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# Closing Roads Due to Increased Flooding: Potential Liability Issues in Virginia



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## About the Authors



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## About the Virginia Coastal Policy Center

The Virginia Coastal Policy Center (VCPC) at the College of William & Mary Law School provides science-based legal and policy analysis of ecological issues affecting the state's coastal resources, by offering education and advice to a host of Virginia's decision-makers, from government officials and legal scholars to non-profit and business leaders.

With two nationally prominent science partners – the Virginia Institute of Marine Science and Virginia Sea Grant – VCPC works with scientists, local and state political figures, community leaders, the military, and others to integrate the latest science with legal and policy analysis to solve coastal resource management issues. VCPC activities are inherently interdisciplinary, drawing on scientific, economic, public policy, sociological, and other expertise from within the University and across the country. With access to internationally recognized scientists at VIMS, to Sea Grant's national network of legal and science scholars, and to elected and appointed officials across the nation, VCPC engages in a host of information exchanges and collaborative partnerships.

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VCPC grounds its pedagogical goals in the law school's philosophy of the citizen lawyer. VCPC students' highly diverse interactions beyond the borders of the legal community provide the framework for their efforts in solving the complex coastal resource management issues that currently face Virginia and the nation.

## I. INTRODUCTION

As seas rise and extreme storm surges and rainfall events become ever more common, communities face the harsh reality that current road infrastructure in zones of current and future inundation will not last forever. Already, structures and roads that lie adjacent to the coastline, or that lie within floodplains, are facing increased recurrent flooding that results in costly repairs at best and complete loss of property at worst.<sup>1</sup> A single storm can wreak hundreds of millions of dollars of damage to the coastal Virginia area.<sup>2</sup> Virginia's recorded history of storm-related flooding dates back to 1667, and the issue is not going to be going away any time soon; therefore, Virginia communities must take action to proactively combat the effects of sea level rise.

Local governments play a key, if not dispositive, role in implementing changes to Virginia's road infrastructure.<sup>3</sup> Decision-makers must decide whether to replace old, worn, flood-prone roads, continue to divert taxpayer dollars towards maintaining the roads, or take necessary steps to abandon the roads altogether. James City County, for example, has begun to take sea level rise into account when zoning its river-bordering housing communities.<sup>4</sup> Increasing frequency of severe storms also can take their toll on transportation infrastructure; at the Chincoteague, National Wildlife Refuge, for example, the U.S. Fish and Wildlife Service and National Park Service are abandoning a stretch of parking lot that provides direct beach access in the face of millions of dollars of sand removal and repair costs after coastal storms.<sup>5</sup> Instead, they are planning to provide new parking a mile away that provides the same access.<sup>6</sup> Local governments are beginning to take steps to address the threat of sea level rise on their communities as they make strategic plans for the future.

But, as decision-makers decide between taking or forgoing a given course of action, they must assess their risk of liability for a variety of reasons. While certain decisions may be protected by the doctrine of sovereign immunity, others might give rise to property-owner actions to recover lost property value as a result of government inaction or road abandonment. For instance, in Gloucester County, homeowners threatened to sue the county and Virginia Department of Transportation after they installed "Road May Flood" signs along a main access road because they allegedly lowered the value of their homes.<sup>7</sup> In St. Johns County, Florida, homeowners along a

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<sup>1</sup> See *Recurrent Flooding Study for Tidewater Virginia*, VIRGINIA INSTITUTE OF MARINE SCIENCE 4-5 (2013), [http://ccrm.vims.edu/recurrent\\_flooding/Recurrent\\_Flooding\\_Study\\_web.pdf](http://ccrm.vims.edu/recurrent_flooding/Recurrent_Flooding_Study_web.pdf). See generally ADAPTVA, <http://www.adaptva.com> (providing forecasting models, adaptation strategies, risk analysis tools and data, and planning and policy materials).

<sup>2</sup> *Id.*

<sup>3</sup> Under the Dillon Rule, applicable in Virginia, local governments and municipal corporations are limited to exercising those powers that are (1) explicitly granted them by legislature; (2) necessarily or fairly implied from a specific grant of power; or (3) essential and indispensable to the existence of government. See *City of Richmond v. Confrere Club of Richmond, VA, Inc.*, 389 S.E.2d 471 (Va. 1990).

<sup>4</sup> Interview with Adam Kinsman, County Attorney, James City County (Oct. 24, 2019).

<sup>5</sup> *Progress Being Made on Improvements to Assateague Beach Parking Lot*, Shore Daily News (Mar. 1, 2019), <https://shoredailynews.com/headlines/progress-being-made-on-improvements-to-assateague-beach-parking-lot/>

<sup>6</sup> *Id.* See also the project Environmental Assessment, available at <https://www.fws.gov/uploadedFiles/2018%20EA%20for%20Beach%20Relocation.pdf>.

<sup>7</sup> *Mixed reaction to flooding signs in Gloucester County*, 13 News Now (May 17, 2018), <https://www.13newsnow.com/article/news/local/mixed-reaction-to-flooding-signs-in-gloucester-county/291-553194108>.

low-lying coastal road successfully sued the county after it declined to continue repairing a flood-prone road because it was too costly.<sup>8</sup> As sea level rise and recurrent flooding continue to damage roads and infrastructure, decision-makers must take into account their potential liability as they decide how best to implement resilient systems moving forward.

## II. WHO IS RESPONSIBLE FOR WHAT ROADS?

Virginia has a long and interesting history with regards to its roads.<sup>9</sup> Prior to the Byrd Road Act of 1932, the operations and maintenance responsibility of the local public roads belonged to the local governments of each individual county and independent city.<sup>10</sup> The board of supervisors (BOS) of that county or city council of that city were the primary decision makers on virtually all road decisions.<sup>11</sup> Under the Byrd Act, the Virginia General Assembly transferred the operation and maintenance of most—but not all—county and city roads to the State, except for those counties or cities that, by a referendum of their voters, elected to continue county control.<sup>12</sup> Thus, the Byrd Act created the current system of highways in Virginia, notably the secondary system of state highways.<sup>13</sup> The Byrd Act also created a funding regime for the maintenance and improvement of Virginia roads.<sup>14</sup>

Virginia's cities are independent of its counties.<sup>15</sup> Further, according to Virginia Law, cities, regardless of their population, towns with a population greater than 3,500; specific towns

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<sup>8</sup> *Jordan v. St. Johns County*, 63 So. 3d 835, 839 (Fla. 5th DCA 2011) (finding that the county had a duty to “reasonably maintain” and repair the road to provide “meaningful access” and that “governmental inaction—in the face of an affirmative duty to act—can support a claim for inverse condemnation”).

<sup>9</sup> See generally *A History of Roads in Virginia: “The Most Convenient Ways,”* VIRGINIA DEPARTMENT OF TRANSPORTATION (2006), <http://www.virginiadot.org/about/resources/historyofrds.pdf>.

<sup>10</sup> See *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways*, VIRGINIA DEPARTMENT OF TRANSPORTATION 1 (2015), [https://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\501\GDoc\\_VDOT\\_5956\\_v1.pdf](https://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\501\GDoc_VDOT_5956_v1.pdf).

<sup>11</sup> For this paper, collectively, the “governing bodies.”

<sup>12</sup> See *A History of Roads in Virginia: “The Most Convenient Ways,”* *supra* note 9, at 34. The roads that were publicly worked prior to 1932 that did not come into the state system are still public and exist as the responsibility of the local governing body.

<sup>13</sup> Section 2 of the Byrd Road Act is now codified in Virginia Code Section 33.2-326, which states: “The control, supervision, management, and jurisdiction over the secondary state highway system shall be vested in the Department, and the maintenance and improvement, including construction and reconstruction, of such secondary state highway system shall be by the Commonwealth under the supervision of the Commissioner of Highways. The boards of supervisors or other governing bodies of the counties shall have no control, supervision, management, or jurisdiction over such public highways, causeways, bridges, landings, and wharves constituting the secondary state highway system. Except as otherwise provided in this article, the Board shall be vested with the same powers, control, and jurisdiction over the secondary state highway system in the counties and towns of the Commonwealth, and such additions as may be made, as were vested in the boards of supervisors or other governing bodies of the counties on June 21, 1932, and in addition thereto shall be vested with the same power, authority, and control as to the secondary state highway system as is vested in the Board in connection with the primary state highway system.” VA. CODE ANN. § 33.2-326 (2014).

<sup>14</sup> See *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways*, *supra* note 10, at 1.

<sup>15</sup> Thus, counties rely on funding from VDOT for construction, operation, and maintenance of their own roadways. Today, Arlington (359 miles) and Henrico (1,279 miles) counties continue to elect to maintain their own roads with



under a former Virginia Code section;<sup>16</sup> and the towns of Altavista, Lebanon, and Wise are required to maintain and operate their own roadway system.<sup>17</sup> Currently, there are 10,561 miles of roads that are maintained by cities and towns with the help of VDOT funds.<sup>18</sup> An additional thirty-nine miles of toll roads are maintained and operated by others.<sup>19</sup>

The Virginia Department of Transportation (VDOT), operates and maintains the third largest highway system in the United States.<sup>20</sup> The Federal Government operates and maintains 382.99 miles of numbered routes and other major roads in Virginia.<sup>21</sup> The 57,867-mile VDOT-maintained system is divided into four categories. There are 1,118 miles of four-to-ten lane interstate highways that connect states and major cities.<sup>22</sup> There are also 8,111 miles of two-to-six-lane primary roads that connect cities and towns with each other and with interstates. Furthermore, there are 48,305 miles of secondary local connector or county roads. Finally, Virginia has 333 miles of frontage roads.<sup>23</sup> Virginia law defines the maintenance required of the responsible agencies as follows: “‘Maintenance’ means (i) ordinary maintenance; (ii) maintenance replacement; (iii) operations that include traffic signal synchronization, incident management, and other intelligent transportation system functions; and (iv) any other categories of maintenance that may be designated by the Commissioner of Highways.”<sup>24</sup>

In addition to Virginia’s state highway system discussed above, VDOT also defines private road, public road, and county road. A private road is “[a] street or road that is restricted in some way to access by the general public, regulated by hours of use, or otherwise is limited to access by privilege, generally associated with property ownership or membership.”<sup>25</sup> A public road is “[a] street or road that can be used by the general public without regard to the hours of access and which is operated [and maintained] under the jurisdictional authority of the local governing body or VDOT.”<sup>26</sup> Public roads that are not under VDOT’s jurisdiction are maintained and operated by either the county or city, depending on if the road is in a county or city. A county road is “[a] public road that has not been accepted by VDOT for maintenance as part of the secondary system of state highways or one that was discontinued by VDOT from the system [transferring it back to

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VDOT funding. See *Virginia's Highway System*, VIRGINIA DEPARTMENT OF TRANSPORTATION (Feb. 13, 2018), [https://www.virginiadot.org/about/vdot\\_hgwy\\_sys.asp](https://www.virginiadot.org/about/vdot_hgwy_sys.asp).

<sup>16</sup> V.A. CODE ANN. § 33.1-80 (repealed 2014).

<sup>17</sup> V.A. CODE ANN. § 33.2-319(A) (2017).

<sup>18</sup> See *Virginia's Highway System*, *supra* note 15.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See *id.* The National Park Service maintains several parkways in Virginia (the Blue Ridge Parkway, Colonial Parkway, George Washington Memorial Parkway, and Skyline Drive). The U.S. Army Corps of Engineers maintains State Route 4 over the John H. Kerr Dam and State Route 143 in Fort Monroe, and the Metropolitan Washington Airports Authority operates and maintains State Route 267 and owns the Dulles Access Road.

<sup>22</sup> “The States own and operate the Interstate highways.” *Highway History*, U.S. DEPARTMENT OF TRANSPORTATION FEDERAL HIGHWAY ADMINISTRATION, (Dec. 18, 2018), <https://www.fhwa.dot.gov/interstate/faq.cfm#question5>.

<sup>23</sup> See *Virginia's Highway System*, *supra* note 15.

<sup>24</sup> V.A. CODE ANN. § 33.2-100. VDOT policies require that secondary state highways have an 11-year design horizon during which the road must be minimally adequate. Other systems and selected urban secondary state highways require a 22-year design horizon. See *Functional Classification Comprehensive Guide*, VIRGINIA DEPARTMENT OF TRANSPORTATION (2014), [https://www.virginiadot.org/Functional\\_Classification\\_Comprehensive\\_Guide.pdf](https://www.virginiadot.org/Functional_Classification_Comprehensive_Guide.pdf).

<sup>25</sup> See *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways*, *supra* note 10, at 2.

<sup>26</sup> *Id.*

the local governing authority].”<sup>27</sup> County roads are maintained and operated under exclusive jurisdiction of the county and not by VDOT.

In summary:<sup>28</sup>

<b>Type of Road:</b>	<b>Who Maintains/Operates?</b>
<b>Primary</b> or <b>secondary</b> roads in the Virginia highway system	<b>VDOT</b>
All <b>public</b> and <b>county</b> roads not in the Virginia highway system	Either a <b>Virginia County</b> (if the specific public/county road is located in a county) or a <b>Virginia City/Town</b> (if the specific public/county road is located in a city/town).
<b>Private</b> road	<b>Private ownership.</b>

After the Byrd Act, Virginia law has “preserved the spirit of partnership that the Act created between the local governments and the State’s operation of the secondary system.”<sup>29</sup> This partnership between local governments and the State allows the local governing bodies to continue to have certain legislative authority while other authority falls under VDOT’s control.<sup>30</sup> Notably, the Byrd Act allowed the counties to retain the power to establish and create new public roads—that may or may not become part of the State’s secondary highway system—and the power to terminate the rights of the public to use certain public roads.<sup>31</sup> However, in most counties, new public roads are not part of the State’s secondary highway system and are under the operation and maintenance of the local governing body as a county road until the local governing body petitions VDOT to accept the public road(s) and VDOT accepts or declines that request.<sup>32</sup>

In 2001, the Virginia General Assembly adopted the “Devolution Statute.”<sup>33</sup> The Devolution Statute allows a county, “following receipt of a resolution adopted by the board of supervisors of a county,” to request authority from VDOT to “resume responsibility over all or any portion of the secondary state highway system” within the county’s jurisdiction.<sup>34</sup> The ensuing agreement between VDOT and the county’s BOS “shall specify the equipment, facilities, personnel, and funding that will be provided to the county in order to implement such agreement’s

<sup>27</sup> *Id.*

<sup>28</sup> All primary or secondary roads in the Virginia highway system are maintained and operated by VDOT. All public and county roads not in the Virginia highway system are maintained and operated by either a Virginia county (if the specific public/county road is located in a county) or a Virginia city/town (if the specific public road is located in a city/town).

<sup>29</sup> *Id.* at 1.

<sup>30</sup> *Id.*

<sup>31</sup> VA. CODE ANN. § 33.2-705 (2019).

<sup>32</sup> See *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways*, *supra* note 10, at 1. For a discussion on how the State determined acceptance of a county public road into the VDOT secondary highway system, see Greg Kamptner, *The Albemarle County Land Use Law Handbook*, ALBEMARLE COUNTY ATTORNEY’S OFFICE 24-4 (2015).

<sup>33</sup> VA. CODE ANN. § 33.2-342 (2014); *Devolution of the Secondary System*, VIRGINIA DEPARTMENT OF TRANSPORTATION (Nov. 1, 2017), [http://www.virginiadot.org/business/lad\\_devolution.asp](http://www.virginiadot.org/business/lad_devolution.asp).

<sup>34</sup> VA. CODE ANN. § 33.2-342 (2014).

provisions.”<sup>35</sup> According to VDOT, no county has implemented the Devolution Statute since it was implemented in 2001.<sup>36</sup>

Transportation funding is also another important aspect when analyzing Virginia roads. Transportation funding in Virginia is highly complex, but the primary route of obtaining funding is the SMART SCALE program; however, SMART SCALE does not replace optional ways of obtaining funding from VDOT.<sup>37</sup> The purpose of SMART SCALE “is to choose the best investments to ensure that the most critical transportation needs of the Commonwealth are met.”<sup>38</sup> For SMART SCALE project screening, the “only time that flooding is taken into account is in regards to how historical flooding levels have affected travel time. . . . Only past flooding is taken into account, so there is no consideration paid to rising sea levels. Also, the only element of flooding taken into account is the extent to which it disrupts traffic.”<sup>39</sup> Further, for SMART SCALE evaluation and scoring, environmental quality, fifty percent weight assigned to Air Quality and Energy Environmental Effect<sup>40</sup>, fifty percent weight assigned to Impacts to Natural and Cultural Resources,<sup>41</sup> is only one of six factors considered by the evaluation team.<sup>42</sup> Thus, SMART SCALE evaluates environmental impacts very narrowly, which is troubling for funding roads that are impacted by rising sea levels.

### III. THE CURRENT STANDARDS FOR ABANDONMENT OF EXISTING ROADS

In Virginia, the old common law saying, “[o]nce a highway, always a highway,” holds true unless and until the publicly maintained road is abandoned or vacated in the manner prescribed by Virginia statutes.<sup>43</sup> Public roads in Virginia “may be abandoned by either the state highway procedures under Virginia Code [Section] 33.2-909 or, if the roads were created by a subdivision plat, by vacating the subdivision plat or a portion thereof (and the public roads shown thereon), pursuant to Virginia Code [Section] 15.2-2270.”<sup>44</sup> The Virginia Supreme Court has held that Virginia citizens have “no vested right in public roads” and once a public road has been abandoned,

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<sup>35</sup> *Id.*

<sup>36</sup> See *Guide to County Assumption Of Secondary Roads (Devolution Guidebook)*, VIRGINIA DEPARTMENT OF TRANSPORTATION 1 (2007), <https://www.virginiadot.org/business/resources/SecRoadsFinalDevolutionGuide3-30-07.pdf>.

<sup>37</sup> For a comprehensive overview of SMART SCALE funding, see Kulkarni & Phillips, *SMART SCALE Funding for Infrastructure Projects*, VIRGINIA COASTAL POLICY CENTER (2018). For an overview of alternative funding sources, see *id.* at 13-14.

<sup>38</sup> VA. CODE ANN. § 33.2-214.1 (2017).

<sup>39</sup> Kulkarni & Phillips, *supra* note 37.

<sup>40</sup> Air Quality and Energy Environmental Effect Measure Description: “Potential of project to improve air quality and reduce greenhouse gas emissions”. Air Quality and Energy Environmental Effect Measure Objective: “Measure rates a project’s potential benefit to air quality and ability to increase energy efficiency or alternative energy use weighted by the total number of users served.” SMART SCALE, SMART SCALE TECHNICAL GUIDE 29 (2017).

<sup>41</sup> Impacts to Natural and Cultural Resources Measure Description: “Potential of project to minimize impact on natural and cultural resources located within project buffer.” Impacts to Natural and Cultural Resources Measure Objective: Measure evaluates how much sensitive land would be affected within project buffer around the project, and rates projects highest that have minimal or no impacts and are providing benefits in other factor areas.” *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Bond v. Green*, 52 S.E.2d 169 (Va. 1949).

<sup>44</sup> Kamptner, *supra* note 32, at 10.



the State interest in the road as a way for public travel, and the public interests of the persons who use those public roads, are extinguished.<sup>45</sup> Thus, once a section of a road is abandoned, that section of road is no longer a public road in Virginia.<sup>46</sup> However, Virginia law cautions the State or localities from abandoning a public road if the “effect is to deprive any party of access to a public road.”<sup>47</sup>

According to a Virginia Attorney General Opinion,<sup>48</sup> a governing body’s abandonment procedures require a number of steps, including:

- (1) a petition for abandonment;
- (2) posted and published notice, and notice to the Commonwealth;
- (3) a public hearing when required;
- (4) adoption of a resolution by the board of supervisors, making the requisite findings;
- (5) communication of the resolution to the Commonwealth; and
- (6) sale or conveyance of the publicly owned former right-of-way.<sup>49</sup>

A government body abandoning a road must comply with all of the statutory requirements because failure to substantially comply with those requirements will invalidate the abandonment action.<sup>50</sup> Once any road, including a state road, county road, or city/town road, is abandoned, “the public’s right to use a public highway, public landing, or public crossing has been extinguished.”<sup>51</sup> However, as a general rule, an abutting landowner has an easement in a public road under Virginia case law, subject to a locality’s exercise of its police power to protect the public health, safety and welfare.<sup>52</sup>

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<sup>45</sup> *Board of Supervisors of Louisa County v. Virginia Electric & Power Co.*, 192 S.E.2d 768 (Va. 1972).

<sup>46</sup> See *Va. Op. Att’y. Gen.* 393 (1987-88).

<sup>47</sup> *Ord v. Fugate, State Highway Commissioner*, 152 S.E.2d 54 (Va. 1967) (referring to what is now VA. CODE ANN. § 33.2-924).

<sup>48</sup> In that instance, the Virginia Attorney General stated that the county failed to comply with all notice requirements, which invalidated the abandonment action. The county failed to post notices at the front doors of the county courthouse. The county also failed to post notices on and along the road, where adjoining county landowners used the road as their only means of access. *Va. Op. Att’y. Gen.* 391 (1987-88).

<sup>49</sup> “A ‘right of way’ is a term used to describe a right belonging to a party to pass over land of another.” *Ryder v. Petrea*, 416 S.E.2d 686 (Va. 1992). For a general overview of the release of right-of-way following abandonment (or vacation) procedures, see *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways*, *supra* note 10, at 23.

<sup>50</sup> *Kamptner*, *supra* note 32, at 12.

<sup>51</sup> VA. CODE ANN. § 33.2-900 (2014).

<sup>52</sup> *Wood v. City of Richmond*, 138 S.E. 560 (Va. 1927). In *Wood*, the City of Richmond required the appellant to close down one of two driveways into the appellant’s gasoline station, which abutted two streets and a maintained driveway entering into each of those streets. *Id.* at 561. Richmond explained that safety was the primary reason for the closure. *Id.* at 561. The Court conceded that “an abutter has an easement in the public road which amounts to a property right,” but also held “that the exercise of this right is subordinate to the right of the municipality, derived by legislative authority, to control the use of the streets as to promote the safety, comfort, health, and general welfare of the public.” *Id.* at 562. The Court stated that “every property owner is bound to so use and enjoy his own as not to interfere with the general welfare of the community in which he lives. It is the enforcement of this duty which pertains to the police power of the State, so far as the exercise of that power affects private property. Whatever restraints the legislature imposes upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby he is without remedy. *It is a regulation and not a taking, an exercise of police power, not of eminent domain.*” *Id.* at 562–63 (emphasis added). The Court found that the closing of the driveway was a reasonable exercise of police power. *Id.* at 563.

According to VDOT:

For roads that exist on a prescriptive easement for right of way (see [Section] 33.2-105 of the Code of Virginia), a lawful abandonment . . . normally extinguishes the easement and the road ceases to be a public road. No subsequent conveyance of right of way is applicable.

For roads that exist on right of way dedicated to public use, abandonment has the effect of closing the road to the public, but interests in the real property dedicated for right of way may only be transferred by a separate conveyance (see [Section] 33.2-913). Right of way dedicated to a county government may be conveyed by the county; right of way dedicated to the Commonwealth may be conveyed only by VDOT. The conveyance of right of way may follow, but may not precede, an abandonment.<sup>53</sup>

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<sup>53</sup> *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways*, *supra* note 10, at 21.

The table below summarizes the different abandonment procedures (to be covered in detail below) and their key characteristics<sup>54</sup>:

Abandonment Procedures and Their Key Characteristics			
Virginia Code Section	When Procedure Used	Key Finding	Other
33.2-909	Road is in the secondary system of state highways	Road is “to be no longer necessary for the uses of the secondary state highway system”	Public <i>disuse</i> is the key consideration as to necessity
33.2-912	Road is in secondary system that has been altered or a new road serves same citizens	There is a new road which serves the same citizens as the old road	Scope of abandonment is limited to the extent of the alteration
33.2-915	Public road that is not in the secondary system	Road is “to be no longer necessary for public use”	Due consideration is to be given to the historic value, if any, of the road
33.2-923	Public road that is not in the secondary system that has been altered or new road serves same citizens	There is a new road which serves the same citizens as the old road	Scope of abandonment is limited to the extent of the alteration
15.2-2271	Road established by subdivision plat; no lots within subdivision have been sold	Plat or portion thereof may be vacated by written instrument signed by all owners or by ordinance adopted by governing body	In determining whether to adopt ordinance, governing body should consider whether the owner of the property shown on the plat will be irreparably damaged by the vacation
15.2-2272	Road established by subdivision plat; lots within subdivision have been sold	Plat or portion thereof may be vacated by written instrument signed by all owners immediately adjoining or contiguous to vacated road, and all others whose access would be affected, or by ordinance adopted by governing body	In determining whether to adopt ordinance, governing body should consider whether the owner of the property shown on the plat will be irreparably damaged by the vacation  Public roads in the secondary system will be deemed to be abandoned if vacated under this procedure, provided the plat or portion thereof has been the subject of a rezoning or special use permit, the Commissioner of Highways is notified of such in writing prior to the public hearing, and the vacation is necessary to implement a proffer or a special use permit condition

### A. Abandonment Where a Road in the Primary/Secondary State Highway System is Deemed no Longer Necessary

Under Virginia Code Section 33.2-909, the governing body<sup>55</sup> of any county, town, or city “on its own motion or upon petition of any interested landowner may cause any section of the secondary state highway system . . . to be abandoned altogether as a public highway.”<sup>56</sup> For the

<sup>54</sup> Kamptner, *supra* note 32, at 24-11.

<sup>55</sup> In this paper, “governing body” refers to the governing body of any specific Virginia town, city, or county, including City Councils and Board of Supervisors.

<sup>56</sup> VA. CODE ANN. § 33.2-909 (2020).

governing body to abandon a road under this section, the secondary highway must be deemed by the governing body “to be abandoned altogether as a public highway.”<sup>57</sup> To abandon a secondary state highway without replacing it, the governing body must find (1) “no public necessity exists for the continuance of the section of the secondary highway as a public highway” (i.e., lack of public use); or (2) “the safety and welfare of the public would be served best by abandoning the section of highway.”<sup>58</sup> The term “public necessity” is not used in the “sense of being absolutely indispensable to communications between two points, but with relation to the purposes for which public highways are established, namely, the reasonable accommodation of the traveling public.”<sup>59</sup> Scenic value alone is sufficient to support a finding of public necessity.<sup>60</sup> Excessive public use of a road is an improper reason to support a finding of public necessity.<sup>61</sup>

VDOT warns governing bodies to be circumspect when deciding whether to abandon a road. When a governing body receives or submits a request to abandon a segment of road, “a [governing body] should first consider the matter on a preliminary basis. Once abandoned, it may not be possible to re-add the facility as part of the secondary system of state highways if the [governing body] has a change of heart.”<sup>62</sup> Virginia law also requires the governing body to “give notice of its intention to abandon any such highway . . . (i) by posting a notice of such intention at least three days before the first day of a regular term of the circuit court at the front door of the courthouse; . . . or (ii) by posting notice in at least three places on and along the highway . . . sought to be abandoned for at least 30 days and in either case by publishing notice of its intention in two or more issues of a newspaper having general circulation in the county.”<sup>63</sup> Further, the governing body must be willing to hold a public hearing regarding the “proposed abandonment and shall give notice of the time and place of the hearing by publishing such information in at least two issues in a newspaper having general circulation”<sup>64</sup> Lastly, the governing body must also provide formal notice to VDOT.<sup>65</sup> Next, following “a public hearing, assuming one is requested and properly held,” the governing body must either dismiss the abandonment request or “abandon the road within a prescribed time frame.”<sup>66</sup>

According to VDOT guidance,

[u]pon receipt of the BOS notice of intent to abandon a road, the resident engineer<sup>67</sup> should promptly evaluate the proposed abandonment and forward the BOS notice

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Kirby v. Town of Claremont*, 416 S.E.2d 695, 699 (Va. 1992).

<sup>60</sup> *See id.*

<sup>61</sup> *See Board of Supervisors of Fairfax County v. Horne*, 208 S.E.2d 56, 58 (Va. 1974).

<sup>62</sup> *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways*, *supra* note 10, at 21.

<sup>63</sup> VA. CODE ANN. § 33.2-909 (2020).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways*, *supra* note 10, at 21. The steps that the local governing body will take from here on out will be the same as a public road not in the secondary system. *See discussion infra* Part II.C.

<sup>67</sup> A resident engineer is employed to work from site for VDOT in various Virginia regions. The duties include supervision of and issuing of instructions to the contractor and to report regularly to VDOT. *See VDOT Offices:*

of intent and his recommendations to the Highway System Group. The Highway System Group normally prepares the formal response from [VDOT] to the BOS.<sup>68</sup>

If VDOT concurs with the BOS's abandonment decision, VDOT acknowledges the abandonment.<sup>69</sup> If VDOT does not concur, VDOT will respond to the governing body with appropriate concerns about the abandonment.<sup>70</sup> Usually, when VDOT does not concur, "the resident engineer will formally present those concerns to the county, in writing and in person at the public hearing and at subsequent meetings of the BOS scheduled to consider or act on the proposed abandonment."<sup>71</sup> Note that the governing body can abandon a road over VDOT's objection, however, the resident engineer must notify VDOT as soon as possible so that VDOT can have the opportunity to file an appeal.<sup>72</sup>

Section 33.2-910 of the Virginia Code lays out the abandonment appeal procedure.<sup>73</sup> If the governing body abandons a secondary highway, any "one or more of the landowners whose property abuts the highway . . . proposed to be abandoned, or if only a section of a highway . . . is proposed to be abandoned, whose property abuts such section of the highway . . . and who petitioned for a public hearing under [Section] 33.2-909" may appeal to the circuit court within thirty days.<sup>74</sup> Further, the Commonwealth Transportation Commissioner [VDOT]; and Director of Game and the Inland Fisheries may also appeal the decision to abandon (when appropriate).<sup>75</sup> Once a party initiates an abandonment appeal, circuit court will next:

Decide the appeal based upon the record and upon such other evidence as may be presented by the parties. Upon the hearing of the appeal, the court shall ascertain and by its order determine whether adequate justification exists for the decision of the governing body of the county that public necessity exists for the continuance of the section of highway . . . or whether the welfare of the public will be served best by abandoning the section of the highway.<sup>76</sup>

If there is not an appeal, the resident engineer prepares the necessary abandonment documents.<sup>77</sup>

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*Residencies*, VIRGINIA DEPARTMENT OF TRANSPORTATION (Feb. 13, 2018),

[https://www.virginiadot.org/about\\_vdot/residencies.asp](https://www.virginiadot.org/about_vdot/residencies.asp).

<sup>68</sup> *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways*, *supra* note 10, at 21.

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *Id.*

<sup>72</sup> *See id.*

<sup>73</sup> VA. CODE ANN. § 33.2-910 (2020).

<sup>74</sup> *Id.*

<sup>75</sup> *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways*, *supra* note 10, at 22.

<sup>76</sup> VA. CODE ANN. § 33.2-910 (2020).

<sup>77</sup> These documents are available on the VDOT Website at

<https://insidevdot.cov.virginia.gov/div/maint/RWI/RABP/Documents/Forms/AllItems.aspx>.



One case regarding future flooding is *Smith v. Board of Supervisors of Franklin County*.<sup>78</sup> In *Smith*, a powerplant was to be constructed on the Roanoke River.<sup>79</sup> Further, the powerplant project would include two separate dams on the Roanoke River.<sup>80</sup> A study found that these future dams would flood forty-two sections of secondary roads in Bedford, Pittsylvania, Campbell, Franklin and Roanoke counties.<sup>81</sup> After the study, the “Franklin County Board duly ordered the abandonment of the twenty-eight sections of road in that county.”<sup>82</sup> The governing body found no public necessity existed for the continuance of these roads and the public interest would be best served by their abandonment because of the future flooding.<sup>83</sup> The appellants<sup>84</sup> appealed to the Circuit Court, and the Circuit Court decided in favor of the board.<sup>85</sup> The appellants again appealed, this time to Virginia’s highest court.<sup>86</sup>

The Virginia Supreme Court of Appeals, now the Virginia Supreme Court, affirmed and held that the governing body could abandon sections of secondary roads that would be subject to future flooding on the condition that the power company would construct new non-flooding roads that would serve the public in general.<sup>87</sup> Thus, the court concluded that future flooding pointed towards “no public necessity [existing] for the continuance of said section of road” because it could be replaced by a different, alternative route, and further that “the welfare of the public will be served best by the abandonment of [those existing] sections of road.”<sup>88</sup> Note, however, that the court stated that the Virginia Code does not “require[] the building of new roads, but there is nothing in the statute forbidding such, and it is apparent *that the reasonable and convenient exercise of the discontinuing power in many cases would be seriously hindered or wholly prevented if conditional abandonment were not permitted.*”<sup>89</sup> Thus, it seems that a locality can abandon a road that will be under stress because of future flooding, provided that the locality considers building alternative roads to counteract the abandoned roads or have some conditional plan in place at or before the abandonment.

## **B. Abandonment Where a Road in the Primary/Secondary State Highway System Has Been Altered or New Road Serves the Same Citizens**

Under Virginia Code Section 33.2-912, a governing body may adopt a resolution declaring an old road in the secondary system to be abandoned when (1) “it has been or is altered<sup>90</sup> and a

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<sup>78</sup> 109 S.E.2d 501 (Va. 1959).

<sup>79</sup> *Id.* at 504.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Thirteen citizens of Franklin County who allegedly were affected by the abandonment of the roads and bridges.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 505-06.

<sup>88</sup> *Id.* at 505.

<sup>89</sup> *Id.* at 506 (emphasis added). This case continues to be controlling law in Virginia.

<sup>90</sup> Virginia code does not define “altered” with respect to roadways. However, it may be helpful to look at easement alterations for guidance. When “altered” is applied to an easement, the general rule in Virginia is “when the character of an easement is once fixed, no material alterations can be made in physical conditions which are essential to the proper enjoyment of the easement except by agreement. This applies to both the owner of the easement and to the owner of the fee. The test to determine the right to make a particular alteration is whether the

new highway that serves the same users as the old highway is constructed as a replacement and approved by [VDOT];” or (2) “the Chief Engineer of the Department recommends that it is appropriate in connection with the completion of a construction or *maintenance project*.”<sup>91</sup> Thus, Virginia Code Section 33.2-912 requires that “a new road ‘which serves the same citizens as the old road’ must be already constructed to VDOT standards and be ready for acceptance into the secondary system.”<sup>92</sup>

The Code of Virginia states that, the scope of the abandonment is limited to the “extent of such alteration, but no further.”<sup>93</sup> Virginia Code Section 33.2-912 gives the governing body broader authority than under the General Abandonment section.<sup>94</sup> Regarding this broader authority, the Virginia Supreme Court has stated that “the General Assembly obviously recognized that, when a new road is constructed to replace an old road, there is only a minimal possibility that public use will be diminished and a strong probability that public use will be facilitated and the capacity for public use increased.”<sup>95</sup>

According to case law, the phrase, “a new road which serves the same citizens as the old road” is “to be liberally construed and a wide discretion must be accorded the Board in its determination to abandon or alter a road.”<sup>96</sup> The BOS’s power is subject to a challenge only upon a showing of fraud or “flagrant hardship evidencing abuse of discretion by the Board.”<sup>97</sup> Thus, no right to an appeal to the courts exists outside of fraud or flagrant hardship.

### **C. Abandonment Where a Public Road That is Not in the State Highway System is Deemed to be No Longer Necessary**

Under Virginia Code Section 33.2-915, the governing body may cause any section of a public road<sup>98</sup> not in the secondary state highway system to be abandoned as a public road.<sup>99</sup> These roads include specifically:

County roads maintained by a county and not part of the secondary system, and to roads dedicated to the public but which are not parts of the State Highway System,

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alteration is so substantial as to result in the creation and substitution of a different servitude from that which previously existed.” *Vance v. Davis*, 737, 80 S.E.2d 396, 400 (Va. 1954).

<sup>91</sup> VA. CODE ANN. § 33.2-912 (2014) (emphasis added).

<sup>92</sup> *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways*, *supra* note 10, at 21.

<sup>93</sup> VA. CODE ANN. § 33.2-912 (2014).

<sup>94</sup> VA. CODE ANN. § 33.2-909 (2014).

<sup>95</sup> *Board of Supervisors of Fairfax County v. Horne*, 208 S.E.2d 56, 59 (Va. 1974).

<sup>96</sup> *American Oil Co. v. Leaman*, 101 S.E.2d 540 (Va. 1958) (finding that plaintiff’s easement to public highway was extinguished by legal abandonment of such highway and opening of new highway which offered ingress and egress to plaintiff by another road).

<sup>97</sup> *Id.* at 550.

<sup>98</sup> Roads in this section include “county roads maintained by a county and not part of the secondary state highway system and [city/town] roads dedicated to public use but that are not part of the primary or secondary state highway system.” VA. CODE ANN. § 33.2-914 (2014).

<sup>99</sup> VA. CODE ANN. § 33.2-915 (2014).

or the secondary highway system. The term “road” shall include streets and alleys in case of dedication to the public.<sup>100</sup>

For the governing body to abandon a road under Virginia Code Section 33.2-915, the road must be deemed “to be no longer necessary for public use.”<sup>101</sup> Abandonment under this section may be initiated either by the governing body or upon the petition of any person desiring to have the road abandoned.<sup>102</sup> When considering the abandonment of any section of road under Virginia Code Section 33.2-915, the governing body must give due consideration to the “historic value, if any, of such road.”<sup>103</sup>

Once an abandonment procedure has been initiated:

The governing body shall give at least 30 days' notice of its intention to do so by posting notice at the front door of the courthouse, by posting notices on at least three places along and visible from the road proposed to be abandoned, and by publishing notice in at least two issues in a newspaper having general circulation in the county. All such notices shall state the time and place at which the governing body will meet to consider the abandonment of such road.<sup>104</sup>

Next, one or more of the affected landowners of a proposed abandonment may file a petition for a “public hearing with the governing body within 30 days after notice is posted and published, the governing body shall hold a public hearing in the county for the consideration of the proposed abandonment.”<sup>105</sup> Finally, if a petition for a public hearing with the governing body is not filed, or after a public hearing is held, and the governing body is:

Satisfied that no public necessity exists for the continuance of the section of road as a public road . . . or that the welfare of the public would be served best by abandoning the section of road . . . as a public road . . . the governing body shall (i) within four months of the 30-day period during which notice was posted where no petition for a public hearing was filed or (ii) within four months after the public hearing adopt an ordinance or resolution abandoning the section of road as a public road . . . and with that ordinance or resolution the section of road shall cease to be a public road. If the governing body is not so satisfied, it shall dismiss the application within the applicable four months provided in this section.<sup>106</sup>

Roads abandoned under the process set out in Virginia Code Section 33.2-915 may be appealed under Virginia Code Section 33.2-920. Under that process, “one or more of the landowners who filed a petition or the governing body may within 30 days from the action of the

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<sup>100</sup> *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways*, *supra* note 10, at 24.

<sup>101</sup> *Id.*

<sup>102</sup> *See* VA. CODE ANN. § 33.2-917 (2014).

<sup>103</sup> VA. CODE ANN. § 33.2-915 (2014).

<sup>104</sup> VA. CODE ANN. § 33.2-916 (2014).

<sup>105</sup> *Id.*

<sup>106</sup> VA. CODE ANN. § 33.2-919 (2014).

governing body on the proposal appeal from the action of the governing body to the circuit court of the county.”<sup>107</sup> Upon such an appeal:

If it appears to the court that by the abandonment of such section of road . . . any party to such appeal would be deprived of access to a public road, the court may cause . . . the governing body . . . to be made parties to the proceedings, if not already parties, and may enter such orders as seem just and proper for keeping open such section of road . . . for the benefit of such party or parties.<sup>108</sup>

VDOT rarely takes a position on a government body’s decision to abandon or vacate a county road, “unless it is appropriate to raise a procedural objection, or the abandonment would adversely affect the operations of roads under VDOT jurisdiction.”<sup>109</sup>

#### **D. Abandonment Where a Public Road That is Not in the State Highway System Has Been Altered or a New Road Serves the Same Citizens**

Virginia Code Section 33.2-923 provides that a governing body may adopt a resolution declaring any public road not in the secondary system abandoned when “it has been or is altered and a new road which serves the same citizens as the old road is constructed in lieu thereof and approved by the board.”<sup>110</sup> The scope of the abandonment must be limited “to the extent of such alteration, but no further, by an ordinance or resolution of a governing body declaring the old road or public crossing abandoned.”<sup>111</sup> Virginia Code also allows for vacating all or part of a subdivision plat that includes road segments.<sup>112</sup> Appendix A contains an Abandonment Procedures Flow Chart outlined by VDOT.<sup>113</sup>

#### **E. Discontinuance of Primary/Secondary State Highway System Road**

VDOT can discontinue roads in the primary and secondary highway system. The discontinuance procedures for primary system roads are very similar to secondary system roads. Discontinuance of VDOT road maintenance is “a determination only that [the road] no longer serves public convenience warranting its maintenance at public [State] expense.”<sup>114</sup> Thus, a

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<sup>107</sup> VA. CODE ANN. § 33.2-920 (2014).

<sup>108</sup> *Id.*

<sup>109</sup> *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways, supra* note 10, at 24.

<sup>110</sup> Kamptner, *supra* note 32, at 24-13.

<sup>111</sup> VA. CODE ANN. § 33.2-923 (2014).

<sup>112</sup> For a comprehensive discussion, see Kamptner, *supra* note 32, at 24-13. “County Roads or Facilities Not or No Longer Part of the Secondary System of Highways Pursuant to § 33.2-925 of the Code of Virginia, these roads or facilities may be vacated under the provisions of §15.2-2272 as an alternative means of abandoning such roads to the procedures prescribed by §33.2-915 through §33.2-929. Such actions may be appealed under the provisions cited in §15.2-2272.” *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways, supra* note 10, at 24-25.

<sup>113</sup> *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways, supra* note 10, at 23.

<sup>114</sup> *Ord v. Fugate, State Highway Commissioner*, 152 S.E.2d 56 (Va. 1967). In *Ord*, plaintiffs alleged that a public road was in an “untravelable state and condition” and that the plaintiffs were “thus deprived of the appropriate and normal enjoyment” of their property. *Id.* VDOT asserted that the road was not under VDOT control and jurisdiction

discontinuance determination divests VDOT of control of the road.<sup>115</sup> Under Virginia Code Section 33.2-908, the Commonwealth Transportation Board may discontinue the maintenance of a road in the secondary system either on its own motion, or on a petition of the governing body.<sup>116</sup> Simply put, the discontinuance reduces to the status of a state maintained/operated road to a county maintained/operated road, which the county has exclusive jurisdiction.<sup>117</sup>

A discontinuance “does not eliminate it as a public road or to render it unavailable for public use.”<sup>118</sup> Once a road is discontinued, the road remains a public road and the county has exclusive jurisdiction over that road.<sup>119</sup> Further, until a discontinued road is abandoned, the public at large is “entitled to the full and free use of all the territory embraced within a highway in its full length and breadth.”<sup>120</sup> Lastly, the VDOT discontinuance procedure is separate and distinct from the abandonment procedures conducted by the governing body.

The Virginia Attorney General opined that a governing body could temporarily install a barricade on a discontinued road for safety reasons as an exercise of its police power.<sup>121</sup> Similarly, a governing body could remove such a barricade as an exercise of its police power.<sup>122</sup> Further, the Attorney General also concluded that a governing body could barricade a public road to vehicular traffic.<sup>123</sup> However, opinions like the one above are likely limited in application to particular facts presented, with public safety as the primary factor.<sup>124</sup>

Finally, when a road in the secondary system of highways is discontinued under Virginia Code Section 33.2-908, the governing body may, by ordinance, provide for the use of the property for the following purposes: “(i) hiking or bicycle trails and paths or other nonvehicular transportation and recreation; (ii) greenway corridors for resource protection and biodiversity enhancement, with or without public ingress and egress; and (iii) access to historic, cultural, and educational sites.”<sup>125</sup>

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since it had been discontinued under VA. CODE ANN. § 33.2-908. *Id.* The lower court granted the defendant's motion to dismiss because portions of seven secondary highways in the county, including 0.85 miles of Route 740 (the road in question) were properly discontinued. *Id.* The Supreme Court of Appeals of Virginia affirmed, concluding that VDOT no longer had jurisdiction over that section of road because VDOT properly discontinued 0.85 miles of Route 740. *Id.* at 60.

<sup>115</sup> See Kamptner, *supra* note 32, at 24-14.

<sup>116</sup> See VA. CODE ANN. § 33.2-908 (2014). For a detailed explanation of the discontinuance process, see generally *id.*

<sup>117</sup> See *Board of Sup'rs of Albemarle County v. Ripper*, 790 F. Supp. 632, 635 (W.D. Va. 1992).

<sup>118</sup> *Ord.*, 152 S.E.2d at 59.

<sup>119</sup> See *Ripper*, 790 F. Supp. at 635 (stating that a specific road that was “eliminated” from the secondary system was not abandoned but its state maintenance was discontinued, and such a road became a “county road”); *Va. Op. Att’y. Gen. 131* (1978-79) (road remains a public roadway until it is abandoned).

<sup>120</sup> *Wray v. Norfolk & Western Railway Co.*, 61 S.E.2d 65 (Va. 1950).

<sup>121</sup> *Va. Op. Att’y. Gen. 131* (1978-79).

<sup>122</sup> *Va. Op. Att’y. Gen. 215* (1986-87).

<sup>123</sup> *Va. Op. Att’y. Gen. 205* (1974-75). Here, the public road abutted a county landfill and the only other abutting landowner agreed to the closure. *Id.* The road remained open to the public from 8:00 a.m. to 4:30 p.m. during the work week and from 8:00 a.m. to noon on Saturdays. *Id.* Further, the landfill caretaker was available during weekends and holidays to admit people wanting to visit local cemeteries served by the road. *Id.*

<sup>124</sup> See *id.* In 1978, the Attorney General declined to find the above situation controlling where a county proposed a complete, permanent barricade to public road access. *Va. Op. Att’y. Gen. 131* (1978-79). Thus, it seems like the permanent solution to cutting off public road access is the abandonment process.

<sup>125</sup> VA. CODE ANN. § 33.2-911 (2014).



An instructive recent example of road abandonment by a locality is the Jolly Pond Road in James City County. Around 2012, VDOT discontinued road maintenance of Jolly Pond Road<sup>126</sup> and James City County took over the operation and maintenance of the road.<sup>127</sup> However, county officials recently closed a quarter-mile stretch of road due to safety concerns, by temporarily installing a barricade.<sup>128</sup> The James City County Attorney noted that the County’s position is that it can temporarily, possibly indefinitely, close a section of county road without any hearing, which is what it is currently doing with the Jolly Pond Road.<sup>129</sup> James City County also recently decided to begin the abandonment process pursuant to Virginia Code Section 33.2-915 on a section of road traversing the Jolly Pond Road Dam.<sup>130</sup> James City County placed six notices along Jolly Pond Road, as well as at the courthouse, and in the local newspaper.<sup>131</sup> If Jolly Pond Road is abandoned, it will become a private road owned by the abutting property owner.<sup>132</sup>

Appendix B is a Discontinuance Procedures Flow Chart outlined by VDOT.<sup>133</sup>

#### **IV. LEGAL ACTION FOR FAILURE TO MAINTAIN ROADS AND DEFENSES**

The entity responsible for maintaining a given road is potentially liable if it fails to meet its duty to maintain the road. Lawsuits would likely be based in tort for a failure to fulfill its duty to maintain the road, or based on the theory of inverse condemnation. In Virginia, sovereign immunity generally shields the Commonwealth from liability for torts committed by its representatives.<sup>134</sup> According to the Supreme Court of Virginia, the principle of sovereign immunity “protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities.”<sup>135</sup> While there are exceptions to the applicability of this doctrine in Virginia, it is alive and well.<sup>136</sup> For instance, sovereign immunity does not protect the Commonwealth from actions it performs *ultra vires*—i.e. beyond its legal authority<sup>137</sup>—or when it commits gross negligence.<sup>138</sup>

Sovereign immunity extends to counties, and, to a lesser extent, to cities and towns.<sup>139</sup> At the state and county level, sovereign immunity extends to both governmental and proprietary actions. At the city and town level, however, sovereign immunity protects only governmental

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<sup>126</sup> Interview with Adam Kinsman, *supra* note 4.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways*, *supra* note 10, at 20.

<sup>134</sup> *See* Doud v. Commonwealth, 717 S.E.2d 124, 125 (Va. 2011).

<sup>135</sup> Messina v. Burden, 321 S.E. 2d 657 (Va. 1984) (quoting Hinchey v. Ogden, 307 S.E.2d 891 (Va. 1983)).

<sup>136</sup> *Id.* at 668.

<sup>137</sup> Wiecking v. Allied Med. Supply Corp., 391 S.E.2d 258, 261 (Va. 1990).

<sup>138</sup> Colby v. Boyden, 400 S.E.2d 184, 186 (Va. 1991).

<sup>139</sup> *See, e.g.*, Mann v. County Bd. Of Arlington County, 98 S.E.2d 515, 519 (Va. 1957).

functions, while proprietary functions are not protected.<sup>140</sup> Governmental functions include “duties performed exclusively for the public welfare” and “entail[] the exercise of an entity’s political, discretionary, or legislative authority.”<sup>141</sup> On the other hand, proprietary functions are those performed for the political entity’s own benefit.<sup>142</sup> Furthermore, “[i]f the function is a ministerial act and involves no discretion, it is proprietary.”<sup>143</sup> For example, planning where to build a new road is a governmental function, but maintaining the road once it is built is a proprietary one.<sup>144</sup> The Virginia Supreme Court explained this distinction, remarking that “[a] function is governmental in nature if it is directly related to the general health, safety, and welfare of the citizens. . . . In contrast, a function is proprietary in nature if it involves a privilege and power performed primarily for the benefit of the municipality.”<sup>145</sup>

While sovereign immunity limits the legal exposure of state and local governments from some tort claims, governments are not immune to all lawsuits. Inverse condemnation liability arises when a government takes or damages private property, and does not pay to do so.<sup>146</sup> These causes of action are based on an implied contract theory found in the Constitution of Virginia, not tort.<sup>147</sup> Because these causes of action are based in constitutional rights, sovereign immunity is not available to a government as a defense to these claims. Losing access to property because of a flooded road or a flooded road damaging property could lead to such a suit. However, simply an allegation that damage occurred due to the actions of the state is insufficient to state a claim for inverse condemnation.<sup>148</sup> The claimant has to allege that the municipality purposefully damaged the private property “for a public use.”<sup>149</sup>

In Virginia, landowners who lose property to flooding that results from government failure to maintain or properly design or operate mitigation structures like flood walls, flood gates, drains, or diversionary channels may have a claim for compensation under the takings clause.<sup>150</sup> In *Livingston v. Virginia Department of Transportation*, the Virginia Supreme Court found that a single occurrence of temporary flooding was enough for a plaintiff to state a cause of action for an inverse condemnation claim.<sup>151</sup> *Livingston* did not actually impose damages on VDOT, but it affirmed the landowners’ right to sue under the conditions in the case.<sup>152</sup> While that case dealt with

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<sup>140</sup> See David N. Anthony & Beth V. McMahon, *Sovereign Immunity: Can The King Still Do No Wrong?*, VIRGINIA LAWYER, 11 (2000), available at [https://www.vsb.org/docs/vlawyermagazine/apr00anthony\\_mcmahon.pdf](https://www.vsb.org/docs/vlawyermagazine/apr00anthony_mcmahon.pdf) (describing the distinction between governmental and proprietary actions taken by a municipality leading to sovereign immunity protection).

<sup>141</sup> *Id.*

<sup>142</sup> *City of Chesapeake v. Cunningham*, 604 S.E.2d 420, 426 (Va. 2004).

<sup>143</sup> *Id.* (citing *Carter v. Chesterfield County Health Comm'n*, 527 S.E.2d 783, 785 (Va. 2000)).

<sup>144</sup> *Brooks v. City of Roanoke*, 89 Va. Cir. 439 (Va. Cir. Ct. 2015) (collecting uses the Virginia Supreme Court has determined are governmental and proprietary).

<sup>145</sup> *Gambrell v. City of Norfolk*, 593 S.E.2d 246, 249 (Va. 2004) (citations omitted).

<sup>146</sup> See VA. CONST., art. 1, § 11.

<sup>147</sup> See *Bell Atlantic-Virginia, Inc. v. Arlington County*, 486 S.E.2d 297, 298 (Va. 1997).

<sup>148</sup> *AGCS Marine Insurance Co. v. Arlington County*, 800 S.E.2d 159, 167-68 (Va. 2017).

<sup>149</sup> *Id.*

<sup>150</sup> *Livingston v. Virginia Dept. of Transp.*, 726 S.E.2d 264 (Va. 2012).

<sup>151</sup> *Livingston*, 726 S.E.2d at 271.

<sup>152</sup> *Id.*

the planning and maintenance of stormwater infrastructure, it is possible that its reasoning could be applied to road maintenance as well.

## V. ABANDONMENT AND INVERSE CONDEMNATION CLAIMS

While abandonment can be used to avoid the potential liabilities of failing to maintain a road, and the risk of resulting tort and inverse condemnation suits, choosing to abandon a road could also expose the locality to the risk of inverse condemnation claims, or claims that property was taken without just compensation in violation of the Fifth Amendment to the U.S. Constitution. To be successful on a takings claim, a litigant would have to show that the road being abandoned interfered with a property owner's right to access the land.<sup>153</sup> The Virginia Constitution was amended in 2012 to explicitly require the government to provide compensation for "lost access" to property.<sup>154</sup> "Lost access" means a material impairment of direct access to property which has been damaged by the taking in question.<sup>155</sup> Therefore, landowners who lose access to their land because a road is abandoned would potentially have a claim for damages.<sup>156</sup> However, a landowner who retains reasonable access would not have a claim for a taking under Virginia law.<sup>157</sup> For example, the Supreme Court of Virginia determined that a deprivation of access to one road did not deprive a landowner of reasonable access when it still retained access to a major public highway.<sup>158</sup>

## VI. RECOMMENDATIONS

Localities can take proactive steps to avoid liability for the claims discussed above, and to otherwise improve and ensure the road abandonment and discontinuance processes are followed. For instance, ensuring that the community is included in the abandonment process may help to mitigate the threat of these claims. When a governing body decides to abandon a road, best practice likely includes discussing the abandonment with affected property owners and attempting to reach an agreement before the abandonment takes place. It is likely cheaper and wiser for governing bodies to have educational discussions with property owners early on and to negotiate with them

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<sup>153</sup> *State Highway & Transp. Comm'r of Virginia v. Lanier Farm, Inc.*, 357 S.E.2d 531, 533 (Va. 1987) (explaining that "a 'complete extinguishment and termination of all the landowners' rights of direct access' to an abutting highway constitutes a compensable 'taking' within the eminent domain clause of the Virginia Constitution.") (citing *State Highway Comm'r v. Linsly*, 223 Va. 437, 442-43, 290 S.E.2d 834, 837-38 (1982); *Highway Commissioner v. Easley*, 215 Va. 197, 203-04, 207 S.E.2d 870, 875 (1974); *Highway Commissioner v. Howard*, 213 Va. 731, 732-33, 195 S.E.2d 880, 881 (1973); *Wood v. Richmond*, 148 Va. 400, 407, 138 S.E. 560, 562-63 (1927)).

<sup>154</sup> VA. CONST., art. I, § 11.

<sup>155</sup> VA. CODE ANN. § 25.1-100 (2018).

<sup>156</sup> *Hooked Grp., LLC v. City of Chesapeake*, 842 S.E.2d 413, 418 (Va. 2020) ("Under the current statute, a taking has occurred if the remaining access is not 'reasonable.' In addition, if the landowner has suffered 'a material impairment of direct access to property,' that loss is now compensable even if the landowner retains reasonable access."); see also Kelci Block, "Takings" Liability for Vacating Roads in Flood-Prone Areas: Poquoson Case Study, VA. COASTAL POL'Y CTR. (2013), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1011&context=vcplclinic>.

<sup>157</sup> *Hooked Grp., LLC v. City of Chesapeake*, 842 S.E.2d 413, 417 (Va. 2020) (finding that "[u]nder this body of case law, the exercise of police power by the City to close access to and from Callison Drive did not, as a matter of law, deprive the Landowner of reasonable access.").

<sup>158</sup> *Id.*

up front, rather than risk costly and time consuming litigation. Making the public aware of a potential abandonment, and constructing or improving a better placed road that provides access to all of the affected properties, will significantly decrease the likelihood of being held liable for inverse condemnation claims arising from the abandonment. Additionally, it might be possible for a governing body to turn over maintenance of a road to affected property owners or their incorporated homeowners association, which would allow them continued use of the road after a governing body's responsibility to maintain it ceases.

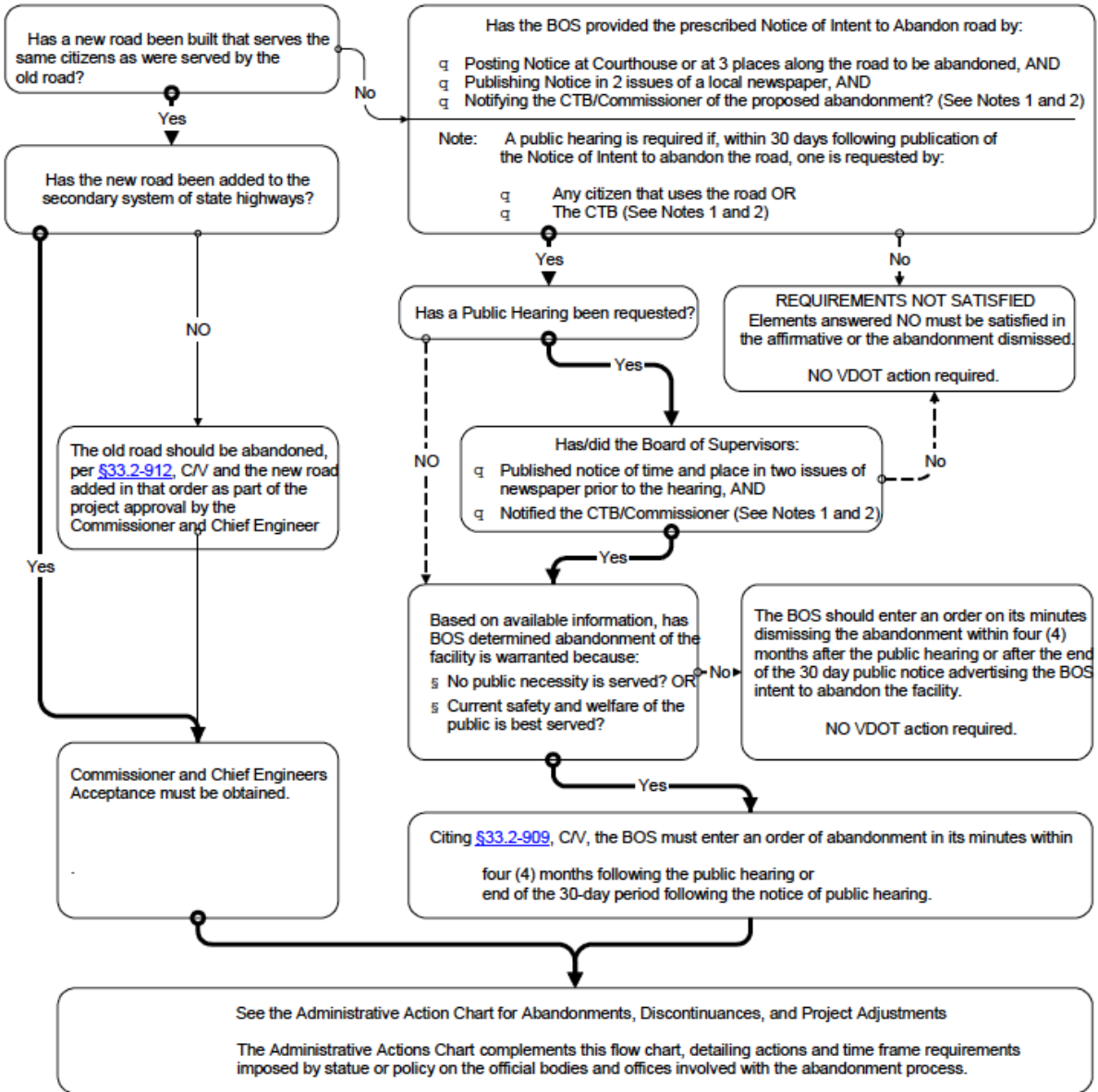
In a more general sense, local governments also should educate their citizens as much as possible about the current and predicted flooding risks in their communities, and the causes of those risks. When citizens have a better understanding of sea level rise and increasingly frequent severe storm events, they can better plan for their own and their communities' futures, and better realize the need for measures to increase the resilience of transportation infrastructure – whether those measures include increasing expenditures for infrastructure projects, or abandonment or discontinuance of roads that face increasing flood events and thus unsupportable maintenance costs.

## **VII. CONCLUSION**

As sea levels continue to rise and storm events become more intense and more frequent, state and local government entities will need to consider whether it is worth the expense to continuously maintain roads that are repeatedly damaged by flooding. While sovereign immunity may act as a defense against many of these claims, it will not protect against all. This is especially true for towns and cities in Virginia, for whom sovereign immunity is only a defense against claims stemming from their governmental operations, not proprietary actions. Localities will thus likely have to consider the option of abandoning certain roads that become problem areas for repeated flooding. This will allow them to shed the responsibility to maintain the roads in question, but does come with its own potential legal risks, especially potential inverse condemnation claims from landowners who lose sole access to their properties when their road is abandoned.

# Appendix A:

## Abandonment Procedures Flow Chart



Guide for Administering Additions, Abandonments, and Discontinuances of the System of State Highways, VIRGINIA DEPARTMENT OF TRANSPORTATION 23 (2015)



## Appendix B:

### Discontinuance Procedures Flow Chart

