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

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SPRING 2020 SUBMISSION DEADLINE: FRIDAY, APRIL 3, 2020

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OF THE VIRGINIA STATE BAR WILL BE HELD ON
FRIDAY, JANUARY 24, 2020, AT 1:00 PM
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CHAIR'S MESSAGE – THINGS CHANGE

By Ronald D. Wiley, Jr.



Ronald D. Wiley, Jr., is the 2019-2020 Chair of the Real Property Section of the Virginia State Bar. He has been a real estate lawyer in Charlottesville since graduating in 1983 from the T. C. Williams School of Law at the University of Richmond. Ron became Underwriting Counsel with Old Republic Title in 2016. He is a frequent presenter of continuing education programs for real estate professionals and has helped teach the Real Estate Transactions and Finance course at the University of Richmond School of Law every year since 2013. Ron has been married to Gail Hyder Wiley since 1980 and they have two adult sons.

Those of you who know me well know teaching is the part of my professional career I enjoy most. Indeed, for nearly two years well into my career as a real estate lawyer I taught high school Earth Science and, in many ways, I still think of myself as a former teacher even though that was more than 25 years ago. As I write this column, I am planning to give a presentation on title insurance for a real estate transactions class at the University of Richmond School of Law, which I have helped teach for several years.

I tried to help my Earth Science students reconcile two apparently contradictory principles – that things change and things stay the same. One cannot study geology and environmental science without recognizing that physical processes on Earth have resulted in change over time. Nonetheless, the constant “laws” of physics and forces of nature can help us predict climate and weather and consider the wonders of space.

Title 55 of the Code of Virginia, dealing with property and conveyances, has been recodified effective October 1, 2019 as Title 55.1. Thanks to Virginia’s Legislative Information Services, the editors of *the FEE SIMPLE* were able to include the Virginia Code Commission’s report on the recodification and comparison tables cross-referencing the Code sections in the former and new titles in the last issue. We hope to be discussing the recodification at a meeting of the Board of Governors and Area Representatives of the Real Property Section early next year. Things change.

But things also stay the same. Very few significant changes in the law governing our practice area were reported by the Code Commission. While we may need to update forms to reference new Code sections, few substantive changes in the law will affect our practices.

There is one change that went largely, if not entirely, unnoticed. § 55.1-136 (former § 55-20.2) now provides “Spouses may own real or personal property as tenants by the entirety for as long as they are married.” (italics added.) The subtle change from “husband and wife” to “spouses” should resolve once and for all any question about whether all married couples, including same-sex couples, can hold title as tenants by the entirety in Virginia.

Even though *Bostic, et al. v. Schaefer, et al.*¹ affirmed “the Virginia Marriage Laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the extent that they prevent same-sex couples from marrying and prohibit Virginia from recognizing same-sex couples’ lawful out-of-state marriages”,² some Virginia lawyers nonetheless held to the notion that Virginia Marriage Laws had to be amended before they would draft deeds to same gender married couples as tenants by the entirety. Even after *Obergefell v. Hodges*,³ these Virginia lawyers pointed to former § 55-20.2

¹ *Bostic, et al. v. Schaefer, et al.*, 760 F. 3d 352 (4th Cir., July 28, 2014).

² *Id.* at 384.

³ *Obergefell v. Hodges*, 576 U.S., 135 S. Ct. 2584, and 192 L. Ed. 2d 609 (2015).

of the Code of Virginia as authority for the idea that only opposite-sex married couples could take title as tenants by the entirety.

As 4th Circuit Judge Floyd wrote in *Bostic*:

We recognize that same-sex marriage makes some people deeply uncomfortable. However, inertia and apprehension are not legitimate bases for denying same-sex couples due process and equal protection of the laws. Civil marriage is one of the cornerstones of our way of life. It allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships, which provide unparalleled intimacy, companionship, emotional support, and security. The choice of whether and whom to marry is an intensely personal decision that alters the course of an individual's life. Denying same-sex couples this choice prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance.⁴

With the recodification of Title 55 as Title 55.1 and the amendment of former § 55-20.2 of the Code of Virginia as new § 55.1-236, our statutory law has recognized the practical effect of the applicable decisions of the U.S. Court of Appeals for the Fourth Circuit and the Supreme Court of the United States on real property law and practice in Virginia. Things do change, after all.

⁴ *Bostic, supra*, at 384.

PROTECTING THE RIGHTS OF UNIT OWNERS OR TENANTS IN THE TERMINATION OF A CONDOMINIUM

By John C. Cowherd



John C. Cowherd is a practitioner in Fairfax County. He has over 13 years of experience litigating and arbitrating real estate, landlord-tenant, community association, and construction law matters. He represents lot or unit owners in disputes with adjoining property owners, community association boards or construction contractors. John Cowherd would like to thank Amelia E. Elze and Norman A. Thomas for their assistance with this article.

The Spring 2019 issue of *The Fee Simple* included an article by attorney John W. Farrell entitled “How to Sell an Existing Commercial Condo Project.” Mr. Farrell represented the Board of Directors of the Unit Owners Association of Sunset Hills Professional Center in disputes over the validity and effect of its termination and the subsequent sale of the property in the condominium to a developer. Mr. Farrell made a case study out of this condominium termination; in his conclusion, he recommended changes to the Virginia Condominium Act and suggested additional strategies useful to boards or purchasers in a commercial condominium termination.

In the lawsuit, I represented a long-term tenant operating a dental practice in one of the condominium units, whom Mr. Farrell’s client moved to join as a third-party defendant. Mr. Farrell’s article raised awareness in the legal profession about condominium terminations; in response, I would like to share my observations about terminations and sales from a unit owner’s (or tenant’s) perspective.

Every year, the condominium becomes a more prevalent type of land development. As condominium developments age, unit owners sometimes want to terminate the declaration of covenants and sell the entire property for redevelopment or rentals. The condominium instruments and statutes provide rules governing such termination and sales. Use of certain amendments to the Condominium Act can threaten the rights of unit owners, long term tenants, and lien holders because the current statute ineffectively addresses problems that arise. Any attorney representing a client with an interest in a Virginia condominium (such as a lease of a commercial unit), must be aware of how termination may affect the client’s interests or interfere with the client’s plans.

Lease by Unit Owner to Tenant; Termination and Sale of Condominium Property:

Sunset Hills Professional Center (“Sunset Hills”) was a 30-unit “low rise” commercial condominium complex in Reston, Virginia. Sunset Hills was subject to a recorded Declaration and Bylaws dated December 11, 1981. On December 31, 2013, the owner of condominium Unit 8 (“Landlord”) executed a 10-year lease (“Lease”) with a dentist (“Tenant”), including renewal and purchase options. The Tenant used the premises continuously for her dental practice and was not in default under the Lease. In November 2016, the Tenant and her Landlord executed and recorded a Memorandum of Lease.

Developmental value of land in this neighborhood increased with the construction of a new Metro station nearby. The new Silver Line further integrated Reston into the Washington, D.C. metropolitan area. In 2015, the Board and certain unit owners devised a plan to sell the entire property to a developer. Landlord notified the Condominium Unit Owner’s Association (“Association”) that a tenant occupied Unit 8 pursuant to a long-term lease.

On August 28, 2016, the developer purchased one unit in the condominium, thereby becoming a member of the Association. On September 9, 2016, the developer informed the Association that it would not agree to take title to the Property if encumbered by the Lease on Unit 8.

On September 29, 2016, the Board convened a special meeting of the unit owners to vote on (1) a Real Estate Sales Contract between the Association, certain unit owners and the developer (“Final Contract”) and (2) a termination of the Condominium simultaneous with settlement upon of the Final Contract. The Contract required the sellers to convey the Property to the developer free and clear of any leases or liens except as specifically assumed. (The Tenant’s Lease was not expressly assumed.) The Final Contract’s purchase price was \$36,500,000 and required the Association to bring such actions for partition as may be necessary to convey the Property.

During that meeting, 75.7% of the interests of the unit owners voted to approve the proposal to terminate and sell. Multiple-unit owners, including the Landlord, voted against the proposal. Neither the Final Contract nor any other Condominium termination-related document was recorded in the Land Records at that time. The developer threatened to sue the sellers to the Final Contract for specific performance.

Initiation of Litigation:

On November 14, 2016, the Association filed its Complaint in circuit court seeking declaratory relief against the Landlord and other “dissenting” unit owners.

The Landlord filed a counterclaim seeking a declaratory judgment that the Final Contract was void and could not terminate the Lease with the Tenant. The Association successfully moved to join the Tenant as a party to determine whether the Tenant must give up possession of Unit 8. The Association argued that recordation of a termination instrument would terminate the Tenant’s Lease, as it would in the event of a foreclosure.

The Tenant filed a crossclaim against the Association seeking a declaratory judgment that the execution or settlement of the Final Contract did not and cannot terminate the Lease.

The Lease and its Possessory Interest Runs with the Land:

The termination could not extinguish the Tenant’s Lease because it, “ran with the land.” Covenants contained in a lease or conveyance, “run with the land” when the benefits and burdens thereof pass with the land to the assignee, into whosoever hands the encumbered land may come.¹ A lease conveys an interest in real property.² The Lease therefore encumbered the commercial condominium unit. The Association and developer possessed actual knowledge of the Lease before signing and voting on the Final Contract. The Tenant did *not* acquire her leasehold interests in the Demised Premises subject to the Final Contract. The recorded Lease afforded the Tenant possessory rights in the condominium unit with priority over *any* possessory interests that a buyer might acquire through the post-termination sale.³

At best, the Association, upon Condominium termination, or the developer, upon purchasing the Property, would become the successor-in-interest to the unit owner. In that regard, a successor landlord is entitled to the benefits of, and is burdened with, the duties and obligations that lease covenants confer and impose on the original parties.⁴ A purchaser takes property *subject to* known leases or options.⁵

¹ *Burton v. Chesapeake Box & Lumber Corp.*, 190 Va. 755, 764 (1950)(*quoting*, 2 Minor’s Institutes, 775).

² *Clark v. Harry*, 182 Va. 410, 414 (1944).

³ *Clark*, 182 Va. at 414; Va. Code § 55.1-1601, formerly, Va. Code § 55-57.1.

⁴ *Taylor v. King Cole Theatres, Inc.*, 183 Va. 117, 122 (1944).

⁵ *Id.*; *Great Atlantic & Pacific Tea Co. v. Cofer*, 129 Va. 640, 646-47 (1921).

The Lease Provided No Basis for any Party to Terminate the Tenant's Possessory Interests:

The Lease did not provide for its termination upon the condominium's termination. Furthermore, the Lease required the Landlord (or its successor) to honor its Covenant of Quiet Enjoyment to the Tenant, "without hindrance or interruption by Landlord or any other person or persons lawfully or equitably claiming by, though, or under Landlord, subject, nevertheless, to the terms and conditions of this Lease." In other words, the Landlord could not lawfully evict the Tenant so long as she performed her Lease obligations.

Association boards', landlords' and tenants' interests often do not align in the event of a termination and sale of the condominium. The majority of unit owners want to maximize the value of the termination sale, but individual unit owners may find their portion of the sale price to inadequately compensate them for an undesired loss of property. Owner-occupants or long-term tenants may find the termination disruptive to their plans to fulfill a business plan or to have their kids finish high school. Condemnation, a recession economy, redevelopment of surrounding areas, or catastrophic failure of building structure may cause unit owners to seek termination as a remedy to a situation not contemplated in the negotiation of the lease. Unit owners or tenants ought to consider carefully what effect, if any, a termination and sale would have on a long-term lease during negotiation.

The Condominium Governing Documents Provided No Basis to Terminate the Lease:

Mr. Farrell describes in his article how his client took the position that the termination of the condominium would terminate the Tenant's lease. However, the Declaration and Bylaws did not allow the proponents of the Final Contract to terminate the Tenant's lease or evict her; in fact, the Declaration protected her leasehold. The Declaration provided that termination would convert the condominium into a tenants-in-common ownership of the Property subject to a partition action. Among the partition statutes, Va. Code § 8.01-91 specifically protects tenants' leasehold rights.

A condominium is essentially a "contract" between the unit owners and the association regarding the subject property. A declaration sets forth the terms of the condominium "contract."⁶ One must review the declaration, bylaws and any recorded amendments to make an initial assessment of a condominium matter. The termination of a condominium consists of termination of that "contract" and causes title to all units and common areas to be held by all unit owners as tenants-in-common.

The Declaration provided that any unit owner may initiate judicial partition of the Property following termination. The Declaration did *not* give the Association any rights to bring suit or sell the Property. The Declaration did not permit the Board to handle the proceeds of any partition sale. Rather, the termination provisions delegate this duty to appointed Insurance Trustees. By the partition statute, "[a]ny person who, before the partition or sale, was lessee of any of the lands divided or sold, shall hold the same of him to whom such land is allotted or sold on the same term on which by his lease he held it before the partition."⁷

The Association had no powers not authorized in the Declaration or Bylaws.⁸ These governing documents did not provide the Association, other signers of the Final Contract, or the purchaser-developer with any authority to terminate the Lease. In fact, by requiring disposition of the property

⁶ *Sully Station II Community Ass'n, Inc. v. Dye*, 259 Va. 282, 284 (2000); *Unit Owners Ass'n of BuildAmerica-1, a Condo. v. Gillman*, 223 Va. 752, 766 (1982).

⁷ Va. Code § 8.01-91.

⁸ *Farran v. Olde Belhaven Towne Owners Ass'n*, 80 Va. Cir. 508, 511 (Fairfax Co. 2010).

post-termination via a partition action, the Declaration confirms that The Tenant's leasehold is protected by Va. Code § 8.01-91.

If a declaration has termination provisions, the legal meaning of those contract terms will play a part in determining the outcome of any litigation. Attempts to leap-frog to a desired outcome by ignoring the declaration and bylaws may result in litigation that takes months or years to resolve.

The Condominium Act Provided No Basis to Terminate the Lease or Evict the Tenant:

The Association relied upon the Virginia Condominium Act ("Condo Act"), as amended, for its assertion that a termination sale would automatically extinguish the Lease. This argument ignored Virginia's plain meaning rule of statutory interpretation, as *no* provision of the Condo Act provides for any such result.⁹

This theory argued by the Association would mean that the Tenant's pre-established leasehold interest is defeated by a later condominium termination agreement made by parties not to her Lease. However, the Declaration did not call for termination of leaseholds upon Condominium termination. The Association itself would gain neither an ownership nor a possessory interest in Unit 8 pursuant to the Declaration.

In 1993, the General Assembly adopted a new statute, Va. Code § 55-79.72:1 (re-codified in 2019 as Va. Code § 55.1-1937) pertaining to condominium terminations ("1993 Amendment").¹⁰ The 1993 Amendment references two scenarios for what might happen following a condominium's termination. First, by default, the recordation of a termination agreement (approved by a requisite majority) causes the condominium property to be held by all unit owners as tenants in common.¹¹ This result is consistent with the prior version of this statute and the 1981 Declaration.¹² Absent an agreement among the now-tenants in common, a unit owner would need to bring a partition suit to divide and/or sell the whole property. The costs and delays associated with partition tend to discourage condominium termination sales where there is no other option to dispose of the property absent an agreement among all unit owners.

Second, the 1993 Amendment describes a new, alternative procedure for disposal of terminated condominium property that may avoid partition or complete agreement among the owners. If the statute applies and its requirements are fulfilled, the association may contract for sale of the property and distribute the proceeds.¹³

In the lawsuit, the Association asserted that under the 1993 Amendment, the legal effect of the termination and sale of the condominium on the Lease was analogous to a foreclosure of a deed of trust. However, no statutory language supported this position. In addition, foreclosure via a deed of trust (or other instrument) recorded *subsequent* to a lease would *not* terminate the lease.¹⁴

Finally, the Association's attempted reliance upon the 1993 Amendment was doubtful for three additional reasons. First, the provisions of the Declaration would seem to control to the extent that they conflict with the 1993 Amendment, and the Declaration contains no language to support the

⁹ *Addison v. Jurgelsky*, 281 Va. 205, 208 (2011); Va. Code § 55.1-1937, formerly, Va. Code § 55-79.72:1.

¹⁰ Va. Code § 55-79.72:1, re-codified as, Va. Code § 55.1-1937.

¹¹ Va. Code § 55.1-1937(G), formerly, Va. Code § 55-79.72:1(G).

¹² Va. Code § 55-79.72 (1975).

¹³ Va. Code § 55.1-1937(E, F, H & I), formerly, Va. Code § 55-79.72:1(E, F, H & I).

¹⁴ Va. Code § 55.1-1601, formerly, Va. Code § 55-57; *VVB Props., Inc. v. Forst*, 33 Va. Cir. 501, 504 (Rockingham Co. 1974).

Association's position. Second, even if the 1993 Amendment applied, the Final Contract does not meet the statutory requirements for a "sale" by the Association per Va. Code § 55.1-1937. Third, even if the Final Contract did comply with the statute's subpart (F), no wording in Va. Code § 55.1-1937 provides for termination of the Lease upon settlement of any sale.

The Tenant's and Association's competing theories regarding the effect of termination of the Declaration on the Lease of Unit 8 were not decided by the Circuit Court because of a settlement. Only one remaining dissident unit owner (not Unit 8's) went to trial with the Association in the declaratory judgment action. The Court ultimately determined that the one remaining dissident unit owner was bound by the Final Contract approved by the super majority. However, the final order did not elaborate in more detail about the legal effect or enforceability of particular provisions of that termination agreement.

The Facts of the Sunset Hills Termination and Sale are Unusual:

Sunset Hills may not be the best "case study" on condominium terminations. These facts were atypical. Termination and resale of Sunset Hills made sense to a majority of unit owners because the new commuter rail station nearby made the land more valuable. Such a windfall is not always the motivating factor. Many terminations occur because of changing economic conditions or a catastrophic structural failure. In terminations and sales, the party desiring to redevelop the property will often buy up enough units in the development to achieve the super-majority necessary to force through a termination. For example, the original developer may fail to sell out all the units before going bankrupt. When it appears the market may turn around, an investor can buy unsold units in bulk. Then, the redeveloper only needs to acquire enough additional units to achieve the requisite number of votes.

In condominium terminations, often the redeveloper controls both the buyer and the seller, threatening the rights of the dissenting unit owners in the selection of the sales price and other terms. If the redeveloper can choose the appraiser for all the units and set the price for the termination sale, the risk of oppression of the dissenting unit owners and their tenants is substantial. The 1993 Amendments to the Condominium Act fail to include sufficient safeguards against such risks to property rights in a "bulk-buyer" scenario. In many ways, unit owners have fewer rights in a condominium termination and sale than a landowner in an eminent domain case, who can get a trial for fair market value by a jury of landowners.

Conclusion:

Purchasers or tenants of a condominium unit ought to have a plan of how they will protect their interests in the event that the requisite majority of units resolve to terminate and sell the property. The interests of the purchaser, board, owners and tenants are unlikely to align financially in a termination. Few unit owners or long-term tenants know how a termination agreement could affect their interests. Some may prefer simply to avoid buying or renting in a condominium; however, as these commercial developments become more prevalent, non-condominium properties become less available. Attorneys who regularly draft or negotiate commercial leases can help their landlord or tenant clients protect themselves by carefully considering the effect of a condominium termination or sale on the parties' interests, and counsel their clients accordingly.

C-PACE TODAY – A VIRGINIA UPDATE*

By William L. Nusbaum



William L. Nusbaum is a shareholder at Williams Mullen in the firm's Norfolk office. His practice focuses on commercial real estate, municipal bonds, economic development incentives, and alcoholic beverage licensing. He graduated with an A.B. from Harvard College in 1977 and received his J.D. from the University of Virginia School of Law in 1980. A past Chair of both the Board of Governors of the Real Property Section of the Virginia State Bar and its Commercial Real Estate Committee, he now serves on the Boards of Directors of the Virginia Association for Commercial Real Estate ("VACRE") and the Hampton Roads Association for Commercial Real Estate ("HRACRE"), and on HRACRE's Legislative Committee. He also represented VACRE in 2015 on the Virginia Department of Mines, Minerals and Energy's Commercial PACE Stakeholder Committee that drafted the Uniform Statewide Financial Underwriting Guidelines for PACE loans. He is a Board member and Secretary of the Virginia PACE Authority.

Commercial Property Assessed Clean Energy ("C-PACE") financing provides funding for certain types of improvements to commercial real estate without incurring mortgage debt or adversely impacting the property owner's balance sheet. The 2009 General Assembly created C-PACE in Virginia as a local option vehicle to finance energy efficiency, water efficiency and renewable energy improvements.¹ Rather than being secured by a deed of trust lien, C-PACE financing is secured by a voluntary special assessment lien recorded against the real estate being improved. The financing comes from a private capital provider (e.g., a bank or a non-bank lender), although, in a few states, public money has been used to originate C-PACE financings. By facilitating new construction and renovation projects, creating jobs and enhancing the real estate tax base, C-PACE can become a valuable economic development tool for Virginia localities.

Statutory Background. The enactment of the C-PACE statute, however, drew no interest from C-PACE capital providers due to a serious flaw in the statute. The Virginia statute made the C-PACE special assessment lien subordinate to mortgage liens (and thus subject to being wiped out by a foreclosure), unlike in other states where the C-PACE special assessment lien was on par with the lien of real estate taxes and thus superior to mortgage and deed of trust liens.

In late 2014, however, a group of C-PACE advocates hired lobbyist Preston Bryant of McGuireWoods LLP to help fix this statutory flaw, and together they obtained the agreement of the Virginia Bankers Association not to oppose giving the C-PACE special assessment lien parity with the lien of real estate taxes in exchange for adding a statutory requirement for lender consent to the C-PACE financing. In the ensuing (2015) session, the General Assembly enacted the compromise.² Also pursuant to the 2015 legislation, a statutorily mandated Stakeholder Committee comprised of interested parties (including your author) met over a period of months to develop voluntary C-PACE underwriting

* This article provides an update on Virginia developments in Commercial Property Assessed Clean Energy ("C-PACE") since the previous article in this publication, introducing C-PACE, by the author and Abigail C. Johnson (See William L. Nusbaum & Abigail C. Johnson, *Property Assessed Clean Energy ("PACE") Financing Comes to Virginia*, 37 Fee Simple, no. 1 at 49 (2016).) and their C-PACE presentation on March 2, 2018, at the Virginia State Bar Real Property Section's Advanced Real Estate Seminar. (Ms. Johnson is President of Abacus Property Solutions and, since 2018, President and Executive Director of the Virginia PACE Authority.)

¹ Act of Mar. 30, 2009, ch. 773, 2009 Va. Acts 1656 (codified as amended at VA. CODE ANN § 15.2-958.3 (Cum. Supp. 2019)).

² Act of Mar. 23, 2015, ch. 389, 2015 Va. Acts 738; Act of Mar. 23, 2015, ch. 427, Va. Acts 816.

guidelines for localities' C-PACE ordinances, ultimately issuing its report on December 1, 2015.³ As a result, C-PACE lenders started to become interested in finding deals in Virginia; this led to localities recognizing that perhaps C-PACE could finally realize its potential in Virginia and began looking into starting their own C-PACE programs.

On January 16, 2019, Abigail Johnson and your author learned that State Sen. Lynwood Lewis (D – Accomack), had introduced SB 1559, to add “shoreline resiliency”⁴ to the list of projects that could be funded using C-PACE, as a result of a suggestion made to him the previous summer by Norfolk City Councilwoman Andria McClellan, a passionate C-PACE advocate herself. Recognizing that resiliency was much broader than just shorelines, that afternoon, your author, Ms. Johnson and Cliff Kellogg of the C-PACE Alliance partnered to draft an Amendment in the Nature of a Substitute for SB 1559, to (1) expand the scope of the bill to cover all types of resiliency improvements, (2) add storm water management improvements, and (3) correct some lingering issues and ambiguities in the statute. The Amendment in the Nature of a Substitute was presented to Sen. Lewis that evening, accepted by him a few days later, and then, over the ensuing weeks, approved unanimously by the legislative committees and both houses of the General Assembly,⁵ becoming law July 1, 2019.

Local Developments. As a local option, C-PACE requires each locality to adopt its own ordinance creating its C-PACE program. The locality may craft its own ordinance and competitively procure (i.e., by a request for proposals, or “RFP”) a third-party program administrator (“P. A.”) to operate the program. It may include in its form contract attached to the RFP a clause permitting “cooperative procurement,”⁶ by which it permits other localities to elect to “ride on” its C-PACE contract, engaging the program administrator competitively procured by the first locality (rather than the subsequent locality issuing an RFP pursuant to its own competitive procurement process). Alternatively, the locality may follow one of the other options allowed by the Virginia Public Procurement Act; however, to date, all localities that have adopted a C-PACE ordinance and engaged a P. A. have either issued an RFP or ridden on another locality’s competitive procurement process.

As of mid-October, C-PACE ordinances have been adopted by Arlington County (November 18, 2017), City of Fredericksburg (November 13, 2018), Loudoun County (February 21, 2019), Fairfax County (March 19, 2019) and City of Petersburg (July 2, 2019). Municipal governments (at some level) in Chesapeake, Dumfries, Lynchburg, Norfolk, Portsmouth, Richmond and Roanoke are also considering or recommending the adoption of a C-PACE ordinance. Brief discussions of the known, adopted ordinances follow:

Arlington County. After a statutorily mandated Stakeholder Committee comprised of interested parties (including your author) issued a report with voluntary C-PACE underwriting guidelines for localities' C-PACE ordinances on December 1, 2015, Arlington County began its process to launch Virginia's first C-PACE program as part of its wide-ranging environmental initiative. Because of the novelty of C-PACE in Virginia, Arlington County first engaged Sustainable Real Estate Solutions (“SRS”) (a for-profit P. A. with contracts around the country), as its P. A. and to help design the Arlington C-PACE program (the usual practice is to adopt the ordinance, and then engage a P. A.).

³ Virginia Department of Mines, Minerals and Energy, Final Uniform Statewide Financial Underwriting Guidelines for Clean Energy Loans Made by Localities under §15.2-958.3 of the Code of Virginia (Dec. 1, 2015) (<http://townhall.virginia.gov/L/ViewGDoc.cfm?gdid=5861>).

⁴ By reference to the second paragraph of Va. Code Ann. § 10.1-603(25), it can be inferred that the General Assembly considers “shoreline resiliency” to mean adaptation to recurrent flooding along a shoreline and mitigation of future shoreline flood damage.

⁵ Act of Mar. 21, 2019, ch. 753, 2019 Va. Acts __ (codified as amended at VA. CODE ANN. § 15.2-958.3 (Cum. Supp. 2019)).

⁶ VA. CODE ANN. § 2.2-4304 (Supp. 2019).

The process proved to be a long one, though, and it took many months before Arlington's C-PACE ordinance was finally adopted on November 18, 2017.

Subsequent to the adoption of Arlington's ordinance, capital providers and others expressed concerns about whether the ordinance's delegation to capital providers of (1) the responsibility for servicing the C-PACE financing and, more importantly, (2) enforcing the C-PACE special assessment lien went beyond the scope of the statute, violating Dillon's Rule. This led Loudoun County, which was then studying how to structure its C-PACE ordinance, to request the Attorney General of Virginia to issue an opinion on the legality of those aspects of the Arlington ordinance. That opinion⁷ concluded that both of those aspects of the Arlington ordinance were authorized under the statute (and consequently, no Dillon's Rule analysis appeared in the AG opinion). Nonetheless, most capital providers have privately continued to express concerns about the "hands-off" aspects of the Arlington ordinance. (In addition to the above concerns, the County also does not execute any documents in connection with a C-PACE financing, which may be unique in the country). As a result, the Arlington County official who oversees its C-PACE program recently inquired of a limited circle of stakeholders if their organization had any issues with Arlington's C-PACE program, including the current Ordinance.⁸ This inquiry suggests Arlington County may be concerned about its failure to close the first deal in the two (2) years since its ordinance was adopted, which could lead to the Arlington ordinance being amended to be made more attractive to capital providers in the future.

The Arlington P. A. contract with SRS included a cooperative procurement clause, allowing other jurisdictions to elect to "ride on" the Arlington ordinance and its choice of P. A., though as of this writing, no locality has chosen to do so. Since the adoption of Arlington's ordinance, and in response, in part, to Arlington having engaged a for-profit entity as its P. A., an independent, interdisciplinary group of C-PACE professionals (again, including your author) organized a non-profit P. A. called the Virginia PACE Authority ("VPA") to offer an open-model, lower-cost alternative to localities as they launch their respective C-PACE programs.

City of Fredericksburg. The Fredericksburg ordinance was adopted in response to the prospect of using C-PACE in the capital stack for Fredericksburg's proposed minor league baseball stadium to house the relocated Potomac (Md.) Nationals (to be renamed the Fredericksburg Nationals). (In states like Virginia, where the C-PACE statute requires local ordinance adoption, the existence of a developer's high-profile project is the most common impetus for the adoption.) For the baseball stadium project, the City decided to proceed without engaging a P. A., and to operate the C-PACE program itself, using City staff. A few months later, however, because of the very low interest rates available in the tax-exempt bond market, the decision was made to finance the stadium using bonds instead. Now, in anticipation of other C-PACE projects entering its pipeline, Fredericksburg has engaged VPA's Abigail Johnson to assist it in drafting C-PACE program guidelines and launching its C-PACE program.

Loudoun County. In Loudoun, the County Board of Supervisors embraced the "open model" for a C-PACE program, in which the property owner is allowed to bring its own team to the table, so long as the P. A. has qualified them as knowledgeable about C-PACE (where, and to the extent, relevant to their role in the transaction). In that context, of course, a greater understanding of C-PACE will be required of an architect or mechanical engineer than a surveyor or title examiner. Loudoun also seized on the flexibility offered by the Attorney General's opinion, imposing the loan servicing obligations on the capital provider, if willing, or else on the P. A. If the capital provider will service the C-PACE financing, then the Borrower is to make payments directly to the capital provider, but if the P. A. will be providing servicing, then the Borrower will make its payments in the traditional manner for C-PACE financings, sending its payments to the County, and the County then remitting

⁷ 2019 OP. VA. ATT'Y. GEN. 18-056.

⁸ Out of respect for the Arlington official and the e-mail recipient who shared the e-mail with the author, no citation is included to this e-mail correspondence.

them to the capital provider with assistance from the Program Administrator. Also, since Loudoun adopted its ordinance prior to SB 1559 being enacted and becoming effective, its ordinance does not specifically include resiliency improvements and storm water management improvements in its definition of eligible improvements, but the County expects to add resiliency and storm water management improvements once its Program has been operating for a few calendar quarters.

Loudoun also decided that, rather than ride on the Arlington ordinance, it would also issue an RFP to procure a P. A. to run its program. On June 12, 2019, Loudoun awarded its P. A. contract to VPA. Since then, VPA has stood up the Loudoun C-PACE program, preparing program guidelines and documentation, and the Loudoun C-PACE program opened for business with a soft opening on October 4, 2019, and an official opening on November 7, 2019, and is already working on its first three deals, totaling roughly \$12 million.

Fairfax County. Fairfax County, in the drafting of its ordinance, chose to convene a stakeholder committee to advise it on the content and structure of its C-PACE ordinance. That stakeholder committee (including your author) worked through January and February 2019, reviewing, commenting and helping to mold the draft Fairfax County ordinance. Fairfax County's ordinance tracked the catch-all language in the Loudoun County ordinance's list of eligible improvements, meaning that resiliency and storm water management improvements will also be eligible under the Fairfax County ordinance.⁹ Also, Fairfax County, like Loudoun County, chose to eschew riding on the Arlington County C-PACE cooperative procurement provision, instead electing to pursue its own RFP process to select its P. A., which process was ongoing as this issue went to press.

City of Petersburg. As in Fredericksburg, the City of Petersburg's adoption of its C-PACE ordinance was driven by a high-profile project (the rehabilitation of an abandoned hotel) whose developer sought to use C-PACE in the project's capital stack. In response, the City Council moved quickly to adopt a C-PACE ordinance modeled on Loudoun County's and chose to "ride on" Loudoun County's procurement of VPA as the P. A. for the Petersburg C-PACE program, with VPA being officially chosen as Petersburg's P. A. in August 2019. Petersburg's C-PACE program is expected to open for business in the fourth quarter of 2019. According to VPA, Petersburg also has three potential projects, including the aforementioned hotel project, which could be as much as a \$5 million in C-PACE financing.

It has been a long and winding road for C-PACE since the General Assembly adopted Virginia's first C-PACE statute ten (10) years ago. That road has been a frustrating one for C-PACE advocates, given that as of this writing, Virginia's first C-PACE deal has yet to close. The momentum, however, has accelerated rapidly through the first three quarters of 2019, and it is very likely that by the end of the fourth quarter, Virginia's long C-PACE drought will finally end. The coming year holds promise of a maturing C-PACE market taking hold in Virginia, improving property owners' finances, generating construction jobs, bolstering real estate tax revenue for localities and creating a new source of deal flow for Virginia commercial real estate attorneys.

⁹FAIRFAX COUNTY, VA., CODE OF ORDINANCES § 127-2-1(a)(5) (2019).

LEGAL REPRESENTATION FOR AND ADVERSE TO SERVICEMEMBERS IN VIRGINIA¹

By Kathryn N. Byler and Austin Streeter



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Austin Streeter is a former Explosive Ordnance Disposal Chief Petty Officer in the United States Navy, Austin Streeter is a third year law student at Regent University School of Law where he serves as a staff editor on the Regent University Law Review and the secretary for the Business Law Society. His legal experience includes an apprenticeship with Jones, Walker & Lake in Virginia Beach and a judicial internship with Chief Judge Larry D. Willis of the Chesapeake Juvenile and Domestic Relations Court. Austin intends to practice business or property law.

Military service, like any job, has positive and negative aspects. Some of the benefits of serving in the armed forces include job security, twenty-year retirement, the post-9/11 GI Bill, and comprehensive employer healthcare coverage. Although military service has many benefits, drawbacks include deployments, relocating every few years, and the myriad of regulations, laws, and procedures. The average active duty service member has a permanent change of duty station an average of 3.8 times during his or her career.² The possibility of relocating every few years means that military members are left to adapt to a new set of laws regarding renting, financing, purchasing, and/or selling real property every time they must move. This transient lifestyle requires military members to process all the information concerning the transaction and requires them to understand how to navigate issues that inevitably arise in their new location. Depending on the experience and astuteness of the service member, service members might not understand all of the resources at their disposal when faced with such an issue. This article will assist attorneys help service members navigate these resources to reduce legal costs and increase client satisfaction. Section I explains the purpose, functions, and limitations of legal assistance offices; Section II will look at other legal resources that are available for service members and Section III will provide insight for attorneys representing military members.

I. Purpose, Functions, and Limitations of Military Legal Assistance Offices

The Legal Assistance Program was established in 1943 to provide general advice to service members;³ it is a component of the Department of Defense regulated by the respective branches of service. Currently, the Air Force, Army, Navy, and Coast Guard have Legal Assistance Offices that

¹ This is the first of a two-part series. Another article will follow in the spring edition of the Fee Simple to address some of the intricacies of the Service Member Civil Relief Act such as notice, appointment of a *Guardian ad Litem*, and maximum interest rates intended to protect deployed service members. The second article will also note remedies available to landlords, mortgage holders, and other persons adverse to deployed service members.

² DEF. RESEARCH, SURVEYS AND STATISTICS CTR., STATUS OF FORCES SURVEY OF ACTIVE DUTY MEMBERS (2013 & 2014 SOFS-A) 39 (2016), http://download.militaryonesource.mil/12038/MOS/Reports/SOFS-A_Briefing_20160311.pdf.

³ Colonel Felix A. Losco, Article: Time to Reconsider In-court Representation of legal assistance Clients, 73 A.F. L. Rev. 1, 3 (2015) (citing War Dep't Circular 74, Legal Advice and Assistance for Military Personnel (1943)).

provide legal help to active duty members of the armed forces.⁴ All of the services prioritize assistance to deploying members for resolving legal issues.⁵ The Army and Coast Guard provide priority to members of their branch of service.⁶ The Navy and Air Force instructions give the authority to the local office to further regulate the priority of legal services.⁷ Each branch offers a similar breadth of legal services which includes advice, general document preparation, and communication with the opposing party; additionally, each branch restricts services based on the time, resources, and experience of its available attorneys.⁸

The branches vary in the type of legal help their legal assistance offices are authorized to provide. However, all of the branches offer service members assistance in matters relating to landlord and tenant issues, real estate closings, mortgages, and foreclosures. Because state and federal law provide different protections for tenants, all branches of service provide advice, correspondence, negotiation, lease review, and lease drafting for tenants entering and ending residential leases.⁹ This advice includes compliance with the Virginia Landlord Tenant Act (VLTA) and the Service Member Civil Relief Act (SCRA).¹⁰ In the area of landlord tenant-law, service members are likely the most vulnerable perhaps because of the transient nature of their service and the number of airmen, soldiers, and sailors that would be renting in an unfamiliar location for the first time.¹¹

⁴ See SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 8 (2018); COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 2 (2017); JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 22 (2013); RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 5 (2011).

⁵ See SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 8 (2018); COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 2 (2017); JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 22 (2013); RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 5 (2011).

⁶ COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 7 (2017); RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 5 (2011).

⁷ SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 10 (2018); JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 41 (2013).

⁸ See SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 7-8 (2018); COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 4-6 (2017); JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 40-41, 48 (2013); RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 7, 9-11 (2011).

⁹ See SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 10 (2018); COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 5 (2017); JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 47 (2013); RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 7, 10 (2011).

¹⁰ See SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 10 (2018); COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 5 (2017); JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 47 (2013); RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 7, 10 (2011).

¹¹ In 2018, PRG Real Estate Management reached a settlement agreement for alleged violations of SCRA providing \$1.59 million in damages over accusations that PRG obtained default judgments against service members and imposed early termination fees for leases. Press Release, U.S. Dep't of Justice, PRG Real Estate Management to Pay \$1.59 Million for Alleged Violations of the SCRA (Mar. 15, 2019), <https://www.justice.gov/opa/pr/justice-department-obtains-its-largest-ever-settlement-against-property-management-company>.

Although tenant help is widely given, assistance to a landlord is far more limited. Landlords are referred elsewhere for issues regarding personal, commercial enterprises or investment properties.¹² (However, legal assistance officers *will* help when service members are seeking to rent out their principal residence due to a permanent change of station.¹³) These services include preparation and review of leases, advice concerning the landlord's rights, responsibilities, and remedies under the VLTA and SCRA, and negotiations with tenants or a prospective tenant.¹⁴ Additionally, legal assistance officers are authorized to explain the process of real estate closings, types of mortgages, the foreclosure process, and how the SCRA can affect real property, but they must refer these issues to a civilian attorney for further help beyond the limited scope legal assistance officers are authorized to give.¹⁵

Understanding the areas of legal advice provided by the different services is important, as is understanding the limitations of each of the services' legal assistance offices. The most significant differences between the services are the limitations placed on legal assistance offices by their branch of service. The Navy's instruction regarding legal assistance officers has the strictest guidelines limiting the help provided to service members while the other services delegate the authority to restrict services to the local legal assistance office.¹⁶ The Army's legal assistance offices may assist in drafting or recommending provisions for the sale, purchase, or leasing of real property;¹⁷ the Airforce, however, will not review closing documents for their legal sufficiency but will refer the client to civilian counsel in order to preclude service members from signing an unconscionable agreement.¹⁸ On the other hand, the Coast Guard's legal assistance offices may provide advice and review of purchase contracts, and they may also advise on rights and remedies of other property issues affecting homeowners.¹⁹ In the event the service member's legal issue is outside the authority of the legal assistance office, the service member still has resources that can assist in resolving the issue.

¹² SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 7, 10 (2018); COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 5 (2017); JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 48 (2013); RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 10, 16 (2011).

¹³ SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 7, 10 (2018); COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 5 (2017); JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 48 (2013); RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 10 (2011).

¹⁴ SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 7, 10 (2018); COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 5 (2017); JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 48 (2013); RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 10 (2011).

¹⁵ SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 7 (2018); COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 5 (2017); JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 40, 48 (2013); RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 11 (2011).

¹⁶ Compare SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 10 (2018); COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 4, 7 (2017); RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 9-16 (2011), with JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 41 (2013).

¹⁷ RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 10 (2011).

¹⁸ SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 7 (2018).

¹⁹ COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 5 (2017).

II. Other Resources

All of the branches offer in-court representation in limited circumstances when specific criteria are met, and all of the branches require attorneys to comply with licensing requirements of the state in which the attorney will appear in court.²⁰ The same limitations apply to the expanded in-court representation as to the previously mentioned legal services provided by the legal assistance offices.²¹ Each branch varies on service members' qualification for in-court representation.

The Navy expanded legal assistance program (ELAP) is very restricted, and all cases taken on by the Navy's ELAP involve SCRA violations. The Navy expanded program is not generally authorized for independent legal assistance attorneys and in "the rare circumstances when ELAP may be provided commands are encouraged to carefully screen cases."²² Additionally, to qualify for assistance, the Navy's program requires the active duty service member to have a rank of E3 or below or have a rank of E4 with dependent, have a case of significant importance or affecting other service members, or the military member being unable to afford an attorney.²³

The Air Force leaves the authorization for ELAP to the Legal Issue Division, coordinated through the service members chain of command.²⁴

The Coast Guard also leaves their ELAP approval up to a local authority, the Command Director.²⁵ The Coast Guard limits its program by restricting the eligible cases to minor civil and certain misdemeanor criminal matters, ensuring legal assistant attorneys adhere to state and local bar requirements, and providing representation only when potential legal fees exceed what the service member could reasonably afford.²⁶

The Army authorizes in-court representation for active duty service members with approval of a supervising attorney.²⁷ The Army's in-court representation is the most utilized of the different branches.²⁸ In 2014, the Army assisted 653 of their members incourt through the legal assistance officers, and 483 of those soldiers were represented by the Fort Lee legal assistance office located in Petersburg.²⁹

²⁰ SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 8, 12 (2018); COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 5, 8, 10 (2017); JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 101-04 (2013); RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 14-15 (2011).

²¹ SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 8, 12 (2018); COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 5, 8, 10 (2017); JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 101-04 (2013); RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 14-15 (2011).

²² JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 101 (2013).

²³ JUDGE ADVOCATE GENERAL, JAG INSTRUCTION 5801.2B, at 102-03 (2013).

²⁴ SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-304: LEGAL ASSISTANCE, NOTARY, PREVENTATIVE LAW, AND TAX Programs 12 (2018)

²⁵ COMMANDANT U.S. COAST GUARD, COMMANDANT INSTRUCTION 5801.4F: LEGAL ASSISTANCE PROGRAM 10-11 (2017)

²⁶ *Id.*

²⁷ RAYMOND T. ODIERNO, DEP'T OF THE ARMY, ARMY REGULATION 27-3: THE ARMY LEGAL ASSISTANCE PROGRAM 14-15 (2011).

²⁸ Losco, *supra* note 2, at 7.

²⁹ *Id.*

Another option: the legal assistance attorneys may refer cases to the ABA Military Pro Bono Project (ABA Project).³⁰ The ABA Project provides support in situations where the legal assistance office is unable to provide help to service members who have legal issues.³¹ The ABA Project connects civilian attorneys who volunteer to provide pro bono assistance to military members who are financially unable to retain an attorney.³² Only legal assistance attorneys can refer cases to the ABA Project—if it meets specific criteria, to wit:³³ the case must have merit, and the service member must meet specific income guidelines.³⁴ After the legal assistance officer determines that the case meets those criteria, the supervising attorney must verify the case has merit and may then send the case to the ABA Project.³⁵ The ABA Project director will also verify the merit of the case while determining the case's placement with a civilian attorney. Currently, the ABA Project has open cases in sixteen states. There is one Virginia case open as of July 2019.³⁶

III. Conclusion

In assisting military members, it is crucial to consider the member's experience in navigating the challenges relating to real estate situations that arise from one's service in the military. A person who serves for thirty years and achieves a high rank will have significantly more knowledge about navigating resources than a service member who is trying to get his security deposit returned before his first deployment. Additionally, if the service member is having an issue with his or her landlord concerning renting his/her principal residence before deployment, or with SCRA violations that do not require in-court representation, referring the service member to the legal service office will increase the law firm's goodwill, customer relations, and word-of-mouth advertising.

Variances in legal advice offered through military legal assistance offices at a given time or location are considerable. The only way to know if legal representation is available through a military office or through the ABA Project is for a potential client to go through the process of soliciting assistance and being appropriately qualified. Because most legal matters have deadlines and/or court appearances, time is of the essence. A potential client should waste no time in contacting his/her legal assistance office for help. If denied assistance, the next step would be contacting the ABA Project for potential qualification and placement with a pro bono attorney. If neither of these options is viable, a local attorney whose practice focuses on real estate transactions should be retained promptly.

³⁰ JUDGE ADVOCATE GENERAL, *supra* note 3, at 93.

³¹ MILITARY PRO BONO PROJECT, Military Pro Bono Project Information, https://www.militaryprobono.org/newcases/item.3217-Information_for_Servicemembers_Seeking_Pro_Bono_Help_Through_the_Project (last visited June 9, 2019).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ MILITARY PRO BONO PROJECT, ABA Military Pro Bono Project FAQs, https://www.militaryprobono.org/probono/item.3210-Pro_Bono_Case_Opportunities_for_Volunteer_Attorneys (last visited June 9, 2019).

³⁶ MILITARY PRO BONO PROJECT, Cases, https://www.militaryprobono.org/new_cases/ (last visited July 31, 2019).

PRACTICE POINTERS FOR DEEDS OF TRUST*

By Curtis L. Sano



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Mr. Sano received his BA from Yale University and has a JD and a Master's of Public Policy from University of California at Berkeley. Prior to joining Holland & Knight, he practiced in San Francisco and Hawaii.

Deed of Trust – when bordering a right of way, the center line isn't always the edge of your collateral

In Virginia deeds of trust, the granting clause contains a description of the property that is encumbered by the deed of trust. Often, as one of the appurtenances, an item like the following will be listed:

All right, title and interest in all land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the Land, to the center line thereof...

The concern here is the clause “to the center line thereof.” I remove the clause “to the center line thereof” in all of my deeds of trust when I represent the lender and ask the lender’s counsel to remove it from their forms when I represent borrowers. Why? The problem is that in Virginia, the center line of the right of way isn’t always the reversion that the grantor receives in the event that the road is abandoned.

The general rule in Virginia is that “... on the condemnation or dedication of land for use as a public highway, the public acquires only an easement in the land condemned or dedicated. The fee remains in the owner subject to the right of passage.” [citations omitted] *Bond v. Green*, 189 Va. 23, 32 (1949).

Therefore, if the right of way is ever abandoned, the land will revert to being a part of the parcel from which it was originally taken. This means that the grantor’s reversionary rights *may be* to the center line of the right of way, but in many cases, the reversionary rights may encompass greater or lesser land than to the center line.

If the road was dedicated in a subdivision at the same time that the lots were laid out and the right of way was later abandoned, the fee simple to the area formerly occupied by the road would vest in the neighboring property owners to the center line of the right of way.¹

However, if the right of way was originally dedicated or taken from a parcel in any case where the former boundary line between two lots is not down the middle of the right of way dividing them, then

* Copyright 2019. Permission hereby granted for publication of the above article by the Virginia State Bar in the Fall 2019 FEE SIMPLE publication and any reprints thereof, and for posting of the above article on the Virginia State Bar Real Property Section website. This article is the first in a series of practical pointers for drafting of deeds of trust. Any comments, questions or corrections would be appreciated.

¹ Code of Virginia § 15.2-2274.

if the right of way is ever abandoned, the fee title to the former right of way becomes a part of the parcels from which it was dedicated or taken.²

Therefore, if a deed of trust contains a grant of the grantor's rights to the right of way extending to the center line of the adjoining road, there are two potential problems. If the original parcel from which the right of way was dedicated or taken extends beyond the centerline of the right of way, the deed of trust will not encumber all of the grantor's property. Conversely, if the original parcel from which the right of way was dedicated or taken stops short of the centerline of the right of way, the grantor will be attempting to encumber property it does not own and may be in violation of its warranty of title.

My recommendation is that counsel preparing or reviewing a deed of trust should remove (or request the removal of) any language regarding the center line of adjoining roads and simply have the grantor grant whatever rights it may have in the potential reversion of land within any adjoining right of way.

² Tidewater Area Charities, Inc. v. Harbour Gate Owners Ass'n, Inc., 240 Va. 221, 227 (1990).

Editor's Note: The following was published in the Spring issue of the Fee Simple. Because Title 55.1 replaced Title 55 on October 1, 2019, we are reprinting for convenience the conversion tables of former Title 55 and current Title 55.1 of the Code of Virginia.

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 necessities, 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>.

APPENDIX A—COMPARATIVE TABLE: PROPOSED TITLE 55.1 TO TITLE 55

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1-604	Tract of land lying in both coordinate zones.	55-291
1-605	Definition of systems by National Ocean Service/ National Geodetic Survey; adopted.	55-292
1-606	Position of systems.	55-293
1-607	Limitations on use of systems.	55-294
1-608	Limitation on use of name of systems.	55-295
1-609	Use of system not compulsory.	55-296
1-610	Old Dominion University designated as administrative agency.	55-297
		55-297.1 (repealed)
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8.01-130.1	Remedy for rent and for use and occupation.	55-227
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8.01-130.5	Procedure for trial on warrant in distress.	55-230.1
8.01-130.6	On what goods levied; to what extent goods liable; priorities between landlord and other lienors.	55-231
8.01-130.7	Procedure when distress levied and tenant unable to give forthcoming bond; what defense may be made.	55-232
		55-232.1 (repealed)
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8.01-178.1	Waste; who is liable.	55-211, 55-212, and 55-213
8.01-178.2	Civil action for waste; double damages.	55-214
8.01-178.3	Waste for tenant to sell or remove manure from leased premises.	55-215
8.01-178.4	Waste committed during pendency of action.	55-216
Chapter 18.01 of Title 8.01	ASSIGNMENTS FOR BENEFIT OF CREDITORS.	Chapter 9
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8.01-525.2	Substitution of another trustee by creditors.	55-157
8.01-525.3	Procedure to question claim of creditor.	55-158
8.01-525.4	Provision to bar further claim by creditors who accept deed.	55-159
8.01-525.5	Compensation of trustee.	55-160
	Article 2. Assignment of Salary, Wages, or Income.	Article 2 of Chapter 9
8.01-525.6	Petition for assignment of salary, wages, or income for the benefit of creditors.	55-161
8.01-525.7	Trustee; rights and duties; compensation.	55-162
8.01-525.8	Resignation of trustee.	55-163
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8.01-525.10	Exemption from garnishment, levy, or distress.	55-165
8.01-525.11	Termination of assignment by court.	55-166
8.01-525.12	Clerk to preserve assignment; fees.	55-167
Chapter 20 of Title 32.1	DISPOSITION OF ASSETS BY NONPROFIT HEALTH CARE ENTITIES.	Chapter 30
32.1-373	Definitions.	55-531
32.1-374	Obligations of nonprofit entity.	55-532
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

36-172	Claiming first-time home buyer status.	55-556
36-173	Tax exemption; conditions.	55-557
36-174	Withdrawal of funds from account for purposes other than eligible costs for first-time home purchase.	55-558
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Chapter 14.7:3 of Title 45.1	MINERAL RIGHTS.	three sections from Chapter 8
45.1-161.311:9	Presumption that no minerals, coals, oils, or ores exist in certain lands.	55-154
		55-154.1 (repealed)
45.1-161.311:10	Presumption regarding estate of owner of mineral rights.	55-154.2
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54.1-2354.1	Definitions.	55-528
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Chapter 2 of Title 57	CHURCH PROPERTY; BENEVOLENT ASSOCIATIONS AND OBJECTS.	Chapter 2
	Article 1. General Provisions.	
		55-26 (repealed)
57-6.1	Validity of literary, educational, and charitable gifts, grants, devises, or bequests.	55-26.1
		55-27 through 55-34 (repealed)
Chapter 1 of Title 64.2	DEFINITIONS AND GENERAL PROVISIONS.	55-19.5
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64.2-108.2	Provision in certain trust void.	55-19.5

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR ANNUAL MEETING

Minutes

Friday, June 14, 2019
Oceanaire Hotel, Virginia Beach, VA

Chairman Kay Creasman called the meeting to order at 12:06 p.m.

The minutes of the Spring Meeting of the Board of Governors and Section, held March 1, 2019, were adopted without comments or questions. Kay noted that the minutes of the Summer Meeting would be circulated to the Board soon after this meeting for comments, with final adoption to occur at the September meeting.

The Chair reported that the Section is in good shape financially and that the Bar has the ability to fund any shortfalls. Kay also noted that she had had a question about a \$5k+ charge to the Section and learned that it comprised costs from the Advanced Real Estate Seminar, including the \$25.00 membership credit that 114 people received. Kay says she read the regulations regarding reimbursements and had intended to curb those in compliance with the strictures of the regulations but then learned that the Bar would cover expenses and encouraged all members to submit receipts for one night's hotel stay.

STANDING COMMITTEES

1. **Membership** — Co-Chairs: Ron Wiley & Pam Fairchild
 - a. Ron reported that the credit for the Section's increase in membership goes to excellent programs, the newsletter, and the collegiality of the Section. As of 6/7/19, the Section has 1,960 members (125 members joined since our October meeting), which will provide more dues for the Section to spend.
 - b. Soliciting member sign-up at the Advanced and Annual meetings was successful. There was good participation by volunteers manning tables at these programs. It was also a good opportunity to talk about the Section and remind people of the value of membership.
 - c. New Area Representatives were nominated and accepted into the Section as follows:
 - (1) **Jon Brodegard** nominated by Kay M. Creasman: young attorney who began working with Old Republic last year; has settlement experience.
 - (2) **Amanda Hayes** nominated by Steve Gregory: 2015 graduate of University of Illinois School of Law, active in VLTA and the Bar, has a master's degree in social work, title agent.
 - (3) **Kristen Jurjavich** nominated by J.B. Lonergan: Pender & Coward attorney, #1 in her Regent Law class.
 - (4) **Ralph Kipp** nominated by Lawrence Daughtrey: admitted to the Bar in 1979, graduate of T.C. Williams School of Law, practices in Fairfax.
 - (5) **Vanessa Carter** nominated by Susan Pesner: practicing real estate since 2013, settlement experience at Shaheen Law, now at Glasser & Glasser in foreclosure department, working on title actions

Steve asked who is responsible for sending the new Area Representatives the Section handbook. Kay said the secretary technically has such responsibility, but she has been doing it as she sends it along with a letter encouraging them to join a committee.

2. Fee Simple — Co-chairs: Steve Gregory & Rick Chess

- a. The Fee Simple was sent out electronically on June 10, 2019. It includes the full report from Virginia Legislative Services / Code Commission on the move to Title 55.1, including three charts that will help make the transition easier. Steve reported that he will be discussing alternate ways to extend the May 1 publication deadline, given the long-running legislature sessions. His assistant, Hayden Anne Breedlove, has expressed an interest in continuing for another year, and Steve would like to keep her on as assistant for another year, if no objection from the Section. Members expressed gratitude and were favorable to Ms. Breedlove's continuing to work on the journal.
- b. The Chair noted that all Board members and ARs have received emailed copies of the conversion charts. Before July 1st, all Section members will receive a separate email with the charts attached. The charts are, or will be, posted on the Section webpage and may be posted on the Bar's website for non-RE attorneys to access. She stated that she thinks there must be a provision for automatically validating old Code references in documents that were written prior to the re-codification.

3. Programs — Co-Chairs: Kathryn Byler & Ben Leigh

- a. Kathryn reported that the Annual CLEs went smoothly and had excellent speakers. She reported, and Tracy confirmed, that the Advanced will not be at Kingsmill next year because Kingsmill overbooked for that weekend. The Advanced will be held instead at the Williamsburg Lodge March 6-7, 2020. Tracy stated that she regards the Annual and Advanced as substantive CLEs and that our Section sets the bar for programming. She invited members to send ideas for programs to members of the committee or to her and stated her appreciation for firms sending multiple attendees to the conferences. Kay noted we are looking for speakers from a broader audience, such as the keynote speaker this year. Kay has asked whether the Bar can reimburse travel expenses for speakers; if not, we'll need to find sponsors or our registration fees will increase. Susan Pesner reminded the group that the Advanced seminar is meant to expand your knowledge; she stated that the committee would like a confidential review of the Advanced CLE's programs from Area Representatives and Board of Governors so the committee knows whether and why members liked the sessions. Not enough attendees complete the CLE evaluations, so they will discuss ways to gather that information. Kay recognized John Hawthorne, stating that he was one of the best speakers she's heard in years since she started going to them in the '80s (session at the Annual on easements) – that the session was interesting and kept the audience engaged.
- b. During the 2019 Summer Meeting CLE, Paul Melnick will present on the panel for the topic Real Estate, Death and Taxes.

4. Technology — Co-chairs: Mark Graybeal & Matson Coxe

Last October Mark suggested having photos of Board members posted on our website. He has expanded that initiative to include ARs as well. He will email those from whom he's received a photo. Section members may send photos to Mark Graybeal at mark.graybeal@capitalone.com or to Matson Coxe at matson.coxe@fnf.com. Any format is fine. They will be taking pictures at future events to post if no other photo is provided, in order that Section members will be able to identify Board members and ARs at other events. Photos will be uploaded in the next couple of months. Kay noted that the technology committee is doing a good job of keeping up our website, but we need to feed them information, which needs updating more frequently. Kay suggested that members change committees or add a committee and think about the Technology Committee as an option. She would

like people to be more cognizant of resources available on the website. Steve Gregory noted that, though we're encouraged to obtain our CLE materials electronically, there are no electric outlets at the seminars.

SUBSTANTIVE COMMITTEES

1. **Commercial Real Estate** — Co-chairs: John Hawthorne & David Hannah
John spoke at the Annual Seminars in May. The topic, easements, arose from the committee's conversations during regular committee meetings. A question has been raised whether the scope of easements is being modified by development rather than development's conforming to existing easements; John is contemplating an article on the subject for The Fee Simple.
2. **Common Interest Community** — Co-chairs: Josh Johnson & Sue Tarley
A written report is in materials.
3. **Creditor's Rights and Bankruptcy** — Co-chairs: Christy Murphy & Brian Dolan
Christy reported the committee met in January and May and discussed article and CLE subjects. An article was submitted to The Fee Simple regarding a bankruptcy case. The committee is considering a future article on *Bellinger v. Buckley*, 577 V.R. 193 (D. Md. 2017). Kay commented that she enjoyed Christy's program, which she attended during both the Fairfax and Williamsburg Annual CLEs.
4. **Eminent Domain** — Chair: Chuck Lollar
Chuck reported that the committee has been inactive as he is beginning a new law firm and has been active in the Bar, from which he has just retired from leadership. He will undertake finding his successor in the next three months. Eminent domain is a growing practice, he reported; there have been 450 natural gas pipeline eminent domain filings in Virginia relating to two projects in West Virginia, Virginia, and North Carolina in the past year. Judges are telling him that they don't understand the pipeline easements and need expert testimony, so there will be work for attorneys in that capacity as well. Just beginning the first jury trials in the pipeline matter.
5. **Ethics** — Co-chairs: Ed Waugaman & Blake Hegeman
Blake reported that meeting took place June 12th. Christina Meier reported on the LEO review project she led, the purpose of which is to identify LEO's that affect real estate. She reports that we found almost 200 real estate-related and another 200 of interest to real estate practitioners. Many focused on residential real estate but also other issues. Over the next six weeks, she needs four to eight volunteers to review the lists. Then, the committee would like one or two law students to prepare summaries of the LOI's, then create a searchable data base for the website and perhaps for printing in The Fee Simple; maybe a CLE could be planned on the subject. Several members volunteered. Kay is checking with the Bar to find out if our Section dues may be used to pay for the students' time. [7/8/2019 Note: Kay has confirmed with the Bar that Section dues may be used for this purpose.]
6. **Land Use and Environmental** — Co-chairs: Karen Cohen & Lori Schweller
Karen noted that the Land Use Committee has common ground with the Commercial and, now realizes, with the Eminent Domain committees and suggested that we collaborate in the future for articles and CLEs.
7. **Residential Real Estate** — Co-chairs: Susan Walker & Hope Payne
Report in the package.
8. **Title Insurance** — Chair: Cynthia Nahorney
Cynthia reported that Ali Anwar moved to Japan.

UNFINISHED BUSINESS

The Virginia Lawyer Real Estate Edition –Lewis Biggs & Kay Creasman. Lewis reported that Kay, Steve Gregory, Rick Chess and he have been working on the sections for *The Virginia Lawyer* October 2019 publication – deeds/title/business/creditors' rights issues, common interest community committee article, and Ben Leigh's idea on graveyards of formerly enslaved people and getting standing to assert rights to the graves without paperwork. Kay stated that the common interest community article, which is an elaboration of the brochure discussed below, will be helpful to attorneys as property owners. The title (deeds)/business/creditors' rights issue article will educate non-real estate attorneys that what they do affects our work.

Kay commented that she had reviewed the Section meeting minutes over the year for her annual report and noted that one issue we've mentioned often is broadening the scope of continuing education to benefit not just real estate attorneys but consumers and other real estate professionals, tax assessors, and judges. She noted that, if we made information easily available to them, it would make our jobs as real estate practitioners easier. Examples of such information include:

- a. CIC brochure
- b. Owner's Title Insurance brochure
- c. Other possible topics she thought of:
 - (1) How to title real estate? CFPB has a four-page brochure for residential real estate purchasers with useful information, including ways to limit wire fraud. The brochure reports a 480% increase in wire fraud between 2016 and 2017. The cybersecurity bill of rights can be sent out to clients. Kay asked if the Section would like to educate the public and attorneys in other practice areas as to this serious issue. John Hawthorne says they have hosted social meetings in which real estate practitioners meet with non-real estate practitioners and talk about how their practices affect one another and how they can help one another. Bill Nusbaum stated that he used the eminent domain committee's brochure on our website recently when working on a ground lease and asked about whether there is one more up-to-date. Chuck Lollar responded that the committee could prepare one for lawyers.

NEW BUSINESS

1. The Board approved the allocation of \$200 to pay for clerical assistance with Ethics LEO project. (Lori moved, Blake seconded, unanimous approval.)
2. Items from the floor:
 - a. Chair Creasman said that Citi sent out information alerting title insurance underwriters that, as of 6/24/19, settlement agents would have to supply information to lenders required by Freddie Mac/Fannie Mae.
 - b. Susan Pesner reported that a deed to a buyer accidentally got recorded without consideration being paid, and the only way to undo is to get a court order to nullify it. The buyer can't deed the property back to the seller since it had no standing to do so, and the seller shouldn't want that anyway because it would violate the due on sale clause of the current owner's (Seller's) mortgage. Kay asked for a short Fee Simple article on the subject.

NOMINATING COMMITTEE REPORT

1. The nominating committee, consisting of Kay Creasman, Ron Wiley, Whitney Levin, Paula Caplinger and Paul Melnick, met via email on May 13, 2019 and nominated as Board Members the following:

Stephen Gregory for a third 3-year term
J. Lori H. Schweller for a second 3-year term
Sarah Loupe Petcher for a first 3-year term

Kay is resigning, so not standing for another 3-year term.

2. Nominated for 2019-2020 Board of Governor's officers are:

Chair	Ronald D. Wiley, Jr.
Vice Chair	J. Lori H. Schweller
Secretary/Treasurer	Kathryn N. Byler

The nominations were approved unanimously by the Section membership. Stephen Gregory suggested that, since officers spend three years as officers, such time shouldn't be docked against their ability to serve on the Board. Kay responded that it is not; the bylaws were amended some years ago to allow three terms on the Board instead of two to accommodate time spent as officer. Ron said he'd look at the issue to get a clearer understanding of whether officers are in fact members of the board or their board terms should be separate from their Board tenure; he stated that he believes each ex-president is a member of the Board by virtue of holding the office of past-chair. Kay said that such Board member would be non-voting, however. [**Secretary's Note:** Article III, Section 1 of the Bylaws <https://www.vsb.org/site/sections/realproperty/bylaws> provides that a person is eligible to serve on the Board of Governors for three (3) full three-year terms. The Immediate Past Chair of the Real Property Section, the Executive Director of the Virginia State Bar, the Chair of the Virginia Bar Association Real Estate Section, and a member of a law school faculty and retired or sitting judge shall each be an *ex officio* member of the Board but shall have no voting privileges as an *ex officio* member. Presumably, if an Immediate Past Chair were still within his or her allowable terms, he or she would still have voting rights. Article IV provides that officers shall be elected from among the Section's Board of Governors.]

Ron presented gifts to Kay as outgoing Chair, including a plaque for the gavel. The Section expressed its appreciation to Chair Kay Creasman for her service. Kay presented a gift of a gavel to Ron Wiley for the upcoming year as Chair.

Karen thanked the Hawthornes for the blueberries from their farm.

The next Section meeting will be held in Charlottesville at the office of VaCLE on Friday, September 13, 2019 at 10 a.m. The Programs Committee and any interested persons are welcome to remain after the meeting to discuss in more detail the 2020 programs.

The meeting was adjourned at 1:34 p.m.

List of Attendees

Board Members

Kay M. Creasman, Chair
Ronald D. Wiley, Jr., Vice Chair
Lori H. Schweller, Secretary-Treasurer
Stephen Gregory
Karen L. Cohen
Richard B. "Rick" Chess*
F. Lewis Biggs*
Kathryn N. Byler
Mark W. Graybeal
Robert E. Hawthorne, Jr.
Blake Hegeman

Tracy Winn Banks, VaCLE

*Attended by conference call

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Christina Meier
Sarah Louppe Petcher
John Broadway
Wayne Glass
Cynthia Nahorney
Chuck Lollar
Page Williams
Harry Purkey
Pam Faber
Michael Barney
Susan Pesner
Bill Nusbaum
Cartwright Reilly*
Vanessa Carter (newly-elected)
Ann A. Gourdine
Susan Siegfried
Jon Puvak
Howard E. Gordon
Philip Hart
John Hawthorne
Paul Melnick
Christy L. Murphy
Douglas Dewing
Bob Hawthorne

**REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR
SPRING MEETING OF THE BOARD OF GOVERNORS AND
AREA REPRESENTATIVES**

Friday, March 1, 2019
Kingsmill on the James, Williamsburg, VA

Chair Kay Creasman called the meeting to order at 10:31 a.m. Kay asked section members to update their contact information on the Section roster and to add the date that they became Area Representative.

Mark Graybeal moved to adopt the minutes of the January 25, 2019 Winter Meeting, and the minutes and were adopted without revisions or discussion.

Chair Creasman noted that the budget information is not included in agenda but that expenditures are in line with expectation. She will disseminate new information next week and requests that attendees return expense vouchers by March 11th.

Chair Creasman noted that she had received three committee reports.

On behalf of the Membership Committee, Ron Wiley introduced Young Lawyers Committee ex officio member, Brian Thornton Wesley and noted that such ex officio position is a new position and is filled by the current Chair of the Young Lawyers Committee. Ron reported further that, as of February 1, 2019, the section has 1,932 members, which is an increase over last year. As has been discussed at previous meetings, a table is set up for enrolling new members at the Advance Real Estate Seminar. New enrollees as of April 1st will owe no membership fee for the remainder of the year (registration paperwork completed during the conference will be held and submitted on April 1st).

On behalf of *The Fee Simple* Committee, Steve Gregory reported that the committee is on track for the Spring issue and that the article submission deadline is April 5, 2019. The Committee did not hold a meeting in the interim since the Winter section meeting.

On behalf of the Programs Committee, which did submit a report, Kathryn Byler reported that registration for the Advanced seminar reached 155 and thanked the committee members for their work. She reported that the Annual seminars are set and invited members to register for the three locations and mark calendars for next year's Advanced for which they are now accepting topics. Kay noted that the Committee is working to get national speakers, whom the committee would like to commit early.

Annual Real Estate Practice Seminar dates and locations: May 8 – Roanoke; May 21 – Fairfax; May 23 – Williamsburg.

For the Summer 2019 Meeting, Paul Melnick is coordinating with members of the tax section and trusts and estate section for a session on Real Estate, Death and Taxes.

On behalf of the Technology Committee, Mark Graybeal reported that no meeting had been held. Following up on the last meeting, Matson Cox will write an article on MERS. They are looking for an article on e-closings and asked for members to let them know if they have done them or know someone who has.

On behalf of the Commercial Real Estate committee, David Hannah reported that the committee had had a short meeting and that John Hawthorne is working on an article regarding easements.

On behalf of the Common Interest Community committee, Josh Johnson reported that the committee had a meeting yesterday. He discussed the Community Associations Institute Law Seminar and

recommended it as worthy of attending. Sue Tarley is working on a chart and article regarding new legislation for *The Fee Simple*.

There were no reports from the Creditor's Rights and Bankruptcy, Eminent Domain, Ethics, Residential Real Estate, or Title Insurance Committees. Karen Cohen submitted a brief report on behalf of the Land Use and Environmental committee based on a meeting from the last cycle.

Will Homiller, Chair of VBA Real Estate Council and VBA liaison, presented updates on Virginia legislation, specifically a bill led by Charlie Menges, to address The Game Place case which passed both Houses and became law, effective February 19, 2019. He reported that a lease of more than five years need not be in the form of a deed, and the amended Code section contains a retroactive component to ratify prior leases. Also, Senate Bill 1080, which codifies Title 55, now Title 55.1., has been approved by both Houses and awaits the Governor's signature. Kay noted it will have a delayed effective date of October 1st after the effective date of July 1st and that a conversion chart will be created.

Chair Creasman reported that the committee preparing *The Virginia Lawyer Real Estate Edition* (October 2019 publication) has received article suggestions and will get together within next couple of weeks to finalize decisions. There will be an article regarding deeds and one addressing real estate topics that non-real estate lawyers need to understand.

Chair Creasman reintroduced the issue of Pro Bono opportunities for real estate attorneys, stating that the group had not reached a consensus on how the section should address *pro bono*. The Board had not had time to discuss the issue between the winter and this meeting. She suggested making available opportunities known on the VSB website. She noted that there is an opportunity to report *pro bono* hours on the annual license renewal form. The group discussed further.

Kay noted she had not heard of Virginia's Land Conservation and Greenways Conference, scheduled April 8-10, 2019 in Richmond, for which talks on real estate subjects have been advertised; no section members had either. She'll find out more.

Chair Creasman invited members to serve on the nominating committee and stated that one position is currently open. The committee will get together in early April or May to discuss.

Kay introduced the subject of the "Gray Tsunami." She noted that one of the things that attracted her to the law was that she couldn't be forced to retire. She invited members to talk about what they love about real estate law and what they don't like and suggested that we need to make real estate interesting to new lawyers and that it is a high-stress business and time-driven. The members provided comments, including that we need to love our clients and their businesses, the people we work with, and what we do to be successful; the value of phone conferences as opposed to emailing; that we get to interact with clients when they are happy; that projects are short-lived and get paid in certified funds at closing; that there is a generational gap in the real estate legal market because of the economic downturn and firms not hiring for real estate, which means opportunity for young lawyers in real estate, which we should emphasize to them; the concreteness of real estate work, seeing the effect of our work in the world. Steve noted that these ideas could be the basis of a good article and reminded us that *The Fee Simple* is distributed to law schools.

Kathryn asked for confirmation that the law schools can offer scholarships to this CLE.

Kay reported that there will be no recipient of the Traver Scholar Award this year again. The group will meet to revise the bylaws so that a consensus can be reached when we have qualified nominees.

The next meeting will be held in Virginia Beach Friday, June 14, 2019, 11:45 -1:45 is current estimated time. Exact time and room in the Oceanaire Hotel to be determined.

Chair Creasman adjourned the meeting at 11:28 p.m.

Respectfully submitted,

Lori H. Schweller, Secretary

List of Attendees

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Kay M. Creasman, Chair
Ronald D. Wiley, Jr., Vice Chair
Lori H. Schweller, Secretary-Treasurer
Whitney J. Levin
Karen L. Cohen
Richard B. "Rick" Chess*
F. Lewis Biggs
Kathryn N. Byler
Mark W. Graybeal
Robert E. Hawthorne, Jr.,
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Blake Hegeman

Tracy Winn Banks, VaCLE
Will Homiller, VBA

*Attended by conference call

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**BOARD OF GOVERNORS
REAL PROPERTY SECTION
VIRGINIA STATE BAR
(2019-2020)**

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

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

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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).

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