

The

Fee Simple

*The Journal of the
Virginia State Bar
Real Property Section*



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Fall 2018



2018-2019 Real Property Section Officers

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Anyone wishing to submit an article for publication should send it in Microsoft Word format to Felicia A. Burton ((757) 221-3813, (email) faburt@wm.edu). Authors are responsible for the accuracy of the content of their article(s) in the FEE SIMPLE and the views expressed therein must be solely those of the author(s). Submission will also be deemed consent to the posting of the article on the Real Property Section website, <http://www.vsb.org/site/sections/realproperty/newsletters>. The FEE SIMPLE reserves the right to edit materials submitted for publication.

The Board of Governors gratefully acknowledges the dedication and the hard work of Felicia A. Burton, of the College of William and Mary School of Law.

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SPRING 2019 SUBMISSION DEADLINE: FRIDAY, APRIL 5, 2019

**THE NEXT TWO MEETINGS OF THE BOARD OF GOVERNORS OF THE REAL PROPERTY SECTION
OF THE VIRGINIA STATE BAR WILL BE HELD ON**

January 2019
TBA, Williamsburg

March 1, 2019, at TBA
Kingsmill, Williamsburg

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CHAIR'S COLUMN

By Kay M. Creasman



Kay M. Creasman is Assistant Vice President and Counsel for Old Republic National Title Insurance Company since 2008. Ms. Creasman is the 2017 recipient of The Traver Scholar Award from the Real Property Section of the VSB, a past president of the Virginia Land Title Association and 2010 recipient of the VLTA Distinguished Service Award. Ms. Creasman has been involved with real estate at various times since 1976 as a title examiner, private practitioner, university professor, title insurance agency owner, settlement service provider, and counsel for national title insurance companies. She has a BS from Athens College, MEd from Tulane University and JD from the University of Richmond.

For gardeners, autumn is a time for planting, preparing the ground, and planting seeds and bulbs for the spring. Fall is also planning time for the Real Property Section of the VSB; not only do we use the Fall meeting to plan the Advanced and Annual seminars for the spring, we also discuss the goals we have for the Section for the year. This year is no exception.

A major goal of the Section is the education of real estate attorneys. Our Programs Committee continues to do an excellent job coming up with interesting and informative seminar topics and speakers, but this year we are branching out—in addition to providing information for real estate attorneys, we have committed to having the Section sponsor the October, 2019 edition of *The Virginia Lawyer*, with the intention to provide basic real estate principals to non-real estate practitioners.

We have also been invited to provide articles for other Section newsletters, and perhaps provide an hour on real estate matters in their seminars. What would you like Trusts and Estates attorneys, Family Law attorneys, or attorneys who specialize in other practice areas to know about real estate?

Further, we are continuing to educate the public with brochures discussing fundamental real estate issues that impact and affect them. The Common Interest Community Committee published a brochure available for all attorneys to order and use: http://www.vsb.org/site/publications/resale_disclosure. The Title Insurance Committee is working on an explanation of owner's title insurance.

We plan to draft articles for tax assessors and others in local government to explain basics of real estate and how their decisions impact real estate in the land records. What group of people would you like to be informed about real estate concepts?

The Ethics Committee is working on a multi-year project to summarize and list all Legal Ethics Opinions that impact a real estate practice. (The existing master list of LEOs doesn't show everything that impacts our practice.) To break the massive task into manageable portions, everyone on the Committee is reading a small selection of the LEOs and sharing his/her opinions on what affects us as real estate attorneys.

Part 6, Section IV of the Rules of the Supreme Court of Virginia (effective December 1, 2018) was changed to encourage attorneys to report annually either their pro bono hours or their monetary contributions to pro bono programs.¹ (Rule 6.1 states that “[a] lawyer should render at least two percent per year of the lawyer’s professional time to pro bono legal services.”) Another goal of the section this year is to develop ideas for ways real property attorneys can provide pro bono legal assistance to those in need who otherwise would be unable to afford representation.

¹http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/paragraph_22_pro_bono_reporting. See Chief Justice Lemons’ letter, following the Editor’s column, *infra*.

A third goal (an annual goal of every chairperson) is to encourage greater participation from real property section members. Being involved is not particularly time consuming; Area Representatives meet 4 times a year, in person or by phone. Committee members generally meet 3 times a year, by telephone conference. Regardless of the time spent, the benefits of having access to the collective knowledge and collegiality of the group, along with just getting to know real estate attorneys from around the state, cannot be measured. This year, each committee will have co-chairs and will actively recruit additional members for each committee. Please review the list found near the end of this edition of *The Fee Simple* to determine which committee would be of interest to you and contact the chair to volunteer. We look forward to hearing from you at a meeting in 2019.

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April 15, 2018

Dear Members of the Virginia State Bar:

I am writing to encourage you to voluntarily report your pro bono legal service when you file your Virginia State Bar license renewal application in 2019.

As you know, Rule 6.1 of the Rules of Professional Conduct establishes an aspirational goal for the provision of pro bono legal services: "A lawyer should render at least two percent per year of the lawyer's professional time to pro bono public legal services." Many Virginians are unable to hire a lawyer when they have legal issues. In court proceedings, self-represented parties are less likely to be successful, regardless of the merits of their complaint or defense. Low-income individuals and families are greatly in need of assistance from lawyers.

In his "President's Message" that appeared in the October 2016 *Virginia Lawyer*, entitled "The Most Meaningful Service We Provide," Virginia State Bar President Michael W. Robinson observed:

Simply put, our privilege to practice law carries with it the responsibility to ensure legal services are available to those who, because of financial circumstances, cannot otherwise afford representation. This principle upholds the highest ideals of our profession, and is likewise firmly enshrined in our Rules of Professional Conduct. Rule 6.1 sets forth an aspirational goal for Virginia lawyers to devote 2 percent of their professional time to pro bono public service. That equals just 40-50 hours per year. The goal is aspirational – a distinction that goes hand-in-hand with the voluntary nature of pro bono work, and recognizes that we are perhaps at our best when undertaking voluntary efforts.

On February 27, 2018, the Supreme Court of Virginia amended Part Six, § IV of the Rules of Court by adding Paragraph 22. When Virginia lawyers file their annual Virginia State Bar license renewal application, they will be asked to voluntarily report the number of hours they devoted to pro bono service, or the amount of their direct financial support of programs that

Letter to Members of the Virginia State Bar
April 15, 2018
Page Two

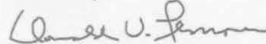
provide direct delivery of pro bono legal services. In accordance with Paragraph 22, the annual license renewal application will allow lawyers to identify the number of pro bono hours provided in the period from July 1, 2018 to June 30, 2019, identify the financial contribution made in lieu of direct service, indicate that the two percent aspirational goal is inapplicable, or decline to make any report. The amendment does not go into effect until December 1, 2018. I write to bring it to your attention so that, if you choose to voluntarily report, you can begin to track hours or financial contributions now for easier reporting in 2019.

As Mr. Robinson said in the conclusion to his President's Message:

Pro bono work allows us to use our special skills as lawyers to improve and change people's lives in ways small and large. From personal experience, and from many discussions with lawyers around the Commonwealth, I can join the chorus that also says it is often the most meaningful – and personally satisfying – service we provide.

The Supreme Court of Virginia is solidly behind the provision of pro bono services. I encourage you to consider Mr. Robinson's inspirational words and to voluntarily report your efforts.

Sincerely,



Donald W. Lemons

DWL:sa

THE CLERK'S CORNER

The Honorable John T. Frey, Clerk of the Fairfax County Circuit Court, submitted by Karen Day¹



John T. Frey has served as the Clerk of the Fairfax Circuit Court since first being elected in 1991; he was re-elected for his fourth eight-year term in 2015. As Clerk of the largest circuit court in the Commonwealth of Virginia, Mr. Frey oversees a staff of 163 employees with a budget of over \$11 million. He attended West Springfield high school and received a Bachelor of Arts degree from Furman University in Greenville, South Carolina. Mr. Frey received his law degree from Hamline University School of Law in St. Paul, Minnesota. He is a member of the Virginia State Bar and the Fairfax Bar Association. John lives in West Springfield with his wife, Shelia.

Mr. Frey served as President of the Virginia Court Clerks' Association from September 2016 through September 2017 and is a past president of the National Association of County Recorders Election Officials and Clerks (NACRC) and the Virginia Association of Local Elected Constitutional Officers. He is a member of the Property Records Industry Association and a former member of the State Public Records Advisory Board, the Virginia Board for People with Disabilities, and the Board of Directors of the Fairfax Bar Foundation. John received the 2006 Public Official of the Year Award from the National Association of County Recorders Election Officials and Clerks which recognizes the member who best exemplifies a commitment to excellence in county government. He was the 2013 recipient of the Virginia Coalition for Open Government Freedom of Information Award and received an Award of Appreciation from the Fairfax Bar Association in recognition of his outstanding service to the community. Additionally, Virginia Lawyers Weekly in 2015 named Mr. Frey as one of their Leaders in the Law.

Karen Day (KD): How did you come to your position as Clerk of the Circuit Court?

Frey: While waiting to hear the results of the Bar Exam, I volunteered on the campaign of Warren Barry, who was running for Circuit Court Clerk in Fairfax. Mr. Barry had been the long time House of Delegates Member representing the Springfield area, where I grew up. When Mr. Barry won the election in November, he asked me to join his staff. I worked in the clerk's office for two years before going into private practice.

One day I was recording some documents in the land records when Mr. Barry approached me and said to stop by his office when I was done recording. When I sat down with Mr. Barry, he told me he was going to run for the State Senate, and he thought I should run for clerk. I had a three-way race for the Republican nomination, and faced Tim Hamer, a really nice guy, in the November election. I have been blessed to be re-elected 3 times.

KD: What do you feel is most unique about your office?

Frey: I think the most unique thing about being a Circuit Court Clerk is the variety of the work. Clerks have over 800 statutory duties. We deal with judges, lawyers, and members of the public on a daily basis. I believe that the Clerk's office touches the lives of just about every family over the 8-year term of a Clerk of Court. We handle marriage licenses, notaries public, concealed handgun permits, adoptions, divorces, business disputes, personal injury cases, jury duty, land records, probate, felonies, misdemeanor appeals, and much more.

¹ Karen L. Day is an attorney and manager of Absolute Title & Escrow LLC, in Alexandria, Virginia.

KD: What are some of the changes you've seen during your time as Clerk?

Frey: I was fortunate to follow in the footsteps of Warren Barry.² He was a visionary. He developed the first case management system and the first remote access system in Virginia. We expanded the remote access system dramatically. Users now have over 40 million images and indices which they can access from their home or office. We were one of the first in the country to automate the land records recording system, and one of the first to implement e-filing of land documents. We automated the jury management system and went to electronic documents and electronic signatures in probate.

The most exciting change is definitely the use of technology. George Washington would have been comfortable searching titles up until about 1985. Sure, the clerk's offices were no longer using quill pens, and we had moved to microfilm, but with the introduction of computers, relational databases, digital imaging, electronic recording, and other technologies. Beginning in the 80's and 90's, the Clerk's office and the real estate industry was fundamentally changed— for the better, in most cases.

KD: Any predictions as to future changes?

Frey: In the near future, I think electronic filing of land records will be mandated by the General Assembly. In the distant future, we may see real property conveyed by the same technology used in crypto currencies. The Property Records Industry Association³ is already studying the use of blockchain technology for transferring interests in real property. Of course, if blockchain technology is ever adopted for conveying real property, it would be a huge disrupter. Potentially, the “land records” we know today would cease to exist and buying and selling real property would become similar to buying and selling a car.

KD: Has increased technology changed the relationships between clerks, real estate attorneys, and title examiners?

Frey: In the “old days”, everyone was in the record room. Having worked in the clerk's office and having practiced real estate law, I knew most of the real estate attorneys and the title examiners on a first-name basis. While there were issues that would arise in the record room, because everyone knew each other, they usually could be resolved in a mutually agreeable manner. Now most of the people in the record room are members of the public looking for a copy of their deed, certificate of satisfaction, or something similar. I no longer know most of the real estate lawyers or title examiners. I miss that interaction.

KD: Have electronic recordings changed the issues facing the Clerks?

Frey: With increased electronic recordings, the Clerk's biggest challenge is trying to find a person at the company handling the recordings with whom to discuss any serious issues.

² Known for his straightforward personality and strong convictions, Warren E. Barry, served in the Virginia legislature for more than 20 years. First elected in 1968 to the Virginia House of Delegates, he was re-elected seven times, serving for fourteen years. He was elected as Clerk of the Fairfax County Circuit Court in 1983. He was elected to the Virginia Senate in 1991 and served until his appointment in 2002 as commissioner of the Virginia ABC Board. (See, Senate Joint Resolution No. 293: *Celebrating the life of the Honorable Warren E. Barry* (2017 Reg. Sess.) available at <http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+SJ293ER+hil>)

³ The Property Records Industry Association (PRIA) was established in 2002 from the outgrowth of a three-year task force formed to promote communication and understanding between the industry's government and business sectors. The mission of the association is to develop and promote national standards and best practices for the property records industry. (See, <https://www.pria.us/>)

KD: Are there any changes you would like to see from technology or the legislature?

Frey: The General Assembly needs to come to a consensus on how to balance people's right to privacy and open records. In the past, the General Assembly tried to protect privacy by requiring remote access users to enter into an agreement with the local clerk's office to gain remote access to non-confidential court records. They also made the purchase of bulk data somewhat cost -prohibitive. Recently, there has been a move toward putting more court information on the internet for free and providing third parties with bulk data. As more court data (versus land records data) is put onto the internet, there will be a backlash. No one wants their neighbor reading the pleadings in their divorce on the internet.

KD: Is there anything the VSB can do (or do better) for you as the Clerk?

Frey: The VSB does a great job getting information out to members of the bar, from CLEs to the various section publications. I always learn something from reading *the Fee Simple*. The topics are timely, and the authors are truly knowledgeable.

KD: What is your favorite part of the job? What is the most challenging aspect of your job? Has it changed over time?

Frey: My favorite part of the job is working with people. I have an awesome staff, and a great bench and bar to work with. The most challenging aspect of my job, which has not changed over the years, is dealing with difficult people. I fundamentally believe that being a public servant means treating everyone, even the mean and nasty people, with respect. You have to deal with people as they are, not as how you want them to be. For example (and this is a true story), I once had a manager come to me and tell me they had a problem at the marriage license counter. When she told me the issue, I honestly had no idea how I was going to deal with it. I said a silent prayer for wisdom and went to meet the person at the counter. Long story short, he was at our counter to obtain a marriage license with his INVISIBLE fiancé. He told me that she was under doctor's care and the medicine she was taking made her invisible. I told him I understood, but Virginia law required both of the parties to appear before the clerk. Then it hit me (not an audible voice from God, but definitely an answer to my prayer), the issue is not that this guy is a nut. The issue is that I cannot see his fiancé. I told the gentleman that they should talk to her doctor and see if the doctor could reduce her medication *just* enough for her to reappear, and then I would be glad to issue them a marriage license. He thanked me profusely, and *they* left the courthouse.

KD: What do you like to do when you're not working?

Frey: My wife Sheila and I have three awesome grandkids, so we spend as much time as possible with them. But, if I have free time, you will find me fishing or hunting for gems and minerals. My garage is full of rocks. The gold nuggets I have found over the years represent some of the most expensive gold in the world, but that cost was well worth the fun of traveling around our beautiful country to find it.

KD: Mr. Frey, thank you. Your time and generosity in sharing your thoughts with us is greatly appreciated.

BLACKACRE, WHITEACRE, GREENACRE, OH MY!

By Hayden-Anne Breedlove, *Student Editorial Assistant*



I've heard many references to the fictional "Blackacre" during my two-plus years in law school. It is discussed so frequently in first-year property courses that my classmates and I were beginning to wonder if it was an exclusive, secretive vacation spot for lawyers! However, (as we all know) Blackacre is fictional. I've talked with many professionals and professors, yet no one seemed to know where this common property class term (along with "Whiteacre" and "Greenacre") originated.

Based on my research, I've been able to determine that these phrases have been referencing hypothetical tracts of land for centuries. The terms originated in the 1600s in England, referencing certain crops grown on various tracts of land. One of the earliest law treatises written in English, *Institutes of the Lawes of England* by Sir Edward Coke, contains the first written reference. Written in 1628, Coke's *Commentary Upon Littleton* (also known as *Coke on Littleton*) references both Blackacre and Whiteacre in a deed transfer hypothetical. He states, "A man seised of *Black Acre* and *White Acre* makes a deed of feoffment of both, and a letter of attorney to enter into both Acres, and to deliver seisin of both of them according to the form and effect of the deed, and he [the attorney] enters into *Black Acre* and delivers seisin..."¹

The Oxford English Dictionary suggests that the phrases stem from tracts of land growing different crops.² It states, "Peas and beans are black, corn and potatoes are white, and hay is green." I'm not necessarily sure those are the crops I'd first associate with each of those colors, but the analogy makes sense when viewed in reference to the period of the 1600s.

Other "odd" terms that are used as real property jargon, such as "seisin" and "fee simple," have more commonly known origins. "Seisin" is a medieval term that represented a legal possession of the land;³ fee simple originated from old English common law, with feudal roots.

King William granted large "estates" of land in exchange for services, such as the provision of food to, or participation in, the royal army. Landholders were essentially tenants of the land that the king owned, thus making the king the landlord. The owners of these large estates were known as "tenants in chief," and reported directly to the king. Eventually, they were able to issue subsequent grants of parcels of land from their estate to "sub-tenants," making the original landowners landlords themselves—yet their obligation to report to the king remained. The term "fee" reflects the right to the use and profit from the land that the landholder had as long as the obligations to the king were met. "Simple" meant that the land could be passed on to any person, as chosen by the estate holder.

The next time you hear someone refer to Blackacre, Whiteacre, and Greenacre, you can enlighten him or her with your knowledge the terms origination,—or just save these tidbits for a real property-themed trivia night. Either way, you now know as much as I do about the origins of these commonly-used property appellations.

¹ Coke, Sir Edward, *Coke Upon Littleton*. 1628. Ed. 2014 Digital Edition. http://www.constitution.org/coke/coke_littleton_coventry.html.

² Oxford English Dictionary.

³ Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart, and R. Wilson Freyermuth, *Real Estate Transfer, Finance, and Development, Cases and Materials* (9th Ed.), 2015.

BOUND AND DETERMINED: THE POWER OF A VIRGINIA ZONING DETERMINATION

By Michelle A. Rosati and David I. Schneider



Michelle A. Rosati and David I. Schneider are land use and zoning attorneys in the Tysons office of Holland & Knight LLP.

There are few areas of law that touch every business, resident, or landowner in Virginia – but zoning is surely one of them. Developers and home builders work every day with complex zoning approvals, navigating the complexities of process and property rights. However, there are many more homeowners and business owners who suddenly find themselves dealing with zoning issues in the course of their other affairs. Zoning issues can come to the forefront in a variety of ways– changes in tenancy, use of signage, and even additions to homes. Zoning ordinance issues can delay tenant buildout and occupancy or potentially disrupt a pending transaction. Other times, property or business owners discover (through receipt of a notice of zoning violation) that their long-standing use of their property is considered illegal.

In Virginia, the zoning administrator is the official charged with addressing these issues. The Code of Virginia permits the governing body of each local jurisdiction to delegate all necessary authority “to administer and enforce the zoning ordinance” to a zoning administrator.¹ Thus, a Virginia zoning administrator has broad statutory authority to administer and enforce the duly adopted zoning ordinances of the locality. The authority includes the power to make binding determinations as to the meaning and application of all terms of the zoning ordinance as well as the power to cite zoning violations. A zoning administrator’s interpretation and construction of the zoning ordinance is accorded “great weight” as a matter of Virginia law.² This dynamic is critical. Lawyers are always conscious of this principle, even when our own analysis of the plain language of an ordinance provision differs from a determination issued by the zoning administrator. The power of a zoning administrator in Virginia is not to be underestimated.

These considerations are amplified by the short reaction time (30 days) afforded by the Code of Virginia for appealing an adverse determination or a notice of violation. As explained in more detail below, the thirty-day period provided in §15.2-2311 is not much time for a surprised landowner to evaluate the factual situation, decide to engage counsel, work with counsel to develop grounds for appeal, and prepare to file. Additionally, parties are confronted with having to quickly evaluate the financial impact of an adverse ruling and decide as to whether to commit resources to a defense of using their land in a way that they fully believed was perfectly lawful. Although in some cases the private parties have lengthier notice of the facts leading up to such a situation, this is certainly not always the case. Finally, the implications of an adverse zoning ruling are significant in that they can very quickly become binding as a matter of law, with no further recourse for appeal or reversal. These parties can be faced with a complex legal situation, with limited time to react, and with potentially very serious and permanent adverse consequences.

¹ Section 15.2-2286(A)(4), which provides specifically that the Zoning Administrator’s authority “shall include (i) ordering in writing the remedying of any condition found in violation of the ordinance; (ii) insuring compliance with the ordinance, bringing legal action, including injunction, abatement, or other appropriate action or proceeding subject to appeal pursuant to § 15.2-2311; and (iii) in specific cases, making findings of fact and, with concurrence of the attorney for the governing body, conclusions of law regarding determinations of rights accruing under § 15.2-2307 or subsection C of § 15.2-2311.”

² *Masterson v. Bd. of Zoning Appeals of City of Virginia Beach*, 233 Va. 37, 44, 353 S.E.2d 727, 733 (1987) (“consistent administrative construction of an ordinance by the officials charged with its enforcement is entitled to great weight”).

Nonetheless, there are shards of light penetrating the darkness. Over the last twenty years, case law and statutory developments have emerged to afford limited harbors of protection to those dealing with potentially adverse zoning rulings.

Following are a series of vignettes developed to illustrate some of these principles. As any lawyer must say, any resemblance to actual persons, places or events is purely coincidental. Furthermore, each vignette is answered with the intent to highlight a specific aspect of an issue and provide reference to current law that could be used in the representation of zoning clients. They are not intended to be a complete analysis of each fact pattern, but rather a guide to help spot crucial zoning matters for your clients.

* * *

1. A client comes into your office with a copy of a notice of violation issued twenty-three days ago by the Happy County Zoning Administrator. The client has been cited for failure to provide the requisite number of parking spaces for retail use in a strip shopping center. The notice of violation bears a notation that the landowner has thirty days to either cure the violation or appeal to the Board of Zoning Appeals. Your analysis indicates that the Zoning Administrator may be in error, as you believe that the site's parking was fully zoning-compliant when the uses were established. Your reading of the relevant zoning provisions indicates that the parking is *legally* nonconforming, meaning that the client could continue to operate lawfully despite not complying with current parking standards. You call the Happy County Zoning Administrator and explain your position. The Zoning Administrator says "Hmmm. I will have to think about that." This seems promising, but what is the best course to protect the client's interests?

The Happy County Zoning Administrator may ultimately agree with your position. However, the critical issue here is the clock ticking on the thirty-day appeal period. Preserving your client's ability to challenge the notice of violation procedurally is essential.

Pursuant to § 15.2-2311 of the Code of Virginia, "[T]he appeal shall be taken within 30 days after the decision appealed from by filing with the zoning administrator, and with the board, a notice of appeal specifying the grounds thereof." In challenging a notice of violation issued by a Zoning Administrator, "a landowner may be precluded from making a direct judicial attack on a zoning decision if the landowner has failed to exhaust 'adequate and available administrative remedies'³ before proceeding with a court challenge. *Vulcan Materials Co. v. Bd. of Sup'rs of Chesterfield Cty.*, 248 Va. 18, 23, 445 S.E.2d 97, 100 (1994) (citing *Rinker v. City of Fairfax*, 238 Va. 24, 29, 381 S.E.2d 215, 217 (1989)). Therefore, "[i]f this mandatory appeal is not timely filed, the administrative remedy has not been exhausted and the zoning administrator's decision becomes a "thing decided" not subject to court challenge."⁴

This thirty-day filing deadline is statutory, and thus, because of the Dillon Rule, strictly construed.⁵ Courts have strictly interpreted this requirement, refusing to entertain an exception for when "...the issue in dispute may be resolved solely as a matter of law"⁶, recognizing only a judicial attack to the constitutionality of an ordinance in its entirety⁷. Virginia Circuit Courts have also strictly interpreted

³ Appealing a decision of a Zoning Administrator to the Board of Zoning Appeals is an administrative remedy. *Lilly v. Caroline Cty.*, 259 Va. 291, 296, 526 S.E.2d 743, 745 (2000).

⁴ *Id.* (citing *Dick Kelly Enter. v. City of Norfolk*, 243 Va. 373, 378, 416 S.E.2d 680, 683 (1992)).

⁵ The Virginia Supreme Court has "consistently held that boards of zoning appeals are 'creatures of statute possessing only those powers expressly conferred'." See *BZA of Fairfax County v. Board of Sup'rs.*, 276 Va. 550, 666 S.E.2d 315 (2008).

⁶ *Phillips v. Telum, Inc.*, 223 Va. 585, 588-89, 292 S.E.2d 311, 313 (1982).

⁷ *Bd. of Sup'rs of James City Cty. v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975).

this thirty-day requirement, starting the “clock” from the earliest appealed decision⁸ and declining to apply the extension of filing periods to the next business day when the thirtieth day lands on a weekend or holiday⁹. The key here is to count this 30-day period as conservatively as possible.

Although it is certainly encouraging that the Happy County Zoning Administrator appears to be considering your substantive argument, this does not modify, or even permit the Zoning Administrator to modify or toll, the timing parameters of the statute. Unless you can persuade the Zoning Administrator to officially withdraw such a notice of violation pending substantive discussions, it is critical to assume that a timely appeal must be filed to preserve your client’s legally nonconforming rights, even if you assert that the notice was issued in error. Your legal position on the substantive zoning issue may well be correct, but that does not mean that the notice of violation is voided retroactively - without assuring that the rights are protected by a timely appeal.¹⁰

2. Your client owns the Joyful Candy Shoppe but has grown bored with selling saltwater taffy. She has come to you to ask for help in converting the candy store to a coffeehouse. Your review of the Sunnyville County Zoning Ordinance indicates that this would be a permitted “by right” use, but you have advised the client that it would be best to get an official zoning determination before investing in the expensive coffee roasters and espresso makers for the new use. The Sunnyville Zoning Administrator issues a zoning determination that a coffeehouse is a permitted “by right” use, and, further, the determination states that “This determination shall be final and unappealable if not appealed within thirty (30) days.” Your client happily puts a “Coming soon!! Sunnyville Café!!” banner on the candy store and starts taste-testing coffees from all over the world. Unfortunately, several of the neighbors, having seen the banner, grow concerned about issues like traffic and noise in their neighborhood. After these neighbors have several anxious discussions with the Sunnyville Zoning Administrator, your client receives a letter indicating that the zoning determination, issued six weeks prior, was issued in error, and has been revoked.

While this is an unpleasant surprise for your client, the Sunnyville Zoning Administrator *does* have the right to reverse the initial determination – *at this point*. Although an unhappy *recipient* of a zoning determination has only 30 days to appeal, the zoning administrator can change or completely reverse the determination for 60 days. Section 15.2-2311(C) of the Code of Virginia provides that a “written order, requirement, decision or determination made by the zoning administrator or other administrative officer” cannot be changed, modified or reversed after 60 days “where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer.” This rule offers significant protection to parties who in good faith rely on approvals issued in error once sixty days has passed.

There are exceptions to this rule – such determinations can still be reversed after the 60-day period has run if the original ruling was made because of malfeasance or fraud on the part of the official making the ruling, or (with the concurrence of the attorney for the governing body) for the purpose of correcting a clerical error. This statute¹¹ was enacted in 1995 in reaction to the Supreme Court of

⁸ *David and Catharine Voortiees v. County of Fairfax Board of Zoning*, Case No. CL-2007 (Va.Cir.Ct. Fairfax County Apr. 15, 2009).

⁹ *Gem Ram, LLC v. Board of Zoning Appeals of the Town of Round Hill, Virginia*, No. CL-43458, (Va.Cir.Ct. Loudoun County Nov. 09, 2008).

¹⁰ *Gwinn v. Alward*, 235 Va. 616, 621, 369 S.E.2d 410, 412 (1988). In *Gwinn v. Alward*, a seminal Virginia case on this issue, there were facts supporting an assertion that the uses cited as zoning violations were “grandfathered” (or, more accurately, legally nonconforming), but the Supreme Court of Virginia held that holding that the failure to exhaust the administrative remedy of appeal to the Board of Zoning Appeals rendered the Zoning Administrator’s decision “a thing decided and not subject to attack” by the property owner.

¹¹ Section § 15.1-496.1 was subsequently recodified as §15.2-2311.

Virginia's Decision in *Gwinn v Collier*.¹² In *Gwinn*, the Fairfax County Zoning Administrator issued a non-residential use permit for a “major vehicle establishment,” but revoked that permit nearly two years later by declaration that the issued non-RUP was void *ab initio* and by issuance of notices of zoning violation. The Supreme Court of Virginia held that Collier’s failure to appeal the revocation rendered the adverse ruling a “thing decided”.¹³ The apparent unfairness of such a result prompted the General Assembly to enact Section 15.2-2311(C). The statute and rights that it confers are significant, as it protects the good-faith reliance of landowners on a determination– even when that determination turns out to have been made in error.

The Court affirmed the protections of Section 15.2-2311(C) in the 2008 *Goyonaga* case.¹⁴ The Supreme Court of Virginia “assume[d], without deciding, that here the zoning administrator’s approval of the building plans” constituted a Section 15.2-2311(C) decision. However, the Court did not extend the protection of the statute to the *Goyonaga* approvals, concluding that “...the circuit court correctly determined that the evidence did not establish that the zoning administrator’s approval of the building plans included an authorization to effect the complete demolition of the existing structure.”¹⁵

The Supreme Court of Virginia has most recently considered the operation of Section 15.2-2311(C) in *Bd. of Supervisors of Richmond Cty. v. Rhoads*.¹⁶ In that case, a homeowner filed building permit plans for a new two-story detached garage, including an application for a “Zoning Certificate of Compliance.” The zoning administrator visited the site, reviewed the plans, and checked “Approved” on the application, signing the Certificate of Compliance in November of 2013. In July of 2014, the zoning administrator informed Rhoads that the garage approval had been made in error, as the garage was taller than the existing primary structure. In September of 2014, the zoning administrator issued a notice of violation. Rhoads appealed this notice of violation on the basis that the initial approvals could not be reversed pursuant to Section 15.2-2311(C), but the BZA denied their appeal. The Board stipulated at trial that the zoning administrator had visited the subject property, and knew, as of that day, that the primary structure was only a one-story house. The zoning administrator testified, essentially, that he had signed the approval without reading the application carefully. This is a different situation from *Goyonaga* – the issue of contention here was the height of the garage and there was no contention that the on-site construction differed from the approval. The Zoning Administrator simply approved the garage in error. Therefore, the Circuit Court ruled in favor of Rhoads, holding that their approval was vested pursuant to Section 15.2-2311(C). The Supreme Court of Virginia affirmed and, emphasizing the remedial nature of the statute, noted that the statute must be “liberally construed so that the purpose intended may be accomplished,” and

¹² 247 Va. 479, 443 S.E.2d 161 (1994).

¹³ *Id* at 164.

¹⁴ *Goyonaga v. Board of Zoning Appeals*, 275 Va. 232, 657 S.E. 2d 153 (2008).

¹⁵ The Goyonagas had obtained a variance to permit the expansion of a residence that was legally nonconforming in a number of respects. Unfortunately, during construction of the expansion, the landowners encountered structural issues, requiring demolition of more than 75% of the existing structure – which, as a matter of the applicable ordinance, terminated the nonconforming use status. The Goyonagas performed this work without obtaining a zoning determination or amending their variance. The zoning administrator issued a stop-work order and a determination that all construction on site was required to comply with then-current zoning provisions (in essence, ruling that the site and structure had lost all legally nonconforming rights). The Court noted that the 2006 amendment of Section 15.2-2309 states that a variance renders a nonconforming use “conforming for all purposes under state law and local ordinance” so long as the use approved by variance is not expanded. However, as the Court indicates, this did not help the Goyonagas, as the amendment became effective after the BZA ruled in their case. However, this statutory provision is a useful one to note.

¹⁶ *Bd. of Supervisors of Richmond Cty. v. Rhoads*, 294 Va. 43, 803 S.E.2d 329 (2017).

must “..be interpreted so as to provide relief and protection to property owners who rely in good faith upon erroneous zoning determinations.”¹⁷

Because the Sunnyville Café determination is within the initial 60-day period, the protections offered by the remedial statute do not apply. However, depending on the actual wording, the *reversal* may well be a determination in its own right, and appealable as such to the local Board of Zoning Appeals.

3. Harry Homeowner filed for building permits to establish a small acupuncture clinic on the second floor of his detached garage, zoned R-1, in Greenfields County. Harry received approval of his building permits in April of 2017. On the face of the documents a box titled “Zoning Certification” was checked, signed and dated by the Greenfields Zoning Administrator. The zoning certification bore the standard language “This certification shall be final and unappealable if not appealed within thirty (30) days”. Harry constructs the improvements, purchases new equipment, and pays for advertising for his new clinic. In January 2018, the Greenfields Zoning Administrator retires, and a new Zoning Administrator begins work in Greenfields on February 1, 2018. The new Zoning Administrator notes, with surprise, the Harry Homeowner permit. The Zoning Administrator drafts, then sends, a letter to Harry, revoking the April 2017 permits. The revocation states that the permits had been issued in error, as acupuncture clinics are permitted only within principal structures, and may only occupy 25% of any principal structure. The revocation is followed shortly thereafter by a Notice of Violation.¹⁸ You meet with the Greenfields County Attorney to explain that the April 2017 permit is now beyond the time period where it may be reversed. The Village Attorney tells you, in no uncertain terms, that (a) the approval of building permits is not a “zoning determination” at all, and thus Section 15.2-2311(C) does not apply, (b) in any case, the decision was “non-discretionary” because the error is clear on the face of the zoning ordinance, and (c) because the error committed by the previous Greenfields Zoning Administrator was “non-discretionary”, its reversal is not limited by the 60-day rule. The County Attorney explains (at some length) that only the Board of Supervisors can enact provisions of the zoning ordinance, and that the previous zoning administrator simply did not have the legal authority to make such a determination – so it is void *ab initio*. The County Attorney sounds very sure about this, and, to be honest, it sounds rational and logical. Can anything be done?

In this situation, Harry Homeowner appears to have received a zoning determination or decision that is protected by Section 15.2-2311(C), but the County Attorney is refusing to recognize these rights. As to point (a) made by the County Attorney, the Court’s ruling in *Rhoads*¹⁹ makes it clear that the zoning administrator’s certification that plans submitted for approval meet all applicable zoning requirements is, indeed, a “written order, requirement, decision or determination” for purposes of Section 15.2-2311. This is a notable result—it is common that ministerial (aka “by-right”) approvals are sent to the zoning administrator (or someone operating under duly delegated authority of the zoning administrator), to be checked for zoning compliance.

The *Rhoads* opinion is not clear on a number of factors. First, was this “Certificate” a separate document or simply an element of the permit application – and whether that distinction would bear on the ultimate result. Also, the *Rhoads* opinion indicates that the “...Certificate included instructions regarding how to appeal if the Application was denied;”²⁰ It is not entirely clear on the face of the *Rhoads* opinion whether these instructions referred to the “Certificate of Compliance” alone or to the entire submission for approval to construct the garage. However, the Court in *Rhoads* did say that

¹⁷*Rhoads*, 294 Va. at 55, 803 S.E.2d at 335 (2017).

¹⁸ This is an interesting twist – certainly, under these circumstances, if it is not clear whether the revocation is the first decision with the requisite “finality”, it would be the safer course to appeal both the revocation and the notice of violation within 30 days of the issuance of the revocation.

¹⁹ *Rhoads*, 294 Va. 43, 803 S.E.2d 329, 330 (2017)

²⁰ *Id. at Va. 43, S.E.2d. 331.*

the Certificate “..affirmatively approved the zoning for the Garage project at issue,” and it is clear that the Certificate of Compliance, by ordinance, affirms “that the building plans complied with the Zoning Ordinance in all respects.”²¹ While these types of permits will vary widely in format in various Virginia jurisdictions, it will be interesting to see how courts view these “zoning review signature” determinations in light of the *Rhoads* case and the law on construction of remedial statutes.²²

In points (b) and (c), the Greenfields County Attorney leans heavily on the argument that the previous zoning administrator’s determination was based on a non-discretionary error. It is true that § 15.2-2311(C) at one time contained an exception to the 60-day rule when “modification is required to correct clerical or other non-discretionary errors.” (emphasis added). In a 2009 Fairfax County Circuit Court case, the term “non-discretionary” was interpreted to include errors made by the zoning administrator on the grounds that the zoning administrator does not have the authority to modify the text of the zoning ordinance or ignore its provisions.²³ Clearly, such an interpretation would negate the clear remedial intent of the statute. Fortunately for Harry Homeowner, § 15.2-2311(C) was amended in 2012 to delete the words “or other non-discretionary”, limiting this part of the exception to modifications required to correct clerical errors.

The *Rhoads* case is also notable in that the Court makes it clear that a ruling that is protected under Section 15.2-2311(C) is not just binding on the zoning administrator – it is also binding on the governing body of the locality, *and* on the board of zoning appeals, *and* on the court on review. This clarification seems consistent with the remedial intent of the statute, and appears to render these decisions truly protected even if made in clear error. So, while the Greenfields County Attorney’s assertions have a basis in broader zoning principles, the current version of Section 15.2-2311(C) and the Court’s clarifications in *Rhoads* may indicate that Harry Homeowner has found his way to a safe harbor.

4. Stacy Cappuccino owns the Fabulous Coffee Shop but has grown bored with lattes and would like to open a craft brewery in the existing coffee shop structure. She has a set of sketches drawn and submits a building permit application for the craft brewery at the County zoning offices. After several weeks with no response, Stacy goes to the zoning office to see what is happening. When she inquires at the counter, the Zoning Administrator informs Stacy that a craft brewery would not be permitted on the site, as the area of the lot is too small for the use. Stacy is not happy to hear this because she believes that the craft brewery is an “eating establishment” with a required 30,000 square foot lot minimum lot size and not, as the Zoning Administrator contends, a “production facility” with a two-acre minimum lot size requirement. Stacy says, “the ordinance clearly permits this – there are five others in town and none of them is on a two-acre lot!” A heated argument ensues; just before Stacy leaves the office, the Zoning Administrator says “Fine! If you don’t like my answer, you can always appeal and take it up with the Board of Zoning Appeals!” After

²¹ *Id. at Va. 52, S.E.2d. 334.*

²² The distinction between the “Certification of Zoning” in *Rhoads* with the “Zoning Clearance Certificate” on the “Cash Receipt” in the *Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 738 S.E.2d 895 (2013), case is a fine one. While *Norfolk 102* is often cited for the proposition that a “Cash Receipt” is not a zoning determination, the case is complicated, and may have actually turned more on the question of whether the use was properly categorized in the application. The context of *Norfolk 102* is also notable, as the businesses in question, alcohol-serving “Entertainment Establishments”, were attempting to revert to rights they asserted arose from their 1998-1999 business license approvals calling the uses “Eating Place[s]”, after their special exceptions for Entertainment Establishments had been revoked, and applications for new special exceptions were denied.

²³ “Section (2) is clearly applicable to this case. For some reason it was either overlooked or ignored by the Director when the line adjustment was approved. Yet, the Director may not apply one section of the Zoning Ordinance, but ignore its companion section. Doing so is a non-discretionary error.” *Board of Sup'rs of Fairfax County v Board of Zoning Appeals of Fairfax County*, No. CL-2008-2729, 2009 WL 1269386 (Va.Cir.Ct. Fairfax County Apr. 08, 2009).

some consideration, Stacy makes an appointment and meets with you to discuss her options three weeks later.

Believe it or not, there is such a thing as an “oral” or “unwritten” zoning determination, and even these unwritten zoning determinations must be appealed within thirty days or they will become a “thing decided” not subject to appeal. The Supreme Court of Virginia made this very clear in *Lilly v. Caroline County*²⁴. It appears that this “discussion” may qualify as a binding determination, and Stacy would do well to file a timely appeal.

The notion that an unwritten statement can have such serious legal importance is both challenging and counterintuitive. How can we distinguish between simple discussions with zoning officials and “determinations”? It is not entirely clear what separates the kind of non-written zoning determination in *Lilly* from the non-written zoning decision described in *Vulcan Materials*²⁵. An examination of the differences in these cases can shed some light on Stacy Cappuccino’s zoning issues.

In *Vulcan*, a landowner sought to reopen a quarry that was subject to a still-valid conditional use permit and engaged in discussions with the County in order to determine what, if any, approvals would be required. The County planning officials told the applicant, by telephone, that “we determined,” according to Rogers, that “the conditional use was still valid, but the plan of operation had expired in 1982 and that in order to re-open the quarry, it would be necessary for them to submit another plan of operation to the Planning Commission and Board of Supervisors.” *Vulcan*, 248 Va. At 20, 445 S.E.2d at 98 (1994).²⁶ *Vulcan* submitted a new “plan of operation”, but it was ultimately denied. On appeal, the trial court ruled that *Vulcan*’s failure to appeal the verbal determinations timely precluded them from raising the issue in court. However, the Supreme Court of Virginia had a different perspective and ruled that, because *Vulcan* did not have applications pending at the time of the determination, they were not “aggrieved” and, thus, “[W]ithout a pending application, the oral comments merely were advisory.”(emphasis added) Section 15.2-2311(C) does not limit its protection to written decisions made in the course of a land use approval process, but the *Vulcan* case might be read to make that issue dispositive as to *unwritten* determinations.

In the *Lilly* case, an oral determination made during a Planning Commission hearing was appealed by a non-party to that application, and the Supreme Court of Virginia ruled that the determination was binding if not timely appealed.²⁷ It is also notable that the “oral determination” in *Lilly* was followed by an oral notification that this decision could be appealed.²⁸ In both cases, the result was to allow the courts to consider whether the “determination” was correct. It is reasonable to conclude that, although the courts may view what constitutes “oral determinations” more narrowly, they may still be binding and subject to the 30-day appeal requirement.

Stacy Cappuccino definitely has a land use application pending, meaning the facts in her case are much more like *Lilly* than *Vulcan*. Stacy’s basis for being “aggrieved” is even clearer than that of the *Lillys*, as she is the applicant in that pending case. The “discussion” that Stacy has at the zoning

²⁴ *Lilly v. Caroline Cty.*, 259 Va. 291, 526 S.E.2d 743 (2000).

²⁵ *Vulcan Materials Co. v. Bd. of Sup'rs of Chesterfield Cty.*, 248 Va. 18, 445 S.E.2d 97 (1994).

²⁶ This “determination” was reiterated to the landowner in the pre-application meetings: “*Vulcan* did not challenge this advice at the time and proceeded to work with county officials in developing an acceptable, new plan of operation. In two “preapplication” meetings held in August and September 1990 attended by *Vulcan* representatives, Rogers discussed again the requirements she “had determined would be necessary for *Vulcan* to begin reoperation of the quarry.” She told *Vulcan* that a new plan of operation would have to be approved by the Board after it had received a recommendation from the planning commission.” *Id.*, 248 Va. At 21, 445 S.E.2d at 98.

²⁷ *Lilly*, 259 Va. 291, 526 S.E.2d 743 (2000).

²⁸ *Vulcan*, 248 Va. 18, 445 S.E.2d 97 (1994).

office has two other critical characteristics: first, she is told that the decision may be appealed, and, second, the decision was conveyed with adequate information as to the reasoning behind it.²⁹

From a practical standpoint, it seems prudent to err on the side of caution. If an official tells you that his unwritten decision can be appealed, *Lilly* certainly supports taking that official at his word, concluding that the oral decision is binding and acting accordingly. Even without such a statement, it would be prudent to ask for clarification in a situation where there is doubt of as to whether or not the decision is binding (either orally or in writing). It is our experience that in cases where the official did not mean to make a binding determination, the official will promptly and readily clarify. It can be very helpful to have informal discussions with planning and zoning staff for multiple reasons, and it would be advisable to clarify that you are not asking for binding determinations during those discussions. We commonly have such discussions in order to formulate more productively written requests for written determinations.

Section 15.2-2311(A) specifies that, as to a *written* determination, the 30-day appeal period does not begin to run until the requisite notice of appeal rights has been given, this code provision does NOT encompass unwritten/oral determinations. Again, with erring on the side of caution as the theme, it seems most prudent to calculate the appeal period from the day that the unwritten/oral determination is made, even if the notice of appeal rights is given later (or not at all). This is not to imply that the countless discussions that happen every day between counsel and zoning officials are all binding determinations, but as *Lilly* and *Vulcan* illustrate, they do exist.

5. Clara Cottager owns a lovely old bungalow in Saint Cecilia County. After the house was built, the Saint Cecilia County Zoning Ordinance was amended to include minimum side yard requirements. Clara's house does not meet these requirements but is legally nonconforming by virtue of having been legal when originally constructed. Clara has often considered moving to Florida to be closer to her grandchildren and even put her house on the market for a period of time, but did not receive an offer that induced her to leave her lovely gardens and the moderate Virginia climate. Having made this decision, she begins to think about expanding her back porch, and has an architect draw up plans for the zoning office. Clara is shocked to learn that, when her house was on the market, one of her prospective buyers, Pansy Purchaser, had requested a zoning determination as to whether the addition of a side porch would be permitted. The Saint Cecilia County Zoning Administrator issued a written determination to Pansy Purchaser that, due to the adoption of the new minimum side yard requirements, "no additions to the existing residence shall be permitted". Clara, who had worked at the zoning office prior to her retirement, immediately said "But Section 23.2(e) of the Saint Cecilia Zoning Ordinance very clearly states that expansions of legally nonconforming structures are permitted so long as the expansion does not exacerbate the nonconformity!" The zoning administrator is clearly sympathetic, but the Saint Cecilia County Attorney sadly chimes in: "Unfortunately, Miss Purchaser did not file a timely appeal of that determination...so it is now a "thing decided" and not subject to reversal."

Clara's conundrum is that the determination was issued without her knowledge or consent and may be beyond the point where she can appeal it. This illustrates the importance of ensuring that contract purchasers clearly understand what they may and may not do in the course of performing due diligence on an acquisition. Fortunately for Clara, there are two statutory provisions that will help the Zoning Administrator land on the right answer here. Section 15.2-2204(H), as it was amended in 2011, places an affirmative duty on the locality to ensure that the property owner receives notice of a determination request by a third party:

"When any applicant requesting a written order, requirement, decision, or determination from the zoning administrator, other administrative officer, or a board of zoning appeals that is subject to the appeal provisions contained in § 15.2-2311 or 15.2-2314, is not the owner or the agent of the owner of the real property

²⁹ Dick Kelly Enterprises, Virginia P'ship, No. 11 v. City of Norfolk, 243 Va. 373, 416 S.E.2d 680 (1992).

subject to the written order, requirement, decision or determination, written notice shall be given to the owner of the property within 10 days of the receipt of such request. Such written notice shall be given by the zoning administrator or other administrative officer or, at the direction of the administrator or officer, the requesting applicant shall be required to give the owner such notice and to provide satisfactory evidence to the zoning administrator or other administrative officer that the notice has been given. Written notice mailed to the owner at the last known address of the owner as shown on the current real estate tax assessment books or current real estate tax assessment records shall satisfy the notice requirements of this subsection.

This subsection shall not apply to inquiries from the governing body, planning commission, or employees of the locality made in the normal course of business.” (emphasis added).

The notice provision of the statute is clearly intended to provide the property owner – the most critical party-in-interest – with enough time to intervene before a potentially adverse determination is made. The hypothetical in Clara’s case assumed that she did not receive any mailed or posted notice. If it can be proven that Pansy Purchaser had provided misleading evidence of having notified Ms. Cottager, it might be possible for the Zoning Administrator to reverse the determination as having been made in reliance on a fraud, pursuant to Section 15.2-2311(C). However, in the event that this was simply the result of an error, Section 15.2-2311(A) appears to come into play:

“Notwithstanding any charter provision to the contrary, any written notice of a zoning violation or a written order of the zoning administrator dated on or after July 1, 1993, shall include a statement informing the recipient that he may have a right to appeal the notice of a zoning violation or a written order within 30 days in accordance with this section, and that the decision shall be final and unappealable if not appealed within 30 days. The zoning violation or written order shall include the applicable appeal fee and a reference to where additional information may be obtained regarding the filing of an appeal. The appeal period shall not commence until the statement is given and the zoning administrator’s written order is sent by registered mail to, or posted at, the last known address or usual place of abode of the property owner or its registered agent, if any.” (emphasis added)

Because Clara has just learned of this determination, it would seem that, pursuant to Section 15.2-2311(A), the thirty-day appeal period would begin running on that day. (Viewing the situation conservatively, it would be better to start the clock than to quibble about “constructive notice” satisfying the posting requirement.) Although the Zoning Administrator may not have the legal authority simply to reverse the determination, it seems that Ms. Cottager could still make a timely appeal, and send the issue to the local Board of Zoning Appeals to be decided on its merits. (The Zoning Administrator may even acquiesce to a correct interpretation on appeal.) In our experience, Virginia zoning administrators care very much about reaching the right answer, as the Virginia courts recognize that “..consistent administrative construction of an ordinance by the officials charged with its enforcement is entitled to great weight³⁰, especially, although not always, where the “.. administrative construction has continued and been acquiesced in for a long period of time”³¹. Although Virginia law will support reversal of a zoning determination in cases where the interpretation is “plainly wrong” as a matter of the text of the applicable zoning ordinance,³² in reality, most of the zoning interpretations made in the ordinary course operate in shades of gray, versus

³⁰ *Masterson v. Bd. of Zoning Appeals of City of Virginia Beach*, 233 Va. 37, 44, 353 S.E.2d 727, 733 (1987)

³¹ *Id.*

³² See *Donovan v. Bd. of Zoning Appeals of Rockingham Cty.*, 251 Va. 271, 274, 467 S.E.2d 808, 810 (1996); See also *Bd. of Zoning Appeals ex rel. Cty. of York v. 852 L.L.C.*, 257 Va. 485, 514 S.E.2d 767 (1999).

black or white. The bottom line here is that the protections in the Code of Virginia for landowners like Clara Cottager have given her the opportunity for a substantive appeal.

* * *

As these zoning fables illustrate, a Virginia zoning administrator has broad authority on substantive issues of interpretation and enforcement. This makes perfect sense, as zoning administrators are engaged in this process on a daily basis and have both the expertise and the task of administering the ordinances consistently and accurately. When our clients have zoning interpretation or enforcement issues, an awareness of the ticking “game clock”, and of the various protective statutory provisions, can help ensure that such stories have a happy ending.

FINDING COMMON GROUND ON PROFFER REFORM

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Since its controversial passage in 2016, Virginia's Proffer Reform Law² has continued to stir debate. Despite the rift between homebuilders and local governments over the law, efforts are underway to find common ground.³ Initially, opponents of the law sought either outright repeal or additional exemptions to make the law inapplicable to certain parts of the Commonwealth.⁴ However, recent efforts have instead focused on reforming the Proffer Reform law.⁵ This article highlights some of the key concerns voiced by both opponents and supporters of the law, and evaluates what types of legislative changes may be appropriate in light of common law and constitutional limitations.

Creation of the Proffer System

The current clash between local governments and the development industry represents a tension between public interests and private property rights that has existed since zoning was found to be lawful by the U.S. Supreme Court in *Village of Euclid v. Ambler Realty Co.*⁶ On the one hand, there is the local government's valid exercise of its "police power" to protect its citizens from the harmful

¹ The views expressed in this article are solely the views of the authors and do not represent the views of any other person, firm, institution or organization.

² Code of Virginia § 15.2-2303.4, also known as "The Proffer Reform Law," was passed by the Virginia General Assembly during the 2016 session and became effective July 1.

³ For example, stakeholders convened last May for a discussion hosted by the George Mason University Center for Real Estate Entrepreneurship entitled *The Proffer Reform Law and Northern Virginia Residential Development - Where Do We Go From Here?*. The panel was organized to discuss the different responses from residential developers, builders, and local governments to the Proffer Reform Law.

⁴ The law in its present form exempts certain areas. Va. Code § 2303.4(E). See also Renss Greene, *Loudoun Planning Commission Waves Through Proffer Workaround*, Loudoun Now (Sept. 30, 2016) (reporting that the proffer reform bill faced "strident and unanimous opposition" from local government organizations and that "[c]ounty leaders and representatives in Richmond admitted early on that they had little chance of defeating the bill, and focused instead on writing in exemptions.").

⁵ The Virginia Municipal League reported that the Senate Committee on Local Government held a meeting in the spring to discuss proffers and determined that local governments and homebuilders should meet and "develop sensible changes to the proffer statute." <https://www.vml.org/enews-april-19-2018/>.

⁶ 272 U.S. 365 (1926).

impacts of development.⁷ On the other hand is the requirement to protect the rights of property owners as embodied in the U.S. and Virginia constitutions.⁸

Nearly fifty years ago, Virginia lawmakers, working with the public and private sectors, enacted a legislative solution that sought to balance these competing interests.⁹ This legislation allowed conditional zoning¹⁰ whereby developers could voluntarily offer to mitigate the impact of their developments, rather than losing approval for projects because of unmitigated impacts.¹¹ These voluntary offers of mitigation (known as “proffers”) are made as written conditions applicable to the project, and upon acceptance, the proffers become part of the zoning ordinance applicable to that particular development.¹²

Since their inception, the use and breadth of proffers has expanded and now includes the ability of developers to offer construction of off-site improvements and/or cash to local jurisdictions.¹³ That has led to renewed clashes as local governments in some parts of the state sought cash proffers approaching \$60,000 per single family home, as predicted by Til Hazel, a proponent of the proffer system.^{14, 15}

Pressures on the Proffer System

Certain economic and legal developments added fuel to the conflict. For example, several northern Virginia counties had become the fastest growing jurisdictions in the country,¹⁶ putting enormous political pressure on local government officials to make developers pay for growth – with schools

⁷ *Id.* at 387 (“The [zoning] ordinance now under review . . . must find [its] justification in some aspect of the police power, asserted for the public welfare.”).

⁸ U.S. Const. amend. V; Va. Const. art. I, § 11.

⁹ See Edward A. Mullen & Michael A. Banzhaf, *Virginia’s Proffer System and the Proffer Reform Law of 2016*, 20 Rich. Pub. Int. L. Rev. 203 (2017) for a discussion of the history of proffers in Virginia.

¹⁰ See Va. Code § 15.2-2303 (allowing in certain localities “the adoption . . . of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body . . . by the owner of the property which is the subject of the proposed zoning map amendment.” (emphasis added)).

¹¹ See Mullen & Banzhaf, 20 Rich. Pub. Int. L. Rev. at 205 (“[T]he original intent and purpose underlying Virginia’s proffer system [was] to provide a legally binding (legislative) method by which an applicant may add to the requirements of, or modify her rights under, an existing zoning classification in a manner not generally applicable to land in the zone both to provide for the protection of the community and as means for gaining government approval for a rezoning.”).

¹² See *Jefferson Green Unit Owners Association, Inc. v. Gwinn*, 262 Va. 449, 551 S.E.2d 339 (2001) (“ . . . the [written] proffers become part of the zoning ordinance . . . they are legislative enactments . . .”).

¹³ Initially, cash proffers were disallowed. See Mullen & Banzhaf at 207-08 (noting that when proffering authority was expanded to all localities in 1978, “the General Assembly was sufficiently concerned with potential abuse that it disallowed both cash contributions and other benefits that are not specifically tied to the impacts of the development . . . and specifically prohibited any condition that is not related to the physical development or physical condition of the property.”).

¹⁴ Some developers consider John T. (Til) Hazel, attorney and developer, to be the father of the proffer system. See Marcia McAllister, Proffers system helps Fairfax County ride boom, *Washington Post* (May 11, 1985).

¹⁵ In 2016, the cash proffer in Loudoun County for example had risen to just under \$60,000 for a single-family home. See <https://www.cvilletomorrow.org/news/article/24155-new-virginia-proffer-law-creates-uncertainties/>.

¹⁶ In 2013, Loudoun County was the second fastest growing county in the country. Joel Kolin, *America’s Fastest Growing Counties: The ‘Burbs Are Back*, *Forbes.com*, September 26, 2013.

being at the epicenter of citizens' frustrations.¹⁷ Because roads and schools were not being built at the same pace as development, some residents understandably became antagonistic toward growth, spurring a "no growth" or "not in my backyard" reaction to residential zoning cases.¹⁸

In response, several jurisdictions enacted proffer schedules that set out how much per dwelling unit a property owner/developer should pay for schools and other services. While these schedules were theoretically "suggestions" for *voluntary* proffers, in practice, developers simply paid the "suggested" sums, believing that if they did not, their rezoning application would be denied. Initially, the development community welcomed the schedules because they provided not only certainty as to how much would have to be paid, but also an argument that if those amounts were proffered, rezoning requests could not be denied because the impacts clearly had been mitigated by proffering the suggested amount.

However, the economic and political forces began shifting in ways that led to the current conflict. As rapid growth continued, citizens demanded that rezonings either be denied or that developers pay more. Zoning moratoriums, however, are illegal in Virginia,¹⁹ so in response, localities increased their suggested proffer amounts.²⁰ Neighboring localities even competed with one another, increasing proffers deemed "too low" compared to other jurisdictions.²¹

Although they complained about proffers as "extortion," large developers willingly paid the increased amounts because doing so meant obtaining approval of the project – and definite sums provided certainty for project *pro forma* assumptions and projections. Developer acceptance of higher proffers, however, dimmed during the Great Recession as construction stalled nationwide.²² Local governments faced pressures of their own (especially the fast growth jurisdictions), and in some cases, even if there was a legitimate basis for a reduction, the governing body did not, and perhaps politically could not, reduce the proffer amounts previously set.

Constitutional and Statutory Limitations on Proffers

The problem of excessive exactions in land use cases came to the attention of the courts in a series of statutes²³ and cases, including *Cupp v. Board of Supervisors of Fairfax County* and *Board of*

¹⁷ See e.g., <https://potomaclocal.com/2017/01/27/school-overcrowding-spooks-prince-william-leaders-rezoning-deferred/>.

¹⁸ For a discussion of "NIMBY-ism" in Loudoun County, Virginia, see Calandrillo, S. P., Deliganis, C. V., & Woods, A., When private property rights collide with growth management legislation, *Cornell Real Estate Review*, 13(1), 20-35 (2015); <http://scholarship.sha.cornell.edu/crer/vol13/iss1/6>.

¹⁹ *Board of Supervisors v. Horne*, 216 Va. 113, 215 S.E.2d 453 (1975); *Matthews v. Board of Zoning Appeals*, 218 Va. 270, 237 S.E.2d 128 (1977).

²⁰ See Jill Palermo, *Prince William County will ask for more cash from developers*, InsideNova (June 21, 2014).

²¹ *Id.* "School board members have long complained that Prince William's proffers, last revised in 2006, are too low compared to surrounding counties and fall far short of covering the costs of new schools."

²² See <https://www.pbs.org/newshour/economy/u-s-construction-rebound-great-recession> (Aug. 30, 2016).

²³ Initially, these clashes were over how proffer monies were being collected and used. That resulted in limits on when proffers could be paid and the time period in which they must be used by the local government. See Va. Code §§ 15.2-2298(A); 15.2-2303.1:1; 15.2-2303.2(C); 15.2-2303.3.

Supervisors of James City County v. Rowe in Virginia²⁴ and *Nollan v. California Coastal Community and Dolan v. City of Tigard* in the U.S. Supreme Court.²⁵

Addressing special exceptions in *Cupp*, the Virginia Supreme Court said that requiring a property owner to expand a road when his development contributed only a small part of the traffic on the road violated Article I, § 11 of the Virginia Constitution.²⁶ The U.S. Supreme Court cases *Nollan* and *Dolan* came to similar conclusions based on the Fifth Amendment to the U.S. Constitution.²⁷ In these state and federal cases, the common problem was that the government required more than was reasonably necessary to mitigate the developments' impacts, and therefore, the courts found that the government was effectively taking private property to benefit the public without just compensation in violation of the takings clause.²⁸

Still, exactions were not totally prohibited by the courts. The U.S. Supreme Court laid out a two-part test for analyzing government exactions in land use cases. First, there must be a connection between what the government requires of the landowner and the impact of the proposed development; the court characterized this connection as an "essential nexus."²⁹ Second, there must be "rough proportionality," which refers to "the required *degree of connection* between the exactions and the projected impact of the proposed development."³⁰ Expounding on this concept, the U.S. Supreme Court said: "We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but 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."³¹

The Koontz Case

These constitutional constraints were brought into focus once again in the landmark U.S. Supreme Court decision, *Koontz v. St. Johns River Water Management District*.³² *Koontz* arose from a case in Florida where a local government agency conditioned the issuance of a permit on Mr. Koontz's agreement to either not build anything on 13.9 of his 14.9 acres by granting the state a conservation easement, or pay the state for off-site wetlands mitigation located several miles from the development. Mr. Koontz objected, sued under the Fifth Amendment and sought damages under a Florida statute. *Nollan* and *Dolan* "involve a special application of th[e] [unconstitutional conditions] doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits."³³ The Court stated that land use cases are unique in that they subject applicants to the potentially coercive power of government:

[L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has

²⁴ *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984); *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975).

²⁵ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

²⁶ *Cupp* at 595-96.

²⁷ *Nollan* at 837; *Dolan* at 384-86.

²⁸ See nn. 25 & 26, *supra*.

²⁹ See *Nollan* at 837.

³⁰ *Dolan* at 386 (emphasis added).

³¹ *Id.* at 391 (emphasis added).

³² *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 133 S.Ct. 2586 (2013).

³³ *Id.* at 570 U.S. at 604.

broad discretion to deny a permit that is worth far more than property it would like to take . . . the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.³⁴

The Court went on to say that a violation could occur whether the permit was granted or denied,³⁵ and that taking money as well as property could violate the Fifth Amendment.³⁶ None of this was too surprising given the prior rulings of the Court. However, what happened next added a new level of complexity, especially applicable in the proffer context.

*The Court said that because of the inherently coercive nature of the land permitting process, the mere act of making a demand for an excessive sum of money or property was itself a violation of a property owner's rights under the Fifth Amendment. Because a constitutional right was at stake, reasonableness or arbitrariness of the government's suggested mitigation did not come into play: "We are not here concerned with whether it would be 'arbitrary or unfair' for [Florida] to order a landowner to make improvements to public lands that are nearby . . . whatever the wisdom of such a policy, it would transfer an interest in property from the landowner to the government. For that reason, any such demand would amount to a per se taking similar to the taking of an easement or a lien."*³⁷

That ruling led to this excerpt from Justice Kagan's profound dissent: "If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed the government might desist altogether from communicating with applicants."³⁸ Justice Kagan noted that the "danger" of local governments simply denying applications outright rather than negotiating agreements that would work to both sides' advantage "would rise exponentially if something less than a clear condition—if each idea or proposal offered in the back-and-forth of reconciling diverse interests—triggered *Nollan-Dolan* scrutiny. At that point, no local government official with a decent lawyer would have a conversation with a developer."³⁹

Those words seem especially prescient from the vantage point of post-Proffer Reform Law in Virginia. It is worth noting, however, that Justice Kagan's comments derive from the particular facts of the *Koontz* case.

As Justice Kagan explained in her dissent, "...the [water management] District never made any particular demand respecting an off-site project (or anything else)" and it had "made clear that it welcomed additional proposals from Koontz to mitigate his project's damage to wetlands."⁴⁰ She noted further that "[e]ven at the final hearing on his applications, the District asked Koontz if he would 'be willing to go back with the staff over the next month and renegotiate this thing and try to

³⁴ *Id.* at 605.

³⁵ *Id.* at 606 ("The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so.").

³⁶ *Id.* at 619 ("We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.").

³⁷ *Id.* at 615.

³⁸ *Id.* at 631.

³⁹ *Id.*

⁴⁰ *Id.* at 632.

come up with' a solution."⁴¹ "But Koontz refused, saying (through his lawyer) that the proposal he submitted was 'as good as it can get.'"⁴² Thus, Justice Kagan's concern was that, in this case, the parties appeared to have been in the midst of negotiations; indeed, the government's last overture was an invitation for further dialogue, which arguably cannot be characterized as a "demand." The Court's holding merely confirmed the applicability of *Nollan* and *Dolan* as the appropriate constitutional doctrine in cases involving monetary exactions and a permit denial; importantly, "the Court expresse[d] no view on the merits of petitioner's claim that respondent's actions here failed to comply with the principles set forth in this opinion and those two cases [*Nollan* and *Dolan*]," and remanded the case for further proceedings not inconsistent with its opinion.⁴³ Perhaps due in part to the fact that the merits were not addressed (creating some uncertainty), the decision caused commentators to fear its "chilling" effect.⁴⁴ Indeed, some of the reactions to the Proffer Reform Law in Virginia give credence to the validity of Justice Kagan's concerns. That said, appropriate dialogue regarding impact mitigation *can* coexist with sound application of constitutional doctrine, and, under *Koontz*, it must.

Finally, the *Koontz* court considered the question of damages; however, because the damage claim arose under a Florida statute authorizing compensation for violations of constitutional rights, the court did not address the damages that could be assessed on a purely federal theory, but remanded the case to the Florida courts.⁴⁵ In response to the *Koontz* case, in 2014, the Virginia legislature enacted Va. Code § 15.2-2208.1; that section provides, in part, ". . . any applicant aggrieved by the grant or denial by a locality of approval or permit, however, described or delivered, . . . where such grant included or denial was based upon, an unconstitutional condition pursuant to the United States Constitution or the Constitution of Virginia, shall be entitled to an award of compensatory damages"

The enactment of § 15.2-2208.1 did not seem to affect proffer practices in Virginia, leading to growing frustration in the development community and culminating in 2016 with the Homebuilders Association of Virginia (HBAV) pushing for proffer reform. As a result, the Virginia legislature passed the Virginia Proffer Reform Law, which was codified as § 15.2-2303.4.

The Proffer Reform Law

Much has already been written about the law's specific language, and the reader is directed to the statute for the entirety of that language; in this article, we will summarize what we consider to be the key provisions.

The proffer reform law applies only to new residential developments and limits offsite proffers to those for transportation, public safety facilities, schools and parks.⁴⁶ It states that an offsite proffer is unreasonable unless it addresses an impact created by the new development in "excess of existing public facility capacity at the time of the rezoning" and the development receives a "direct and material benefit" from the proffer.⁴⁷ It provides that ". . . a locality may base its assessment of public

⁴¹ *Id.*

⁴² *Id.* at 632-33 (internal citations omitted).

⁴³ *Id.* at 619.

⁴⁴ See e.g., Julie A. Tappendorf & Matthew T. DiCianni, *The Big Chill?—The Likely Impact of Koontz on the Local Government/Developer Relationship*, 30 *TOURO L. REV.* 455, 471-72 (2014).

⁴⁵ *Id.* at 618.

⁴⁶ Va. Code § 2303.4(A) (definition of "public facilities").

⁴⁷ Va. Code § 2303.4(C)(a) and (b).

facility capacity on the projected impacts specifically attributable to the new residential development or new residential use.”⁴⁸

The proffer reform law goes on to state that

[i]n any action in which a locality has denied a rezoning or an amendment to an existing proffer and the aggrieved applicant proves by a preponderance of the evidence that it refused or failed to submit an unreasonable proffer or proffer condition amendment that it has proven was suggested, requested, or required by the locality, the court shall presume, absent clear and convincing evidence to the contrary, that such refusal or failure was the controlling basis for the denial.⁴⁹

Certain small area plans are exempt if they meet specific criteria related to mass transit.⁵⁰

Responses to the Proffer Reform Law

The responses to the law have varied from jurisdiction to jurisdiction. For example, Chesterfield County limited its proffers to transportation and set a new maximum amount.⁵¹ In contrast, the City of Norfolk elected to stop accepting residential proffers, meaning that residential rezoning applications would be forced to stand or fail without them.⁵² The Prince William County Board of Supervisors repealed its proffer guidelines for monetary contributions; other jurisdictions also eliminated their proffer schedules.⁵³

In addition to repealing its proffer guidelines, Prince William County amended its submission requirements to require developers to submit an SB549 narrative that “identifies all impacts of the proposed rezoning” and “propose[s] specific and detailed mitigation strategies and measures to address all of the impacts.” Applicants also must “[s]pecifically address whether all of the mitigation strategies and measures are consistent with all applicable law, including, but not limited to, [the Proffer Reform Law].” The SB549 narrative must “[s]pecifically demonstrate the sufficiency and validity of those mitigation strategies using professional best accepted practices and criteria, including all data, records and information used by the applicant or its employees or agents in identifying any impacts and developing any proposed mitigation strategies and measures.”⁵⁴ Despite

⁴⁸ Va. Code § 2303.4(C).

⁴⁹ Va. Code § 2303.4(D)(2).

⁵⁰ Va. Code § 2303.4(E).

⁵¹ The Chesterfield County Board of Supervisors has established \$9,400 as the maximum per dwelling unit road cash proffer that it will accept in a zoning case to address the transportation impacts of a proposed new residential development on the County’s transportation facilities. <https://www.chesterfield.gov/DocumentCenter/View/382/Cash-Proffer-Policy-PDF?bidId=>.

⁵² See City of Norfolk Ordinance No. 46,487 (6/22/16) (if an application for residential rezoning is submitted with proffers, the “proffer shall be stricken and the applicant may elect to withdraw the application or else to proceed with the rezoning without any conditions.”).

⁵³ In Prince William County, “[i]n response to SB549, the Board adopted a resolution on May 17, 2016, which [among other things] . . . [r]epealed the residential portion of the County’s Policy Guide for Monetary Contributions,” effective as of the effective date of the Proffer Reform law (July 1, 2016). <http://www.pwcgov.org/government/dept/planning/Documents/Senate%20Bill%20549%20-%20New%20Proffer%20Legislation%20w%20Summary.pdf>.

⁵⁴ Reference Manual for Rezoning, Special Use Permit and Proffer Amendment Applications (Revised July 1, 2017) at pp. 4-5.

this requirement, the chairman of the Board of County Supervisors subsequently announced publicly that all residential rezonings in Prince William County were “dead on arrival.”⁵⁵

The Fairfax County Board of Supervisors passed a resolution stating that “the sole method by which the Board will accept a proffer” for a new residential development “is that the proffer must be requested or suggested in writing *first* by the person(s) applying for approval . . . and not by any person(s) on behalf of, or on the apparent behalf of, the County”⁵⁶ In Loudoun County, existing policy documents regarding administration of proffers were qualified by adding “to the extent permitted by law.”⁵⁷ Nevertheless, Loudoun seems to interpret the law to allow for “per-unit” proffer guidelines that are based on an appropriate methodology. The Loudoun County Board of Supervisors has also pointed to what it perceives are disadvantages of the proffer system, including its unreliability as a source of significant levels of capital funding, and inconsistent application, stating that it “must seek alternative methods of funding needed public improvements.”⁵⁸

These varying reactions have resulted in confusion and uncertainty on the part of all relevant stakeholders. Not knowing how to proceed in the absence of the proffer policies and being unable to talk to jurisdictions about impact mitigation proposals, many developers simply have stopped filing residential rezoning applications.⁵⁹ Over time, the situation has eased somewhat as Loudoun and Fairfax Counties used the “small area” plan exceptions to maintain their prior systems. Still, that approach is not a “silver bullet” – for reasons discussed below.

There must be an effort to find common ground for legislative changes to alleviate the current confusion and conflict.

ISSUES AND POTENTIAL SOLUTIONS

Proposals have been introduced in committees to study the law, repeal the law, carve out additional exemptions, enable the use of impact fees, and remove the language prohibiting a locality from *accepting* an unreasonable proffer (while retaining the prohibition on *requesting* an unreasonable proffer). As yet there have been no amendments to the statute;⁶⁰ nevertheless, there likely are legislative solutions to at least some of the localities’ and homebuilders’ specific concerns.

⁵⁵ See *Dennis v. Board of County Supervisors of Prince William County*, Complaint for Declaratory Judgment (CL18003370-00, filed April 5, 2018), ¶¶ 19, 20.

⁵⁶ Board of Supervisors of Fairfax County, Virginia, Resolution Regarding Senate Bill 549 (adopted June 21, 2016) (emphasis added).

⁵⁷ “Where and to the extent permitted by law, the County will structure residential proffer guidelines on a per-unit basis, based upon the respective levels of public cost of capital facilities generated by the various types of dwelling units (i.e., single-family detached, single-family attached, or multi-family land development pattern).” Loudoun County Board of Supervisors, *Resolution to Administer New Proffer Legislation*, <https://www.loudoun.gov/DocumentCenter/View/123444>.

⁵⁸ *Id.*

⁵⁹ Max Smith, *Northern Va. Leaders: Home Building Grinds to Halt After State Law Change* (Sep. 7, 2017); <https://wtop.com/virginia/2017/09/northern-va-leaders-home-building-grinds-to-halt-after-state-law-changes/>.

⁶⁰ See SJ13 (conditional rezoning proffer reform bill; joint commission to study); HB 1446 (provision for public facility improvement); HB 89 (affordable dwelling units); SB469 (removes restrictions on types of proffers a locality may request or accept); SB957 (exempts certain localities from law); SB944 (cash proffers; impact fees); SB458 (public facility capacity, previously approved residential developments; removes prohibition on accepting unreasonable proffer).

1. The Law Prevents Local Jurisdictions from Speaking to Developers

Both sides of the debate agree that an unintended and undesirable consequence of the law is the stifling of appropriate communications between planning staff and applicants. Localities are correct in that they have potential liability in speaking to developers if, during the course of that communication, they seek mitigation measures that exceed the impact of the proposed development but developers need input from the localities on public facility capacity and other conditions affecting the impact analysis so that they can voluntarily proffer appropriate mitigation.

It is important to note that the Proffer Reform Law does not expressly preclude the negotiation of reasonable approaches to mitigating impacts specifically attributable to the project. Nevertheless, a risk jurisdictions face is statutory liability (including damages and attorneys' fees) for subjecting property owners to unconstitutional conditions in the grant or denial of land use approvals under Virginia Code § 15.2-2208.1, which is the direct offspring of *Koontz*. Additionally, it is true that under the Proffer Reform Law, a locality is at risk not just for requesting, but for merely *accepting* a proffer deemed unreasonable.

One possible approach to reforming the law would be to add language to the Proffer Reform Law expressly permitting such negotiations; Virginia Code § 15.2-2208.1 could be amended to exclude proffer *negotiations* (but not the resulting proffers) from creating liability under Virginia law. Proponents of reform on both sides of the debate have advocated for language that also would allow an applicant to submit *any* offsite proffer the applicant deems reasonable and appropriate. The rationale is that an applicant ought to be able to offer *voluntarily* anything it wants to give if such "gift" helps win approval for the project.

However, this is problematic for a variety of reasons. First, it is contrary to the essential purpose of the proffer system: a proffer is not something that is offered as compensation for the right to rezone; rather, it is something that is offered to *mitigate the particular impacts* of a proposed project. Recall that the proffer system was devised as a solution to the 1970s anti-growth period in Fairfax County, when rezoning requests faced near-certain denial. Proffered mitigation allowed the developer to gain approval because it meant that the developer had sufficiently mitigated the impacts that otherwise would have been a lawful basis for denial. It was never intended to be "zoning for dollars."⁶¹

Second, the proffer-enabling laws' provisions for "reasonable" conditions do not permit proffers that are wholly untethered to mitigation of the project's impacts.⁶² The law's recognition of proffers that are "not generated *solely* by the rezoning itself," is not inconsistent with constitutional limitations.⁶³ Because factors *in addition* to the rezoning itself may generate a dedication by a developer does not mean that the dedication itself may be wholly unrelated to the development. Virginia law is consistent with the constitutionally mandated "essential nexus" and "rough proportionality" tests.⁶⁴

⁶¹ Indeed, cash contributions were initially prohibited altogether. Va. Code § 15.2-2297(iii).

⁶² See Va. Code §§ 15.2-2297 (". . . the rezoning itself must give rise for the need for the conditions; [] the conditions shall have a reasonable relation to the rezoning"; and providing a remedy against loss of development rights if developer makes substantial dedications not generated solely by the rezoning itself); 15.2-2298 (same in relevant part); 15.2-2303 (requires "reasonable conditions"; and providing same remedy for substantial dedications not generated *solely* by the rezoning itself; and clarifying that the governing body *may* accept proffered conditions which include provisions for timing or phasing of dedications, payments, or improvements; provisions for affordable housing; and provisions for "payment . . . of a pro rata share of the cost of reasonable and necessary road improvements, located outside the property limits of the land owned or controlled by him *but serving an area having related traffic needs to which his subdivision or development will contribute.*" Citing Va. Code § 15.2-2246(5) (emphasis added)).

⁶³ Va. Code 15.2-2303 (emphasis added).

⁶⁴ See discussion of *Nollan* and *Dolan*, *supra*.

Application of those tests does not require a proffer to be *solely* generated by the development,⁶⁵ nor does the Proffer Reform Law, as “specifically attributable” does not mean “solely attributable.”⁶⁶

Finally, it simply is bad public policy to promulgate a system in which developers “pay to play.” The power of local government to regulate land use derives from its police powers, *i.e.*, the power to regulate for the protection of the health, safety and welfare of its citizenry.⁶⁷ Requiring a developer to mitigate negative land use impacts is an appropriate exercise of such power and properly protects the public. However, if a developer can offer unlimited cash or improvements wholly unrelated to the project’s land use impacts, the government’s legitimacy is seriously undermined.⁶⁸ All developers are not on equal footing in their ability to offer “extra” contributions; thus, while larger developers might benefit from an unconstrained proffer system, smaller landowners would be at a disadvantage.

2. There are Impacts Other than Schools, Parks, Public Safety and Transportation

As an example, new developments may have an impact on libraries. The premise underlying proffers, embodied in the Virginia Proffer Reform Law, is that they are for capital costs and not operating costs which are paid from real estate taxes. Arguably, the developer ought to be able to proffer construction of a library or library improvements so long as there is the requisite nexus between the proposed project and the proffer is roughly proportional to the impact of the proposed development. A legislative compromise would be to permit developers to voluntarily offer proffers for certain capital projects that currently cannot be considered under the law as written but make it clear that the failure to do so would not be grounds for denial of the rezoning.

3. No One Can Tell What Constitutes a Reasonable Proffer or What Constitutes “Existing” Public Facility Capacity

The statute provides that an offsite proffer is unreasonable “unless the new residential development or new residential use creates a need, or an identifiable portion of a need, for one or more public facility improvements in excess of existing public facility capacity at the time of the rezoning or proffer condition” and requires that the residential use applied for “receives a direct and material benefit from [the offsite public facility] proffer.”⁶⁹ Some efforts to reform the Proffer Reform Law have focused on this “capacity” provision.⁷⁰

Local governments and developers alike have raised legitimate concerns over the proper interpretation of this provision, and it is undoubtedly one of the more complex issues arising out of the Proffer Reform Law. For example, an owner of undeveloped land who has contributed taxes with no demand for services, including schools, ought to be able to utilize existing capacity when developing her land. However, local governments are correct that a problem arises if multiple

⁶⁵ Such an “exacting correspondence” was expressly rejected by the U.S. Supreme Court in *Dolan*. *Dolan* at 389; (rejecting the “specific and uniquely attributable test,” stating that “[w]e do not think the Federal Constitution requires such exacting scrutiny . . .”).

⁶⁶ In fact, an earlier version of the bill that became the Proffer Reform Law required that the impact be “*specifically and uniquely attributable*” but the words “and uniquely” were stricken from the bill text. See SB549 (offered 1/13/16, 16103808D).

⁶⁷ See *Euclid*, *supra* at n. 5.

⁶⁸ As an example, if a project’s impact is \$5,000 and the developer proffers \$500,000, this raises the specter of a developer “buying the rezoning,” which erodes public trust in government. It is theoretically possible for a developer to make a “gift” or “dedication” of land or improvements without any nexus to a particular project and not for the purpose of mitigating impacts; this, however, does *not* constitute a “proffer” and would have to occur outside of the zoning approval process.

⁶⁹ Va. Code § 2303.4(C).

⁷⁰ See *e.g.*, SB458.

developers are permitted to claim the same capacity by disregarding previously approved rezonings that are in the pipeline but have not yet been completed.⁷¹ That said, a potentially complicating factor is that previously approved projects in the applicable impact area may never be built or may have already proffered mitigation to address their impacts.

A secondary argument is that it is impossible to measure specific impacts and benefits. The data to support proffers exists in most jurisdictions on a case-by-case basis; one solution is to utilize a similar methodology to traffic impact analyses. In that methodology, projects that have been approved but are not yet built and that impact a particular road impact zone are considered together with their proffered mitigation. Impacts from the proposed project are then evaluated utilizing this data. If after the analysis, capacity remains, proffers are not required. If the project has an impact beyond available capacity, mitigation is required. This concept is not new or untested; individual traffic impact analysis has been the norm for many years. Jurisdictions similarly can require applicants to submit a detailed impact analysis to show how the proffer conditions mitigate the specific impacts.⁷² Jurisdictions can freely criticize the methodology and assumptions in the analysis without asking for specific proffers.

Of course, a fundamental issue – whether in the context of traffic mitigation or other offsite proffers – is that the identified impact zone must be justified as having the constitutionally mandated “essential nexus” to the proposed development.⁷³ Whatever the appropriate constitutional line-drawing may be to define an impact zone with the requisite nexus to the development’s impacts, the zone is likely to be found to be too broad if the proposed “mitigation” results in charging the property owner with fixing a pre-existing public problem not created by the development (except to the extent that the proposed development increases the problem).⁷⁴ In any event, a datacentric analysis appears to satisfy *Dolan’s* requirement of an individualized determination of a project’s impacts, and provides maximum flexibility in crafting mitigation strategies, as originally contemplated when the proffer system was created.⁷⁵

4. Localities Cannot Respond to Citizen Concerns, Interfering with the Political Process

Despite the legal limitations involved, zoning is still a political process and rezoning is a legislative act. However, constitutional limitations balance the public good against the property rights of individual citizens. The process has typically played out in the public zoning hearing process and private negotiations; that process can continue. Local government bodies can still consider public

⁷¹ SB 458 proposes that a locality be permitted to base its assessment of public facility capacity not only the projected impacts specifically attributable to the proposed project, but also on impacts attributable to “previously approved residential developments, or portions thereof, that have not yet been completed.”

⁷² See n. 53, *supra* (referencing Prince William County’s requirement for an SB549 Narrative).

⁷³ Local governments are likely to advocate for a broader impact zone (such as an entire school district), while developers will want a narrowly defined impact zone (only the schools serving the particular development). Neither the U.S. Supreme Court nor the Virginia Supreme Court has considered that specific issue. One problem with using county-wide averages is the fact that an average, by definition, means most of the developers will pay more or less, than their specific impacts would require.

⁷⁴ In *Koontz*, the court said requiring a developer to pay to improve nearby wetlands violated the Fifth Amendment, stating that the Due Process Clause protected a developer “from an unfair allocation of public burdens.” *Koontz* 570 U.S. at 618. In *Rowe and Cupp*, the Virginia Supreme Court also required the mitigation be tied specifically to the impacts of the development. *Cupp* at 594 (“[E]ven if we assume that the Board had the authority, in a proper case, to impose such a condition, it could not do so in this case because the dedication and construction requirements were unrelated to any problem generated by the use of the subject property.”).

⁷⁵ Increasingly, the courts have been requiring governments to justify their decisions with data. *Shelby County v. Holder*, 570 U.S. 2 (2013) (the court found the lack of appropriate supporting data to be fatal to the government’s position).

input that seeks protections within constitutional limitations, including objections to density and other deviations from the comprehensive plan. In addition, it is important to note that the judicial limits placed on the zoning process only apply to government actions. Developers have occasionally entered into private contracts with citizens (and/or recorded covenants) to address the citizens' specific concerns. There is nothing in the Proffer Reform Law that prevents this, and it has the added benefit of providing a direct enforcement mechanism for those citizens. There are thus benefits to being able to have a less inhibited discussion of potential mitigation tools, including those suggested not just by staff but by citizens. The above-described proposals would address this issue by revising the particular provisions thought to be most likely to stifle conversations.

5. Impact Fees

Some have suggested broadening the ability to use impact fees or the small area plans exemption in § 15.2-2303.4(E).⁷⁶ It is important to recognize that neither impact fees nor exemptions are free from constitutional constraints. Impact fees clearly constitute a “monetary exaction,” subject to the nexus and rough proportionality requirements of *Nollan* and *Dolan*.⁷⁷ Before any such fee may be imposed, there must be an individualized determination that the fee is related both in nature and extent to the impact of the proposed development.⁷⁸ Thus, an impact fee regime that provides set amounts for dissimilar cases (in essence being a substitute for proffer schedules) may be subject to constitutional attack for lack of an individualized (project-based) determination.⁷⁹ Additionally, set fees are particularly vulnerable to failing the “rough proportionality” test. Assume, for example, that an individualized analysis leads to a determination that an appropriate cash proffer to mitigate the school impact for a particular new residential development is \$10,000 per single family home. A required set fee of \$80,000 per single family home would not appear to be “roughly proportional.” With the data available to calculate specific impacts and reasonably appropriate mitigation on a case-by-case basis, set fees and categorical exemptions therefore remain vulnerable to constitutional challenges.

Conclusion

The Virginia Proffer Reform Law was an effort to course-correct by reiterating the constitutional limits on Virginia's proffer system, which seemed to have – at times – lost its mooring from those constitutional underpinnings. While the statute fundamentally reflects the constitutional limits applied to land use decisions by the Virginia and U.S. Supreme Courts, legislative changes are needed to strike a proper constitutional balance between the legitimate needs of local governments and the property rights of land owners. Finding this balance should continue to be the objective of all parties.

⁷⁶ VML reports that two bills dealing with impact fees, SB208 and SB944, will go to the floor of the Senate at the 2019 General Assembly Session. See Virginia Municipal League, VML eNews (July 26, 2018); <https://www.vml.org/enews-july-26-2018/>.

⁷⁷ *Koontz*, 570 U.S. 595 (holding that “so-called ‘monetary exactions’ must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.”).

⁷⁸ See *Dolan* at 391.

⁷⁹ Even road impact fees – the only impact fees enabled by Virginia law – are authorized only to the extent the road improvements are “reasonable” and “benefit the new development.” Va. Code § 2319, *et seq.*

YES, VIRGINIA, THERE IS OPPORTUNITY!

By Jenny H. Connors



Jenny H. Connors is a partner in the tax section at Williams Mullen in the Richmond office. Her practice focuses on the taxation of businesses, business owners and investors, with an emphasis on the taxation of flow-through entities. Jenny counsels clients in a wide range of real estate transactions, including, without limitation, the acquisition of low-income housing, historic rehabilitation, and new market tax credits. Jenny has become a go-to resource for clients in identifying changes in tax laws and finding opportunities to spearhead growth. The QO Tax Incentive is a prime example.

Upon its passage in December 2017, President Trump declared the Tax Cuts and Jobs Act (the “Act”) to be “an incredible Christmas gift for hardworking Americans.” While the accuracy of that statement is debatable, the benefit of the Act’s tax incentive for investments in “qualified opportunity zones” (“QO Zones”) is undeniable, particularly in Virginia.

The “QO Tax Incentive,” as I will refer to it herein, provides taxpayers with an opportunity to defer, if not eliminate, the recognition of federal income tax on the sale of property.¹ Codified as Sections 1400Z-1 and 1400Z-2 of the Internal Revenue Code (the “Code”), the QO Tax Incentive is highly attractive for taxpayers with eligible low-basis property who are willing to make investments in QO Zones.

Earlier this year, the Treasury Department’s Community Development Financial Institutions Fund (the “CDFI Fund”) announced its much-anticipated designations of QO Zones. These QO Zones identify the census tracts eligible for QO Zone investments under the new QO Tax Incentive.

For Virginia, the Treasury Department designated the 212 low-income communities nominated by Governor Northam. Per the Act, Northam was permitted to propose up to 25% of the Commonwealth’s low-income communities as QO Zones.² In a press release dated April 19, 2018, he stated that his selection of QO Zones was based on “state and local economic development and revitalization efforts,” and, indeed, many of the QO Zones in Virginia are prime areas for development.

With QO Zones now designated, opportunity is knocking in Virginia. This article addresses the “what,” “how” and “where” of the QO Tax Incentive so that taxpayers can open the door to possibilities in the Commonwealth.³

¹ The Act’s Committee Report states that the QO Tax Incentive is available for “capital gains” reinvested in QO Zones, and the title of Code Section 1400Z-2 is “[s]pecial rules for capital gains invested in opportunity zones.” Nevertheless, the statutory language applies to gains from a sale or exchange of “any property.” Most practitioners agree that regulations issued by the Treasury Department will clarify this issue and limit the QO Tax Incentive to gain from the sale of capital gain property.

² The definition of “low-income community” for purposes of the QO Tax Incentive is the same as for NMTCS (defined below). Notably, pursuant to Code Section 1400Z-1, Governor Northam also was permitted to designate tracts contiguous to low-income communities, subject to certain limitations. Of the 212 designated QO Zones in Virginia, 5 represented contiguous tracts that were not low-income communities.

³ Notably, there are many unanswered questions under the statutory provisions applicable to the QO Tax Incentive, and the issuance of proposed regulations is imminent. A draft of the proposed regulations is currently “pending review” at the Office of Management and Budget, and it is possible that the regulations may be released prior to the publication date of this article.

What is the QO Tax Incentive?

The QO Tax Incentive offers a temporary deferral, a permanent reduction, and a permanent exclusion of taxable gain on the sale of eligible property. Code Section 1400Z-2(a) provides that, if a taxpayer so elects, he, she or it may temporarily defer the gain recognizable on a sale or exchange of property so long as the taxpayer invests such gain in a “qualified opportunity fund” (a “QO Fund”) within the 180-day period following the sale or exchange. This “Deferral Election” is only available for sales or exchanges of property occurring before December 31, 2026.

If a taxpayer makes the Deferral Election and meets the applicable requirements discussed below, the taxpayer takes a basis of \$0 in the new QO Fund investment (the “QO Investment”), thus preserving the deferred gain for subsequent recognition. However, Code Section 1400Z-2(b) allows taxpayers to reduce a portion of their deferred gain permanently through basis adjustments, provided they meet certain holding periods. For example, if the taxpayer retains its QO Investment for at least five years, the basis of the taxpayer’s QO Investment increases 10%; if the taxpayer holds its QO Investment for at least seven years, the basis of the increases an additional 15%—thereby allowing the taxpayer to reduce its gain recognition by 15%.

The gain deferred under Code Section 1400Z-2(a) must be recognized on the earlier of (i) the date on which the QO Investment is sold or exchanged, or (ii) December 31, 2026. In other words, the temporary deferral period ends in 2026, regardless of whether the QO Investment is retained or sold. Given this 2026 recognition deadline, and the basis increases applicable in years 5 and 7, taxpayers should consider making QO Investments between now and December 31, 2019 to take full advantage of the QO Tax Incentive’s gain deferral and reduction opportunities under Code Sections 1400Z-2(a) and 1400Z-2(b).

Even if taxpayers miss the window for maximum gain deferral and/or reduction, Code Section 1400Z-2(c) includes a permanent exclusion election (the “Exclusion Election”) for taxpayers holding QO Investments for more than 10 years. In that case, a taxpayer may elect to increase the basis of its QO Investment to its fair market value as of the date that it is sold or exchanged. Effectively, this Exclusion Election permits taxpayers to exclude any appreciation in QO Investments.⁴

By way of example, assume the taxpayer sells five shares of stock with a basis of \$100 each for \$1,000 on December 31, 2018. Taxpayer then invests the \$500 gain on the sale in a QO Fund and makes the Deferral Election. After five years, his basis in the QO Investment is increased by 10%, or \$50, and, after seven years, his basis in the QO Investment is increased by an additional 5%, or \$25, for a total basis increase of \$75. On December 31, 2026, the taxpayer continues to hold his QO Investment. Nevertheless, he must recognize the gain deferred under the Deferral Election as of that date, increasing his basis in the QO Investment to \$500. The taxpayer ultimately sells his QO Investment on January 1, 2029 for \$2,000 and makes the Exclusion Election. Since the taxpayer held his QO Investment longer than 10 years, he further increases his basis in the QO Investment to \$2,000 as of the date of sale, thereby excluding from gain the \$1,500 of appreciation in his QO Investment.

This simple example shows the potential benefit of the QO Tax Incentive. On \$2,000 gain from his QO Investment, our hypothetical taxpayer paid tax on only \$425. As with most tax incentives, though, the QO Tax Incentive is not without obstacles. Taxpayers must satisfy various requirements to qualify for the QO Tax Incentive. The discussion below addresses compliance matters under Code Section 1400Z-2.

⁴ A common misconception is that the QO Tax Incentive eliminates all gain that would have been recognized on the sale of eligible property. While the Deferral Election permits taxpayers to defer and, potentially, reduce such gain, the deferral period ends on December 31, 2026, at the latest. So, by the time the Exclusion Election is made, a taxpayer would have already paid tax on its deferred gain.

How do Taxpayers Qualify for the QO Tax Incentive?

As mentioned above, to qualify for the QO Tax Incentive, a taxpayer must make investments in QO Funds entities. Code Section 1400Z-2(d) states that QO Funds are corporations or partnerships formed to invest in “qualified opportunity zone property” (“QO Property”) and hold at least 90% of their assets in such QO Property.⁵ QO Property, in turn, may be (i) “qualified opportunity zone stock” (“QO Stock”), (ii) “qualified opportunity zone partnership interests” (“QO Interests”), or (iii) “qualified opportunity zone business property” (“QO Business Property”).⁶

Generally, QO Stock and QO Interests, which are defined in Code Section 1400Z-2(d), are equity interests held by QO Funds in “qualified opportunity zone businesses” (each, a “QO Business”). While QO Stock must be acquired by the QO Fund at original issuance after December 31, 2017, QO Interests need only be acquired by the QO Fund after December 31, 2017. At the time the QO Fund acquires QO Stock or QO Interests, the underlying corporation or partnership must qualify or intend to qualify as a QO Business. Further, the underlying corporation or partnership must continue to qualify as a QO Business for substantially all the QO Fund’s holding period in such corporation or partnership.

A QO Business is any corporation or partnership that is engaged in a trade or business in which substantially all the tangible property owned or leased by it is QO Business Property. A QO Business must also:

- (i) derive at least 50% of its total gross income from the active conduct of such business⁷ in a QO Zone;
- (ii) use a substantial portion of its intangible property in the active conduct of a qualified business in a QO Zone; and
- (iii) attribute less than 5% of the average unadjusted basis of its property to “nonqualified financial property.”⁸

In addition, no “sin business” may qualify as a QO Business. Such businesses include the operation of a private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility,

⁵ The IRS released “Opportunity Zones Frequently Asked Questions” on April 24, 2018 (the “FAQs”). In the FAQs, the IRS noted that, QO Funds will be self-certified. No approval or action on the part of the IRS will be required for an entity to be certified as a QO Fund. The self-certification process will be completed on an IRS Form (anticipated this summer) and attached to the taxpayer’s timely filed federal income tax return for the applicable tax year.

⁶ The difference between a “direct” hold of QO Business Property and an “indirect” hold of QO Stock or QO Interests can be significant. Taxpayers should consult tax advisers in structuring QO Funds and their QO Property holdings.

⁷ Code Section 1400Z-2(d)(3)(A) references portions of Code Section 1397C(b) in determining whether a QO Fund is engaged in a QO Business. The statute, however, seems to purposefully avoid referencing the “qualified business” limitation set forth in Code Section 1397C(b), which would exclude the rental of “residential real property” (as defined in Code Section 168(e)(2)) from the QO Tax Incentive. Thus, a business comprised entirely of renting residential real property may constitute an eligible QO Business. It is anticipated that further guidance will specifically clarify this matter.

⁸ This limitation on “nonqualified financial property” excludes “reasonable amounts of working capital” pursuant to Code Section 1397C(e). It is important to note that in a “direct” hold scenario, there is no such allowance for reasonable working capital, and taxpayers would have to ensure that non-QO Business Property, such as cash, other nonqualified financial property and intangibles did not exceed the 10% limitation.

racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises.⁹

By holding QO Stock or QO Interests, a QO Fund functions as a holding company of equity in a QO Business with QO Business Property. In some instances, however, a QO Fund may itself be a QO Business directly holding QO Business Property. In either case, the following requirements for QO Business Property must be satisfied:

- (i) the QO Business Property must be acquired by purchase after December 31, 2017 from a seller who is not a related party under Code Section 179(d)(2);
- (ii) the original use of the QO Business Property in a QO Zone must commence with the QO Fund, or, in the alternative, the QO Fund must substantially improve¹⁰ the QO Business Property; and
- (iii) during substantially all of the QO Fund's holding period for the QO Business Property, substantially all of the QO Business Property must be used in a QO Zone.

Code Section 1400Z-2(e)(4) authorizes the Secretary of the Treasury to prescribe regulations necessary or appropriate to carry out the purpose of the QO Tax Incentive. Specifically, the Treasury Department is authorized to issue regulations to prevent statutory abuse. Detailed regulations on the "what" and "how" of the QO Tax Incentive are imminent and should provide further guidance on the best way to utilize the QO Tax Incentive. Meanwhile, taxpayers can and should plan for what we know for certain: the "where."

Where are the QO Zones in Virginia?

Aimed at stimulating economic growth in distressed communities, the QO Tax Incentive offers taxpayers a reward for what, typically, are higher-risk investments. In Virginia, however, the QO Zones are reflective of population movement and development trends and, therefore, may not be as perilous. This combination of tax incentives and strong growth potential is a "win-win" for those seeking opportunity in Virginia.

A user-friendly, searchable map of Virginia's designated QO Zones can be found on the Virginia Department of Housing and Community Development's website.¹¹ While awaiting further regulatory authority, taxpayers should review this map and consider investment prospects within Virginia's QO Zones. As discussed above, time is of the essence. With the December 31, 2026 deferral deadline looming, earlier QO Investments will have the potential to reap greater tax benefits.

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⁹ Presumably, this would also include marijuana dispensaries in states in which it is legal. –Ed.

¹⁰ QO Business Property is substantially improved under Code Section 1400Z-2(d)(2)(D)(ii) if, during any 30-month period beginning after the property's acquisition date, the QO Fund's additions to basis with respect to such property exceed the QO Fund's adjusted basis of the property at the beginning of such 30-month period. Essentially, this test requires the QO Fund to spend more to improve the property than it spent to acquire the property.

¹¹ <http://www.dhcd.virginia.gov/index.php/opp-zones.html> –Ed.

A BRIEF HISTORY OF THE VIRGINIA RIGHT TO FARM ACT

By Timothy R. Johnson



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Virginia's Right to Farm Act (Va. Code § 3.2-300 *et seq.*) has protected farms from private and public nuisance suits since its enactment in 1981.¹ The law originally protected for-profit farms that non-negligently engaged in farming activities, including those that were in operation for at least one year when there was a substantial change in its operations or if there were changes in the “locality” where the farm was located (e.g. character of the neighborhood changed to residential).²

One of the oldest examples of the Right to Farm Act in action is the case of *French v. Town of Mt. Jackson*, 4 Va. Cir. 315 (Shenandoah Cnty. July 2, 1985). Douglas French, a resident of the town of Mt. Jackson, was cited for creating a nuisance by letting his grass exceed 12 inches in height. (French let his cattle graze in that area.) He sought an injunction from the town on the grounds that the Mt. Jackson ordinance was in violation of various federal and state laws, but, notably, that the law infringed upon the Virginia Right to Farm Act (1981). The court concluded that since French and his witnesses (all farmers) agreed that French's operation of his cattle ranching was in accordance with the best practices at the time, the town could not enforce its ordinances against French. The court stipulated, however, that its ruling did not prohibit any future injunctions sought by the town if French's actions ever did appear to be negligent or not compliant with best practices.

The Right to Farm Act was expanded in 1995 to limit local government's role in regulating agricultural activities. The expansive public policy declaration was deleted; added was “no county shall adopt any ordinance that requires that a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification.”³ Localities were expressly permitted to regulate “setback requirements, minimum area requirements, and other requirements that apply to land[.]”⁴ Zoning ordinances could not “unreasonably restrict or regulate farm structures or farming and forestry practices” in agriculturally-zoned areas.

¹ The Right to Farm Act, as amended in 1991, stated “[w]hen nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this chapter to reduce the loss to the Commonwealth of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance, especially when nonagricultural land uses are initiated near existing agricultural operations.” [former]Va. Code § 3.1-22.28 (1991).

² For more information about the history of the original texts of the Right to Farm Act, see Jacqueline Waymack, *Agricultural Preservation Techniques in Virginia*, 18 COLONIAL LAW. 11 (1989), pp. 21 – 25.

³ Agricultural zoning has been interpreted to include areas where agricultural activities are expressly permitted, even if the zone is not titled as “agricultural.” See *Layng v. Gwynn*, 52 Va. Cir. 71 (Fairfax Cnty. Feb. 24, 2000) (overruled locality demurrer and held that plaintiff-nursery may be protected under Right to Farm Act in a Residential-Estate zoning district since zone permits agricultural activities).

⁴ Va. Code § 3.1-22.28 (1991).

The 1995 amended statute also provided an affirmative defense to farms defending against nuisance suits by clarifying that a farm would not constitute a nuisance “if [agricultural] operations are conducted in accordance with existing best management practices and comply with existing laws and regulations of the Commonwealth.”⁵ Finally, the law opened the definition of what constitutes an “agricultural operation” to include farmers who grow crops even without intent to sell.

By 2008, the law was amended and re-codified to current Title 3.2, Chapter 3. Since that time, the law has not been significantly changed.

THE “BONETA BILL” RELATIONSHIP TO THE RIGHT TO FARM ACT

In March 2014, the legislature passed the so-called “Boneta Bill.”⁶ Va. Code § 15.2-2288.6 limited locality regulation of agritourism and agritourism-related activities by prohibiting localities from passing ordinances regulating or requiring “agricultural operations” to acquire special exception or administrative permits unless the restrictions bear a relationship to a “substantial impact on the health, safety, or general welfare of the public.” Any restriction must “take into account the economic impact of the restrictions on the agricultural operation and the agricultural nature of the activity.”

The law adopts the definition of “agricultural operation” from the Right to Farm Act, which includes “any operation devoted to the bona fide production of crops, or animals, or fowl including the production of fruits and vegetables of all kinds; meat, dairy, and poultry products; nuts, tobacco, nursery, and floral products[.]”⁷ Although other provisions of the Right to Farm Act limit the extent localities may regulate agricultural operations in agriculturally-zoned areas, the “Boneta Bill” does not expressly provide that the covered agricultural operations in that Code section must be in agriculturally-zoned areas.

CHANGES IN AGRICULTURAL PRACTICES

When the Right to Farm Act and “Boneta Bills” were passed, the General Assembly contemplated serving the ninety percent (90%) of Virginia farms which are family-owned farms.⁸ The vast majority of Virginia’s farms still operate under traditional farming concepts – two-dimensional plotting to maximize crops in planar space, for example. (Think about ten rows by ten columns of lettuce grown in the ground outdoors or under a simple greenhouse.) Most farmers can only afford to develop modified environment agriculture (“MEA”) facilities, which permit limited environmental control of crop development. A typical example of an MEA facility is a greenhouse in which farmers can help control numerous environmental variables but are incapable of completely controlling the environment. The resources needed to grow crops without MEA and within MEA facilities are well-established by hundreds of years of agricultural practices and are easily understood by localities and regulatory agencies.

Increasingly accessible advanced agricultural technologies such as hydroponics mean that traditional notions of farming may be cast aside to consider three-dimensional plotting. (Now imagine ten rows by ten columns on ten vertical shelves of lettuce grown in a warehouse.) Controlled

⁵ See *Wyatt v. Sussex Surry, LLC*, 74 Va. Cir. 302 (Surry Cnty. Nov. 2, 2007) (demurrer denied as defendant’s arguments that Right to Farm Act preempts all common law claims is invalid since law only provides an affirmative defense to nuisance suits, and does not preempt trespass or negligence claims)

⁶ Martha Boneta’s family farm was fined tens of thousands of dollars by Fauquier County for her failures to obtain permits for hosting birthday parties, advertising pumpkin carvings, and for selling homegrown produce on her farm. The Farm-to-Consumer Legal Defense Fund adopted her cause and became an advocate for the Boneta Bill’s passage.

⁷ Va. Code § 3.2-300.

⁸ Virginia Farm Bureau Mutual Insurance Company Agriculture Facts Website. <https://www.vafb.com/membership-at-work/agriculture/agriculture-facts>

environment agriculture (“CEA”) facilities operate more akin to factories because, by definition, they require complete (and often computer-based) control of the facility’s environment (e.g. temperature; humidity; light diffusion; types of lighting; water composition; soil composition; water delivery; nutrient delivery; etc.). These facilities tout substantial resource usage efficiency.

An oft forgotten or misunderstood fact is that while resources used per crop unit are typically fewer for CEA-grown crops than those using traditional farming practices, a CEA facility can grow vastly more crops in the same amount of space than traditional farming practices. The gross amount of resources used for CEA facilities tends to be much higher than traditional farms. For example, a one-acre lettuce field can yield sixteen tons of lettuce if grown by traditional farming practices, but a CEA facility can easily grow one hundred and sixty tons in that same space. That can translate to tens, if not hundreds, of thousands of gallons of water use per day.

THE RIGHT TO FARM ACT GIVES INDUSTRIAL-SCALE GROWING OPERATIONS A RIGHT TO MANUFACTURE

Despite the substantial differences in how industrial-scale CEA facilities grow crops versus traditional farming practices, the Right to Farm Act protects these CEA facilities if they are located in agriculturally-zoned areas. CEA facilities require substantial electric and water resources and are often best suited for industrially-zoned areas that have developed those utilities. Some CEA ventures, however, are open to working with local power companies or will conduct the well-drilling themselves in agriculturally-zoned areas to take advantage of zero-to-minimal regulations, proximity to interstate highways, and lower local taxes.⁹

While in theory, localities can regulate CEA operations by passing general ordinances that bear a relationship to public health and safety, in practice this is rarely done due to the concern that such regulations may be overbroad and impact other economic or residential activities. If the ordinance is perceived to target a particular facility, the locality incurs a substantial risk of litigation, and may decline to pursue passage.

This leaves localities in a very weak position to govern and develop reasonable environmental protection laws catered to their community’s natural resources and constituents’ needs. The General Assembly did not contemplate that the Right to Farm Act could or would be used to protect large-scale, corporate activities that could drive local farmers out of business by systematically drying up local groundwater and other resources.

Another issue arises regarding what constitutes an “appurtenance” to the agricultural operation—which would also be protected under the Right to Farm Act. A barn that holds equipment or a stable that houses animals is undoubtedly an appurtenance to a traditional farming operation but what if a CEA facility decides to establish on-site generators utilizing solar panels and sells back excess energy to the power company for subsidies to their own bills (or for profit). Is that an appurtenance to the agricultural operation or is it a different business activity that can be regulated by the County? There is little case law on the question.¹⁰

⁹ An example of this occurred in Clarke County from late 2017 into early 2018 when an out-of-state corporation sought to establish a hydroponic lettuce farm in an agriculturally-zoned area. Upon discovering that the facility would use at least 50,000 gallons of groundwater per day, and have its growing lights on throughout the night, prospective neighbors (including local farmers) commenced a grassroots movement to stop the facility. Central to the issue was the county’s board of supervisors stating it could not take action, and citing the Right to Farm Act protected such facilities. http://www.winchesterstar.com/news/business/clarke-supervisors-can-t-take-action-on-controversial-greenhouse/article_c68d7fc4-2939-5ddc-ad9c-99a781e6a4cc.html

¹⁰ One notable case that carefully considered whether an activity was covered by the Right to Farm Act was *Buckley v. Zoning Appeals Bd.*, 59 Va. Cir. 150 (Loudoun Cnty. June 4, 2002). The Court held that plaintiff was

A savvy marketer for a CEA facility might even use the Boneta Bill's protections to promote "agritourism" activities related to its factory-grown produce. Although this would be a proper use of the law if the facility was in an agriculturally-zoned area, it's important to note that the Boneta Bill only adopts the Right to Farm Act definition of "agricultural operation" and does not expressly apply only to those operations located in agriculturally-zoned areas. This means the agritourism protections may (arguably) apply to a CEA facility located in an industrial park. Hop on the hayride to witness steel manufacturers, factory-grown herbs and vegetables, and chemical refineries! Or participate in a pumpkin carving across the street from a pumpkin canning facility. And don't forget to pick-your-own lettuce off the conveyor belt...as farm fresh as possible!

As ridiculous as those scenarios may seem, the law in its current form permits them and hinders local governments from regulating those situations without running the risk of violating either the Right to Farm Act or the Boneta Bill. While CEA facilities provide mutually beneficial economic development and agriculturally-productive opportunities when established in areas with the requisite resources and infrastructural support, the Commonwealth should not give CEA businesses blanket protection under the Right to Farm Act and Boneta Bill. Localities should have the final say as to whether such a facility fits the local government's comprehensive plan and economic development strategies.

protected by Right to Farm Act since felling trees and holding them is a valid silviculture activity, but if he had processed the trees into boards, it may constitute manufacture, which would not be protected.

RIPARIAN PROPERTY RIGHTS AT WATERFRONT PROPERTIES IN VIRGINIA

By James T. Lang and Hannah Fruh



James T. Lang is a shareholder at Pender & Coward, P.C., in Virginia Beach. He uses riparian property rights law, maritime & admiralty law, and environmental law to protect Virginians who live, work and play on the water.



Hannah Fruh is a second-year law student at Regent University School of Law in Virginia Beach, where she is a member of the Honors College, and a staff editor of Regent Law Review. She is also a 2018 scholarship recipient to the VSB Annual Real Estate Practice Seminar.

Vast numbers of Virginians enjoy the benefits of living on waterfront property; even more Virginians work or play on the water. Within the Commonwealth of Virginia there are 3,285 square miles of water in the form of bays, lakes, rivers, and streams.¹ These waters create a combined 10,577 miles of shoreline,² important because the shoreline is home to a rich bundle of valuable riparian property rights.



Riparian Area

Riparian rights apply only within a defined footprint called the “riparian area.”³ The riparian area is unique to each waterfront property, formed by the shore of the waterfront property on one side and by the line of navigation on the other side. Riparian boundary lines extend out from the shoreline to the line of navigation to complete the formation of the riparian area. Just as every waterfront property is unique, so too is the size and shape of the riparian area unique to each particular property. Establishing the riparian area for a waterfront property in Virginia is a complex job requiring review and advice from a riparian property rights attorney and a hydrographic surveyor working under his or her supervision.

¹ How Much of Your State is Wet, USGS: Science for a Changing World, <https://water.usgs.gov/edu/wetstates.html> (site visited March 29, 2018).

² Marcia Berman, *How Long is Virginia's Shoreline?*, http://www.vims.edu/bayinfo/faqs/shoreline_miles.php (April 20, 2010) (site visited Oct. 4, 2018).

³ *Groner v. Foster*, 94 Va. 650, 652-53, 27 S.E. 493, 494 (1897) (describing the method to set out the boundaries of the riparian area), cited with approval in, *Carr v. Kidd*, 261 Va. 81, 86, 540 S.E.2d 884, 887 (2001).

Riparian property rights may or may not include ownership of the bottomland depending on factors such as whether the waterfront property is located on a navigable body of water,⁴ whether the bottomland was conveyed into private ownership by the British Crown in the time prior to the American Revolution (under a so-called “King’s Grant”), or whether the bottomland was conveyed into private ownership by the Commonwealth of Virginia⁵ (at some point after the American Revolution⁶). The vast majority of waterfront properties in Virginia that adjoin a navigable waterbody do *not* include ownership of the bottomland.⁷

Compared to inland tracts, waterfront properties sell at a premium. For example, the premium to acquire an oceanfront property is 45% over a similar property that doesn’t border the Atlantic; for lakefront properties, 25% more; and for riverfront properties, 24%.⁸ Purchasers pay extra for property touching an ocean, lake or river because in part, unlike a comparable property inland, riparian property rights very likely⁹ are attached to the waterfront property.

⁴ The riparian property owner — not the Commonwealth — owns the bottomland under of a non-navigable waterbody. *Patterson v. Overbey*, 117 Va. 345 (1915).

⁵ Va. Code §28.2-1200.1.

⁶ Through operation of the international law of conquest, See, e.g., *Johnson v. M’Intosh*, 21 U.S. 543, 5 L. Ed. 681, 8 Wheat. 543 (1823), during the time period before the American Revolution, the real property within the boundaries of the United States was owned by the sovereigns of Great Britain, France and Spain. At the time of the Revolutionary War, all of the real property within what is now the Commonwealth of Virginia was owned by the British Crown. In the treaty that concluded the American Revolutionary War, the British Crown conveyed its “right to soil” in the United States to the United States. *Id.* A “King’s Grant” is if the British Crown conveyed bottomland into private ownership at any point prior to the American Revolution. The words of the grant must be interpreted, on a case-by-case basis, to determine whether bottomland was intended to convey.

⁷ Va. Code §28.2-1200.

⁸ Dr. Michael Sklarz and Dr. Norman Miller conducted this study by:

limit[ing] the data to a large sample of 5-digit ZIP Codes that include both waterfront and off-water sales. These waterfront properties were categorized into three types: ocean and bay front, lakefront, and riverfront. These classifications were based upon a proprietary database which Collateral Analytics created to identify and analyze waterfront properties across the entire U.S. using advanced GIS techniques.

Dr. Michael Sklarz and Dr. Norman Miller, *The Impact of Waterfront Location on Residential Home Values*, http://collateralanalytics.com/index.html?p=1676.html#_ftnref1 (March 27, 2018) (site visited Oct. 4, 2018).

⁹ An owner of waterfront property (land that touches a river, bay, creek, or the ocean) normally owns riparian property rights, except where the riparian rights were withheld by a prior owner as documented in the chain of title for the property (a process called “severing” the riparian property rights from the land). *Thurston v. Portsmouth*, 205 Va. 909, 140 S.E.2d 678 (1965). Because riparian property rights can be severed from the land, and because title insurance companies may draft a riparian rights title exception into the title insurance policy, a person thinking about purchasing waterfront property should check with a riparian property rights attorney before making the purchase.

Riparian Property Rights Provide Value in a Real Estate Transaction Involving Acquisition of Waterfront Property¹⁰

Because of their exceedingly high value, riparian property rights are an important element of due diligence in any real estate transaction. In one instance of failed due diligence, a developer in Maryland purchased what it thought were expansion and riparian rights to valuable property for the specific purpose of developing a marina, condominium regime, and a yacht club on the property. However, the riparian property rights were owned by another party; this blocked the developer's plan to build piers and docks with marina slips for the yacht club.¹¹ As noted above, a prudent buyer should engage a riparian property rights attorney to assist in the transaction.

Benefits of Riparian Property Rights

Riparian property rights under Virginia law consist of five specific benefits:¹²

1. *The right to enjoy the natural advantages conferred upon the land by its adjacency to the water.* Virginia law allows people or businesses to lease state-owned land submerged under the water (called "bottomland") to grow oysters.¹³ A riparian property owner gets "head-of-the-line" privileges for these leases in a process controlled by specific sections of the Virginia Code, and is managed by the Virginia Marine Resources Commission (VMRC).¹⁴

Additionally, waterfront property owners attach a great deal of value to the scenic view available to them when they look out over the water. It is, however, somewhat challenging at times to obtain legal protection that preserves this vista.

2. *The right of access to the water, including a right-of-way to and from any navigable waters.* The riparian area is designed to protect navigation from the shoreline out to the navigable part of the waterway. (The navigable part of the waterway is defined as beginning at the "line of navigation," the area where most ships and boats travel through).

3. *The right to build a pier out to the navigable part of the water.* The right to build a pier in the Commonwealth is specified in the Virginia Code and is managed by the Virginia Marine Resources Commission (VMRC).¹⁵

4. *The right for property to expand if the body of water places additional soil along the shoreline.* Contrarily, erosion can cause waterfront property to shrink. The shoreline boundary of a waterfront property is determined by the line of mean low water.¹⁶ It is fluid, changing over time as the shoreline changes. The Virginia Supreme Court noted decades

¹⁰ The Virginia Supreme Court wrote recently that "The littoral or riparian nature of property is often a substantial, if not the greatest, element of its value." *Lynnhaven Dunes Condominium Association v. City of Virginia Beach*, 284 Va. 661, 673, 733 S.E.2d 911, 917 (2012).

¹¹ *Conrad/Dommel, LLC v. W. Dev. Co.*, 149 Md. App. 239 (2003).

¹² *Taylor v. Commonwealth of Virginia*, 102 Va. 759, 773, 47 S.E. 875, 880-81 (1904) (listing the five benefits), cited with approval in, *Scott v. Burwell's Bay Improvement Association*, 281 Va. 704, 710, 708 S.E.2d 858, 862 (2011).

¹³ Va. Code §§28.2-600 to -650.

¹⁴ Va. Code §§28.2-600 to -602.

¹⁵ Va. Code §§28.2-1205; see especially Va. Code §§28.2-1205(D) (describing a streamlined process).

¹⁶ Va. Code §28.2-1202.

ago that riparian boundaries “are subject to the losses and gains of erosion and accretions.”¹⁷

5. *The right to make a reasonable use of the water as it flows past or washes upon the land.* During earlier times in Virginia, a riparian owner could use flowing water in a river as an energy source to drive a water wheel that operated a sawmill or a gristmill. Today, water might be withdrawn from a river or stream to irrigate crops or to water cattle. A modern electric power generating plant built next to a river may use river water to cool equipment inside the plant, then return the water (after it has been heated) to the river.¹⁸

¹⁷ *Woody v. Abrams*, 160 Va. 683, 693, 169 S.E. 915, 919 (1933).

¹⁸ The withdrawal of surface water may require a Virginia Water Protection permit from the Virginia Department of Environmental Quality.

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR

AGENDA FOR THE FALL MEETING¹ OF THE BOARD OF GOVERNORS AND AREA REPRESENTATIVES

Friday, October 5, 2018, at **10:00 a.m.**
Virginia State Bar, Board Room, 7th Floor
1111 East Main Street, Richmond, Virginia

- I. **WELCOME AND ROLL CALL** — Creasman — If attending by conference call, please send email to Lori Schweller Lori.Schweller@leclairryan.com to let her know that you are on the line.
- II. **ADOPTION OF MINUTES** — Summer Meeting of the BOG and Section held June 15, 2018 — Wiley (see Schedule 1). Minutes will be circulated to the Board soon after Fall meeting for comments, with final adoption to occur at Winter meeting.
- III. **FINANCIAL REPORT** — Creasman
 1. **Budget Information** (see Schedule 2(a) thru 2(c))
 - i. Eight percent of our income was remaining at the end of FY 2018 (\$2,916.07). Sch 2(a) shows the actual expenses paid.
 - ii. Sch. 2(b) shows FY 2019 budget and expenditures through August, 2018
Dues allocated for our use = \$36,580.00
Expenditures for July 2018 = \$ 6,599.31; for August = \$74.39
Remaining funds = \$29,980.69 (82%)
 2. **Expense Vouchers** **Please return signed originals for this meeting to Kay Creasman no later than October 19th. Mail to 1245 Mall Drive, N. Chesterfield, VA 23235.**
 - [Volunteer Travel Expense Reimbursement Detailed Instructions](#) (PDF file)
 - [Volunteer Reimbursement Voucher](#) (Excel file)
 - [Commonwealth of Virginia Substitute W-9 Form](#) (PDF file)
- IV. **STANDING COMMITTEES**
 1. **Membership** — Wiley (no written report)
 - i. Review roster and updating website. Add year/approximate year you became an AR to the list
 - ii. **New Area Representatives** (Schedule 3 (a) thru (c))
 - a. **David Hannah**, Protora Law PLLC, Tysons Corner (John Hawthorne)
 - b. **Theodora Stringham**, Offit Kurman P.A. Tysons Corner (John Hawthorne)
 - c. **Susan Tarley**, Tarley Robinson, PLC, Williamsburg (Joshua Johnson)

¹ Minutes from the Fall Meeting will appear in the Spring issue once they are approved in the January meeting. Financial information for the Real Property Section has been intentionally redacted from this report.— Ed.

iii. Total membership = 1835

Area Reps, including Board members = 98 plus newly elected = 101; 5.5% of the membership

a. Free Section memberships at Seminars*

Suggestion for discussion: Have Section officers seek approval from the Virginia State Bar to waive section dues for the remainder of the current year for any Virginia lawyer who is not a current or past section member and joins the section at its annual advanced real estate seminar or real estate practice seminars each year.

b. Reception after classes at George Mason and U. of Richmond*

c. Mentorship program*

d. Honorary members*

2 Fee Simple - Gregory (see written report) (Schedule 4)

a. Article Submission Deadline — **October 5, 2017**

b. Solicitation for article topics for future issues of The Fee Simple

3. Programs – Byler and Leigh

(no written report; met Sept. 6 2:00 pm telephone conference)

a. Dates and locations; topics and speakers

(1) Advanced Real Estate Seminar - March 1-2, 2019 Williamsburg

(2) Annual Real Estate Practice Seminar

May 8 – Roanoke

May 21 – Fairfax

May 23 - Williamsburg

b. 2019 Summer Meeting CLE – Wiley

(1) Real Estate, Death and Taxes

4. Technology — Graybeal (Schedule 5)

V. SUBSTANTIVE COMMITTEES

a. Commercial Real Estate — John Hawthorne (no written report)

b. Common Interest Community — Josh Johnson & Sue Tarley (no written report)

c. Creditor's Rights and Bankruptcy - Christy Murphy (no written report)

d. Eminent Domain — Lollar (no written report)

e. Ethics — Waugaman & Hegeman (report attached)(no written report)(met 10/10/18 at 10 am via telephone conference)

f. Land Use and Environmental — Cohen & Schweller (report attached) (Schedule 6)

g. Residential Real Estate — Walker & Payne (report attached)(Schedule 7)

h. Title Insurance — Anwar & Nahorney (report attached) (Schedule 8)

VI. UNFINISHED BUSINESS

1. VBA Update — Wiegard

a. Recodification of Title 55

b. *The Game Place* case and seminar at 3:30 at VBA office, Richmond

2. *The Virginia Lawyer* Real Estate Edition – Creasman & Biggs

a. Materials due to Bar July, 2019 for October 2019 publication date

b. 6,000 words total

c. Steering committee: Lewis Biggs, Rick Chess, Kay Creasman and Steve Gregory

d. Submit proposals to Lewis or Kay

VII. NEW BUSINESS

1. VBA legislative update – Wiegard
2. Co-chairs needed for all committees
3. Education beyond attorneys
 - a. Public / consumers
 - i. Common Interest Community pamphlet/online
 - ii. Owner's Title Insurance pamphlet/online
 - iii. Other areas?
 - b. Tax Assessors
 - c. Other groups?
4. Virginia Supreme Court on Pro Bono hours
 - a. Chief Justice Donald W. Lemon's letter dated April 15, 2018 (Schedule 9)
 - b. Suggestions for pro bono work for real estate attorneys
 - c. *Va. Lawyer*, August 2018, "Back to the Land: Nonprofit Wants to Connect Black Landowners to Lawyers" <http://www.vsb.org/docs/valawyeromagazine/vl0818-complete.pdf>
5. Collegiality with other Sections and Conferences
 - a. Young Lawyers: non-voting Ex Officio member
 - b. Articles from/to Military; Local Governments; Family; Trusts & Estate; etc.;

"Ask the Expert" column (Family Law Section idea)
6. Virginia -North Carolina border issue
7. Diversity and real estate attorneys
 - i. Encourage new membership
 - ii. Encourage more participation as Area Representative
 - iii. Invite participation on a committee
8. Items from the floor

VIII.FYI

- a. Statutory changes – statute of limitations
 - i. § 19.2-305.2. Amount of restitution; enforcement.

A. The court, when ordering restitution pursuant to § 19.2-305.1, may require that such defendant, in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense, (i) return the property to the owner or (ii) if return of the property is impractical or impossible, pay an amount equal to the greater of the value of the property at the time of the offense or the value of the property at the time of sentencing.

B. An order of restitution may be docketed as provided in § 8.01-446 when so ordered by the court or upon written request of the victim and may be enforced by a victim named in the order to receive the restitution in the same manner as a judgment in a civil action. *Enforcement by a victim of any order of restitution docketed as provided in § 8.01-446 is not subject to any statute of limitations.* Such docketing shall not be construed to prohibit the court from exercising any authority otherwise available to enforce the order of restitution.

- ii. § 19.2-341. Penalties other than fines; how recovered; in what name; limitation of actions.

When any statute or ordinance prescribes a monetary penalty other than a fine, unless it is otherwise expressly provided or would be inconsistent with the manifest intention of the General Assembly, it shall be paid to the Commonwealth if prescribed by a statute and paid to the locality if prescribed by an ordinance and recoverable by warrant, presentment, indictment, or information. Penalties imposed and costs taxed in any such proceeding shall constitute a judgment and, if not paid at the time they are imposed, execution may issue thereon in the same manner as upon any other monetary judgment. No such proceeding of any nature, however, shall be brought or had for the recovery of such a penalty or costs due the Commonwealth or any political subdivision thereof, unless within ~~twenty~~ 60 years from the date of the offense or delinquency giving rise to imposition of such penalty if imposed by a circuit court, or within ~~ten~~ 30 years if imposed by a general district court.

VIII. NEXT MEETING — The winter meeting will be held in Williamsburg to coincide with the Annual Meeting of the VBA, Friday, January 25, 2017. The meeting time and place are still TBD, but will likely be at 1:00 P.M at the Williamsburg Inn.

IX. ADJOURNMENT

Schedule 1 – June 2018 Minutes

VIRGINIA STATE BAR

Real Property Section

Annual Meeting

Board of Governors and Area Representatives Summer Meeting

June 15, 2018

Minutes

The joint 2018 annual meeting and summer meeting of the Board of Governors and Area Representatives of the Virginia State Bar Real Property Section was held Friday, June 15, 2018, at the Oceanaire Resort, Gannett Room B, Virginia Beach, Virginia, in conjunction with the annual meeting of the Virginia State Bar. The meeting was called to order at 11:50 a.m. by Whitney Levin, Section Chair. Those present for the meeting were invited to get their box lunches and eat while participating. Those participating by conference call were asked to email or text Ron Wiley. A list of those attending in person and by conference call is attached to these minutes.

The minutes of the Spring 2018 meeting of the Board of Governors and Area Representatives were approved unanimously. The financial report was provided with the meeting materials packet; no questions were raised and the report was received.

The report of the Membership Committee was included in the meeting materials. The possibility of being more intentional about using the annual advanced and real estate practice programs to recruit and sign up new members was discussed briefly. Also, it was suggested that the law school liaisons be asked to seek opportunities to encourage graduating law students to join the section. No new area representatives were nominated.

Editor and committee chair Steve Gregory gave the report for *the FEE SIMPLE*. The submission deadline for the Fall 2018 issue is the first Friday in October. Article topics suggested included Opportunity Zones, the leases under seal decision by the Virginia Supreme Court, and leasing issues, generally.

Kathryn Byler gave the report of the Programs Committee; a written report also was included in the meeting materials packet. She reported 117 people attended the 2018 advanced program and the annual real property practice programs had the following attendance: Fairfax — 174, Roanoke — 46, and Williamsburg — 86.

The dates of the 2019 programs were announced [Advanced — March 2-3, Williamsburg; Annual — May 8 (Roanoke), 23 (Williamsburg), and 30 (Fairfax)]. Several questioned whether the western location for the annual program should be changed to Lexington. Several strongly suggested re-scheduling the Fairfax annual program to a date other than at the end of a month in the spring. The committee and Virginia CLE will consider those questions and suggestions. (Note: it also was suggested later in the meeting that 90-minute presentations be considered for the programs.)

There was some discussion of the section trying to co-sponsor a CLE program at the 2019 VSB annual meeting. The topic, "Real Estate, Death, and Taxes", for presentation with the Trusts & Estates and Taxation Sections was suggested and the consensus was that it would be a good topic to offer.

The written reports submitted by any substantive committees were included in the meeting materials. Commercial Real Estate Committee chair John Hawthorne reported on an issue with emails being blocked by SPAM filters or going to Junk mail folders. Ethics Committee chair Ed Waugaman suggested compiling a compendium of VSB legal ethics opinions dealing with real estate practice issues.

Max Wiegard reported on behalf of the Virginia Bar Association Real Estate Council. The recodification of Title 55 of the Code of Virginia is an ongoing VBA project. The fall CLE and social event for the VBA Real Estate Section will be Friday, September 14, following the fall meeting of the VSB Real Property Section Board of Governors and Area Representatives. The VBA considers its report on legal opinions in real estate transactions to be proprietary and access is limited to VBA members. Other benefits of VBA membership were mentioned.

The VSB Real Property Section will be the focus of the October 2019 issue of *Virginia Lawyer*. Kay Creasman and an ad hoc committee will be soliciting articles from section committees and members.

Steve Gregory suggested the section study creating title standards like those adopted in Ohio. After some discussion, including some concerns being raised about whether the VSB would be permitted to adopt title standards or should refer the idea to the VBA, the idea was referred to the Title Insurance Committee.

The report of the nominating committee was received. Board members and officers were elected, with Lewis Biggs moving their election and Mark Graybeal seconding the motion, which passed unanimously. The election report accompanies these minutes.

2017-2018 Section Chair expressed thanks to Rosalie Doggett, who will continue as an Area Representative but has moved out of Virginia and will no longer be on the Board of Governors. The traditional gifts were presented to the 2017-2018 (gavel mounting plaque) and 2018-2019 (gavel) Section Chairs. Kay Creasman also presented Whitney Levin with a print of the Virginia Museum of Contemporary Art boardwalk art show poster, signed by those in attendance. 2018-2019 Chair Kay Creasman remarked that everyone would hear from her about her ideas for the upcoming year's agenda for the section.

Future meetings were announced, as well as the annual section leadership reception and dinner at Steinhilber's that evening. The meeting was adjourned at 1:00 p.m.

Respectfully submitted,

Ronald D. Wiley, Jr., 2017-18 Secretary-
Treasurer

VIRGINIA STATE BAR

Real Property Section
Annual Meeting
June 15, 2018

Attendance

Board Members

Whitney J. Levin, Chair
Kay M. Creasman, Vice-
Chair
Ronald D. Wiley, Jr.,
Secretary-Treasurer
F. Lewis Biggs
Steve Gregory
Kathryn Byler
Rick Chess*
Karen Cohen
Mark Graybeal
Blake Hegeman
Lori Schweller*
Max Wiegard, VBA
Tracy Winn Banks, VaCLE

Section Members

Jon Puvak

* Attended by conference call

Area Representatives

Bill Nusbaum
Wayne Glass
Ann A. Gourdine
Ed Waugaman
Paul Melnick
Susan Pesner
John Hawthorne
Robert E. Hawthorne, Jr.
Cooper Youell
Doug Dewing
Howard Gordon
Michael Barney
Harry Purkey
Philip Hart
Christina Meier*
Jean Mumm*
Cartwright Reilly*
J.B. Lonergan, honorary
Robert E. Hawthorne, Sr., honorary

VIRGINIA STATE BAR

**Real Property Section
2018-2019 Section Officers & Board of Governors
Elected at Annual Meeting, June 15, 2018**

Officers

Chair: Kay M. Creasman

**1245 Mall Drive
Richmond VA 23235**

Vice-Chair: Ronald D. Wiley, Jr.

**911 Locust Lane
Charlottesville VA 22901**

Secretary-Treasurer: Jennifer Lori Hodge Schweller

**LeClairRyan, PLLC
123 East Main St; Suite 800
Charlottesville VA 22902**

Board of Governors

Newly-Elected: Robert E. Hawthorne, Jr.

(Replaces Rosalie Kane Doggett; Term Expires 2021; First Term)

**Hawthorne & Hawthorne
1805 Main Street; P O Box 931
Victoria VA 23974**

Re-Elected:

Whitney Jackson Levin (Term Expires 2021; Third Term)

Blake B. Hegeman (Term Expires 2021; Second Term)

Respectfully submitted,



Ronald D. Wiley, Jr., 2017-18 Secretary-Treasurer

Schedule 3 (a) – Area Representative Nominee

David C. Hannah

Member of the Virginia State Bar
LEED® Accredited Professional

419 Park Street,
SE Vienna, Virginia
22180
Mobile: (703) 929-7790
[Email: DCHannah@cox.net](mailto:DCHannah@cox.net)

Summary

Resourceful attorney with broad-based professional experience, including U.S. and international business planning and operations; entrepreneurial strengths; excellent organizational, communication and decision-making skills; strong analytical and problem-solving abilities; and the versatility to combine business and management background with the skills of a legal advisor.

Professional Experience

Protora Law, PLLC – Tysons, Virginia
Partner Attorney
2017 to Present

Transactional attorney with a focus on real estate development and finance in a business law firm representing commercial clients and providing legal advice and business guidance. Responsibilities include:

- Creating, developing and negotiating complex real estate and business asset acquisition, finance and leasing transaction structures to achieve financial and corporate goals for clients;
- Providing legal advice and business guidance to developer clients in all aspects of real estate ownership and operations, including acquisition, finance, entitlement, development and construction, and leasing;
- Drafting complex commercial contracts and business alliance agreements;
- Representing commercial lending institutions in general asset-based and real estate-based commercial loans; and
- Assisting clients with business entity organization, governance and compliance issues.

Bean, Kinney & Korman, P.C. – Arlington, Virginia
Shareholder Attorney
2007 to 2016

Via & Hannah, LLC & Fortress Title & Settlement Services, LLC – Vienna, Virginia
Partner / Principal & President
2002 to 2007

Education

George Mason University School of Law – Arlington, Virginia
Jurist Doctorate
Member of George Mason University Law Review

Rollins College – Winter Park, Florida
Bachelor of Arts

Schedule 3 (b) – Area Representative Nominee

Theodora Stringham

8271 Clifton Farm Court • Alexandria, VA • 22306 (202) 415-6880 • theodora.stringham@gmail.com

PRINCIPAL ATTORNEY

SUMMARY: Principal-level litigation attorney focused on assisting businesses, individuals, and organizations with growth while minimizing liability. Focus on real estate and personnel development, with full-service representation from counseling through trial.

BAR ADMISSIONS

Commonwealth of Virginia; District of Columbia; State of New Jersey; Eastern District of Virginia

EXPERIENCE

PRINCIPAL ATTORNEY, OFFIT KURMAN, P.A., TYSONS CORNER, VA *May 2017-Current*

Principal-level litigation attorney focused on assisting businesses, individuals, and organizations with growth while minimizing liability. Provide full-service representation for real estate land/use issues as well as employment matters, including but not limited to, eminent domain, eminent disputes, subdivision plans, rezoning development plans, discrimination (race, gender, national origin, and disability), and disciplinary issues.

Featured speaker at National Business Institute Seminars on “Road Easements from A to Z” and “Land Use and Zoning” as well as Offit Kurman’s “Sexual Harassment Remediation.” (2018).

LITIGATION ASSOCIATE, REES BROOME, PC, TYSONS CORNER, VA *December 2015-May 2017*

ATTORNEY AND MEMBER SERVICES ADVOCATE, SEIU VIRGINIA 512, FAIRFAX, VA *April 2012-November 2015*

FIELD ORGANIZER, FAIRFAX VICTORY 2011, MCLEAN, VA *October 2011-November 2011*

CERTIFIED LEGAL INTERN, VOLUNTEER LAWYERS FOR JUSTICE, NEWARK, NJ *September 2011-October 2011*

EDUCATION

J.D., Rutgers School of Law-Camden, NJ, Awarded May 2011

B.A., Rutgers University, New Brunswick, NJ, Awarded May 2008; Magna Cum Laude

ACTIVITIES

Fairfax Bar Association, June 2013-Present

Current Chair of Real Estate Practice Section. Awarded “President’s Award for Outstanding Service.” (2018).

Virginia Women Attorney Association, May 2016-Present

Community Outreach Committee member.

Northern Virginia Pro Bono Law Center, May 2015-Present

Serve as a pro bono volunteer attorney for the Neighborhood Outreach Program, providing advice to individuals in shelters across Northern Virginia.

Northern Virginia Legal Services, May 2015-December 2015

Served as a pro bono counsel for the Employment Panel.

Schedule 3 (c) – Area Representative Nominee

Susan B. Tarley

4808 Courthouse Street, Suite 102, Williamsburg, VA 23188

Phone: 757-229-4281 Cell: 757-880-1962 [Email: starley@tarleyrobinson.com](mailto:starley@tarleyrobinson.com)

LEGAL EXPERIENCE

Attorney **1988-Present**

- Partner with Tarley Robinson, PLC.
- Civil practice, including, commercial and residential real estate matters, community association law, and small business representation.
- Appointed to Best Practices for Declarations Committee through Virginia Common Interest Community Board.
- Substitute Judge, 9th Judicial District, 1998-2016.
- General practice from 1988-1996, including, civil litigation, real estate, criminal defense, guardian ad litem and juvenile matters, and bankruptcy law.
- Managing Partner from 1992-2009 with responsibility for personnel matters, budgeting, marketing, and other related management.

Teaching

- Adjunct Professor, William and Mary Law School, Real Estate Transactions
 - Developed 3 credit advanced real estate transactions class; Spring semester 2005 and 2006.
- Requested speaker
 - Virginia Leadership Conference.
 - Community Association Institute.
 - National Business Institute, Real Estate CLE.
 - Institute for Paralegal Education, Real Estate seminar, Title seminar.
 - Approved through Virginia Common Interest Community Board to teach certification classes.

LEADERSHIP

- Committee Member, 2014-Present, Chair, 2018- Present, Virginia State Bar Clients' Protection Fund Board.
- Committee Member, 2013- Present, Virginia State Bar, Common Interest Community Subcommittee.
- Board Member, 2010-Present, Chair, 2012-2016, Virginia Legislative Action Committee, Community Association Institute.
- Committee Member, Government and Public Policy Committee, Community Association Institute.
- Committee Member, Law Seminar, Community Association Institute.
- Board Member, Virginia Company Bank (Audit and Compliance Committees), 2011-2014.
- Board Member, Child Development Resources (Executive Committee, Nominating Committee Chair), 2007-2012.
- Member, Virginia Legislative Action Committee (FHA Task Force Chair), 2011- 2012.
- Board Member, Community Association Institute-Central Virginia Chapter, 2000-

2006; 2009-2012.

- Past President, Williamsburg Bar Association, Greater Peninsula Women's Bar Association, Community Association Institute-Central Virginia Chapter, Avalon: A Shelter for Women and Children.
- Past Vice President, American Heart Association-Williamsburg Chapter, Williamsburg Area
- Trial Lawyers Association.

AWARDS

- 2011, Past Presidents Award, 2008 Chapter Award, 2003 Rising Star Award, Community Associations Institute-Central Virginia Chapter.
- 2009, Award of Merit, Williamsburg Bar Association, Recognized for significant volunteer activities and contributions that have helped to enhance the image and esteem of the Williamsburg Bar Association, the lawyers, the judges, and the legal community.
- 2006, Virginia Leader in the Law, Recognized for establishing pro bono legal clinic for Williamsburg area.
- 2007, James City County, Volunteer Contributions for providing seminars for county residents.

EDUCATION

George Mason University School of Law, Juris Doctor, 1988

Pennsylvania State University, Bachelor of Science, 1983, Major: Administration of Justice

Schedule 4 – Committee Report: Fee Simple

Minutes of the **Fee Simple Committee** Telephone Conference

The Fee Simple Committee held a telephone conference on 16 August 2018 at 10:00 AM. Participating in the call were the chair, assistant editor Hayden-Anne Breedlove, and committee members Michelle Rosati, Ben Titter, Karen Day, and Doug Dewing. Rick Chess notified the chair that he was not available.

The focus of the call was the Fall, 2018, issue. The chair reminded everyone that the deadline for submissions is the first Friday in October (5 October).

Ms. Rosati said that the article on which she has been working should be ready for publication in the coming issue.

Ms. Day stated that she has interviewed John Frey of Fairfax County for the Clerk's column and it will be submitted for the fall issue.

Ms. Breedlove offered to write an article on the origins of "Blackacre" and "Whiteacre." She also volunteered to see if one of the Richmond University law professors would be willing to write an article on the real estate implications of domestic violence cases. (Protective orders, order to abandon marital domicile, etc.)

The chair mentioned two recent cases with real property implications: *Kruck v. Krisak* (partial revocation of a trust) and *Porter v. Porter* (validity of marriages). The discussion ended without a decision on articles on either.

The chair also informed the committee that he and Ms. Breedlove were looking into redesigning the masthead. Ms. Breedlove had offered some changes, but Mr. Titter offered to see if his firm's CIO could assist. Following the meeting, Mr. Titter sent a (very attractive) redesign from Jeremy Williams of the Shaheen Law Firm.

The meeting adjourned at approximately 11:00.

Respectfully submitted,

Stephen C. Gregory
Editor and chair

Schedule 5 – Committee Report: Technology Committee

REPORT FROM
MARK W. GRAYBEAL
CHAIRMAN OF THE TECHNOLOGY COMMITTEE
VIRGINIA STATE BAR, REAL PROPERTY SECTION

Date: September 10, 2018

As Chairman of the Technology Committee, I submit this report on behalf of the committee to the Board of Governors and the Area Representatives of the Real Property Section of the Virginia State Bar:

On Monday, September 10, 2018 at 1:00pm, the Technology Committee held a meeting by conference call. In attendance were Mark W. Graybeal (Chairman), and Matson Coxe.

After taking roll, the Chairman thanked all in attendance for participating in the call. The Chairman then noted that the Real Property Board of Governor's meeting had been postponed until October 5th due to the approaching hurricane and directed the committee to review the email from Kay Creasman, which had additional details.

Next, the Chairman notified the committee that a committee co-chair is needed and that an email would be circulated to the committee asking for volunteers and/or nominations.

Following that, Mr. Coxe and the Chairman discussed the Chairman's employer recent transition to the G-Suite of products, including using Gmail, Google Calendar, and Google Docs. The Chairman noted that the G-Suite of products is far better for collaboration between internal teams. However, it was also noted that there have been some bumps with the transition as well as a somewhat steep learning curve.

Next, the Chairman put out a call for any potential topics or *Fee Simple* articles. It was also noted that the fall 2018 Fee Simple would most likely contain information about Blockchain, including Mr. Anwar's article. It was suggested that any other technology related articles look towards the 2019 Fee Simple's for publication.

Finally, the Chairman suggested proposing to the Board that pictures be added to the Board of Governors page of the Section website. After discussion, it was determined that there appeared to be no downside to doing so and that the proposal should be made at the next Board meeting.

The call was then concluded.

Separately from the above, the Chairman submits this report on the website traffic:

In June, 2018, we had 788 unique visitors. The most popular pages were:

1. Our front page
2. The Newsletters page (containing the Fee Simple link)
3. The Links page

In July, 2018, we had 530 unique visitors. The most popular pages were:

1. Our front page
2. The Newsletters page (containing the Fee Simple link)
3. Area Reps Page

In August, 2018, we had 696 unique visitors. The most popular pages were:

1. Our front page
2. Meeting Minutes from April 8, 2000
3. The Newsletters page (containing the Fee Simple link)

Respectfully,

Mark W. Graybeal, Chairman

Schedule 6 – Land Use Committee Report

**Virginia State Bar
Real Property Section
Land Use & Environmental Committee
REPORT**

September 4, 2018, 10:00 a.m.
(By Teleconference)

Committee Members: Alan D. Albert, Michael E. Barney, Karen Cohen, Joshua Johnson, Preston Lloyd, John M. Mercer, Lisa Murphy, Andrew Painter, Jonathan Stone, Steve Romine, Lori Schweller, Maxwell Wiegard

- I. **Committee Leadership** – Karen Cohen is the new Land Use & Environmental Committee Chair. Lori Schweller, former Chair and current Secretary of the Section, is the committee Co-Chair.
- II. **Membership** - The members will reach out to other land use attorneys inside and outside of their firms to ensure more practitioners know about the Committee and the benefits of being a member, including sharing legislative and case law updates.
- III. **Committee Objectives** – Karen suggested that the Land Use & Environmental Committee and the Commercial Real Estate Committee seem like they would share some common interests/legal topics, and may benefit from a joint-committee meeting or other brainstorming about how to benefit our collective members.
- IV. **Legislative Update** – Karen informed the group of a few 2018 bills, including the new CICB disclosure packet forms for both Property Owners’ Association Act and Condominium Act disclosures/resale packets, and associated legislation (HB 923); redaction of books and records under Condo Act (SB 722); variance standards where variance sought by someone with a disability (HB 796); and vested rights regarding existing landscaping (HB 1595/SB 972). The homebuilding industry and local governments are continuing to present ideas about possible changes to the proffer legislation. Some are suggesting impact fees.
- V. **Cases of Interest** – Preston Lloyd informed the group of his firm’s pending petition before the Supreme Court of Virginia on behalf of their client, HH Hunt. The case involves the County’s elimination of a planned road, and petitioner’s claim that the County’s action impaired its vested rights in that planned road extension, which would’ve connected portions of a planned development. Following the meeting, Preston circulated the petition and the amicus brief of Home Builders of Virginia. The case is *Loch Levan Land Partnership; Wellesley Land Limited Partnership; HHH Land, LLC; and HHH Hunt Corporation v. Board of Supervisors of Henrico County, Virginia and the County of Henrico*.

- VI. **Summer Meeting Topics** – Lori informed the group that we should think about “what every real estate lawyer should know” to provide suggested topics for the summer meeting. Lori provided the following suggestions:
1. Fundamentals of a Deed
 2. Types of Estates in Real Property
 3. Easement Fundamentals
 - a. Types of easements (e.g., appurtenant, in gross, express, implied, prescriptive, etc.)
 - b. Roads, right-of-way, utilities, access
 4. Leases vs. Licenses
 5. Common Ownership Principles
 - a. Common Areas, Common Elements (Condos), TICs
 - b. Condo Regime Basics
 6. Real Estate Closing Basics (process, the players, checklists)
- VII. **Announcements**
- a. The fall meeting of the VSB Real Property Section Board of Governors and Area Representatives is scheduled for Friday, September 14, 2018, in Charlottesville.
 - b. Max Wiegard informed that the VBA meeting will be held at 3:00 pm at Wineworks on 9/14 (following the VSB meeting). The topic will be the *Gameplace* case, in which the Supreme Court of Virginia strictly interpreted the statutory requirement for a lease of 5+ years to be in the form of a deed of lease and executed under seal. The VBA will discuss the potential legislative fixes.

The meeting adjourned at 10:40 a.m.

Schedule 7 - Residential Committee Report

REPORT OF THE RESIDENTIAL SUBCOMMITTEE

Hope V. Payne and Susan S. Walker, Co-Chairs

The Residential Sub-committee met by teleconference on September 11, 2018 at 11:00 a.m. Participating in the call were Matson Coxe, Michael Lafayette, Hope V. Payne, Harry Purkey, Christina E. Meier, Trevor Reid, Susan S. Walker, Benjamin Winn, and Eric Zimmerman.

Topics of discussion were as follows:

When is a closing complete?

A committee member from Hampton Roads reported that deeds are often delivered the day after the buyer has closed, raising the question of when closing is actually complete. According to Virginia Code 55-525.8 says, "Settlement" means the time when the settlement agent has received the duly executed deed, loan funds, loan documents, and other documents and funds required to carry out the terms of the contract between the parties and the settlement agent reasonably determines that pre-recordation conditions of such contracts have been satisfied." The Code uses the word, "received", not "delivered", so the mailbox rule does not apply. Also, the Code does not require recordation in order for closing to be deemed complete. In the instance where the deed is not delivered until the next day, though, various problems can arise. First, whose insurance company, the buyer's or the seller's, is responsible if a casualty loss occurs during the gap between the buyer's closing and delivery of the deed? Since it is unclear, the attorney for the seller should advise the seller not to cancel their homeowner's insurance until they receive their proceeds. Another problem, which one member has witnessed, could arise when the buyer takes possession before the deed is delivered, discovers property defects, and demands that the seller agree to repair these items before recordation and disbursement. Because the deed had not been delivered and therefor closing was not complete, it is not entirely clear that the Buyer accepted the property by taking possession. Committee members from Charlottesville, Richmond and Northern Virginia related that timing of deed delivery in those jurisdictions is different and completely avoids the foregoing issues. In Charlottesville, the buyer does not take possession until the deed is recorded. In Northern Virginia and Richmond, the executed deed is required to be present at the time the buyer closes. Since the problem appears to be regional, it was suggested that the committee members from Hampton Roads seek clarifications in the standard, local real estate contracts (e.g. add language requiring the settlement agent to publish when closing is complete), rather than seeking to amend the Code of Virginia's definition of Settlement.

Settlement Agent as trustee under the deed of trust

How appropriate it is for an attorney to be named as trustee in a deed of trust for a borrower whom he or she represents in a closing? Certain lenders name the attorney or title company conducting the settlement as the trustee on their deed of trust. This is especially common with out of state mortgage companies who have no Virginia office. Being the trustee under the deed of trust would seem to create a conflict of interest in representing the borrower. Along the same line, is it inappropriate to notarize the borrower's signature on a document where the notary/attorney is a party? To avoid the foregoing problems one member reported that their firm routinely substitutes Samuel I. White, P.C. as the trustee on these deeds of trust because that firm specializes in foreclosures and has given permission to be named as trustee. Another member pointed out that if a suit relating to the Deed of Trust is filed and the trustee is named and served, the trustee may then have to file a responsive pleading. In this situation the trustee could file a disclaimer of interest in the suit. The question was then raised whether the borrower is still our client, and, if so, whether we have any duty to the borrower to forward the pleading and advise them to consult counsel. That answer would depend on facts beyond the scope of the discussion during the meeting.

Fall 2019 Virginia Lawyer Article

The section chair has tasked the committee with reviewing a list of proposed topics or coming up with our own topic for an article to be published in the Fall 2019 Virginia Lawyer. Potential article topics suggested by the chair were: (1) Issues that non-real estate attorneys have when drafting deeds; (2) Proposed foreclosure and tax assessor's office. (Owner does a boundary line adjustment or deed of gift of a portion of their real estate, but the lender doesn't join in the deed. The assessor adjusts the tax records. The lender forecloses and the assessor is not willing to readjust their records without a deed signed by the lender); (3) Divorce and the timing of deed recordation when tenants by the entirety is severed; and (4) The effect of estate planning on real estate, specifically poorly worded wills and trusts. The committee agreed that topics (1) and (3) regarding deeds would be excellent material for an article. Benjamin Winn agreed to work with the section chair, Kay Creasman, to produce such an article. The committee felt the second topic about the tax assessor is too narrow and specific for us competently to address in an article. The committee agreed that the forth topic regarding poorly worded wills and trusts should be written by an attorney who practices both real estate and estate planning law.

The meeting concluded at 11:55 a.m.

Schedule 8 - Title Insurance Committee Report

Minutes of the **Title Insurance Committee**, Real Estate Section of the VSB
September 12, 2018 Conference Call

Present: Ali Anwar, Matson Coxe, Ken Dickenson, Tom Lipscomb, Cynthia Nahorney, Randy Howard, Paula Caplinger, & Tara Boyd

- I. Welcome Co-Chair, Cynthia Nahorney
- II. What do ALL attorneys in Virginia need to know about real estate (2019 Annual Meeting/Oct 2019 VA Lawyer Publication)

- a. It was suggested that deed format/requirements be shared with the bar association as a whole, specifically the proper formatting for the derivation clause

- III. Potential Articles for fee simple

Article related to rent-to-own transactions within homeowner's associations and issues related to violations prior to purchase

- IV. Legislative changes to contractor lien rights

Respectfully submitted,

Ali T. Anwar

**BOARD OF GOVERNORS
REAL PROPERTY SECTION
VIRGINIA STATE BAR
(2018-2019)**

[Note: as used herein, a Nathan¹ () denotes a past Chair of the Section, and a dagger (†) denotes a past recipient of the Courtland Traver Scholar Award]*

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¹ Named after Nathan Hale, who said "I only regret that I have but one asterisk for my country." -Ed.

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