



# COMMONWEALTH of VIRGINIA

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Jason J. Ham, Esquire  
Town Attorney for the  
Town of New Market  
410 Neff Avenue  
Harrisonburg, Virginia 22801-3434

Dear Mr. Ham:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You inquire whether § 33.1-42 of the *Code of Virginia* permits the Town of New Market ("Town"), with the consent of the Commissioner of Highways, to maintain its own streets that are incorporated in the State Highway System and whether it allows the Town to be reimbursed up to the amount the Commissioner is authorized to expend on such street maintenance.

## Response

It is my opinion that § 33.1-42, by its express terms, allows the Town of New Market, with the consent of the Commissioner of Highways, to maintain those roads in the Town that are incorporated in the State Highway System, but not those that are part of the secondary system of state highways. It is further my opinion that the statute further allows the Town to be reimbursed up to the amount the Commissioner is authorized to expend for such street maintenance.

## Background

You relate that the Town is located at the crossroads of U.S. Routes 11 and 211 and Interstate 81 in Shenandoah County, Virginia. The population of the Town is approximately 2,150 as of the 2010 Census. Because of its location at the junction of these highways, the Town, for a town of its size, has an unusually high volume of vehicular traffic on both primary and secondary routes. You further relate that the Town is not eligible to maintain its own secondary street system under § 33.1-224 because its population is less than 3,500.<sup>1</sup> In light of the traffic volume and a desire to exercise autonomy, the Town

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<sup>1</sup> VA. CODE ANN. § 33.1-224 (2011) provides that

Whenever any incorporated town has a population of more than 3,500 inhabitants, all the roads, streets, causeways, bridges, landings and wharves in such town theretofore incorporated within the secondary system of state highways shall be eliminated from such system and the control and jurisdiction over them shall be vested in the local authorities.

would like to maintain its own streets and be reimbursed by the Commissioner of Highways up to the amount he is authorized to expend on such street maintenance pursuant to § 33.1-42.

### Applicable Law and Discussion

“When construing a statute, our primary objective is ‘to ascertain and give effect to legislative intent,’ as expressed by the language used in the statute.”<sup>2</sup> Thus, we interpret statutes according to their plain meaning,<sup>3</sup> for “when the legislature has used words of a clear and definite meaning, the courts cannot place on them a construction that amounts to holding that the legislature did not intend what it actually has expressed.”<sup>4</sup>

Under certain circumstances, § 33.1-42 permits the roads and streets of incorporated towns of fewer than 3,500 inhabitants to be incorporated into the State Highway System.<sup>5</sup> For those roads and streets that have been incorporated, § 33.1-42 expressly provides that “[t]he Commissioner of Highways may in his discretion permit such town or city to maintain any such road or street, or portion thereof . . . .” Accordingly, provided the Commissioner consents, a town may maintain roads and streets within its jurisdiction that have been incorporated into the State Highway System.

In addition, § 33.1-42 expressly confers upon the Commissioner the discretion to “reimburse [the] town up to such amount as he is authorized to expend on the maintenance of such road or street, or portion thereof.”<sup>6</sup> Again, the clear language of the statute establishes that a town may be reimbursed up to the authorized amount upon assuming responsibility for the maintenance of roadways within the State Highway System. Nonetheless, such reimbursement is subject to the sound discretion of the Commissioner.

Therefore, provided the Commissioner is agreeable with the Town’s request to maintain its roads or streets and exercises his discretion in the Town’s favor, § 33.1-42 permits the Town to maintain its roads or streets, or portions thereof, that are incorporated in the State Highway System, and to receive the reimbursement provided for under the statute. The Commissioner is not required to consent; thus, any request to maintain such roads or streets or subsequent request for reimbursement may be denied under this provision.<sup>7</sup>

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<sup>2</sup> *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011)) (further citation and internal quotation marks omitted).

<sup>3</sup> *See Davenport v. Little-Bowser*, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

<sup>4</sup> *Hubbard v. Henrico Ltd. P’shp*, 255 Va. 335, 339, 497 S.E.2d 335, 337 (1998).

<sup>5</sup> The statute specifically provides that

The Commonwealth Transportation Board may, by and with the consent of the Governor and the governing body of any incorporated town or city having a population of 3,500 inhabitants or less, incorporate in the State Highway System such streets and roads or portions thereof in such incorporated town or city as may in its judgment be best for the handling of traffic through such town or city from or to any road in the State Highway System.

<sup>6</sup> VA. CODE ANN. § 33.1-42 (2011).

<sup>7</sup> *See Masters v. Hart*, 189 Va. 969, 979, 55 S.E.2d 205, 2210 (1949) (“unless it is manifest that the purpose of the legislature was to use the word ‘may’ in the sense of ‘shall’ or ‘must’ then ‘may’ shall be given its ordinary meaning – permission, importing discretion.”).

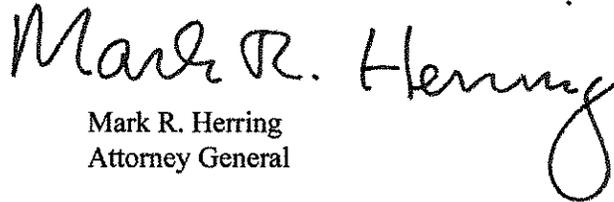
I must note further that the express language of § 33.1-42 limits the availability of this arrangement to those portions of roads and streets that have been incorporated into the “State Highway System.”<sup>8</sup> The Code expressly excludes from this system the roads and streets in the secondary system of state highways.<sup>9</sup> Therefore, to the extent a street or road in a town is part of the secondary system of state highways, or any other system, rather than the primary “State Highway System” the provisions of § 33.1-42 do not apply,<sup>10</sup> and the Town may not seek to maintain such a road or street pursuant to the statute.<sup>11</sup>

### Conclusion

Accordingly, it is my opinion that § 33.1-42 of the *Code of Virginia* does permit the Town of New Market, with the consent of the Commissioner of Highways, to maintain such roads and streets that are incorporated as primary roads in the State Highway System, and the statute authorizes the Commissioner, in his discretion, to reimburse the Town for such maintenance, up to the amount the Commissioner is authorized to expend for such maintenance.

With kindest regards, I am

Very truly yours,

  
Mark R. Herring  
Attorney General

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<sup>8</sup> The roads and streets constituting the “State Highway System” are also referred to as “The Primary System of State Highways.” *See* § 33.1-25 (2011).

<sup>9</sup> Section 33.1-25. Section 33.1-67 provides that the secondary system of state highways “shall consist of all of the public roads . . . in the several counties of the Commonwealth not included in the State Highway System, including such roads and community roads leading to and from public school buildings, streets, causeways, bridges, landings and wharves in incorporated towns having 3,500 inhabitants or less . . . as constitute connecting links between roads in the secondary system in the several counties and between roads in the secondary system and roads in the primary system of the state highways, not, however, to exceed two miles in any one town.” Section 33.1-72.1 permits, under specific circumstances, certain streets, not already part of the secondary state system, to be taken into the secondary system of state highways. In addition, the CTB is authorized to transfer, as it deems proper, roads from the primary to the secondary state system, § 33.1-35 (2011), and vice versa, § 33.1-34 (2011).

<sup>10</sup> The maxim ‘*expressio unius est exclusio alterius*’ “provides that mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute.” *GEICO v. Hall*, 260 Va. 349, 355, 533 S.E.2d 615, 617 (2000) (quoting *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992)). Thus, when the legislature has created an express grant of authority, that authority exists only to the extent specifically granted. *See, e.g.*, 2010 Op. Va. Att’y Gen. 10, 11 & n.2.

<sup>11</sup> Irrespective of §§ 33.1-42 and 33.1-224, to the extent any particular road within the Town does not “constitute[] a part of any system of state highways,” the Town has broad authority to maintain such a road. *See* VA. CODE ANN. §§ 15.2-2000 (2012) & 15.2-2001 (2012) (“Every locality may lay out, open, extend, widen, narrow, establish or change the grade of, close, construct, pave, curb, gutter, plant and maintain shade trees on, improve, maintain, repair, clean and light: streets, limited access highways, express highways, roads, alleys, bridges, viaducts, subways and underpasses.”).