

# Private Roads

**The Legal Framework under State and County Law**

# What are VDOT standards?

- VDOT has issued thousands of pages of standards and specifications governing the construction of roads. Technically, these standards only apply to roads that are maintained by VDOT.
- However, Orange County has “opted in” to those standards by requiring (generally) that “[a]ny road serving more than two (2) lots shall be constructed to meet the current VDOT standards.” Orange Co. Subdiv. Ord. § 54-121(c).
- But there’s an exception to this “opt in”: **private roads.**

# What is a private road?

- *Private road:* “A road built to standards contained [in the Orange County Subdivision Ordinance] which is not approved to be maintained by VDOT as part of the state system of highways, and which is maintained by individual owners/users of the road at no public expense, and which is contained within an access easement or private right-of-way owned by an owners’ association.” Orange County Subdivision Ordinance § 54-6.
- A private road must serve 3 to 10 lots. (If it serves less than three lots, it’s a driveway. If it serves more than 10 lots, it’s a public road.)
- Although a private road does not need to conform to VDOT standards, it must still conform to simplified standards laid out in the Orange County Subdivision Ordinance § 54-121(c)(ii).
- A private road application cannot be approved when a private road needs to be extended in order for a subdivision to be approved, and there is not a private road maintenance agreement for 80% of existing lots + 100% of new lots.

# How the law on private roads has recently developed in Orange County

- On April 9, the Board of Supervisors adopted an amendment to Subdivision Ordinance § 54-121(c) that (generally) prohibits private roads.

# How the law on private roads has recently developed in Orange County

- What was the Legislative Intent?
  - The first (and most important) sentence of that amendment reads: “[I]t is the intent of the county that all roads be constructed to meet current VDOT standards” (emphasis mine).
  - At that Board of Supervisors’ public hearing on the amendment, Tom Lacheney explained that this amendment clarified the law as it already is; but he elucidated three purposes behind the legislation, based on guidance from the Board of Supervisors:

# How the law on private roads has recently developed in Orange County

- What was the Legislative Intent?
  1. To “put public roads to a higher standing because [the Board] said that’s what [it would] prefer.”
  2. To provide guidelines on “how [the Planning Commission can determine that a private road is appropriate.”
  3. To “add[] some basis to [the Planning Commission’s] . . . legal authority [to grant private roads].  
(enumeration mine)

# How the law on private roads has recently developed in Orange County

- Under this ordinance, the Board of Supervisors clarified that ***when you see an application for a private road, your general answer should be to deny the application.***
- Although the Board intended that “all roads be constructed to meet current VDOT standards,” the Board also seems to have understood that this rule could result in unanticipated consequences.
- That is why the Board left the Planning Commission with some power to grant waivers from this requirement.



## Before Granting a Waiver, Consider the Following:

1. First, the Planning Commission must make a determination that there are: “**unusual situations** concerning the construction of a road, or situations when strict adherence to the general regulations would result in **substantial injustice or hardship.**” Orange Co. Subdiv. Ord. § 54-121(c).
  - a. What are the *usual* situations in which a person wants to build a private road?
    - i. Affordability. “I can’t afford to build a road to VDOT standards because it’s too expensive.”
    - ii. Lack of ‘need.’ “We live in a remote, rural neighborhood, and telling us to build a fancy VDOT road is expecting too much out of us.”
    - iii. These are exactly the kinds of situations where the Board of Supervisors seems to have wanted applications to be denied.





# Before Granting a Waiver, Consider the Following:

## What is a “hardship”?

- To determine whether a “hardship” really exists, it is helpful to look at other places in the State Code where the word “hardship” is used. There are only two other places in state land use law where the word “hardship” is used:
  - In the variance context, a “BZA has authority to grant variances only to avoid an unconstitutional result”—specifically a violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution and the Virginia Bill of Rights. *Cochran v. Fairfax Cty. Bd. of Zoning Appeals*, 267 Va. 756, 764, 594 S.E.2d 571, 576 (2004). Thus, generally, there must be a “hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance.” Va. Code § 15.2-2309(2).



# Before Granting a Waiver, Consider the Following:

## What is a “hardship”?

- In the zoning context, the Zoning Administrator has power to grant special “hardship” waivers only when “such hardship is not shared generally by other properties in the same zoning district and the same vicinity.” Va. Code § 15.2-2286(A)(4).



## Before Granting a Waiver, Consider the Following:

### What do both of these things have in common?

- *There is something different about this land (not just the circumstances or preferences of the applicants) that makes it uniquely difficult or unjust to build a road to VDOT standards.*



## Before Granting a Waiver, Consider the Following:

2. **The Planning Commission needs to consider these six factors:** specifically, the impact of the proposed road and its resulting development related to:
  1. the future land use objectives of the Comprehensive Plan;
  2. the adequacy and safety of the state road network in the area;
  3. the availability of other means of accessing the property;
  4. sensitive environmental areas;
  5. the suitability of the land for utilities; and
  6. the proximity and arrangement of neighboring properties.

## But don't forget!

- These two criteria (hardship + 6 factors) are the analysis you need to go through.
- But there's a third thing you need to remember: go through the analysis, **on the record**.

"[T]he 'fairly debatable' standard cannot be established by a silent record. Unless the Board makes appropriate findings, supported by the record, or states appropriate conclusions supported by the record, or unless the record itself, taken as a whole, suffices to render the issue fairly debatable, probative evidence of unreasonableness adduced by a litigant attacking the Board's action will be deemed unrefuted." *Gladstone v. Board of Supervisors*, 38 Va. Cir. 309 (Fairfax 1996) (citing *Ames v. Town of Painter*, 239 Va. 343, 350 (1990)).

# Hypotheticals

# 1. John Q. Smith Sr. applies for a private road to be built from his property to his son's property, which is next-door. He says that it would create a substantial hardship for him to have to build a road to VDOT standards when he only wants to be able to drive next-door. Should the application be approved? Why or why not?

- Answer: No. This is a driveway, because it only serves two lots.

# Hypotheticals

- # 2. John Q. Smith Sr. has another son, whose house is also adjacent to his. He wants to build a road that connects all three lots. Should the application be approved?
  - Answer: No. There is nothing “unusual” about “the construction of a road,” and there is no “substantial injustice or hardship.”

# Hypotheticals

- Jane Doe owns one lot on a driveway; and her neighbor owns another lot on that driveway. She wants to subdivide her lot into two lots. However, the driveway runs right between a cliff and a rock face of a mountain. Her engineer informs her that, to convert the driveway into a road that meets VDOT standards, the rock face will need to be substantially removed using dynamite. That explosion would impose significant danger to her neighbor's home. Should the application be approved?