



Guidance Document

To: Regulants & Other Members of the Public

From: Virginia Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers, and Landscape Architects (APELSCIDLA Board)

Date: TBD

Re: **Property lines along public roads without recorded fee simple right of way.**

Surveyors often retrace property boundaries abutting public roads with no recorded fee simple right of way. These roads are often described as prescriptive right of way or prescriptive easement and are normally 30' wide. The following shall apply to the location of the property line along these roads:

Based on the recorded descriptions the surveyor shall determine when the road is the controlling monument, as in this example, "*along the Ox Road, the following courses, N 27 1/2° W, 9 poles.*" Generally, calls for the center of the road, along the road, or similar phrases indicate the monument is controlling. In those cases, the center of the road is the boundary. When there is evidence of an old road scar or the current road having been in a different location, a determination of whether to use the current road or the old road location shall be made based on the preponderance of the evidence and information that can be obtained. The property line shall be established using the center of one road location or the other.

Under no circumstance shall the property line be established as 15' from the center of the road without recorded fee simple dedication for public road purposes.

Surveyors often retrace property boundaries abutting public roads with no recorded fee simple right of way where a previous survey has mistakenly established the property line as being 15' off the center of the road. The following shall apply with regard to the location of the property line along the road in these situations:

Unless there is evidence to the contrary, the assumption shall be made that the intent was not to sever or create a parcel 15' wide along the road. Further, the assumption shall be made that the "grantor is presumed to intend to convey the largest bundle of rights he or she possesses," (see paragraph 2 following). The new survey shall go to the center of the center of the road or old property line location as described previously.

The following paragraphs provide the code, case law and other information on which the forgoing guidance is based.

Solving any boundary retracement problem requires two elements: the written intention of the parties and the physical evidence that documents or witnesses the written intention. What is the surveyor to do when the road is a prescriptive right? There are many of these roads in Virginia. Prescriptive easements arise from continuous use of a particular area for a particular purpose for a requisite period with knowledge and acquiescence of the owners. These easements are thought vested in the public interest for purpose and right-of-passage over the way. This guidance document highlights the generally acceptable practices for surveys along prescriptive roads. Consider first the Code of Virginia on the matter of prescriptive easement roads:

§ 33.2-105. Evidence as to existence of a public highway.

When a way has been worked by highway officials as a public highway and is used by the public as such, proof of these facts shall be prima facie evidence that the same is a public highway. And when a way has been regularly or periodically worked by highway officials as a public highway and used by the public as such continuously for a period of 20 years, proof of these facts shall be conclusive evidence that the same is a public highway. In all such cases, the center of the general line of passage, conforming to the ancient landmarks where such exist, shall be presumed to be the center of the way and in the absence of proof to the contrary, the width shall be presumed to be 30 feet.

Nothing contained in this section shall be construed to convert into a public highway a way of which the use by the public has been or is permissive and the work thereon by the highway officials has been or is done under permission of the owner of the servient tenement.

Code 1950, § 33-98; 1970, c. 322, § 33.1-184; 2014, c. 805.

Consider also Virginia Administrative Code on the matter of prescriptive easement roads:

18VAC10-20-370. C.

4. Monumentation. As a requisite for completion of the work product, each land boundary survey of a tract or parcel of land shall be monumented with objects made of permanent material at all corners and changes of direction on the land boundary with the exceptions of meanders, such as meanders of streams, tidelands, lakes, swamps and prescriptive rights-of-way, and each such monument, other than a natural monument, shall, when physically feasible, be identified by a temporary witness marker. Where it is not physically feasible to set actual corners, appropriate reference monuments shall be set, preferably on line, and the location of each shall be shown on the plat or map of the land boundary.

Surveying after someone placed monuments 15' from the centerline of the traveled way along a prescriptive easement road can raise questions. Did they intend to sever the 15' strip? Did they record a plat of survey, and metes and bounds description where they reference those as an offset to the centerline? Do we treat found, called pipe along the

sidelines as offsets to the true corners? Under closer inspection of the chain of title for the property, we often find no mention of intention to dedicate fee simple right of way. The property likely passed multiple conveyances using such description which patently severs the subject property from the area of the prescriptive easement. How then is best to handle the severed strip and the property fronting the road?

Provided there is no affirmative fee simple dedication on record, accepted rules of law for reconstruction of intent, namely, that “called for” natural monument overrides an artificial monument (1), thus center of traveled way overrides the set pipe if the deed calls the road as the boundary. Also provided the metes and bounds description clearly indicates a property not including the road, and is whole and complete upon its face, the deed description can be interpreted primarily in two ways using existing case law as guidance.

1. “Where the description in a deed is not ambiguous, but certain and complete, there is no occasion to resort to extrinsic evidence to ascertain the intent of the parties as to the land intended to be conveyed,” (*Ault v. Clark*, 112 N.E. 843 (1916)). Assume the strip may not have conveyed. The preferred solution is cleaning the chain of title. This may be the most advantageous solution when working toward a fee simple dedication for expanding the road. Cleaning the title of uncertainties by using eminent domain condemnation on the severed strip, via a plat styled for *Heirs and Assigns of <name of Last Known Owner>, and/or Owners Unknown* is an effective solution allowing any interested parties to come forward yet, still gaining fee simple title for the City, County, Town, or Commonwealth. This solution should be undertaken in consultation with the municipality.
2. In absence of a “clearly and expressly reserved legal title,” (*Smith v. Smith*, 622 A.2d 642 (1993)) assume the grantor conveyed the full bundle of rights they held, not intending to hold back a strip. Inconsistencies and uncertainties are “resolved in favor of the grantee as long as such a construction does not violate any apparent intention of the parties to the transaction.” *Rohner v. Niemann*, 380 A.2d at 552. (Id.) and “a conveyance of title to adjacent property served by an easement is presumed to pass title to the center line of the easement. 12 Am.Jur.2d Boundaries §§ 22, 38, 54 and 55 (1964). (Id.) This approach assumes the title passed with each conveyance and likely is sufficient for successive conveyances not submitting property to an act of subdivision, nor a fee simple dedication for an expansion of the road. See below for Virginia Department of Transportation (VDOT) guidance.

As a point of law, dedication of platted streets conveys in fee simple to the municipality after 1946 when the (state) Subdivision Code authorized the action of automatically conveying fee of rights-of-way of duly approved subdivisions to the municipality.

§ 15.2-2265. Recordation of approved plat as transfer of streets, termination of easements and rights-of-way, etc. (in part)

The recordation of an approved plat shall operate to transfer, in fee simple, to the respective localities in which the land lies the portion of the premises platted as is on the plat set apart for streets, alleys or other public use and to transfer to the locality any easement indicated on the plat to create a public right of passage over the land. The recordation of such plat shall operate to transfer to the locality, or to such association or public authority as the locality may provide, such easements shown on the plat for the conveyance of stormwater, domestic water and sewage, including the installation and maintenance of any facilities utilized for such purposes, as the locality may require.

The roads in VDOT Secondary System of State Highways are often referred to as “Byrd Act Roads.” This is a misnomer and generally refers to roads not dedicated in fee simple. Nothing within the act guides the surveyor on how to delineate the existing roads. The Byrd Act is legislation from Virginia Acts of Assembly, VA 1932, which provided relief to counties for road construction and maintenance. It created the Secondary System of Highways, and passed whatever title and interests in public roads, held by participating counties to the Commonwealth. However, in 1932, almost all roads were by common use, prescriptive. Counties generally held no title interests to the roads at that time. The main points accomplished in this act are:

- Created Secondary System of Highways.
- Relieved counties of duties of control, supervision, management, and jurisdiction.
- Limits on taxations and various methods of funding roadways.
- Directed State Highway Commission (SHC) to make maps of highways and future expenditures.
- Directed inventory of maintenance equipment.
- Vested the State Highway Commissioner with the powers of Eminent Domain for purposes of secondary system, and authorized county Boards of Supervisors to act to do the same.
- Retained authority of counties for the establishment of new roads for the secondary system.
- Authorized SHC to direct counties to maintain roadways at a specified standard, and directed funding supplement.
- Allowed counties to opt out of the Secondary System; Arlington and Henrico counties remain out of the system.

Endnotes: VDOT Survey Manual states:

“Prescriptive or statutory easements are to be shown on the plans but will not to be shown or labeled as existing fee right of way. A note will be placed in the survey file indicating which parcels are affected by the prescriptive easement. Property lines will be extended into the prescriptive easement to their terminus according to record data or the center of the traveled way. These lot lines will not be connected along the center of the traveled way, unless described by metes and bounds in the deed of record.

When a metes and bounds survey is required, the survey party will make sufficient ties of the existing corners to the survey baseline and will reference to the final construction centerline/baseline by station and right angle offset. When property belonging to any agency of the United States Government is crossed by the centerline, the distance from the centerline crossing to the nearest tract corner measured along the Government's property line will be obtained.” (Virginia Department of Transportation, 2018)

References:

Ault v. Clark, 112 N.E. 843 (1916)

Code of Virginia, 2018, Title 15.2. Counties, Cities and Towns, Chapter 22. Planning, Subdivision of Land and Zoning, § 15.2-2265. Recordation of approved plat as transfer of streets, termination of easements and rights-of-way, etc. Retrieved from: <https://law.lis.virginia.gov/vacode/title15.2/chapter22/>

Code of Virginia, 2018, Title 33.2. Highways and Other Surface Transportation Systems Chapter 1. Definitions and General Provisions, § 33.2-105. Evidence as to existence of a public highway. Retrieved from: <https://law.lis.virginia.gov/vacode/title33.2/chapter1/section33.2-105/>

Smith v. Smith, 622 A.2d 642 (1993)

Spainhour v. Huffman, 237 Va. 340, 377 S.E.2d. 615; 1989 Va.

Virginia Administrative Code, 2018, Title 18. Professional and Occupational Licensing, Agency 10. Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects, Chapter 20. 18VAC10-20-370. Minimum Standards and Procedures for Land Boundary Surveying Practice. 2018, Retrieved from: <https://law.lis.virginia.gov/admincode/title18/agency10/chapter20/section370/>

Virginia Department of Transportation, 2018 Retrieved from: http://www.virginiadot.org/business/locdes/survey_manual.asp

Ward v. Harper, 234 Va. 68, 70, 360 S.E.2d 179, 181 (1987).