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the FEE SIMPLE

The Journal of the
Virginia State Bar
Real Property Section

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Former Chairs of the Real Property Section

Back row (L-R): Paula Caplinger (2003-2004), Larry McElwain (2004-2005)
Middle row (L-R): David Helscher (1986-1987), William Nusbaum (2013-2014), Michael Barney (1987-1988), Stephen Romine (2002-2003)
Front row (L-R): Susan Pesner (1996-1997), Joseph W. ("Rick") Richmond, Jr. (1985-1986), Howard Gordon (1982-1983)

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ON THE COVER: Nine former chairs of the Real Property section came together during the January Board Meeting in Williamsburg. That photo and their years of service grace this issue's cover. Not pictured but still active in the Section: Whitney Jackson Levin (2017-18); Lewis Biggs (2016-17); Susan Walker (2015-16); Cooper Youell (2014-15); Philip Hart (2012-13); Paul Melnick (2011-12); Randy Howard (2008-09); Jean Mumm (2007-08); Doug Dewing (2005-06); Susan Siegfried (1999-2000); Larry Schonberger (2001-02); Chip Land (1997-98); Chuck Lollar (1992-93); Neil Kessler (1990-91). A complete list of the former chairs of the section may be found on Page 153.

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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.

Proofreader
Stephen C. Gregory, Esquire
WFG National Title Insurance Company
1334 Morningside Drive
Charleston, WV 25314
(703) 850-1945 (mobile)
Email: 75cavalier@gmail.com

Student Assistant
Hayden-Anne Breedlove
10901 Warren Road
Glen Allen, VA 23060
(804) 357-5687
Email:
haydenanne.breedlove@richmond.edu

FALL 2019 SUBMISSION DEADLINE: FRIDAY, OCTOBER 4, 2019

THE NEXT MEETING OF THE BOARD OF GOVERNORS OF THE REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR WILL BE HELD ON
JUNE 14, 2019, AT 11:45 AM
OCEANAIRE RESORT, GANNETT B, 3421 ATLANTIC AVE., VIRGINIA BEACH, VA 23451

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CHAIR'S MESSAGE

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.

For the past several months, I've been reading about the "Silver Tsunami" that's predicted to hit the real estate field. Many experienced real estate attorneys are retiring. For a period of about 10 years, firms did not hire practitioners in their real estate departments, creating a gap in attorneys with real estate experience. In addition, many firms have chosen to cease doing residential settlements altogether. At the March meeting of the Real Property Section, the Board and Area Representatives discussed both what we love about a real estate practice and what frustrates us. The purpose was to redefine our practices in order to attract new attorneys to the real estate field because it seems few automatically think of this as an attractive practice area. Although acknowledging that real property can be a high-stress and time-driven business (whether residential or commercial settlements, land use planning, common interest community group issues, or any of the myriad other areas that comprise the broad spectrum of a real estate practice), those of us who stay in the field thoroughly enjoy our work. Culling from the minutes of the meeting, our Secretary recorded: "… we love our clients and their businesses, the people we work with, and what we do to be successful;" "we get to talk to people in person or by phone conferences as opposed to emailing;" "we get to interact with clients when they are happy; projects are short-lived and we usually get paid in certified funds at closing;" "due to the economic downturn and firms not hiring for real estate for almost 10 years a generational gap exists in the real estate legal market, which means opportunity for young lawyers in real estate – which we should emphasize to them;" and "real estate work is concrete." We can see the effect of our work in the world. How wonderful is that!

In addition to discussing how to attract new attorneys to the field, throughout the year we discussed how to handle the Virginia Supreme Court's focus on *pro bono* hours. The group was quite split on whether or not the Real Property Section should be involved in providing *pro bono* suggestions for members. Some believe it's better handled at the local bar level; some would love to have a resource that allows them to use their real estate skills rather than learning new skills to address underserved populations; some in small practices in small towns think they have sufficient hours when people stop by to chat about an issue, with no expectation of paying for the advice they receive; and others feel it's all they can do to pay their own bills (working in real estate today), so there's no time presently to devote to *pro bono* work.

[One issue discussed was the definition of *pro bono.* The consensus was that this is not a reduced fee situation. Work is only *pro bono* if no fee is charged at all for the services rendered. The Section agreed to post any information received by the Section on its website, so anyone interested can check there for groups that may be able to use some of your time.]

We have several projects that should benefit our members.

- The Ethics Committee, with the aid of the Board and Area Representatives, is doing a comprehensive review of all Legal Ethics Opinions in order to develop a usable database for real estate attorneys.
- As of October 1, 2019, Title 55 of the Code of Virginia will become Title 55.1. We hope to have a conversion chart published in the Fall edition of *Fee Simple*. All of us will be learning new Code section references, just as we did with Title 64.2 a few years ago.
- This summer we will submit our articles for the October 2019 issue of *The Virginia Lawyer* with a focus on real estate. Articles are being drafted in April and should be ready for

publication by June. We agreed to do this to help to educate attorneys in other practice areas of real estate issues that may impact their area of work. In future years, we may expand the idea to have Section members write articles for other practice area newsletters, or even publications for Clerks or Tax Assessors, to ensure we all have the same understanding about real estate law in Virginia.

- The Title Insurance subcommittee is continuing to work on a publication about owner's title insurance that should be posted on our website for members to use and the public to reference.

Our Advanced Real Estate Seminar at Kingsmill March 1-2 may have had a record number of attendees, with 155 participants signed up. James Charles Smith, recently retired from the University of Georgia School of Law, discussed Inquiry Notice. Next year we hope to have another keynote speaker with a national reputation. If anyone has ideas for speakers, please pass them along to the Board or the subcommittee on education (programs).

Unfortunately, we did not have a Traver Scholar Award recipient this year. We had a number of well-qualified nominees, but no one person reached the mandatory number of votes required to be selected. The Traver Scholar Award is awarded by the Real Property Section of the Virginia State Bar and Virginia Continuing Legal Education to honor Real Property Section members who embody the highest ideals and expertise in the practice of real estate law and have generously shared their knowledge with others. Traver Scholars have made significant contributions to the practice of real property law generally, and the Section specifically. The award is named for the "father" of Virginia real estate lawyers, Courtland L. Traver, Jr. (1935-2014), whose outstanding legal ability and willingness to share his knowledge and experience continues as an inspiration to others. The Committee will work this year to revise the selection guidelines in anticipation of having an award recipient in 2020.

For the past few years, Virginia State Bar presidents have had a theme for their year in office: access to justice, diversity and this year, wellness. Within the real estate bar wellness is a fitting area on which to focus. Working an average of 60-70 hours a week is not a healthy lifestyle. (This is "been there – done that" speaking.) Make time for yourself, your family, your life outside of your practice. You deserve the time for yourself. If you can't get in regular exercise, make sure you walk up the stairs at work (depending on your office situation) or up and down the hall every hour. Getting out of your chair and making time for even a small amount of physical exercise will go a long way to improving your mental outlook and making sure you are working to live, not living to work.

Finally, I offer a heartfelt "thank you" to those who have been of special help this year: Dolly Shaffner, our liaison with the Bar; Felicia A. Burton of William & Mary Law School who is support for *The Fee Simple*; Lori Schweller, as Secretary of the Section; Christina Meier for stepping in to work on the Ethics project; all members of the Board of Governors or their support and encouragement; and most especially all of the Co-chairs of the Committees which actually do the work of the Section: Steve Gregory, Rick Chess, Ron Wiley, Pam Fairchild, Kathryn Byler, Ben Leigh, Mark Graybeal, Matson Coxe, John Hawthorne, David Hannah, Josh Johnson, Sue Tarley, Christy Murphy, Brian Dolan, Chuck Lollar, Ed Waugaman, Blake Hegeman, Karen Cohen, Lori Schweller, Hope Payne, Susan Walker, Ali Anwar and Cynthia Nahorney. No Chair of the Section can function without the generous help all these people provide. Thank you.

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We hope to see all of you at the Summer Bar meeting in Virginia Beach. Paul Melnick will be participating in a seminar on "Real Estate, Death and Taxes" on behalf of the Section. We will have a meeting on Friday, June 14th and invite you to attend. Just let us know you will attend, and we'll have lunch ready.

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Our Fall meeting is usually the second or third Friday of September at the Virginia CLE offices in Charlottesville, Virginia. Again, all section members are welcome to attend.

2019 VIRGINIA GENERAL ASSEMBLY: SELECTED REAL ESTATE LEGISLATION BILL LIST

Compiled by Maxwell H. Wiegard
and Lauren E. Coleman

Maxwell H. Wiegard is a partner at Gentry Locke in Roanoke, Virginia concentrating his practice on the representation of real estate developers and investors, common interest community associations, wireless communications carriers, owners and operators of industrial, and commercial facilities, and other businesses in real estate, land use, zoning, environmental, corporate, and commercial matters. Mr. Wiegard is the Chair of the Real Estate Section of the Virginia Bar Association, Ex-officio Member of the Board of Governors of the Real Property Section of the Virginia State Bar, Member of the Virginia State Bar Real Property Section Subcommittee on Land Use and Environmental Law, Member of the Executive Council of the Environmental Section of the Virginia Bar Association, and Past-Chair of the Environmental Section of the Virginia State Bar. Mr. Wiegard is a graduate of the University of Virginia and the Marshall- Wythe School of Law at the College of William and Mary.

Lauren E. Coleman is an associate at Gentry Locke in Roanoke, Virginia concentrating her practice on representing businesses and individuals in connection with a wide range of corporate, commercial, real estate, land use, and environmental matters. Ms. Coleman graduated summa cum laude from the College of William & Mary in 2013, and earned her J.D. from the Marshall-Wythe School of Law at the College of William & Mary in 2016.

Bill Number	Patron	Bill Description
	BUILDINGS	
HB 1725	Delegate Barry D. Knight	Public school building security enhancements; compliance with Uniform Statewide Building Code, etc. [Amends and reenacts Virginia Code § 22.1-138]
HB 1966	Delegate David E. Yancey	Uniform Statewide Building Code; issuance of building permits. [Amends and reenacts Virginia Code § 36-105]
	CEMETERIES	
HB 2212	Delegate C. Matthew Fariss	Certain private roads or rights-of-way; gates and fences. [Amends and reenacts Virginia Code § 33.2-110]
HB 2238	Delegate Delores L. McQuinn	Cemeteries; removal of remains, etc., of previously unidentified. [Amends and reenacts Virginia Code §§ 57-36, 57-38.1, and 57-38.2; Adds Virginia Code § 57-35.35:1]

COMMUNITY ASSOCIATIONS

HB 1853; SB 1537	Delegate David L. Bulova; Senator Scott A. Surovell	Virginia Property Owners' Association Act; home-based businesses. [Amends and reenacts Virginia Code § 55-513.2]
HB 1962	Delegate David L. Bulova	Common Interest Community Board; issuance of compliance orders. [Amends and reenacts Virginia Code §§ 54.1-2352, 55-79.100, 55-396, and 55-500]
HB 2030; SB 1538	Delegate David L. Bulova; Senator Scott A. Surovell	Common interest communities; dissemination of annual budget, reserve for capital components. [Amends and reenacts Virginia Code §§ 55-79.83:1, 55-471.1, and 55-514.1]
HB 2081	Delegate Vivian E. Watts	Common Interest Community Board; association fees, etc. [Amends and reenacts Virginia Code §§ 54.1-2349, 55-79.93:1, 55-504.1, 55-509.6, 55-509.7, 55-516.1, and 55-529]
HB 2385; SB 1580	Delegate David L. Bulova; Senator David R. Suetterlein	Condominium Act and Property Owners' Association Act; delivery of condominium resale certificates. [Amends and reenacts Virginia Code §§ 55-79.97 and 55-509.4]
HB 2647	Delegate David A. Reid	Condominium Act; meetings of unit owners' associations, proxy voting. [Amends and reenacts Virginia Code § 55-79.77]
HB 2694	Delegate Mark L. Cole	Property Owners' Association Act; association meetings, notice by email. [Amends and reenacts Virginia Code § 55-510]
SB 1756	Senator Scott A. Surovell	Virginia Condominium and Virginia Property Owners' Association Acts; stormwater facilities. [Amends and reenacts Virginia Code § 55-79.74 and 55-509.2]

CONSERVATION

HB 2482	Delegate M. Keith Hodges	Land preservation tax credits; operation of facility on donated land, third party agreements. [Amends and reenacts Virginia Code § 58.1-512]
SJ 309	Senator Bill R. DeSteph, Jr.	Virginia Marine Resources Commission; creation of protection zones for submerged cables.

CONTRACTS

SB 1449	Senator Mamie E. Locke	Residential Executory Real Estate Contracts Act; created. [Adds new Virginia Code §§ 55-252.1 through 55-252.4]

COUNTIES, CITIES AND TOWNS

HB 1649; SB 1594	Delegate Hyland F. "Buddy" Fowler, Jr.; Senator Siobhan S. Dunnavant	Boundary agreement, local; locality allowed to attach to their petitions to circuit court a GIS map. [Amends and reenacts Virginia Code § 15.2-3108]

EMINENT DOMAIN

SB 1256	Senator Frank M. Ruff, Jr.	Income tax, state; subtraction for gain from taking by eminent domain. [Amends and reenacts Virginia Code §§ 58.1-322.02 and 58.1-402]
SB 1421	Senator Mark D. Obenshain	Eminent domain; entry upon private property, calculation of just compensation, damages. [Amends and reenacts Virginia Code §§ 25.1-203, 25.1-230, 25.1-230.1, 25.1-312, 25.1-419, 33.2-1011, and 33.2-1024]

ENVIRONMENTAL

HB 1614; SB 1248	Delegate Mark L. Cole; Senator Bryce E. Reeves	Stormwater Management Fund, local; locality by ordinance authorized to create. [Adds new Virginia Code Section 15.2-2114.01]
HB 1822	Delegate David L. Bulova	Virginia Water Quality Improvement Fund; grant for wastewater conveyance facility, etc. [Amends and reenacts Virginia Code § 10.1-2131; Adds Virginia Code §§ 10.1-2127.1, 10.1-2134.1, and 62.1-44.15:29.2.
HB 2019	Delegate Kathleen Murphy	Residential real property; required disclosures of stormwater management facilities. [Amends and reenacts Virginia Code § 54.1-2350 and 55-519]
SB 1292	Senator Jill Holtzman Vogel	Virginia Residential Property Disclosure Act; required disclosures, mineral rights. [Amends and reenacts Virginia Code § 55-519]

SB 1400	Delegate J. Chapman Petersen	C-PACE loans; stormwater management, residential dwellings and condominiums. [Amends and reenacts Virginia Code § 15.2-958.3]
SB 1559	Senator Lynwood W. Lewis, Jr.	C-PACE loans; shoreline resiliency improvements. [Amends and reenacts § 15.2-958.3]

LANDLORD/TENANT

HB 1660	Delegate Karrie K. Delaney	Landlord and tenant; landlord may obtain certain insurance for tenant, notice to tenant. [Amends and reenacts Virginia Code § 55-225.24 and 55-248.7:2]
HB 1898; SB 1445	Delegate Jennifer Carroll Foy; Senator Mamie E. Locke	Virginia Residential Landlord & Tenant Act; tenant's right of redemption. [Amends and reenacts Virginia Code § 55-248.34:1]
HB 1923	Delegate Jeffrey M. Bourne	Virginia Residential Landlord and Tenant Act; noncompliance with rental agreement, etc. [Amends and reenacts Virginia Code §§ 55-248.25 and 55-248.27]
HB 2054; SB 1676	Delegate Betsy B. Carr; Senator William M. Stanley, Jr.	Virginia Residential Landlord and Tenant Act; rental agreement, provisions made applicable by law. [Amends and reenacts Virginia Code §§ 55-248.4 and 55-248.7]
HB 2262	Delegate Jeffrey L. Campbell	Landlord; managing agent. [Amends and reenacts Virginia Code §§ 16.1-88.03, 55-246.1, and 55-248.4]
HB 2287; SB 1422	Delegate James A. "Jay Leftwich; Senator Mark D. Obenshain	Lease agreements; requirements; emergency. [Amends and reenacts Virginia Code §§ 55-2, 55-57, 55-76, 55-77, 55-79, and 58.1-807]
HB 2304	Delegate James A. "Jay" Leftwich	Virginia Residential Landlord and Tenant Act; landlord may obtain insurance for tenant. [Amends and reenacts Virginia Code §§ 55-225.24 and 55-248.7:2]
HB 2410	Delegate Les R. Adams	Resident agent; appointment by nonresident property owner. [Amends and reenacts Virginia Code § 55-218.1]

MISCELLANEOUS

HB 2182; SB 1681	Delegate Terry L. Austin; Senator T. Montgomery "Monty" Mason	DGS; surplus property, opportunity for economic development entities to purchase. [Amends and reenacts Virginia Code §§ 2.2-1130, 2.2-1153, 2.2-1156, 2.2-1157, 10.1-1122, and 36-139.1]
HB 2711	Delegate Marcus B. Simon	Real estate; exemptions, recordation of signed writing, etc. [Amends and reenacts Virginia Code § 34-6]
SB 1336	Senator John S. Edwards	Mechanics' liens; notice of sale. [Amends and reenacts Virginia Code §§ 43-34 and 46.2-644.03]

PROFESSIONAL REGULATION

HB 2352; SB 1061	Delegate Jason S. Miyares; Senator T. Montgomery "Monty" Mason	Real Estate Board; real estate licensees. [Amends and reenacts Virginia Code §§ 54.1-2105, 54.1-2106.1, 54.1-2108.2, and 54.1-2109]

RECORDATION TAXES

SB 1610	Senator Ryan T. McDougle	Recordation tax; exemption for property transferred by deed of distribution. [Amends and reenacts Virginia Code § 58.1-811]

TAXATION

HB 1655; SB 1270	Delegate Jason S. Miyares; Senator Richard H. Stuart	Real property tax; exemption for disabled veterans, surviving spouse's ability to move. [Amends and reenacts Virginia Code §§ 58.1-3219.5, 58.1-3219.9, and 58.1-3219.14]
HB 1937	Delegate Paul E. Krizek	Real property tax; exemptions for elderly and handicapped, computation of income limitation. [Amends and reenacts Virginia Code § 58.1-3212]
HB 2060	Delegate Betsy B. Carr	Real estate with delinquent taxes or liens; appointment of special commissioner, etc. [Amends and reenacts Virginia Code § 58.1-3970.1]
HB 2150; SB 1196	Delegate Riley E. Ingram; Senator Rosalyn R. Dance	Real property tax; exemption for the elderly and disabled, improvements to a dwelling. [Amends and reenacts Virginia Code § 58.1-3210]

HB 2365	Delegate Barry D. Knight	Land preservation; special assessment, optional limit on annual increase in assessed value. [Amends and reenacts Virginia Code § 58.2-3231]
SB 1588	Senator Lynwood W. Lewis, Jr.	Real property taxes; partial exemption for flood mitigation efforts. [Amends and reenacts Virginia Code § 58.1-3228.1]

TIME SHARES

SB 1086	Senator John A. Cosgrove, Jr.	Common Interest Community Board; administrative proceedings. [Amends and reenacts Virginia Code §§ 55-396 and 55-399; repeals Virginia Code § 55-399.1]

VIRGINIA CODE

SB 1080	Senator John S. Edwards	Property & Conveyances; revision of Title 55 to create Title 55.1, pertains to rental property, etc.

ZONING

HB 1913; SB 1663	Delegate David L. Bulova; Senator George L. Barker	Subdivision ordinance; sidewalks. [Amends and reenacts Virginia Code § 15.2-2242]
HB 2139	Delegate Robert M. "Bob" Thomas, Jr.	Transfer of development rights; specified sending and receiving areas. [Amends and reenacts Virginia Code § 15.2-2316.2]
HB 2342; SB 1373	Delegate Robert M. "Bob" Thomas, Jr.; Senator Barbara A. Favola	Conditional rezoning proffers; extensive changes to zoning provisions. [Amends and reenacts Virginia Code § 15.2-2303.4; repeals third enactment of Chapter 322 of the Acts of Assembly of 2016]
HB 2375	Delegate Danica A. Roem	Zoning ordinance; review of proposed amendments. [Amends and reenacts Virginia Code § 15.2-2285]
HB 2420	Delegate Richard P. Bell	Nonconforming use; a wall built on residential property shall be grandfathered as a valid use, etc.
HB 2621; SB 1091	Delegate Riley E. Ingram; Senator Bryce E. Reeves	Rezoning and site plan approval; decommissioning solar energy equipment, etc. [Amends and reenacts Virginia Code § 15.2-2241.2]

The following bills are not included in the Legislative Summary that follows this article but are included because they may be of interest to section members.

LAND PRESERVATION, ENVIRONMENT, AND STORMWATER

HB 1816	Delegate C. Matthew Fariss	Land preservation tax credit; extends allowable time to claim credit. [Amends and reenacts Virginia Code § 58.1-512]
SB 1388	Senator Frank W. Wagner	Chesapeake Bay Watershed Implementation Plan; Lynnhaven River and Little Creek watersheds. [Repeal of Chapter 41 of the Acts of Assembly of 2013 and Chapter 184 of the Acts of Assembly of 2015]

LAND USE, ZONING, AND ENTITLEMENTS

HB 1698	Delegate C. Matthew Fariss	Zoning Appeals, Board of; written order, certified mail. [Amends and reenacts Virginia Code § 15.2-2311]
HB 2224	Delegate Israel D. O'Quinn	Zoning appeals, local board of; membership. [Amends and reenacts Virginia Code § 15.2-2308]
HB 2569; SB 1094	Delegate Dave A. LaRock; Senator Barbara A. Favola	Family day homes; zoning permits. [Amends and reenacts Virginia Code § 15.2-2292]
HB 2686	Delegate Barry D. Knight	Zoning Appeals, Board of; changes vote requirement. [Amends and reenacts Virginia Code §§ 15.2-2308 and 15.2-2312]

LIENS AND CREDITOR / DEBTOR RIGHTS

HB 2409	Delegate Les R. Adams	Mechanic's liens; forms. [Amends and reenacts Virginia Code §§ 43-4, 43-5. 43-8, and 43-10]

REAL PROPERTY TAX

HB 1965; SB 1089	Delegate Gordon C. Helsel, Jr.; Senator Mamie E. Locke	Fort Monroe Authority; payments to the City of Hampton in lieu of real property taxes. [Amends and reenacts Virginia Code § 2.2-2342]

2019 VIRGINIA GENERAL ASSEMBLY REPORT: SELECTED REAL ESTATE LEGISLATION

By Maxwell H. Wiegard
and Lauren E. Coleman

In keeping with the tradition of the Real Property Section of the Virginia State Bar, provided below is a summary of selected real estate legislation passed by the General Assembly in the 2019 session. The General Assembly continues to enact laws affecting land use and development, conveyances and transactions, and real property rights. This article aims to highlight bills of interest and relevance to Virginia real estate practitioners.

2019 SESSION BY THE NUMBERS

The 2019 Session of the Virginia General Assembly convened on January 9, 2019 and adjourned *sine die* February 23, 2019. This was the "short" session of the General Assembly, lasting 46 days.

During the 2019 session, 3,128 bills and resolutions were introduced in the General Assembly . This number is fewer than the number introduced in last year's "long" session (3,722), but greater than the number introduced in the most recent "short" session in 2017 (2,959).

Of the bills and resolutions considered in 2019, 1,898 were passed by both the Senate and the House of Delegates. By comparison, 1,833 were passed in the 2018 session. A total of 1,434 bills and resolutions failed, and the Governor vetoed 34 bills this year.

2019 SESSION AT A GLANCE

The topics with the greatest number of bills in this compilation include residential (11), land use, zoning, and entitlements (10), common interest communities (9), land preservation, environment, and stormwater (9), and commercial (8).

Several of the bills discussed in this compilation are identified by the Virginia Division of Legislative Services as the most significant legislation passed by the 2019 Session of the General Assembly.[1] In particular, the General Assembly passed legislation related to conditional rezoning proffers (House Bill 2342; Senate Bill 1373), and decommissioning of solar energy equipment, facilities or devices (House Bill 2621; Senate Bill 1091).

The summaries below are derived primarily from abstracts provided by the Virginia Division of Legislative Services. The authors extend their sincere appreciation to the Division staff for their expertise in researching, summarizing, and documenting the work of the Virginia General Assembly. These summaries are intended to provide a brief overview of certain bills affecting real estate passed in the 2019 session. The full text of the bills summarized below is available on the Virginia Legislative Information System website, https://lis.virginia.gov.

Unless otherwise noted herein, the legislation passed by the Virginia General Assembly will become effective on July 1, 2019. The authors have attempted to identify delayed effective dates or emergency start dates; however, careful attention should be given to the effective dates of specific bills.

[1] *See 2019 Session Highlights*, VIRGINIA DIVISION OF LEGISLATIVE SERVICES, http://dls.virginia.gov/pubs/hilights/2019/Highlights2019.pdf (last visited May 2, 2019).

2019 LEGISLATION PASSED BY THE LEGISLATURE AND SIGNED BY THE GOVERNOR

Buildings

The General Assembly implemented a new requirement that each public school board, in consultation with the local building official and state or local fire marshal, must develop a procurement plan to ensure all security enhancements to public school buildings comply with the Uniform Statewide Building Code and Statewide Fire Prevention Code (**House Bill 1725**).

If a local building department denies an application for a building permit, the department must provide a written explanation detailing the reasons why the application was denied (**House Bill 1966**). In response, the applicant may submit a revised application addressing the reasons for which the application was denied, and the local building department is encouraged (but not required) to limit its review to those portions of the application that were revised. Fees collected by a local government to defray costs of Building Code enforcement and appeals must be used only to support the functions of the local building department.

Cemeteries

A petitioner need not prove that a gate across a private road or right-of-way owned by another person was willfully and maliciously erected by a landowner for a court to order the landowner to make necessary and reasonable changes to the gate (**House Bill 2212**). The bill also clarifies that landowners are not prohibited from replacing a gate with a cattle guard as permitted by Virginia Code § 55-305.

House Bill 2238 enables localities to remove remains from a "previously unidentified cemetery" which is defined as a cemetery that, although known by researchers, members of the community, or descendants of those buried there, has not been identified in the Virginia Cultural Resources Information System or has not been officially located in the land records of the locality.

Community Associations

The Virginia Housing Commission recommended that the General Assembly pass House Bill 1853 (**Senate Bill 1537**), which relates to home-based businesses and the Virginia Property Owners' Association Act. The bill provides that if a development is located in a locality that classifies home-based childcare services as an accessory or ancillary residential use under its zoning ordinance, the home-based childcare services is deemed a "residential use" unless (i) expressly prohibited or restricted by the association's declaration, or (ii) restricted by an association's bylaws or rules.

House Bill 1962 enables the Common Interest Community Board under the Virginia Condominium Act, the Virginia Real Estate Time-Share Act, and the Virginia Real Estate Cooperative Act to issue orders requiring governing boards and developers to take affirmative action as may be deemed appropriate by the Board to comply with certain statutory requirements. Under current law, the Board may only issue to temporary and permanent cease and desist orders.

Except to the extent provided in the governing documents, a governing body of a common interest community under the Condominium Act, the Property Owners' Association Act, and the Virginia Real Estate Cooperative Act must make the annual budget or summary of the annual budget available to members prior to the commencement of each fiscal year (**House Bill 2030; Senate Bill 1538**). In addition, when completing the required five-year cash reserve study, the governing body must include a statement of the amount of reserves recommended in the study and the amount of current cash held for replacement of reserves. The Common Interest Community Board is charged with preparing guidelines for the development of reserve studies for capital components.

The General Assembly passed legislation eliminating annual assessments imposed by the Common Interest Community Board (the "Board") (**House Bill 2081**). The bill enables the Board to collect

application, renewal, and annual reporting fees in amounts set by the Board in accordance with a biennial assessment of the Common Interest Community Management Information Fund. A fee must not exceed $25 unless the fee is based on the number of units or lots in the association.

House Bill 2385 (**Senate Bill 1580**) enables the purchaser of a condominium unit subject to the Virginia Condominium Act (or the purchaser of a lot subject to the Virginia Property Owners' Association Act), who receives a condominium resale certificate or association disclosure packet that does not conform with the law to cancel the contract within certain time limits.

The General Assembly amended the Condominium Act to provide that any proxy will be void if not signed by or on behalf of the unit owner (**House Bill 2647**). If the unit owner is more than one person, any such unit owner may object to the proxy at or prior to the meeting and the proxy will be deemed revoked.[2]

Notice of meetings of a property owners' association may be sent by email provided (i) the member has elected to receive notice by email, and (ii) if the email is not deliverable, such notice is to be sent by United States mail (**House Bill 2694**). [3]

Senate Bill 1756 amends both the Virginia Condominium Act and Virginia Property Owners' Association Act to provide that within 45 days from the expiration of the period of declarant control, the declarant must deliver to the president of the unit owner's association or his designated agent (for condominiums) or the board of directors or their designee (for property owners' associations), an inventory and description of stormwater facilities located on common elements or which otherwise serve the condominium or development and for which the association has or may have maintenance, repair or replacement responsibility.

Conservation

If the Commonwealth or a state instrumentality operates a facility on land donated for a land preservation tax credit, including charging fees for use of such facility, such operation shall not disqualify the conveyance from eligibility for the tax credit so long as any fees are used for conservation or preservation purposes (**House Bill 2482**). Further, if the Commonwealth or a state instrumentality enters into an agreement with a third party to lease or manage a facility on donated land, the fact that the third party operates mainly as a business for profit will not disqualify the conveyance from eligibility for a tax credit, so long as such agreement is for conservation or preservation purposes.

The General Assembly tasked the Virginia Marine Resources Commission with studying the feasibility of creating protection zones for submerged fiber optic cables located along Virginia shores (**SJ 309**).

Contracts

On recommendation of the Virginia Housing Commission, the General Assembly created the Virginia Residential Executory Real Estate Contracts Act and established provisions applicable to such contracts. The Act defines a "residential executory real estate contract" as an installment land contract, lease option contract, or rent-to-own contract by which a purchaser acquires any right or interest in real property other than a right of first refusal and occupies or intends to occupy the property as his or her primary residence. The Act tasks the Board of Housing and Community Development with developing on its website best practice provisions for residential executory real estate contracts (**Senate Bill 1449**).

[2] Current law provides that a proxy will be void if not signed by a person having authority at the time of execution, to execute deeds on behalf of that person.

[3] Under current law, notice of meetings must be sent by United States mail or hand delivered.

Counties, Cities and Towns

After adopting a voluntary boundary agreement with a neighboring locality, a locality may attach a Geographic Information System (GIS) map showing the boundary change to its petition to the circuit court to approve the voluntary boundary agreement (**House Bill 1649; Senate Bill 1594**).[4]

Eminent Domain

The General Assembly made several changes to provisions related to entry upon private property in an eminent domain proceeding. In particular, **Senate Bill 1421** requires that (i) a request for permission to inspect property include the number of persons for whom permission is sought, (ii) a notice of intent to enter property include all information contained in the request for permission to inspect the property, and (iii) a court award the owner fees for up to three experts or as many experts as called by petitioner at trial (whichever is greater) if the court determines the petitioner damaged the property. Further, the bill removes (i) the requirement that damages must be done maliciously, willfully, or recklessly for the owner to be reimbursed for costs, and (ii) the option that the owner may be reimbursed for his costs if the court awards the owner actual damages in an amount 30% or more greater than the petitioner's final written offer made no later than 30 days after the filing of an answer in circuit court or return date in general district court. The bill provides the calculation method for determining just compensation in an eminent domain proceeding. The bill also allows a person to recover damages resulting from reformation, alteration, revision, amendment, or invalidation of a certificate in an eminent domain proceeding and allows an owner to recover costs if a taking is abandoned in full or in part.[5]

The General Assembly passed legislation creating an income tax subtraction for gain from a taking of real property by condemnation proceedings (**Senate Bill 1256**).

Environmental

The General Assembly passed legislation enabling a locality by ordinance to create a local Stormwater Management Fund containing appropriated local money for granting funds to private property owners or common interest communities for the construction, improvement, or repair of a stormwater management facility, or for erosion and sediment control on previously developed land. (**House Bill 1614; Senate Bill 1248**).

The Director of the Virginia Department of Environmental Quality (VADEQ) may authorize grants from the Virginia Water Quality Improvement Fund for the design and installation of certain wastewater conveyance infrastructure (**House Bill 1822**). The VADEQ, in consultation with stakeholders, must annually determine an estimate of the amount of grant funding that local governments will request from the Water Quality Improvement Fund and Stormwater Local Assistance Fund for eligible projects.

A locality may, by ordinance, authorize contracts to provide loans for the initial acquisition and installation of clean energy or stormwater management improvements with free and willing property owners of existing properties and new construction (**Senate Bill 1400**).[6]

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[4] Current law only allows GIS maps to be used for changes to the boundary between Louisa County and Goochland County, between Loudon County and any towns within Loudon County, or between Spotsylvania County and Orange County.

[5] The bill has an effective date of July 1, 2019. However, it does not apply to condemnation proceedings where the petitioner filed a petition in condemnation or a certificate of take or deposit before that date.

[6] Under current law, localities may only provide such loans for clean energy improvements.

A locality may, by ordinance, authorize contracts to provide loans for initial acquisition and installation of resiliency improvements for mitigation of flooding or the impacts of flooding or stormwater management improvements (**Senate Bill 1559**). The bill gives preference to use of natural or nature-based features and living shorelines.[7]

The owner of residential property under the Virginia Residential Property Disclosure Act must include in the residential property disclosure statement that the owner makes no representation with respect to the existence or recordation of any maintenance agreement for any stormwater detention facilities on the property, and advises the purchaser to perform due diligence to determine the presence of any such agreements or facilities (**House Bill 2019**).

Senate Bill 1292 amends the Virginia Residential Property Disclosure Act to provide that (i) the owner of residential real property makes no representations or warranties with regard to any conveyances of mineral rights and (ii) that before purchasing residential property, a buyer should exercise due diligence in determining whether property is located in a special flood hazard area by contacting the Federal Emergency Management Agency (FEMA) or visiting the website for FEMA's National Flood Insurance Program or the Virginia Department of Conservation and Recreation's Flood Risk Information System.

Landlord/Tenant

House Bill 2262 provides that a managing agent of a landlord can sign pleadings and other court documents related to a judgment for possession or for rent or damages in general district court, so long as that person is acting pursuant to a written property management agreement.

The Governor of Virginia signed **House Bill 2287** (**Senate Bill 1422**) into law in direct response to the Virginia Supreme Court's ruling in *The Game Place, L.L.C., et al. v. Fredericksburg 35*, LLC, 295 Va. 396, 813 S.E.2d 312 (Va. 2018). In *The Game Place*, the Virginia Supreme Court held that a lease with a 15-year term was unenforceable because it was not in the form of a "deed" as required by Virginia Code § 55-2. The implications from this ruling were that any lease with a term of more than 5 years would need to contain either (i) a seal as required by Virginia common law or (ii) a seal substitute as recognized in Virginia Code § 11-3. House Bill 2287 clarifies that any lease agreement will not be invalid, unenforceable or subject to repudiation by the parties because the conveyance of the estate was not in the form of a deed. The bill had an emergency effective date of February 13, 2019.

House Bill 2410 defines a "nonresident property owner" as any nonresident individual or group of individuals who own and lease (i) residential property consisting of four or more rental units, or (ii) commercial real property within a county or city in Virginia. The bill also provides that every nonresident property owner must appoint and continuously maintain an agent who (i) is a resident of Virginia (if the agent is an individual) or is authorized to conduct business in Virginia (if the agent is an entity), and (ii) maintains a business office in Virginia.

If a rental agreement does not require a tenant to obtain renter's insurance, then the landlord must give the tenant written notice before entering into the rental agreement that (i) the landlord is not responsible for the tenant's personal property, (ii) the landlord's insurance does not cover tenant's personal property, and (iii) if tenant would like to protect his personal property, he should acquire renter's insurance (**House Bill 1660**). Further, the landlord must give tenant notice that renter's insurance does not cover flood damage and to contact FEMA to determine if the rental property is in a special flood hazard area. Failure of a landlord to provide the notice does not affect the validity of the rental agreement.

[7] Like with Senate Bill 1400, Senate Bill 1559 only allows localities to provide such loans for clean energy improvements.

If payment under an unlawful detainer action has not been made as of the return date for the unlawful detainer, the tenant may pay to the landlord, the landlord's attorney, or the court all amounts claimed in the summons no less than two business days before a writ of eviction is delivered to be executed (**House Bill 1898; Senate Bill 1445**).

The General Assembly amended the Virginia Residential Landlord & Tenant Act to provide that a tenant may recover to reasonable attorney fees if a tenant successfully raises as a defense the landlord's noncompliance with the rental agreement and the court enters judgment in favor of the tenant (**House Bill 1923**).

A landlord must offer the tenant a written rental agreement with the terms governing the rental of any dwelling unit and containing the terms and conditions of the landlord-tenant relationship. If there is no written agreement, a rental tenancy will exist by operation of law, and certain terms as set forth in Virginia Code Section 55-248.7(C) will apply (**House Bill 2054; Senate Bill 1676**).

A landlord who obtains renters' insurance on behalf of his or her tenants may include as part of the summary of the insurance policy or certificate evidencing coverage, a statement regarding whether the policy contains a waiver of subrogation provision. A landlord's failure to provide such a summary or certificate will not affect the validity of the rental agreement (**House Bill 2304**).

Miscellaneous

Notice of sale for property being sold pursuant to a mechanics' lien must be posted in any of the following locations: (i) a public place in(the county or city where the property is located, (ii) a website operated by the Commonwealth, the county or city where the property is located, or a political subdivision of either, or (iii) a newspaper of general circulation in the county or city where the property is located (in print or online) (**Senate Bill 1336**).[8]

Before offering surplus property for sale to the public, the Department of General Services must notify the chief administrative officer of the locality where the property is located and the locality's economic development entity of the pending disposition of the property (**House Bill 2182; Senate Bill 1681**). The chief administrative officer or local economic development entity will have 180 days from the date of the notification to submit a proposal to the Department for use of the property by the economic or the local development entity in conjunction with a good faith economic development activity. If the Department determines that the proposal is viable and could benefit the state, the Department may negotiate for the sale of such property to the locality or economic development entity.

A householder must record in writing his intent to claim a homestead exemption for real estate in the county or city where the real property or any part thereof is located, or if the property is in another state, in the Virginia county or city where the householder resides (**House Bill 2711**).

Professional Regulation

The Real Estate Board may establish criteria outlining the permitted activities of unlicensed individuals employed by, or affiliated as an independent contractor with real estate licensees or under the supervision of a real estate broker (**House Bill 2352; Senate Bill 1061**). The bill also provides that a real estate group may hire unlicensed assistants as employees or independent contractors.

[8] Current law provides that notice of sale is required to be advertised in a public place which is defined as premises owned by the Commonwealth or a political subdivision, or an agency of either that is open to the general public.

Recordation Taxes

Senate Bill 1610 provides that no recordation tax will be required for recording a "deed of distribution" when no consideration has passed between the parties and the deed states on the front page that it is a deed of distribution. The bill defines "deed of distribution" as a deed conveying property from an estate or trust (i) to the original beneficiaries of a trust from the trustees holding title under a deed of trust, (ii) the purpose of which is to comply with a devise or bequest in the decedent's will or to transfer title to one or more beneficiaries after the death of the settlor in accordance with a dispositive provision in the trust instrument, (iii) that carries out the exercise of a power of appointment, or (iv) is pursuant to the exercise of the power under the Uniform Trust Decanting Act (Va. Code § 64.2-779.1 et seq.).

Taxation

Localities that require use value assessment and taxation may provide by ordinance that the annual increase in assessed value of the property will not exceed a certain dollar amount per acre (**House Bill 2365**).

House Bill 2060 increases the assessed value of property for the purpose of a locality appointing a special commissioner to convey property with delinquent taxes or liens to the locality in lieu of a public auction. The assessed value was increased from $100,000 to $150,000 in Norfolk, Richmond, Hopewell, Newport News, Petersburg, Fredericksburg, and Hampton, and from $50,000 to $75,000 in all other localities.

The General Assembly enacted legislation to amend Section 6-A of the Constitution of Virginia, which provides a real property tax exemption for the surviving spouse of a disabled veteran (**House Bill 1655; Senate Bill 1270**). In particular, the General Assembly clarified that the exemption applies without any restriction on the spouse moving to a new residence. The provisions of the bill apply to taxable years on and after January 1, 2019.

Under Virginia Code Section 58.1-3212, a locality may establish by ordinance income limitations for real estate tax exemptions for elderly and handicapped individuals. **House Bill 1937** provides that a locality may exclude, by ordinance, for purposes of computation of annual income, any disability income received by a family member or nonrelative who lives in the dwelling and who is permanently and totally disabled.

If a locality permits a tax exemption for property of certain elderly and handicapped persons pursuant to Virginia Code Section 58.1-3210, certain improvements to exempt land and the land on which the improvements are situated are part of the "dwelling" and are exempt from tax (**House Bill 2150; Senate Bill 1196**).

The General Assembly codified an amendment to Article X, Section 6 of the Virginia Constitution that was adopted by voters on November 6, 2018 (**Senate Bill 1588**). The amendment allows a locality to provide by ordinance a real estate tax exemption for flooding abatement, mitigation, or resiliency efforts for improved real estate that is subject to recurrent flooding. The tax exemption applies only to certain "qualifying flood improvements" that do not increase the size of any impervious area and are made to qualifying structures or land. [9]

Time Shares

The General Assembly amended provisions in the Virginia Real Estate Time-Share Act related to temporary cease and desist orders to conform to similar provisions under the Condominium Act

[9] See the text of the bill for details related to applicability. No exemption will be granted for any improvements made prior to July 1, 2018.

(**Senate Bill 1086**). Further, the Assembly removed provisions (i) requiring that hearings of the Common Interest Community Board be held in Henrico County monthly, and (ii) granting the Board investigative powers that are already exercised by the Director of the Department of Professional and Occupational Regulation.

Virginia Code

On recommendation of the Virginia Code Commission, the General Assembly created a new Title 55.1 to revise the current Title 55 (Property and Conveyances) (**Senate Bill 1080**). Title 55.1 is designed to organize laws in a logical manner, remove obsolete and duplicative provisions, and improve clarity of statutes relating to real and personal property conveyances, recording deeds, rental property, common interest communities, escheats, and unclaimed property. The bill has an effective date of October 1, 2019.

Zoning

A locality may, by ordinance, require the dedication of land and construction of a sidewalk on the property being subdivided or developed, if such property fronts an existing street and the provision of a sidewalk, the need for which is substantially generated and reasonably required for the proposed development, is in accordance with the local comprehensive plan, a locality by ordinance may require the dedication of land and construction of a sidewalk on the property being subdivided or developed (**House Bill 1913; Senate Bill 1663**).

House Bill 2139 allows a locality to designate receiving areas or receiving properties that will receive development rights only from certain sending areas or sending properties. A locality may provide in its ordinance for receiving areas to include urban development areas or similarly defined areas in the locality.[10]

The General Assembly made significant changes to Virginia Code Section 15.2-2303.4, relating to conditional rezoning proffers (**House Bill 2342; Senate Bill 1373**). No local governing body shall require any unreasonable proffer.[11] Additionally, an applicant can submit any onsite or offsite proffer that the applicant deems reasonable and appropriate, as conclusively evidenced by signed proffers. Nothing in the bill prohibits or requires communications between an applicant or owner and the locality, or prohibits or requires presentation, analysis, or discussion of the potential impacts of new residential development or other new residential use on the locality's public facilities.[12]

A local governing body must hold a public hearing if it proposes to reduce a planning commission's review period of a zoning ordinance amendment to less than 100 days. The governing body must publish a notice of the public hearing in a newspaper having general circulation in the locality at least two weeks before the hearing, and on the locality's website (if one exists) (**House Bill 2375**).

The General Assembly passed new legislation which provides that a wall built on residential property is grandfathered as a valid nonconforming use, and the wall will not be subject to removal solely due to nonconformity, in any instance where (i) a residential property owner sought local government approval prior to 2008 for construction of the wall, (ii) the property owner was informed by a local official that the wall required no permit and complied with the locality's zoning ordinance, (iii) the wall was thereafter constructed, (iv) the locality subsequently informed the property owner that the

[10] Under current law, a locality may only provide for receiving areas to include urban development areas.

[11] Under current law, no locality may "request or accept" any unreasonable proffer.

[12] The bill applies only to rezoning applications filed on or after July 1, 2019, proffer condition amendments to a rezoning filed on or after July 1, 2019, or other certain pending applications. See House Bill 2342 for full details related to applicability.

wall was illegal, and (v) the wall, had it been constructed as described in clauses (ii) and (iii) after 2017, would be considered a valid nonconforming use not subject to removal (**House Bill 2420**).

As part of the local legislative approval process or as a condition of approval of a site plan, a locality must require an owner, lessee, or developer of real property subject to Virginia Code Section 15.2-2241.2 to enter into a written agreement to decommission solar energy equipment, facilities, or devices on certain conditions. Such conditions include (i) the locality's right to enter the property and engage in decommissioning if the owner defaults in its obligations, and (ii) financial assurance by the owner, lessee, or developer in a form outlined in the statute (**House Bill 2621; Senate Bill 1091**).

CONCLUSION

The Virginia General Assembly continues to address wide-ranging topics and items of interest to real estate practitioners in the Commonwealth. The biggest change in 2019 is the recodification of Title 55, but other bills may prove equally as important, depending upon your area of practice.

REVISION OF TITLE 55, CODE OF VIRGINIA

The long-awaited revision of Title 55 (Property and Conveyances) was approved by the Virginia Code Commission on October 15, 2018, and introduced as Senate Bill 1080 during the 2019 session of the General Assembly. It was duly passed and signed into law with an effective date of October 1, 2019. Following is the Executive Summary from the Virginia Code Commission; the hot links (in blue in the digital edition) may be followed by ctrl+click:

Title 55 (Property and Conveyances) contains provisions of the Code of Virginia that address property in the Commonwealth, including the conveyance of real estate and rental property, the settlement and recordation of real estate, and common interest communities found in the Commonwealth.

Title 55 has not been revised since the adoption of the Code of Virginia of 1950, at which time the title consisted of 18 chapters. In the ensuing 68 Regular Sessions of the General Assembly, 26 chapters have been added and seven have been repealed, resulting in the existing title, which comprises 37 current chapters. In the intervening years, the original organizational scheme has been compromised by the insertion of new chapters within or at the end of the title and by the insertion of new sections within or at the end of an existing chapter. It has become appropriate to (i) organize the laws in a more logical manner, (ii) remove obsolete and duplicative provisions, and (iii) improve the structure and clarity of statutes pertaining to real and personal property in the Commonwealth.

Organization of Proposed Title 55.1

Proposed Title 55.1 consists of 29 chapters divided into five proposed subtitles: Subtitle I (Property Conveyances), Subtitle II (Real Estate Settlements and Recordation), Subtitle III (Rental Conveyances), Subtitle IV (Common Interest Communities), and Subtitle V (Miscellaneous).

Subtitle I contains proposed Chapters 1 through 5, all of which pertain to real and personal property conveyances.

Proposed Chapter 1 (Creation and Limitation of Estates) includes provisions relating to the creation and transfer of estates. It contains sections from existing Chapter 1 (Creation and Limitation of Estates; Their Qualities) and existing Chapter 20 (Virginia Solar Easements Act). In addition, existing § 55-153, relating to removal of a cloud on title, is relocated from existing Chapter 8 to this proposed chapter.

Proposed Chapter 2 (Property Rights of Married Persons) contains provisions found in existing Chapter 3 (Property Rights of Married Women) addressing the property rights of married persons, including the section pertaining to the abolition of equitable separate estates. The name of proposed Chapter 2 and the proposed text of the chapter with regard to married women is updated to apply the chapter contents to all spouses, as opposed to just married women. See additional specifics regarding this chapter in the chapter drafting note.

Proposed Chapter 3 (Form and Effect of Deeds and Covenants; Liens) contains the provisions from of existing Chapter 4 of the same name, which addresses deeds, including deeds of trust, easements, and the satisfaction of security interest in real property.

Proposed Chapter 4 (Fraudulent and Voluntary Conveyances; Writings Necessary to Be Recorded) contains the provisions of existing Chapter 5 (Fraudulent and Voluntary Conveyances, Bulk and Conditional Sales, etc.; Writings Necessary to Be Recorded), which addresses certain void conveyances of real or personal property, including the authority of a court to set aside such a conveyance, as well as provisions governing the recording of certain contracts and deeds.

Proposed Chapter 5 (Commutation and Valuation of Certain Estates and Interests) contains the provisions of existing Article 2 (Commutation and Valuation of Certain Estates and Interests; Tables) of Chapter 15.

Subtitle II contains proposed Chapters 6 through 11, which include provisions governing the recordation and settlement of real estate, including various uniform acts enacted in Virginia relating to the requirements of such recording and settlement.

Proposed Chapter 6 (Recordation of Documents) contains the provisions of existing Chapter 6 of the same name, which governs the general process of the recordation of documents in the Commonwealth. This proposed chapter also contains three uniform acts enacted in Virginia: (i) the Uniform Recognition of Acknowledgments Act, currently found in existing Article 2.1 of Chapter 6; (ii) the Uniform Federal Lien Registration Act, currently found in existing Article 6 of Chapter 6; and (iii) the Uniform Real Property Electronic Recording Act, currently found in existing Article 7 of Chapter 6.

Proposed Chapter 7 (Virginia Residential Property Disclosure Act) contains the provisions of existing Chapter 27 of the same name, which pertains to certain required disclosures by owners of real residential property to potential purchasers of such property.

Proposed Chapter 8 (Exchange Facilitators Act) contains the provisions of existing Chapter 27.1 of the same name, which contains requirements for the activities of exchange facilitators, who are persons that for a fee enter into an agreement with a taxpayer to act as (i) a qualified intermediary in an exchange of like-kind property, (ii) an Exchange Accommodation Titleholder, or (iii) a qualified trustee or escrow holder.

Proposed Chapter 9 (Real Estate Settlements) contains the provisions of existing Chapter 27.2 of the same name, which contains provisions relating to the settlement of real estate in the Commonwealth, including the duties of a lender and settlement agent involved in such a settlement.

Proposed Chapter 10 (Real Estate Settlement Agents) contains the provisions of existing Chapter 27.3 of the same name, which outlines which persons may act as real estate settlement agents in the Commonwealth, along with the duties required of such agents.

Proposed Chapter 11 (Commercial Real Estate Broker's Lien Act) contains the provisions of existing Chapter 28 of the same name, which allows a commercial broker who provides licensed services resulting in the procuring of a tenant of commercial real estate to obtain a lien upon rent paid by the tenant.

Subtitle III contains proposed Chapters 12 through 17, all of which pertain to the conveyance of rental property in the Commonwealth.

Proposed Chapter 12 (Virginia Residential Landlord and Tenant Act) contains the provisions of existing Chapter 13.2 of the same name, which governs the rental of certain residential properties in the Commonwealth, including the duties and remedies of both the landlord of and the tenant renting such a property. In addition, existing Chapter 25 (Transfer of Deposits), a one-section chapter that pertains to the transfer of security deposits by the owner of rental property to a subsequent owner upon transfer of the rental property to such subsequent owner, is relocated to proposed Chapter 12 (and, with amendment, is included in Chapters 13 and 14).

Proposed Chapter 13 (Manufactured Home Lot Rental Act) contains the provisions of existing Chapter 13.3 of the same name, which governs the rental of manufactured home lots in the Commonwealth, including the rights and obligations of manufactured home park landlords and tenants. In addition, existing Chapter 25 (Transfer of Deposits), a one-section chapter that pertains to the transfer of security deposits by the owner of rental property to a subsequent owner upon

transfer of the rental property to such subsequent owner, is amended as it relates to manufactured home lot rental and included in proposed Chapter 13.

Proposed Chapter 14 (Commercial Tenancies) contains certain provisions of existing Chapter 13 (Landlord and Tenant) that are applicable to nonresidential tenancies. Provisions of existing Chapter 13 that apply only to residential tenancies are proposed for repeal because, as a result of Chapter 730 of the Acts of Assembly of 2017 and Chapter 221 of the Acts of Assembly of 2018, they were made identical in substance to provisions in proposed Chapter 12. In addition, existing Chapter 25 (Transfer of Deposits), a one-section chapter that pertains to the transfer of security deposits by the owner of rental property to a subsequent owner upon transfer of the rental property to such subsequent owner, is amended as it relates to commercial tenancies and included in proposed Chapter 14.

Proposed Chapter 15 (Residential Ground Rent Act) contains the provisions of existing Article 4 of Chapter 4 of the same name, which governs the rent or charge paid for the use of land, whether or not title of such land is transferred to the user, or a lease of land, for personal residential purposes.

Proposed Chapter 16 (Deeds of Lease) contains the provisions of existing Article 1 (Form and Effect of Deeds and Leases) and existing Article 3 (Effect of Certain Expressions in Deeds and Leases) of Chapter 4 that relate specifically to deeds of lease, including the form of a deed of lease and certain covenants of a lessor and lessee to a lease.

Proposed Chapter 17 (Emblements) contains the provisions of existing Chapter 14 of the same name, which relates to the law of emblements, that is, annual crops produced by cultivation legally belonging to the tenant with the implied right for its harvest, and they are treated as the tenant's property.

Subtitle IV contains proposed Chapters 18 through 23, all of which pertain to common interest communities found within the Commonwealth.

Proposed Chapter 18 (Property Owners' Association Act) contains the provisions of existing Chapter 26 of the same name, including the applicability of the Act, resale disclosure requirements of property subject to the Act, and sections pertaining to the operation and management of such associations.

Proposed Chapter 19 (Virginia Condominium Act) contains the provisions of existing Chapter 4.2 (Condominium Act), which sets forth the rules governing property considered to be a condominium, including provisions setting forth the creation, alteration, and termination of a condominium, rules governing the management and sale of a condominium, and resale disclosure requirements for condominiums.

Proposed Chapter 20 (Horizontal Property Act) contains the provisions of existing Chapter 4.1 (Horizontal Property), which relates to developments established under a horizontal property regime. Numerous existing sections (§§ 55-79.16, 55-79.21, 55-79.21:2 through 55-79.31, and 55-79.33) pertaining to the protection of horizontal property purchasers are recommended for repeal as obsolete because as of July 1, 1974, the Horizontal Property Act was superseded by existing Chapter 4.2 (Condominium Act). As a result, no new developments may be established under a horizontal property regime, and protections for purchasers under this Act are no longer needed.

Proposed Chapter 21 (Virginia Real Estate Cooperative Act) contains the provisions of existing Chapter 24 of the same name, which pertains to real estate considered to be a cooperative in the Commonwealth, including the rules governing the creation, alteration, and termination of cooperatives; the management of cooperatives; the protection of cooperative purchasers; and the administration and registration of cooperatives.

Proposed Chapter 22 (Virginia Real Estate Time-Share Act) contains the provisions of existing Chapter 21 (The Virginia Real Estate Time-Share Act), which governs time-shares in the Commonwealth, including the creation, termination, and management of a time-share; the protection of purchasers of a time-share; and the financing, registration, and administration of a time-share.

Proposed Chapter 23 (Subdivided Land Sales Act) contains the provisions of existing Chapter 19 of the same name, which pertains to the subdivision of land into 100 or more lots that are sold or disposed of by land sales installment contracts and whose purchaser has access to common facilities and amenities for which annual dues are paid.

Subtitle V consists of proposed Chapters 24 through 29, all of which are currently contained in existing Title 55 and belong in proposed Title 55.1 but none of which logically fit within the context of the other subtitles previously outlined.

Proposed Chapter 24 (Escheats) contains the provisions of existing Chapter 10 (Escheats Generally), which pertains to the escheat to the Commonwealth of dormant and unclaimed property with no known owner.

Proposed Chapter 25 (Virginia Disposition of Unclaimed Property Act) contains the provisions of existing Chapter 11.1 (Disposition of Unclaimed Property), which pertains to the system in place in the Commonwealth for transferring to and holding by the Commonwealth of intangible or tangible personal property upon abandonment of such property.

Proposed Chapter 26 (Property Loaned to Museums) contains the provisions of existing Chapter 11.2 of the same name, which pertains to the loaning of property to museums in the Commonwealth, including the process by which the ownership of property that is loaned to museums is established.

Proposed Chapter 27 (Drift Property) contains the provisions of existing Chapter 11 (Estrays and Drift Property), which details the procedure by which a property owner who finds a stray animal or a boat or vessel adrift on his land may notify the court of the finding and through a proceeding obtain an appraisal of the value of the property. Existing §§ 55-202 through 55-206 of existing Chapter 11, addressing such procedures with respect to stray animals and abandoned watercrafts, are proposed for repeal because they are obsolete, as other procedures found in the Code and in common law address these situations according to modern practice. The title of proposed Chapter 27 reflects the remaining portion of the existing chapter.

Proposed Chapter 28 (Trespasses; Fences) contains the provisions of existing Chapter 18 of the same name, which relates to fences and boundaries, trespasses by animals, and damages for timber cutting.

Proposed Chapter 29 (Virginia Self-Service Storage Act) contains the provisions of existing Chapter 23 of the same name, which governs personal property stored within leased spaces at storage facilities in the Commonwealth.

Statutory Provisions Proposed for Repeal

During the revision process, the Code Commission became aware of a number of existing sections and an existing chapter that are either unnecessary or obsolete and have been stricken in this report; these are recommended for repeal and thus not included in the proposed title. Chapter drafting notes in the body of the report describe the reasons for the recommended repeal of the following chapter and sections:

- §§ 55-79.16, 55-79.21, 55-79.21:2 through 55-79.31, and 55-79.33.

• §§ 55-202 through 206.

• § 18.2-324.1 (Punishment for violation of §§ 55-298.1 through 55-298.5, relating to electric fences).

• As previously noted, numerous provisions of existing Chapter 13 that apply only to residential tenancies are proposed to be repealed because, as a result of Chapter 730 of the Acts of Assembly of 2017 and Chapter 221 of the Acts of Assembly of 2018, they were made identical in substance to provisions in proposed Chapter 12. Such provisions are as follows: existing §§ 55-221.1 and 55-225.01 through 55-225.50 and subsections B, C, and D of existing § 55-243.

Other Affected Titles

The following chapters are relocated from existing Title 55 to other titles of the Code of Virginia:

• Chapter 17 (§ 55-287 et seq.) (Virginia Coordinate System) is relocated as proposed Chapter 6 (§ 1-600 et seq.) of Title 1 (General Provisions).

• Chapter 12 (§ 55-211 et seq.) (Waste) is relocated as proposed Article 15.1 (§ 8.01-178.1 et seq.) of Chapter 3 (Actions) (§ 8.01-25 et seq.) of Title 8.01 (Civil Remedies and Procedure).

• Chapter 9 (§ 55- 156 et seq.) (Assignments for Benefit of Creditors) is relocated as proposed Chapter 18.1 (§ 8.01-525.1 et seq.) of Title 8.01 (Civil Remedies and Procedure).

• Chapter 29 (§ 55-528 et seq.) (Common Interest Community Management Information Fund) is relocated as proposed Article 2 (§ 54.1-2354.1 et seq.) of Chapter 23.3 (Common Interest Communities) of Title 54.1 (Professions and Occupations).

• Chapter 30 (§ 55-531 et seq.) (Disposition of Assets by Nonprofit Health Care Entities) is relocated as proposed Chapter 20 (§ 32.1-373 et seq.) of Title 32.1 (Health).

• Chapter 32 (§ 55-555 et seq.) (First-Time Home Buyer Savings Plan Act) is relocated as proposed Chapter 12 (§ 36-171 et seq.) of Title 36 (Housing).

• Chapter 2 (§ 55-26.1) (Educational, Literary and Charitable Gifts, Devises, Etc.) is relocated as one section, proposed § 57-6.1, within Article 1 (§ 57-3 et seq.) of Chapter 2 (Church Property; Benevolent Associations and Objects) of Title 57 (Religious and Charitable Matters; Cemeteries).

The following sections are relocated from existing Title 55 to other titles of the Code of Virginia:

• § 55-19.5, relating to certain types of trusts and Medicaid planning, located within existing Chapter 1 (§ 55-1 et seq.) is relocated to Article 2 (§ 64.1-102 et seq.) of Chapter 1 of Title 64.2 (Wills, Trusts, and Fiduciaries).

• §§ 55-154, 55-154.2, and 55-155 of existing Chapter 8 (§ 55-153 et seq.) (Clouds on Title) are relocated to proposed Chapter 14.7:3 (Mineral Rights) of Title 45.1 (Mines and Mining).

• §§ 55-227 through 55-237 of existing Chapter 13 (§ 55-217 et seq.) that contain provisions relating to a civil cause of action for recovering rent are relocated as proposed Article 13.1 (§ 8.01-130.1 et seq.) of Chapter 3 (Actions) of Title 8.01 (Civil Remedies and Procedure).

The following provisions are relocated from other titles of the Code of Virginia to proposed Title 55.1:

• The provisions of § 18.2-324.1, which provide that a violation of existing §§ 55-298.1 through 55-298.5 is a Class 1 misdemeanor, are moved to proposed § 55.1-2803 (existing § 55-298.5) of proposed Chapter 28 (Trespasses; Fences).

The relocation of sections, articles, and chapters to other titles of the Code of Virginia is not intended to have any substantive effect on their interpretation.

An outline of the organization of proposed Title 55.1 is included as Appendix A.

Technical Changes Made Throughout Title 55.1

Each section is followed by a drafting note describing any changes made in the section. If a section drafting note states "no change," the section contains no changes other than renumbering. If a drafting note states "technical changes," the section contains technical changes to the text ranging from the insertion of clarifying punctuation to a thorough modernization of archaic writing style. When sections contain structural or substantive changes, such as the deletion or addition of language, the drafting note describes the reason for the proposed change.

Many of the technical changes arose from the Code Commission's determination that terminology should be clear, consistent, and modern. The following list provides a representative sample of the most significant and most widely implemented technical changes made in the proposed title.

The following technical changes are made in order to maintain consistency with changes made in previous title revisions, to update antiquated language, to provide clarity, and to bring Title 55.1 into accordance with Title 1 rules of construction for the Code:

• § 1-218. Includes. "Includes" means includes, but not limited to.

• § 1-221. Locality. "Locality" means a county, city, or town as the context may require.

• § 1-227. Number. A word used in the singular includes the plural, and a word used in the plural includes the singular.

• § 1-244. Short title citations. Short titles have been eliminated as unnecessary in light of the title-wide application of § 1-244, which states that the caption of a subtitle, chapter, or article operates as a short-title citation.

• § 1-216. Gender. A word used in the masculine includes the feminine and neuter.

• In accordance with title-wide conventions, gender-specific terms are replaced with gender-neutral ones.

• References to "court of competent jurisdiction" after "court" have been deleted as unnecessary.

• Purpose statements have been stricken in accordance with the Code Commission's policy that purpose statements do not have general and permanent application and thus are not to be included in the Code.

• Subsection catchlines have been stricken pursuant to the Code Commission's policy that such catchlines are unnecessary.

• Outdated language used in the old equitable pleading practice, including use of the words "bill," "decree," and "suit," is replaced with modern terminology.

• The requirement that a newspaper be in "an English language" is deleted as unnecessary and for consistency throughout the Code.

• "And/or": This grammatical shortcut, which often leads to confusion or ambiguity, is amended throughout to reflect the appropriate meaning: "and" in the sense of all, inclusive; "or" in the sense of "either/any or both/all."

• When grammatically feasible, "will" or "must" is changed to "shall" or other appropriate term.

• "Virginia" is replaced with "the Commonwealth."

• "This Commonwealth" is replaced with "the Commonwealth."

• The phrase "goods or chattels" is modernized with the phrase "personal property."

• "Shall have the authority to" and similar variants of this term are changed to "may."

• To the extent feasible, unclear references to "herein," "therefor," "thereof," and "thereon" are replaced with more specific references.

• Phrases such as "heretofore or hereafter" are removed because they mean "before now or after now."

• Definitions are moved to the beginning of the section, article, chapter, etc., to provide the reader better clarity and context.

• When grammatically feasible, "shall be guilty" is changed to "is guilty."

• "Admit to record" is changed to "record," and "admitted to record" is changed to "recorded."

• The phrase "tenants by the entireties" is changed to "tenants by the entirety" for consistency throughout the title.

• In the context of an administrative agency promulgating regulations, the word "rules" is stricken prior to the word "regulations" because an administrative agency promulgates regulations, not rules.

Substantive Changes Proposed in Title 55.1

When the Code Commission has approved a substantive change to a provision of existing law, it is noted in the drafting note for the affected section. In addition to the substantive changes listed below, as previously noted, during the revision process, the Code Commission became aware of several existing sections and an existing chapter that are unnecessary or obsolete and are recommended for repeal. While not included below, such recommendations are substantive in nature. Further substantive changes not yet addressed in the summary include:

• The title of existing Chapter 3 (Property Rights of Married Women) is changed to Property Rights of Married Persons in proposed Chapter 2 to reflect the title-wide convention that gender-neutral terms are preferable to gender-specific ones. The language throughout the chapter is also updated to apply the chapter contents to all spouses, as opposed to just married women. These amendments resolve the current law's potentially unconstitutional sex-based classification, which applies to wives but not husbands. See Schilling v. Bedford Co. Mem'l Hospital, 225 Va. 539, 303 S.E.2d 905 (1983) (holding that the doctrine of necessaries, which made a husband responsible for the necessary goods and services furnished to his wife, was unconstitutional).

• As previously noted, existing Chapter 29 (§ 55-528 et seq.) (Common Interest Community Management Information Fund) is relocated as proposed Article 2 (§ 54.1-2354.1 et seq.) of Chapter 23.3 (Common Interest Communities) of Title 54.1 (Professions and Occupations). Existing sections of Chapter 23.3 of Title 54.1 are designated as part of proposed Article 1. A substantive change is recommended to add a new section (proposed § 54.1-2345.1) to Article 1, which uses language from the Uniform Common Interest Ownership Act and excludes the following from being deemed common interest communities: (i) contractual arrangements for cost sharing between two or more common interest communities or contractual arrangements between an association and

the owner of real estate outside of the common interest community's boundary and (ii) certain covenants of separately owned or leased parcels of real estate.

• Existing § 55-169 provides that an escheator is to provide a $3,000 bond for the judicial circuit in which he is appointed in the circuit court of the locality in which he resides. In proposed § 55.1-2402, a substantive change is made to specify that the escheator's bond is not required to be secured. This change is consistent with the requirements for a fiduciary's bond pursuant to § 64.2-1411.

• Existing § 55-170 relates to the increase or reduction of penalty of an escheator's bond. The section provides that an escheator who is required to give a bond with an increased penalty and who fails to do so within a reasonable time period has neglected an official duty within the meaning of § 55-169. This provision is proposed for repeal as obsolete; according to existing § 55-168, escheators serve at the pleasure of the Governor and may be removed with or without cause, including neglect of an official duty. Existing § 55-169 was amended in 1982 to remove language relating to neglect of official duty, but existing § 55-170 was not amended at that time to reflect those changes.

• Existing § 55-175 has conflicting requirements as to how many jurors are required to concur in a verdict in an escheat proceeding: One portion of the section states that at least seven impaneled jurors must concur in the verdict, whereas another sentence states that a verdict must be signed by a majority of the jurors. The sentence stating that a verdict is effective if signed by a majority is proposed for repeal.

• Existing § 55-310 contains provisions regarding how the governing body of a county may make a local fence law. Proposed § 55.1-2814 contains a substantive change by providing that a county must act by ordinance to make a local fence law, cross-referencing the notification requirements contained in subsection F of § 15.2-1427 for adopting an ordinance. Existing § 55-310 contains language that is unclear as to the process needed for the declaration of a lawful fence since, pursuant to § 15.2-1425, counties may only act by ordinances, resolutions, and motions.

• Existing § 55-324 outlines the petition process for an action to fix the boundaries of a village or unincorporated community, including the requirement of posting a notice at the front door of a county courthouse and at three or more conspicuous places within the boundaries of the village or unincorporated community. A substantive change is recommended in proposed § 55.1-2828 by adding the requirement to publish the notice in a newspaper of general circulation for consistency throughout the chapter.

Also following are the published cross-reference tables: Appendix A, Title 55.1 to Title 55; Appendix B, Title 55 to Title 55.1; and Appendix C, Title 55 Provisions relocated to Other Titles.

Finally, the full legislation as introduced may be found at CHAPTER 712 (2019). This will open the bill as a PDF file. For those who are reading this in hard copy, the URL is http://lis.virginia.gov/000/1080chp.pdf.

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55-530.1. Common Interest Community Management Recovery Fund.	54.1-2354.4
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55-531. Definitions.	32.1-373
55-532. Obligations of nonprofit entity.	32.1-374
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CHAPTER 31. UNIFORM TRUST CODE.	
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32.1-375	Applicability of chapter.	55-533
Chapter 12 of Title 36	**FIRST-TIME HOME BUYER SAVINGS PLAN ACT.**	Chapter 32
36-171	Definitions.	55-555

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36-172	Claiming first-time home buyer status.	55-556
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54.1-2354.1	Definitions.	55-528
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VIRGINIA REAL ESTATE CASE LAW UPDATE (SELECTED CASES)*

By Otto Konrad and Christy L. Murphy


Presenters Otto Konrad, of Williams and Mullen, and Christy L. Murphy, of Bischoff & Martingayle gratefully acknowledge and express their appreciation to Tommy Bishop, Jim Giudice, Sadullah Karimi, and Hannah Rudder, of Williams Mullen, for their assistance in preparing this outline.

A. VIRGINIA SUPREME COURT CASES

1. *Barr v. Atlantic Coast Pipeline, LLC*, 295 Va. 522 (2018).

Facts: As part of the process to seek regulatory approval for a natural gas pipeline, Atlantic Coast Pipeline, LLC ("ACP"), a natural gas company, was required to conduct surveys, tests, appraisals, and other examinations on properties located along the pipeline's proposed route. After landowners initially refused ACP's request to enter their properties, ACP provided notices of intent pursuant to Code § 56-49.01. ACP then filed for declaratory judgment, seeking an order declaring that the notices of intent to enter provided ACP with a right to enter the properties under the Code.

The landowners demurred to ACP's petition on two grounds: first, that the allegations in the petition failed to meet the requirements of the Code; and second, that the activities constituted a taking of private property and thus violated both the U.S. and VA Constitutions. The trial court overruled the demurrers and the landowners subsequently filed responsive pleadings to ACP's petitions. The case proceeded to trial.

Lower Court Proceedings: The trial court granted ACP permission to enter the landowners' properties.

Holdings: The Supreme Court affirmed the trial court's decision to grant ACP permission to enter the landowners' properties.

Discussion: The Supreme Court's analysis regarding the landowners' first objection focused on whether the applicable language of the Code was to be construed as conjunctive or disjunctive, to wit: the Code authorizes natural gas companies to undertake certain activities, without the owner's permission, "as are necessary to satisfy any regulatory requirements *and* for the selection of the most advantageous location or route." Both the trial court and the Supreme Court found that because the second clause of the Code has a discretionary element (selecting the most advantageous route), the statute cannot be conjunctive. Therefore, ACP did not violate the statute by failing to meet the first element but satisfying the second element.

The Court disagreed with the landowners' additional claims that ACP's activities exceeded the scope of what was permitted by the Code and that ACP failed to provide an exact date of entry as required by the Code. Regarding the first claim, the Court noted that the landowners mistakenly relied on the initial letter ACP sent requesting permission to enter. After that letter was rejected, ACP sent a notice of intent to enter, which included a description of the work ACP planned to do. This description of work complied with the activities permitted under the Code. Therefore, the Court rejected the landowners' claim that ACP exceeded the activities permitted by the Code. The Court further found that the Code allows a company to provide a range of dates (as opposed to an undefined date range). The purpose is to allow the landowners to be present during the entry, and to ensure any damage is

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documented. The Court found that ACP's notice provided a limited set of dates for entry, and therefore the notice did not violate the Code.

2. *Board of Supervisors of Fairfax County v. Cohn*, 821 S.E.2d 693 (2018).

Facts: Douglas and Kathryn Cohn (the "Cohns") own property in McLean, Virginia located in an R-1 zoning district (not more than one dwelling on any lot). The Cohns have a main house, a detached garage, and a garden house, all built in the 1960s and early 1970s. On August 4, 2016, the Fairfax County Zoning Administrator issued a Notice of Violation because the garage and garden house had been converted into dwellings. The Cohns were instructed to remove kitchens, appliances and accoutrements from both structures immediately.

The Cohns appealed to the Fairfax County Board of Zoning Appeals ("BZA") on September 2, 2016, contending that the structures should be grandfathered because both were built as dwelling units and no violations had been issued since their construction. The Zoning Administrator provided the original building permits, which noted that no kitchens or bathrooms were approved for the structures. The BZA held a hearing on March 1, 2017 and issued a letter on March 7, 2017 upholding the determination of the Zoning Administrator. On March 28, 2017, the Cohns appealed the decision of the BZA to the circuit court. On July 20, 2017, the circuit court issued a letter opinion reversing the BZA. The court reasoned that Code § 15.2-2307(D)(ii) protects non-conforming structures from future zoning amendments so long as taxes have been paid on the property; the Court held that the structures had been occupied as dwelling units since 1998 and the Cohns had paid taxes. Thus, the Code protects the Cohns from having to destroy or otherwise modify the structures. The Board appealed to the Supreme Court of Virginia.

Holding: The Court reversed the circuit court judgment and reinstated the determination of the Fairfax County Board of Zoning Appeals.

Discussion: Zoning ordinances may regulate, restrict, prohibit, and permit the use of land, buildings, and structures. The General Assembly enacted Code § 15.2-2307 to prevent the impairment of vested rights in a landowner's use of property.

The first subsection of the statute concerns vesting of the use of land. It provides that a significant affirmative governmental action, such as approval of a rezoning application, granting a special use permit and/or approving a variance, or allowing the use of land in a particular way may result in the beneficiary receiving a vested right to use that land in that manner. The Cohns agree that no use, building, or other permit has been approved for such use of the garage and garden house and have not shown they acquired vested rights for such use.

Code § 15.2-2307(C) concern's a landowner's vested right to maintain nonconforming structures. A nonconforming use may not be established through a use of land which was commenced or maintained in violation of a zoning ordinance. The usage of the Cohn's garage and garden house as dwellings is not a nonconforming use because the structures were built after the effective date of the zoning restriction.

The Cohns claim that because they paid taxes for the previous 15 years on the structures, Code § 15.2-2307(D) protects the physical structures and their use as dwellings. The Court reasoned that this code section applies only to the structures of the garage and garden house but does not provide protection for the uses. The Board did not attempt to have the structures torn down, but the notice of violation only addressed the improvements in the structures which facilitated the prohibited use.

3. *Cherry v. Lawson Realty Corporation*, 812 S.E.2d 775 (2018).

Facts: This case arose from a dispute between a tenant, a landlord and a real estate management company over mold remediation measures in a rental apartment. The initial move-in inspection did not reveal any visible mold in the apartment, but a month later the HVAC unit leaked and water

soaked the HVAC closet wall as well as the living room floor and carpet. The landlord repaired the HVAC but did not address the wet carpet. The HVAC continued to leak into the apartment. The landlord used fans and a blower in an attempt to dry the wet carpet. As a result of the leaks, mold covered the HVAC closet, mushrooms began to grow on the carpet, and some of the drywall in the unit crumbed into pieces. The tenants eventually moved out after several ineffectual attempts by landlord to control the mold. The tenant filed a complaint that included five counts: counts I and II sought recovery for violation of VRLTA and breach of contract; counts III and IV alleged common law negligence and *per se* negligence; and count V alleged actual or constructive fraud.

Lower Court Holding: The Circuit Court of the City of Newport News held that the General Assembly intended to abrogate the application of common law claims for personal injury involving landlord/tenant relationships when it enacted Code § 8.01-226.12. The Court dismissed the negligence claims based on statutory abrogation and certified its decision for interlocutory appeal.

Supreme Court Holding: The Supreme Court of Virginia reversed the Circuit Court's holding and remanded for furthering proceedings.

Discussion: The Supreme Court held that it perceived "no intent by the General Assembly to abrogate common law tort liability or immunity beyond the narrow confines of what is plainly expressed in Code § 8.01-226.12." The Court stated that "a statutory provision will not be held to change the common law unless the legislative intent to do so is plainly manifested." The statute in question creates new obligations for the landlord and clarifies existing immunities but does not repeal or modify existing common law causes of action.

4. *Commissioner of Highways v. Karverly, Inc.*, 295 Va. 380 (2018).

Facts: This dispute arose from a taking of real property by the Commissioner of Highways. A narrow strip of commercial property in Henrico County along the Route 5 corridor was taken to construct a portion of the Virginia Capital Trail. Karverly, the condemnee, owns and operates a child care facility on an (approximately) five-acre tract in eastern Henrico. At the lower court jury trial to determine just compensation, the Commissioner's expert, Joseph Call, an appraiser, presented evidence related to damages–which he calculated to be zero. He based this figure on a review of the property generally, on commercial development plans for the property (as a daycare, its current use), utility availability, and zoning restrictions. He determined that the highest and best use of the property was as a daycare.

When asked if the remaining property suffered damage as a result of the take, Call testified that there was "no way in the world that the [remaining] property was damaged in any way. Karverly's counsel objected, and the court determined that Call's response was "not responsive to the question." After Call gave further details of his analysis and was again questioned as to whether the remainder was damaged, Karverly's counsel again objected, stating that Call's testimony as to the measure of damages was inadmissible as a matter of law because, as counsel argued, Call had not prepared before-and-after fair market value appraisals. Outside the presence of the jury, the court asked Call how and whether he had evaluated the remainder, and Call recited over half a dozen elements of his valuation of the remainder. Nevertheless, Karverly's counsel persisted in its objection, and the court sustained it, holding that the Commissioner's counsel could not ask Call if the remainder had been damaged by the taking. Karverly's expert witness, Dennis Gruelle, an appraiser, presented evidence of considerable damages to the remainder that resulted from the taking beyond mere compensation for the value of the condemned land. He calculated These damages using various appraisal techniques, and his methods were laid out in testimony before the jury.

Lower Court Ruling: A 3 to 2 majority of the jury entered judgment in favor of Karverly on damages, awarding $167,866. The Commissioner appealed.

Issue Before the Supreme Court: Did the lower court err by excluding the Commissioner's expert's testimony as to damages to the remainder?

Supreme Court Holding: The Supreme Court concluded that the trial court had committed error by excluding the testimony of the Commissioner's expert and preventing the opportunity for Call to explain why he had determined that no damages had been done to the remainder. The trial court's final judgment was reversed and the case remanded for retrial.

Discussion: In finding that the testimony of both experts was important to the jury's decision, the Supreme Court noted that the "contest between [the] competing experts [was] a legitimate dispute over which rational factfinders could reasonably disagree." The Court noted that experts for both sides worked from the same analytical template and that the jury "should have heard from both experts before being asked to decide." The Supreme Court was not convinced by Karverly's argument in favor of excluding Call's testimony on the grounds that Call "failed to understand that '[t]he law provides a formula and directs the factfinder to use it: Before value – after value = damages.'" Call's statements regarding his review of the remaining property's value, the Court concluded, should have been explained to the jury "just as Gruelle [Karverly's expert] was given the opportunity to explain why he reached the opposite conclusion."

5. *Crosby v. ALG Trustee, LLC*, 296 Va. 561, 822 S.E.2d 185 (2018).

Facts: Crosby, the owner of real property in Albemarle County, took out a $60,000 loan evidenced by a promissory note and secured by a deed of trust encumbering the property. Fannie Mae was the creditor and ALG Trustee ("ALG") was the trustee of the deed of trust. On May 12, 2014, after the loan was in default with $18,313.05 due on the note, ALG informed Crosby that a foreclosure sale would take place on May 29, 2014. Two separate entities, Argent Development, LLC and Emerald Spring LLC made a joint bid of $20,903.77 for the property, which had a tax assessed value of $436,800.00. ALG accepted the offer, and Crosby subsequently filed a complaint claiming that ALG breached its fiduciary duties as a trustee by failing to act impartially, by failing to conduct the sale in a manner that would have generated a higher bid, by not cancelling the sale when it only received one inadequate bid, and by not timely responding to Crosby's request for the amount required to reinstate the loan.

Lower Court Proceedings: The Circuit Court sustained ALG's demurrer, holding: 1) that Crosby's claim was a common law negligence claim; and, 2) that ALG duties are limited to the four corners of the deed of trust contract, and no duty was owed under the common law.

Holdings: The Supreme Court reversed the judgment of the Circuit Court and remanded the case.

Discussion: The Supreme Court disagreed with the Circuit Court that Crosby's claim was a negligence claim but instead found that it was a claim sounding in contract. Crosby alleged that the relationship between himself and ALG was based on the deed of trust, and that since the deed of trust is a contract, the claim is one of contract and not tort.

The Court further recognized that a trustee under a deed of trust owes both the debtor and creditor certain implied fiduciary duties.The Court further disagreed with the Circuit Court's claim that ALG's duties were limited to the four corners of the contract. Among those implied duties is the duty to act impartially and to consider the interests of both the debtor and creditor. Thus, the Court viewed ALG's actions in conducting the sale as a breach of the duty of impartiality to Crosby: the property sold for 5% of its market value, and the sales price allowed Fannie Mae to recover the full amount it was due while Crosby lost all the equity he had amassed in the property. The Court found that the sales price "shocked the conscience" and overwhelmingly benefitted the creditor. Thus, the Court determined that Crosby's allegations were sufficient to survive a demurrer.

6. *Eaton v. Baer*, 2018 WL 4926219 (Supreme Court of Virginia).

Facts: This appeal arose out of a suit for declaratory judgment to establish an easement by necessity over Carla Baer's ("Baer") property in Loudoun County. The Eaton family ("Eaton") own three

contiguous lots west of Baer's lot on the slope of Short Hill Mountain. Baer's lots are between the Eaton lots and the public road. The Eaton and Baer lots were previously held by a common owner.

The prior owner of the Eaton lots sued a prior owner of the Baer lot seeking an easement by necessity-- but the Eaton owner died during the pendency of the litigation. The case went dormant for more than two years and the circuit court discontinued it pursuant to Code § 8.01-335(A).

Baer purchased her lot in October 2010 and the Eatons purchased their lots in December 2011. After negotiations to obtain an easement failed, the Eatons filed a declaratory judgment action seeking an easement by necessity over Baer's lot to access Route 690. Baer filed a plea in bar and motion to dismiss, arguing that the matter was time-barred because the circuit court had previously discontinued the case under Code § 8.01-335(A). The circuit court denied both the plea and the motion. The court initially granted an easement across Baer's property subject to several conditions including: (1) determination of the location of the easement; (2) that the easement cross Baer's lot to the minimum extent necessary; and (3) that the Eatons had to present a recordable easement.

The parties could not agree on a location and experts were engaged to make arguments regarding possible locations for the easement. The circuit court entered an order granting an easement across the southeast corner of the Baer lot and held that the easement could not re-cross into the southwest corner of the lot. The Eatons attempted to obtain county approval but there was disagreement between the experts about whether the county would grant the necessary approvals. Because the Eatons' could not prove the County would approve the road in the proper location, the circuit court denied any easement altogether.

Lower Court Holding: Denied the previously approved easement by necessity due to failure of the Eatons to meet the necessary conditions.

Holding: Reversed and remanded for further proceedings.

Discussion: As an initial matter, the Court found the case was not time-barred by Code § 8.01-335(A) because a discontinuance is not a decision on the merits and does trigger *res judicata*.

Easement by Necessity

The elements of an easement by necessity are: (1) the dominant and servient estates were derived from a common title; (2) the easement is reasonably necessary to the enjoyment of the dominant estate; and (3) the dominant estate became landlocked at the time of the severance of the two estates.

The Eaton lots and the Baer lot were previously held by a common owner. By law, an easement by necessity is awarded when both tracts had a common owner who later sold the tracts, resulting in one or more tracts becoming landlocked. The circuit court denied the easement because it concluded the Eatons had failed to establish that a County approved roadway could be built in the one identified location of the easement. This judgment was in error. The granting of an easement by necessity is not predicated on whether or not a road can be built in the easement. Infeasibility of a particular aspect of a proposed path of an easement by necessity is not a basis for denying an easement altogether. It has been long held that once the elements of an easement by necessity or implied easement are established, the party is entitled to the easement as is necessary for the beneficial use of that property.

7. *Ettinger v. Oyster Bay II Community Property Owners' Association*, 819 S.E.2d 432 (2018).

Facts: This case arose from a boundary dispute between Ettinger and the Oyster Bay II Community Property Owners' Association (the "Association"). Title to the property in question traced back to a developer that recorded subdivision plats in 1972 that created lots and parcels of the Oyster Bay II community. In 1975, the property was conveyed to Woodrow D. Marriott. In 1976, the Association

was created, and the developer conveyed to the Association all its right, title and interest to all streets, alleys and other real estate in Oyster Bay II. Every deed conveying the property contained the same property description that included, in pertinent part, "said tract is bounded on the Northeast by Hibiscus Drive."

Ettinger acquired the property from Marriott's successors-in-interest in 2009. As he began to clear portions of the property for development, the Association erected a fence and a "no trespassing" sign along Hibiscus Drive, preventing access to the property. Ettinger filed a complaint in the Circuit Court seeking a declaration that under the rule in *Martin v. Garner*[1], the property's boundary extends to the center line of Hibiscus Drive.

Lower Court Holding: The Circuit Court of Accomack County ruled that the property only had a right of way over Hibiscus Drive, relying on both the deed's reference to a subdivision plat and its description of the property as comprising a specific number of square feet that did not include any part of Hibiscus Drive.

Supreme Court Holding: The Supreme Court of Virginia reversed the Circuit Court's decision, holding that a conveyance of land bounded by or along a way carries title to the center of the way, unless a contrary intent is shown.

Discussion: The Court stated that a grantor may reserve a narrow strip to the center of the road from the conveyance, but it must do so expressly. The Association's argument that the deed's inclusion of the square footage and reference to a subdivision plat provide the contrary intent is not enough. Quantity designations are "regarded as the least certain mode of describing land and hence must yield to description by boundaries and distances." The opinion also stated that a "mere reference to a plat does not constitute evidence of contrary intent."

8. *The Game Place, L.L.C., et al. v. Fredericksburg 35, LLC*, 295 Va. 396, 813 S.E.2d 312 (2018).

Facts: Fredericksburg 35, LLC ("F35") purchased commercial property that was being leased to The Game Place, LLC ("TGP"). The original 15-year lease was between a prior landlord and lessee; both parties assigned their rights and obligations to F35 and TGP, respectively. After a number of years, TGP could not keep up with the rent and vacated the premises a few years before the end of the term. TGP terminated what it claimed to be a month-to-month periodic tenancy. F35 responded with a suit seeking unpaid rent that had accrued since the time TGP vacated. TGP demurred and argued that the 15-year lease was unenforceable under the Statute of Conveyances because it did not contain a seal as required by common law or a seal substitute as permitted under Code § 11-3.

Lower Court Proceedings: The Circuit Court overruled the demurrer and entered judgment against TGP and Lightburn, its guarantor, ordering them to pay $68,610.44 in unpaid rent and $17,152.61 in attorney fees.

Holdings: The Supreme Court reversed the judgment of the Circuit Court and entered final judgment in favor of TGP and Lightburn.

Discussion: The Supreme Court analyzed both the common law and statutory requirements of sealing a deed in a conveyance. The Court acknowledged that, historically, a seal was required under common law for reasons that may no longer be pertinent today. The Court also acknowledged that, under the Statute of Conveyances, an inter vivos conveyance for a term of more than five years requires a deed to affect the transfer. The General Assembly enacted more recent statutory exceptions to the common law seal requirement, which are: 1) "a scroll by way of a seal"; 2) an imprint or stamp of a corporate or official seal on paper or parchment; 3) the words "this deed" or "this indenture" used in the body of the writing; and 4) an acknowledgement of a document before

[1] 286 Va. 76 (2013)

an officer authorized to acknowledge deeds clearly demonstrating intent to convey real estate. The statutory reforms do not abolish the common law seal requirement, but merely provide exceptions for deeds governed by the Statute of Conveyances.

The Court determined that the lease in question did not include a seal nor did it include a seal substitute. The Court further disagreed with the Circuit Court's opinion that the law looks at substance over form, arguing that it is the role of the legislature, not the courts, to change the law or overturn well-settled legal principles. The General Assembly provided specific exceptions to the seal requirement, but never removed the requirement entirely.

Lastly, the Court rejected F35's claim that Code § 55-51 acts as a saving statute and cures any errors made by the Circuit Court. The language of Code § 55-51 plainly states that it only saves deeds that "fail to take effect by virtue of this chapter". Since the deed requirement is derived from common law and the exceptions appear in the Statute of Conveyances, neither of which are found in Chapter 4 of Title 55, the saving statute did not apply. Thus, the court determined that TGP had a month-to-month lease based on the occurrence of rent payments, and since rent was paid through the last month of occupancy, TGP had no further rent obligation to F35.

9. *J&R Enterprises v. Ware Creek Real Estate Corp.*, Record No. 170854, 2018 WL 4786370.

Facts: In a bench trial, Ware Creek Real Estate Corp. ("Ware Creek") was awarded a $30,000 judgment from J&R Enterprises based on a finding that it was entitled to a brokerage commission under an exclusive Listing Agreement to sell real estate. Pursuant to the Listing Agreement, Ware Creek received an exclusive window of six and a half months to sell the property . If the property were sold or exchanged during that period, Ware Creek was entitled to a 10% commission. The Listing Agreement also provided a 90-day protection period which allowed Ware Creek to collect its Broker Fee if the property were sold to a party to whom Ware Creek showed, offered or introduced the property. During the 90-day period, J&R entered into a written purchase contract (2008 Contract) with a buyer Ware Creek introduced. However, the contract was contingent on the purchaser obtaining adequate and suitable financing, which the purchaser failed to do. More than a year later, J&R and the purchaser entered into a new, and materially different contract (2009 Contract) for the sale of the property, which ultimately closed.

Holding: Reversed and remand. The property was not "sold" during the Listing Agreement's operative period so as to trigger the commission obligation.

Discussion: The 2009 contract was a new and materially different contract executed more than a year later and therefore was not covered by the Listing Agreement. As a matter of law, Ware Creek was not entitled to a commission.

10. *Kerns v. Wells Fargo Bank, N.A.*, 818 S.E.2d 779 (2018).

Facts: This case arose from a foreclosure sale of a property as a result of a default under the note and deed of Trust. Kerns borrowed money from a mortgage lender to purchase property; the note was secured by a deed of trust. The note included an acceleration clause that stated that the noteholder could require Kerns to pay immediately the full unpaid amount of the note plus interest in the event of a default. Kerns failed to make his mortgage payments, and Wells Fargo sent him a notice informing him that he was in default and if he did not make payments in thirty days, then Wells Fargo would accelerate payment on the Note and pursue remedies established in the note and deed of trust. Kerns acknowledged that he received the notice but did not make any payments. Wells Fargo accelerated the debt and foreclosed on the property.

Exactly five years after the foreclosure sale of the property, Kerns filed a breach of contract action against Wells Fargo. Kerns alleged that Wells Fargo breached the promissory note and deed of trust by issuing a back-dated pre-acceleration notice that only gave him twenty-nine days to cure rather than the thirty that was required.

Lower Court Holding: The Circuit Court held that the five-year statute of limitations barred the breach of contract claims.

Kerns argued on appeal that the five-year limitation period began to run on the date of the foreclosure sale. Wells Fargo argued that the breach of contract claim accrued at the earlier time of the wrongful acceleration of debt caused by the allegedly defective pre-acceleration notice.

Supreme Court Holding: The Supreme Court of Virginia affirmed the decision of the circuit court and held that the breach of contract claims accrued, and the statute of limitations began to run, when Wells Fargo actually accelerated the debt and made the entire balance of the loan immediately due.

Discussion: The Court held that "a contractual right of action accrues 'when the breach of contract occurs'" and is "not postponed by the fact that the actual or substantial damages do not occur until a later date." When Wells Fargo accelerated the debt and made the entire outstanding balance immediately due, it created a legally viable cause of action against Kerns that could be enforced in foreclosure and collection proceedings. This altered the legal relationship between the parties, and the alleged breach by Wells Fargo "caused Kerns legal cognizable harm."

11. *Prince William Board of County Supervisors v. Archie*, 296 Va. 1 (2018).

Facts: This case resulted from the denial in part of a "verification of a nonconforming use" request for property located in Prince William County. Appellee Henry Archie, Jr. owns three parcels in Prince William that have been used as an "automobile graveyard" since his father purchased the property and began an auto salvage business in the early 1950s. Prince William, in 1958, enacted a zoning ordinance that made the junkyard use of the property a lawful non-conforming use.

Archie requested a verification of non-conforming use for all three parcels on August 13, 2015. Prince William's Zoning Administrator issued the verification as to two parcels (lots "20" and "20B") but denied the verification as to one of the parcels (lot "20A"). She based her denial on a 1991 decree of the Circuit Court which noted that there was "no evidence of any cars stored on lot 20A at that time." The Zoning Administrator concluded that any cars on lot 20A must have been placed there after the ordinance was in effect, without any permit to do so, and ordered their removal.

Archie appealed the denial to the BZA, where he asserted that the use of lot 20A as a junkyard had begun in 1954, had been verified by the County as a non-conforming use in 1982, and had never stopped at any point, even though Archie had been compelled by the Circuit Court to remove the vehicles in an action instituted in 1989 by a former owner of lot 20A. The County countered that Archie *had* discontinued his non-conforming use of the property. As proof of the discontinuance, the County offered only the language of a 1990 order of the Circuit Court which directed Archie to remove the cars from lot 20A within 30 days. Archie responded that regardless of who owned lot 20A at any point, it was "continually used to store vehicles, with or without permission" as the sworn testimony of at least 13 witnesses would attest. Nevertheless, the BZA upheld the Administrator's Denial. Archie appealed to the Circuit Court.

Lower Court Holding: The Circuit Court reversed the BZA, finding that the use of Lot 20A as a junkyard predated the zoning ordinance and that this pre-existing lawful non-conforming use was never abandoned or discontinued, notwithstanding the attempts by the former owner of lot 20A to force Archie to discontinue the use. The County appealed.

Supreme Court Holding: The Circuit Court's reversal of the BZA was affirmed, noting that none of the evidence presented by the County could show that the non-conforming use was ever "discontinued in actuality."

Discussion: The Supreme Court pointed to Prince William County Code § 32-601.21 which requires, in the absence of intentional abandonment (which effects immediate termination), "discontinuance" of a non-conforming use for a period of at least two years. It went on to analyze § 32-100, which

provides the County's own definition of use as an "automobile graveyard" as any "lot . . . upon which five or more inoperative motor vehicles of any kind are found." Based on this reading of the controlling ordinance, the Supreme Court found that discontinuance could only have occurred if fewer than five vehicles were on lot 20A for a period of at least two years. The Court noted that even though the property was conveyed to an owner who wanted the cars removed, the mere intent to discontinue the use did not constitute an actual discontinuance of use. In light of the lack of evidence presented that suggested disuse, and the evidence presented that supports a theory of continuous use, the Supreme Court upheld the Circuit Court's decision.

B. CIRCUIT COURT CASES

1. *Amzat v. Banks*, Case No. 17-3424, 2018 Va. Cir. LEXIS 127 (Madison County).

Facts: The legal issue in this case was if the filing of a deed placed Plaintiff on constructive notice that the Defendant became the owner of the property. The court was asked to decide a plea in bar and demurrer.

Holding: The court overruled the plea in bar and the demurrer.

Discussion: The pleadings in this case created a factual issue concerning when someone would have knowledge of a fraudulent lien or property transfer. The court researched Virginia's recording statutes and found no authority for the proposition that recording a deed provides the public with constructive notice. Under Virginia law, whether due diligence has been exercised must be determined by an examination of the facts and circumstances of the case. The court found the facts in the complaint alleged that the signatures on the recorded documents were obtained fraudulently and based on misrepresentation.

2. *Hooked Group, L.L.C. v. City of Chesapeake*, No. CL17-5646, 2018 Va. Cir. LEXIS 616.

Facts: This case arose from the City's closure of a certain public right of way. When Hooked Group purchased the subject property, it had frontage on Battlefield Boulevard and Callison Drive; a commercial entrance existed on the property to facilitate vehicular ingress and egress directly to Callison Drive. The City closed a portion of Callison Drive, including Hooked Group's commercial entrance. Hooked Group alleged that this extinguished its easement of ingress and egress from Callison Drive for vehicular access.

In addition, the City planned to convert the section of Battlefield Boulevard directly in front of the property into a divided roadway, which would have prevented vehicles from turning left out of or into the property. Hooked Group alleged that this would diminish the value of the property and confirmed that Callison Drive was necessary to serve as a secondary ingress and egress to support the property's development. The City filed a demurrer.

Holding: The Court sustained the demurrer because the property had not been damaged because there was no complete extinguishment and termination of all access to and from an abutting road.

Discussion: The Court stated that a "mere partial reduction or limitation of an abutting landowner's rights of direct access, imposed by governmental authority in the interest of traffic control and public safety, constitute a valid exercise of police power and is not compensable in condemnation proceedings." In order for it to constitute a compensable "taking" under eminent domain, there would need to be a complete extinguishment and termination of all of the landowners' rights of direct access. Even though the access to Battlefield Boulevard was limited to a "right-in, right-out," access to the property still exists.

3. *Kruck v. Krisak*, 99 Va. Cir. 196 (Fairfax County).

Facts: This case arises from a controversy over the enforceability of an express grant of easement which was amended and re-executed amidst a conveyance of the servient tract. Plaintiff's brother, Austin Foster ("Foster"), granted an easement to Plaintiff on September 30, 1974 for the establishment and maintenance of a septic field on Foster's property (the "Servient Land"), now owned by Defendants. This easement was recorded on June 13, 2006 (the "First Easement"). Foster conveyed the Servient Parcel to "Austin Foster as Trustee of the Austin Foster Revocable Living Trust" on April 15, 2006; this conveyance was recorded on June 21, 2006. On June 9, 2006, Foster executed an "Amendment to Deed of Easement" which was recorded on June 13, 2006, which re-stated the septic field permission as in the First Easement, and also included a new provision for an ingress and egress easement over the Servient Land (the "Second Easement"). Foster later transferred the Servient Land to Edward and LeeAnn Foster on January 31, 2008; this conveyance was recorded on February 4, 2008. On November 26, 2012, the Secretary of Housing and Urban Development ("HUD") conveyed the Servient Land to Defendants following a foreclosure; this conveyance was recorded December 6, 2012.

Issues Before the Court: Is the grantee of an easement for value without notice of a prior conveyance of the servient parcel protected by the statutory scheme from challenge to his interest? If not, is the easement still enforceable on other grounds?

Circuit Court Ruling: The grant of an easement is not a conveyance of an estate protected by the recording statute. The deed of easement (the Second Easement) to Plaintiff which precedes recording of the conveyance into the Trust does, however, operate to partially revoke the transfer into the Trust insofar as that transfer would place the easement property into the Trust. Thus, the easement remains enforceable.

Discussion: The court determined that an easement conveyance is not a transfer of the type protected by the recording statute because, while it does convey to the grantee an "interest" in the property, it does not transfer title to the property so as to make the grantee a "purchaser" for the purposes of achieving "bona fide purchaser" status.

The easement remains enforceable, however, because the Second Easement acts as a partial revocation of the transfer of the Servient Land into the Trust. The court cited a 2017 case wherein the Supreme Court of Virginia noted that "where the settlor of a revocable trust is also the trustee, a requirement of written notice to the trustee of the settlor's intention to revoke a prior conveyance may be satisfied with the settlor's written execution of instruments conveying the trust property to another party." *Gelber v. Glock*, 293 Va. 497, 507 (2017). Because the Second Easement satisfies this written notice requirement, the court found that Foster had revoked the transfer of the easement portion of the Servient Land into the trust, and thus the easement remained binding on successors-in-interest to the Servient Land.

4. *Mendez v. Huntington Forest Homeowners Ass'n*, 99 Va. Cir. 160; 2018 Va. Circ. LEXIS 130 (Fairfax County).

Facts: The plaintiffs, homeowners within the Huntington Forest Development (the "Development"), sought a declaratory judgment that the Huntington Forest Homeowners Association (the "2008 Entity") was not authorized to act as the Homeowners Association (the "Association") for the Development. The plaintiffs claimed that the Huntington Forest Homeowners Association, Inc. (the "1980 Entity") was terminated by the Virginia State Corporation Commission in 2001, and since that time the entity has been in an unadjudicated state of dissolution. The plaintiffs further claim that, upon dissolution, the assets of the 1980 Entity passed to its directors as Trustees in Liquidation who were then bound to strictly follow the terms of Articles of Incorporation and Declaration. Finally, the plaintiffs contend that the 2008 Entity's lack of authority was already decided in a case in 2016, and therefore res judicata should apply.

Holdings: The Circuit Court concluded that the 2008 Entity was a de facto successor to the 1980 Entity, and therefore had the authority to act as the Association for the Development. The Court further ruled that the 2016 case was not decided on the merits and therefore res judicata did not apply.

Discussion: The Court first noted that the dissolution of the 1980 Entity was an involuntary act–the entity was terminated by the SCC and the directors, unaware of the termination, failed to rescind the termination within five years. Moreover, the dissolution provision in the Articles of Incorporation governs voluntary dissolutions. In an involuntary termination, the Court looked to the 1981 Declaration of Covenants, Conditions and Restrictions, which created a Property Owners Association ("POA") that has the right to levy assessments and to enforce covenants. The Court determined that, even though the corporate existence of the 1980 entity was terminated, the members are not prevented from continuing a successor homeowners association for the Development.

Although the 1980 Entity was terminated in 2001 and the members operated as an unincorporated association until the incorporation of the 2008 Entity, the mere continuation doctrine provides that the latter entity was a continuation of the 1980 Entity. The facts revealed that the 2008 Entity managed the same assets, retained the same directors and officers, and performed services for the same homeowners as the 1980 Entity. Thus, the surviving entity – the 2008 Entity – was a mere continuation of the 1980 Entity and had the authority to act under the 1981 Declaration.

The plaintiffs did not provide enough evidence that the factual issues related to standing were "actually litigated and essential to a valid and final judgment" in the 2016 suit. Therefore, the Court held that res judicata did not apply to this case.

5. *Nassabeh v. Montazami*, Case No. CL-2014-4585, 2019 Va. Cir. LEXIS 23 (Fairfax County).

Facts: In 2003, Montazami purchased a marital home with his wife. In 2010, a judgment was entered against Montazami in favor of petitioner in the amount of $186,662.56. The couple divorced in 2015, and the divorce order required Monatazami to refinance the marital home to remove the wife from two deeds of trust securing loans used by the couple to purchase the property. Montazami failed to refinance, and the court appointed a Commissioner to sell the property. The Commissioner secured an offer to purchase and filed a motion for approval by the court, which, based on representations of the Commissioner, was approved. By that order all unpaid liens and encumbrances associated with the property were transferred to the proceeds of the sale. According to the priority of liens, $79,452.28 of the proceeds should have been applied to satisfy part of Petitioner's lien.

Holding:

(1) In an action where the Special Commissioner of sale was ordered to sell a property that a spouse failed to refinance as part of a divorce, the Commissioner failed to comply fully with the fiduciary duties imposed, which included accounting for encumbrances, such as petitioner's judgment lien. This effectively caused dishonor to petitioner's judgment lien by directing payment to the debtor without complete consideration of petitioner's interest.

(2) The court held the Commissioner personally liable pursuant to Va. Code Ann. § 8.01-105, and ordered the Commissioner to implead $79,452.28 to the court and provide notice to then-existing lien creditors who might have had a valid legal claim to the proceeds of the judicial sale.

Discussion: The court examined: (1) the confines of the courts power to order a partition sale; (2) the nature of the judgment liens and associated creditors' rights; (3) whether notice to creditors prior to the judicial sale was required; (4) whether the Commissioner owed a fiduciary duty to the judgment creditors; and (5) whether the Commissioner is personally liable for directing the proceeds to the debtor without a formal accounting in light of the obligation as agent of the court to "faithfully discharge" the duties of Special Commissioner of Sale, thereby failing to comply with the terms of the Appointment Order.

The court found the Commissioner failed to comply fully with the fiduciary duties imposed by the nature of the agency with this court and the appointment order, which delineated the manner of approval of the sale. Such requirements for sale included an accounting for encumbrances and identification of lien priorities with the amounts thereof. The Commissioner failed to quantify the judgment lien of petitioner. Further, the Commissioner stated, "everyone was in agreement as to the distribution," although petitioner was not given notice of the judicial sale proceedings.

Ultimately, the court found the Commissioner failed to faithfully discharge the duties of a commissioner of sale by failing to file a proper accounting as ordered and by making representations which could only cause the court to think petitioner was in agreement with the distribution. The court relied on Code § 8.01-105, which contemplates holding the Commissioner personally liable, pursuant to the court's civil contempt power.

6. ***Ononuju v. Virginia Housing Development Authority*, No. CL18-7959, 2019 Va. Cir. LEXIS 33 (Norfolk).**

Facts: Ononuju purchased real property in Norfolk, Virginia by obtaining a loan from C&F Mortgage Corporation, which later transferred the loan to VHDA. Ononuju contacted VHDA to explain that he was having financial issues and would be unable to pay his upcoming mortgage payments. He did not make the payments for the next three months, and in the fourth month, Ononuju was incarcerated. Two months later, Evans & Bryant PLC, a debt collector, sent Ononuju a letter stating VHDA requested that it collect the outstanding mortgage debt through a foreclosure on the property. This letter also informed him that his debt had been accelerated. Later that same month, Evans & Bryant sent another letter to Ononuju stating it had been appointed as substitute trustee by VHDA, and the following month, Evans & Bryant sent a letter informing Ononuju that the property had been sold at a foreclosure sale. The Deed of Trust in question incorporated by reference certain regulations promulgated by HUD; one such regulation provided that VHDA could accelerate the mortgage repayment only after it met with Ononuju in person or made reasonable attempts to meet with him. Ononuju sued to set aside the foreclosure.

Holding: The Court found that the complaint did not sufficiently allege claims for breach of contract, breach of fiduciary duty, an FDCPA violation, or for rescission of the foreclosure sale based on fraud or collusion. The Court found that the complaint did sufficiently allege a claim for rescission based on the foreclosure sale having been conducted in material breach of the Deed of Trust.

Discussion: The Court states that "the face-to-face meeting required by section 203.604(b) is not required, *inter alia*, if the mortgagor does not reside in the mortgaged property at the time the face-to-face meeting is required to take place, as opposed to the time of loan acceleration." The Court holds that the face-to-face meeting with Ononuju should have occurred prior to the acceleration of the debt. The Court held that a foreclosure sale can be set aside in equity when conducted in material breach of the deed of trust.

However, Ononuju's claims of breach of contract and fiduciary duty fail to demonstrate causation. There are no factual allegations that demonstrate that the foreclosure resulted from the failure to conduct a face-to-face meeting.

7. ***Pittman v. Walters*, Civ. No CL 18-692, 2018 Va. Cir Lexis 335 (Chesapeake).**

Facts: This circuit court case came before the court following a dispute about termites. Plaintiffs Archie and Brandi Pittman retained a buyer's broker, Defendant Jillian Walters ("Walters") to assist in their purchase of a home in Chesapeake, Virginia. On June 3, 2016, the Plaintiffs, through Walters, entered into a purchase agreement with Defendants Christopher and Alisa Stantz (the "Stantzes"), through their realtor, Defendant Tracey Patrick ("Patrick"). This purchase agreement was contingent upon a clean termite report.

The Stantzes and Patrick hired ACCEL Pest & Termite Control ("Accel") in June 2016 to conduct a termite inspection. Accel reported that insects were found in the home. The Stantzes and Patrick did not hire Accel to do the termite remediation, and at the suggestion of Walters, the Stantzes and Patrick hired Monstar Pest Control ("Monstar") to conduct a separate report. Monstar found termites and informed Walters, Patrick, and the Stantzes. No one told the Plaintiffs of the infestation; rather, Monstar provided a letter indicating that no evidence of termites was found, billing the Stantzes for the treatment.

The Plaintiffs sued:

1. Walters (their own broker);
2. Rose & Womble Realty Company (Walters' employer);
3. Patrick (the sellers' realtor);
4. Action Property Management, Inc. ("Action") (Patrick's employer); and
5. The Stantzes (the sellers of the termite-infested home).

The suit alleged five counts:

1. Breach of Contract against Walter and Rose & Womble;
2. Breach of Contract against all the Defendants;
3. Breach of the Virginia Consumer Protection Act against Walter, Rose & Womble, Patrick, and Action Property Management;
4. Actual fraud against all Defendants; and
5. Civil Conspiracy against all Defendants.

Issues Before the Court: Are real estate licensees in the course of a residential transaction required to disclose adverse termite evidence, either as a matter of contract law, by a duty imposed by Va. Code § 54.1-2131, or by the Virginia Consumer Protection Act ("VCPA")?

Circuit Court Ruling: The circuit court sustained demurrers as to Defendants Action, Patrick, Walters, and Rose & Womble as to the VCPA claims, overruled demurrers from Defendants Walters and Rose & Womble as to the Plaintiffs' breach of contract claims, took under advisement several of the pleas in bar of the various Defendants, and took under advisement all motions to dismiss, motions craving oyer, and pleas in bar of the Stantzes.

Discussion: The court found that, as for Action and Patrick, the Sellers' realtor's brokerage firm and realtor, respectively, there was no contractual duty to disclose the termite discovery, and even though Va. Code § 54.1-2131 does impose duties on real estate licensees, violations of that statute do not provide an independent cause of action. The court further noted that the Virginia Consumer Protection Act does not apply to real estate licensees, and accordingly dismissed those counts as to all licensees. The court sustained demurrers to all but the Stantz Defendants as to the fraud and conspiracy claims, but granted the Plaintiffs leave to amend their complaint to make those claims with the requisite specificity.

8. *PM Lube, LLC v. County of Loudoun*, 2018 Va. Cir. LEXIS 706.

Facts: PM Lube, LLC, dba Valvoline Instant Oil Change ("Plaintiff"), filed a declaratory judgment action seeking compensation for the inverse condemnation of its property rights by the County of Loudoun ("County"). Plaintiff's property is accessed primarily by a service road leading from Route 7, which "virtually all" of its customers use. In January 2015, a large sinkhole caused by a failure of the County's storm water management system damaged the service road and essentially cut off access to the Plaintiff's business. In February, the County acknowledged the sinkhole, acknowledged that it was a County issue, and that repairs would be the responsibility of the County. Despite this, the County took no action for at least six months and the repairs were not completed until the end of 2015. Plaintiff sought to recover $258,404.21 for lost profits. County filed a combined demurrer,

motion craving oyer, and a plea in bar asserting that the amended complaint is barred by sovereign immunity.

Holdings: The Circuit Court overruled the demurrer, denied the motion craving oyer, and denied the plea in bar.

Discussion: In evaluating the demurrer, the Court reviews the Plaintiff's complaint in line with the elements of an inverse condemnation claim. First, the Court determines that although the Plaintiff is merely a tenant and not the property owner, as a business owner it nonetheless has a private personal property right to reasonable access to its business. Accordingly, the Court concludes that an inverse condemnation claim may be based upon a real property or personal property right.

Next, the Court disagreed with the County's assertion that the Plaintiff failed to allege that any actual property right was damaged for a public use "through a purposeful act or omission" by the County. The Court notes the fact that the County was aware of the sinkhole and the damage it caused the nearby businesses, and it waited six months to begin repairs. In the Court's opinion, this amounted to a purposeful omission, or failure to act.

The Court explained that the purpose of a motion craving oyer is to produce documents that are essential to the basis of the plaintiff's claim. The documents requested must serve more than an evidentiary function – they must be vital to the complaint. Here, the County's request for Exhibit A of the lease was not a request for a vital document. Neither the lease nor the exhibit was essential to proving the Plaintiff's property right and the related damage. Accordingly, the Court denied the motion.

The Court further denied the County's plea in bar. The plea asserted the same two claims as the demurrer – that the Plaintiff lacked property rights needed to assert an inverse condemnation claimand that those rights were damaged for a public use through a purposeful act or omission by the County. The Court disposed of those assertions in its analysis of the demurrer; thus, the plea in bar was denied.

9. ***Ruloff et al. v. Precon Dev. Corp.*, Case No. CL15-2998, 99 Va. 441 (Chesapeake).**

Facts: In 2003, Wilson Development Corp. ("Wilson") entered into a Settlement Agreement with Precon, in which Wilson agreed to convey to Precon approximately 17.2 acres of land with the exception of an 8-acre tract depicted on a sketch attached thereto. The Settlement Agreement was amended in 2005 ("Amended Agreement") to adjust the timing of Precon's obligations, but all other terms remained in full force and effect.

The Amended Agreement imposed specific requirements on Precon to subdivide and convey the 8-acre carve-out. Pursuant to the Amended Agreement, Precon recorded a Memorandum of Option allowing Wilson to purchase the 8-acres for $1 on or before December 31, 2010. Wilson did not exercise its option to purchase by December 31, 2010. The plaintiffs in this case are Trustees that allege all of Wilson's interest in the 8 acres was conveyed to their trusts, and as trustees they are successors in interest to Wilson, and therefore have title to the 8 acres.

Since the filing of this action Precon conveyed the property, including the 8 acre carve-out to Jinger Land ("Jinger"), who is now a defendant in this case. Jinger brought this Motion for Summary Judgment on four grounds: (1) the Amended Agreement is void for vagueness; (2) the Trustees' claims are time-barred pursuant to a five-year statute of limitations; (3) the doctrine of merger precludes all of the Trustees' claims; and (4) the expiration of the Option extinguished all of the Trustees' interest in the 8 acres.

Holding:

(1) The parties amended settlement agreement failed to sufficiently identify the land to be conveyed.

(2) Because it was impossible to identify the location of the parcel that was never identified in the first place, without such identification the agreement did not satisfy the legal requirements for conveying an interest in land.

(3) Based on the written contracts and recorded instruments, the agreement was not merged into either the deed or option, and the court denied summary judgment on the merger defense.

Discussion:

(1) *The Amended Agreement is void for vagueness*.

The Amended Agreement failed to sufficiently identify the land to be conveyed. It indicated the parties' understanding that, while generally identified, the location of the 8-acre carve-out was not identified definitively, and the parties merely had the intention to identify it in the future. In order to make a conveyance of land effective, the description must afford the means of ascertaining with accuracy what is conveyed. Extrinsic evidence offered by the Trustees would at best enable the court to estimate the location.

(2) *The Court is unable to determine if the Trustees' claims are time barred*.

It is undisputed that Precon failed to transfer the 8 acres, but it is unclear when a breach occurred. Based on the pleadings alone, the Court is unable to determine when the Amended Agreement was breached and thus when a cause of action accrued.

(3) *The Doctrine of Merger does not preclude all of the Trustees' claims.*

Jinger argues that Precon's contractual obligations, and accordingly any claims for breach of contract or unjust enrichment, were merged into and extinguished by the Deed and the Option. Unlike a unilateral contract to convey, the Amended Agreement contained obligations of both parties. While the Deed was a performance of Wilson's obligation to convey the entire parcel, it was not a performance of Precon's reciprocal obligation to convey the 8 acres. The court found that there would be sufficient evidence of an intent not to merge the Amended Agreement into the Deed and Option as to create a genuine issue of fact.

(4) *The expiration of the Option did not extinguish all of the Trustees' claims.*

Because the Amended Agreement was not merged into the Option, Wilson's contractual right to the 8 acres survived execution of the Option and its expiration.

C. US COURT OF APPEALS CASES

1. *ACA Financial Guaranty Corporation v. City of Buena Vista*, Virginia, 2019 WL 758292.

Facts: To refinance existing debt on a municipal golf course, the City of Buena Vista (the "City") and the Public Recreational Facilities Authority (the "Authority") entered into a bond transaction with SunTrust Bank (the "Bank") and ACA Financial Guaranty Corporation ("ACA"). The bond issuance was in excess of $9 million dollars. The Authority and the Bank entered into a Trust Agreement which described how the bonds would be issued, how they would be repaid and the rights of the parties in the event the bonds were not repaid.

To have a source of revenue to repay the bonds, the Authority leased the Golf Course to the City. Under the Lease Agreement, the City agreed to make rent payments as well as maintain and operate the Golf Course. The Authority agreed that the rent payments would be used to repay the bonds. The rent payments from the City, therefore, were the financial linchpin of the transaction. Critically, however, the City never made an absolute commitment to make the rent payments. Under the Lease

Agreement and the other financing documents, the City's obligation was subject to its decision to appropriate funds each year.

Other documents in the bond transaction gave the Bank rights as a creditor in the event the bonds were not repaid. The City issued a Deed of Trust to the Bank in which the City pledged its existing City Hall building and police station as security. Similarly, the Authority issued a Deed of Trust to the Bank where the Authority pledged the Golf Course as security. Both the City Deed of Trust and the Authority Deed of Trust (collectively "Deeds of Trust") along with the Trust Agreement contained provisions outlining the Bank's creditor's rights to this collateral.

The Bank retained ACA to provide insurance on the bonds. Through this arrangement, ACA received insurance premiums, and, in return, agreed to pay off the bonds if there was a default in repayment. In such a situation, ACA would front the costs of paying off the bonds and then assume the Bank's rights to receive rent payments and to enforce other creditor's rights.

In 2010 and 2011, the City failed to appropriate enough money to fully pay the rent due on the Golf Course lease. As a result, the Authority could not repay the bonds. After discussions and negotiations, the parties entered into a Forbearance Agreement. Under the Forbearance Agreement, ACA agreed to make up any shortfall resulting from the City's failure to make rent payments. It also agreed to temporarily forego exercising its creditor's rights and remedies. The City and the Authority agreed that ACA would be reimbursed for any payments it made and agreed that the bonds would still be repaid from rent payments, although the payment plan was extended over a longer period. Significantly, the Forbearance Agreement also made clear that the obligation to make the rent payments was subject to annual appropriations by the City.

In January 2015, the City voted not to appropriate funds for the rent payments and has not made any payments since that time. As a result, the Authority once again failed to repay the bonds.

In response, ACA and the Bank filed a ten-count complaint in federal court against the City and the Authority. The City and the Authority filed a motion to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Lower Court Holding: The Court of Appeals affirmed the 2017 Federal District Court's dismissal.

Discussion: The Court held that, as a consequence of the "subject to appropriation" language in the Trust Agreement, the Lease and the Forbearance Agreement, the City's failure to appropriate monies to pay the rent under the Lease, and accordingly provide the Authority with funds to service the bond payments, was not an event of default under any of the applicable bond documents.

2. *Williams v. Colonial Penniman, LLC*, 582 B.R. 391 (2018).

Facts: This case arose from a dispute between two parties subject to a Deed of Easement. Appellee acquired property from Appellants, and as part of that transfer, they entered into a deed of easement with Appellee's property as the dominant estate and the Appellant's remaining property as the servient estate. The Deed of Easement grants several rights, including the right of ingress and egress, the right to install and construct underground utilities, the right to improve the current gravel driveway, and the right to establish or erect an entry way or gate at the entrance of the driveway. It conveys the easement to the Grantee, its successors and assigns, and to the owners of future subdivided lots. After Appellee subdivided the property to begin development, the Appellants began restricting access to the easement using barriers and gates. Appellants sought injunctive and declaratory relief to clarify the scope of the easement.

Lower Court Holding: The Bankruptcy Court held that the use of the easement extended to the Appellant and its invitees as necessary for the sale and development of the property.

District Court Holding: On appeal from the Bankruptcy Court, the Federal District Court for the Eastern District of Virginia agreed that the Deed of Easement conveyed all beneficial uses to Appellant and its successors in interest.

Discussion: The District Court stated that "the dispute between the Parties concerns whether the terms of the easement specifically restrict uses and, if not, whether the uses contemplated by Appellee are 'reasonably consistent with the uses contemplated by the grant of easement.'" The decision turned on how the disputed phrase "the right of way shall only be for the benefit of the Grantors, or either, and Grantees." The District Court held that the plain text of this phrase conveyed all uses that were for the benefit of the Granteeswhich would include "building homes, traveling to and from home, inviting repairmen to the home, inviting guests to the home, or any other beneficial use reasonably anticipated by the owner of a private residence."

D. US DISTRICT COURT CASES

1. *Columbia Gas Transmission v. Grove Avenue Developers*, No. 2:17cv483, 2019 WL 130168 (E.D.Va. Jan. 8, 2019).

Facts: This federal diversity action resulted from an easement dispute between Grove Avenue Developers ("Grove") and Columbia Gas Transmission ("Columbia"). Grove owns property in Suffolk, Virginia (the "Grove Parcel") which is subject to an easement granted by Grove's predecessor-in-interest, Victoria Rountree, for the benefit of Columbia's predecessor-in-interest. That easement, which was granted in 1950, permits Columbia to install, operate and maintain one or more underground gas pipelines within an 80-foot right-of-way along the northern edge of the Grove Parcel. Columbia's predecessor-in-interest installed through the easement two pipelines which are still in use and are being maintained by Columbia. In connection with its planned development, Grove sought to construct an asphalt road which would cross the easement and perforce over the buried pipelines. Columbia filed suit to enjoin Grove from constructing the asphalt drive unless Grove agreed to take costly mitigation measures; Columbia also sought a declaratory judgment that the road crossing would be an unreasonable interference with Columbia's rights under the easement. Grove in turn sought a declaration to the contrary, that the proposed roadway was permissible because it did not unreasonably interfere with Columbia's rights.

Issue Before the Court: Under Virginia law, does constructing the asphalt road proposed by Grove constitute an unreasonable interference with Columbia's rights to the use of the easement?

Holding: The proposed roadway would be an unreasonable interference because, without prior mitigation measures, it may damage the pipelines or prevent Columbia from maintaining its pipelines as it is entitled to do under the easement.

Discussion: In its discussion, the court made a key point on the adjudication of claims involving easements:

> The critical question in this case is not whether an asphalt crossing, in the abstract, unreasonably interferes with Columbia's safe operation, testing, maintenance, and repair activities, but rather, whether this specific road, in this specific place, built in the specific manner proposed by Grove, would constitute an "unreasonable" interference.[2]

This passage indicates the subjective nature of the court's ultimate determination. The opinion also highlighted Virginia's approach to limiting and delineating a dominant estate holder's easement rights. Where easement rights are not specifically defined, the law will imply those rights reasonably necessary for the enjoyment of the easement, limited to those that will burden the servient estate

[2] 2019 WL 130168 at *10.

as little as possible.[3] While the court noted that, pursuant to the easement, Columbia had a legal right to enjoin activities that pose a material risk to its pipelines, the risk of catastrophic harm that always exists with gas pipelines is not sufficient to prevent all development and improvements over the dominant parcel without due regard for actual evidence of substantial risk. In other words, the dominant estate holder may exercise its legal rights, but must do so by informed judgment based on reasonable evidence.

Columbia presented two reasons why Grove's construction of the roadway would cause an unreasonable interference with its rights to maintain the pipelines. First, Columbia argued that the weight of vehicles crossing over the pipelines on the roadway would potentially damage the pipelines, and the presence of the roadway surface over the pipelines would create an unreasonable delay if Columbia needed to make emergency repairs to the pipeline (this factor being exacerbated by the fact that the roadway would be the sole means of ingress and egress to the development). Second, Columbia argued that the presence of the roadway surface would unreasonably interfere with its ability to test and monitor its pipelines. The court, considering expert testimony of "wheel load risk" posed by vehicular traffic, was eventually persuaded by the first argument. The court reserved judgment on the second argument, noting that any impact on Columbia's ability to test its many miles of pipelines occasioned by the 26-foot roadway would be *de minimis*.

E. BANKRUPTCY COURT CASES

1. *In re Toys "R" Us, Inc.*, 587 B.R. 304 (2018).

Facts: Toys "R" Us ("TRU"), a Chapter 11 debtor, rented a space in a retail shopping center from Brea Union Plaza I ("Brea"). As part of the bankruptcy proceedings, TRU auctioned off its lease with Brea to Burlington Coat Factory Warehouse Corporation ("Burlington"), an "off-price" retailer. Brea objected to the assumption and assignment of the lease to Burlington, claiming that the proposed assignment would: 1) breach an exclusivity provision contained in a lease with a different "off-price" retail tenant in the shopping center; and, 2) disrupt the existing tenant mix and balance in the shopping center.

Holdings: The Bankruptcy Court held that the assumption and assignment of the lease did not breach the exclusivity provision of the other lease, nor did it disrupt the existing tenant mix and balance of the shopping center. The Court approved the assumption and assignment of the lease to Burlington.

Discussion: The Court's analysis focused on Section 365(b)(3) of the Bankruptcy Code relating to shopping centers, specifically subsection (C), which requires adequate assurance from a debtor that an assignee will continue to honor any use restrictions in the lease and subsection (D), which requires that an assignment of the lease not disrupt the tenant mix or balance in such shopping center.

The court found that the purpose of subsection (C) was to preserve the landlord's bargained-for protections in the lease rather than those of other tenants. The lease with TRU was negotiated well before the other lease containing the exclusivity provision, and the TRU lease contained no provision requiring compliance with other lessee's use restrictions.The Court concluded that the assignment was not required to comply with the restrictions of other lease. The Court further noted that even if the assignment did have to comply with the other lease, the assignment would not breach the other lease's exclusivity provision. The provision prohibited the landlord from renting to another "off-price" retailer only if the landlord "ha[d] the capacity to do so", and since this action was court ordered pursuant to the Bankruptcy Code, the landlord did not have the capacity to prevent that action from happening.

Regarding subsection (D), the court stated that the statute must be interpreted to refer to contractual protections rather than undefined notions of tenant mix. Brea did not point to any contractual

[3] *Id.* at *8.

provisions requiring a specific mix of tenants, nor did Brea provide any other basis for which Burlington would set off the mix or balance of the tenants in the shopping center. Accordingly, the Court found that the assumption and assignment was in the best interests of the debtor's estate and did not prohibit the proposed assumption and assignment to Burlington.

2. *In re Roadcap*, 590 B.R. 747 (2018).

Facts: Phillip Roadcap and his wife owned real estate as tenants by the entirety. The real estate was sold, but prior to the sale the couple separated. A month before the closing the couple executed an escrow agreement to have the sale proceeds held in escrow until they either entered into a property settlement agreement or received a divorce decree directing the disbursement of sale proceeds. Upon closing of the sale of the property, they deposited the proceeds with the escrow agent; several months later the Roadcaps executed a separation and property settlement agreement in anticipation of divorce.

Before all of this took place, Campbell[4] obtained a judgment against Phillip Roadcap; shortly after Roadcap and his wife sold their property. Campbell took steps to enforce the judgment on the sale proceeds held in escrow through a writ of *fieri facias* and a service of garnishment summons. The garnishment summons was served on the escrow agent prior to the property settlement agreement between the Roadcap and his wife. Shortly thereafter, the circuit court held a trial to determine entitlement to proceeds, but the trial was not concluded. Campbell served a second garnishment, Roadcap and his wife objected to the garnishment, arguing that the proceeds were also held as tenants by the entirety and not subject to the judgment lien against Phillip alone. The general district court agreed and dismissed the garnishment. Campbell appealed, and while the matter was pending at the circuit court, Roadcap filed a Chapter 7 bankruptcy petition;, as a result, all actions against Roadcap, his property, or property of his estate became stayed, and Roadcap sought to quash the garnishment.

The core issue was whether the tenancy was severed such that Campbell's lien could attach to the sale proceeds.

Holding: The motion to quash the garnishment is denied in part and granted in part.

(1) The tenancy by the entirety was severed at the time Roadcap and his wife signed the property settlement agreement.

(2) Roadcap timely claimed his homestead exemption and can protect $3,000 of the proceeds.

(3) Campbell's judgment lien was valid and will survive the bankruptcy proceeding.

Discussion:

Was the tenancy severed?

In Virginia, an estate owned as tenants by the entirety renders the property immune from claims by creditors against either husband or wife alone, and while the sale of real estate owned by husband and wife terminates the estate in that property, a tenancy by the entirety remains in the proceeds. However, Roadcap and his wife signed an escrow agreement to hold the proceeds until they executed a settlement agreement or received a divorce decree. The court decided this demonstrated an intent to sever the tenancy, and the terms of the settlement agreement demonstrated the parties wanted to change the character of the property to tenants in common.

[4] Harrisonburg Printing and Graphics, LLC, D/B/A Campbell Print Center, Respondent in a separate action in the bankruptcy court to quash a garnishment.

Due to his Chapter 7 bankruptcy filing can Roadcap exempt the sale proceeds?

The automatic stay granted by the bankruptcy proceeding prevented the state court from ordering delivery of the proceeds to Campbell. Therefore, Roadcap had not lost his interest in the proceeds which also meant that when he filed his bankruptcy petition, he was free to claim an exemption of his interest in the proceeds.

(i) *Does the claim of exemption render the proceeds protected as tenants by the entirety?*

The Court said. no. The fact that Roadcap prevented his bankruptcy trustee from administering the interest did not convert the interest from tenant in common to tenant by the entirety.

(ii) *Does Roadcap's claim of the homestead exemption in the proceeds protect the proceeds from the judgment lien?*

Upon filing the bankruptcy case, Roadcap timely claimed a homestead exemption of $3,000. Therefore, he may protect $3,000 of the proceeds as exempt property.

Conclusion

After signing of the settlement agreement, the tenancy by the entirety was severed and the proceeds were held as tenants in common. Campbell's lien on the property, converted into proceeds, was valid before bankruptcy and will survive bankruptcy. Once the stay terminates Campbell may exercise its state law remedies as to the sale proceeds, except for the $3,000 homestead exemption.

MAY A CONDEMNOR COMPEL A LANDOWNER TO ACCEPT LAND AS A COMPONENT OF JUST COMPENSATION?

By Paul B. Terpak and Patrick Piccolo

Paul B. Terpak is a shareholder at Blankingship & Keith, P.C. in Fairfax. He is the editor of "Eminent Domain Law in Virginia" (2018) and has been selected three times (most recently in 2018) by Best Lawyers as "Eminent Domain and Condemnation Law Lawyer of the Year" in the DC metro area. Mr. Terpak has lectured and written about eminent domain on numerous occasions and served on the Virginia Code Commission Advisory Committee on the recodification of eminent domain law. He is a graduate of the University of Virginia and its School of Law and is a past president of the Fairfax Bar Association and past chair of the Virginia State Bar Committee on Lawyer Discipline.

Patrick Piccolo is an attorney at Blankingship & Keith, P.C., in northern Virginia. His practice focuses on eminent domain and commercial litigation. He completed a clerkship with the Honorable Daniel Ortiz of the Fairfax County Circuit Court and is a graduate of the University of Virginia and its School of Law.

In a recent eminent domain action, the Virginia Department of Transportation (VDOT) asserted that it could include the conveyance of adjacent parcels of land to a condemnee as a component of just compensation. The Landowner objected, stating that it was entitled to compensation solely in the form of money. The case was settled before the court opined, but the idea of conveying surplus VDOT land to a landowner will surely occur again. Whether or not VDOT can compel a landowner to accept land as part of just compensation is an important question.

In *Commissioner of Highways v. Lomas, LLC*,[1], VDOT took approximately a half acre of land from a 5-acre shopping center for the widening of U.S. Route 1 in the Woodbridge area. The taking eliminated many parking spaces; VDOT's initial appraisal was for $4.2 million, including a large damage component. VDOT then sent a revised appraisal of $1.5 million with the following extraordinary assumption: VDOT would, and could, convey about 24,000 square feet of land it acquired from the neighboring landowners to mitigate the loss of parking as part of the just compensation. In short, VDOT sought to satisfy the constitutional right to just compensation by tendering "replacement land."

It is firmly established that eminent domain statutes (or any statute affecting an individual's private property rights) must be strictly construed by Virginia courts.[2] The relevant statutes, in turn, require that condemnors offer the landowner, and "deposit" with the Court, an "amount" that estimates "the fair value of the land taken, or interest therein, or damage done."[3] An "amount" that can be "deposited" is clearly a reference to monetary compensation, and cannot be reasonably construed to include an interest, right or ownership in some other piece of real property. Of course, a landowner can agree to a land swap, but it cannot be *coerced*.

Although Virginia courts have not directly addressed the propriety of non-monetary compensation in a proceeding initiated under existing eminent domain statutes, the Virginia Supreme Court in a related context indicated that this is *not* an acceptable practice. In *Louisville & Nashville R.R. Co. v. Interstate R.R. Co.*,[4] two railway companies disputed the placement of a cross section to connect

[1] Commissioner of Highways v. Lomas, LLC, CL-15-634 (Prince William County Circuit Court),

[2] Mahan v. NCPAC, 227 Va. 2330 (1984); Charlottesville v. Maury, 96 Va. 383 (1898).

[3] Va. Code §§ 25.1-417, 33.2-1001, -1019(B).

[4] Louisville & Nashville R.R. Co. v. Interstate R.R. Co., 108 Va. 502 (1908)

their respective rail tracks.[5] When it became clear the parties could not agree, the Virginia State Corporation Commission made a determination that required connecting track to be constructed through Louisville's property, not Interstate's. Louisville argued that this resolution, ordered by the State Corporation Commission, amounted to a taking and required just compensation to be paid by Interstate. The Court agreed. Moreover, the fact that the tracks could be used by *both* railway companies, including Louisville—in essence giving each an equal right and interest in the tracks—was not sufficient to constitute compensation. The Court clarified the meaning of just compensation: "Being entitled to compensation for its lands taken or used…the appellant was entitled to payment thereof in the manner prescribed by law—that is, in money."[6] The Court went on: "We know of no authority or power by which a person, whether individual or corporation, can be deprived of his property for a public use and be compelled to take as compensation therefor rights or interests, however valuable they may be…"[7]

In *Nichols on Eminent Domain*, viewed by the Virginia Supreme Court as the leading treatise on eminent domain, the authors plainly state, "no just compensation can be made except *in money*."[8] The treatise even goes on to clarify, "land or anything else may be compensation, but it must be at the election of the party."[9] American Jurisprudence states: "Generally a condemnor cannot force a condemnee to accept compensation in any form other than money."[10] Similarly, in *Dunclick*, the Supreme Court of Idaho held "the condemnor cannot force an exchange of land, nor require the condemnee to purchase other lands in lieu of that taken, nor pay for the land taken and damages to the remainder in anything except cash."[11]

In Lomas, *supra,* the landowner argued that VDOT could not compel it to take replacement land as a component of just compensation. Concluding otherwise would require Virginia to depart from a strict construction of Virginia statutes, *Louisville*, and from a principle widely accepted by authoritative treatises, and sister states. In response, VDOT based its argument on a New Jersey case, *State by Comm'nr of Transp. v. Weiswasser*, 693 A.2d 864 (N.J. 1997), which ought to be viewed as an outlier and minority position. *Lomas* settled before the issue was resolved, but it certainly appears that Virginia should follow the majority rule, constraining the state from compelling landowners to take replacement land as a component of just compensation.

[5] *Id.*

[6] *Id.* at 507.

[7] *Id.*

[8] 3-8 Nichols on Eminent Domain, 8.02

[9] *Id.*

[10] 26 Am. Jur. 2d, *Eminent Domain*, § 218.

[11] *State ex. rel. Rich v. Dunclick, Inc.*, 286 P.2d at 1115.

HOW TO SELL AN EXISTING COMMERCIAL CONDO PROJECT

By John W. Farrell

John W. Farrell is a principal in the Northern Virginia firm of McCandlish Lillard. He has over 40 years of experience in matters of real estate development, land use and environmental regulation, including the acquisition, development, leasing and sale of mixed-use communities, condominium and residential projects, commercial and retail properties.

In the early 1980s, there was a boom in the construction of commercial condominiums. Some mimicked residential townhouses in design; others were single-story layouts. Many of these buildings have now reached the end of their useful lives because of the need for technological upgrades that are difficult (if not impossible) as well as the replacement of major systems like roofing or heating, ventilation, and air conditioning. Moreover, many of these condos are adjacent to areas undergoing major redevelopment.

How will the sale of these condominiums for redevelopment proceed? Analysis of the sale of the first such project may offer some guidance:

Sunset Hills Professional Center was a collection of 7 single-story buildings containing 30 units in total occupied by doctors, dentists, other professionals, and small businesses. The vast majority of the unit owners had purchased their units from the original developer in the early 1980s–and had either already retired or were about to.

In 2009, construction began on the multi-story underground parking garage for the Wiehle Metro Station in Reston, Virginia. That (and the adoption of a major rewrite of Fairfax County's Reston Master Plan) prompted the unit owners of the abutting Sunset Hills Professional Center condominium to begin the process of looking to sell the entire regime to a developer who would pursue redevelopment under the revised Reston Master Plan.

Because there were a limited number of potential buyers who would be prepared to take the land through the lengthy and expensive Fairfax rezoning process necessary to maximize the sales value of the property, the Condominium Board on advice of counsel chose to market the project directly to those potential buyers and thus save the unit owners the brokers' commission. (Dissenting owners justified opposition to the subsequently ratified contract on the basis that listing with a broker would have obtained a higher price.)

After an initial round of bids were received and interviews with the higher bidders completed, the Board, in an attempt to mollify the dissenting owners, solicited proposals from multiple brokers. In each case, however, the brokers wanted to be compensated for the portion of the purchase price already in hand. None of the brokers would guarantee delivery of a higher price than offers already received, nor were they willing to set their commission based solely on the enhancement to the existing highest price that their efforts accomplished. The Board therefore proceeded to solicit "best and final offers" from several of the highest bidders, leading to contract negotiations with the top bidder.

Under the Virginia Condominium Act[1], an entire condominium may be sold following a vote of the unit owners. Va. Code §55-79.72:1(B) allows the governing instruments of a non-residential condominium to set the threshold for termination by a lower majority than the 80% required for residential regimes. The Sunset Hills Professional Center Declaration[2] required an affirmative vote

[1] Virginia Code §55-79.39 *et seq.*

[2] *Deed Book 5619, at page 229, Art. XVI (A), Fairfax County Land Records*

of unit owners holding at least two-thirds (2/3) of the common element interests in order to sell the entire condominium.

Once negotiations were completed, the Board sent out the required notice for a special meeting of members to vote on the contract. To assure themselves that the contract was supported by the necessary majority, the contract provided signature lines for individual unit owners. Although this process had the benefit of inducing a psychological commitment to vote for the sale at the special meeting by those unit owners who signed the contract, it became a source of contention for the dissenters in the subsequent litigation. Prior to the special meeting, signatures had been obtained from one fewer than the 2/3 required.

The members' meeting was contentious. The prospective buyer attended to address the questions of the dissenters, to no avail. Five unit owners insisted that they would not vote for a contract that was not obtained through a broker; two unit owners would not vote for the sale because each of their units was subject to a long term lease which the buyer would not assume; and two unit owners (each of whom owned two units, conferring two votes per owner) wanted changes to specific contract terms other than the purchase price. When the roll was called, the motion to ratify the contract and terminate the condominium fell one vote short.

The Board renegotiated the sales contract to address the specific terms that had prompted the objection of two unit owners and convinced the buyer to take one of the units subject to the existing long-term lease. Once these changes were incorporated into the contract, the revised contract was again circulated for signature by the unit owners and a second special meeting was called to vote on the termination and sale.

Va. Code §55-79.72:1(C) provides for the execution and recordation of a termination agreement among the land records when the membership has voted to terminate and sell. However, Va. Code §55-79.72:1(G) provides that upon recordation of the termination agreement, the unit owners' interests are converted to tenant in common interest with each unit owner having an exclusive right to occupy its former unit. Because the rezoning would take an estimated thirteen (13) months from the date of ratification of the sales contract, the termination agreement was not recorded immediately after the membership vote, but rather was delayed to the post-rezoning closing. This allowed the Association to continue its operations through the existing management and assessment regime. Va. Code §55-79.72:1(C) specifically anticipates this prospect by providing that the termination agreement shall include a date after which, if not recorded, the termination would be void. An outside date for recordation of the termination agreement was included in the membership resolution ratifying the sales contract.

Va. Code §55-79.72:1(I) provides that sales proceeds are to be divided among the unit owners based upon the fair market value of each unit as determined by independent appraisers. Because the units at Sunset Hills were not significantly different one from another, the Board decided to forego the substantial expense of having each unit appraised and proposed to the unit owners that the proceeds be divided based on the percentage of common element interests of each unit. This choice was adopted by the membership as part of the resolution ratifying the sales contract.

One circumstance not anticipated by the Condominium Act was the means to pay off the debt encumbering each of the units. There was no debt encumbering the common areas or the assessment stream and some units were debt free; however, one dissenter's unit was encumbered by debt far in excess of the proceeds of sale attributable to that unit. The membership resolution ratifying the sales contract provided that the payoff of individual unit mortgages would come from the proceeds of sale allocated to that unit.

At the second special meeting, the membership resolution ratifying the sales contract and incorporating the foregoing provisions passed the needed super-majority by one vote.

With the contract ratified, the buyer proceeded to file the rezoning and the Association's counsel considered how to satisfy the contractual requirement of court action to remove any questions as to the effectiveness of the Association's vote. The contract contemplated the filing of a petition for partition by sale based on the tenant in common status described in Va. Code §55-79.72:1(G) but left open the possibility of other processes.

Ultimately, counsel concluded that partition was too convoluted a process inasmuch as it would require the appointment and compensation of a commissioner who could decide to rebid the property all over again. Instead, counsel sought a declaratory judgement that the Association had acted consistently with Va. Code §55-79.72:1(F) and that the dissenting unit owners were bound by the super-majority vote to comply with the terms of the contract despite their individual refusal to vote to ratify or to execute the sales contract.

Originally, seven dissenting unit owners were named in the complaint. (Fairfax Circuit Court Case No. CL-2016-15665.) Service was not immediately effected, but courtesy copies were delivered instead to the dissenting owners in the hope that some or all might change their minds once the cost and inconvenience of defending a lawsuit was no longer hypothetical. Four unit owners did so and signed the contract to evidence their willingness to comply with its terms. The remaining three were served. One of the unit owners failed to file an answer and a default judgement was entered against him. Two owners remained.

Each remaining unit owner presented a very different challenge to the Association. One unit owner had sold its business some years before and had rented its unit to the business purchaser under a long-term lease. Thus, it was necessary to consider the costs to relocate the tenant . One element of potential damages for termination of the lease was resolved when it was determined that the rent charged by the unit owner to the new business owner was higher than rent for comparable space in the area. However, the business had extensive trade equipment affixed to the unit. Further, the unit owner threatened to sue the Association for tortious interference in a business relationship in the event the Association attempted to negotiate a buy-out of the tenancy directly with the new business owner, necessitating adding the new business owner/tenant as a party defendant to the declaratory judgement action.

The Association's opening position was that the anticipated termination of the condominium would also terminate the lease, leaving the responsibility for the costs of relocation to fall on the new business owner/tenant. That position was based on the analysis that the "first in time" recordation of the condominium instruments together with the Condominium Act had put all prospective unit tenants on notice that the condominium, and the tenant's rights of occupancy, could be terminated at any time by a super-majority of the unit owners. The condominium termination was analogized to the foreclosure of a previously-recorded deed of trust which perforce terminated any subsequent leases.

The unit owner and its tenant argued that the anticipated termination of the condominium converted its interest into a tenancy in common with exclusive right of possession, pursuant to Va. Code §55-79.72:1(G); that exclusive right of possession was therefore capable of being leased and, pursuant to Va. Code §8.01-91, anyone who was a lessee before a partition would continue to hold the leasehold on the same terms by which it was held before the partition. The Association countered that because the property was not being sold by partition and the termination would be recorded simultaneously with closing on the sale, Va. Code §8.01-91 did not apply. After an exhaustive search, no case law could be found anywhere in the United States which addressed the survival of a commercial lease of a unit after termination of a condominium.

The unit owner also argued that its share of the sales proceeds could not be reduced by the costs to buy out its tenant's lease. This argument ran counter to the plain language of Va. Code §55-79.82(B) which authorizes special assessments against an individual unit owner for costs incurred by an association because of the acts of that unit owner. Unfortunately, the Sunset Hills By-laws had not incorporated this *optional* provision of Virginia Code. Thus, it was necessary to amend the condominium by-laws in the middle of the litigation to add this potential remedy for the Association. (This effort was complicated by the Sunset Hills Declaration's requirement to give secured lien holders thirty days' notice prior to the effective date of any amendment of the condominium instruments. *Declaration, Art. XII(B)(1).*) In retrospect, the power to impose a special assessment on unit owners who uniquely caused expenses to the Association should have been added to the condominium instruments once the existence of the long-term leases had been identified. Notice of the implementation of the by-law amendment would then be given to contemporaneously to the secured lienholders–well in advance of closing on the sale.

These complications, combined with comments from the presiding judge that foretold an adverse ruling, triggered the parties to enter into mediation. Negotiations lasted over 17 hours, but in the end the contract buyer and the Association agreed to provide the tenant with assistance in its relocation; the unit owner agreed to sign the contract; and the tenant agreed to enter into a new short-term lease with the contract buyer at closing. This resolution was facilitated by the fact that, prior to commencement of construction, the contract purchaser would have to receive site plan approval from Fairfax County for its redevelopment after the rezoning and the closing on the sale. In Fairfax, site plans can take eighteen (18) months or more to process, particularly a complicated mixed-use development of the type proposed to replace the Sunset Hills Professional Center. Thus, the tenant would not be faced with a relocation for 18 months or longer after the closing.

After the dismissal of the tenant and its unit owner from the suit, the Association proceeded to trial with the remaining unit owner, who attempted to convince the Court that it was not bound by the contract because: 1) unlike the other unit owners, it had not signed the contract; 2) not all of the unit owners had signed the contract within a time limit set out in the contract; 3) the condominium termination agreement had not been recorded; 4) no written consent of the secured parties to the termination had been obtained; and 5) one of the sales contract's conditions of settlement, the rezoning, had not been satisfied.

The Association responded to arguments 1 and 2 that the signatures of the unit owners, including the defendant, were surplusage as the 2/3 vote of the membership bound all unit owners to the contract under the Declaration and Va. Code §55-79.72:1. The Association relied on Va. Code §55-79.72:1(C) to rebut Argument 3 that the termination agreement did not have to be recorded immediately, but could be recorded at settlement. As to the secured parties (Argument 4), the Association countered that a) the proceeds of sale would be sufficient to pay off all but one of the secured parties at closing and b) the contract required each unit owner to remove any financial encumbrances on its unit as a condition of closing. Finally, Argument 5 was moot because the rezoning had been accomplished by the time of trial.

The Court found in favor of the Association, ruling that the defendant unit owner was bound by the contract of sale.

If only that had been the end of the story.

During the pendency of the sale, the remaining recalcitrant unit owner had bought another business and another office condominium nearby and had cross-collateralized those debts with the Sunset Hills unit, meaning that the total amount of the debt encumbering the defendant's Sunset Hills unit was equal to almost double the proceeds it would realize from the sale. When the date for closing came, all the other unit owners fulfilled their obligations under the contract except for the defendant unit owner who had not arranged to refinance its debt.

While a rule to show cause was prepared and filed, the lender of the defendant unit owner was contacted to determine if the Association could buy the defendant's debt from the lender. The amount of the loans greatly exceeded the value of the two condominium units and, therefore, the loan should have been categorized as "non-performing" on the lender's books and eligible for some discount on sale. The Association obtained a private line of credit to finance the purchase of the notes. The Association's plan was to acquire the notes, execute a partial release of the deeds of trust for the Sunset Hills unit; use the sale proceeds to reduce the line of credit and then foreclose on the off-site condominium unit and the personal guarantees of the unit owner to satisfy the remaining balance on the private line of credit. Unfortunately, the lender was in the midst of a sale of all of its stock and did not want to risk a suit from its borrower interfering with that sale. The Association's offer to buy notes at par was rejected.

When the Rule to Show Cause was heard, the defendant had no justification for its failure even to submit an application to refinance its debt to enable the closing. Despite having no articulable defense to the motion, the trial judge refused to hold the defendant unit owner in civil contempt, ruling, *sua sponte*, that the Association had not met the burden for *criminal contempt*.

The Association and the contract purchaser then agreed to increase the payment to the defendant unit owner, and the sale closed.

Lessons learned:

1) The membership resolution approving the sale should include an outside date for the expiration of the termination agreement that accounts for the satisfaction of any conditions of settlement (such as rezoning).

2) The membership resolution should also set out the means of dividing the proceeds of sale among the unit owners. (Considering that differences in the value of units are generally reflected in the differences in the percentage of ownership of common element interests, the legislature should amend the Condominium Act to eliminate the requirement of the expense of appraisals of individual units.)

3) The membership resolution should make clear that financial encumbrances on individual units will be satisfied from the sale proceeds attributable to that unit, and that the individual unit owners are responsible to deliver possession of their units free of encumbrances at closing. Again, the Condominium Act should be amended to set out these principles clearly.

4) Instead of having the unit owners who support the sale sign the sales contract, have them sign proxies to the President of the Association approving the sale; have the contract drafted to list the Association as the only seller with an acknowledgement by the purchaser that removing any financial or other encumbrances on individual units and delivery of possession of each unit at closing are the responsibilities of the individual unit owners.

5) Determine if the provisions of Va. Code §55-79.82(B) are incorporated into the condominium instruments before the sales effort is undertaken. If not, the declaration should be amended accordingly. This enables the Association to recover the costs to buy-out tenants or pay off lenders on individual units responsible for those expenses; this has the added benefit of making the risks facing recalcitrant owners clear at the outset.

6) Include in any motion for a rule to show cause an explanation of the different standards for civil versus criminal contempt.

THE IMPACT OF THE RECENT FOURTH CIRCUIT DECISION IN *BATE LAND & TIMBER LLC* ON THE PRACTICE OF REAL ESTATE LAW

By John H. Maddock, III and Jessica O. Taylor


John H. Maddock III (partner) and Jessica O. Taylor (associate) are members of McGuireWoods LLP's Restructuring & Insolvency Department, specializing in restructuring and insolvency, state creditors' rights law, and commercial litigation.

When a mortgagor falls into dire financial straits, lenders may find themselves thrown into the uncharted waters of bankruptcy. Previously in Virginia, a real estate lender could rely on its secured status with the Bankruptcy Code ensuring that a debtor's proposed plan of reorganization provides the lender with an at least expectant recovery on its secured claim. However, real estate lenders may find that in bankruptcy cases, what they receive on account of their claims may be far less than they expected.

Recently, the Fourth Circuit issued a decision in *Bate Land Company LLC vs. Bate Land & Timber LP,*[1] that will be of importance to real estate practitioners. The Court ruled on the extent to which a partial "dirt-for-debt" plan can provide a secured creditor with the equivalent value of its claim. This article seeks to summarize this decision and discuss its critical practical implications.

BATE LAND & TIMBER LLC AND THE INDUBITABLE EQUIVALENT

Prior to filing its bankruptcy petition, Bate Land Company, LLC ("BLC") sold Bate Land & Timber LP (the "Debtor") seventy-nine tracts of land in eastern North Carolina for $65 million. Of this amount, the Debtor paid $9 million in cash and financed the amount with a promissory note secured by a purchase money deed of trust encumbering the property. In the years that followed, the Debtor paid over $60 million towards satisfaction of the loan, but was unable to repay the loan in full by the maturity date. Subsequently, financial difficulties culminated in the Debtor filing a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code on July 26, 2013, in the United States Bankruptcy Court for the Eastern District of North Carolina.[2]

BLC filed a proof of claim asserting a secured claim in the amount of approximately $13 million. The Debtor proposed a Chapter 11 Plan by which the Debtor offered to satisfy BLC's secured claim through the conveyance of two tracts of property, also known as a "dirt-for-debt plan." In a dirt-for-debt plan, a debtor proposes that a secured lender accept collateral in satisfaction of its entire debt. In a partial dirt-for-debt plan, however, a debtor transfers only part of the collateral to satisfy the secured creditor's claim.[3] The Debtor's proposed plan estimated that the two tracts of land were worth approximately $13.5 million, thus satisfying BLC's secured claim. After transferring these two tracts of land, the Debtor proposed that it would retain the remaining tracts of land free and clear of any liens. BLC objected, arguing that it would not receive the indubitable equivalent of its claim to which it was entitled under Chapter 11.

When a secured creditor disagrees with a debtor's valuation of its claim, a bankruptcy court has authority to "cram down" or approve a plan over the secured creditor's ballot rejecting the plan,

[1] 877 F.3d 188 (4th Cir. 2017).

[2] *See generally*, Case No. 13-04665-8-SWH (Bankr. E.D. N.C.).

[3] *Bate Land & Timber LLC*, 877 F.3d at 192 (citing *In re SUD Props., Inc.*, No. 11-03833-8-RDD, 2011 WL 5909648, at *2–3 (Bankr. E.D.N.C. Aug. 23, 2011) (defining partial dirt-for-debt)).

pursuant to 11 U.S.C. § 1129(b)(2)(A)(iii)[4]. Section 1129(b)(2)(A)(iii) states that in order to cram down a plan, the plan must be fair and equitable regarding the dissenting creditor. As such, with respect to a class of secured claims that has voted against the plan, the plan must provide "for the realization by such holders *of the indubitable equivalent of such claims*."[5]

The Bankruptcy Code does not define "indubitable equivalent," but courts have interpreted it to mean a value free of doubt. There are three scenarios in which a secured creditor may receive satisfaction of its claim in full: (1) returning the secured creditor's collateral to the secured creditor; (2) paying the claim in full; or (3) providing the secured creditor with appropriate substitute collateral, so long as the substitute is "indubitable," or "too evident to be doubted."[6] The Debtor's request to cram down the plan over BLC's dissenting vote required the Bankruptcy Court to determine whether the Debtor's proposed partial dirt-for-debt plan would provide BLC with the indubitable equivalent of its claim.

The Bankruptcy Court then held a confirmation hearing in which expert testimony was presented by both sides regarding the value of the two tracts of land which the Debtor proposed to convey to BLC in satisfaction of BLC's claim. In valuing these tracts of land, the Bankruptcy Court considered the land's highest and best use rather than its current physical condition.[7] BLC's experts testified that the best use of the two tracts was their current use, i.e. the production and harvesting of timber. The Debtor argued and presented expert testimony that the highest and best use of the tracts was to develop as residential property. The Bankruptcy Court agreed with the Debtor.[8] BLC appealed. The District Court dismissed the appeal as equitably moot because the Debtor substantially consummated the confirmed plan and an appeal would have a detrimental effect on the success of the confirmed plan.[9] The Fourth Circuit Court of Appeals disagreed, and turned to the merits of the case.

BLC's appeal presented the Court with two questions: (1) whether a partial dirt-for-debt plan can ever achieve "the level of certitude required in an indubitable equivalence calculation"[10] and, (2) if it can, whether the Bankruptcy Court incorrectly valued the land at issue.[11] BLC argued that partial dirt-for-debt plans can never provide a creditor with the indubitable equivalent of its claims because property valuations are inherently uncertain. The Court of Appeals disagreed. The Court declined to hold that partial dirt-for-debt plans can *never* provide the indubitable equivalent of a creditor's claim. Judge Duncan's opinion held that variations in appraisals of real property are an insufficient basis on their own to declare a bankruptcy court's valuation of real property as uncertain.[12] In reaching this conclusion, the Court reasoned that all valuations are in some degree uncertain.[13] To address any

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[4] 11 U.S.C. 1129(b)(2)(A)(iii).

[5] *Id*. (emphasis added).

[6] See Alec P. Ostrow, *Doubting the Indubitable: Can a Partial "Dirt for Debt" Plan Supported by a Contested Appraisal Constitute Indubitable Equivalent of a Secured Claim?*, ABIJ 36, (March 2018).

[7] *See* Case No. 13-04665-8-SWH, Docket No. 306 (Order providing valuation analysis and establishing total value of two tracts offered for surrender).

[8] *In re Bate Land & Timber, LLC*, 541 B.R. 601, 615-16 (Bankr. E.D.N.C. 2015).

[9] *Bate Land Company, L.P. vs Bate Land & Timber, LLC*, No. 7:16-CV-23-BO, 2016 WL 10957314, at *3 (E.D.N.C. 2016), *overruled by Bate Land & Timber LLC*, 877 F.3d 188.

[10] *Bate Land & Timber LLC*, 877 F.3d at 196.

[11] *Id*.

[12] *Id*. at 197.

[13] "'[V]aluation is not an exact science, and the chance for error always exists.'" *Id*. (quoting *In re Simons*, 113 B.R. 942, 947 (Bankr. W.D. Tex. 1990)).

uncertainty, the Court of Appeals held that most courts take a conservative approach in determining fair market value.

Turning to the Bankruptcy Court's valuation of the real property at issue, the Judge Duncan reviewed the Bankruptcy Court's determination for clear error. The Court noted that this standard is an arduous one, and is not met simply because another court may have reached a different result.[14] The Fourth Circuit held that the Bankruptcy Court's reliance on one expert's testimony over another did not render its decision clearly erroneous. Moreover, the Appellate Court found that the disparate appraisals of the real property did not negate the indubitableness of the Bankruptcy Court's equivalence determination. Judge Duncan reasoned that the Bankruptcy Court, in arriving at its conclusion, properly weighed the evidence presented by both parties.

Bate Land & Timber LLC Going Forward

The Fourth Circuit Court of Appeals' decision in *Bate Land & Timber LLC* may have a direct impact on the value of a secured creditor's claim because a bankruptcy court may base its value of the secured creditor's real property collateral on how the real property can be used in the future regardless of its current condition. This opens the door further to opposing expert valuation testimony. The Court of Appeals made clear that the "indubitable equivalent" standard under section 1129(b)(2)(A)(iii) of the Bankruptcy Code may be met even when a court is presented with disparate valuations. Thus, a bankruptcy court may confirm a debtor's dirt-for-debt plan despite a secured creditor's objection as to the certainty of the value of the dirt it is to receive.

Real estate practitioners must be keenly aware of the practical implications of *Bate Land & Timber LLC*. Before extending credit to a borrower for the purchase of real property, real estate practitioners should advise lenders that over time, market trends and community growth or decline may impact the best use of such real property and impact its value. Therefore, lenders seeking to maximize the recovery of their claims may be dissatisfied with what they perceive to be an inflated valuation. Notwithstanding the possibility of competing valuations that may be based on varying uses of the real property, the real property they would receive under a partial dirt-for-debt plan may be based on a use not anticipated by the lender when the loan was made. Thus, the lender may be forced to liquidate the real property in accordance with its anticipated use (perhaps at a value less than that determined by the bankruptcy court), or incur costs and expenses to adapt the real property to the use upon which the bankruptcy court based its valuation.

[14] *Id*. at 198 (noting the clearly erroneous standard is a demanding one and must show that a mistake has been made).

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR AGENDA FOR THE WINTER MEETING OF THE BOARD OF GOVERNORS AND AREA REPRESENTATIVES

Friday, January 25, 2019 at 1:00 p.m.
Williamsburg Lodge, East Lounge
Williamsburg, Virginia

I. WELCOME AND ROLL CALL — Creasman or Wiley — If attending by conference call, please send email or text to Lori Schweller (lschweller@williamsmullen.com or 804.248.8700) to let her know that you are on the line.

II. ADOPTION OF MINUTES — Fall Meeting of the BOG and Area Representatives held October 5, 2018 — Schweller (see Attachment 1). (Minutes of this Winter Meeting will be circulated to the Board soon after the meeting for comments, with final adoption to occur at March meeting.)

III. FINANCIAL REPORT — Ron Wiley
1. Budget Information (see Attachment 2)
2. Expense Vouchers — **Please return signed originals for this meeting no later than February 8, 2019. Mail to: Kay Creasman; 1245 Mall Drive North; Chesterfield, VA 23235.** (Refer to the VSB website for forms)

IV. STANDING COMMITTEES
1. Membership — Ron Wiley & Pam Fairchild
   a. Review roster and updating website. Add year/approximate year you became an AR to the list
   b. New Area Representatives (see Attachment 3) — Tracy Bryan Horstkamp
2. Fee Simple — Steve Gregory & Rick Chess (see Attachment 4)
   a. Article Submission Deadline — April 1, 2019 (Articles for the Fee Simple should be sent in Word format to Felicia Burton (faburt@wm.edu) who will format it and circulate it to the appropriate committee members. If sent to either of the committee chairs, it will just be forwarded to Ms. Burton.)
   b. Solicitation for article topics for future issues of The Fee Simple
3. Programs — Kathryn Byler & Ben Leigh
   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 — Ron Wiley/Paul Melnick
4. Technology — Mark Graybeal & Matson Coxe (Attachment 5)

V. SUBSTANTIVE COMMITTEES
   a. Commercial Real Estate — John Hawthorne & David Hannah
   b. Common Interest Community — Josh Johnson & Sue Tarley
   c. Creditor's Rights and Bankruptcy — Christy Murphy & Brian Dolan
   d. Eminent Domain — Chuck Lollar
   e. Ethics — Ed Waugaman & Blake Hegeman
   f. Land Use and Environmental — Karen Cohen & Lori Schweller
   g. Residential Real Estate — Susan Walker & Hope Payne (see Attachment 6)
   h. Title Insurance — Ali Anwar & Cynthia Nahorney

VI. UNFINISHED BUSINESS

1. VBA Update — Max Wiegard
   a. Recodification of Title 55 submitted to General Assembly
   b. Legislative response to *The Game Place* case
2. *The Virginia Lawyer* Real Estate Edition — Lewis Biggs & Kay Creasman
   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 by February 8, 2019
3. Pro Bono hours — discussion was cut short at the meeting in October. Do we want to pursue this for Section members? If yes, do we want to have the Membership Committee take charge of organizing the initial framework? We have information from Rick Richmond as to the Charlottesville Bar program, which was modeled after the longstanding Harrisonburg Bar efforts.

VII. NEW BUSINESS

VIII. NEXT MEETING — The next meeting will be held **10:00 a.m. at Kingsmill** in Williamsburg at the Advanced Real Estate Seminar, **Friday, March 1, 2019**. Exact room to be determined.

IX. ADJOURNMENT

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR

MINUTES OF THE WINTER MEETING
OF THE BOARD OF GOVERNORS AND
AREA REPRESENTATIVES

Friday, January 25, 2019, 1:00 p.m.
Williamsburg Inn, East Lounge
Williamsburg, Virginia

Chair Kay Creasman called the meeting to order at 12:56 p.m.

Bill Nusbaum moved for adoption of the minutes of the Fall Meeting of the Board of Governors and Area Representatives, held October 5, 2018 at the VBA offices in Richmond, and the minutes were adopted by voice vote.

Vice Chair Ron Wiley delivered the financial report. The proposed budget, attached as an exhibit to the agenda, is to take effect July 1, 2019. For comparison, the 2018-19 budget also was included. The proposed 2019-20 budget is based on membership of 1,789 section members; however, as of January 22nd, the Section had 1,875 members. With 86 additional members at $25/member, we should have about $1,700 more than the budget indicates. For FY2018/19, we returned an approximately $3,000 surplus to the Bar, which is about average for the past few years. Ron noted some changes in various charges and requested Board members and area representatives to submit expense reimbursement forms, which are available on the VSB website, to Chair Creasman. Kay encouraged attendees to review the rules for reimbursement.

Ron Wiley spoke on behalf of the Membership Committee, noting that there is no written report. Ron reported that the Section was asked if it would like to participate in the VSB Tech Show. The Technology Committee and Membership Committee together considered the offer and decided to decline the opportunity based on their investment versus benefit analysis. Ron says that we were not asked to participate in the First Year in Practice seminar. Kay stated that the seminar was reorganized. Ron reported that the Section will continue its plan to solicit new members at the Advanced and Regular Real Estate seminars.

Kay introduced Tracy Horstkamp, who practices in Northern Virginia and has a focus in deed and other real estate document preparation. The Section voted in Tracy as a new Area Representative.

Rick Chess spoke on behalf of the Fee Simple Committee. Rick reported that he is calling each committee chair to remind us that he expects at least one article/year from each committee and to say that we should consider converting articles in Fee Simple to other publications to gain greater exposure for the Section and our practices. Rick also noted that many of us have practices that do not overlap – e.g. commercial and residential – so we can collaborate without competing.

Kathryn Byler reported on behalf of the Programs Committee. She reported that the Advanced Real Estate Seminar, to be held March 1-2, 2019 at KingsMill in Williamsburg, is all set and encouraged the section members to register. Kathryn noted that registration has been slow so far this year – only 30 so far, and we need 100. Ron commented that he just received the physical brochure this week and that the online code was incorrect; he has taken steps to correct the error with the VSB. Other members also agreed that the seminar hasn't been publicized well. The program for the Annual Real Estate Practice Seminar, to be held May 8th in Roanoke, May 21st in Fairfax, and May 23rd in Williamsburg, is being finalized. Kathryn thanked Rick for reaching out to the committee chairs; the Programs and Fee Simple committees are working together. Steve Gregory and Rick Chess, Co-Chairs of the Fee Simple Committee, have suggested that presenters write articles for publication, and the Programs Committee has suggested that recent articles could be expanded as

future seminar topics. As an example, an article on riparian rights is being repurposed into a program at the Advanced. For the Annual, lots of speakers are needed since different speakers will cover the same topic at different locations.

Paul Melnick has offered to be the liaison to put together the Section meeting at the VSB annual meeting in June. Paul reported that a meeting is forthcoming to discuss the program, which will include tax code changes and transfer on death, and to assign topics.

With respect to the Technology Committee, Kay noted that Tracy's wife is general counsel for MERS. Kay expressed a desire to have a place on the VSB website (not on real property section where password is required) where the public can get information regarding basic real estate topics like MERS, title insurance, common interest communities, tax assessors' offices, etc.

John Hawthorne reported on behalf of the Commercial Real Estate Committee, stating that the committee recently met and submitted a report, which will be included in the minutes. John thanked Rick Chess for attending along with the other members. The Committee discussed potential topics for the *Fee Simple* and the real property issue of *The Virginia Lawyer*. One topic of discussion was the expansion of the use and scope of easements beyond their original stated purposes. Another topic was commercial leasing and the use of the word "invitee" in commercial leases as it applies to indemnification clauses.

Josh Johnson reported on behalf of the Common Interest Community Committee that the committee did not have a meeting this quarter, that Susan Tarley is in Louisiana for the Community Association Institute (CAI) meeting and that the group will meet upon her return, prior to the March Section meeting.

Ron noted that Christy Murphy submitted a report for the Creditor's Rights and Bankruptcy Committee and that the committee is planning to write an article for the *Fee Simple* on Bate Land Company, LP vs. Bate Land & Timber, LLC, 877 F3d 188 (4th Cir. 2017) and has an idea for *The Virginia Lawyer* issue – liens and the effect of bankruptcy on liens.

There was no report from the Eminent Domain Committee.

Ed Waugaman reported that the Ethics Committee submitted a report that will be included in the minutes. The committee is reviewing all ethics LEO's (1700 on the CLE website) and is recruiting section members to help with the project. Ed confirmed that Susan Pesner would be continuing on the committee and that the committee would like to have four or five more members or contributors. Kay requested each section member to take ten ethics opinions to review to help with the effort.

Lori Schweller reported that the Land Use and Environmental committee had a meeting and would be submitting a report, as well as ideas for the *Fee Simple* and *The Virginia Lawyer* real property issue.

Susan Walker reported on behalf of the Residential Real Estate Committee, noting that the report is included in agenda. The committee discussed the recent Va. Supreme Court case Crosby vs. ALG Trustees, LLC, dealing with a foreclosure sale where the winning buyer bid 5% of the property's tax-assessed value. The borrowers sued, and the circuit court found in favor of the trustee. On appeal, the case was remanded on the grounds that the trustee could have done more advertising. The committee found this result alarming and agreed with the dissent, which found that the trustee did all that the law required. Kay suggested that the case would be a good subject for a *Fee Simple* article. Members offered to send information to Susan to help. Steve Gregory suggested waiting until the final outcome, that it will be reported in the case law update of the Spring *Fee Simple*, but Kay and other members expressed interest in timely information. Lewis commented that the issue is not novel, the decision is not shocking and could wait for publication. The editorial staff will decide. Susan reminded the group that the audience is not just the active members in the room and that information is needed for the

remaining members of the section, who may not conduct foreclosures frequently. Cooper commented that anyone conducting a foreclosure should be aware that he or she has a duty to the borrower. Members continued a discussion regarding the merits of publication.

Paula Caplinger reported on behalf of the title insurance committee that it held a conference call meeting January 23, 2019. The committee discussed pending legislation (Recodification of Title 55 and The Game Place case). The committee solicited possible articles for the *Fee Simple* from members participating in the call. Committee members were also encouraged to ask attorneys who are engaged in real estate law that we encounter in our day to day practice (whether at a large or small firm or solo) to consider joining the section. Rick Chess noted that he spoke with Ali, who said that he would be interested in the committee's repurposing articles. Ron commented that the Virginia Land Title Association Examiner includes a profile of member Todd Condron in which he talks extensively about how useful it is to be a member of this section.

Max Weigard provided the VBA Update. Max has passed the gavel to Will Homiller, a partner at Troutman Sanders. The VBA Real Estate Council is renewing the terms of Council members Brian Chase and Hank Day, has asked Josh Johnson to take a three-year term on the council, and are discussing a potential term on Council with others who are active in the Section. Will should have an update at the next meeting. Max updated the group on real property bills in the current General Assembly session. Notably, bills in both houses address Va. Code Sec. 55-2, the statue of conveyances, amendments based on The Game Place decision. Both bills have passed their respective houses and would be effective upon enactment. Recodification of Title 55 is in process. Will commented that there is a lot of overlap between the VSB and VBA Real Property sections. VBA will be at forefront of legislative initiatives, and he encouraged members to come to them with new proposed legislation or Code sections needing improvement. The VBA's subcommittees are similar to those in the VSB Real Property section. Two new initiatives have been implemented recently: a regular monthly newsletter (the first went out earlier this week), as well as regular email communications; and more in-person meetings on a regional basis coinciding with regular council meetings (which are 11 a.m. on the 3rd Wed of month).

Lewis Biggs provided an update of the *The Virginia Lawyer* Real Estate Edition. The steering committee has one topic idea from the creditors rights committee regarding liens and treatment in bankruptcy and need at least two more ideas. Each article need not exceed 2,000 words; there is a 6,000 word limit in the aggregate, and articles need not be the same length. Articles should be of broad application to the Bar. Kay noted that we need an article discussing deeds.

Section members continued the discussion begun at the October meeting regarding whether the Section should gather, catalog, and disseminate pro bono opportunities. Members discussed local bar programs that share posted information about pro bono opportunities. Bill Nusbaum requested the officers to formulate a proposal to put before the Section at the Kingsmill meeting.

Ron reported that, with regard to the Travers Scholarship Award, which is traditionally presented at the March meeting and Advanced Real Estate Seminar, we've been informed that the bylaws do not need to be approved by Bar Council, so we can treat the Travers scholarship committee as having been approved by the section. Members should send nominations to Howard Gordon and/or Susan Pesner, co-chairs of the committee.

Cooper thanked the section members for responses to his email re non-compete provisions for development. Susan commented that she doesn't think such provisions are enforceable, and Cooper responded that he thought they were. The section discussed.

Chair Creasman discussed an article in the *Richmond Times* that the boundary line between Louisa and Hanover counties has not been established and that the Commonwealth and counties want to clarify its location before the census. By statute, certain counties have authority to use GIS to establish boundary lines. There is also a problem between Prince William and Fauquier counties.

Chair Creasman announced that the next meeting will be held **10:00 a.m. at Kingsmill** in Williamsburg at the Advanced Real Estate Seminar, **Friday, March 1, 2019**. Bill Nusbaum noted that the meeting historically begins at 10:30. Kay will circulate an agenda with the time. Kay encouraged those committees that did not have a meeting prior to this one to have a meeting and send a report for the March meeting.

Chair Creasman adjourned the meeting at 2:19 p.m.

Respectfully submitted,

Lori H. Schweller, Secretary

VIRGINIA STATE BAR
Real Property Section

Winter Meeting
January 25, 2019

List of Attendees

Board members:	**Area Representatives:**
Kay M. Creasman, Chair	Philip Hart
Ron D. Wiley, Jr. Vice Chair	Page Williams
Lori Schweller, Secretary	Josh Johnson
Mark Graybeal	Ben Leigh
Richard B. "Rick" Chess	Rick Richmond
Kathryn N. Byler	Matson Coxe
Robert Hawthorne, Jr.	Steven Blaine
Whitney Levin	Paula S. Caplinger
Max Wiegard, VBA	Harry Purkey
Tracy Winn Banks, VACLE	Brian Dolan
F. Lewis Biggs*	Benjamin Titter
Blake Hegeman*	Howard E. Gordon
Stephen Gregory*	Larry McElwain
	Ed Waugaman
Will Homiller, VBA	Cooper Youell
	Bill Nusbaum
	Thomson Lipscomb
	Susan Pesner
	David Helscher
	Pam Fairchild
	Diana H. D'Allessandro*
	Sarah Louppe Petcher*
	Tara Boyd*
	Cartwright Reilly*
	Christina Meier*
	John Hawthorne*
	Susan Walker*
	Douglass Dewing*
	*attended via teleconference

TRACY BRYAN HORSTKAMP, ESQUIRE
1184 Hawling Place SW
Leesburg, Virginia 20175
Telephone: 703.669.4935 Facsimile: 703.738.7261
E-mail: tbh@.horstkamplaw.com

WORK EXPERIENCE:

The Law Office of Tracy Bryan Horstkamp, P.C.; 1998-present
President
Twenty year practice focusing on real estate and small business organization; prepare documentation for numerous real estate settlement companies operating in Virginia; advise those companies on underwriting, contract and settlement issues; extensive experience drafting real estate contracts, easements, road maintenance agreements, etc. for both purchasers and sellers of Virginia real estate.

Threescore Settlement Services, LLC; 2002-2008
Co-Owner
Reviewed real estate contracts, title searches, title insurance binders and final lender's and owner's title policies; conducted real estate closings; disbursed monies in accordance with CRESPA regulations.

Lawyer's Advantage Title Company; 1997-1998
Settlement Attorney
Reviewed real estate contracts, title searches, title insurance binders and final policies; conducted real estate closings; company acted as agent to Department of Housing and Urban Development re-sale operation with a workload of approximately 80 to 100 transactions per month; supervised and advised company on its compliance with Virginia law with respect to real estate transactions.

Leming, Healy, Levy & Saller, P.C.; 1995-1997
Associate Attorney
Reviewed real estate contracts, title searches, title insurance binders and final lender's and owner's title policies; conducted real estate closings: disbursed monies in accordance with CRESPA regulations; performed mechanic's lien agent related tasks for commercial and residential construction projects; assisted partners with litigation related research and document preparation.

EDUCATION:
T.C. Williams School of Law; The University of Richmond; Juris Doctor
Virginia Polytechnic Institute and State University; Bachelor of the Arts; Political Science

PROFESSIONAL AFFILIATIONS:
Member, Virginia State Bar and Real Property Section Member of Virginia State Bar

Minutes of the Fee Simple Committee Telephone Conference

The Fee Simple Committee held a telephone conference on 10 January 2019 at 2:00 PM. On the call were Ben Titter, Karen Day, Michelle Rosati, Doug Dewing, Josh Johnson, student assistant Hayden-Anne Breedlove, and the Chair. The spring 2019 edition was the focus of the conversation.

The chair informed the committee that an article had already been submitted with a commitment for a second; the spring issue is also the annual legislative and case law update. The chair mentioned he had been in contact with Alexis Stackhouse, Alexandria, on an article concerning representation of military persons in real estate transactions. Ms. Day offered to follow up with Ms. Stackhouse, given the proximity of their respective offices.

The chair thanked Ms. Day for her effort in providing the Clerk's Corner regular feature. With Ms. Day's concurrence, it was decided that the interview should be published annually in the fall issue. Suggested subjects for the next interview were (from Mr. Dewing) the clerks of the City of Chesapeake (Alan Krasnoff) because of the digital records archive and the City of Portsmouth (Cynthia Morrison, spouse of Judge Johnny Morrison). The Chair suggested Brenda Hamilton of the City of Roanoke, a long-serving African-American woman.

Mr. Dewing stated that section chair Ms. Creasman had circulated an opinion concerning property boundaries that extend to the center of the adjoining street, and said that he thought it had been provided to Ms. Creasman by Bill Nusbaum. The chair offered to contact Mr. Nusbaum.

The discussion shifted to technological topics. The advent of e-closings in the Commonwealth could form the basis for a timely article; the chair suggested the technology committee of the section may be able to furnish one. Available closing software could be an article as well; undoubtedly there are/were law firms who have recently purchased and installed them. Mr. Dewing suggested that the ABA Legal Technology Resource Center may have a review of available software or other tech tips and may be willing to allow a reprint.

The federal government shutdown prompted issues with closings, specifically the inability to obtain IRS payoffs and other related matters. However, it was felt (hoped) that the topic would be moot by the time the spring issue his mailboxes.

Ms. Breedlove said that a professor at T.C. Williams referenced the Fee Simple in power points during real property classes. The committee felt that we should contact real property professors at other law schools in the Commonwealth and provide them copies of the journal if they would be interested. Mr. Chess was "volunteered" to initiate contact with the professors.

The call was adjourned at 2:50 PM.

Respectfully submitted,

Stephen C. Gregory

Chair

REPORT FROM

MARK W. GRAYBEAL

CHAIRMAN OF THE TECHNOLOGY COMMITTEE

VIRGINIA STATE BAR, REAL PROPERTY SECTION

Date: January 17, 2019

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 Thursday, January 17, 2019 at 10:00am, 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 Ethics Committee was looking for assistance in reviewing Legal Ethics Opinions. If anyone desired to lend a hand to the Ethics Committee, they should contact Ed Waugaman and Blake Hegeman for more information.

Next, the Chairman inquired whether any member had article suggestions for the Fee Simple. Mr. Coxe noted that an interesting current topic in the technology space was blockchain and its various impacts. However, Mr. Coxe noted that since the major title insurance companies are not yet insuring transactions that are based on blockchain, it is probably not yet a ripe topic for an article. Further, there is already a large amount of information and articles already published on blockchain.

Next, the conversation moved to discussion of material the Technology Committee could supply for the issue of Virginia Lawyer to which the Real Property Section will be contributing. The Chairman suggested that a relevant topic that would appeal to a general audience would be electronic recording of land records documents. Mr. Coxe noted that there is a lack of consistency in application of electronic recording, with requirements and systems varying by county.

Mr. Coxe also suggested that a possible topic would be an explanatory article or blurb on the Mortgage Electronic Registration System (MERS). He recently had a case in which the judge was completely unfamiliar with MERS and had to continue the case for two weeks in order to research and learn what MERS was. Mr. Coxe also noted that he knew of a Federal Court of Appeals case where MERS was well explained. The Chairman expressed interest in the case and suggested that both ideas would be good for discussion at the upcoming Board of Governors meeting.

Finally, the call was concluded with the Chairman reminding everyone that the next meeting of the Board of Governors would be held on January 25, 2019 in Williamsburg.

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

In October, 2018, we had 800 unique visitors. The most popular pages were:

1. Our front page
2. Area Reps page
3. Publications page

In November, 2018, we had 729 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 December, 2018, we had 874 unique visitors. The most popular pages were:

1. Our front page
2. Meeting Minutes from April 8, 2000
3. Area Reps Page

Respectfully,

Mark W. Graybeal, Chairman

REPORT OF THE RESIDENTIAL SUBCOMMITTEE

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

The Residential Sub-committee met by teleconference on January 16, 2019 at 1:30 p.m. Participating in the call were Matson Coxe, George Hawkins, Blake Hegeman, Michael Lafayette, Thomas Lipscomb, Christina Meier, Hope Payne, Susan Walker, Benjamin Winn and Eric Zimmerman.

At the outset of the meeting, committee members compared the volume of residential closing business in their respective regions during 2018 and offered projections for 2019. While most members reported an overall high volume of closings for 2018, most agreed that volume had slowed toward the end of the year. New homes sales volume is projected to decrease in 2019. It was also discussed that the government shut-down could impact residential transactions in various ways, including, by way of example, delay in FHA approvals for condominium projects, inability obtain tax transcripts from the IRS needed for mortgage approval, and credit score impact on unpaid government workers who cannot make mortgage payments or pay other bills.

Secondly, we compared closing software and whether the programs are cloud based or server based. Programs used by members on the call included SoftPro (hosted), Cleo, Title Express and Qualia. In choosing to use a cloud based, or hosted service, we must make some inquiry to determine that the service has measures and qualifications to secure our client data, but we are not required fully to understand the technical aspects of the service's data security features.

Next, we discussed one committee member's transaction in which the ownership of a 1/5th interest in property depends upon whether the decedent and her (subsequently deceased) husband legally adopted the "son", or if they simply raised him without adoption. The purported son has not responded to attempted communication. Ways of obtaining court records of an adoption or custody proceeding from long ago or a vital statistics report were discussed. It was also discussed whether a quiet title action or partition suit would be more appropriate. While partition was recommended, in this case the low value of the subject property would not justify the cost of either type of action. In such event, the other heirs could simply stop paying real estate taxes, and eventually the property will be auctioned at tax sale..

As our final discussion topic, co-chair Hope Payne presented a case summary of a recent Virginia Supreme Court decision, **Crosby v. ALG Trustees, LLC**, Record No. 180062. In **Crosby** a borrower sued to rescind a foreclosure sale, naming as defendants the substitute trustee, the foreclosure purchasers, and Fannie Mae. After settling with Fannie and the foreclosure purchasers, the borrower obtained leave to amend his complaint to seek monetary damages from the trustee. The amended complaint asserted a claim for breach of fiduciary duty on the grounds that the trustee sold the property for an unconscionably low price, far below its obvious value, and that it did so after only the bare minimum advertising of the sale. It also alleged suspicious circumstances — the only two bidders in that day's series of auction sales submitted a joint bid for this property at roughly 5% of its assessed value. The trial court sustained the trustee's demurrer and dismissed the case. A divided Supreme Court reversed and remanded the case. Finding that the amended complaint stated a viable claim, the majority said that the trustee is a fiduciary for both parties in a foreclosure — both borrower and lender. The trustee's fiduciary duties are not limited by the terms of the deed of trust but include common-law duties as well. The majority found that the borrower properly alleged that "the foreclosure sale overwhelmingly benefited the creditor at the debtor's expense and there was a significant discrepancy between the sales price and the value of the property," thus stating a claim. The dissent noted that the deed of trust defines what a trustee must do, and the trustee did exactly that by advertising the required number of times and selling to the highest bidder at auction. The dissent warned that the ruling "makes the trustee under a deed of trust a guarantor by implication of the price that a foreclosed property sells for at auction." The committee discussed what the trustee

could or should have done, in light of the shockingly low bid price. Perhaps the trustee should have canceled the sale and re-advertised. It was also suggested the trustee could have petitioned the court for aid and direction. Doing so would have required that the trustee accept the foreclosure bid, conditional upon approval by the court.

The meeting concluded at 2:15 p.m.

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REAL PROPERTY SECTION
VIRGINIA STATE BAR
(2019-2020)

[Note: as used herein, a Nathan[1] (*) denotes a past Chair of the Section, and a dagger (†) denotes a past recipient of the Courtland Traver Scholar Award]

Officers

Chair
Kay M. Creasman† (2018-2019)
Assistant Vice President and Counsel
Old Republic National Title Insurance Company
1245 Mall Drive, Suite B
North Chesterfield, VA 23235
(804) 897-5499; cell: (804) 475-1765
email: kcreasman@oldrepublictitle.com
Term Expires: 2019 (2)

Vice-Chair
Ronald D. Wiley, Jr.
Underwriting Counsel
Old Republic Title
400 Locust Avenue, Suite 4
Charlottesville, VA 22902
(804) 281-7497
email: rwiley@oldrepublictitle.com
Term Expires: 2020 (2)

Secretary/Treasurer
Lori H. Schweller
Williams Mullen
321 East Main Street, Suite 400
Charlottesville, VA 22902-3200
(434) 951-5728; cell: (804) 248-8700
email: lschweller@williamsmullen.com
Term Expires: 2019 (1)

Board Members

F. Lewis Biggs* (2016-2017)
Kepley, Broscious & Biggs, P.L.C.
2211 Pump Road
Richmond, VA 23233
(804) 741-0400
email: flbiggs@kbbP.L.C.com
Term Expires: 2020 (3)

Kathryn N. Byler
Pender & Coward, P.C.
222 Central Park Avenue, Suite 400
Virginia Beach, VA 23462-3026
(757) 490-6292; cell: (757) 646-7004
email: kbyler@pendercoward.com
Term Expires: 2020 (2)

Richard B. "Rick" Chess
Chess Law Firm, P.L.C.
2727 Buford Road, Suite D
Richmond, VA 23235
cell: (804) 241-9999
email: rick@chesslawfirm.com
Term Expires: 2020 (1)

Karen L. Cohen
Vanderpool, Frostick & Nishanian, P.C.
9200 Church Street, Suite 400
Manassas, VA 20110
(703) 369-4738
email: kcohen@vfnlaw.com
Term Expires: 2020 (1)

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

Ex Officio

VBA Real Estate Council Chair
William G. Homiller
Troutman Sanders
1001 Haxall Point, Suite 1500
Richmond, VA 23219
(804) 697-1288
email: will.homiller@troutman.com

Immediate Past Chair
Whitney Jackson Levin* (2017-2018)
Miller Levin, P.C.
128 West Beverly Street
Staunton, VA 24401
(540) 885-8146
email: whitney@millerlevin.com
Term Expires: 2021 (3)

Other Liaisons

Virginia CLE Liaison
Tracy Winn Banks
Virginia C.L.E.
105 Whitewood Road
Charlottesville, VA 22901
(434) 951-0075
email: tbanks@vacle.org

VSB Liaison
Dolly C. Shaffner
Meeting Coordinator
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-3565
(804) 775-0518
email: shaffner@vsb.org

Liaison to Bar Council
Vacant

Judicial Liaison
Honorable W. Chapman Goodwin
Augusta County Courthouse
1 East Johnson Street
Staunton, VA 24402-0689
(540) 245-5321

Young Lawyers Conference Liaison
Brian T. Wesley
Thornton Wesley, PLLC
P.O. Box 27963
Richmond, Virginia 23261
(804) 874-3008
email: bwesley@thorntonwesley.com

AREA REPRESENTATIVES

Area Representatives are categorized by six (6) regions: Northern (covering generally Loudoun County in the west to Prince William County in the east); Tidewater (covering generally the coastal jurisdictions from Northumberland County to Chesapeake); Central (covering generally the area east of the Blue Ridge Mountains, south of the Northern region, west of the Tidewater region and north of the Southside region); Southside (covering generally the jurisdictions west of the Tidewater region and south of the Central region which are not a part of the Western region); Valley (covering generally the jurisdictions south of the Northern region, west of the Central region and north of Botetourt County); and Western (covering generally the jurisdictions south of Rockbridge County and west of the Blue Ridge Mountains).

Central Region

Steven W. Blaine
LeClairRyan, P.C.
123 Main Street, 8th Floor
Charlottesville, VA 22902-2017
(434) 245-3423
email: sblaine@leclairryan.com

Tara R. Boyd
Boyd & Sipe, P.L.C.
126 Garrett Street, Suite A
Charlottesville, VA 22902
(804) 248-8713
email: tara@boydandsipe.com

Connor J. Childress
Scott Kroner, P.L.C.
418 E. Water Street
Charlottesville, VA 22902
(434) 296-2161
email: cchildress@scottkroner.com

Douglass W. Dewing*† (2005-2006)
P.O. Box 38037
Henrico, VA 23231
(804) 795-1209
email: douglassdewing@gmail.com

Michele R. Freemyers
Leggett, Simon, Freemyers & Lyon, P.L.C.
Counsel to: Ekko Title, L.C.
1931 Plank Road, Suite 208
Fredericksburg, VA 22401
(540) 899-1992
email: mfreemyers@ekkotitle.com

Barbara Wright Goshorn
Barbara Wright Goshorn, P.C.
203 Main Street
P.O. Box 177
Palmyra, VA 22963
(434) 589-2694
email: bgoshorn@goshornlaw.com

J. Philip Hart* (2012-2013)
Vice President & Investment Counsel
Legal Department
Genworth
6620 West Broad Street, Building #1
Richmond, VA 23230
(804) 922-5161
email: philip.hart@genworth.com

Randy C. Howard* (2008-2009)
11437 Barrington Bridge Court
Richmond, VA 23233
cell: (804) 337-1878
email: randychoward@msn.com

Timothy I. Kelsey
Wood Rogers, P.L.C.
P.O. Box 2496
Charlottesville, VA 22902
(434) 220-6830
email: tkelsey@woodsrogers.com

Neil S. Kessler* (1990-1991)
Neil S. Kessler Law Office, P.L.L.C.
1501 Hearthglow Court
Richmond, VA 23238
(804) 307-8248
email: neilkessler1@gmail.com

Otto W. Konrad
Williams Mullen
200 South 10th Street, Suite 1600
Richmond, VA 23219
(804) 420-6093
email: okonrad@williamsmullen.com

Larry J. McElwain*† (2004-2005)
Scott Kroner, P.L.C.
418 East Water Street
Charlottesville, VA 22902-2737
(434) 296-2161
email: lmcelwain@scottkroner.com

Collison F. Royer
Royer Caramanis & McDonough
200-C Garrett Street
Charlottesville, VA 22902
(434) 260-8767
email: croyer@rcmplc.com

John W. Steele
Hirschler Fleischer
Federal Reserve Bank Building
701 East Byrd Street
Richmond, VA 23219
or
P. O. Box 500
Richmond, VA 23218-0500
(804) 771-9565
email: jsteele@hf-law.com

Michael P. Lafayette
Lafayette, Ayers & Whitlock, P.L.C.
10160 Staples Mill Road, Suite 105
Glen Allen, VA 23060
main: (804) 545-6250 direct: (804) 545-6253
email: MLafayette@lawplc.com

Hope V. Payne
Scott Kroner, P.L.C.
418 East Water Street
Charlottesville, VA 22902-2737
(434) 296-2161
email: hpayne@scottkroner.com

Susan H. Siegfried* (1999-2000)
5701 Sandstone Ridge Terrace
Midlothian, VA 23112
(804) 739-8853
email: shs5701@comcast.net

J. Page Williams
Flora Pettit P.C.
530 East Main Street
P.O. Box 2057
Charlottesville, VA 22902-2057
(434) 817-7973
email: jpw@fplegal.com

Northern Region

Dianne Boyle
Chicago Title Insurance Company
2000 M Street, N.W., Suite 610
Washington, D.C. 20036
(202) 263-4745
email: boyled@ctt.com

Henry Matson Coxe, IV
Fidelity National Law Group
8100 Boone Boulevard, Suite 600
Vienna, VA 22182
(703) 245-0284
email: Matson.Coxe@fnf.com

Todd E. Condron
Ekko Title
410 Pine Street, S.E., Suite 220
Vienna, VA 22180
(703) 537-0800
email: tcondron@ekkotitle.com

Diana Helen D'Alessandro
Pesner, Altmiller, Melnick & DEmers, P.L.C.
7926 Jones Branch Drive, Suite 930
Tysons Corner, VA 22102
(703) 506-9440 ext. 245
email: ddalessandro@pesner.com

Lawrence A. Daughtrey
Kelly & Daughtrey
10605 Judicial Drive Suite A-3
Fairfax, VA 22030
(703) 273-1950
email: ldaught@aol.com

Pamela B. Fairchild
Attorney at Law
Fairchild Law
9501 Ferry Harbour Court
Alexandria, VA 22309
cell: (703) 623-9395
email: pam@fairchild-law.com

David C. Hannah
Protorae Law, P.L.L.C.
1921 Gallows Road, Suite 950
Tysons, VA 22182
(703) 929-7790
email: DHannah@protoraelaw.com

Jack C. Hanssen
Moyes & Associates, P.L.L.C.
21 North King Street
Leesburg, VA 20176-2819
(703) 777-6800
email: jack@moyeslaw.com

George A. Hawkins
Dunlap, Bennett & Ludwig
8300 Boone Boulevard, #550
Vienna, VA 22182
main: (703) 777-7319; direct: (571) 252-8521
email: ghawkins@dbllawyers.com

John H. Hawthorne
Protorae Law, P.L.L.C.
1921 Gallows Road, Suite 850
Tysons, VA 22182
(703) 942-6147
email: jhawthorne@protoraelaw.com

Joshua M. Johnson
Walsh, Colucci, Lubeley & Walsh, P.C.
1 E. Market Street, Suite 300
Leesburg, VA 20147
main: (703) 737-3633 ext. 5774
direct: (571) 209-5774
email: jjohnson@thelandlawyers.com

Benjamin D. Leigh
Atwill, Troxell & Leigh, P.C.
50 Catoctin Circle, N.E., Suite 303
Leesburg, VA 20176
(703) 777-4000
email: bleigh@atandlpc.com

Paul H. Melnick* (2011-2012)
Pesner, Altmiller, Melnick & Demers, P.L.C.
7926 Jones Branch Drive, Suite 930
Tysons Corner, VA 22102
(703) 506-9440
email: pmelnick@pesner.com

Andrew A. Painter
Walsh, Colucci, Lubeley & Walsh, P.C.
One East Market Street, Suite 300
Leesburg, VA 20176-3014
(703) 737-3633 ext. 5775
email: apainter@thelandlawyers.com

Susan M. Pesner*† (1996-1997)
Pesner, Altmiller, Melnick & DEmers, P.L.C.
7926 Jones Branch Drive, Suite 930
McLean, VA 22102
(703) 506-9440
email: spesner@pesner.com

Sarah Louppe Petcher
S & T Law Group P.L.L.C.
8116 Arlington Boulevard, Suite 249
Falls Church, VA 22042
email: sarah@SandTlawgroup.com

Michelle A. Rosati
Holland & Knight
1650 Tysons Boulevard, Suite 1700
Tysons, VA 22102
(703) 720-8079
email: michelle.rosati@hklaw.com

Jordan M. Samuel
Asmar, Schor & McKenna, P.L.L.C.
5335 Wisconsin Avenue, N.W., Suite 400
Washington, D.C. 20015
(202) 244-4264
email: jsamuel@asm-law.com

Lawrence M. Schonberger* (2001-2002)
Sevila, Saunders, Huddleston & White, P.C.
30 North King Street
Leesburg, VA 20176
(703) 777-5700
email: LSchonberger@sshw.com

David W. Stroh
2204 Golf Course Drive
Reston, VA 20191
(703) 716-4573
email: davidwstroh@gmail.com

Benjamin C. Winn, Jr.
Benjamin C. Winn, Jr, Esquire P.L.C.
3701 Pender Drive, Suite 300
Fairfax, VA 22030
(703) 652-9719
email: bwinn@nvrinc.com

Theodora Stringham
Offit Kurman, P.A.
8000 Towers Crescent Drive, Suite 1500
Tysons Corner, VA 22182
(703) 745-1849
email: theodora.stringham@gmail.com

Lucia Anna Trigiani†
MercerTrigiani
112 South Alfred Street
Alexandria, VA 22314
(703) 837-5000; direct: (703) 837-5008
email: Pia.Trigiani@MercerTrigiani.com

Eric V. Zimmerman
Rogan Miller Zimmerman, P.L.L.C.
50 Catoctin Circle, N.E., Suite 333
Leesburg, VA 20176
(703) 777-8850
email: ezimmerman@rmzlawfirm.com

Southside Region

Thomson Lipscomb
Attorney at Law
89 Bank Street
P.O. Box 310
Boydton, VA 23917
(434) 738-0440
email: janersl@kerrlake.com

Tidewater Region

Ali T. Anwar
Kase & Associates, P.C.
200 Bendix Road, Suite 150
Virginia Beach, VA 23452
main: (703) 385-9875 ext. 474
direct: (703) 385-3170
email: alia@kaselawyers.com

Michael E. Barney* (1987-1988)
Kaufman & Canoles, P.C.
P.O. Box 626
Virginia Beach, VA 23451-0626
(757) 491-4040
email: mebarney@kaufcan.com

Robert C. Barclay, IV
Cooper, Spong & Davis, P.C.
P.O. Box 1475
Portsmouth, VA 23705
(757) 397-3481
email: rbarclay@portslaw.com

Richard B. Campbell
Richard B. Campbell, P.L.C.
129 N. Saratoga Street, Suite 3
Suffolk, VA 23434
(757) 809-5900
email: rcampbell@law757.com

Paula S. Caplinger*† (2003-2004)
Vice President and Tidewater Agency Counsel
Chicago Title Insurance Company
Fidelity National Title Group
P.O. Box 6500
Newport News, VA 23606
(757) 508-8889
email: caplingerP@ctt.com

Brian O. Dolan
Brian Dolan Law Offices, P.L.L.C.
12610 Patrick Henry Drive, Suite C
Newport News, VA 23602
(757) 320-0257
email: brian.dolan@briandolanlaw.com

Alyssa C. Embree
Williams Mullen
999 Waterside Drive, Suite 1700
Norfolk, VA 23510
(757) 629-0631
email: aembree@williamsmullen.com

Pamela J. Faber
BridgeTrust Title Group
One Columbus Center, Suite 400
Virginia Beach, VA 23462
office: (757) 605-2015
cell: (757) 469-6990
email: pfaber@bridgetrusttitle.com

Howard E. Gordon*† (1982-1983)
Williams Mullen
999 Waterside Drive,Suite 1700
Norfolk, VA 23510
(757) 629-0607
email: hgordon@williamsmullen.com

Ann A. Gourdine
115 High Street
Portsmouth, VA 23704
(757) 397-6000
email: aagourdine@gmail.com

Naveed Kalantar
Pender & Coward, P.C.
117 Market Street
Suffolk, VA 23434
(757) 490-6251
email: nkalantar@pendercoward.com

Ray W. King
LeClairRyan, P.L.L.C.
999 Waterside Drive, Suite 2100
Norfolk, VA 23510
main: (757) 624-1454
direct: (757) 441-8929
email: ray.king@leclairryan.com

Charles (Chip) E. Land* (1997-1998)
Kaufman & Canoles, P.C.
P.O. Box 3037
Norfolk, VA 23514-3037
(757) 624-3131
email: celand@kaufcan.com

Charles M. Lollar* (1992-1993)
Lollar Law, P.L.L.C.
Virginia Bar No. 17009
North Carolina Bar No. 7861
P. O. Box 11274
Norfolk, VA 23517
office: (757) 644-4657; cell: (757) 735-0777
email: Chuck@Lollarlaw.com

Christina E. Meier
Christina E. Meier, P.C.
4768 Euclid Road, Suite 102
Virginia Beach, VA 23462
(757) 313-1161
email: cmeier@cmeierlaw.com

Jean D. Mumm* (2007-2008)
LeClairRyan, P.L.L.C.
999 Waterside Drive, Suite 2100
Norfolk, VA 23510
direct: (757) 441-8916; cell: (757) 681-5302
email: Jean.Mumm@leclairryan.com

Christy L. Murphy
Bischoff & Martingayle
Monticello Arcade
208 East Plume Street, Suite 247
Norfolk, VA 23510
(757) 965-2793
email: clmurphy@bischoffmartingayle.com

William L. Nusbaum* (2013-2014)
Williams Mullen
1700 Dominion Tower
999 Waterside Drive
Norfolk, VA 23510-3303
(757) 629-0612
email: wnusbaum@williamsmullen.com

Cartwright R. "Cart" Reilly
Williams Mullen
222 Central Park Avenue, Suite 1700
Virginia Beach, VA 23462
(757) 473-5312
email: creilly@williamsmullen.com

William W. Sleeth, III
Gordon & Rees, LLP
5425 Discovery Park Boulevard, Suite 200
Williamsburg, VA 23188
(757) 903-0869
email: wsleeth@grsm.com

Susan B. Tarley
Tarley Robinson, P.L.C.
4808 Courthouse Street, Suite 102
Williamsburg, VA 23188
(757) 229-4281
email: starley@tarleyrobinson.com

Andrae J. Via
Senior Corporate Counsel
Ferguson Enterprises, Inc.
12500 Jefferson Avenue
Newport News, VA 23602
(757) 969-4170
email: andrae.via@ferguson.com

Edward R. Waugaman†
1114 Patrick Lane
Newport News, VA 23608
(757) 897-6581
email: eddieray7@verizon.net

Cynthia A. Nahorney
Fidelity National Title Insurance Corporation
Commonwealth Land Title Insurance Company
150 West Main Street, Suite 1615
Norfolk, VA 23510
(757) 216-0491
email: Cynthia.nahorney@fnf.com

Harry R. Purkey, Jr.
Harry R. Purkey, Jr., P.C.
303 34th Street, Suite 5
Virginia Beach, VA 23451
(757) 428-6443
email: hpurkey@hrpjrpc.com

Stephen R. Romine* (2002-2003)
Williams Mullen
222 Central Park Avenue, Suite 1700
Virginia Beach, VA 23462-3035
(757) 473-5301
email: sromine@williamsmullen.com

Allen C. Tanner, Jr.
701 Town Center Drive, Suite 800
Newport News, VA 23606
(757) 595-9000
email: atanner@jbwk.com

Benjamin Titter
Shaheen Law Firm, P.C.
12350 Jefferson Avenue, Suite 100
Newport News, VA 23602
direct: (757) 961-5560
email: btitter@shaheenlaw.com

Susan S. Walker* (2015-2016)
Jones, Walker & Lake
128 S. Lynnhaven Road
Virginia Beach, VA 23452
(757) 486-0333
email: swalker@jwlpc.com

Mark D. Williamson
McGuireWoods, L.L.P.
World Trade Center, Suite 9000
101 W. Main Street
Norfolk, VA 23510
(757) 640-3713
email: mwilliamson@mcguirewoods.com

Valley Region

K. Wayne Glass
Poindexter Hill, P.C.
P.O. Box 235
Staunton, VA 24402-0235
(540) 943-1118
email: kwg24402@gmail.com

James L. Johnson
Wharton, Aldhizer & Weaver, P.L.C.
100 South Mason Street
P.O. Box 20028
Harrisonburg, VA 22801
(540) 434-0316
email: jjohnson@wawlaw.com

Paul J. Neal
122 West High Street
Woodstock, VA 22664
(540) 459-4041
email: neallaw@shentel.net

Mark N. Reed
Reed & Reed, P.C.
16 S. Court Street
P.O. Box 766
Luray, VA 22835
(540) 743-5119
email: lawspeaker@earthlink.net

Western Region

David C. Helscher*† (1986-1987)
Osterhoudt, Prillaman, Natt, Helscher, Yost, Maxwell & Ferguson, P.L.C.
3140 Chaparral Drive, Suite 200 C
Roanoke, VA 24018
(540) 725-8182
email: dhelscher@opnlaw.com

Maxwell H. Wiegard
Gentry Locke
SunTrust Plaza
10 Franklin Road, S.E., Suite 900
Roanoke, VA 24011
(540) 983-9350
email: mwiegard@gentrylocke.com

C. Cooper Youell, IV* (2014-2015)
Whitlow & Youell, P.L.C.
28A West Kirk Avenue
Roanoke, VA 24011
(540) 904-7836
email: cyouell@whitlowyouell.com

Honorary Area Representatives (Inactive)

Joseph M. Cochran* (2009-2010)
177 Oak Hill Circle
Sewanee, TN 37375

Robert E. Hawthorne* (1993-1994)
Hawthorne & Hawthorne
P.O. Box 603
Kenbridge, VA 23944
Kenbridge Office: (434) 676-3275
Victoria Office: (434) 696-2139
email: rehawthorne@hawthorne-hawthorne.com

Edward B. Kidd* (1988-1989)
Troutman Sanders Building
1001 Haxall Point
Richmond, VA 23219
(804) 697-1445
email: ed.kidd@troutmansanders.com

James B. (J.B.) Lonergan* (1995-1996)
Pender & Coward, P.C.
222 Central Park Avenue
Virginia Beach, VA 23462
(757) 490-6281
email: jlonerga@pendercoward.com

Michael M. Mannix* (1994-1995)
Holland & Knight, L.L.P.
1600 Tysons Boulevard, Suite 700
McLean, VA 22102
(703) 720-8024
email: michael.mannix@hklaw.com

R. Hunter Manson*
R. Hunter Manson, P.L.C.
P.O. Box 539
Reedville, VA 22539
(804) 453-5600

G. Michael Pace, Jr.* (1991-1992)
General Counsel
Roanoke College
Office of the President
221 College Lane
Salem, VA 24153
(540) 375-2047
email: gpace@roanoke.edu

Joseph W. Richmond, Jr.*† (1985-1986)
McCallum & Kudravetz, P.C.
250 East High Street
Charlottesville, VA 22902
main: (434) 293-8191; direct: (434) 220-5999
email: jwr@mkpc.com

Michael K. Smeltzer* (1998-1999)
Woods, Rogers & Hazlegrove, L.C.
P.O. Box 14125
Roanoke, VA 24038
(540) 983-7652
email: smeltzer@woodsrogers.com

COMMITTEE CHAIRPERSONS AND OTHER SECTION CONTACTS

Standing Committees

FEE SIMPLE
Co-Chairs
Stephen C. Gregory
WFG National Title Insurance Company
1334 Morningside Drive
Charleston, WV 25314
cell: (703) 850-1945
email: 75cavalier@gmail.com

Richard B. "Rick" Chess
Chess Law Firm, P.L.C.
2727 Buford Road, Suite D
Richmond, VA 23235
cell: (804) 241-9999
email: rick@chesslawfirm.com

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Old Republic Title
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(804) 281-7497
email: rwiley@oldrepublictitle.com

Pamela B. Fairchild
Attorney at Law
Fairchild Law
9501 Ferry Harbour Court
Alexandria, VA 22309
cell: (703) 623-9395
email: pam@fairchild-law.com

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(757) 490-6292
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Benjamin D. Leigh
Atwill, Troxell & Leigh, PC
50 Catoctin Circle N.E., Suite 303
Leesburg, VA 20176
(703) 777-4000
email: bleigh@atandlpc.com

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Senior Real Estate Counsel
8000 Towers Crescent Drive
Vienna, VA 22182
office: (703) 760-2401
email: Mark.Graybeal@CapitalOne.com

Henry Matson Coxe, IV
Fidelity National Law Group
8100 Boone Boulevard, Suite 600
Vienna, VA 22182
(703) 245-0284
email: Matson.Coxe@fnf.com

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Protorae Law, P.L.L.C.
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Tysons, VA 22182
(703) 942-6147
email: jhawthorne@protoraelaw.com

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direct: (571) 209-5774
email: jjohnson@thelandlawyers.com

Susan Bradford Tarley
Tarley Robinson, PLC
4808 Courthouse Street, Ste. 102
Williamsburg, Virginia 23188
tel: (757) 229-4281; cell: (757) 880-1962
email: starley@tarleyrobinson.com

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Norfolk, VA 23510
(757) 965-2793
email: clmurphy@bischoffmartingayle.com

Brian O. Dolan
Brian Dolan Law Offices, PLLC
12610 Patrick Henry Drive
Suite C
Newport News, VA 23602
(757) 320-0257
email: brian.dolan@briandolanlaw.com

Committee members: Paula S. Beran
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Lollar Law, P.L.L.C.
P. O. Box 11274
Norfolk, VA 23517
(757) 735-0777
email: Chuck@Lollarlaw.com

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Edward R. Waugaman
1114 Patrick Lane
Newport News, VA 23608
(757) 897-6581
email: Eddieray7@verizon.net

Blake Hegeman
KaneJeffries, LLP
1700 Bayberry Court, #103
Richmond, VA 23226
(804) 288-1672
email: bbh@kanejeffries.com

Committee members: David B. Bullington
Richard B. Campbell
Todd E. Condron
Kay M. Creasman†
Lawrence A. Daughtrey
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Vanderpool, Frostick & Nishanian, P.C.
9200 Church Street, Suite 400
Manassas, VA 20110
(703) 369-4738
email: kcohen@vfnlaw.com

Lori H. Schweller
Williams Mullen
321 East Main Street, Suite 400
Charlottesville, VA 22902-3200
(434) 951-5728; cell: (804) 248-8700
email: lschweller@williamsmullen.com

Committee members: Alan D. Albert
Michael E. Barney*
Steven W. Blaine
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418 East Water Street
Charlottesville, VA 22902-2737
(434) 296-2161
email: hpayne@scottkroner.com

Susan S. Walker* (2015-2016)
Jones, Walker & Lake
128 S. Lynnhaven Road
Virginia Beach, VA 23452
(757) 486-0333
email: swalker@jwlpc.com

Committee members:

David B. Bullington
Todd E. Condron
Henry Matson Coxe, IV
Kay M. Creasman†
Pamela B. Fairchild
Michele R. Freemyers
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Title Insurance
Co-Chairs
Ali T. Anwar
Kase & Associates, P.C.
200 Bendix Road, Suite 150
Virginia Beach, VA 23452
(703) 385-3170
email: alia@kaselawyers.com

Cynthia A. Nahorney, Esquire
Vice President/Area Agency Counsel
Fidelity National Title Group
4525 Main Street, Suite 810
Virginia Beach, VA 23462
main: (757) 216-0491; cell: (757) 406-7977
email: Cynthia.nahroney@fnf.com

Committee members:

Nancy J. Appleby
Michael E. Barney*
Tara R. Boyd
Paula S. Caplinger*†
Henry Matson Coxe, IV
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