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Disposition of Right of Way Abandoned by Private Turnpike Companies

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Abstract

From the late 1700s through the early 1900s Virginia chartered hundreds of joint stock companies to build turnpike roads throughout the Commonwealth. Some of these roads were well travelled and well maintained. Many are still in use today and are part of the State highway system. However, a substantial number of these turnpike roads were abandoned by the chartered companies, thus prompting the enactment of legislation in the mid-1800s to deal with the problem. The difficult questions of ownership involve these abandoned turnpikes which fell into non-use.

This report tracks the statutory scheme from incorporation to abandonment, describes the property rights involved in assessing ownership, and examines relevant Virginia case law.

# DISPOSITION OF RIGHT OF WAY ABANDONED BY PRIVATE TURNPIKE COMPANIES

by

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(A Cooperative Organization Sponsored Jointly by the Virginia Department of Transportation and the University of Virginia)

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## INTRODUCTION

The Virginia Department of Transportation often receives requests for information regarding the ownership of turnpikes "abandoned" by private or semi-private companies that operated in the early to mid-1800s during Virginia's so called "turnpike era." A general determination of the ownership of these parcels would aid the Department in planning the acquisition of right of ways for highway construction. However, such a general determination is not simple to arrive at, nor can it be entirely accurate due to the large number of variables. In actual practice, the determination will have to be made on a case by case basis, but the issues that need to be resolved in each case can be discussed in a general way.

After an initial discussion of the Virginia turnpike era and the private or semi-private turnpike companies, a statutory analysis of counties' and state's rights is presented as well as how they may have come by ownership of the roads abandoned by the turnpike companies. This issue, as well as any other requiring reference to statutes pertaining to turnpikes or public roads, is clouded by close to 200 years of acts, amendments, and codifications. However, it appears that a turnpike road constructed by a private or semi-private company was nonetheless a public road, which the public had the same right to travel as it did any other public road except that the payment of a toll was required. The right to collect tolls was a privilege bestowed on the turnpike company in consideration for the work and expense involved in building and maintaining the road. The company retained this privilege so long as it actually maintained the road. Upon abandonment of a turnpike by its chartered company, the road apparently remained a public road, and it became the responsibility of the county or state to maintain it.

Other issues include an examination of how land for the turnpike road was acquired, what property interest was vested in the company, and why this may make a difference to current rights or ownership. The turnpike company may have initially acquired the right of way as a fee simple absolute or as an easement through condemnation or acceptance of a dedication. In either case, at least an easement would have still existed for the road after abandonment since the road remained public.

Once a public road is established, it remains public until officially vacated or abandoned through non-use and/or other acts evidencing the intent to abandon. Of the turnpikes that became ordinary public roads, many are still in use today and are part of the state highway system. Some may have been officially vacated, and others simply fell into non-use. Because the turnpike remained a public road after abandonment by the chartered company, the issues of vacation, discontinuance, and abandonment by proper authority are discussed.

If it is determined that the state does still own a particular right of way or that an easement for a public road still exists, another set of issues comes into play. These include the necessity of being able to sufficiently identify the road's location and what the width of the road is permitted to be.

If the state wishes to use any portion of a turnpike right of way that has fallen into non-use, it will have the burden of establishing the road's location and width, whereas the party who currently claims ownership of the land will have the burden of proving that the road had been officially vacated or abandoned.

One issue not discussed herein is the effect that Virginia recording acts may have on current status.

## VIRGINIA'S TURNPIKE ERA

Virginia's "turnpike era" roughly covered the latter quarter of the 18th century through the mid 19th century. The turnpike companies were originally owned and operated by joint stock companies permitted to incorporate for this purpose through enabling legislation granting charters to them. The individual acts of incorporation can be found in documentation of the Acts of the General Assembly. The General Turnpike Act, passed on February 7, 1817, provided general regulations for the incorporation of turnpike companies and for the general characteristics of the road such as width and surface. 1816-17 Va. Acts ch. 38; Va. Code Rev. ch. 234 (1819). The individual acts of incorporation could, and often did, specify provisions different from those of the General Turnpike Act. In such a case, the provisions of the act of incorporation would govern. Va. Code Rev. ch. 234, sec. 1 (1819); Va. Code ch. 61, sec. 3 (1849); Va. Code sec. 1187 (1887); Va. Code sec. 1294j(2) (1904).

All but four turnpike companies required major support from the state. Newlon, H. Jr., Private Sector Involvement in Virginia's Nineteenth-Century Transportation Improvement Program. (1986) at p. 5. The state would purchase stock up to a specified limit when private subscriptions were inadequate to fund construction. Id. at p. 6. Because the state held the stock, the state and the public had an interest in the turnpike road and tolls.

Statutory provisions were in effect whereby the state or private stockholders could transfer their interest in the turnpike to the county through which it ran. E.g., Va. Code ch. 61, sec. 52-53 (1860); Va. Code ch. 61, sec. 71-72 (1873); Va. Code sec. 1254-1255 (1887). Other turnpikes were under the exclusive control of the Board of Public Works

and later the State Corporation Commission. These turnpikes are not considered herein as they were already under state control as a public highway and were exempt from various forfeiture and abandonment statutes. The turnpikes considered herein are those that were privately or semi-privately owned at the time they were abandoned by the chartered company.

## FORFEITURE OF CHARTER

In consideration for the cost of building and maintaining the road, the General Turnpike Act vested forever the tolls and profits of the turnpike in the company shareholders as personal estate. Va. Code Rev. ch. 234, sec. 16 (1819). However, the Act did provide two ways by which the company might forfeit its charter and therefore its right and interest in the road. If the company failed to keep the road in repair for 18 months, the interest of the company in the road and tolls was said to be forfeited and ceased forever. Va. Code Rev. ch. 234, sec. 24 (1819). Also, if the company did not begin work within two years after passage of the act for its incorporation or did not complete the same within ten years as prescribed by the General Act, then the company's interest in the road was forfeited and ceased. Va. Code Rev. ch. 234, sec. 28 (1819). The time provisions appear to have been altered by individual charters, and were definitely altered by subsequent enactments. See, e.g., Va. Code ch. 61, sec. 31 (1849); 1902-03-04 Va. Acts ch. 609, ch. 10, sec. 4. However, unless expressly ruled out, the forfeiture should have operated when the necessary conditions were fulfilled.

Statutory provisions for forfeiture of charter were numerous and continued in force well into the 20th century. E.g., Va. Code sec. 3757 (1919). The state was permitted to proceed by writ of quo warranto, or information in the nature of a writ of quo warranto, against a turnpike company for failure to commence or complete the turnpike within the time prescribed by law or its charter, for abandonment of the turnpike, or for non-use and failure to repair for a period of three successive years. See Va. Code ch. 61, sec. 31 (1849) which read:

> [T]he state may either proceed by quo warranto or take possession of the works and property of such company, and in the case of so taking possession, shall keep the same in good repair, and have all the rights and privileges previously vested in the company. But the state shall pay the company for such works and property, the value of the same at the time it takes possession thereof.

See also Va. Code ch. 61, sec. 39 (1860); Va. Code ch. 61, sec. 55 (1873). The statute had been changed somewhat by 1887. See Va. Code

sec. 1239 (1887). (If there was a judgment against the company, the Board of Public Works was to take possession and sell the works and property of the company and to collect debts owed to the company. The money from the sale and collections was to be used to pay off the company's debts and liabilities, and the remainder was to be paid into the state's treasury.) See also Va. Code, sec. 1313a(58) (1904). The 1906 Va. Acts ch. 239 provided that if there were a judgment against the company, the company would be continued for a sufficient amount of time for it to settle its business, sell its property, and divide its capital. The court could take care of operation of the turnpike in the interim. See also Va. Code sec. 3757 (1919). A quo warranto proceeding basically would be used in the case of long non-use or long neglect of a franchise. It was a method of challenging title of a corporate or other franchise. See Va. Code sec. 3022 (1887). The result of such a proceeding going against the company would be a declaration of forfeiture of charter. See Commonwealth v. James River Co., 4 Va. 190, 197 (1819).

Another means by which a company could lose its charter was by allowing the road to fall into disrepair. Upon a report of disrepair, the court was to appoint a panel of three viewers who would determine whether or not the report was true. If it was found that the road was not properly maintained, the viewers report would be followed by a formal suspension of tolls. The company then had a certain amount of time to put the road in repair. If at the end of that period of time, the viewers determined that the road was not being properly maintained, the court could declare the road abandoned and the charter forfeited. 1906 Va. Acts ch. 297. This provision regarding toll suspension began with the General Turnpike Act and remained operative until 1954, however there was not always mention of forfeiture. Va. Code Ann. sec. 33-136 (1950). This provision along with much other turnpike legislation was repealed by 1954 Va. Acts ch. 374. Most remaining turnpike legislation after 1954 was repealed by 1956 Va. Acts ch. 438 which also provided a means whereby a turnpike company could donate its stock to the State Highway Commission or some political subdivision.

## Abandonment by the Turnpike Company

The state, recognizing that abandonment had become a problem, passed legislation in 1866 that permitted the counties to assume responsibility for maintenance and control of turnpikes abandoned by the companies. 1865-66 Va. Acts ch. 127. The 1865-66 Va. Acts ch. 128, provided the method of giving notice of abandonment and the intention of the court to take charge of the road or part thereof lying in the county. If the turnpike company did not proceed to repair or keep up the road within four months of initial notice, then the court with consent of the Board of Public Works could take possession. Id.

This legislation was periodically amended and re-enacted throughout the late 1800s and the early 1900s. E.g., 1875-6 Va. Acts ch. 39; 1899-1900 Va. Acts ch. 590. The legislation remained in effect under Va. Code Ann. sec. 33-136 (1950), but was repealed by 1954 Va. Acts ch. 374. Each Act and section was written as though it were permissive and discretionary for the counties to assume ownership. See Va. Code ch. 61, sec. 73 (1873); Va. Code Sec. 944a(33) and 1294j(1) (1904); Va. Code Sec. 2000 and 4074 (1919); Va. Code sec. 2000 and 4074 (1924); Va. Code sec. 2039(20) and 4074 (1936); Va. Code sec. 2039(20) (1942); Va. Code sec. 33-136 (1950). However, Va. Code sec. 1002 (1887) put the assumption in mandatory terms: "Whenever any turnpike company shall have abandoned its road, or a part thereof, the county court of the county in which such road lies shall take charge of the same and cause it to be worked and kept in good order in the same manner as the public roads in such county." Id.

The statutory provisions for forfeiture and the maintenance of abandoned turnpikes all required action by the county court, circuit court, or County Board of Supervisors with jurisdiction over the county through which the turnpike section passed. Therefore, documentation of proceedings, resulting orders, and information about whether the county assumed control and responsibility for maintenance of a turnpike abandoned by its chartered company should be available at the county courthouse (now General District Court), circuit courthouse, or county office building for the county through which the road section in question passes. If the county did not formally assume control, the public continued to use the road, and the authorities periodically maintained it, then there may be a presumption that the road remained a public highway. See 1908 Va. Acts ch. 388; 1928 Va. Acts ch. 159, sec. 31; Va. Code Ann. sec. 33.1-184 (1984).

## RIGHTS AND INTERESTS IN ABANDONED TURNPIKES MOST LIKELY REMAINED VESTED IN THE PUBLIC

If the county did not formally or informally assume control of an abandoned turnpike, then all the rights and interests in the right of way may have reverted back to the holder of the fee. See Danville v. Anderson, 189 Va. 662, 669, 53 S.E.2d 793, 797 (1949). The holding in that case was that when the county assumed responsibility for an abandoned turnpike, the part not taken over by the county reverted to abutting landowners. The court held this to be non-acceptance and abandonment of a dedication. Id. If the holder of the fee could not be determined, then the reversion would be to abutting landowners because in the absence of proof to the contrary, there is a presumption that abutting landowners own the fee of the road subject to the easement for public passage. See Western Union Telegraph v. Williams, 86 Va. 696,

698, 11 S.E. 106, 107 (1890). It should be noted that in Danville v. Anderson the portion of the road held to revert to the landowners was never used as part of the turnpike. The court did not have the opportunity to rule on the fate of a portion of a turnpike that had actually been put to public use. The holding of this case is very likely to be applicable to turnpikes that were never constructed. In such a case, public rights did not vest in the road. Another possibility, with the same effect as reversion, is that the abandoned road bed was adversely taken possession of by the abutting landowners. See Chesapeake and Ohio Canal Co. v. Great Falls Power Co., 143 Va. 697, 719-21, 129 S.E. 731, 738-39, cert. denied, 270 U.S. 650, 46 S.Ct. 350, 70 L.Ed. 780 (1925). (The court ruled that title to the abandoned bed of a canal could be acquired by adverse possession, but did not rule that this would be applicable to an abandoned turnpike road.)

An argument could be made that upon forfeiture of charter (which would be the result of abandonment), the interest in the road did not revert back to the holder of the fee or the abutting landowner; rather, the interest in the road remained vested in the public, and it was the county's right to work the road and include it in the county road system. Whether the county took the responsibility of maintaining the road or not, the road belonged to the public.

Elliott's Treatise on Roads and Streets, which influenced many Virginia court decisions in the early 1900's stated,

> [i]f the corporation owning the turnpike suffers it to get out of repair, the corporation's franchises may be forfeited to the state, and in that event the road will become a public way of the governmental corporation or body having control of roads of like character. This result will follow if the road is abandoned by the private corporation.

Elliott and Elliott, The Law of Roads and Streets, at 81 (2d ed. 1900). Many cases from other states were cited in support of this proposition. See, e.g., The Virginia Canon Toll Road Co. v. People ex rel. Vivian, 22 Colo. 429, 434-36, 45 P. 398, 400-1 (1896) (The easement for public passage over the road laid out by the corporation was held to belong to the public subject to the necessity of paying tolls as long as the company exists. Upon dissolution of the company or expiration of its charter, the road reverts to the state.); Commissioner of Highways of the Township of Pontiac, County of Oakland v. Cobb, 104 Mich. 395, 396, 62 N.W. 554, 555 (1895) (Upon abandonment of a plank road, title to the land does not revert to abutting landowners, but rather it remains a public highway.); State ex rel. Boardman v. Lake, 8 Nev. 276, 281-82 (1873) (At the expiration of the term of a charter, control of the road reverts to the sovereign, whose power allowed its creation. Statutory provisions were explicit that upon forfeiture, the rights would vest in

the county.); Craig v. People ex rel. Nevill, 47 Ill. 487, 493-95 (1868) (The court stated that plank roads are public roads, and upon abandonment by the company, they would belong to the public.). See also Annot. 30 A.L.R. 200-15 (1924) and cases cited therein.

This proposition can also be found in Virginia case law which holds that the true interest of an owner is the "franchise of taking tolls, subject to the burden of maintaining the road. The road, however, when established, was, and thence hitherto has been, and still is, a public road." Virginia Hot Springs Co. v. Loman, 126 Va. 424, 432, 101 S.E. 326, 329 (1919). (In this case, the court did not have to decide whether or not a turnpike road still existed but rather the extent of the right of way. However, the court did rule that a turnpike was a public road.) This seems to indicate that upon abandonment, the road would remain open to the public, and what would then be necessary would be a caretaker to maintain the road because upon forfeiture the companies would no longer have incentive to maintain the road. This would account for the statutes which appeared that prescribed how abandoned turnpikes were to be maintained. These provisions are discussed supra. The abandoned turnpike would thus be subject to the rules regarding abandonment and vacation by public authorities discussed in the next section. This argument is strong considering the fact that the turnpike companies were originally chartered to benefit the public and given all the statutes discussed that permitted the counties to assume control. The public had a right to the road. However, at the very least the county's inaction and failure to exercise its prerogative may be strong evidence of intent to abandon the right of way, which may operate to effect the same. See Moody v. Lindsey, 202 Va. 1, 6-7, 115 S.E.2d 894, 898 (1960).

In 1932 the state assumed ownership of county roads. 1932 Va. Acts ch. 415. (Counties were permitted to withdraw from this act, and three decided to do so at that time: Henrico County, Arlington County, and Nottoway County. Nottoway County has since permitted state assumption of its roads.) From the face of this statute, it appears that the state assumed control of all "county roads" whether the county had formally assumed them or not. This construction is also apparent in case law. See Bond v. Green, 189 Va. 23, 30, 52 S.E.2d 169, 172 (1949). (It was contended that the road in question was not included in the highway system when the supervision of county roads was transferred to the state, but because it was a public road regardless, it was to be treated as any other.)

## HOW LAND WAS ACQUIRED FOR THE TURNPIKE RIGHT OF WAY

Once it is established that the county either formally or informally assumed control of an abandoned turnpike road or that the interests of the abandoning company reverted to the county or state, it must be determined how the company initially acquired the land for construction of the road. This determination is necessary to make the additional determination of whether or not the road is still considered to be a public road subject to county or state control.

The General Turnpike Act of 1817, which specified the general method of acquiring land by the turnpike companies, provided that if an agreement could not be reached with the landowners, it shall be lawful for the directors to apply to the court for condemnation proceedings whereby damages would be assessed and awarded to the landowner. Va. Code Rev. ch. 234, sec. 7 (1819). Generally, a company took whatever its charter authorized, either a fee simple or something less. See Danville v. Anderson, 189 Va. at 664, 53 S.E.2d at 793-4. Turnpike companies were an exception to the rule that a corporation condemning land must take a fee simple and not merely an easement, which is the right to use the property of another rather than owning it outright. Matthew v. Codd, 150 Va. 166, 170, 142 S.E. 383, 384 (1928); Blondell v. Guntner, 118 Va. 11, 13, 86 S.E. 897, 897 (1915); Charlottesville v. Maury, 96 Va. 383, 385, 31 S.E. 520, 521 (1889); Roanoke v. Berkowitz, 80 Va. 616, 619 (1885); 1857-58 Va. Acts ch. 120. "Under the General Turnpike Act of 1817 (Rev. Code 1819, c. 234), a turnpike company could not condemn the fee in the land for its purposes, but only the right of way. The former owner still held title to the land subject to the easement." Virginia Hot Springs Co., v. Loman, 126 Va. at 428, 101 S.E. at 327. See also, Bond v. Green, 189 Va. at 32, 52 S.E.2d at 173 (The public only acquires an easement in land condemned for a highway or in land dedicated by a property owner.); Talbot v. Massachusetts Mutual Life Ins. Co., 177 Va. 443, 448-9, 14 S.E.2d 335, 336 (1941) (Condemnation only created an easement for road purposes and upon conveyance back to the landowner, the easement was extinguished.); Western Union Telegraph Co. v. Williams, 86 Va. at 699-702, 11 S.E. at 107-8 (1890) (All the public requires is a right of way over a public road. The fee remains in the landowner.).

The safest route to determine what was acquired if condemnation was resorted to, would be to examine the original charter granted to the turnpike company. The charters can be located in documentation of Acts of the General Assembly. A recent case held that whether a condemnor acquired an easement or a fee simple is a question of law to be determined by a trial court and that any ambiguity is to be construed against the condemnor. Virginia Electric Power Co. v. Lado, 220 Va. 997, 1003-4, 266 S.E.2d 431, 434-5 (1980). However, as noted above,

there is a general consensus that turnpike companies acquired an easement.

Dedication by a property owner was another method through which an easement for the turnpike right of way was often acquired. See Bond v. Green, 189 Va. at 32, 52 S.E.2d at 173. A discussion of the actual mechanics of common law dedication follows this section.

## Fee Simple Absolute

It may make a difference whether the turnpike right of way was initially acquired as a fee simple absolute or as an easement. Generally, adverse possession, which is a method of acquisition of title to real property by non-permissive use or possession for a statutory period, is not permitted against the state. Commonwealth v. Spotsylvania, 225 Va. 492, 495, 303 S.E.2d 887, 889 (1983); Bellenot v. Richmond, 108 Va. 314, 319, 61 S.E. 785, 786 (1908); Buntin v. Danville, 93 Va. 200, 208, 24 S.E. 830, 832 (1896). Therefore, if the state holds a right of way as a fee simple absolute, which could be accomplished through taking possession of the roadway and paying the turnpike company the value of that taken, adverse possession by adjacent landowners should not be permitted even if the road has never been built or put to public use or if the road has been abandoned. This would only be the case where the turnpike company had initially acquired a fee simple absolute. However, there is a presumption that a landowner whose land is bounded by a public highway, owns the fee to the center of the highway subject to the public's right of passage, and the burden of proof to the contrary will be on the state to show that this is not the case. Western Union Telegraph Co. v. Williams, 86 Va. at 698, 11 S.E. at 107. A different result may obtain for roads created under more recent statutes. If the state did not purchase the fee held by the turnpike company upon abandonment, then it is likely that the fee remained in the shareholders of the company, but because the public would retain its rights and interests in the road (discussed supra), an easement for passage would exist.

Adverse possession may have been permitted against a turnpike company once they had abandoned their road and before the county or state had taken over. See Chesapeake & Ohio Canal Co. v. Great Falls Power Co., 143 Va. at 719-21, 129 S.E. at 738-739. In that case, the court ruled that title to the abandoned bed of a canal and to the non-used portion of a railroad right of way could be acquired by adverse possession, "and this conclusion is not affected by the fact that the defendant corporation was a public service one, nor by the fact that the state was a shareholder therein . . . ." Id. at 721, 129 S.E. at 739. The court did not rule on the effect that a later assertion of a public right of use would have. If the same rule regarding adverse possession

held true for turnpike companies as well as for canal companies, then the statute of limitations for adverse possession could have run until the county or state assumed control of the road. If the statute had not lapsed before county assumption, then upon such takeover, the statute stopped running. If the statute had lapsed before county takeover, then there would be nothing for the county to take. This will prove to be a difficult determination to make if there was a long period between abandonment of the turnpike and the county assumption of control. Official records will have to be examined, but it is not likely that there will be any indication from the records when adverse possession of an abandoned roadbed may have commenced. There is also authority holding that adverse possession would not be allowed if the abandoned turnpike remained a public road. See, e.g., Yates v. Warrenton, 84 Va. 337, 339, 4 S.E. 818, 819 (1888). This is discussed further in the next section.

## Easement

A determination of ownership of a strip of land obtained as an easement through either an accepted dedication or condemnation is more difficult since the fee simple generally remained in the owner subject to the right of passage of the highway. Bond v. Green, 189 Va. at 32, 52 S.E. at 173. Upon discontinuance or abandonment of the highway, absolute title to and exclusive possession of the land reverts to the owner of the fee, and the easement is discharged without further action by the public or highway officials. Id. See also Board of Sup'rs of Louisa County v. Virginia Electric and Power Co., 213 Va. 407, 411-12, 192 S.E.2d 768, 771-2 (1972); Heller v. Woodley 202 Va. 994, 998, 121 S.E.2d 527, 531 (1961); Talbot v. Massachusetts Mutual Life Ins. Co., 177 Va. at 447, 14 S.E.2d at 336; Chesapeake & Ohio Canal Co. v. Great Falls Power Co., 143 Va. 697, 710-11, 129 S.E. 731, 736. In Talbot, a turnpike company acquired an easement of passage only, and the fee simple remained in the Appellant who later transferred land bound by the easement to the Appellee. The easement passed through several conveyances from the turnpike company to the City of Norfolk, which conveyed all its right, title, and interest in and to the strip of land back to the Appellant. The Appellee contended and the court held that the transfer from the City back to the Appellant merely extinguished the easement, and that Appellee owned all rights to the center of the strip as it formed a boundary between Appellant's and Appellee's land. Id. It is settled that a conveyance bounded by a highway carries with it the fee to the center line thereof, subject to the right of passage of the public way, provided that the grantor at the time owned to the center and there is no evidence to the contrary. Heller v. Woodley, 202 Va. 994, 998, 121 S.E.2d 527, 531 (1961); Bond v. Green, 189 Va. at 32, 52 S.E.2d at 173; Williams v. Miller, 184 Va. 274, 278, 35 S.E.2d 127, 129 (1945); Cogito v. Dart, 183 Va. 882, 889, 33 S.E.2d 759, 763 (1945);

Nusbaum v. Norfolk, 151 Va. 801, 805, 145 S.E. 257, 259 (1928); Lynchburg v. Peters, 145 Va. 1, 15, 133 S.E. 674, 679 (1926).

The question surrounding the operation of this reversion to the owner hinges upon the meaning of vacation, abandonment, and discontinuance because until such time that the public highway is vacated, abandoned, or discontinued, the state retains ownership. See Buntin v. Danville, 93 Va. at 205, 24 S.E. at 830-31; Bellenot v. Richmond, 108 Va. at 319, 61 S.E. at 786. As previously mentioned, the statute of limitations for adverse possession does not run against the state and therefore will not bar the public's right in the highway. Norfolk & Western Ry. Co. v. Board of Sup'rs of Carroll County, 110 Va. 95, 103-4, 65 S.E. 531, 534 (1909); Bellenot v. Richmond, 108 Va. at 319, 61 S.E. at 786; Buntin v. Danville, 93 Va. at 208, 24 S.E.2d at 832. Unless permitted by statute, an individual cannot obtain right or title to any part of a public highway by adverse possession no matter how long an encroachment has existed or private use has continued. Lynchburg v. Chesapeake & Ohio Ry. Co., 170 Va. 108, 116, 195 S.E. 510, 514 (1938); Yates v. Warrenton, 84 Va. at 339, 4 S.E. at 819; Taylor v. Commonwealth, 70 Va. 780, 793 (1878). This principle was applicable to a turnpike once the road was established since it became a public road despite the fact that it may have been privately or semi-privately owned. Virginia Hot Springs Co. v. Loman, 126 Va. at 432, 101 S.E. at 329.

The burden of proving abandonment, vacation, or discontinuance is on the party asserting it. Moody v. Lindsey, 202 Va. 1, 6, 115 S.E.2d 894, 898 (1960); Sipe v. Alley, 117 Va. 819, 823, 86 S.E. 122, 123 (1915); Basic City v. Bell, 114 Va. 157, 165, 76 S.E. 336, 338 (1912). In a strict sense, a highway is vacated when it is terminated by direct action of public authorities and is abandoned when public right is lost by non-use. Hudson v. American Oil Co., 152 F.Supp. 757, 769 (E.D.Va. 1957); Bond v. Green, 189 Va. at 31, 52 S.E.2d at 172. As noted by both of these courts, the technical distinction between vacation and abandonment is not always observed in statutes. Hudson v. American Oil Co. 152 F.Supp. at 769; Bond v. Green, 189 Va. at 31, 52 S.E.2d at 172. As early as 1819 statutory procedures were in place for vacating or discontinuing highways. See Va. Code Rev. ch. 236, sec. 3 (1819). In order to determine whether a highway was vacated according to these legal proceedings, it will be necessary to examine documentation of actions of the County Board of Supervisors, Board of Public Works (and later the State Corporation Commission), individual cities, and the State Highway Commission. If documentation is found but for some reason there was a procedural error prior to July 1, 1950, the abandonment of the road was validated by Va. Code sec. 33.1-166 (1984) notwithstanding any defects or deficiencies in the proceedings, provided the rights of third parties have not intervened. If no documentation of proceedings to vacate a

highway is found, proof of abandonment through other means is more difficult and convoluted.

It is said, once a highway, always a highway unless it has been vacated in a manner prescribed by statute or abandoned by non-use. Moody v. Lindsey, 202 Va. at 5, 115 S.E.2d at 897; Hudson v. American Oil Co., 152 F.Supp. at 769; Bond v. Green, 189 Va. at 30-31, 52 S.E.2d at 172. This is misleading since mere non-use generally will not operate to effect an abandonment. Moody v. Lindsey, 202 Va. at 6, 115 S.E.2d at 898; Sipe v. Alley, 117 Va. 819, 824, 86 S.E. 122, 123 (1915); Basic City v. Bell, 114 Va. at 167, 76 S.E. at 339. Rather, the non-use must follow intention to abandon for an abandonment to adhere. Moody v. Lindsey, 201 Va. at 6, 115 S.E.2d at 898; Oney v. West Buena Vista Land Co., 104 Va. 580, 585, 52 S.E. 343, 345 (1905). In Moody v. Lindsey, the court went on to state that this is especially true where there is no use of premises adverse to the right of the public. Id. If an occasion were to arise where the use of the premises were adverse to the right of the public, Virginia may permit equitable estoppel to operate and uphold an abandonment. The party claiming equitable estoppel would have to allege that he was influenced by conduct or declarations of the county or state and that he did not have constructive notice of the true state of facts and no convenient or available means of acquiring the information. Lindsey v. James, 188 Va. 646, 659, 51 S.E.2d 326, 332 (1949).

There has been quite a bit of comment regarding what does not constitute non-statutory abandonment. Delay of opening a street dedicated and accepted is not an abandonment. Greenco v. Virginia Beach, 214 Va. 201, 208, 198 S.E.2d 496, 501 (1973); Virginia Hot Springs Co. v. Loman, 126 Va. at 433-35, 101 S.E. at 330; Sipe v. Alley, 117 Va. at 824, 86 S.E. at 123; Basic City v. Bell, 114 Va. at 166, 76 S.E.2d at 339. In the absence of a statute, mere failure of public authorities to maintain a road is not an abandonment. Moody v. Lindsey, 202 Va. at 7, 115 S.E.2d at 898. Maintenance by private parties is not an abandonment. Bond v. Green, 189 Va. at 32, 52 S.E.2d at 173. Failure to comply with a statute and have all county roads plotted on a map is not an abandonment. Id. Allowing maintenance of fences in a right of way that had been dedicated and accepted is not an abandonment. Basic City v. Bell, 114 Va. at 167, 76 S.E. at 339.

Virginia case law spells out a number of ways in which abandonment may be accomplished if not done through formal channels. Non-use coupled with intent to abandon will operate to abandon a public highway. Moody v. Lindsey, 202 Va. at 6, 115 S.E.2d at 898. Alteration of location (discussed infra) will operate to abandon or discontinue a public highway to the extent of the alteration. See Moody v. Lindsey, 202 Va. at 5, 115 S.E.2d at 803; Bare v. Williams, 101 Va. 800, 803, 45 S.E. 331, 332 (1903). Non-acceptance of a dedication of land to use as

a public highway (discussed infra) may operate as an abandonment of the dedication and permit revocation of the same. Brown v. Tazewell County Water and Sewerage Authority, 226 Va. 125, 129, 306 S.E.2d 889, 891 (1983); May v. Whitlow, 201 Va. 533, 539, 111 S.E.2d 804, 808-10 (1960). Also a presumption of abandonment may obtain if the owner of an easement permits an act inconsistent with future enjoyment of the right. Oney v. West Buena Vista Land Co., 104 Va. at 585, 52 S.E. at 345. (The court noted that failure to maintain a bridge, dedicated as an easement, for an unreasonable amount of time may be construed as an abandonment of the easement by the lot owners. However, the court noted that the bridge could still be used with repair work, and held that the easement had not been abandoned.) This case was unusual because public rights in the bridge were not discussed.

The use of the term discontinuance is most troubling since it has often been used interchangeably with abandonment or vacation; but it currently has taken on a different meaning. The court in Bond v. Green ruled that upon discontinuance or abandonment of a public road, the easement would extinguish and all rights would vest in the holder of the fee. 189 Va. at 32, 52 S.E.2d at 173. However, in Ord v. Fugate, the court held that discontinuance does not operate as an abandonment. The effect of discontinuance is not to eliminate the road as a public road or to render it unavailable for public use; it is a determination that a road no longer warrants maintenance at public expense. 207 Va. 752, 207, 152 S.E.2d 54, 58-9 (1967). See also Hiner v. Wenger, 197 Va. 869, 875-6, 91 S.E.2d 637, 641 (1956). (A determination of no public necessity for expenditure of highway funds is not necessarily abandonment of use.) The court in Ord v. Fugate did point out that this interpretation was based on statutes enacted by the legislature in 1950 and that cases decided prior to enactment would have to be interpreted differently. 207 Va. at 757-8, 152 S.E.2d at 58.

Alteration of location of a turnpike or other public road would operate to discontinue or abandon the original location. In Bare v. Williams, the court held that an alteration of a public road made by proper authorities operates as a discontinuance of the original location and therefore closes the road to public use. 101 Va. at 803, 45 S.E. at 332 (1903). In Moody v. Lindsay, the court stated that such discontinuance operated only to the extent of the alteration. 202 Va. at 5, 115 S.E.2d at 898. The 1910 Va. Acts ch. 121 provided that when a turnpike formally changed its location after passage of the Act, or had informally changed its location before passage of the act through continuous use for five years, the old road bed was to be considered abandoned and all rights in the land were to revert to abutting owners. See also Va. Code sec. 4090 (1919); Va. Code sec. 4090 (1936); Va. Code sec. 4090 (1942). The same provision applied to railroad beds. Blondell v. Guntner, 118 Va. 11, 13-14, 86 S.E. 897, 898 (1915).

## Common Law Dedication

At common law, a particular grantee is necessary to take lands by grant or conveyance, therefore, the general public can not be the recipient. Payne v. Godwin, 147 Va. 1019, 1024, 133 S.E. 481, 482 (1926). The "doctrine of dedication" solves this problem. Id. A common law dedication grants to the public a limited right of use in an owner's land. Brown v. Tazewell County Auth., 226 Va. at 129, 306 S.E.2d at 891. Dedication by an owner does not have to be a written conveyance; it can be established by oral declarations of an owner or implied from an owner's actions. Norfolk v. Meredith, 204 Va. 485, 489, 132 S.E.2d 431, 434 (1963); Buntin v. Danville, 93 Va. at 204, 24 S.E. at 830. It is settled that however the dedication is manifested, there must be an unequivocal showing of the owner's intent to dedicate that land to public use. West Point v. Bland, 106 Va. 792, 794, 56 S.E. 802, 804 (1907). (The court held that the intent to dedicate a strip of land to public use as a highway was not shown with the requisite degree of certainty.) See also Brown v. Tazewell County Auth., 226 Va. at 129, 306 S.E.2d at 891; Greenco v. Virginia Beach, 214 Va. at 204, 198 S.E.2d at 498 (1973); Buntin v. Danville, 93 Va. at 204, 24 S.E. at 830. A mere grant of use, for however long, without an owner's intent to dedicate or action on the part of officials is not a dedication but a revocable license. West Point v. Bland, 106 Va. at 797, 56 S.E. at 805. (There, the public was permitted to go over the owner's land, but the court ruled that the use should be regarded as a revocable license.) See also Stanley v. Mullins, 187 Va. 193, 200, 45 S.E.2d 881, 885 (1948); Gaines v. Merryman, 95 Va. 660, 663-4, 29 S.E. 738, 740 (1898); Commonwealth v. Kelly, 49 Va. 632, 635-7 (1851).

Mere use may not constitute a dedication; however, public use coupled with official action may create an inference of dedication and acceptance in order to establish a road as a public road. Stanley v. Mullins, 187 Va. at 200, 45 S.E.2d at 885. (The court stated that an official claim to a way knowingly acquiesced to by the owner by allowing the public to use the road over a long period of time would permit an inference that the road was a public road.) See also Richmond v. Stokes, 72 Va. 713, 715-6 (1879); Commonwealth v. Kelly, 49 Va. at 636. 1908 Va. Acts ch. 388 provided,

> [t]hat where a way has been worked by road officials as a public road and is used by the public as such, proof of these facts shall be prima facie evidence that the same is a public road. And where a way has been regularly or periodically worked by road officials as a public road and used by the public as such continuously for the period for twenty years, proof of these facts shall be conclusive evidence that the same is a public road . . . . In the absence of proof to the contrary the width shall be presumed to be thirty feet. Nothing herein contained shall be construed to convert into

> a public way of which the use by the public has been permissive, and the work thereon by the road officials has been, or is done under permission of owner of servient tenement.

See also Va. Code Ann. sec. 33.1-184 (1984); Stanley v. Mullins, 187 Va. at 197, 45 S.E.2d at 884; Commonwealth v. Kelly, 49 Va. at 635-7. This may be creation of a public road through prescription rather than by dedication if the requisite intent to dedicate is not shown. See Staunton v. Augusta Corp., 169 Va. 424, 437-8, 193 S.E. 695, 698 (1937); Board of Sup'rs of Tazewell County v. Norfolk & Western Ry. Co., 119 Va. 763, 773, 91 S.E. 124, 128 (1916). However, the general provisions of the statute are not limited to roads created through prescription. Commonwealth v. Kinzie, 165 Va. 505, 511, 183 S.E. 190, 193 (1936).

Once an actual dedication is established, it must be accepted by proper authorities or the public itself to be complete, and such acceptance may be either express through action of authorities or implied through long public use or an authority's exercise of dominion. Brown v. Tazewell County Auth., 226 Va. at 129, 306 S.E.2d at 891. See also Burks Bros. of Virginia v. Jones, 232 Va. 238, 248, 349 S.E.2d 134, 140 (1986). (A dedication must be accepted no matter how definitely and finally expressed.) In Norfolk v. Meredith, the court held that the mere recording of a deed did not constitute implied acceptance of a right of way in the absence of some other action taken by the public or officials. In that case, almost thirty years had passed from the time the deed was made, and the public did not treat it as a public road nor did officials take possession, improve the road, or include it in plans for future development. 204 Va. 485, 491, 132 S.E. 431, 436 (1963). In Greenco v. Virginia Beach, the court held that there was an implied acceptance of a street through long public use and acts of dominion exercised by the city including installation of lighting fixtures and allowing a utility company to lay gas pipelines in the street. 214 Va. at 205-9, 198 S.E.2d at 499-502. In Virginia Hot Springs Co. v. Loman, the court ruled that unlike dedication itself, acceptance could be made through long continued public use, and where acts indicated a continued offer to dedicate, the acceptance does not have to be immediate use and occupation of the entire right of way. Rather, use of part with no indication of intention to refuse the remainder, permits postponement of use of the remainder until the public requires it. 126 Va. at 434-5, 101 S.E. at 329-30.

The distinction between a mere dedication and an accepted dedication is important because until accepted, a dedication is revocable with the exception of "dedication by map." Brown v. Tazewell County Auth., 226 Va. at 129, 306 S.E.2d at 891; Payne v. Godwin, 147 Va. at 1027-8, 133 S.E. at 483. A dedicator may revoke or abandon the dedication by consent of the state or municipality, and such abandonment may be established through long non-use. May v. Whitlow, 201, Va. at 539, 111

S.E.2d at 808-10. (The court held the "failure of the public authorities to open and maintain . . . a width of 60 feet, and the systematic diversion of the land north of the 30 foot right of way to uses foreign to the dedication, unmistakably point to a non-acceptance of the offer to dedicate the area in controversy" and the dedication was held to be abandoned.) See also Danville v. Anderson, 189 Va. at 669-70, 53 S.E.2d at 796-97; Magee v. Omansky, 187 Va. 422, 429-30, 46 S.E.2d 443, 448 (1948); Payne v. Godwin, 147 Va. at 1027-8, 133 S.E. at 483.

Upon acceptance, a dedication becomes irrevocable, and the right of the public becomes fixed. Buntin v. Danville, 93 Va. at 205, 24 S.E. at 830. (The court found that the dedication of a strip of land had been accepted and held that no obstruction or encroachment would be permitted to impair the public's benefit unless the dedicated land had been subsequently abandoned.) In Virginia Hot Springs v. Loman, the court held that because the dedication was accepted, title to any part of the turnpike could not be acquired by adverse possession. 126 Va. at 424, 101 S.E. at 329. See also Greenco v. Virginia Beach, 214 Va. at 204, 198 S.E.2d at 499; Basic City v. Bell, 114 Va. at 166-67, 76 S.E. at 338. The burden of proof in establishing a dedication and acceptance is on the party asserting it. Staunton v. Augusta Corp., 169 Va. at 433-36, 193 S.E. at 698.

An accepted dedication results in an easement. Bond v. Green, 189 Va. at 32, 52 S.E. at 173. In Payne v. Godwin, the court ruled that if the dedication does not reserve or dispose of the fee, it vests in the purchasers of abutting lots subject to the public's easement. 147 Va. at 1025, 133 S.E. at 483. Legal rules concerning abandonment, vacation, and alteration apply to accepted dedications as they apply to any other easement upon which a public highway is based. Id. at 1027, 133 S.E. at 483. (These rules are discussed supra.)

## LOCATING PUBLIC ROADS

If it has been established that the county or the state still owns the fee simple or an easement for public highway use in a particular strip of land, then there is the necessity of identifying its location with the requisite degree of certainty. The burden of establishing the location rests on the party alleging that fact. Commonwealth v. Kinzie, 165 Va. at 513, 183 S.E. at 194. See also White v. Reed, 146 Va. 246, 251, 135 S.E. 809, 810 (1926). (One alleging a right of way based on a public road has the burden to establish its existence and its location with reasonable certainty.)

In Commonwealth v. Kinzie, the state brought action to reclaim and clear of encroachments a strip of land sixty-feet wide crossing the

Appellant's land for use as a public road. The strip was originally acquired in fee simple in 1849 or 1850 as the right of way for the Southwestern Turnpike. The state was able to establish with sufficient certainty the location of the strip of land so as to permit re-entry and the right to exclusive use and possession. 165 Va. at 513, 183 S.E. at 194.

In Bare v. Williams, the Appellee initially brought suit to enjoin Appellant from passing over his land on what Appellant contended to be a public road used as such for generations. Evidence was introduced to show that in 1788 a public road was established in the area, but it was not sufficient to show that it was the same road now claimed by Appellant. The court went on to state,

> [i]t is settled law that public highways should be matters of public record, and identified with such reasonable certainty as to apprise the public of their location . . . and also to make known to individuals how much and what part of their lands have been appropriated to public use. The requisite certainty of location in this State is obtained by the statutory requirement that a plat or diagram shall accompany and be filed with the report of viewers appointed in proceedings to establish public roads.

101 Va. at 803, 45 S.E. at 332. But see Bond v. Green, 189 Va. at 34, 52 S.E.2d at 174. The court stated that failure of the highway commission to comply with the statutory requirement of including a county road on a map does not alone establish discontinuance or abandonment of such road as a public highway. Id. Also, the court in Commonwealth v. Kinzie allowed the requisite certainty to be derived from oral testimony of people familiar with the area and the existence of the road as well as a map compiled from historical data. 165 Va. at 508-10, 183 S.E. at 191-2.

## DETERMINING WIDTH OF PUBLIC ROADS

Once location has been established with the requisite degree of certainty, the final step is to determine the width that a reestablished public road may be. As early as 1849, legislation indicated in mandatory terms that county roads were to be thirty-feet wide. Va. Code ch. 52, sec. 5 (1849). ("Every road shall be thirty feet wide unless the county court order it to be less."). See also Va. Code ch. 52, sec. 5 (1860); Va. Code ch. 52, sec. 22 (1873); 1874-5 Va. Acts ch. 181 sec. 2; Va. Code sec. 946 (1887); Va. Code sec. 944a(2) (1904); Va. Code sec. 1977 (1919); Va. Code sec. 1977 (1924). Va. Code sec. 1977 (1924) was repealed by 1928 Va. Acts ch. 159, however, the thirty foot width provision did continue to exist, but somewhat differently. "[T]he right of way for any public road shall not be less than thirty feet wide . . .

unless the Board of Supervisors order a greater width . . . . " Id. In 1908 there arose a presumption that public roads have a thirty foot right of way in the absence of proof to the contrary. 1908 Va. Acts ch. 388. ("[T]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 thirty feet.") See also 1928 Va. Acts ch. 159, sec. 31; Va. Code Ann. 33.1-184 (1984).

In Danville v. Anderson, a turnpike company had acquired only an easement for road purposes, and upon abandonment by the company and county assumption, the part or area not taken over by the county reverted to abutting landowners. The Highway Department claimed a sixty-foot easement even though only twenty four feet was ever used; the court arrived at a thirty-foot easement. Apparently, in the absence of proof to the contrary, all portions of a turnpike easement in excess of thirty feet at the time taken over by the county were relinquished and abandoned, and thus reverted to adjacent landowners, leaving the area over which the county had an easement at thirty feet. 189 Va. at 669, 53 S.E.2d at 797. The court went on to note that this was the result of non-acceptance and abandonment of a dedication. Id. at 670, 52 S.E.2d at 797. This case suggests that whatever width was actually used and maintained by the county at the time of the takeover is the width available for public use, providing the road has not subsequently been abandoned or vacated by public officials. The charter of the turnpike company will not control, and the thirty foot presumption will operate in the absence of proof to the contrary. See also Western Union Telegraph Co. v. Williams, 86 Va. at 698, 11 S.E. at 106.

If the title to the road was acquired by prescription through public usage, generally, the width of the highway is governed by the extent of the use. Pettus v. Keeling, 232 Va. 483, 490, 352 S.E.2d 321, 326 (1987); Virginia Hot Springs Co. v. Loman, 126 Va. at 430, 101 S.E. at 328; Board of Sup'rs of Prince William County v. Manual, 118 Va. 716, 719, 88 S.E. 54, 55 (1916); Board of Sup'rs of Tazewell County v. Norfolk & Western Ry. Co., 119 Va. at 773-4, 91 S.E. at 128. Therefore, any additional right of way must be acquired through condemnation or other legal proceedings. Board of Sup'rs of Prince William County v. Manuel, 118 Va. at 719, 88 S.E. at 55. See also Bare v. Williams, 101 Va. at 803, 45 S.E. at 333. However, as discussed supra, a public road that has come into existence through long public use will be presumed to have a width of thirty feet in the absence of evidence to the contrary. Perhaps extent of use may operate as the evidence to the contrary.

## CONCLUSION

During Virginia's turnpike era, the General Assembly granted charters to various companies giving them the privilege to obtain land, construct a road, and collect tolls from members of the public choosing to travel upon the road. Once established, the turnpike became a public road, which if abandoned by the chartered company, appears to have remained a public road subject to the provisions regarding such.

It is said, once a public road, always a public road, unless vacated as prescribed by statute or otherwise abandoned. Many turnpikes abandoned by the chartered companies remained in public use and have since become part of the state highway system. Some of the turnpikes are likely to have been officially vacated while others simply fell into non-use. Of the roads that fell into non-use, the state may be able to claim that a continuing easement for public road purposes does exist in some cases. That is not to say that this will be a simple task. In some instances, such a determination will be very sensitive due to changed circumstances of the landowner, such as having a house constructed in the right of way. Though the current landowner will have the burden of showing that the road has been officially vacated or abandoned, the state will have the burden of establishing the road's existence and location.