



**BEDFORD COUNTY
OFFICE OF THE COUNTY ATTORNEY**

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PATRICK J. SKELLEY II
COUNTY ATTORNEY

MEMORANDUM

To: Bedford County Board of Supervisors

**CC: G. Carl Boggess, County Administrator;
Gregg Zody, Director of Community Development**

From: Patrick J. Skelley II, County Attorney

Date: August 17, 2016

Re: Old Firetrail Road; Maintenance of Private Roads; Revenue Share Roads

After hearing concerns from citizens whose properties are served by Old Firetrail Road, the Board asked for a summary of options available to such citizens, and the County's role regarding those options. This memorandum shall serve as the requested summary.

As an initial matter, there has been much discussion over whether Old Firetrail is public or private. All the plats of the properties along, and served by, Old Firetrail clearly state that the rights-of-way are private, and not subject to public maintenance.¹ It is also important to note that there is a difference between a "public right-of-way," "public road" or "county road" in the sense that the general public has a right to use a certain road, as opposed to a "public road" or "public highway" which has been expressly dedicated to, and accepted by, the state for control and maintenance.

It is clear in this case that Old Firetrail has never been dedicated nor accepted into the state highway system.² Moreover, there has never been any judicial determination by Declaratory Judgment that Old Firetrail has become a "public right-of-way"; and, even if there

¹ The County's subdivision ordinance in effect at the time that the property along Old Firetrail Road stated clearly, in capital letters, that "STREETS DO NOT QUALIFY FOR PUBLIC MAINTENANCE."

² Apparently some maps show Old Firetrail Road as bearing a Secondary State Route Number. That is likely attributable to a mapping error, and in any event, acceptance of a road by a governmental agency must be express, and through a formal process. It cannot merely be implied by what appears on a map. See Burks v. Jones, cited below.

were such a determination, that would not automatically bring the road into the state highway system for maintenance. There must be an express acceptance by the government. See Burks Brothers of Virginia, Inc., et al. v. Jones, et al., 232 Va. 238 (1986) (finding that a road is not dedicated to the government without formal acceptance, in that case, Suck Mountain Trail).³

Given that Old Firetrail Road has never come into the state highway system for purposes of maintenance, the question obviously remains as to what remedies are available to the residents. As already discussed at the aforementioned meeting, a homeowners' association or joint-road-maintenance agreement are typically the mechanisms by which residents on private roads can pool their resources and keep their roads passable. As it turns out, there are already homeowners' associations in existence all along Old Firetrail Road. (A copy of one such document establishing an association and road-maintenance systems is attached hereto as Exhibit A).

It appears, however, that efforts by the residents to keep those associations organized and active have been piecemeal and inconsistent. When active, those associations would have the authority to collect dues, expend funds for road maintenance, and pursue legal action against fellow landowners who fail to pay their fair share (indeed, the land records show that certain owners have been sued by the associations from time to time to collect dues). In addition, those associations, along with any individual landowners who so chose, could enter into their own joint-maintenance agreement for the purpose of increasing their financial ability to fund road repair.⁴ The most worthwhile course of action for these citizens is to retain the services of a competent attorney who is well versed in real-estate law and transactions to facilitate the above-referenced road-maintenance mechanisms.

³ It is worth noting that Bedford County has no direct authority or control over road maintenance. The Byrd Road Act of 1932 relieved Virginia counties of duties of maintaining roads, and vested that authority in the Virginia Department of Transportation at the state level. The modern version of that statute plainly states "The control, supervision, management and jurisdiction over the secondary system of state highways shall be vested in the Department of Transportation and the maintenance and improvement, including construction and reconstruction, of such secondary system of state highways shall be by the Commonwealth under the supervision of the Commissioner of Highways. The boards of supervisors ... of the several counties . . . shall have no control, supervision, management and jurisdiction over such public roads ... constituting the secondary system of state highways. Virginia Code § 33.2-336 (emphasis added).

⁴ Even without formal associations or agreements, if the residents pooled resources for upkeep of the road, there are legal remedies available to seek contribution from the other landowners who did not pay into the fund, but have benefitted nonetheless from the road repairs.

Some mention has been made of Federal funding to address improvements to rural roads, e.g., the High Risk Rural Road program. Those programs, however, are only triggered by unusually high fatalities on particular roads, which is not the case here.

It goes without saying that the revenue-share program exists as a mechanism by which private roads can be brought into the state highway system, and a copy of the County's procedures for applying for that program is attached hereto as Exhibit B. That is only an option if the road is to be brought up to VDOT standards; and, VDOT will only fund 50% of the construction costs necessary to reconstruct the road to such standards.⁵

There are several possible funding options specified in the Code of Virginia to provide for the other 50% share, and historically, the County of Bedford has required the landowners to come up with the 50% stake themselves. This can be accomplished several ways. One such method is for the County to front the 50% share from the general fund, and then recoup that expenditure through a special assessment levied upon the subject landowners. There are several issues with this approach as concerns Old Firetrail Road, however. First, 75% or of the landowners whose properties actually abut Old Firetrail Road must consent to the special assessment. While landowners not on Old Firetrail Road could opt into the special assessment, they cannot be required to do so, or be counted towards the 75%. In addition, any such special assessment must not exceed one-third of the tax-assessed value for any particular property. From the information provided to date, there is not sufficient interest among the landowners along Old Firetrail Road to meet the 75% threshold, and there are likely properties that do not have a high enough tax assessment to fall within the one-third cap on the assessment.

Another method is for the County to accept contributions from one or more landowners to meet the 50% share, and then levy a special assessment on those who did not contribute, and reimburse the initial contributors accordingly. Again, the issue with this approach as concerns Old Firetrail Road is that there does not appear to be any single landowner, or group of landowners, willing or able to make the up-front investment to meet the 50% investment requirement.

⁵ Continued private maintenance of the road would undoubtedly be far less expensive, as the road could remain gravel, rather than be surface treated.

Finally, the County could (1) use existing general-fund dollars to pay the 50% revenue share to facilitate the reconstruction of Old Firetrail Road or pay 100% of the total cost; (2) issue bonds (i.e., incur debt) to fund 100% of such costs; (3) use a part of its state construction allocation to cover such costs, to the exclusion of other County highway projects; or (4) begin to budget for the future improvement of similar roads with the County bearing 100% financial responsibility . The advisability of any of those options does not call for a legal analysis, but rather one of public policy and fiscal management; and, would also depend on VDOT's willingness to accept responsibility for maintenance and upkeep.

DECLARATION OF RESERVATIONS AND
RESTRICTIVE COVENANTS

THIS DECLARATION OF RESERVATIONS AND RESTRICTIVE COVENANTS made and entered into this the 28th day of April, 1999, by Cedar Creek Land Co., a Virginia Limited Liability Company, hereinafter referred to as the "Grantor".

R E C I T A L S:

1. Cedar Creek Land Co., a Virginia corporation, is the Owner/Developer of the Lakewood Subdivision, Lakewood Subdivision, Section IV, Block B; Parcels No. 1 through 5, inclusive, 14 and 15, inclusive, and 21 through 28, inclusive. The plat of Lakewood Subdivision, Block B, is of record in the Clerk's Office, Circuit Court of Bedford County, Virginia, in Plat Book 37, at Pages 388 thru 392.

2. The Owner/Developer intends that all the Parcels of Lakewood Subdivision, Section IV, Block B, Parcels No. 1 through 5, inclusive, 14 and 15, inclusive, and 21 through 28 inclusive, shall be subject to the Declaration of Reservations and Restrictive Covenants of the Lakewood Subdivision as hereinafter set forth.

NOW, THEREFORE, Cedar Creek Land Co., L.L.C., a Virginia corporation, hereby declares that all Parcels of Section IV, Block B, as more fully shown on that certain plat of survey prepared by Berkley Howell & Assoc., P.C., and recorded in the Clerk's Office, Circuit Court of Bedford County, Virginia in Plat

Book 37, at Pages 388 thru 392 shall be held, transferred, sold, conveyed, owned and occupied subject to the covenants, restrictions, easements and charges as hereinafter set forth as follows:

The Reservations and Restrictive Covenants in this document are to run with the land hereinafter described and shall be binding upon all parties and all persons owning parcels (sometimes referred to as lots) in Lakewood, as below-described, or claiming under them. Furthermore, Arbor Vista Development Corp., and M. L. Carter Realty Trust, their successors and assigns shall expressly benefit by said Restrictions and may enforce them as a covenant appurtenant unto their respective lands, provided that they are seized and possessed in fee simple absolute of land contiguous to Lakewood Subdivision.

Invalidation of any of the following Reservations and Restrictive Covenants by judgment of Court Order shall not affect any of the other provisions, which shall remain in full force and effect. The failure to enforce any of the Reservations and Restrictive Covenants at the time of violation shall not be deemed a waiver to enforce the Covenant.

1. PROPERTIES SUBJECT: The Restrictive Covenants are applicable to the following described property located in Lakes Magisterial District, Bedford County, Virginia except as otherwise provided herein:

Parcels No. 1 through 5, inclusive, 14 and 15, inclusive, and 21 through 28, inclusive, as more fully shown on that certain plat prepared by Berkley Howell & Assoc., P.C., entitled "Plat of Survey of Section IV

Block B, Lakewood Subdivision", dated December 21, 1998, and recorded in the Clerk's Office, Circuit Court of Bedford County, Virginia, in Plat Book 37, at Pages 388 thru 392.

2. PROPERTY OWNERS ASSOCIATION AND ROAD MAINTENANCE:

The Grantor has constructed the present roadways which serve and benefit the subject properties, and shall not be further responsible to any parcel owner or to "The Lakewood Property Owners Association, Section IV" for any future upkeep, maintenance or improvement of the roadways after responsibility for same has ended as provided hereinbelow.

The Lakewood Property Owners Association, Section Four, hereinafter referred to as "The Association", is hereby formed for the purpose of maintaining and repairing the roadways located in the subdivision in good and safe condition. All owners of parcels in the Lakewood Subdivision, Section IV, Block B, its successors and assigns, and which use the roadways of Section IV, shall by acceptance of the deed of conveyance be a member(s), thereof, and subject to the below described road maintenance requirement, as well as the remaining provisions, conditions, restrictions and covenants contained herein.

- a. All members of The Association shall be entitled to one (1) vote. Vote may be made in person or by proxy.
- b. The roadways and rights-of-ways constructed throughout the subdivision are for the use in common with the Grantor, the Grantor's predecessor in title, the M. L. Carter Realty

Trust, and Arbor Vista Development Corp., the parcel owners and their respective heirs, successors and assigns.

This dedication shall not inhibit convenient use of the Subdivision's roadways.

- c. (1) The Association shall maintain the rights-of-ways and roads within the Subdivision, and for such purpose shall assess each member, an amount not to exceed an aggregate of \$100.00 annually for ownership of three parcels or less, and further \$100.00 assessments for additional increments of up to three. The road fee shall be \$100.00 per year until otherwise established by the Association, said road maintenance fee due at closing and on the anniversary date of the purchase of the effected Lot(s) thereafter. The Grantor shall be exempt from any and all assessments, at such time as the Association assumes responsibility for the maintenance of said roads.
- (2) All maintenance and upkeep of the private road serving the Lakewood parcels, including snow removal, will be done on the basis of competitive bids and only as required on demand of one or more the property owners

serviced by the private road. No work will be undertaken where projected costs will exceed \$500.00 until the consent of 75% of the membership obtained.

- (3) Upkeep and maintenance will be limited to that required by virtue of erosion and ordinary wear to the road surface unless otherwise agreed to by all members.
- d. Any assessments, together with interest and costs, shall be a lien upon the parcel against which such assessment is made. The Association shall have the right to file among the land records of Bedford County, Virginia, a duly executed and acknowledged Notice of Lien with respect to each parcel and its owner for which any assessment remains unpaid. However, said assessment shall be a lien whether or not filed in said courthouse.
- e. All property owners (exclusive of the Grantor) agree to attend a meeting of property owners, convened after at least one month's written notice, at which time at least two (2) individuals, but not more than five (5), will be elected directors of the Association by a majority of the votes cast in person or by proxy, to handle the affairs of the Association, including road maintenance. Said directors shall have a

term of one (1) year each, and new directors will be elected on an annual basis thereafter pursuant to a duly held vote of the membership in the Association.

- f. If it is decided by the Association that the annual maintenance fee needs to be increased or decreased, it shall be done only by an affirmative vote consisting of 75% of the membership.
- g. Parcel owners shall be responsible for repair of any damages to roads in the Subdivision, resulting from the willful or negligent acts of himself or his agents, servants or employees; and to perform any such repairs at his/her own expense within a reasonable time, but not in excess of thirty (30) days after written notice of such damages shall have been sent to parcel owner(s) from the Grantor or the Association.
- h. All property owners agree to install driveways and drainage pipe to the state or county department of highways and transportation specifications.

3. EASEMENTS:

- a. The Grantor herein, its successors and/or assigns shall retain a perpetual non-exclusive easement over all right(s) of ways and

easements. The parcels in this project are subject to utility easements for the purpose of bringing public service to the land being developed. They are also subject to road and drainage easements as shown on the recorded plat.

- b. Grantor reserves unto itself, successors and assigns, the right to erect and maintain all utility and electric lines, with the right of ingress or egress for the purpose of installing or maintaining same.

4. RESERVATIONS:

- a. Grantor expressly reserves the right to impose violation of any of the provisions hereof, it shall be lawful for any other person or persons in owning any real estate situated in equity against the person or persons in violation or threatening to violate any such covenant, either to prevent or enjoin such violation or to recover damages or other dues for such violation.
- b. Grantor reserves the right to amend, delete, or add to these covenants and restrictions as necessary provided any such amendments or deletion or addition shall not unreasonably interfere with the use and enjoyment of the land by the respective owner.

5. PARCEL AND AREA USE: No mobile homes shall be allowed on said property, unless underpinned or placed on a permanent foundation. Any such mobile home as permitted shall be no more than ten (10) years old when placed on any location within the property and must be in a condition similar or equivalent to a newly manufactured model. Each parcel shall be used for those purposes allowed under federal, state and local regulations or ordinances, including but not limited to agriculture, residential and permitted recreational use.

6. COMMERCIAL USE AND NUISANCE:

- a. No noxious or offensive trade activity shall be carried on or upon any tract, nor shall anything be done thereon which may cause annoyance or nuisance to the neighborhood; further, activities on or the use of any said parcel shall not pollute, cause waste to, or adversely affect other parcel owners enjoyment of their property. Commercial uses are not permitted. All parcel owners shall maintain their parcel(s) free of litter and debris.
- b. No unlicensed, abandoned or unusable motor vehicle of any sort shall be allowed, left or abandoned on any said parcel.

7. AGRICULTURE: No swine or fowl shall be raised or bred on any parcel. Household pets such as dogs and cats, and also horses and cattle, may be kept provided they are not bred or

maintained for commercial purposes, and not otherwise violate this Declaration or any Municipal/County Ordinance or Regulation. Any domestic pet shall not be permitted to run at large so as to become an annoyance to the subdivision.

8. CONFLICT: In the event of any conflict between the provisions of this document and the Plat drawings and/or specifications, the constraints reflected in the Plat shall govern. Any conflict existing within the provisions of this instrument itself shall result in application of the most restrictive provision herein. Any structures and/or improvements located upon any parcel and pre-existing the recordation of this instrument are exempt from any restrictions in this instrument which would otherwise result in a violation thereof. However, alteration or replacement of any part of said structures and/or the addition of improvements, aside from routine maintenance, requires compliance with these provisions in their entirety.

WITNESS the following signatures and seals:

CEDAR CREEK LAND CO., a Virginia
Limited Liability Company

by: Joseph D. Maillet
JOSEPH D. MAILLET, a Manager

by: Charles M. Bullock
CHARLES M. BULLOCK, a Manager

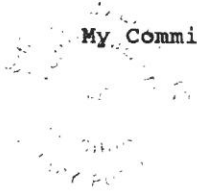
COMMONWEALTH OF VIRGINIA
TO-WIT:
COUNTY OF CAMPBELL

I, Shelly Walker Ore, a Notary Public of the county and
state aforesaid, do hereby certify that on this day personally
appeared before me Joseph D. Maillet and Charles M. Bullock,
Managers of Cedar Creek Land Co., L.L.C., a Virginia Limited
Liability Company, signers and sealers of the foregoing and
hereto annexed Deed and acknowledged the due execution of the
same for the purposes therein set forth.

Witness my hand and notarial seal, this the 7th day of
May, 1999.

Shelly Walker Ore
Notary Public

My Commission Expires: December 31, 1999



VSLF	145	<u>1.00</u>	
State Tax	039	_____	VIRGINIA: In the Clerk's Office of
County Tax	213	_____	the Circuit Court of Bedford County,
City Tax	214	_____	Va. <u>May 14</u> , 1999. This writing
County Transfer	212	_____	with _____
City Transfer	222	_____	was admitted to record at <u>1:24</u>
Clerk's Fee	301	<u>18.00</u>	o'clock <u>P</u> M and the Tax imposed by
State Tax	038	_____	Section 58.1-802 of the Code in the
County Tax	220	_____	amount of \$ _____ has been paid.
City Tax	223	_____	
Tech. Fund	106	<u>3.00</u>	TESTE: CAROL W. BLACK, CLERK
Postage	420	_____	
Refund	515	_____	By: <u>Virginia J. Davenport</u>
Miscellaneous	442	_____	Deputy Clerk

Total		<u>22.00</u>	

Return to:

Prescott Day

Envelope enclosed:

Mail:

**QUALIFICATIONS AND PROCEDURES FOR PARTICIPATION IN THE
REVENUE SHARING ROAD FUND**

QUALIFICATIONS

All subdivisions/property owners who are submitting applications for the Revenue Sharing Road Fund Program must meet the following qualifications:

1. Each road must be designated on a plat that was recorded in the Clerk's Office before July 1, 1990.
2. The plat must show that a 50' right-of-way was designated as a public road. This is commonly referred to as a Class B County Road.

In subdivisions where the property owner's lot lines come to the middle of the road, the roads are ineligible for this program.

3. Each mile of the road to be upgraded must contain 3 occupied houses.
4. Each request will be reviewed in order to determine if any speculative interest has been retained by the original developer, developers or successor developers. Speculative interest is defined as any property owner who owns more than one lot within the subdivision that abuts the road to be upgraded and each lot does not contain a structure. The Code of Virginia defines these property owners as successor developers who have speculative interest in the subdivision.

PROCEDURES

1. Subdivision association submits to the County a complete application. Each application should include the following:
 - Complete name of organization that is authorized to conduct business on behalf of the interested parties;
 - Name of one or two contact persons;
 - Copy of recorded plat for the subdivision detailing property lines and proper easements (Plat is available in the Clerk of Circuit Court's Office in the Courthouse);
 - Each road or portion thereof that is to be upgraded must be shown in red;
 - Total number of the miles of road to be included, to the nearest 1/10th.
2. County reviews plat to determine if the project is eligible based on the qualifications listed above and to determine if any property owner has speculative interest. The contact person for each subdivision will be notified as to the County's determination. If the project is not eligible, the subdivision association will be provided with the reason(s). If the project is eligible, the determination of the amount of speculative interest, if any, that is involved will be provided to the subdivision.
3. Subdivision association verifies to the County that all property lines and easements (particularly drainage easements) have been staked appropriately. Any costs associated with the moving of utilities will be the responsibility of the subdivision/property owner. Revenue sharing funds can not be used for this purpose.

4. Subdivision association submits a signed escrow agreement with Bedford County and a check in the amount of \$2,000.00 made payable to Treasurer, Bedford County. A copy of the escrow agreement to be executed is enclosed. This money will be deposited into an interest bearing account in the name of the subdivision association that is responsible for the project.
5. County schedules the Highway Department to conduct a site visit of the subdivision. Property owners will be notified in advance of the visit.
6. Highway Department prepares cost estimates for the project. Estimates are submitted to and reviewed by the County. County provides subdivision association with a copy. The Highway Department and the County will be available to answer any questions or to provide additional information if necessary.
7. Subdivision association notifies County of their intent. If the association does not wish to proceed, the amount of money in their escrow account less any funds already expended (ex. survey, moving of utilities, etc.) will be remitted to the association. If their intent is to continue on with the project, the association must submit their 50% share plus any speculative interest that may have already been determined by the County. The project will not continue until the County has the entire share deposited in the escrow account.
8. The County notifies the Highway Department that the funds have been deposited.
9. Highway Department prepares project design.
10. The Highway Department schedules project to go out to bid and requests the non-state share of the funding for the project.
11. The Highway Department notifies County and Property association of the dates that the project will be advertised and the date the bids are due.
12. The Highway Department notifies County and property owners of the low bid once the bids have been received and verified.
13. Property owners must notify County of their intent. If the property owners choose to continue and their share does not increase due to the bid amount, the County will notify the Highway Department. If the property owners' share increases, the additional money needed to complete their share must be remitted to the County before the Highway Department can award the contract to the lowest responsible bidder. If the property owners decide not to continue, the same circumstances as in #7 apply. In addition, the property owners will need to reimburse the Highway Department for any expenses incurred during the design and bid process.
14. County notifies the Highway Department of property owners' intent.
15. Highway Department awards the contract.

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