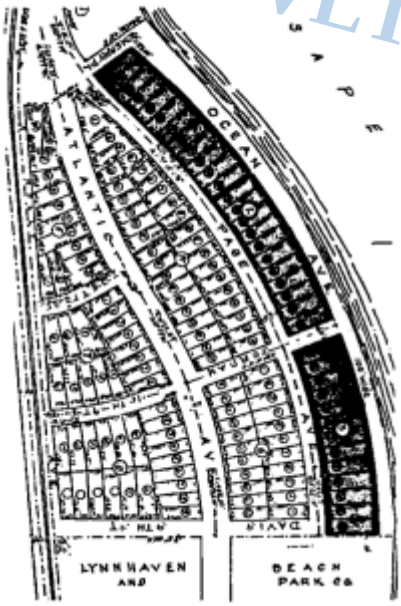
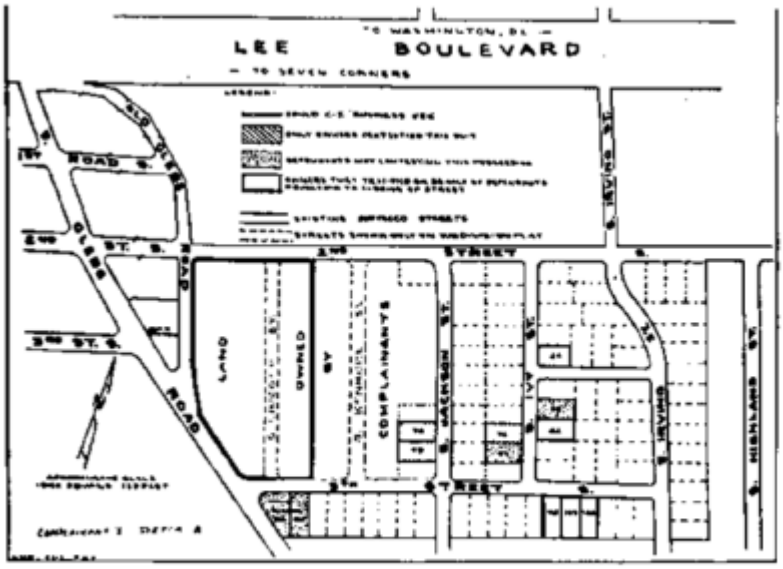


Image B[2]



Specific facts: pre-1900 recording. No ownerâ??s consent. No governmental approval. No reservation of fee in the streets by developer.

Possible resolution: Common law dedication of easement or rite of passage. Because other parties own lots on plat, vacation of plat through city procedures, rather than consent of all lot owners, will probably be preferred by customer. If City disclaims any acceptance in any form, still possible to obtain vacation ordinance, since the ordinance will not only abandon the public interest in the streets, if any (and the city is saying there isnâ??t), but also vacates boundaries shown on the plat (consolidating the street into adjoining lots). Best practice would be to have the ordinance state the city never accepted the offer of dedication. Upon vacation, the owners of lots adjoining the streets will own to the center of the street unencumbered by the public easement. Caveats: if city utilities were placed in the paper streets, and the City seeks to reserve the right to keep them in place, or compel a relocation, that starts to sound like partial acceptance, and Cityâ??s denial of acceptance is dubious. As can be seen, some of the streets shown on the plat were built, and partial acceptance by improvement, especially in an urban area, may constitute acceptance of the whole. Even if there was no public acceptance, other lot owners have private rights, so reconfiguration should not deprive any other lot owner of their means of access to publicly maintained streets.

Variation on a theme: Reservation of fee in the streets by original developer.

Possible resolution: Rights of the public remain a public easement or rite of passage. Need to run developer to current to see if it (or a successor â?? heirs or devisees of individual; another entity that succeeds to the title by reason of purchase or merger of the entity; a court appointed receiver; directors as trustees in dissolution; shareholders as successors by distribution of corporate assets after all debts were paid) ever conveyed the fee (to a subsequent developer[3], to the locality, to an ingenious land salvager). If conveyed to locality, then you have the equivalent of a modern subdivision platâ??s results, the fee simple and the public right are in the same hands. Likely the locality will want to proceed via Â§15.2-2006, and your customer will have to purchase the fee; ordinance of vacation wonâ??t be released for recording until after payment is made. Best practice is to acquire a deed from the locality since a) they acquired by deed and b) less question about what was closed and conveyed (staff drafted ordinances are not always as precise as a title examiner would like).

Variation on a theme: Post 1950 recording. Owner consent verbatim from statute. Prepared by licensed surveyor. Signed off by local government.

Possible resolution: Fee in the streets and alleys was dedicated to local government. Approval signature constitutes written acceptance. Locality may want to proceed via Â§15.2-2006, and your customer will have to purchase the fee; ordinance of vacation wonâ??t be released for recording until after payment is made. Locality may condition abandonment and sale upon reservation of easements for utilities installed in the former roadway. Best Practice suggestion: have the ordinance (and the deed prepared as a result) recite the enabling authority. Since the local government has two statutory options, which allow different results, a recital of the statutory authority should prevent concerns regarding potential claimants under the other statutory scheme.

Variation on a theme: Thereâ??s an alley behind your lot and no one seems to know who owns it.

Possible resolution: Throw out the back title you were given and prepare to run the chain back to the original developer. (well, the policy might be helpful, if it was an old one, and says something helpful like â??Fee in the streets reserved in Deed Book ___, page ___.â?•) Apply the subdivision plat analysis given above to that original subdivision plat. What year was it recorded? What version of the plat act was applicable that year? Did the plat meet the statutory requirements? What actions were taken regarding other streets or alleys shown on the plat since it was recorded? Were there other vacations/abandonments? What interest was described in those earlier actions? Has there been any litigation regarding title to any of the streets and alleys? Call underwriting counsel and discuss.

Two other questions: These might come up, and are related to streets, but are not always subject to answer by reference to the subdivision act.

An acreage property is sold over and over again, and itâ??s discovered that the only means of access is a â??laneâ?• which the City shows as private. What do you do?

A property is sold and back in the chain, the description shows an easement to the property across someoneâ??s property, but the easement is left off the description in subsequent deeds.

Possible resolution: The answer to both questions might be the same. The second question suggests a possible answer to the first. Grantee the owners in the chain of title. Was an easement granted to a prior owner? Was it made appurtenant to the land in question? Has the owner of the land in question continued to use the easement over the lane for access over time? Virginia Code Â§ 55-50 recodified as Â§ 55.1-303) states â??Every deed conveying land shall be construed to include all buildings, privileges and appurtenances of every kind belonging to the lands therein embraced unless an exception therefor is made in the deed.â?• Silence, while not helpful to the examiner, is not the same as an exception. Suggest the addition of a paragraph to the deed, inserted just after the description of the land, that reads something like â??together with the easement made appurtenant to the land described above by deed dated back in the mists of time and recorded on the papyrus rolls that predated our modern deed books.â?• If it is really that old, your underwriting counsel may want some verification that the servient owner knows and agrees that the continued use (and insurance thereof) is appropriate. One example demonstrating that might be that the deeds in the servient property chain of title contain a â??subject toâ?• paragraph describing the easement, even though the dominant owner has neglected to do so. Other possible resolutions, such as easements by necessity, which may have been created by implication, may need to be verified by a confirmation instrument or court order. Prescriptive easements (as noted in the first issue) grow into being over time, but until recognized by

the judiciary, are generally not insurable. Your underwriting counsel may have other theories that will require research and verification in the historic land records.

Examining the title to highways, streets and alleys may be the most difficult, onerous, time consuming work an examiner may be asked to perform. However, as developers look at â??infillâ?• development projects, and redevelopment of previously developed land, an ability to examine the land records and interpret the sometimes-subtle hints in the older documents is a skill that may well define a significant difference between an ordinary searcher and an extraordinary examiner.

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[1] Geronimo Development Corporation and its CaseFinder software. *Ocean Island Inn v. Virginia Beach*, 216 Va. 474, 220 S.E.2d 247 (1975) and Google Maps, http://www.maps.google.com, retrieved September 26, 2014.

[2] Geronimo Development Corporation and its Casefinder software. Day v. Vaughn & Usilton, Inc., 183 Va. 168, 67 S.E. 2n 898 (1951) and Google Maps, http://www.maps.google.com, retrieved September 26, 2014.

[3] Be very careful. Some developers would convey to successor developers using the acreage perimeter description, less and except lots sold. That sort of description would include streets in which the fee had been reserved. Others would convey only the remaining lots. Unless accompanied by language conveying all residual interests, such a deed might leave the fee in the streets in the prior developer, which may or may not have been intended.

IN MEMORY OF DOUGLASS W. DEWING, Esq. 10/7/1954 â?? 4/9/2022
After earning an undergraduate degree from Washington and Lee University and a law degree from the Washington University School of Law in St. Louis, Mr. Dewing began practicing with the Norfolk firm of Kellam Pickrell & Lawlor in 1982. He entered the title insurance industry in 1987 with Lawyers Title Insurance Corporation in Norfolk, serving as an underwriting counsel in Norfolk, Fredericksburg and Richmond. He authored A Virginia Title Examinersâ?? Manual (4th ed. 2017), chapters on title

examination and title insurance for Virginia CLEâ??s publication Real Estate Transactions in Virginia, and articles on many topics involving title to real property. Mr. Dewing had been a member of numerous continuing education panels on real estate title and title insurance topics for various groups including Virginia CLE and VLTA. He was a former Chair of the Real Property Section of the Virginia State Bar. He last held the position â??consulting examinerâ?• (a title he gave himself in homage to Arthur Conan Doylesâ?? immortal literary character Sherlock Holmes).

Category

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2. Title Examination
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