

John Beall



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mary Sue Terry
Attorney General

H. Lane Kneeder
Chief Deputy Attorney General

R. Claire Guthrie
Deputy Attorney General
Human & Natural Resources Division

Gail Starling Marshall
Deputy Attorney General
Judicial Affairs Division

Walter A. McFarlane
Deputy Attorney General
Finance & Transportation Division

Stephen D. Rosenthal
Deputy Attorney General
Criminal Law Enforcement Division

Deborah Love-Bryant
Executive Assistant

September 9, 1987

Mr. Anthony O'Connell
2337 South 13th Street
St. Louis, Missouri 63104

Dear Mr. O'Connell:

In response to our telephone conversation about discontinuance of maintenance of public roads in Virginia, particularly in Fairfax County, I enclose copies of sections from Title 33.1 of the Code of Virginia. The operative sections are §§ 33.1-150 to 33.1-155, § 33.1-147 referenced in § 33.1-150 and § 33.1-69 and § 33.1-229.

Sincerely,

A handwritten signature in cursive script that reads "John J. Beall, Jr.".

John J. Beall, Jr.
Senior Assistant Attorney General

56-c4/JJB/263

cc: Edward J. White, Esq.

Enclosure

ANTHONY M. O'CONNELL
CONSERVATOR
2337 SOUTH THIRTEENTH STREET
ST. LOUIS, MISSOURI 63104

(314) 776-4926

September 10, 1987



Mr. Edward J. White
118 South Royal Street
Alexandria, Virginia 22314

Mr. John Baell
101 North Eighth Street
Richmond, Virginia 23219

Dear Mr. White and Mr. Baell:

I feel very fortunate for you, Mr. White, to have given me access to Mr. Baell, and for you, Mr. Baell, to have given me your unique insight and copies of the pertinent statutes.

Thank you both for your valuable help yesterday.

Sincerely,

Anthony O'Connell
Anthony O'Connell



COMMONWEALTH of VIRGINIA

James S. Gilmore, III
Attorney General

Office of the Attorney General
Richmond 23219

900 East Main Street
Richmond, Virginia 23219
804 - 786 - 2071
804 - 371 - 8946 TDD

September 20, 1996

Mr. Anthony M. O'Connell
216 Governor's Lane, Apt. 12
Harrisonburg, Virginia 22801

Re: Route 220; Highland County

Dear Mr. O'Connell:

You have apparently written to a number of legislators, state and federal, about the problem that you have in Highland County due to the Department of Highway's acquisition of property in 1935 that has left the Jackson River between your property and Route 220. Senator Robb and Delegate Flora Crittenden forwarded your letters to the Attorney General asking that he write you directly. The Attorney General asked me to respond. I have responded directly for the Attorney General to State Senators Potts, Stolle and Delegate Forbes.

You told Delegate Crittenden that your "goal is to obtain a binding completion date for the bridge by the Highway Department or a clear opinion that the landowner is responsible." You asked Senator Robb "for an independent ruling that leaves no room for ambiguity or confusion".

Section 33.1-199 was enacted in 1938, three years after the Department of Highways purchased the property from your predecessor in title. As a consequence that statute has no relevance to your issue.

The Department of Highways purchased the property that has led to the situation that you face in 1935. Any breach of that bargain with your predecessor in title would have had to be litigated long before now.

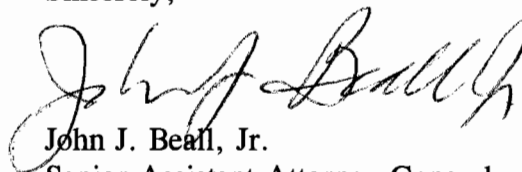
With respect to § 33.1-197, the Department of Transportation, successor to the Department of Highways, routinely grants entrance permits, subject to being satisfied that the safety of the users of such entrance and those on the main highway will not be compromised by the placement and utilization of the entrance. Construction of the entrance, however, is the responsibility of the landowner, including such items as curb and gutter or deceleration or acceleration lanes. The Attorney General in April 1975 was asked for an opinion whether a

Mr. Anthony M. O'Connell
September 20, 1996
Page 2

landowner can be required by the Department of Highways "to construct at his own expense, a turn-off or deceleration lane on the public right of way." It was the opinion of the Attorney General, then and it still is today, that the inherent police power that the Department possesses would permit the Department to require the landowner to construct those features. I enclose a copy of that opinion to then Delegate D. French Slaughter. While that opinion directly addressed § 33.1-198 (commercial entrances) the reasoning is equally applicable to § 33.1-197 (private entrances). Thus, the Department of Transportation has no responsibility under the entrance permit statutes to construct the bridge that apparently is necessary to reach Route 220 from your property.

I hope that this is responsive to your inquiries to Senator Robb and Delegate Crittenden.

Sincerely,



John J. Beall, Jr.
Senior Assistant Attorney General

56/157 (jjb: Itoconel.rob)

c: The Honorable Charles S. Robb
The Honorable Flora D. Crittenden



COMMONWEALTH of VIRGINIA

James S. Gilmore, III
Attorney General

Office of the Attorney General
Richmond 23219

September 20, 1996

900 East Main Street
Richmond, Virginia 23219
804 - 786 - 2071
804 - 371 - 8946 TDD

The Honorable H. Russell Potts, Jr.
Member, Senate of Virginia
118 South Cameron Street
Winchester, Virginia 22601

*Re: Anthony M. O'Connell
Virginia Department of Transportation
Route 220; Highland County*

Dear Senator Potts:

The Attorney General asked me to respond to your recent letter you sent containing a packet of material that Mr. O'Connell, your constituent, had sent to you.

Mr. O'Connell has sent a similar package of material to a number of legislators, state and federal. I enclose the response that the Department of Transportation gave to Senator Trumbo. I also enclose a copy of the response that Senator Kevin Miller gave to Mr. O'Connell.

I have reviewed the material that you furnished. Mr. O'Connell's initial approach to the Department of Transportation sought to invoke § 33.1-199 in order to have the entrance that the Department acquired in 1935 replaced. That statute did not come into existence until 1938, so that statute cannot be used to require the Department to replace the entrance.

It appears, as well, that the Department and Mr. O'Connell's predecessor in title reached an agreement in 1935, which would bind all of Mr. Hiner's successors in title. With the passage of time any breach of that agreement made with Mr. Hiner cannot be enforced legally.

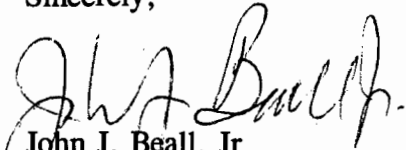
The second approach to the Department involves Mr. O'Connell seeking an entrance permit. The Department routinely grants those permits. The permittees then do the work required by the permit. I share with you a copy of an Official Opinion dated April 8, 1975 that opines that a landowner can be required to pay for items that are installed on the right-of-way pertaining to an entrance. With respect to working in or crossing the Jackson River, which the Commonwealth owns, the Department of Transportation has no jurisdiction over it, so

The Honorable H. Russell Potts, Jr.
September 20, 1996
Page 2

Mr. O'Connell was advised to deal with the Virginia Marine Resource Commission and the Corps of Engineers. It appears to me that the Department of Transportation has handled this matter in accordance with its policies and the law.

In sum, the Attorney General is not in a position to assist Mr. O'Connell. I hope that this is responsive to your letter.

Sincerely,



John J. Beall, Jr.
Senior Assistant Attorney General

56/157 (jjb: ltoconel.pot)

Enclosures



COMMONWEALTH of VIRGINIA

James S. Gllmore, III
Attorney General

Office of the Attorney General
Richmond 23219

September 20, 1996

900 East Main Street
Richmond, Virginia 23219
804 - 786 - 2071
804 - 371 - 8946 TDD

The Honorable Kenneth W. Stolle
Member, Senate of Virginia
780 Lynnhaven Parkway, Suite 200
Virginia Beach, Virginia 23452

Re: Anthony M. O'Connell

Dear Senator Stolle:

The Attorney General asked me to respond to your recent letter in this matter. I do not believe an official ruling is necessary.

I have reviewed the material that you furnished. Mr. O'Connell's initial approach to the Department of Transportation sought to invoke § 33.1-199 in order to have the entrance that the Department acquired in 1935 replaced. That statute did not come into existence until 1938, so that statute cannot be used to require the Department to replace the entrance.

It appears, as well, that the Department and Mr. O'Connell's predecessor in title reached an agreement in 1935, which would bind all of Mr. Hiner's successors in title. With the passage of time any breach of that agreement made with Mr. Hiner cannot be enforced legally.

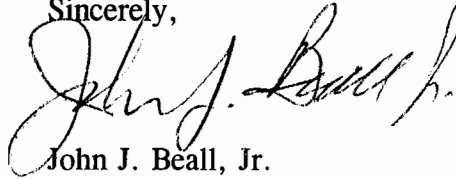
The second approach to the Department involves Mr. O'Connell seeking an entrance permit. The Department routinely grants those permits. The permittees then do the work required by the permit. I share with you a copy of an Official Opinion dated April 8, 1975 that opines that a landowner can be required to pay for items that are installed on the right-of-way pertaining to an entrance. With respect to working in or crossing the Jackson River, which the Commonwealth owns, the Department of Transportation has no jurisdiction over it, so Mr. O'Connell was advised to deal with the Virginia Marine Resource Commission and the Corps of Engineers. It appears to me that the Department of Transportation has handled this matter in accordance with its policies and the law.

With respect to any problem obtaining the entrance permit, the Department's Land Use Permit Manual provides a mechanism to appeal the Resident Engineer's denial of the permit, which the material that you furnished does not indicate has happened yet.

There is no requirement that the Department pay for the work done on the Department's right of way to construct a private entrance. Routinely, such permits are granted and when the entrance is constructed, curb and gutter are required as well as additional paving. I share with you an Official Opinion of the Attorney General dated April 8, 1975 which speaks to the issue of requiring persons to implement the entrance standards at his own expense. The opinion's conclusion is that such a requirement constitutes a valid exercise of the police power.

I hope that this is responsive to your letter.

Sincerely,

A handwritten signature in cursive script, appearing to read "John J. Beall, Jr.", written in dark ink.

John J. Beall, Jr.
Senior Assistant Attorney General

56/157 (jjb: ltoconel.sto)



COMMONWEALTH of VIRGINIA

James S. Gilmore, III
Attorney General

Office of the Attorney General
Richmond 23219

900 East Main Street
Richmond, Virginia 23219
804 - 786 - 2071
804 - 371 - 8946 TDD

September 23, 1996

The Honorable Jay Katzen
Member, House of Delegates
Post Office Box 3004
Warrenton, Virginia 22186

RE: Anthony M. O'Connell
Virginia Department of Transportation
Route 220; Highland County

Dear Delegate Katzen:

The Attorney General asked me to respond to your recent letter regarding this matter.

Mr. O'Connell has sent a similar package of material to a number of legislators, state and federal. I enclose the response that the Department of Transportation gave to Senator Trumbo. I also enclose a copy of the response that Senator Kevin Miller gave to Mr. O'Connell.

I have reviewed the material that you furnished. Mr. O'Connell's initial approach to the Department of Transportation sought to invoke § 33.1-199 in order to have the entrance that the Department acquired in 1935 replaced. That statute did not come into existence until 1938, so that statute cannot be used to require the Department to replace the entrance.

It appears, as well, that the Department and Mr. O'Connell's predecessor in title reached an agreement in 1935, which would bind all of Mr. Hiner's successors in title. With the passage of time any action on that agreement made with Mr. Hiner by the Department cannot be maintained.

The second approach to the Department involves Mr. O'Connell seeking an entrance permit. The Department routinely grants those permits. The permittees then do the work required by the permit. I share with you a copy of an Official Opinion dated April 8, 1975 that opines that a landowner can be required to pay for items that are installed on the right-of-way pertaining to an entrance. With respect to working in or crossing the Jackson River, which the Commonwealth owns, the Department of Transportation has no jurisdiction over it, so Mr. O'Connell was advised to deal with the Virginia Marine Resource Commission and the Corps

The Honorable Jay Katzen
September 23, 1996
Page 2

of Engineers. It appears to me that the Department of Transportation has handled this matter in accordance with its policies and the law.

In sum, the Attorney General is not in a position to assist Mr. O'Connell. I hope that this is responsive to your letter.

Sincerely,

A handwritten signature in cursive script, appearing to read "John J. Beall, Jr.", written in black ink.

John J. Beall, Jr.
Senior Assistant Attorney General

56/157 (jjb: katzen)

Enclosures

Start of Mr. Beall's enclosures

I believe the following six pages were included with Mr. Beall's letters of September 20, 1996, to Senator Potts and to Senator Stolle, and in his letter of September 23, 1996, to Delegate Katzen, as enclosures. To reduce file size and to try to keep it simple, they are only included once.

COMMONWEALTH OF VIRGINIA



KEVIN G. MILLER
26TH SENATORIAL DISTRICT
CITY OF HARRISONBURG, CULPEPER, PAGE,
AND RAPPAHANNOCK COUNTIES AND PART OF
FAUQUIER, ROCKINGHAM, AND STAFFORD COUNTIES
2 SOUTH MAIN STREET
SUITE 608
HARRISONBURG, VIRGINIA 22801

COMMITTEE ASSIGNMENTS
PRIVILEGES AND ELECTIONS, CHAIRMAN
FINANCE
TRANSPORTATION
RULES

SENATE

September 3, 1996

Mr. Anthony M. O'Connell
216 Governors Lane, Apt. 12
Harrisonburg, VA 22801

Dear Mr. O'Connell:

Thank you for the letter and package of documents relating to your property adjacent to Highway 220.

In reviewing your inquiries and the responses you received, it certainly appears to me that the responses by VDOT officials have been made in a prompt and courteous manner. It also appears that the responses have been thorough and accurate.

I am not a lawyer, but even if I were, I do not feel it would be appropriate for an individual legislator to take a position on an issue such as this.

Also, I can find no specific point of law at issue upon which a question to the attorney general could be propounded in a request for an official ruling.

Confident that the final resolution of your efforts will be fair to you, and to all Virginia Taxpayers, I am

Sincerely yours,

Kevin G. Miller
State Senator

Copy to: Honorable Robert E. Martinez, Secretary of Transportation
David R. Gehr, Commissioner - VDOT



COMMONWEALTH of VIRGINIA

DEPARTMENT OF TRANSPORTATION
1401 EAST BROAD STREET
RICHMOND, 23219

DAVID R. GEHR
COMMISSIONER

September 5, 1996

Route 220 - Highland County

The Honorable Malfourd W. Trumbo
Member, Virginia Senate
P. O. Box 44
Fincastle, Virginia 24090

Bo
Dear Senator ~~Trumbo~~:

This is in response to your recent letter concerning Mr. Anthony M. O'Connell's request for assistance in obtaining an entrance to his property located in Highland County. From the information submitted by Mr. O'Connell, you are aware that the Virginia Department of Transportation (VDOT) has thoroughly reviewed this issue in order to resolve the situation.

Originally, VDOT acquired property from the Hiner family in 1935 for the construction of improvements to what is now known as Route 220—including the relocation of the river in this area. Subsequently, Mr. O'Connell acquired the remaining property in 1989 and has focused on the entrance that was affected by VDOT's construction and acquisition in 1935. The Hiners were compensated for the total impact to the property—including payment for damages to their remaining lands.

VDOT has determined that this agency does not have any legal or moral obligation to construct an entrance as requested by Mr. O'Connell. This has been explained to him through numerous letters—as has VDOT's willingness to issue a land use permit (in accordance with our policy) so that he can construct a private driveway.

Hopefully, this information will be helpful in responding to your constituent.

Very truly yours,

A handwritten signature in cursive script that reads "Dave".

David R. Gehr
Commissioner

Commonwealth Transportation Board the cost of such oiling. This section does apply to any highway which is a part of the State Highway System or the secondary system of state highways. (Code 1950, § 33-112; 1970, c. 322.)

§ 33.1-197. Connections over shoulders of highways for intersecting private roads. — The Commonwealth Transportation Commissioner shall permit, at places where private roads leading to and from private homes intersect improved highways, suitable connections from such points of intersection, over and across the shoulders and unimproved parts of such highways to the paved or otherwise improved parts thereof, so as to provide for the users of such private roads safe and convenient means of ingress and egress with motor vehicles to and from the paved or otherwise improved parts of such highways. (Code 1950, § 33-116; 1970, c. 322.)

§ 33.1-198. Connections over shoulders of highways for intersecting commercial establishment entrances. — The Commonwealth Transportation Commissioner shall permit, at places where commercial establishment entrances are desired to intersect improved highways, suitable connections from such points of intersection over and across the shoulders and unimproved parts of such highways to the paved or otherwise improved parts thereof, so as to provide for the users of such entrances safe and convenient means of ingress and egress with motor vehicles to and from the paved or otherwise improved parts of such highways; provided, however, that any person desiring such an entrance shall first be required to obtain a permit therefor from the Commonwealth Transportation Commissioner and shall provide the entrance at his expense and construct or have constructed the same, including such safety structures as are required by the Commonwealth Transportation Commissioner, pursuant to "Minimum Standards of Entrances to State Highways" on file in the Department of Transportation, Richmond, Virginia, and in the office of the Highway District Engineer and Resident Engineers.

All commercial entrances whether or not constructed under this section shall be maintained by the owner of the premises at all times in a manner satisfactory to the Commonwealth Transportation Commissioner.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than \$5 nor more than \$100 for each offense. Following a conviction and fifteen days for correction, each day during which the violation continues shall constitute a separate and distinct offense and be punishable as such. Such person shall be civilly liable to the Commonwealth for actual damage sustained by the Commonwealth by reason of his wrongful act. (Code 1950, § 33-116.1; 1956, c. 91; 1966, c. 378; 1970, c. 322.)

§ 33.1-199. Replacing entrances destroyed by Commissioner. — The Commonwealth Transportation Commissioner shall replace any entrance destroyed by him in the repair or construction of his highways and replace any such entrance and leave any such entrance in the same condition as it was prior to such repair or improvement. (Code 1950, § 33-117; 1970, c. 322.)

§ 33.1-200. Paying for damages sustained to personal property by reason of work projects, etc. — The Commonwealth Transportation Commissioner is authorized and empowered, in his discretion, to pay and settle claims and demands against the Commonwealth arising as a result of damages sustained to personal property by reason of work projects or the operation of state-owned or operated equipment when engaged in the construction, reconstruction or maintenance of the State Highway System, unless said claims or

OPINIONS
OF THE
ATTORNEY GENERAL
AND
REPORT
TO THE
GOVERNOR OF VIRGINIA



From July 1, 1974 to June 30, 1975

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supplies
Richmond
1975

present ones do not. I believe that these applicable sections need no explanation.

In closing, I reiterate that your inquiry involves a factual determination which must be made within the legal parameters set out above.

HIGHWAYS—Commercial Entrances—Authority of Highway Commissioner to require landowner to construct right turn lane at own expense.

April 8, 1975

THE HONORABLE D. FRENCH SLAUGHTER, JR.
Member, House of Delegates

This is in response to your recent inquiry as to whether the Highway Department can require a landowner to construct, at his own expense, a turn-off or deceleration lane on the public right of way. As I understand it, the situation prompting your request involves an entrance from a highway onto private commercial property. You further indicate that §§ 33.1-12(3) and 33.1-198 of the Code of Virginia (1950), as amended, have been cited as authority for such requirement.

The general rule is that an abutting property owner has the right of ingress and egress to a public street, limited by the police power of the State to reasonably control the use of streets so as to promote the public health, safety, and welfare. *Highway Commissioner v. Easley*, 215 Va. 197, 207 S.E.2d 870 (1974); *Azalea Corp. v. City of Richmond*, 201 Va. 636, 112 S.E.2d 862 (1960); *Wood v. City of Richmond*, 148 Va. 400, 138 S.E. 560 (1927). Under § 33.1-198 of the Code, the State Highway and Transportation Commissioner has been delegated the responsibility to issue permits for connections over shoulders of highways for intersecting commercial establishment entrances. That section provides:

“ . . . any person desiring such an entrance shall first be required to obtain a permit therefor from the State Highway Commissioner and shall provide the entrance at his expense and construct or have constructed the same, including such safety structures as are required by the State Highway Commissioner, pursuant to ‘Minimum Standards of Entrances to State Highways’ . . . ”

The manual of standards, as incorporated in this statute, has been duly adopted by the State Highway and Transportation Commission, pursuant to § 33.1-12(3) of the Code and provides at pages 14 and 15 that:

“The highway engineer shall require a right turn lane at any commercial entrance if, upon consideration of the nature of the commercial establishment, its potential growth and/or change, its present and future anticipated traffic volume, and the present and anticipated traffic volume along the state highway(s) affected by the entrance, such lane is desirable and reasonably appropriate to prevent the reduction of safe traveling conditions or the reduction of the traffic or to prevent the backing up of vehicles along the main traveled way of a State highway.”

Pursuant to this authority the Highway and Transportation Commissioner may require construction of a right turn lane where a commercial entrance intersects with the right-of-way of a public highway.

Implicit in your inquiry is the additional question as to whether the legislature can constitutionally require a landowner to implement the minimum standards at his own expense. Although I can find no case law directly applicable to this point, it is my opinion that such requirement

constitutes a valid exercise of the police power. I base this conclusion upon a ruling of the Virginia Supreme Court in the analogous situation presented in *Sanitation Commission v. Craft*, 196 Va. 1140, 87 S.E.2d 153 (1955), in which it was held that the sanitation commission's requirement that a landowner connect with a public water system at his own expense was constitutional.

In summary, it is my opinion that § 33.1-12(3) of the Code provides adequate authority for the enactment of minimum standards and that § 33.1-198 of the Code is correctly interpreted to require that, in appropriate circumstances, a landowner construct a right turn lane for a commercial entrance at his own expense.

HIGHWAYS—County, Through Use of Its Police Powers, May Abandon or Impose Restrictions on Road to Protect Its Property.

BOARDS OF SUPERVISORS—Authority—Cannot on its own motion barricade road; Department of Highways has jurisdiction over secondary system of State Highways.

HIGHWAYS—Secondary System—Control, supervision and management vested in Department of Highways.

April 1, 1975

THE HONORABLE FORD C. QUILLEN
Member, House of Delegates

This is in response to your recent letter wherein you inquire as to whether a county can (1) on its own barricade a road that is within the Secondary System of State Highways or (2), in the alternative, request that the road be removed from the System and then barricaded.

According to your letter and additional information and plats supplied by Bruce K. Robinette, Director, Lenowisco Planning District Commission, the road in question, State Secondary Route 677, runs to an abandoned strip mine leased by Wise County as a sanitary landfill. The last house on this road is located about one-half mile from the terminus of the road. Beyond the house, the road serves two family cemeteries, the landfill in question, and land owned by a landowner who is in agreement with the road closure.

You further advise that at present the County of Wise is unable economically to control recurring malicious vandalism within the landfill area, and such vandalism is serious enough to endanger the continued operation of the landfill. The county represents that it could control the vandalism if it were to erect gates, with lights, across the road beyond the last house served thereby. These gates would be open from 8:00 a.m. until 4:30 p.m. on weekdays, and until 12:00 noon on Saturdays. The caretaker of the landfill would be available to admit those wanting to visit the cemeteries on weekends and holidays.

In answer to your first question, § 33.1-69 of the Code of Virginia (1950), as amended, vests the control, supervision, management and jurisdiction of the Secondary System of State Highways in the Department of Highways and Transportation, and specifically precludes governing bodies from exercising any of these powers. See Opinion to the Honorable W. Roy Smith, Member, House of Delegates, dated February 27, 1964, and found in Report of the Attorney General (1963-1964) at 9 and the case of *Ord v. Fugate*, 207 Va. 752, 152 S.E.2d 54 (1967). The Board of Supervisors, having no control over the road in question, may not, on its own motion, barricade the road.

In answer to your second question, as you are aware, the State Highway and Transportation Commission does not have the power to abandon secondary roads since this power is granted to the counties under § 33.1-151 of

End of Mr. Beall's enclosures