



Town Council Workshop

Monday, July 29, 2019 at 2:00 pm

CALL TO ORDER, PRAYER & PLEDGE

ROLL CALL

WORKSHOP ACTION

1. Discuss Methods to Develop Undersized/Non-conforming ROW

Attachments:

- Agenda Report Number 1 (Road_WS_pkg.pdf)

ADJOURNMENT

Contact: Debby Franklin (townclerk@townofmalabar.org 321-727-7764)

TOWN OF MALABAR AGENDA ITEM REPORT

AGENDA ITEM NO: 1
Meeting Date: July 29, 2019

Prepared By: Debby Franklin, C.M.C., Town Clerk/Treasurer

SUBJECT: Discuss Methods to Develop Undersized/Non-conforming ROW

BACKGROUND/HISTORY:

This was requested by Staff after the recent issues brought to Council regarding how to direct applicants desiring to develop on parcels located on ROW that do not meet the minimum standards in the Malabar Code, Chapter 13 or for other unique situations that exist.

The most common is when only one side of a large parcel dedicated ROW to the Town for future development into roadways. The original plat of the Indian River Fruit and Trucks and the Indian River Land Company only dedicated ROW on the section (1 mile) and half-section (1.2 mile) lines. Later SD like Melbourne Heights platted out small parcels that have ROW on all four sides of each parcel in the SD. None of the other older platted subdivisions have ROW dedicated larger than 44 feet wide. When the regulations were developed in the 1970's for roads, these older SD were not addressed.

The majority of Malabar south of Malabar Road has local streets (identified as Lanes) that only go half way south or north from the main east-west ROW known as Malabar Road, Hall Road, Atz Road, Old Mission Road, Reese Road, Benjamin Road and Booth Road.

Over time, homes have been developed on lanes that were not improved first, for a variety of reasons. Some were built as accessory structures and then evolved into primary structures (think 20 acres at Atz Road and Walker Lane – accessory structure is now a principal home with 1300 foot “driveway” and no ROW.

There is no one person or issue to point to for the cause of this. Since incorporation, Malabar has relied on the good intentions and volunteerism of its residents to do the engineering, drainage, road maintenance and inspections. Most of the early Building Officials were part-time only. There was a period in the late 1970's when the State provided funding for professional planners and we utilized that to create some of the early land use regulations.

Malabar approved the minimum roadway width in 1987 in the Comprehensive Plan and then developed the corresponding Land Development regulations that matched. That requires for local streets (lanes) be 60 feet wide

Minor collector roads be 70 feet wide (Atz, Hall)

Major collector roads be 100 feet wide (Corey, Weber, Old Mission)

Arterials roads be 150 feet wide (Babcock, Hwy 1, Malabar Road)

Malabar needs some additional language in the Code that will provide guidance for applicants desiring to develop parcels located on non-compliant ROWs.

I will be showing examples of some of the ROW challenges in six (6) of the sections south of Malabar Road.

ATTACHMENTS:

Transportation Element of Comp Plan regarding ROW Standards
Exhibits "A" – "B-6" for Road improvement requirements for Malabar
Ordinance 2016-02 eliminating the "variance" procedure for roads
Grant-Valkaria Ord 2008-01 providing for "road agreements"
Memo dated 4/16/19 from Atty Bohne on case law regarding ROW dedications
Email dated 7/12/19 from Atty Bohne responding to staff questions
Accepted/Improved Road List
Section maps for 6 square miles south of Malabar Road
Overall map index showing location of Sections of Malabar
Pictures to be shown at Workshop of specific examples
Historical documents related to these issues

ACTION OPTIONS:

Discussion and Direction to Staff

TRANSPORTATION ELEMENT GOALS, OBJECTIVES, AND POLICIES

§2-1 *Transportation Goals, Objectives, and Implementing Policies.*

This section stipulates goals, objectives, and implementing policies for the Transportation Element pursuant to 163.3177(6)(b), F.S., and § 9J-5.007(3), F.A.C.

GOAL 2.1: EFFICIENT MULTIMODAL TRANSPORTATION SYSTEM

Plan for a safe, convenient, and efficient motorized and non-motorized transportation system which shall be available for existing and anticipated future users of the system.

2-1.1 Objective:

Safe, Convenient, and Efficient Transportation System


Establish a safe, convenient, and efficient motorized and non-motorized transportation system through development and implementation of level of service (LOS) standards.



2-1.1.1 Policy:

Level of Service Standards

The Town hereby adopts that following peak hour LOS standards for non FIHS and non-SIS facilities:

- 
- a. U.S. 1: LOS Standard D (FDOT facility)
 - b. Malabar Road (SR 514): LOS Standard D (FDOT facility)
 - c. Babcock Road (SR 507): LOS Standard D (FDOT facility)
 - d. Collector Roadways: LOS Standard D
 - e. Paved Local Roadways: LOS Standard D
 - f. Unpaved Local Roadways: LOS Standard D

2-1.1.2 Policy:


Level of Service Standards

The Town hereby adopts the following peak hour LOS standards for FIHS and SIS facilities within the Town:

- a. I-95: LOS Standard C (FIHS and SIS facility)

2-1.1.3 Policy:

Master Plan for Road Paving



By 2010 the Town shall prepare and adopt a plan and schedule for paving local streets. The plan shall establish mechanisms for funding road paving projects and the schedule for implementation shall designate relative priorities for needed road improvements and shall establish a time frame for such improvements.

2-1.1.4 Policy:

Criteria for Evaluating Proposed Roadway Improvement. Future roadway improvement proposal shall be evaluated and assigned a relative priority based on specific criteria below cited:

- a. Whether the project is needed to protect public health and safety, to fulfill the Town's legal commitment to provide facilities and services, to preserve or achieve full use of existing facilities; or
- b. Whether the project increases efficiency of use of existing facilities, prevents or reduces future improvement cost, provides service to developed areas lacking full service, or promotes in-fill development.

2-1.1.5 Policy:

Review of Proposed Developments. The Town shall review all proposed development for consistency with adopted LOS standards. No development shall be approved that is projected to generate a traffic volume which would decrease the existing LOS below the adopted standard.

2-1.1.6 Policy:

Assessments in New Developments. The Town shall continue to implement the impact fee ordinance which assesses new developments an equitable pro data share of the costs to provide roadway improvements to serve the development.

2-1.1.7 Policy:

Adequate Facilities Ordinance. The Town shall continue to implement adequate facilities requirement as included in the Land Development Code. The Town shall prepare annual report on the adequacy of public facilities. The adequate facilities ordinance mandates that future applications for development shall include a written evaluation of the inputs of the anticipated development on the traffic system level of service. Prior to the issuance of a building permit, the Town shall render a finding that the applicant has provided assurance that the proposed development shall be serviced with adequate roadway capacity including any traffic system improvements required to maintain adequate levels of service. The developers application shall include written assurances that any required improvements shall be in place concurrent with the impacts of the development (i.e., by the time a certificate of occupancy is granted by the Town.)

2-1.1.8 Policy:

On-Site Transportation Improvements. The Town shall continue to implement land development regulations which require new developments to provide safe and convenient on-site traffic flow considering motorized and non-motorized vehicle parking and internal circulation needs.

2-1.1.9 Policy:

Access Management. The Town shall continue to implement land development regulations for:

- Controlling connections and access points of driveways and roadways to existing roadways;
- Connectivity through cross access easements among all new development and redevelopment projects;
- Preventing conflicts between vehicular, pedestrian and rail traffic; and
- Providing a traffic circulation system which is designed to accommodate the demands of emergency service delivery systems.

2-1.1.10 Policy:

Monitor Intersections with High Crash Rates. The Town shall continue to coordinate with Brevard County and law enforcement agencies to monitor the intersections with high crash rate and implement improvements to reduce accidents.

2-1.1.11 Policy:

Intelligent Transportation System (ITS). The Town shall incorporate Intelligent Transportation System (ITS) techniques to improve traffic operations and reduce delays at intersections.

2-1.1.12 Policy:

Adequate Signage and Traffic Controls. The Town shall continue to provide proper signage and adequate traffic control on Town roadways for efficient and safe traffic circulation.

2-1.1.13 Policy:

Transit Service. The Town shall coordinate with Brevard County, Space Coast Areas Transit (SCAT) service and MPO to expand bus service to the Town of Malabar.

2-1.1.14 Policy:

Transportation Demand Management Techniques. The Town shall support alternate modes of transportation and encourage transportation demand management techniques including ridesharing, van pool, and parking strategies.

2-1.1.15 Policy:

Public Involvement. The Town shall encourage public involvement in transportation planning and transportation improvement projects.

2-1.1.16 Policy:

Establishment of Passenger Rail Line. The Town shall support Florida Department of Transportation efforts towards the establishment of passenger rail line along the Florida East Coast (FEC) corridor.

2-1.2 Objective:

Right-of-Way Acquisition. The Town shall protect existing and future right-of-way from building encroachment. By 2010, additional transportation system right-of-

Policy 2-1.2.2: Standards of Future Road R/W Acquisition. The Town hereby adopts the following minimum standards for road rights-of-way:

- a. Arterial Roadways: 150' R/W
- b. Major Collector Streets: 100' R/W
- c. Minor Collector Streets: 70' R/W
- d. Local Streets: 60' R/W (if swale drainage)
50' R/W (if curb and gutter)

SECTION II: COLLECTOR STREET SYSTEM

(1) The Collector Street System sub-section of the Traffic Circulation System Inventory in the Traffic Circulation Data Inventory and Analysis shall be amended to read as follows:

Collector Street System

The following streets have been classified as collectors pursuant to §9J-5.007(a)(b), F.A.C., with their location and linkages shown on the Existing Traffic Circulation System Map:

Major Collectors

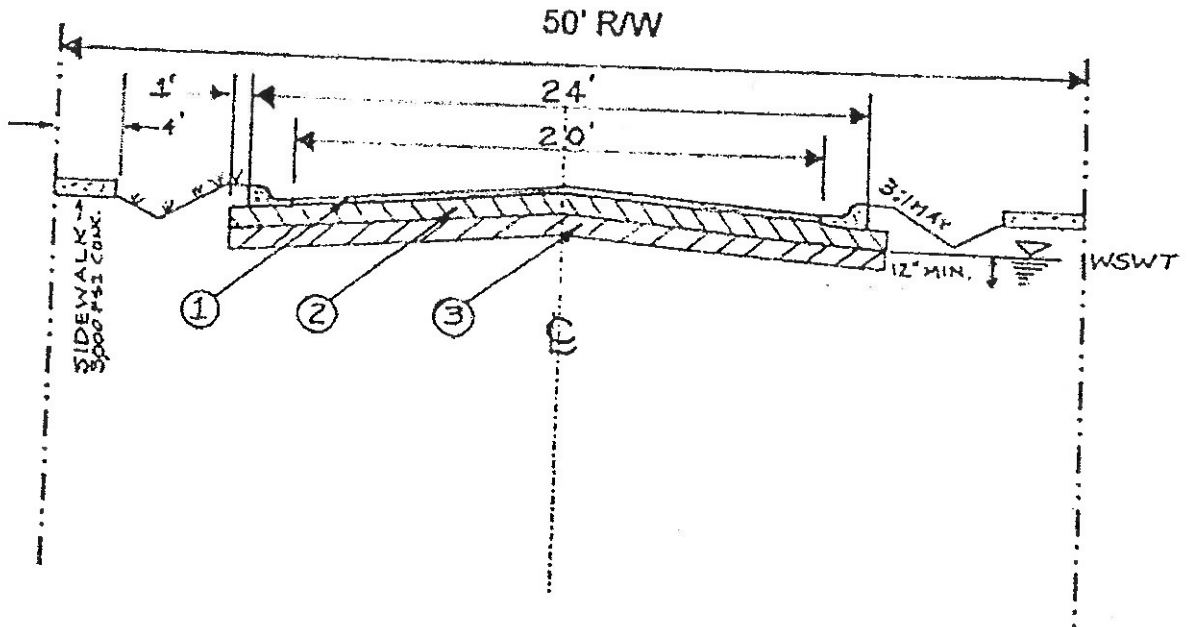
- (1) Weber Road. Weber Road is located in the western one-third of the Town, and runs south from Malabar Road to the southern boundary of the Town.
- (2) Corey Road. Corey Road is centrally located within Malabar and runs parallel to Weber Road. Corey Road is the most heavily travelled collector street within the Town because of its central location. Corey Road runs south from the Country Cove subdivision to the southern Town Limit.
- (3) Valkaria Road. Valkaria Road is a county owned major collector street. Only a small segment of Valkaria Road near Goat Creek is actually within the Town. Residents in the Southeast portions of the Town utilize Valkaria Road to reach S.R. 507 and U.S. #1.
- (4) Marie Street Corridor. The Marie Street corridor, located in the eastern half of the Town, generally extends from a point approximately 970 feet north of Johnston Avenue south across Malabar Road (SR 514) to a point approximately 850 feet past Hall Road. From this point the right-of-way extends to the south Town limits.
- (5) Jordan Boulevard. Jordan Boulevard is located in the southeast section of the Town, and runs west from US 1 to just east of the right-of-way for Marie Street. Traffic on this roadway is generated by the Harris Governmental Systems facility.

Minor Collectors

- (1) Atz Road. Atz Road is located in the central part of the Town, and is south of both Hall and Malabar Roads. Atz Road runs from the western Town limit to just west of the right-of-way for Marie Street.
- (2) Hall Road. Hall Road is first east-west roadway south of Malabar Road, and is parallel to Atz and Malabar Roads. Hall Road runs from Marie Street on the east to the Town limits on the west.
- (3) Old Mission Road. Old Mission Road begins at Babcock Street and runs east to Interstate 95 and stops, and then begins again on the east side of the Interstate and runs east to the right-of-way for Marie Street. Old Mission Road is located south of Malabar Road.
- (4) Benjamin (Reese) Road. Benjamin (Reese) Road forms the southern limit of the Town. The section of the roadway which runs east from Interstate 95 to Weber Road is referred to as Reese Road. Benjamin Road is the part that runs east from Weber Road to the right-of-way for Marie Street.

ROAD CLASSIFICATIONS

EXHIBIT "A"
TYPICAL PAVED ROAD SECTION WITH CURBS FOR 50' WIDE R/W



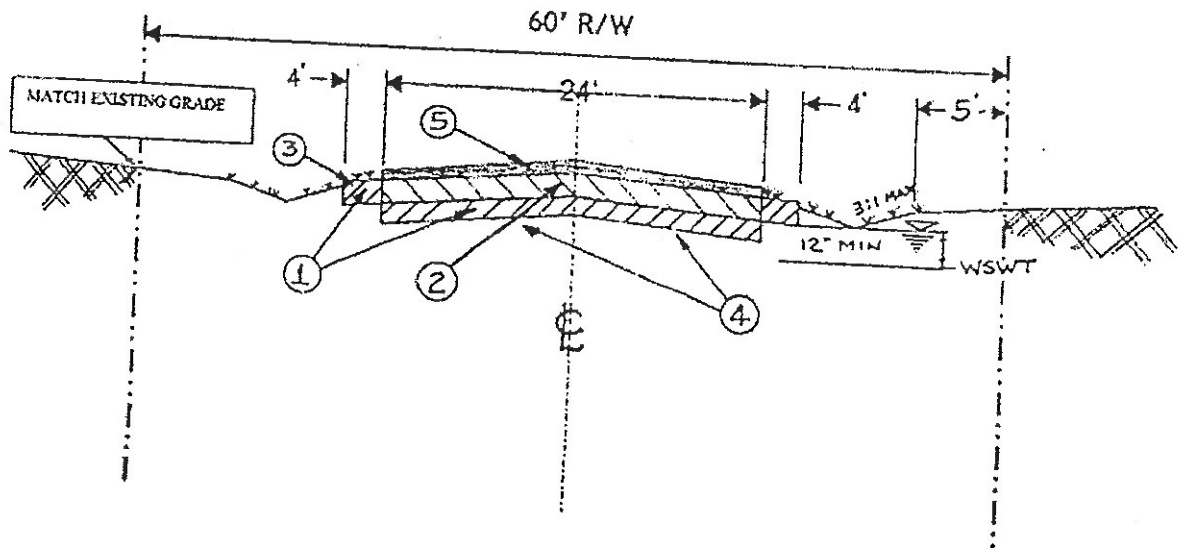
CLEAR & GRUB 50' R/W EXCEPT FOR SPECIMEN TREES TO BE LEFT OUTSIDE SWALES

1. CAP ROAD W/MINIMUM 1.5" THICK TYPE S-1 OR TYPE III ASPHALTIC CONCRETE SURFACE (MINIMUM 1500 PSI MARSHALL)
2. BASE MINIMUM 6" THICK COMPLYING WITH FDOT "BASE THICKNESS AND OPTION CODES"
3. STABILIZED 8" THICK SUB-BASE COMPACTED TO 98% OF MAXIMUM DENSITY PER AASHTO T-180 WITH MINIMUM LBR = 40
4. STABILIZED SHOULDERS BOTH SIDES AND SOD ADJACENT TO THE PAVEMENT MINIMUM 2' WIDE
5. CURB & GUTTER TO BE 3,000 PSI MIN. CONCRETE
6. DRAWING IS NOT TO SCALE

Exhibit A

EXHIBIT "B-1"

TYPICAL PAVED ROAD SECTION FOR 60' WIDE R/W



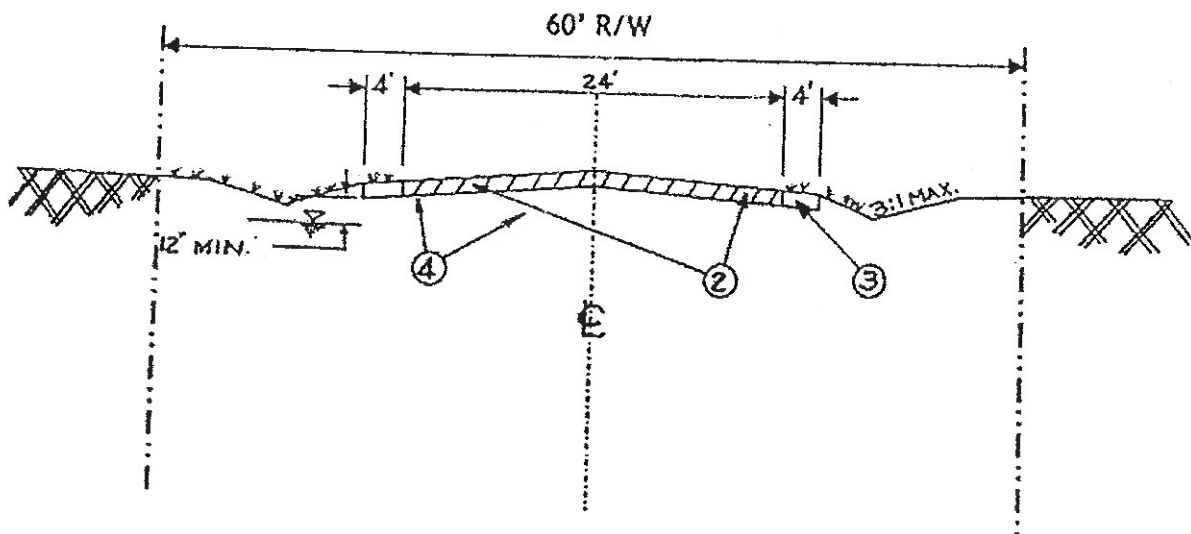
CLEAR & GRUB 60' R/W EXCEPT FOR SPECIMEN TREES TO BE LEFT OUTSIDE SWALES. DISPOSE OF ALL DEBRIS OFF SITE.

1. STABILIZED & MECHANICALLY MIXED 8" THICK ROAD SUB-BASE COMPACTED TO 98% OF MAXIMUM DENSITY PER AASHTO T-180 WITH MINIMUM LBR = 40
2. BASE MINIMUM 6" THICKNESS (COMPLY WITH FDOT BASE THICKNESS AND OPTION CODES)
3. STABILIZED SHOULDERS BOTH SIDES AND SOD ADJACENT TO THE PAYEMENT MINIMUM 2' WIDE AND ON SWALE BANKS. SWALE SIDE SLOPES MAX 3:1.
4. SUITABLE SOILS FREE OF ORGANICS. COMPACT TO 98% DENSITY PER AASHTO T-180
5. CAP ROAD W/MINIMUM 1.5" THICK TYPE S-1 OR TYPE III ASPHALTIC CONCRETE SURFACE (MIN. 1500 PSI MARSHALL).
5. DRAWING IS NOT TO SCALE

Exhibit B-1

EXHIBIT "B-2"

TYPICAL UN-PAVED ROAD SECTION FOR 60' WIDE R/W

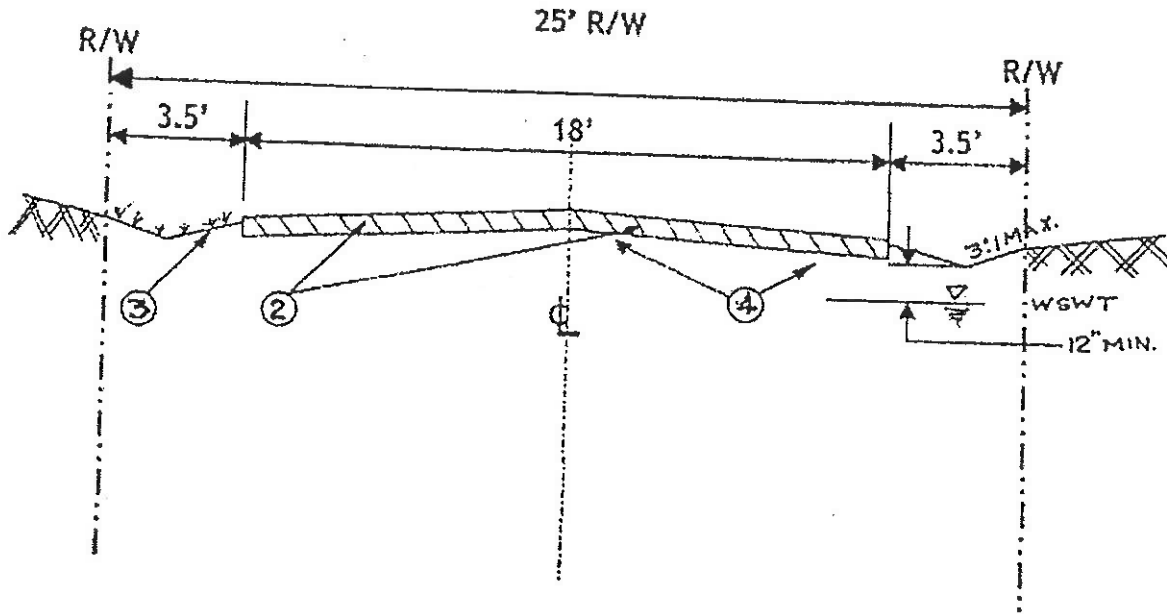


1. CLEAR & GRUB 60' R/W EXCEPT FOR SPECIMEN TREES TO BE LEFT OUTSIDE SWALES. DISPOSE OF ALL DEBRIS.
2. STABILIZED AND MECHANICALLY MIXED 8" THICK ROAD-BASE COMPACTED TO 98% OF MAXIMUM DENSITY PER AASHTO T-180 WITH MINIMUM LBR = 40
3. STABILIZED SHOULDERS BOTH SIDES. SOD ADJACENT TO THE PAVEMENT MINIMUM 2' WIDE AND ON SWALE SLOPES.
4. SUITABLE SOILS FREE OF ORGANICS. COMPACT TO 98% DENSITY PER AASHTO T-180
5. DRAWING IS NOT TO SCALE

Exhibit B-2

EXHIBIT "B-3"

TYPICAL UN-PAVED ROAD SECTION FOR 25' WIDE R/W



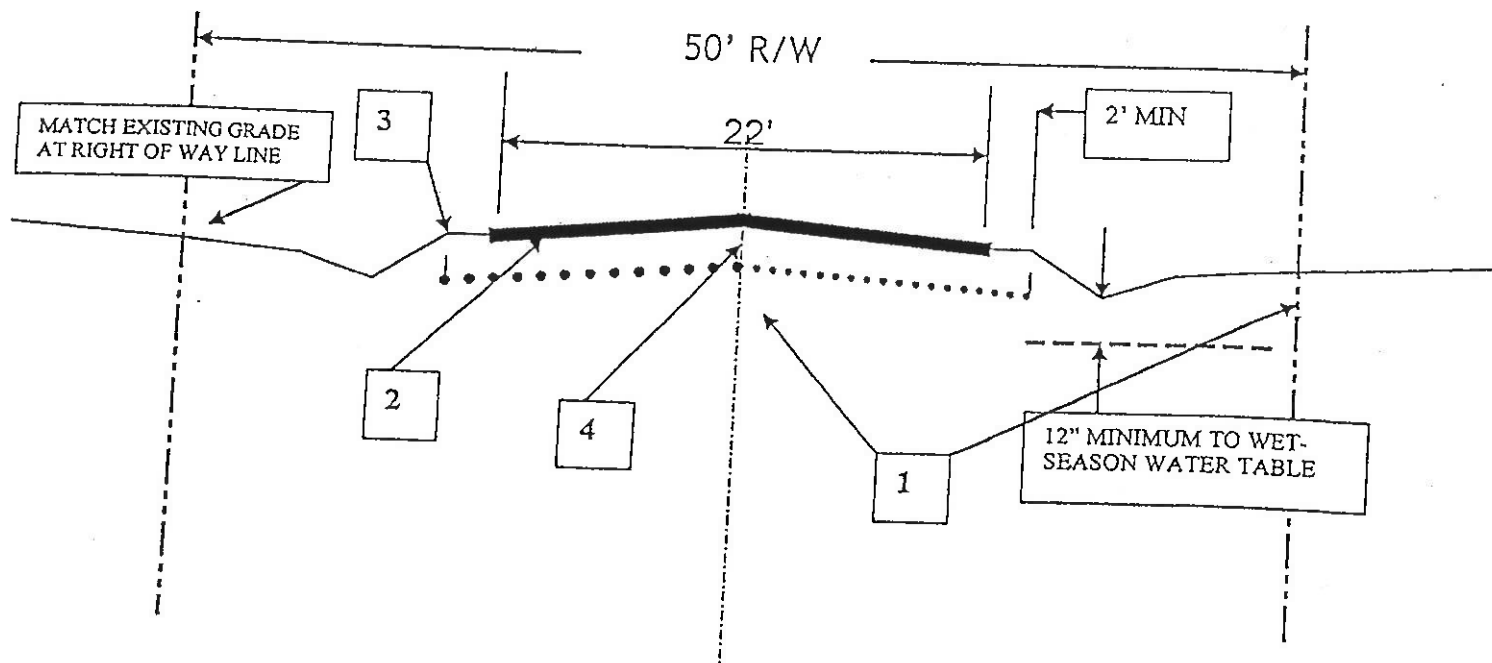
1. CLEAR & GRUB 25' R/W EXCEPT FOR SPECIMEN TREES TO BE LEFT OUTSIDE SWALES
2. STABILIZED & MECHANICALLY MIXED 8" THICK ROAD-BASE COMPACTED TO 98% OF MAXIMUM DENSITY PER AASHTO T-180 WITH MINIMUM LBR = 40
3. SOD ADJACENT TO THE PAVEMENT MINIMUM 2' WIDE AND ALONG SWALE SLOPES
4. SUITABLE SOILS FREE OF ORGANICS. COMPACT TO 98% DENSITY PER AASHTO T-180
5. DRAWING IS NOT TO SCALE

Exhibit B-3

(Res. No. 14-02, § 2, 8-19-02; Res. No. 12-04, § 1, 10-18-04)

EXHIBIT "B-4"

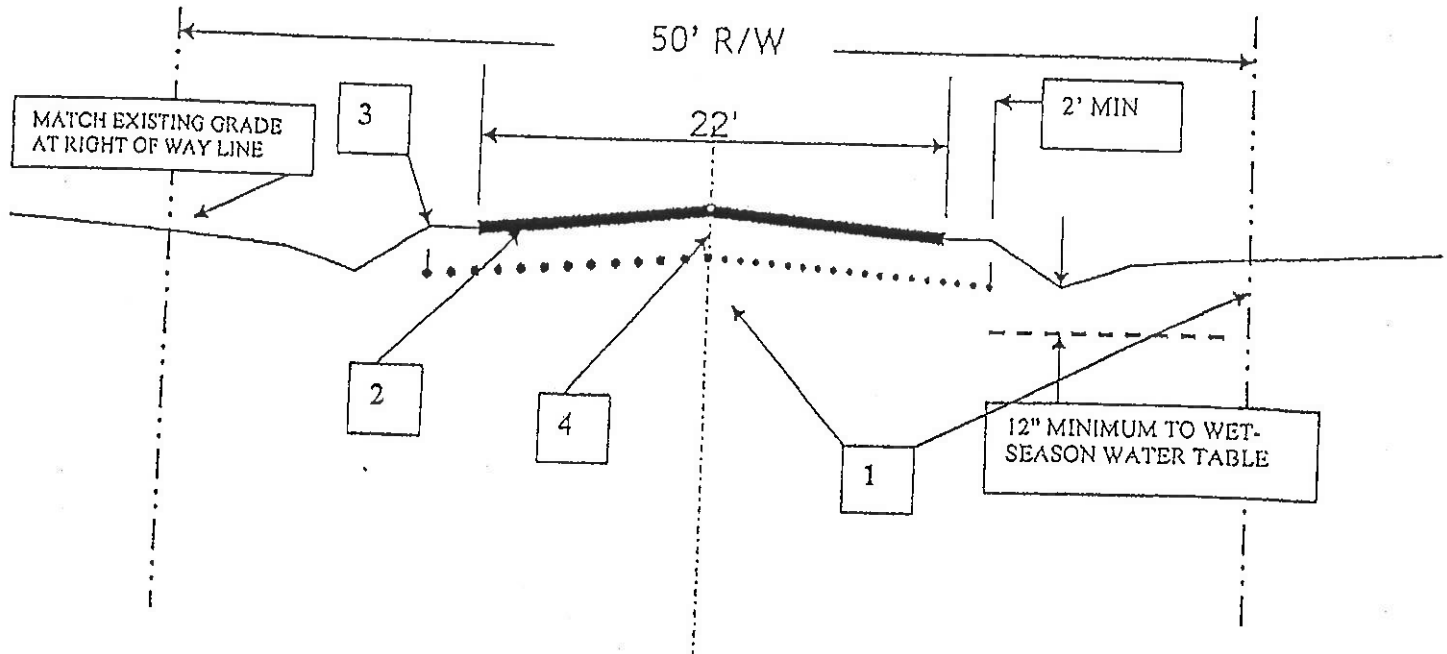
TYPICAL UNPAVED ROADWAY SECTION FOR 50' WIDE R/W



1. CLEAR & GRUB 50' R/W EXCEPT FOR SPECIMEN TREES TO BE LEFT OUTSIDE SWALES AND DISPOSE OF ALL DEBRIS OFF SITE.
2. STABILIZED & MECHANICALLY MIXED 8" MINIMUM THICKNESS ROAD BASE COMPACTED TO 98% OF MAXIMUM DENSITY PER AASHTO T-180 WITH MINIMUM LBR = 40. USE FDOT APPROVED MATERIALS OR LOCAL MATERIALS APPROVED BY TOWN ENGINEER.
3. STABILIZED SHOULDERS BOTH SIDES AND SOD ADJACENT TO THE PAVEMENT MINIMUM 2' WIDE AND ON SWALE BANKS. SWALE SIDE SLOPES MIN. 3:1. BACKSIDE OF SWALES MAY BE SEEDED.
4. SUITABLE SOILS FREE OF ORGANICS. COMPACT SOILS TO 98% DENSITY PER AASHTO T-180.
5. DRAWING IS NOT TO SCALE.

EXHIBIT "B-5"

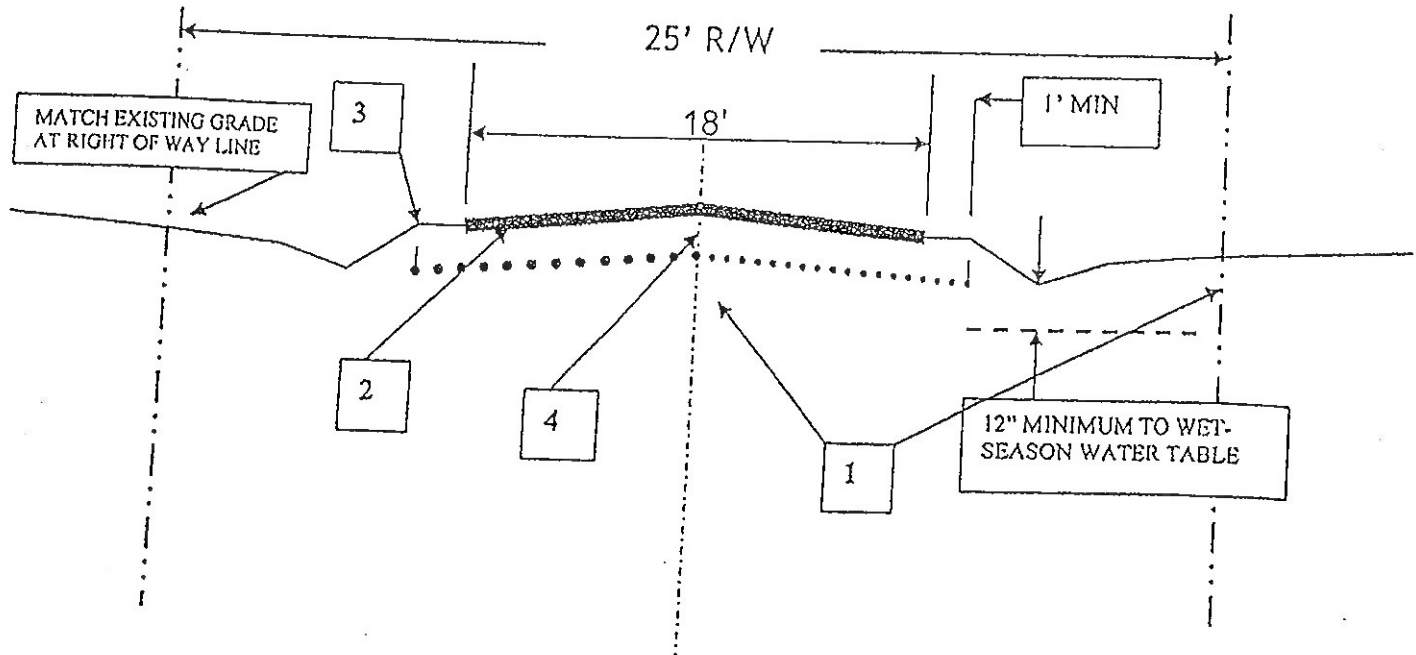
TYPICAL UNPAVED ROADWAY SECTION FOR 50' WIDE R/W



1. CLEAR & GRUB 50' R/W EXCEPT FOR SPECIMEN TREES TO BE LEFT OUTSIDE SWALES AND DISPOSE OF ALL DEBRIS OFF SITE.
2. STABILIZED & MECHANICALLY MIXED 8" MINIMUM THICKNESS ROAD BASE COMPACTED TO 98% OF MAXIMUM DENSITY PER AASHTO T-180 WITH MINIMUM LBR = 40. USE FDOT APPROVED MATERIALS OR LOCAL MATERIALS APPROVED BY TOWN ENGINEER.
3. STABILIZED SHOULDERS BOTH SIDES AND SOD ADJACENT TO THE TRAVELWAY ON EACH SIDE A MINIMUM 4' WIDE; SOD A MINIMUM OF 2' WIDE IN CENTER OF RIGHT-OF-WAY; SOD SWALE BANKS. SWALE SIDE SLOPES MIN. 3:1. BACKSIDE OF SWALES MAY BE SEEDED. SOD OR SEED OF THE ENTIRE ROADWAY SHALL BE AS APPROVED BY TOWN ENGINEER.
4. SUITABLE SOILS FREE OF ORGANICS. COMPACT SOILS TO 98% DENSITY PER AASHTO T-180.

EXHIBIT "B-6"

TYPICAL UNPAVED ROADWAY SECTION FOR 25' WIDE R/W



1. CLEAR & GRUB 25' R/W EXCEPT FOR SPECIMEN TREES TO BE LEFT OUTSIDE SWALES AND DISPOSE OF ALL DEBRIS OFF SITE.
2. STABILIZED & MECHANICALLY MIXED 8" MINIMUM THICKNESS ROAD BASE COMPACTED TO 98% OF MAXIMUM DENSITY PER AASHTO T-180 WITH MINIMUM LBR = 40. USE FDOT APPROVED MATERIALS OR LOCAL MATERIALS APPROVED BY TOWN ENGINEER.
3. STABILIZED SHOULDERS BOTH SIDES AND SOD ADJACENT TO THE TRAVELWAY ON EACH SIDE A MINIMUM 2' WIDE; SOD A MINIMUM OF 2' WIDE IN CENTER OF RIGHT-OF-WAY; SOD SWALE BANKS. SWALE SIDE SLOPES MIN. 3:1. BACKSIDE OF SWALES MAY BE SEEDED. SOD SHALL BE AS APPROVED BY TOWN ENGINEER.
4. SUITABLE SOILS FREE OF ORGANICS. COMPACT SOILS TO 98% DENSITY PER AASHTO T-180.

ORDINANCE NO. 2016-02

AN ORDINANCE OF THE TOWN OF MALABAR, BREVARD COUNTY, FLORIDA; REPEALING SECTION 13-38 (C) RELATING TO VARIANCES AUTHORIZED BY THE BOARD OF ADJUSTMENT; PROVIDING FOR CODIFICATION, SEVERABILITY AND CONFLICTS; PROVIDING AN EFFECTIVE DATE.

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF MALABAR, BREVARD COUNTY, FLORIDA, as follows:

Section 1. Section 13-38 (c) of the Code of Ordinances of the Town of Malabar is hereby deleted.

Section 2. It is the intention of the Town Council of the Town of Malabar, Brevard County, Florida and it is hereby provided that the provisions of this Ordinance shall become and be made a part of the Code of Ordinances of the Town of Malabar.

Section 3. Should any Section, Clause, or Provision of this Ordinance be declared by a court of competent jurisdiction to be invalid, the same shall not affect the validity of the remaining provisions or parts of this Ordinance.

Section 4. All ordinances or parts thereof in conflict herewith are hereby repealed to the extent of such conflict with this Ordinance.

Section 5. This Ordinance shall become effective immediately upon its adoption.

The foregoing Ordinance was moved for adoption by Council Member Vail. The motion was seconded by Council Member Koehler and, upon being put to a vote, the vote was as follows:

Council Member Grant Ball	Aye
Council Member Brian Vail	Aye
Council Member Don Krieger	Aye
Council Member Dick Korn	Aye
Council Member Richard Koehler	Aye

This ordinance was then declared to be duly passed and adopted this 3rd day of Oct, 2016.

TOWN OF MALABAR
Phillip R Crews
Mayor Phillip R. Crews, Council Chair

First Reading 7/18/16
Second Reading 10/03/16

- (2) However, should such principal structure not be located wholly on one (1) lot, or should the owner desire to construct accessory uses, ponds or outbuildings (accessory to the principal structure) on the contiguous lot, then the local street/road shall be improved through the furthest boundary on which such accessory building to be constructed.

(e) The board of adjustment may only grant a variance to the requirements of subsection (b)(1) and (2). Notwithstanding the authority granted to the board of adjustment in section 1-12 of the Town of Malabar Land Development code the below stated procedures shall in all respects be utilized for a variance to subsection (b)(1) and (2). In order to authorize a variance under this section the board of adjustment must find the following:

- ORD 2016-01*
- (1) That special conditions and circumstances exist and that the presence of which would make complying with subsection 13-38(b)(1) or (2) unreasonable. Financial or economic reasons, conditions or circumstances shall not be grounds for a variance under this section;
 - (2) The special conditions and circumstances are not caused in any way by the owner or applicant;
 - (3) That such variances will not be injurious or detrimental to the public welfare;
 - (4) That the variance granted is the minimum variance that will make possible the reasonable use of the land;
 - (5) As a condition to the issuance of a variance the owner of the property shall dedicate the right of way required by section 13-39 of the code through the furthest boundary of the lot of record on which a principal structure or accessory structure is to be constructed. The owner shall also execute an agreement in recordable form with the town that binds the owner and his/her successors in interest to pay for the proportionate share of completion of the road through the furthest boundary of the lot of record on which a principal structure or accessory structure is constructed in the event the road is completed by another. The board of adjustment may impose additional reasonable conditions and safeguards that it deems appropriate;
 - (6) The board of adjustment may prescribe a reasonable time limit within which the action for which the variance is required shall be begun or completed or both.
- (Ord. No. 01-01, § 1-3, 2-5-01; Ord. No. 03-01, § 2, 2-24-03; Ord. No. 03-05, § 1, 6-16-03; Ord. No. 07-11, § 1, 7-16-07; Ord. No. 08-07, § 1, 6-16-08)

Sec. 13-39. Precondition to issuance of building permit—Dedication of sufficient right-of-way.

Except as provided for in section 13-39.1, as a precondition for the issuance of any building permit for a permitted structure on property that abuts an unimproved or unaccepted right-of-way within the Town of Malabar, Brevard County, Florida, the owner of the property

ORDINANCE NO. 2008-01

AN ORDINANCE OF THE TOWN OF GRANT-VALKARIA, BREVARD COUNTY, FLORIDA RELATING TO ROADS; CREATING DIVISION 1, PRIVATE ROAD IMPROVEMENTS; PROVIDING A TITLE AND DEFINITIONS; PROVIDING FOR CRITERIA FOR THE ISSUANCE OF A DRIVEWAY PERMIT; PROVIDING FOR UNPAVED ROAD AGREEMENTS; PROVIDING FOR CRITERIA FOR THE ISSUANCE OF DRIVEWAY PERMITS FOR FLAG PARCELS; PROVIDING FOR A VARIANCE PROCEDURE; PROVIDING AN APPLICATION PROCESS; PROVIDING FOR THE REVIEW OF ADMINISTRATIVE DECISIONS; CREATING DIVISION 2, RIGHT OF WAY IMPROVEMENT; PROVIDING FOR A TITLE AND DEFINITIONS; ESTABLISHING PRECONDITIONS TO THE ISSUANCE OF DRIVEWAY PERMITS; PROVIDING FOR A COST OF IMPROVEMENT BOND AND APPLICATION FEES; PROVIDING FOR A ROAD IMPROVEMENT PROCESS; PROVIDING FOR A COST OF CERTIFICATION PROCESS, A RETURN OF UNUSED PORTION OF BOND AND ROAD IMPROVEMENT STANDARDS; PROVIDING FOR A REIMBURSEMENT PROCESS AND REIMBURSEMENT RECORD; PROVIDING FOR ASSIGNMENT OF COSTS; PROVIDING FOR THE AUTHORITY TO IMPOSE A SPECIAL ASSESSMENT FOR ROAD IMPROVEMENTS; PROVIDING FOR REMEDIES; PROVIDING FOR PROSPECTIVE APPLICATION OF DIVISION 2; PROVIDING FOR EXEMPTIONS AND AUTHORITY TO NAME ROADS; CREATING DIVISION 3, ACCEPTANCE OF LOCAL ROADS; PROVIDING FOR DEFINITIONS; PROVIDING FOR A POLICY STATEMENT; PROVIDING FOR THE PROCESS FOR ACCEPTANCE OF LOCAL STREETS; PROVIDING FOR A REAPPLICATION PROCESS; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE.

WHEREAS, the Town of Grant-Valkaria must adopt land use ordinances to achieve the objectives of the comprehensive plan pursuant to Section 4.05 of the Town's Charter; and

WHEREAS, certain Parcels within the Town are not accessible via an Improved Road and will be benefited by the construction of an Improved Road on the unimproved Right-of-Way adjacent to said Parcels; and

WHEREAS, the Costs of the Improved Road will initially be the responsibility of the Applicant; and

WHEREAS, the Town Council finds that all Owners who are benefited by the Improved Road

4. That the parent parcel which contains the easement is at least 2.5 acres; and
5. That the access is cleared, graded and maintained so as to assure access by emergency vehicles; and
6. That the access is for the exclusive use of the parcel for which the driveway permit is to be issued; except as stated in subsection 8; and
7. That where more than one access strip is utilized, such access strips not to exceed two, may be located side by side, and additional access strips shall be a minimum of 40 feet apart, regardless of ownership when located on local streets, or 90 feet apart, regardless of ownership when located on collector or arterial roads; and
8. That the access is for no more than two parcels. The sum of the parcels served by the easement, including an easement within a flag parcel stem, shall be a minimum of five acres in size.
9. No more than two easements will be allowed per access strip.
10. Only one easement shall be permitted over any flag stem.
11. This section shall not apply to any prior easements approved by the Town.

(c) *Unpaved road agreements.* The Town Council and the property owners whose property abuts a right-of-way which is not maintained by the Town may enter into an agreement to allow the issuance of a single-family residence structure driveway permit under the following conditions:

1. These agreements shall be limited to existing rights-of-way of at least 50 feet in width. If a right-of-way exists of less than 50 feet in width, additional easements, dedicated to the Town, may be obtained on each side of the right-of-way by the owner for drainage and sidewalk purposes to bring the total width to 50 feet. Any requests for deviation shall be made as part of the application process and will be reviewed by the Town Council for a determination.

Any acquisition costs associated with the right-of-way and easements will be borne solely by the property owner. The traveling surface of the road will be centered within the right-of-way.

2. Only those properties within 1320 feet of a Town-maintained paved roadway that are accepted as of the date of adoption of this ordinance are eligible.

3. When an unpaved road is initiated, it may only extend 1320 feet from a Town maintained paved roadway.

4. Each parcel, lot or tract of land must meet all of the requirements of the comprehensive plan, shall satisfy all criteria of the environmental health section, and shall meet all Town requirements for issuance of a driveway permit.

5. There shall be a limitation of one agreement per parcel that is not transferable.

6. By entering into an agreement, the property owner is responsible for all costs related to the roadway including survey, design, initial signage and installation, engineering, permitting and construction. The roadway shall be constructed in accordance with the Town's standards for unpaved roads and shall be reviewed and inspected by the Town for approval prior to the issuance of a driveway permit. Additionally, to defer the cost of Town maintenance, the agreement shall stipulate a fixed amount that must be paid prior to execution of the agreement. This amount would be determined by the Town and adopted by resolution in an amount necessary to reimburse the Town for maintenance costs.

(d) *Flag parcels.* A driveway permit may be issued for a flag parcel as defined in this section where the width of such parcel does not entirely abut a dedicated and accepted road. Approval for such flag parcels shall be obtained from the Town Council as part of the plat approval process. However, an application involving no more than two flag parcels in any parcel, site, lot or tract of land under single ownership may be approved by the Town Council after considering the following factors:

1. There shall be no more than two flag parcels subdivided from any one parcel, parcel or tract unless there exists particular physical conditions, shape or topography of the specific property involved which causes an undue hardship to the applicant if the strict letter of the code is carried out and the Town Council approves more than two such flag parcels.

2. Each flag parcel shall have a minimum parcel area of 2.5 acres, excluding the flag stem.

3. The flag stem shall be a minimum of 25 feet in width.

4. Where more than one access strip is utilized, such access strips, not to exceed two unless approved by the Town Council, may be located side by side, and additional access strips shall be a minimum of 90 feet apart on collector and arterial roads and 40 feet apart on local streets, regardless of ownership; providing the property located between the flag stems meets the minimum parcel width, depth and size requirements of the town zoning requirements.

To: Town Council Town of Malabar

From: Town Attorney Karl W. Bohne, Jr

Date: 4/16/2019

Re: Legality of Compulsory Road Dedication/Exactions

I. Background

Chapter 13 of the code of Ordinances of the Towns contains provisions, under certain circumstances, for the dedication of right of way as a precondition to the issuance of a building permit.¹ However, recently the legality of such a compulsory dedication has come into question when my office found a Final Judgment against the Town relating to such compulsory dedication regarding Linrose Lane.² I have previously briefed the Counsel on this ruling and gave the opinion that with respect to the issuance of future building permits on Linrose, this Judgment does set a precedence. However, the question is how this Judgment applies town wide and its impact on the Town's Road Ordinance with respect to compulsory dedications in the town.

As I explained to the Counsel previously, it is impossible to determine what was argued before the Court by the then Town Attorney. Although the Judgment does recite facts in the analysis, it is impossible to determine the nature and extent of what was argued by the Town and I can't speculate on what was actually argued by the Town before the court.³ I will analyze the cases cited in the judgment as well as the current status of the law and render my opinion on the legality of compulsory road dedications. Certain provision of the judgment dealt with the legality of a moratorium imposed and the ordinance adoption procedures followed, which have no bearing on my analysis and will not be discussed.

II. Constitutionality of Exactions and Compulsory Dedications

A. The U.S. Supreme Court Decisions

The constitutionality of exactions and compulsory dedications were addressed in three U.S. Supreme Court decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) and *Koontz v. Saint Johns River Water Management District*, 133 S. Ct. 2586 (2013).

1. *Nollan v. California Coastal Commission*

¹ Sec. 13-39. - Precondition to issuance of building permit—Dedication of sufficient right-of-way. Except as provided for in section 13-39.1, as a precondition for the issuance of any building permit for a permitted structure on property that abuts an unimproved or unaccepted right-of-way within the Town of Malabar, Brevard County, Florida, the owner of the property for which such permit is requested must agree to dedicate that portion of his property which abuts said right-of-way or unaccepted road such that the town can achieve its goal of acquiring rights-of-way as required by the Town Land Development Code and Comprehensive Plan.

² *David Hoene and Joan L. Hoene v. Town of Malabar*, Brevard County Circuit Court Case No. 90-7319-CA-C.

³ The best way to determine what was argued before the court is through a trial transcript. There is no evidence in the town's files that such a transcript exists.

previously adopted a comprehensive land use plan required by state comprehensive land use management statutes, in accordance with statewide goals. Many of the plan's features are codified in Tigard's Community Development Code (CDC). Among the plan's requirements:

-In accordance with a pedestrian/bicycle pathway plan, new development must dedicate land for pathways where shown on the plan;

-In accordance with a master drainage plan, to combat the risks of flooding in 100-year floodplains, especially as exacerbated by increased impervious surface through development, developers along waterways such as Fanno Creek (which borders the Dolan parcel to the west), must guarantee the floodway and floodplain are free of structures and able to contain floodwaters by preserving the land alongside as greenway.

As a result of the plan and its codification in the CDC, the Commission granted the Dolans their building permit upon condition that they dedicate the portion of their property in the floodplain as a greenway, and that an additional 15-foot strip be dedicated adjacent to the greenway as a pedestrian bicycle path. The basis of these requirements is a series of Commission findings:

-the Commission found that the bikeway/pathway system as an alternative means of transportation "could" offset some of the traffic demand on nearby streets and lessen the increase in traffic congestion.

-it was reasonable to assume that some of the Dolans' customers

And staff could use the pathway for transportation and recreation.

-the Commission found the floodplain greenway dedication was reasonably related to the Dolans' application since the site would have more impervious surface. This would result in increased stormwater drainage. Therefore the dedication requirement was related to the applicants' plans for more intensive development of their land.

The Dolans challenged the holding of the Oregon Supreme Court that the City of Tigard could condition the approval of their building permit on the dedication of property for flood control and traffic improvement. The U.S. Supreme Court agreed to determine the "required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development".

The Court essentially adopted a three-part test:

- a. Does the permit condition seek to promote a legitimate state interest?
- b. Is there an essential nexus between the legitimate state interest and the permit condition?
- c. Is there a required degree of connection between the exactions and the projected impact of the development?

The Court disposed of the first two quickly and affirmatively. Certainly the prevention of flooding along the creek and the reduction of traffic in the business district qualify as the type of legitimate public purposes we have upheld. The court held it was obvious that a nexus exists between preventing flooding and limiting development within the creek's floodplain, and that the same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation like a pedestrian/bicycle pathway. So the Court found a public purpose and essential nexus. The question remained, with respect to the third test: "[W]hether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development."

The Court said no: the city's "tentative findings" concerning increased stormwater flow from the more intensively developed property, together with its statement that such development was "anticipated to generate additional vehicular traffic thereby increasing congestion" on nearby streets, were simply not "constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit."

Nollan deals ostensibly with beach access. The plaintiffs sought a coastal development permit from the California Coastal Commission in order to tear down a beach house and build a bigger one. The Commission imposed a condition on the permit, requiring the granting of an easement to permit the public to use one-third of the property on the beach side. For the privilege of substantially upgrading a beach house, the owner was forced to dedicate to the public lateral access over much of his backyard for more beach for the public to walk upon. The California Court of Appeal had held this was a valid exercise of the Commission's police power under its statutory duty to protect the California Coast.

The U.S. Supreme Court reversed. The Court observed that land use regulations do not effect takings if they substantially advance legitimate state interests and do not deny an owner the economically viable use of his land. But even assuming (without deciding) that legitimate state interests include, in the Commission's words, protecting public views of the beach and assisting the public in overcoming the psychological barrier to the beach created by overdevelopment, the Court could not accept the Commission's position that there was any nexus between these interests and the condition attached to Nollan's beach house redevelopment. The Court stated that:

It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. The Supreme Court noted that it is impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. The Court went on to state that the Commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes.

However, it is an altogether different matter if there is an essential nexus between the condition and what the landowner proposes to do with the property. If the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding the construction of the new house--for example, a height limitation, a width restriction, or a ban on fences--so long as the Commission could have exercised its police power to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover, the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.

If the condition substituted for the prohibition fails to further the end advanced as the justification for the prohibition the lack of nexus between the condition and the original purpose the building restriction converts that purpose into something other than what it was. The purpose then becomes the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them.

In short, the Supreme Court appears to have adopted the "rational nexus" test concerning exactions and compulsory dedications.

2. *Dolan v. City of Tigard.*

In *Dolan v. City of Tigard*, the Supreme Court struck down a municipal building permit condition that the landowner dedicate bike path and greenway/floodplain easements to the city. As the Court pointed out, had Tigard simply required such dedications, it would be required to pay compensation under the Fifth Amendment. Attaching them as building permit conditions required a more sophisticated analysis closely following *Nollan v. California Coastal Commission*, since the police power is implicated rather than the power of eminent domain. In the process, the Court signaled how far local government may go in passing on the cost of public facilities to landowners. **The answer: only to the extent that the required dedication is related both in nature and extent to the impact of the proposed development.**

The Dolans own and operate a 9700 square foot plumbing and electrical supply store on main street in Tigard's central business district. Seeking to double the size of the store and pave a 39-space parking lot, the Dolans applied for a building permit from the City Planning Commission. Tigard had

The Court adopted a "rough proportionality" test regarding the third part of the test:

The city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

Applying the test to the Dolan hardware store property, the Court concluded that the City of Tigard demanded too much to pass this third nexus/rough proportionality test. Simply concluding that a bikeway easement could offset some of the traffic demand which the new hardware store would generate did not constitute sufficiently quantified findings for the taking of an easement. The Court had no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets . . . the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway could offset some of the traffic demand . . . and lessen the increase in traffic congestion. The city must make some effort to quantify its findings beyond the conclusory statements

As to the greenway easement, while the Court said that increasing the amount of impervious surface will increase the quantity and rate of storm-water flow from petitioner's property the city demanded more--it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its Greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

3. *Koontz v. Saint Johns River Water Management District*

Although the Koontz case did not involve compulsory dedication of road way, it did discuss some questions left undetermined by the Supreme Court in *Nollan/Dolan*. In this case, Koontz sought to develop a portion of his Florida wetlands property. The Water Management District, however, refused to approve his project unless he made certain concessions, including spending money to improve public lands elsewhere. Koontz thought these conditions excessive, so he sued under a state law permitting him to seek damages. The Florida Supreme Court held that he did not have a claim for two reasons: first, because the *Nollan-Dolan* standard does not apply to the denial of a permit (as opposed to the approval); and second, because the standard does not apply to a demand for the payment of money, as opposed to a specific burden on a property interest.

The *Koontz* case raises two important legal issues under regulatory takings law: 1) whether the *Nollan/Dolan* standard, which requires that government-imposed project conditions have a nexus to and rough proportionality with the projected effects of a proposed project, applies to project *denials* as well as project approvals; and 2) if the *Nollan/Dolan* test applies to *monetary* exactions as well as government's compelled dedications of real property.

The United States Supreme Court, reversed the Florida Supreme Court on both questions. The Court reasoned that limiting the applicability of the *Nollan-Dolan* standard to exclude either the denial of permits or the exaction of fees would create a path to circumvention. The majority noted a distinction between a consummated taking and the denial of a permit based on an "unconstitutionally extortionate demand". Where a permit is denied and the condition is never imposed- no taking has occurred. While the unconstitutional conditions doctrine recognizes that this burdens a constitutional right, the Fifth Amendment remedy of just compensation does not apply. In cases where there is an excessive demand but no taking, the availability of money damages will turn on the particular federal or state cause of action- an issue that was remanded in *Koontz* to the Florida state courts for decision.

4. *Summary of Nollan/Dolan/Koontz*

The three Supreme Court cases set limits on governments' ability to impair property interests with land use regulations. Under those decisions, there must be a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use.

B. Florida Decisions

There are a few decisions which address the exaction and compulsory dedication issue. I will analyze a few of the more recent decisions to address how the Florida Courts have handled the issue.

1. *Lee County v. New Testament Baptist Church of Fort Myers, Fla., Inc.*, 507 So.2d 626, 12 Fla. L. Weekly 1013 (Fla. 2nd App., 1987)

In *Lee County*, The Court applied the rational nexus test. The rational nexus test requires that there be a reasonable connection between the required dedication of land and the anticipated needs of the community because of the new development. Section C.3.n. of the County Code required all property owners whose property abuts certain streets to give to the county the land necessary to meet the minimum right-of-way requirements established by the county for the street on which the property is located, regardless of the size of the landowner's proposed development or the amount of traffic that development will generate. The Court found that the ordinance does not comply with the rational nexus test because it does not require any reasonable connection between the requirement that land be given to the county and the amount of increased traffic, if any, generated by the proposed development.

2. *Hernando County v. Budget Inns of Florida, Inc.*, 555 So.2d 1319 (Fla. 5th App., 1990)

In *Hernando County*, the 5th District Court of Appeal⁴, Hernando County Ordinance 86-8 provided that developers adjacent to major arterial highways are required to provide, at their expense, a frontage road from property line to property line, parallel to the arterial highway "upon demonstration of need and demand by the County." Hernando County determined that no present need existed for the road, but then conditioned the grant of a building permit upon Budget promising to build a frontage road should Hernando County find a need for such road at any time in the future.

Budget refused to apply for the building permit under the required condition and filed a three-count complaint requesting the following relief:

- Count I--to enjoin enforcement of the ordinance or a declaration of its rights.
- Count II--to enjoin the County from charging an impact fee because the County held up the application process, thereby subjecting Budget to an impact fee not enacted at the time Budget applied for the permit.
- Count III--damages for a temporary taking of land by unlawfully *denying Budget the use of its land*.

The Court found that Hernando County's requirement that Budget show the frontage road on its building plans as a precondition to the issuance of a building permit, where admittedly no present need for the road exists and without any showing that there will be a need in the reasonably immediate future, constitutes an impermissible attempt to "bank" Budget's land without compensation. Presumably this obligation would continue in perpetuity. In a similar case, our sister court adopted a "nexus" test in determining whether a compulsory dedication is valid. *Citing Lee County v. New Testament Baptist Church of Fort Myers*.

⁴ The 5th district is the appellate court whose jurisdiction covers Brevard County.

The Court determined that for the nexus test to apply, thus making a compulsory dedication constitutionally valid, the nexus must be rational. This means it must be substantial, demonstrably clear and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specifically and contemplated immediate improvements--not for the purpose of "banking" the land for use in a projected but unscheduled possible future use. The court stated that the condition imposed by Hernando County fails the nexus test and is thus unconstitutional as applied.⁵

3. *Highlands-in-the-Woods, L.L.C. v. Polk County*, 217 So.3d 1175 (Fla. App., 2017)

This case does a fairly decent job of summarizing the Nollan/Dolan test and applies it to the fact of the case.

In *Highlands*, Polk County conditioned Highlands' permit for development of a subdivision on the installation of a reclaimed water use system in the subdivision and the dedication of the system to the County. Highlands asked the trial court to enter a judgment declaring that the County's conditioning of the permits on the reuse improvements was an unlawful exaction and regulatory taking and that Highlands is entitled to compensation from the County. The Court analyzed the exaction requirement under the Nollan/Dolan standard.

The Court set out the test in evaluating whether an unconstitutional taking has occurred under Nollan/Dolan, a court must first determine whether the essential nexus exists between the legitimate state interest and the permit condition exacted by the government. If such a nexus exists, a court must then determine whether the degree of exactions demanded by the [government's] permit conditions bears the required relationship to the projected impact of the petitioner's proposed development. The conditions of the permit must have a rough proportionality in nature and extent to the impact of the proposed development. The test considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts.

In applying the test the court found there is a clear legitimate state interest in new developments using reclaimed water. The Florida Legislature has declared that "[t]he encouragement and promotion of water conservation and reuse of reclaimed water ... are state objectives and considered to be in the public interest." Water conservation was also a component of the county's comprehensive Plan.

The court then found a clear nexus between the legitimate state interest in conserving water and the permit conditions imposed by the County requiring the use of reclaimed water in the subdivision. The conditions require the installation and dedication of reuse improvements so that the future residents of the subdivision have access to reclaimed water and are not required to use potable water for residential irrigation.

The court then addressed the rough proportionality portion of the test. The County required the installation and dedication of reuse improvements in the subdivision that will be used by the future residents for landscape irrigation. The conditions imposed by the County are directly related to the impact of the subdivision on the state's water resources and do not impermissibly reach beyond that impact. The

⁵ In appropriate cases a governmental unit may place conditions on the issuance of a building permit if the condition furthers a public purpose related to the permit requirement. *Paradyne Corp. v. State, Dept. of Transportation*, 528 So.2d 921 (Fla. 1st DCA), review denied, 536 So.2d 244 (1988). (DOT can condition its permit upon a concession by Paradyne of its property rights only so long as the condition furthers a public purpose related to the permit requirement--the elimination of undue disruption of traffic or the creation of safety hazards. The condition cannot be imposed simply to further the private interests of an abutting landowner).

fact that reclaimed water was not available for two years, requiring Highlands to use potable water to irrigate the landscaping in its common areas during that time, does not alter the conclusion that the reuse improvements have a rough proportionality to the impact of the development. The unavailability of reclaimed water for the common areas for a period of two years is insignificant in comparison to the availability of reclaimed water for the indefinite future of the entire sixty-lot subdivision.

C. Other state decisions

The cases which strike down street and road dedications for lack of nexus and/or proportionality are legion, both pre- and post- *Nollan* and *Dolan*. One such case, from the Second Circuit, is *Walz v. Town of Smithtown*, 46 F.3d 162 (2d Cir. 1995). There, landowners were denied access to the public water supply when they refused to deed the front fifteen feet of their property to Smithtown for road widening purposes. Finding a total lack of nexus between water service and road widening, the court found that "As landowners, the Walzes surely had a right not to be compelled to convey some of their land in order to obtain utility service.

A more egregious example is *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. 1995), in which the Village attempted to exact 20% of Amoco's land for roadway widening purposes before permitting other redevelopment at a gasoline service station. Finding that such an exaction on the basis of a 0.4% increase in traffic "does not correspond with the slightest notions of rough proportionality," the court held that exaction "constitutes a taking under both the Fifth Amendment of the United States Constitution and Article I, Section 15 of the Illinois Constitution."

To the same effect is *Cobb v. Snohomish County*, 829 P.2d 169 (Wash. Ct. App. 1991) striking down a road improvement fee because the county could not show the improvements were reasonably necessary for the particular level of service to be provided; *Dellinger v. City of Charlotte*, 441 S.E.2d 626 (N.C. 1994) striking down a road dedication requirement for failure to make written findings relating dedication to traffic from a proposed subdivision; and *The Luxembourg Group, Inc. v. Snohomish County*, 887 P.2d 446 (Wash. 1995) striking down the dedication of a 60 foot right of way as a disproportional condition for approving a 15 lot subdivision.

III. Florida Statute 70.45

In an apparent response to the *Nollan/Dolan* rulings, the Florida Legislature adopted F.S.70.45 and codified the *Nollan/Dolan/Koontz* nexus requirement. The statute provides in part, a property owner may bring an action in a court of competent jurisdiction under this section to recover damages caused by a prohibited exaction. Such action may not be brought until a prohibited exaction is actually imposed or required in writing as a final condition of approval for the requested use of real property. The right to bring an action under this section may not be waived. This section does not apply to impact fees adopted under s. 163.31801 or non-ad valorem assessments as defined in s. 197.3632.

"Prohibited exaction" means any condition imposed by a governmental entity on a property owner's proposed use of real property that lacks an essential nexus to a legitimate public purpose and is not roughly proportionate to the impacts of the proposed use that the governmental entity seeks to avoid, minimize, or mitigate.

There does not appear to be any reported appellate decisions regarding this statute which was adopted in 2015. The Legislature appeared concerned that Florida laws left unanswered the question of whether money damages would be available to a landowner under circumstances similar to the landowner in *Koontz*. Section 70.45, Florida Statutes, was created to specifically provide landowners with an avenue to pursue an action for monetary damages against a governmental entity for an allegedly unconstitutional/prohibited exaction. A prevailing landowner in such an action could be awarded prejudgment interest, reasonable attorneys' fees and costs, and compensatory damages.

IV. Nollan/Dolan/Koontz applied to the Town's Code.

It is my opinion that the Town's road ordinance with respect to the dedication of right of way as required by chapter 13 of the town's Code of Ordinances is salvageable.

It is at this point staff needs to sit down and revisit the ordinance and dirt road requirements. We need to determine, as far as unpaved local roads re concerned do we want 40, 50 or 60 foot right of ways. Keep in mind the wider we require the more land will have to be dedicated. I think the less we required to be dedicated the easier it will to meet the 3 part nexus test.

We need to come up with a reason for the additional dedication. I believe things such as traffic flow, accessibility to property by mail or parcel carriers, waste disposal companies, utility access; emergency services access; drainage and storm water run-off; road maintenance; and other reasons would provide for the legitimate governmental interest portion of the nexus test.

I also believe that there would be a nexus between the legitimate governmental interests ultimately set forth by the town and the requirement to have a sufficiently wide enough right of way to address these interests.

The issue with most of these situations is: Whether the degree of the exactions demanded by the permit conditions bear the required relationship to the projected impact of petitioner's proposed development. This is the rough proportionality part of the test.

The town must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. In that respect the Town will need to determine what is the minimum width of an unpaved road that will accomplish meeting the traffic impact, drainage impact, emergency services impact and other impacts a proposed home will have upon a right of way. We must also look at chapter 13 of the code and the Transportation element of the comp plan for consistency with each other and determine if changes to on or the other or both need to be done.

According to the Town's Comprehensive Plan, Transportation Element, at 2-1.22 our local road right of way width for a dirt road is 60 feet. Such a 60 foot requirement may not be practical and we need to look at reducing that along with other road width requirements in the comp plan.

RE: Malabar Road workshop

↙ kbohne@fla-lawyers.com

Fri 7/12/2019 7:26 AM

To: Debby Franklin <townclerk@townofmalabar.org>;

2 pages

Debby here are my responses. My answers are in red.

Do we have the authority to require ROW dedication prior to issuing a building permit? I am assuming that this question relates to the construction of an individual residence on a public ROW. Obviously, if this were a subdivision subject to a plat (Stillwater, Brook Hollow, Country Cove, etc.) then the road system would have either been dedicated on the plat or remain private but any way constructed according to code. I will treat your request for an opinion as applying to a property which is not a part of such plats.

Assuming we can clean up the road ordinance and justify the need for the dedication as required by the Constitution as determined by cases dealing with the issue, then in my opinion we could require dedication prior to a building permit being issued.

If you recall I have previously opined the Town's road ordinance with respect to the dedication of right of way as required by chapter 13 of the town's Code of Ordinances is salvageable.

It is at this point staff needs to sit down and revisit the ordinance and dirt road requirements. We need to determine, as far as unpaved local roads re concerned do we want 40, 50 or 60 foot right of ways. Keep in mind the wider we require the more land will have to be dedicated. I think the less we required to be dedicated the easier it will to meet the 3 part nexus test.

We need to come up with a reason for the additional dedication. I believe things such as traffic flow, accessibility to property by mail or parcel carriers, waste disposal companies, utility access; emergency services access; drainage and storm water run-off; road maintenance; and other reasons would provide for the legitimate governmental interest portion of the nexus test.

I also believe that there would be a nexus between the legitimate governmental interests ultimately set forth by the town and the requirement to have a sufficiently wide enough right of way to address these interests. The issue with most of these situations is: Whether the degree of the exactions demanded by the permit conditions bear the required relationship to the projected impact of petitioner's proposed development. This is the rough proportionality part of the test.

The town must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. In that respect the Town will need to determine what is the minimum width of an unpaved road that will accomplish meeting the traffic impact, drainage impact, emergency services impact and other impacts a proposed home will have upon a right of way. We must also look at chapter 13 of the code and the Transportation element of the comp plan for consistency with each other and determine if changes to one or the other or both need to be done.

According to the Town's Comprehensive Plan, Transportation Element, at 2-1.22 our local road right of way width for a dirt road is 60 feet. Such a 60 foot requirement may not be practical and we need to look at reducing that along with other road width requirements in the comp plan.

Do we have authority to require private I/E easements be changed to ROW dedications before we issue a building permit? I don't think this would pass constitutional muster and may also be an issue under Bert Harris. Assuming the easement is sufficient for access to the property and is constructed accordingly then in affect it's a private drive or even a driveway and there would be no legitimate reason to require it be dedicated. Furthermore, the council would need to debate why they would even want it dedicated and now subject to town maintenance. Wouldn't this affect properties accessed by flag stems?

Should we re-adopt the previous language in Chap 13, Sec 13.38(a) that allowed variances to be requested? In my opinion adopting a variance procedure of some sort would strengthen the position of the town regarding dedication of sufficient ROW. If we require a dedication, but due to environmental or some other uncontrolled circumstances dedication would be impossible then they person could not get a permit because they cant dedicate ROW and build the road as required. If we create a variance then there is less likely to be a Constitutional or Bert Harris challenge.

Would adopting a similar provision to G-V relating to "road agreements" improve our code? The road agreement requirement was adopted in GV as a part of the existing county code requirements, as modified by the town. The GV unpaved road agreement relates to ROWs not maintained by the town. It might help. I am not quite sure how successful GV has been with these. I know the County uses them, or at least did at one time.

Things have not actually developed that way so should we be reconsidering the classification of some of the roads? Yes

Local streets will never be 60' of ROW so why not change it? I agree

Karl W. Bohne, Jr.
Schillinger & Coleman, P.A.
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[Melbourne, FL 32940](#)
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8:30 a.m. to 5:00 p.m. Monday thru Thursday

8:30 a.m. to 12 Noon on Friday

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From: Debby Franklin [mailto:townclerk@townofmalabar.org]
Sent: Thursday, July 11, 2019 8:10 PM
To: kbohne@fla-lawyers.com
Subject: Malabar Road workshop

I am working on the agenda package for the road workshop on 7/29. I would like to focus on just the ROW that are not wide enough to meet the Code and Comp Plan requirements. I have prepared section maps that cover sections 1, 2, 3, 10, 11 and 12. That is essentially south of Malabar Road from Marie St. to Babcock. Some questions that may come up:
Do we have the authority to require ROW dedication prior to issuing a building permit?



**Town of Malabar
Public Rights-of-Way Accepted Streets as of 7/1/2019**

NOTE: THIS LIST DOES NOT INCLUDE ALL TOWN-OWNED RIGHTS-OF-WAY

<u>Absaroka Lane</u>	3200' paved west from Corey Rd– private, Stillwater Preserve SD
<u>Arnoid Lane</u>	870' south of Hall Road in 2006
<u>Atz Road</u>	2.5 mile paved west from LaCourt Ln to Town limits and 114 ft dirt east of LaCourt
<u>Appleby Lane</u>	1,322' x 25' north from Hall Rd and 800' south from Hall Rd
<u>Barrow Lane</u>	980' paved from Absaroka – private, Stillwater Preserve SD
<u>Baywood Court</u>	200' paved, Country Cove S/D
<u>Bee Keeper Ln</u>	NOT AN ACCEPTED STREET – NAMED FOR FIRE FIGHTING LOCATION PURPOSES ONLY
<u>Benjamin Road</u>	3,325' x 40' paved east from Corey Road to Kramer Ln
<u>Beran Lane</u>	930' north from Old Mission; Parcel 103 has payback under 90-3
<u>Billie Lane</u>	700' south from Atz Rd.
<u>Blanche Street</u>	1,060' paved north from Malabar Road
<u>Bluff View Place</u>	115' paved west from Pemberton Tr., Brook Hollow S/D
<u>Booth Road</u>	630' east of Babcock Street
<u>Briar Creek Blvd.</u>	2,875' paved south from Malabar Town limit, Brook Hollow S/D
<u>Briar Run Circle</u>	85' paved west from Briar Creek Blvd, Brook Hollow S/D
<u>Brookshire Circle</u>	334' paved west from Hollow Brook Ln, Brook Hollow S/D
<u>Candy Lane</u>	1322' x 50' north from Atz Road. No records in file of approval south of Atz
<u>Cason Lane</u>	1,330' south of Atz Road
<u>Centre Street</u>	528' between Pine St and W. Railroad Ave.
<u>Century Oak Circle</u>	S/D 1,260 ft. paved
<u>Christian Lane</u>	was Prospect Ln name change approved but not constructed as of 1/2011
<u>Coral Way</u>	1,550' paved south from Huggins Dr and east to Rocky Point Rd, Coquina Pt S/D
<u>Corey Road</u>	2 miles paved south from Malabar Rd to Town limit, and 3,900' paved north of Malabar Road
<u>Coquina Terrace</u>	1,350' paved west from Rocky Point Road, Coquina Point S/D
<u>Country Cove Circle</u>	3,085' paved, Country Cove S/D
<u>Crescent Road</u>	460' x 40' south from Township Road
<u>Delaware Avenue</u>	1,293' west from Corey Rd, Melbourne Heights S/D
<u>Duncil Lane</u>	2,440' south from Hall Road and 1,055 ft. north from Hall Road
<u>Elaine Lane</u>	1,310' south from Glatter Road to dead end
<u>Eva Lane</u>	.5 mile from Malabar Road to Hall Road – paved in 2018



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<u>Falls Trail</u>	219' paved from Briar Creek Blvd, Brook Hollow S/D
<u>Fins Lane</u>	550' north of Hall Rd (previously known as <u>Mussell Shoal Ln</u>)
<u>First Lane</u>	240' paved north from Riverview Drive, Riverview S/D
<u>Flashy Lane</u>	1,275' north from Hall Road and 530 ft. x 25 ft. south from Hall Road
<u>Florence Street</u>	1,060' paved north of Malabar Road
<u>Garden Street</u>	528' east from Pine Street to dead end
<u>Gator Way</u>	Appx 700' south from Hall Road to Parcel 554
<u>Gilmore Street</u>	220' paved plus 940' dirt north from Malabar Road to Allen St.
<u>Glatter Road</u>	925' unpaved east of Marie St and 2,890' paved west of Marie to Malabar Rd
<u>Hall Road</u>	2.5 miles paved from Marie Street west to Richards Ln
<u>Hard Lane</u>	564' south of Atz Road to Parcels 93 and 100
<u>Hard Way Lane</u>	1130' north from Old Mission Road (Parcel 22 has payback under 90-3)
<u>Hawthorne Avenue</u>	150' west from Hwy 1
<u>Hollow Brook Lane</u>	2,045' paved north from Briar Creek Blvd, Brook Hollow S/D
<u>Holloway Trail</u>	324' paved west from Briar Creek Blvd, Brook Hollow S/D
<u>Homestead Lane</u>	1,200' paved north from Atz Rd to cul-d-sac, Sugar Pines S/D
<u>Howell Lane</u>	1,100'. north from Hall Rd and 928' south from Hall Rd; Parcel 829 owes payback Ord 03-01.
<u>Huggins Drive</u>	808' paved east from Hwy 1.
<u>Hunter Lane</u>	1,320' north from Atz Rd and 1,500' south of Atz Rd.—see Road payback book
<u>Isasa Lane</u>	730' south from Hall Rd
<u>Ivey Lane</u>	800' south from Hall Road
<u>Johnston Avenue</u>	1,164' east from Marie Street – payback complete
<u>Jordan Boulevard</u>	1,010' paved west from the center line Hwy 1
<u>Kelly Lane</u>	1,483' south from Atz Road
<u>Knave Lane</u>	1000' paved – private, Stillwater Preserve SD
<u>Kramer Lane</u>	1,322' north from Benjamin Rd, payback complete
<u>LaCourt Lane</u>	2,640' south from Hall Rd. to Atz Rd
<u>Leghorn Road</u>	1,000' north of Section 12 from Valkaria Rd Parcel 763 has payback under Ord 01-01)
<u>Lett Lane</u>	1,970' south of Booth Road - Parcels 519, 551,567,529 and part of 527 owe payback under Ord 91-2)



**Town of Malabar
Public Rights-of-Way Accepted Streets as of 7/1/2019**

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<u>Lineberry Lane</u>	1,200' paved north from Atz Rd to cul-d-sac, Sugar Pines S/D
<u>Linrose Lane</u>	928' x 25' north from Hall Rd per Council 7/1/19; 1,300' south of Hall Rd to dead-end
<u>MacDonald Lane</u>	600' south from Atz Rd (the last 200 feet is a payback under Ord 01-01)
<u>Marie Street</u>	970' x 35' unpaved north from Johnston Avenue and 5,330' (1+ mi) paved south from Johnston Avenue to Hall Road and 1800 ft. x 25 ft. unpaved south of Hall Road to Town owned parcels
<u>Marshall Lane</u>	528' north from Malabar Road to dead end
<u>Matthews Lane</u>	1610' south from Atz Rd Parcels, 18, 27, 50 & 51 have payback under Ord. 01-01
<u>McCain Lane</u>	1,100' north and 1,450' south of Hall Rd Parcel 859 granted variance in 2005 to improve only 50'. Council ruled that Parcel 802 could use same access.
<u>Moss Rose Avenue</u>	1,015' west from Corey Rd, Melbourne Heights S/D
<u>New Jersey Avenue</u>	528' west from Hwy 1
<u>Nome Lane</u>	920' paved, south from Absaroka – private, Stillwater Preserve SD
<u>Nord Street</u>	528' east from Marie Street
<u>Oak Harbour Lane</u>	338' paved, Country Cove S/D
<u>Oak Tree Place</u>	389' paved north from Falls Trail, Brook Hollow S/D
<u>Oakridge Lane</u>	700' x 50' & 350' x 25' north from Hall Rd and 1,130' south from Hall Rd
<u>Old Mission Road</u>	1,950' west from Weber Road to Beran Ln
<u>Orange Avenue</u>	1,260' west from Hwy 1 to FEC railroad
<u>Passaic Avenue</u>	782' west from Hwy 1
<u>Pemberton Trail</u>	1,053' paved east from Briar Creek Blvd, Brook Hollow S/D
<u>Pine Street</u>	528' south from Malabar Road to Garden Street
<u>Positano</u>	paved off of Westhorpe Dr – private, Oakmont Preserve SD
<u>Prospect Ave</u>	renamed Christian Lane in Jan 2011
<u>Prosperity Lane</u>	930' north from Osage Road in 2006
<u>Quarterman Lane</u>	1850' south from Hall Road to Parcel 791
<u>Rebel Lane</u>	1000' north from Reese Road
<u>Reef Place</u>	510' paved east from Coral Way, Coquina Pt S/D
<u>Reese Road</u>	685' x 25' west from Weber Rd to Rebel Ln
<u>Richards Lane</u>	807' x 25' north from Hall Rd
<u>Riverview Drive</u>	780' paved west from Hwy 1, Riverview S/D
<u>Rivet Lane</u>	700' x 25' north from Hall Road
<u>Rocky Point Road</u>	7,590' paved (was old Hwy 1)



**Town of Malabar
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<u>Russell Lane</u>	400' south from Atz Road
<u>Samantha Lane</u>	name change approved to Taylor Lane in 2019 for 1200 ft south of Hall Road (Parcel 500 may have a payback under Ord 03-01 for 300')
<u>Sandy Creek Lane</u>	1,500' south from Malabar Road
<u>Shiffett Lane</u>	528' south from Malabar Road to dead end
<u>Ski Lane</u>	564' north of Atz Road--payback under 91-2
<u>Smith Lane</u>	paved in 2018 w/ special assessment. (the first 475 ft. is no payback; the next 1169' is a payback under 91-2; the next 600 ft. is a payback under 01-01)
<u>Steeplechase Circle</u>	358' paved west from Briar Creek Blvd, Brook Hollow S/D
<u>Stika Lane</u>	840' paved – private, Stillwater Preserve SD
<u>Taylor Lane</u>	300' was improved as Samantha Lane (see above)
<u>Township Road</u>	1,056' paved east from FEC railroad to Hwy 1
<u>Waring Lane</u>	1,312' north of Atz Rd and 2,400' south of Atz Rd (Paybacks complete)
<u>Weber Road</u>	2 miles paved south from Malabar Road to Town limits
<u>Weir Street</u>	1,160' north from Malabar Road to Allen Street
<u>West Railroad Avenue</u>	1200' paved north of Malabar Rd and 630' paved south of Malabar Road
<u>Westhorpe</u>	paved east from Marie Street – private, Oakmont Preserve SD
<u>Wilson Lane</u>	1,052 ft. south from Hall Road

NOTES:

- A. Ordinances 90-3, 91-2 & 01-01 require fees be collected from prospective homebuilders on certain parcels of property as payback to original road builder. These portions of streets are indicated.
- B. Any road not on this list of accepted streets may be maintained from time to time, at the Public Works Department's discretion, to allow accessibility of emergency vehicles. This in no way implies that this maintenance constitutes acceptance of any road not on this list.

(Previous Updates 9/21/98, 12/1/99, 3/24/00, 12/29/00, 7/2/01, 10/15/03, 5/10/04, 2011, 2012, 2014)

TOWN OF MALABAR

MEMORANDUM

Date: July 24, 2019 2019-TC/T-072

To: Honorable Mayor and Town Council
Town Administrator Matt Stinnett
Denine Sherear, Admin Asst to Bldg Official (AABO)

From: Debby K. Franklin, C.M.C., Town Clerk/Treasurer

Ref: Proposal for Method to Rate Paved Roads for repaving schedule purposes

I am proposing a road analysis be done by a paving professional to classify the paved roads within Malabar from 0 to 100:

Good would be 76-100
Fair would be 51-75
Poor would be 26-50
Reconstruct would be 0-25

That would give us a standard to use in budgeting for capital paving projects. Each year a road would lose points if no improvements were made.

The roads classified as "reconstruct" would need rebuilding the road base before paving so those would be given higher priority based on how many homes were on them.

"Poor" roads would be given a higher priority to repave before they fell further down into the "reconstruct" class. This would also provide transparency to the public on how Council determines budgeting to resurface one road over another.

"Fair" roads should be scheduled to be recapped within "x" years (based on paving professional's input) and capital funding would be budgeted accordingly.

"Good" roads would be scheduled to be recapped within "x" years (based on paving professional's input) and capital funding would be scheduled out in the CIP.

I have borrowed this process from the Highlands County Road and Bridge Department. The basis for their use of this rating program was shown in the costs; resurfacing costs \$75,000.00 per mile when the road is in "fair" condition. The cost to "reconstruct" was \$280,000.00 per mile.

Thank you.

Vivian's Notes on Right-of-Ways

Along the Indian River Lagoon (and beachside) some properties were established as Government Lots and referred to as GL-1, GL-2, etc. It appears that some of these lots did not provide for right-of-ways. Extensive research would have to be done to determine how these were originally set up. Those sections in Malabar that include the government lots are 31, 6, 5, and 8.

There is an area in Section 1 that was part of the Indian River Fruit & Truck Lands that was platted in 1915 through Plat Book 2, Page 95 (copy on file). Many of the deeds/legal descriptions refer to this recorded plat. The plat, however, does not show how much was reserved for right-of-way, particularly along Marie Street. Current county plat maps show varying width of right-of-ways on the west side of Marie Street such as 20, 33, and 35 feet. No right of way has been dedicated from the east side of Marie Street from Glatter Road (Section 6) southward to county line (Section 7). There is, however, a 33-foot drainage easement along the northwest side of Section 6.

Plat Book 1, Page 165 covers the Florida Indian River Land Company subdivision platted in 1912. On the plat is the following note: "Roads reserved 40 ft. wide on section lines north and south and on section lines and half section lines east and west." (Page 165 includes sections 34, 35, 36; page 165A includes part of section 1, all of sections 2, 3, 10, 11, and 12)

Some right-of-ways have been lost through perhaps early incorrect deeds/legal descriptions or vacated through replats and subdivisions without giving concern to bordering properties which now have no right-of-ways for ingress/egress or have been left with insufficient right-of-ways for today's standards.

Platting and sale of the Cape Kennedy Estates lots took place over a number of years. Their lot layout was dated October 15, 1968. Most of the lots were financed for a number of years with the deed for that lot being issued and recorded after the final payment was made.

The town "fathers" worked with the original Cape Kennedy Estates property owners, Atlantic Ridge Corporation, for acquisition of right-of-ways. Deeds were prepared and recorded to provide right-of-way of generally 35 feet on section lines and 25 feet on local streets. Some of the right-of-way deeds (originally recorded in 1963) were not eventually accepted by the town, and the right-of-ways now belong to the county. Many of the abutting property owners that were not part of the Cape Kennedy project were not required to provide equal right-of-way and have never done so. Some Cape Kennedy Estate lots were located in sections 1, 2, 3, 10, 11 and 12.