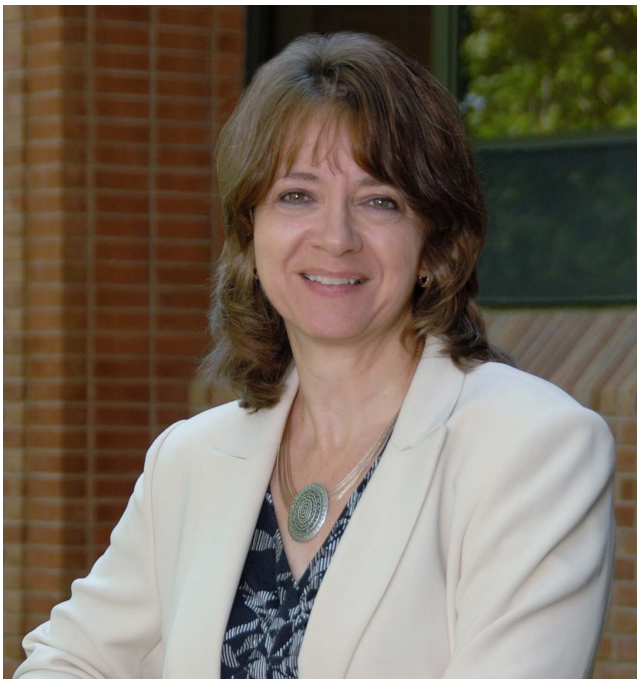
VSB RPS
the FEE SIMPLE

The Journal of the
Virginia State Bar
Real Property Section

http://www.vsb.org/site/sections/realproperty

Vol. XLI, No. 1 Spring 2020

A Tribute to Professor Lynda Butler upon her retirement



As this issue went to press, the Virginia State Bar announced the cancellation of the 2020 Annual Meeting due to concerns regarding COVID-19. We do not know how the annual election of board members and officers of the Real Property Section and other section business normally conducted at the VSB Annual Meeting may be done. An announcement will be forthcoming.

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

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

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FALL 2020 SUBMISSION DEADLINE: FRIDAY, OCTOBER 2, 2020

THE NEXT MEETING OF THE BOARD OF GOVERNORS OF THE REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR

TO BE ANNOUNCED

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for the Real Property Section *Fee Simple Journal*
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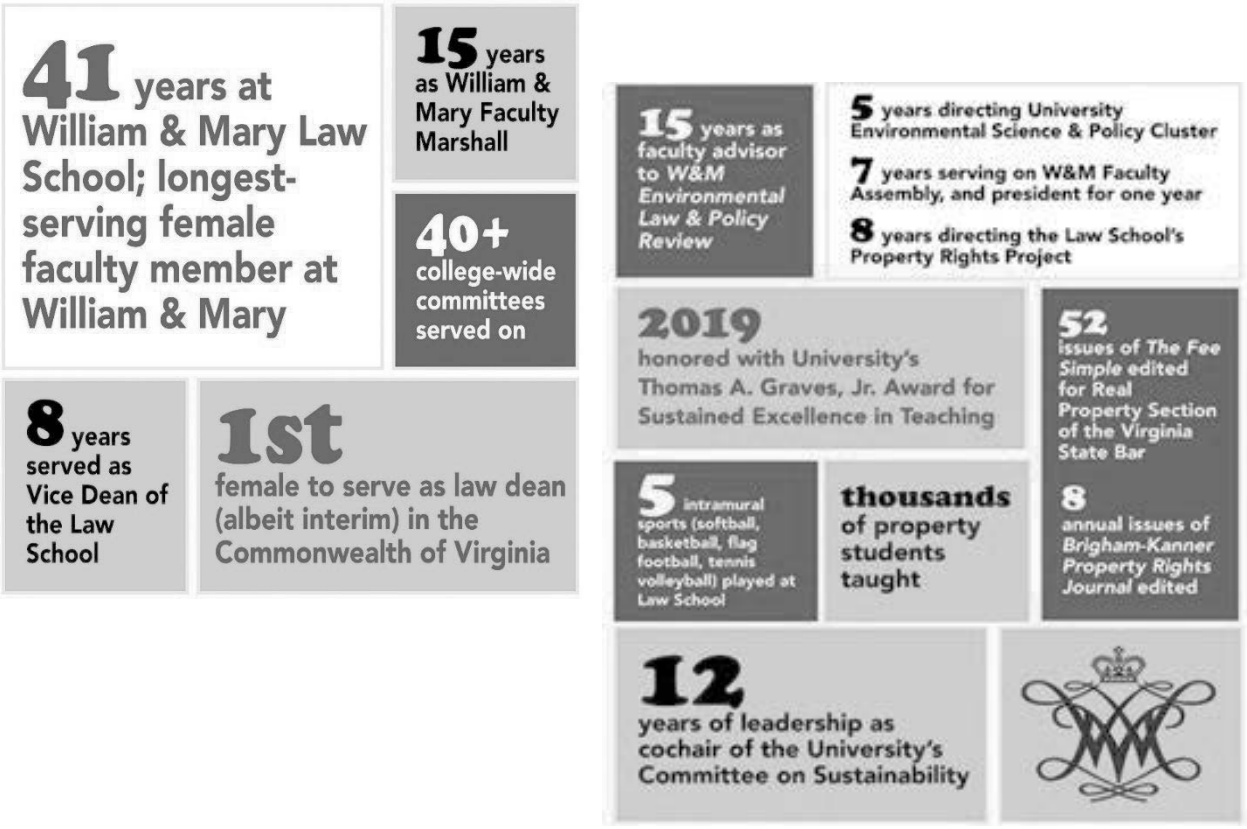
IN APPRECIATION OF PROFESSOR LYNDA L. BUTLER*

Professor Lynda L. Butler was scheduled to deliver her final lecture on April 3 to her class at William & Mary Law School. Fate, as it so often does, intervened; Professor Butler will say farewell via an online presentation as she begins her retirement.

Professor Butler earned a B.S. from William & Mary and a J.D. from the University of Virginia. She leaves as the Chancellor Professor of Law and Director of the William & Mary Property Rights project, and Co-Chair of the President's Committee on Sustainability. Professor Butler was honored as the 2019 Recipient of the University's Thomas A. Graves, Jr. Award for Sustained Excellence in Teaching. Her legacy at the School of Law will include a student scholarship established in her name.

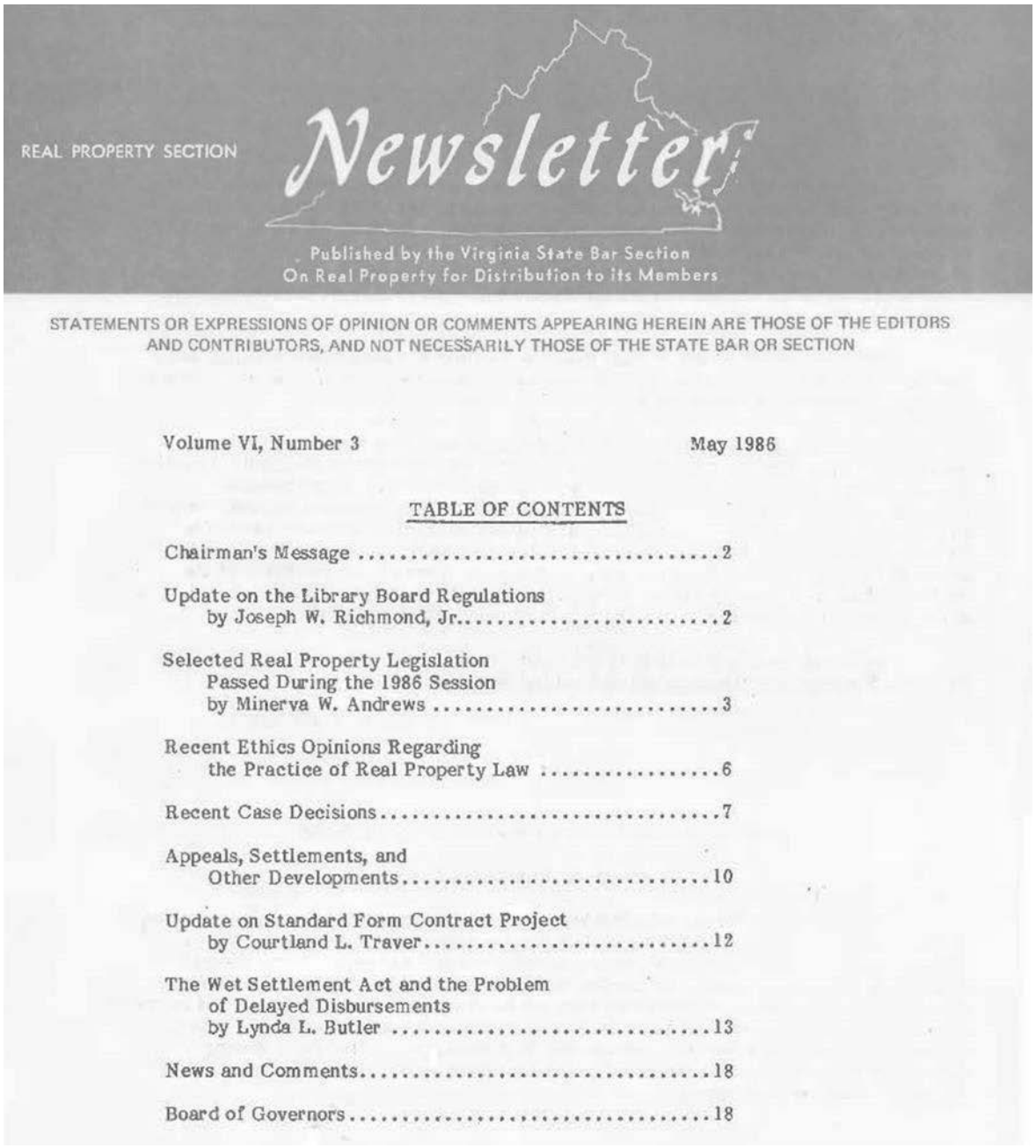
Her scholarly works and accomplishments would fill this issue. Here is but a brief summary, courtesy of the William & Mary Law School:



More than anything, though, Professor Butler touched the lives of her students as well as their minds. There are practitioners throughout the Commonwealth—and indeed, the entire country—who are better lawyers because at one point in their education, Professor Butler was their instructor.

* The photo collage of Lynda L. Butler and the image of the brief summary of her career was created by David F. Morrill, Assistant Director, Communications, William & Mary Law School, Williamsburg, VA. https://law.wm.edu/news/stories/2020/by-the-numbers-professor-lynda-l.-butlers-years-of-sustained-excellence-at-wm-law.php

The Fee Simple was truly fortunate that she devoted so much of her time and energy to the publication, overseeing its tremendous growth over the 26 years that she served as Editor. Below is the cover and publication page from the first issue of the newsletter on which she began to impart her scholarly style.



REAL PROPERTY SECTION

Newsletter

Published by the Virginia State Bar Section
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STATEMENTS OR EXPRESSIONS OF OPINION OR COMMENTS APPEARING HEREIN ARE THOSE OF THE EDITORS AND CONTRIBUTORS, AND NOT NECESSARILY THOSE OF THE STATE BAR OR SECTION

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NEWS AND COMMENTS

1. The Annual Meeting of the Real Property Section will be held at 10:00 a.m., Friday, June 13, in the Holiday Inn located at 39th Street and Atlantic Avenue in Virginia Beach. A presentation will be given by William F. Caldwell, President of the Urban Land Institute. The presentation should familiarize members with the functions and purposes of the Urban Land Institute and may include a display of Institute materials and publications helpful to the practitioner.

2. The editors intend for this and subsequent newsletters to be informative and educational, as well as enjoyable to read. However, we need your input in order to continue to produce the type of newsletter which will prove beneficial to the members of the Real Property Section of the Bar. Accordingly, we encourage you to submit articles or information affecting real property law to the editors. Suggestions for improving future newsletters also are welcome. Please send articles and comments to any one of the following editors:

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I may have succeeded Lynda as Editor, but neither I nor anyone else could replace her. This magazine and the Real Property Section will forever be indebted to her for her leadership and contributions.

I am confident that I speak for all of us—section members and former students—when I say, thank you, Professor Butler. You made all of us better—better persons and better lawyers. Our wish for you is that your retirement is everything that you may have hoped it would be.

TRAVER AWARD RECIPIENT

By Kay M. Creasman

Benjamin D. Leigh of Atwill, Troxell & Leigh, P.C. in Leesburg, Virginia is the 2020 recipient of the Traver Scholar Award which is awarded by the Real Property Section of the Virginia State Bar and Virginia Continuing Legal Education to honor men and women who embody the highest ideals and expertise in the practice of real estate law. Traver Scholars are Real Property Section members who have made significant contributions to the practice of real property law generally and the Section specifically and have generously shared their knowledge with others. The award is named for the "father" of Virginia real estate lawyers, Courtland L. Traver, whose outstanding legal ability and willingness to share his knowledge and experience was an inspiration to others.

Mr. Leigh, a native of Northern Virginia, with deep ties to the legal profession and the communities of Fairfax and Loudoun counties, is a principal in Atwill, Troxell & Leigh, P.C. in Leesburg, Virginia. He works with clients on a variety of business and real estate matters, in transactions, planning and litigation. He employs broad solutions, including strategic negotiations, administrative lobbying and even legislative amendments. Mr. Leigh has a reputation for creative alternatives and strategy and has solved problems through mediation and litigation. He brings unique perspectives, having personally developed residential and commercial projects.

Mr. Leigh is a graduate of the University of Richmond both undergraduate and law school. He is a past chair of the Real Estate Section of the Virginia Bar Association, and currently is an Area Representative for the Real Property Section of the Virginia State Bar.

PREVIOUS TRAVER SCHOLAR HONOREES

2005 Courtland L. Traver
2006 Joseph W. Richmond, Jr.
2007 C. Grice McMullan, Jr.
2008 Douglass W. Dewing
2009 Susan M. Pesner
2010 Larry J. McElwain
2011 Howard E. Gordon
2012 Lynda L. Butler
2013 Lucia Anna "Pia" Trigiani
David S. Mercer
2014 Edward R. Waugaman
2015 Paula Caplinger
2016 David C. Helscher
2017 Kay M. Creasman
2018 –none
2019 –none

HOW BEING QUARANTINED WITH A THREE YEAR-OLD IS MAKING ME A BETTER LAND USE ATTORNEY

By David I. Schneider

David I. Schneider is a land use and zoning attorney in the Tysons office of Holland & Knight LLP.

As attorneys we wear several hats for our clients. We are advocates, fiduciaries, confidants, and counselors. At home, I also wear numerous hats; I am a husband, father of two boys, friend, etc. As I strived to find that ever elusive work-life balance, I would *try* to maintain a psychological firewall between all my work hats and all my family hats (try being the operative word).

Here we are in the midst of a global health pandemic. While my office is closed, I am fortunate to be able to work from home – a collision of my two worlds. I now find myself wearing so many hats at the same time that I feel like a character straight out of a Dr. Seuss book. (See e.g. *The 500 Hats of Bartholomew Cubbins* (September 1, 1938))

Our oldest son is 3 years old and our youngest son is 8 months old. We also have two beagles (who could be the subject of their own piece). I'll be honest, the first few weeks at home were a mental struggle navigating between the different worlds under the same roof. I pride myself in the strong bond I have with my boys, but it took some time to teach my toddler that just because daddy is home does not mean daddy can play all day.

I am trying to find a silver lining in this situation and am trying to lean in to how fortunate I am to spend so much extra time with my family. As I transition back and forth between thinking about proffers, special exceptions, vested rights, and ordinances and then thinking about fun activities to keep a homebound three year-old entertained day after day, I started to notice some overlap between my two worlds.

The rules of parenting are at best ambiguous. Great weight is given to consistent and longstanding application of the house rules.

My wife stays home with our two children. With my office closed, I am crashing into their world and their daily routines. I help whenever I can. Just the other day, I was making lunch for my son and I did the unthinkable. I cut my toddler's sandwich the wrong way. I tried to explain that there is no rule on how a sandwich has to be cut, and it can be done many different ways. Nope. "But mommy always cuts it this way."

This is the way it has always been done in the Town of Mommy. While the house rules may be ambiguous, my wife is clearly charged with enforcing the rules – our very own Zoning Administrator. "A consistent administrative construction of an ordinance by the officials charged with its enforcement is entitled to great weight." *Trustees of Christ & St. Luke's Episcopal Church v. Bd. of Zoning Appeals of City of Norfolk*, 273 Va. 375, 381–82, 641 S.E.2d 104, 107 (2007) (quoting *Masterson v. Board of Zoning Appeals*, 233 Va. 37, 44, 353 S.E.2d 727, 733 (1987)). As I was the interloper in their home routine, I realized that I needed to abide by the unwritten ordinance and, when unsure, give "great weight" to the consistent and longstanding application of the rules. Parenting after all is a bunch of judgment calls and as the Supreme Court of Virginia has said, a "decision, or 'judgment call,' is 'best accomplished by those charged with enforcing': the ordinance. *Id at 381.* (quoting *Lamar Co., LLC v. Bd. of Zoning Appeals*, 270 Va. 540, 547, 620 S.E.2d 753, 757 (2005)).

Conditions Must have Reasonable Relation to the Impacts

For a three-year old, my son is quite adept on a scooter – he must get that level of coordination from his mother. He zips down big hills and turns corners faster than I can run. Our house is in an older subdivision with no sidewalks, so we scooter in the road and down driveways. Luckily, our neighborhood is not a through street and has minimal traffic, especially now with our "stay-at-home" order in effect. That being said, it *is* still a road. One day he zipped down the road and turned into a cul-de-sac. Sprinting and panicking because I lost sight of him for a few seconds, I was flustered. After seeing he was OK and the worry subsided, the anger boiled. Wanting to reinforce the message, I took away his screen time for two days. Right away, I could see that devastating look in his eyes that screamed – "but Dad – TV has nothing to do with my scooter AND two days an eternity."

This moment was an instant reminder that local jurisdictions cannot impose unconstitutional conditions on developments. The Supreme Court of the United States held that requiring landowners to "internalize the negative externalities of their conduct is a hallmark of responsible land use policy…so long as there is a "nexus' and 'rough proportionality' between the property that the government demands and the social costs [i.e., impacts] of the applicant's proposal". *Koontz v. St. Johns River Water Management District, 570 U.S. 595, 605, 133 S. Ct. 2586, 2595 (2013).* The *Koontz* decision was supported by two seminal cases. First, in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987), the Court held that there was no "essential nexus" between demanding owners dedicate a public easement across the beach front of the owners property in exchange for a building permit to build a larger house." Second, in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994) the Court held that while there may be a nexus between conditioning the expansion of a commercial office building on the dedication of land for a bike path and dedication of land in a floodplain for a greenway, such conditions must have a "rough proportionality" with the impacts of the proposed development.

In Virginia, the concept of requiring a condition imposed on a development to be substantially generated by the proposed development originates in common law. The Supreme Court of Virginia held that a local jurisdiction does not have the have the authority to require a property owner to dedicate a portion of its land for the purpose of providing a road, "the need for which is substantially generated by public traffic demands rather than by the proposed development." *Bd. of Sup'rs of James City Cty. v. Rowe,* 216 Va. 128, 138, 216 S.E.2d 199, 208 (1975). This concept was later applied to conditions imposed through a special exception/special use permit in *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984). The General Assembly also applied a similar standard for proffers in §§15.2-2297 and 15.2-2298 which both require that the rezoning give rise for the need for the conditions and that the proffers have a reasonable relation to the rezoning.

After my son made a passionate appeal that would make any attorney proud, my wife and I held the line on no screen time…for a few hours and then gave in to the TV demands. Before you apply your parenting judgment – it was raining and our options were severely limited in a global health pandemic!

Re-thinking Screen-time

There are about a million parenting blogs out there providing opinions on children and screen time. Should you allow screen time? How much is too much? What content is appropriate? We have decided to allow a limited amount of screen time and only to watch things with an educational focus – Daniel Tiger[1] has become a member of our family.

Screen time has now been a huge discussion point in entitlements as our Commonwealth ventures into virtual public hearings. The Freedom of Information Act has many public meeting and public

[1] "Daniel Tiger's Neighborhood" aired by PBS. –Ed.

hearing requirements with respect to land use cases, and specific instructions for emergency situations. With the stay-at-home order in place, there was a lot of debate and opinions about how and if land use cases can continue virtually. Should virtual meetings be allowed? How much public access must be given? What type of public comment is required?

On March 20, 2020, Attorney General Mark Herring issued an opinion stating that local jurisdictions could "meet electronically to make decisions that must be made immediately and where failure to do so could result in irrevocable public harm." On April 22, 2020, the General Assembly authorized public bodies, boards and commissions to meet electronically if certain factors are met. In addition, the General Assembly specifically authorized boards and commissions to consider land use cases in its electronic meeting.

By luck of draw on the agenda, I had the honor of presenting Fairfax County's first virtual land use case during the pandemic. Fairfax County worked diligently to ensure the virtual platform worked and that all participants understood the technology and protocols. The public could participate by writing a letter, calling into the hearing, or even by submitting video testimony. Perhaps this public hearing screen time, when used correctly, could enhance the process and is not something completely taboo. Furthermore, shoes are now optional for a public hearing.

But Dad – I Have a Vested Right to a Cookie

One day my son asked my wife for a cookie. She told him that he could not have one until the playroom was cleaned. I was in the home office and did not hear this arrangement made. Later in the day, my son asked me for a cookie and I said – no. He immediately responded that I was being unfair and that he cleaned the playroom, so it was it was *his* cookie. He told me that his mom said he could have it. Once denied, he took his appeal to the proper authorities and his vested rights determination was issued in his favor.

There are several ways to establish vested rights in Virginia, but this experience made me think of §15.2-2307(A). The Supreme Court of Virginia explained that "[t]he clear intent of the statute is to provide a property owner with protection from a subsequent amendment to a zoning ordinance when the owner has already received approval for and made substantial efforts to undertake a use of the property permitted under the prior version of the ordinance." *Goyonaga v. Bd. of Zoning Appeals*, 275 Va. 232, 243, 657 S.E.2d 153, 159 (2008).

A vested right can be established under §15.2-2307(A) if the landowner satisfies a three part test:

1. Obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project,

2. Relies in good faith on the significant affirmative governmental act, and

3. Incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act

Section 15.2307(B) provides a non-exclusive list of what constitutes a significant affirmative governmental act: (1) proffered rezonings with a specified use; (2) rezonings for a specific use or density; (3) special use permits or special exceptions; (4) variances; (5) preliminary subdivision plats and site plans; (6) final subdivision plats and site plans; and (7) a written order, requirement, decision or determination regarding permissibility of a specific use or density that is no longer subject to appeal.

My son received a conditioned approval of a cookie from my wife. He relied in good faith on that approval and, as he would argue, incurred the extensive obligation of having to clean the playroom. He was being deprived a vested right and sought a vested rights determination to uphold his right to the cookie.

In Virginia there are two avenues to obtain a vested rights determination for rights established under 15.2-2307(A). First, Section 15.2-2286(A)(4) gives the Zoning Administrator the authority to make such a determination with the concurrence of the attorney for the that local jurisdiction. Second, 15.2-2286 allows a landowner to seek the determination directly from the Circuit Court. Selecting which venue to seek a vested rights determination is an important decision and can have significant procedural ramifications. If a landowner seeks an administrative determination from the Zoning Administrator, the landowner cannot then make a direct judicial appeal of the zoning decision without first exhausting administrative remedies. See *Bragg Hill Corp. v. City of Fredericksburg*, 297 Va. 566, 831 S.E.2d 483 (2019); See also *Lilly v. Caroline Cty*., 259 Va. 291, 296, 526 S.E.2d 743 (2000). If the landowner is unhappy with the Zoning Administrator's determination the landowner may appeal that determination to the Board of Zoning Appeals within 30 days of the Zoning Administrator's decision, or the determination becomes a thing decided and not subject to judicial attack. *Bragg Hill*, 297 Va. at 583, 831 S.E.2d at 492 (2019). Section 15.2-2314 then allows a landowner aggrieved by a decision of the Board of Zoning Appeals to appeal the decision to the Circuit Court. Lesson: Do not lose your cookie by dropping the ball on a vested rights determination.

No Matter How Old You Are, People Just Want To Be Heard

Just this past week we changed our son's bed from a toddler bed to a twin mattress. My wife and I thought it was a clear upgrade: a new and bigger bed – a symbol that he is growing up. After we put him down for bed that first night in his big-boy bed, he came out of his room to find us and proclaim "everything is different." Change is scary. We tried to comfort him and put him back in bed. This process repeated several times. Eventually I went into his room and sat with him on his bed and let him explain to me what was different and why it made him nervous. I wanted to give him an opportunity to share his feelings, while guiding him to my desired outcome – bedtime. After a nice discussion, I tucked him back in and he went to sleep.

No matter what age, all people want to be heard. One facet of being a land use attorney is working with the community to introduce and socialize a proposed development. I can explain until I am blue in the face why the new and bigger bed or a new and bigger development is a good thing. This interaction with my son was a good reminder that no matter what change I am proposing, change to one's surroundings is scary. While not everyone may be supportive of a proposed development, it is human nature to desire an opportunity to be heard. Providing an opportunity to let people be heard while still trying to drive your agenda is more art than science. Practicing with the intense emotions of a three-year old is great training.

RIGHTS AND BENEFITS AFFORDED MILITARY PERSONNEL IN VIRGINIA THROUGH THE SERVICEMEMBERS CIVIL RELIEF ACT AND VIRGINIA LANDLORD TENANT ACT

By Kathryn N. Byler and Austin Streeter

Kathryn N. Byler is an attorney with Pender & Coward, PC at their Virginia Beach office, Kathryn focuses her practice in the areas of real estate, guardianships, estate planning, and business matters. As a licensed Virginia real estate broker and commercial property owner, she brings a heightened understanding of her clients' real estate and business needs. Kathryn holds a BSBA from Old Dominion University, an MBA from Golden Gate University, and a JD from Regent University School of Law where she is an adjunct professor. Kathryn serves on the VSB District Committee and is the current secretary/treasurer of the Real Property Section.

Austin Streeter is a former Explosive Ordnance Disposal Chief Petty Officer in the United States Navy. Austin Streeter holds a JD from Regent University School of Law where he served as a senior 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 will sit for the Virginia bar in July 2020, and he intends to practice business or property law.

No matter the political affiliation, economic status, or place of residence, most people in the United States recognize servicemembers make difficult sacrifices while serving their country. These men and women often deploy for long periods missing family milestones and the ordinary comforts of home. They endure the constant stress of performing a job with lives at stake, and they are expected to relocate or deploy at a moment's notice. The difficulty of this task has motivated national and state lawmakers to increase protections for servicemembers.

This article explores some of the extra protections provided to military families in the Servicemembers Civil Relief Act (SCRA) and the Virginia Residential Landlord and Tenant Act (VRLTA), particularly how they affect housing and the differences, similarities, and appropriate situations to apply either of the two acts.

MAXIMUM INTEREST CHARGED UNDER THE SERVICEMEMBERS CIVIL RELIEF ACT

The SCRA limits the amount of interest and most fees that can be charged on many financial obligations incurred prior to military service to six percent. These obligations include mortgages, home equity loans, student loans, credit cards, and vehicle loans. To get this benefit, the servicemember must provide the creditor with written notice and a copy of his/her military orders or other appropriate document such as a letter from his/her commanding officer. The notice must be given within 180 days of the end of the servicemember's military service. The benefit is retroactive, inclusive of fees, and extends for an additional year after the end of military service.

PROTECTION AGAINST DEFAULT JUDGMENTS UNDER THE SERVICEMEMBERS CIVIL RELIEF ACT

At any civil court proceeding in which a defendant servicemember does not appear, the plaintiff creditor must file an affidavit stating one of three things: that the defendant is in the military, not in the military, or that the plaintiff is unable to determine if the defendant is in the military or not. The Department of Defense's "Defense Manpower Data Center" (DMDC) database located online at: https://scra.dmdc.osd.mil/ can be used to determine if a person is in the military or not. If it appears that the defendant in absentia is in the military, a court may not enter a default judgment until after an attorney is appointed to represent the interests of the servicemember. The appointed attorney will serve as a *guardian ad litem* and will file a report or make an appearance on behalf of the servicemember. If the *guardian ad litem* is unable to contact the defendant servicemember, or if it

appears that the servicemember needs to be present in order to adequately put forth a defense, the court must stay the proceeding for at least 90 days. This frequently comes up in judicial foreclosure proceedings or summons of unlawful detainer and will protect the servicemember from coming home to find he/she has no home. The Act imposes limitations on judicial proceedings that could take place during active duty service. These limitations include matters involving "insurance, taxation, loans, contract enforcement, and other civil action."

EARLY TERMINATION OF LEASES UNDER THE SERVICEMEMBERS CIVIL RELIEF ACT

SCRA allows for the termination of residential leases in three instances: (1) the tenant enters into military service; (2) the tenant receives military orders requiring a PCS or deployment with a military unit for ninety or more days; or (3) the tenant's death occurring while in military service, Reserve duty, or National Guard duty.[1] The third situation allows the surviving spouse to cancel the lease within one year of the death of the lessee.[2] The SCRA covers premises "occupied, or intended to be occupied [by] a servicemember or a servicemember's dependents for a residential, professional, business, or agricultural purposes."[3]

PROTECTION FOR TENANTS UNDER THE VIRGINIA RESIDENTIAL LANDLORD AND TENANT ACT

The Virginia Residential Landlord and Tenant Act (VRLTA) in 1977 added protections for military, National Guard, or Civil Service technicians with the National Guard upon its enactment.[4] VRLTA provides for early termination of the military tenant's rental agreement in four situations: (1) The military tenant receives PCS orders to a command that is thirty-five miles or more away from the service member's current command;[5] (2) The military member receives temporary duty orders for a period of ninety days or more and to a location that is thirty-five miles or more away from the member's current command;[6] (3) The servicemember leaves active duty from the armed forces or National Guard;[7] and/or (4) The member is ordered to live in military barracks.[8] The servicemember must provide written notice of termination with an effective date for ending the rental agreement.[9] Along with the notice, the member must provide a copy of the official orders or letter signed by the member's commanding officer.[10] The Virginia Code prevents the servicemember from incurring liquidated damages for early termination of the lease.[11]

DIFFERENCES BETWEEN THE ACTS

Both the SCRA and VRLTA have important requirements to which military tenants must adhere. Not meeting these requirements can cause the service member to lose protections provided by the state

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[1] *Id.*

[2] *Id.*

[3] *Id.*

[4] 1977 Va. Acts 635.

[5] Va. Code Ann. § 55.1-1235 (LEXIS through 2019 Reg. Sess. of General Assemb.) (amending Va. Code Ann. § 55-248.21:1(2018))

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

and federal governments.[12] To ensure the military tenant is following these requirements, the tenant should understand the specifics of each act to receive its protection. Four specific differences between the SCRA and the VRLTA are essential to understand in enabling the military tenant to end a lease early. First, the ability of a servicemember to waive the protection of the SCRA is an important distinction that can cause a military tenant to lose protections of the SCRA.[13] While a service member *can* waive the SCRA, the member is unable to waive the early termination of a rental agreement.[14] Second, another difference between the two is the method of enforcement.[15] The VRLTA allows enforcement through a private cause of action.[16] In contrast, the SCRA provides two methods of enforcement: (1) through the Department of Justice; and (2) a private cause of action.[17] In addition to the avenues of enforcement, the SCRA allows for the recovery of attorney fees by the military tenant and for the criminal prosecution of a landlord's knowing violations of the Act.[18] Third, the qualifications for termination of the lease differs between the acts.[19] The SCRA has no distance specifications for PCS moves, and the SCRA requires a deployment to last over ninety days to qualify for the termination.[20] Conversely, VRLTA requires the PCS or temporary assigned duty outside of a thirty-five-mile radius of the member's current duty station.[21] Fourth, the scope of coverage of the VRLTA is more limited than the SCRA.[22] The SCRA applies to dependents of the service member who are "materially affected by reason of the service member's military service", while the Virginia Act only applies to rental agreements in which the member is a party.[23]

SIMILARITIES OF THE ACTS

In addition to the difference between the two acts, they are also several similarities, three of which are important. First, the two acts have similar termination dates:[24] both state that the termination of

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[12] *See* 50 U.S.C.S. § 3918 (LEXIS through Pub. L. No. 116-108) (allowing for a waiver of the SCRA and providing termination of the lease in three instances); *see also* Va. Code § 55.1-1235 (LEXIS) (requiring written notice with the date of termination and allowing early termination in three situations).

[13] § 3918 (LEXIS)

[14] *See* Va. Code § 55.1-1235 (LEXIS) (providing no waiver for early termination).

[15] *Compare* 50 U.S.C.S. § 4041 ((LEXIS through Pub. L. No. 116-108) (allowing the Attorney General to commence a civil suit), *and* 50 U.S.C.S. § 4042 ((LEXIS through Pub. L. No. 116-108) (allowing a private cause of action), *with* Va. Code § 55.1-1259 (LEXIS through 2019 Reg. Sess. of General Assemb.) (same).

[16] Va. Code § 55.1-1259 (LEXIS).

[17] § 4041 (LEXIS); § 4042 (LEXIS).

[18] 50 U.S.C.S. § 3955 (LEXIS through Pub. L. No. 116-108).

[19] *Compare* § 3955 (LEXIS) (allowing service members to end a lease for all PCS moves), *with* Va. Code § 55.1-1235 (LEXIS through 2019 Reg. Sess. of General Assemb.) (requiring PCS and temporary duty outside a thirty-five-mile radius of current duty station for early termination).

[20] § 3955 (LEXIS).

[21] Va. Code § 55.1-1235 (LEXIS).

[22] *Compare* 50 U.S.C.S. § 3959 (LEXIS through Pub. L. No. 116-108) (entitling dependents of service members to the protections of the Act), *with* Va. Code § 55.1-1235 (2019) (allowing only the service member to terminate his or her rental agreement).

[23] § 3959 (LEXIS).

[24] *See* § 3955 (LEXIS) (termination of the lease takes effect thirty days after the date of the next rental payment); *see also* Va. Code § 55.1-1235 (LEXIS) (same).

the lease takes affect thirty days after the date of the next rental payment.[25] Additionally, the Virginia Code does not allow for the termination to take effect sixty days or more before the ordered departure date.[26] Second, both acts prevent the military tenant from incurring fees for terminating the lease. The VRLTA specifies no liquated damages are allowed,[27] and the SCRA prohibits early termination fees for a military tenant ending the lease early for the stated reasons.[28] Finally, both acts are similar in the required notice; the SCRA requires written notice that is hand-delivered or sent certified mail, while the VRLTA specifies the need for written notice.[29]

Servicemembers and landlords leasing to servicemembers should be familiar with both acts.

CONCLUSION

While both SCRA and VLTA provide benefits and protections to servicemembers, they levy additional requirements and limitations upon landlords and others doing business with servicemembers. The acts apply to both active duty servicemembers and dependents who are "materially affected by reason of the service member's military service."

When a servicemember chooses to rent a housing unit, he/she should carefully read the rental agreement and other documents to ensure he is not waiving SCRA protections. Although a separate document from the rental agreement in a twelve-point font is needed to waive the SCRA, the military member must remain vigilant when handed a stack of papers to sign.[30] Once the protections are secured, the servicemember can terminate the contract early if needed. If the military tenant decides for any reason that the lease should end and he or she has a temporary assignment that is thirty-five miles or farther away, then the servicemember should follow the requirements of the VRLTA for early termination. In rental contracts, if the military member is deploying for ninety or more days, the member's spouse is the only party to the lease, and the spouse is materially affected by the deployment, then the spouse should follow the procedure in the SCRA to terminate the contract. Whichever predicament a military member is in regarding renting a property, the member should understand the requirements of each method of terminating a lease and the difference between the two acts in order to get maximum protection intended by the lawmakers. Landlords doing business with servicemembers should familiarize themselves with both acts and should then take steps to ensure their rental applications, leases, policies, and procedures comply with state and federal law.

[25] § 3955 (LEXIS); Va. Code § 55.1-1235 (LEXIS).

[26] Va. Code § 55.1-1235 (LEXIS).

[27] *Id.*

[28] § 3955 (LEXIS).

[29] *See* § 3955 (LEXIS) (requiring either hand-delivered written notice or sent certified mail); Va. Code § 55.1-1235 (LEXIS) (requiring only written notice).

[30] 50 U.S.C.S. § 3918 (LEXIS through Pub. L. No. 116-108).

CAN VIRGINIA RENTERS BE EVICTED DURING THE COVID-19 CRISIS?*

By Kathryn N. Byler

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There seems to be a common belief that landlords may not evict residential tenants during the COVID-19 pandemic. Like most beliefs, it's rooted in truth, but the details may be surprising.

On March 16, 2020, the Virginia Supreme Court made an emergency judicial order in response to COVID-19 that essentially put the brakes on all cases for 21 days. On March 27, the Court extended the order by another 21 days. At the present time, all civil matters are continued through April 26, 2020. While the order was made "to protect the health and safety of court employees, litigants, attorneys, judges and the general public" it had the effect of providing a moratorium on evictions. It's important to note that this does not mean that tenants are not responsible for their ongoing rent. It also doesn't address late fees or other penalties for late payment.

The $2 trillion relief bill, known as the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) provides a moratorium on evictions and foreclosures from homes with certain federal housing programs or those with federally backed mortgage loans. The moratorium lasts for 120 days beginning on March 27, expiring on June 24. A potential shortcoming of the CARES Act moratorium is that a tenant would not normally know if his/her landlord has a federally backed loan. Examples of a federally backed mortgage are Veterans Affairs (VA) and Federal Housing Administration (FHA) loans and those mortgages purchased or secured by Fannie Mae or Freddie Mac. Note that this provision only applies to those with federally backed financing or those in federal programs. Also, important to note, the CARES Act only protects against eviction in the short-term. Just as noted under the Virginia Supreme Court emergency order, the CARES Act does not stop rent from accruing, therefore, an eviction will likely follow when the moratorium ends unless the tenant is able to secure funds to pay.

The CARES Act also provides assistance to property owners with federally backed mortgages. To qualify the landlord must assert that he/she is experiencing a financial hardship during the COVID-19 pandemic.

Some people are currently calling for Congress to step in and provide federal assistance for homeowners and tenants alike. While state law generally controls real estate matters, there is precedence for the federal government to legislate housing as evidenced in the federal Fair Housing Act, passed in 1968, which protects all people from discrimination when they are renting or buying a home, getting a mortgage, seeking housing assistance.

Programs to assist those struggling financially due to the COVID-19 pandemic are emerging every day. Several bills addressing evictions have been introduced in Congress. It is reasonable to expect that legislation providing rent relief or moratoriums on evictions may be forthcoming. Anyone

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struggling to pay rent or mortgage should communicate, either directly or through a lawyer, with their landlord or mortgage holder.

Provided below are links to some useful resources.

http://www.courts.state.va.us/news/items/2020_0327_scv_order_extending_declaration_of_judicial_emergency.pdf

https://www.congress.gov/bill/116th-congress/senate-bill/3548/text

https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview#_The_Fair_Housing

https://www.pogo.org/analysis/2020/04/amid-pandemic-congress-suspends-evictions-but-not-for-all/

COMMERCIAL LANDLORD-TENANT RELATIONS DURING THE COVID-19 PANDEMIC*

By Kathryn N. Byler

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Amid the health and economic crisis created by COVID-19, landlords, property managers, and tenants of commercial property are scrambling for information and establishing new policy. Briefings by the President and Governor change the way businesses can be conducted with little or no advanced warning. What makes sense one day, may not be an option the next.

What has become clear, is that the COVID-19 pandemic is causing economic upheaval for businesses. Among the hardest hit are restaurants, gyms, churches, and hair salons, but many others are experiencing a complete shutdown or a sizeable loss of business. While the federal government is attempting to provide some economic relief to businesses, many companies will not be able to take advantage of these limited programs. Some will be left unable to meet their financial obligations, including their lease payments.

Commercial landlords need a comprehensive, yet individualized, plan for dealing with tenants whose businesses have been closed or otherwise severely economically impacted. When making that plan, they should attempt to be flexible and consider the many ways to work through these difficult days. What works in one situation may not for another. As in most cases, landlords should first analyze the strength of the tenant and the lease terms. This will provide important direction for creating a plan for moving past the COVID-19 emergency. Because each situation will be unique, a nondisclosure agreement will keep the details confidential and prevent help offered to one tenant from undermining other negotiations.

Tenants faced with drastically reduced revenue will likely ask for either rent abatement or rent deferment. Generally, the best approach is to temporarily defer all or part of the rent, waive late fees, assure the tenants that they are in no immediate danger of eviction, encourage the application for all available assistance, and establish a congenial rapport. While covering the rent is important, many business owners are facing a multitude of problems, such as completing contracts, retaining employees, and basic survival. Temporary rent relief will be greatly appreciated and will not waive the landlord's right to collect rent in full.

Based on the tenant's financial stability and history of rent payments, this may be a good time to amend the lease. A good faith negotiation can result in everyone walking away happy. Depending on the business and the lease, the landlord may request financials for the preceding year plus year-to-date in order to adequately assess both the need for relief and the ability to structure a realistic recovery plan. Some possibilities are:

- Abate rent for an agreed upon period (two or three months) in exchange for an extended termination date

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- Defer rent for an agreed upon period with the deferred amount amortized over the remainder of the lease (or perhaps amortized over a pre-determined, shorter term that makes sense for the specific tenant)
- Defer rent for an agreed upon period with a balloon payment at a later date
- Apply all or part of a security deposit to current rent
- Modify lease terms such as CAM (common area maintenance) fees or maintenance
- Expand or reduce the leased premises
- Increase rent escalations in exchange for short-term rent reduction, deferment, or abatement
- Add an individual as an additional tenant to strengthen the lease
- Add a personal guarantee

Under the concept "making lemonade out of lemons," this might be a good time to make improvements to leased premises. It's difficult to renovate when business is in full swing, but while operations are suspended or severely reduced, tenants and landlords can partner to paint, deep clean, replace flooring, do landscaping, and generally spruce up the property. With tenants providing sweat equity and landlords covering the cost of materials, the landlord-tenant relationship is strengthened and the tenants' commitment to the leased space is reinforced. Ideally for the landlord, the cost of materials will be applied to rent. If that's not an option for the tenant, the landlord could provide the materials or reimburse as agreed.

Small, commercial tenants without a CFO or executive board may appreciate direction to appropriate government programs. There are many excellent industry-specific websites, but the primary basic relief is through the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) signed into law on March 27, 2020.

The CARES Act contains $376 billion in relief for American workers and small businesses. The Small Business Administration (SBA) website has information on loan and debt relief options for both landlords and tenants. The same programs that benefit tenants may also benefit landlords who are often small businesses themselves.

The Paycheck Protection Program provides loan forgiveness for retaining employees by temporarily expanding the traditional SBA 7(a) loan program is part of the CARES Act. If employees are kept on the payroll for eight weeks and the money is used for payroll, rent, mortgage interest, or utilities, the loan will be forgiven. Application is made through any SBA 7(a) lender or any participating federally insured depository institution or credit union. Essentially, small businesses make the application through their bank.

Also, under the CARES Act, The Economic Injury Disaster Loan Emergency Advance (EIDL) provides up to $10,000 of economic relief to businesses that are currently experiencing temporary loss of revenue due to COVID-19. Application is made through the SBA website. If approved, the loan advance will not have to be repaid.

Further, the CARES Act gives states the option of extending unemployment compensation to workers who are ordinarily ineligible for benefits, such as independent contractors. Unemployment benefits are administered through each state's unemployment insurance program. This program might help small business owners with no employees such as hair stylists, massage therapists, and general contractors.

In addition to government programs, tenants should be encouraged to look into possible coverage under their insurance policies. Insurance policies are merely contracts which provide payment to the insured in certain situations where loss has been incurred. "Interruption of business" clauses may or may not cover this pandemic depending on both the wording of the policy and future court decisions interpreting the language.

Adversity is opportunity. If handled well, both landlords and tenants can come through these difficult days stronger. Amending or extending a lease can help tenants get through the COVID-19 crisis in

the short-run leaving landlords with valuable tenants, and more valuable property, in the long-run. As in any business negotiation, the goal is to find a resolution that works for both parties. Both landlord and tenant have problems that need resolving, but they also each have things to offer. A good result is more likely if a non-adversarial relationship is maintained, parties are innovative, and focus is kept on the proverbial big picture.

Provided below are links to some helpful resources:

https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources

https://www.dol.gov/coronavirus/unemployment-insurance

QUARRY VALUATION IN LITIGATION

By Paul B. Terpak and Patrick B. Piccolo

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It is necessary from time to time to value quarry property – for financing purposes, when contemplating a sale or purchase, or in a condemnation context. Nationally, appraisals often rely on royalty capitalization for such valuations, particularly given the scarcity of comparable sales. Moreover, the Virginia attorney general's office has opined that royalty capitalization is appropriate in valuing mineral lands for *property tax* purposes.[1] Royalty capitalization is akin to the discounted cash flow method to value developable property. It assumes a direct relationship between the value of the property and the income it will produce in the future; in the case of a quarry, it would be the royalties from mineral sales. Future royalty expectations are discounted by an assumed rate to achieve a present value.

Nevertheless, a recent decision by the Virginia Supreme Court stated that reliance on future income, capitalized over time, is risky and, arguably, outright inadmissible. In *VEPCO v. Hylton*,[2] the landowner, while computing fair market value, attempted to include the value of an unopened surface mine on its property, and relied at least in part on potential future rents and royalties. Reversing the decision of the trial court, and ruling the landowner's evidence of quarry value inadmissible, the Court emphasized that the mine was *unopened* and that there were *no existing plans* to mine the property. However, the Court also stated that "the future rents and royalties that would be received for [the mineral reserves] when and if they are removed from the land, are inadmissible for proving either the value of the property taken or damage to the residue."[3]

Hylton was an apparent departure from prior case law and arguably only applies to the weak facts in that case. In *East Tennessee Natural Gas Co. v. Riner*,[4] although not central to its holding, the Supreme Court of Virginia noted that a prospective purchaser of quarry property "would necessarily contemplate acquisition of the income stream presently produced by the mineral lease as well as the prospect of future royalties."[5]. This is consistent with use of the income approach to value involving any income producing property. But the *Riner* formulation leaves open the question of how to value the quarry lessee's interest – which ought to be part of the value of the "undivided fee," the

[1] Opinion Letter 10-006, Office of the Attorney General (April 26, 2010).

[2] *VEPCO v. Hylton,* 292 Va. 92, 108 (2016).

[3] *Id.*

[4] *East Tennessee Natural Gas Co. v. Riner,* 239 Va. 94, 98 (1990).

[5] *Id.*

value of *all* interests in the land. Notably, *Riner* was cited with approval in *Hylton*, which could be distinguished because the mine at issue was unopened, and thus, there was no existing income stream. Future royalties in *Hylton*, absent even a plan to mine, were far more speculative than when a property is actively being mined and actually producing an income stream.

The language in *Hylton*, prohibiting the use of future business income in valuing the land, nevertheless must be taken seriously – landowners cannot risk doing otherwise. Moreover, Virginia has similarly cut against the grain of popular valuation methodologies in other contexts. The *Hylton* Court's apparent rejection of royalty capitalization for quarries is similar to the Virginia Supreme Court's well-established rejection of development cost and discounted cash flow analysis in litigation, even though that methodology is accepted in many states and by many lending institutions.[6] It is safest to avoid any reliance on future income.

Simultaneously, the *Hylton* Court reiterated a more widely-accepted prohibition of the "Unit Rule" to value mineral resources on property taken by eminent domain.[7] Specifically, landowners cannot calculate value by multiplying mineable tons by the anticipated price. *Hylton*, 292 Va. at 108. Taken together, these rules create challenges when valuing an operating quarry owned by the operator (that is, an operating business earning income from mining rock as opposed to an absentee landowner just collecting royalties).

Litigants must focus on what the Court has unambiguously permitted. The Supreme Court of Virginia, when valuing an ongoing quarry operation, *has* authorized the *consideration* of the marketability, quantity and character of mineral resources. In *Board of County Sup'rs of Henrico County v. Wilkerson*,[8] the Supreme Court of Virginia approved the following jury instruction:

> [Y]ou may not consider the existence of sand and gravel deposits on the land being taken as an element contributing to the market value of the land as a whole, unless you determine:
>
> (1) that the development of such sand and gravel deposits is consistent with the highest and best use of the property; and,
>
> (2) that there is a market for such sand and gravel in the area, and
>
> (3) that the mineral deposits are of such quantity and character that they may economically be mined taking into consideration all relevant factors; and
>
> (4) that the presence of such sand and gravel deposits on the property contributes to the market value of the property when compared with other land in the area.

Consequently, the Court permitted expert testimony from a geologist discussing the nature and quantity of the minerals as well as a line of questions, on cross-examination concerning the market price per ton of sand and gravel.[9] The *Hylton* Court cited to *Wilkerson* with approval, and this jury instruction – as well as its authorization to consider the marketability, quantity and character of mineral resources on a condemned property – is still good law.

When confronted with a quarry valuation issue in litigation, there is a way to navigate the ambiguous terrain of these Supreme Court of Virginia holdings. Appraisers will likely need to forgo the royalty

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[6] See *Fruit Growers Express Co. v. City of Alexandria*, 216 Va. 602, 604-06 (1976).

[7] *Hylton*, 292 Va. at 108; *see also East Tennessee Natural Gas Co. v. Riner*, 239 Va. 94 (1990); *Bd. of Cnty Supervisors of Henrico Cnty v. Wilkerson*, 226 Va. 84 (1983); *see also* 4 *Nichols on Eminent Domain* § 13.14(4).

[8] *Bd. of Cnty Supervisors of Henrico Cnty v. Wilkerson*, 226 Va. 84, 92 (1983).

[9] *Id.*

capitalization methodology they typically employ in other states (or for lending and property tax purposes in Virginia), and the case will require the retention of several additional experts, *to wit*:

Litigants should retain a *mining* expert. The quantity and character of the available rock needs to be analyzed by a competent geologist and/or mining engineer. Mining engineers can prepare a Mine Plan to analyze the usable material in a quarry.

Litigants should also retain a certified *blaster* and a *seismologist*. A critical component in quarry valuation is required setbacks under local, state, and federal laws and regulations. One of the most important setbacks involves blasting, a process required to actually retrieve the rock for sale in the market. The metric for determining setbacks is called the maximum allowable *peak particle velocity* in terms of inches per second. This measures ground vibrations caused by the blast, which naturally could impact nearby structures. Regulations will likely permit different levels of peak particle velocity depending on the type of structure, and require different levels of protection from nearby blasting. Structures to be built on the land taken in a condemnation may well change the required setback.

In order to determine any blasting setbacks at a quarry site, it will be necessary to work with both a blasting expert and a seismic engineer, who can render opinions on how far back mining operations have to be to remain within allowable limits. The change in that distance before and after a condemnation will be a critical issue in the case.

The marketability of the mineral resources can be addressed by the appraiser, a competitor, or perhaps by the operator of the quarry.

Finally, it will be necessary to hire an appraiser who *specializes in quarry valuation*. Quarries are valued so rarely that a general commercial appraiser may never see a quarry valuation in his career. It is critical for an out of state quarry appraiser to understand the limits in valuation set forth by the Virginia Supreme Court. Appraisers should not blindly rely on appraisal methodology which may be admissible in another state, and even in Virginia for property tax purposes, but not in the context of condemnations. Most importantly, the out of state appraiser should be instructed to avoid royalty capitalization–or any method which solely values the quarry on tonnage to be mined at some point in the future. Based on the mining, blasting and seismology experts' opinions, however, the marketability, quantity and character of the rock should be permissible as adjustments to quarry sales data to achieve an admissible value.

SELLING AN EXISTING CONDOMINIUM JUST GOT EASIER

By John W. Farrell

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

In the Spring 2019 edition of the *Fee Simple*, I reported on one of the first terminations of a condominium regime in Virginia and the litigation attendant to that termination and prospective sale.

The article concluded with several "lessons learned" that, among other things, recommended amendments to the Condominium Act to make condominium terminations more equitable and less susceptible to manipulation by dissident unit owners.

With the leadership of Delegate Marcus Simon, Chairman of the Housing Subcommittee of the General Laws Committee of the House of Delegates, and input from practitioners in the field, the General Assembly passed, and the Governor signed, Chapter 817 of the 2020 Acts of the Assembly. Introduced as House Bill 1548, the bill made multiple changes to Va. Code §§ 55.1-1937 and 55.1-1941, which changes go into effect on July 1, 2020.

When the requisite majority of the unit owners have voted to terminate and sell the condominium, subparagraph I (5) of § 55.1-1937 now makes explicit that it is the responsibility of the individual unit owner to satisfy and cause the release of any leases, mortgages or liens applicable to that unit. As described in the prior article, the dissenting unit owners at Sunrise Valley were able to extract a disproportionate share of the sale proceeds through the imposition of leases and mortgages on their individual units. After July 1, 2020, unless the termination agreement specifically permits such an arrangement, that tactic will no longer be effective.

New language in § 55.1-1941 also provides that only institutional mortgagees may object to an amendment to the condominium documents and they must do so within a year of recordation of the amendment. This provision prevents a private mortgagee, such as a friend or relative of a dissenting unit owner, from interfering with the sale of a condominium.

Next, Subparagraph I (3) of § 55.1-1937, explicitly allows condominium associations to avoid the substantial costs of individual appraisals of each unit as part of the sales process. However, that paragraph also includes language that protects the interests of the individual unit owners from an unfair division of the sale proceeds. If the proceeds of the sale are to be divided among the unit owners based on the percentage of their common elements interest or some other means that does not rely on appraisals then the association must give each unit owner a notice stating the results of the chosen method for each unit. That subparagraph goes on to provide that 10% of the unit owners can dispute the allocation of proceeds and demand that all the units be appraised. If the appraisal demonstrates that value of the objecting unit owners is 10% more than each would have received under the method chosen by the majority, the proceeds are distributed using the relative values of the appraisals and the costs of the appraisals are born by the association. If the difference is less than 10%, the costs of the appraisals are born by the objecting unit owners.

New language in Paragraphs D, F and G of § 55.1-1937 makes clear that condominium terminations may be accomplished by exchanging interests in a successor limited liability company or other entity and not solely upon the payment of cash.

Paragraph C has been amended to make clear that anyone acquiring a condominium unit subsequent to the approval of a termination agreement is bound by that termination.

New language has been added to Paragraph G to provide that, if the termination does not result in a sale but rather a conversion to a tenancy in common interest, any lien on an individual unit will not encumber the entirety of the property but only the tenancy in common interest of the individual unit owner.

With these changes, sales of condominiums should be able to proceed more smoothly thereby achieving the desires of the substantial majority of owners.

Even with these statutory changes, several of the lessons learned from the Sunrise Valley sale will still apply:

1. The provisions of Va. Code § 55.1-1964(B) must be incorporated into the declaration to permit the association to recover from individual unit owners the association's costs to buy out tenants or pay-off lenders of those individual units.

2. The sales contract should list the association as the seller and should include an acknowledgement by the buyer that removal of liens and tenancies and delivery of possession of individual units is the responsibility of individual unit owners.

3. The membership resolution approving the termination should have an outside expiration date that accounts for the satisfaction of any sale contingencies, e.g. a rezoning.

4. The membership resolution should set out how the proceeds will be allocated among the unit owners.

5. Members who support the sale should sign proxies to the association president approving the sale.

6. Notices of the allocation of proceeds should be sent to each unit owner as soon as possible in order to start the 30 day objection period set out in Subparagraph I (3) of § 55.1-1937.

VIRGINIA'S "NEW" ENTITY - THE PROTECTED SERIES LIMITED LIABILITY COMPANY

By Richard Howard-Smith

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This article is intended to introduce the reader to Virginia's newest legal entity and provide a brief overview of some of the more significant characteristics of the "protected series limited liability company" (the "SeLLC"). Virginia has very modern business entity statutes, all typically based heavily on the various uniform laws drafted by the Uniform Laws Commission, and the Virginia Uniform Protected Series Act[1] is no exception. This discussion is not intended to be a complete and comprehensive analysis, but rather to describe and explain some of the similar and unique provisions of the Act (compared to other Virginia entities) and also comment on some practical issues.[2] Hopefully it will provide enough information to enable readers to assess more readily the potential of the SeLLC with their own review and research of the Act and the SeLLC for asset holding structures that might be useful in particular situations. In particular, a basic discussion of the use of SeLLCs for real estate holdings in Virginia will be included.

A. Introduction to the SeLLC

A complex variant of the limited liability company form of entity is the relatively new "series" limited liability company ("SeLLC"), created by Virginia's 2019 enactment of its version of the Uniform Protected Series Act.[3] In fact, the VUPSA is not a "stand-alone" Act, but is really a subset of the Virginia Limited Liability Company Act (Article 16 of Chapter 12 of Title 13.1; the "VLLCA"); it can better be understood in that context. If the VUPSA does not address an issue, the VLLCA controls.

SeLLCs began in Delaware over 20 years ago, but perhaps due to non-adoption elsewhere (along with unfavorable cases involving foreign recognition), they still only exist in approximately 15 states as of the date this was written. The main legal distinction of a SeLLC from a regular LLC is the presence of an internal liability shield that protects assets of the SeLLC and its various "series" from liabilities of each other and each other series (occasionally referred to as "horizontal" liability), as well as the protection of the members from liabilities of the entity and the entity from liabilities of its members as with a regular LLC (also referred to as "vertical" liability). In this sense, the SeLLC emulates the effect of having a tiered LLC structure – a "master" or "parent" LLC that itself owns any number of single member LLCs or "children" LLCs (much like wholly-owned subsidiaries), the form of compound asset holding using different "buckets" that has heretofore been utilized. However, the SeLLC also can take this somewhat common design one step further than the parent-child structure

[1] The Virginia Uniform Protected Series Act is based on the Uniform Act promulgated in 2017 by the National Conference of Commissioners on Uniform State Laws (NCCUSL) (aka the Uniform Laws Commission - https://www.uniformlaws.org), is effective as of July 1, 2020. See Va. Code § 13.1-1088 et seq.

[2] There are many other issues not covered in this article that should be considered when evaluating the use of an SeLLC–such as the rules regarding rights of members to information and compliance with entity transaction rules that are available, to name a few.

[3] The provisions of the VUPSA, though enacted in 2019, have a delayed effective date of July 1, 2020.

by permitting different members of the different series, provided that all such members are also members of the SeLLC.[4] This unique aspect of the SeLLC distinguishes it from all other Virginia entities (except the Business Trust, which also has the concept of different series[5] and discussed some in this article), and also contributes to its relative complexity among entities.

B. General Characteristics of a SeLLC

As defined by the VUPSA,[4] the SeLLC is characterized by the following:

1. an identifiable set of assets segregated within a limited liability company ("a series limited liability company");
2. the assets:
   a. comprise a protected series, which is empowered to conduct activities in its own name;
   b. must be identified by thorough recordkeeping that distinguishes them from assets of the series limited liability company and assets of any other protected series of the company;
   c. are obligated solely to persons asserting claims pertaining to activities related to the segregated assets; and
   d. are not available to persons asserting claims arising from the activities of the series limited liability company or any other protected series of the company;
3. one or more members of the series limited liability company may be associated with the protected series, but not necessarily; and
4. distributions arising from the assets and activities go to:
   a. the members associated with the protected series, if any; or
   b. if the series has no associated members, the series limited liability company.

C. Organizational and Entity Issues

1. *SeLLC Operating Agreement*. A detailed operating agreement will be absolutely critical to a SeLLC, and except as otherwise specifically provided by the VUPSA, it will govern:

a. The internal affairs of a protected series, including: relations among associated members, managers, assignees of the protected series and the protected series; rights and duties of any managers; governance decisions affecting and the conduct of the activities and affairs of the protected series; and procedures and conditions for becoming an associated member or protected series assignee;

b. The relations among the protected series of a series limited liability company, the series limited liability company, and any other protected series of the series limited liability company; and

c. Relations between any of the protected series, its manager, any associated member or assignee of the protected series; and a person who is not an associated member, manager or assignee of the protected series, or an assignee of the series limited liability company.[6]

2. *Limitations*. The SeLLC has more limitations for entity combinations than other Virginia entities, largely due to its unique multi-faceted nature.

a. A series limited liability company may not: convert to a different type of entity; domesticate as a foreign limited liability company; or be a party to or the surviving company of a merger

[4] Va. Code § 13.1-1099.3.A.

[5] See Va. Code § 13.1-1219.B.1.

[6] Va. Code § 13.1-1092.

(unless not created in the merger).[7] However, an SeLLC may be party to a merger only if: each party to the merger is a limited liability company; and the surviving LLC is not created in the merger.[8]

b. To clarify: although a protected series is generally regarded "as if" it were a separate LLC,[9] it cannot: be a party to a merger; convert to a different type of entity; domesticate as a protected series under the laws of a foreign jurisdiction; or be a party to or be formed, organized, established, or created in a transaction substantially like a merger, interest exchange, conversion, or domestication.[10]

D. Additional Characteristics and Limitations

The SeLLC concept can perhaps best be understood by looking at the entity from the perspective of the assets with those assets being separated into different series and identified as such– both by the SeLLC's name and series name, and suffixed with either "protected series," "PS," or "P.S." Each separate series of assets may, but need not, be effectively owned by different members of the SeLLC and associated with the assets of a protected series. Each PS will need to file a "statement of protected series designation"[11] with the SCC and pay its own filing fee and annual registration fee.[12] The PS must have a registered agent (as with other entities conducting business in Virginia), but it must be the same agent as its SeLLC.[13] From a state law filing perspective, the SeLLC offers no cost or administrative advantage over a tiered structure of LLCs, and also will be at least as complicated from an organizational structure and document standpoint. The novelty of SeLLC's governing law, the statutory provisions and terminology (overlaid on the existing LLC laws), and the interrelated nature of the SeLLC and its PSis almost certain to make the SeLLC a significantly more complicated organizational structure than the LLC. There are also many statutory provisions for SeLLCs that cannot be altered by the SeLLC's operating agreement, such as the requirement that all SeLLC Members must agree to any amendments of a statement of a protected series designation.[14] On the other hand, for very closely held SeLLCs, some operational and dissolution simplifications may exist due to the overlapping nature of the SeLLC and its PS– such as the dissolution of the SeLLC resulting in the dissolution of every PS within it.[15]

With respect to the SeLLC, confusion will likely arise from the unique terminology of the VUPSA itself. The VUPSA does not use familiar language such as the PS "owning" an asset; rather it uses the construct that an asset is either "associated" with a PS or the SeLLC (but not both). Also, confusion will arise from the fact that only the SeLLC can participate in certain entity-level transactions (like a merger with another LLC),[16] and dissolution of the SeLLC also causes dissolution of its PS;[17] but each

[7] Va. Code § 13.1-1099.15.

[8] Va. Code § 13.1-1099.16.

[9] Va. Code § 13.1-1094.1.

[10] Va. Code § 13.1-1099.14.

[11] Va. Code § 13.1-1095.

[12] Va. Code §§ 13.1-1099.1. and 13.1-1061.

[13] Va. Code § 13.1-1097.

[14] Va. Code § 13.1-1093.A.9. and 13.1-1095.D.

[15] Va. Code § 13.1-1099.11.1.

[16] Va. Code § 13.1-1099.14.

[17] Va. Code § 13.1-1099.11.1.

PS is otherwise regarded as a separate "person,"[18] having the power and authority to hold, own, manage and administer its own assets, as well as contract and conduct business in its own name, and sue and be sued in its own name,[19] characteristics normally reserved for legal separate entities. A PS apparently can own interests in other legal entities, such as other LLCs and corporations, but cannot own an interest in its own SeLLC or another PS.[20] Further, the various Member and Manager interests in a SeLLC or PS are interconnected with the SeLLC and each PS in many ways, which further compounds the potential confusion.[21] Specifically to this point of potential confusion, with respect to each PS, an associated member, assignee, membership interest, manager, asset, or creditor or other obligee of the PS is also "deemed to be" a member, assignee, membership interest, manager, asset, or creditor or other obligee of the SeLLC.

The image here is a comparatively flat one-tiered structure: with the members of the SeLLC as the owner level, the SeLLC as the consolidated entity level directly owned by its members, and each PS being owned only by those same members of the SeLLC (though potentially in differing proportions) as the series level. In contrast, partnerships and LLCs can have any number of tiers of members– sort of like the mythical story of the earth's support being on the back of a turtle, which in turn rested on the back of another turtle, and so on *ad infinitum*.

For example, a simple SeLLC could have two series, A, PS and B, PS. This would involve three separate SCC filings: first one for the SeLLC Series, and then one each for the SeLLC Series A, PS, and SeLLC Series B, PS. Let's assume three persons who would like to participate in a business venture, X, Y and Z, but X and Y only are to have rights in the asset associated with SeLLC Series A, PS, and only Y and Z are to have rights in the asset associated with SeLLC Series B, PS. All three of X, Y and Z must be members of the SeLLC. The income from the activities of SeLLC Series A, PS, is only distributable to X and Y, and the income from the activities of SeLLC Series B, PS, is only distributable to Y and Z. Obviously very detailed books and records for each PS will be required in this regime, and that is precisely the mandate of the VUPSA.[22] If a member were to convey its transferrable interest,[23] it must convey both the associated member interest in the SeLLC and the member interest in the PS with which it is associated.[24]

E. Liabilities

Somewhat unique to Virginia's statutory requirements for entities,[25] recordkeeping for assets and members will need to be detailed and comprehensive and maintained meticulously on a continuous basis because much of the segregated liability protection afforded to the SeLLC and each of its separate protected series is based on the proper maintenance of such records. For instance, separate bank accounts for each PS would undoubtedly be essential. In short, if an asset is associated with SeLLC Series A, PS, and there is a creditor of that series or a particular asset of that series, and the proper identification and activity records are maintained, that creditor will not be able to pursue its claim against either SeLLC Series B, PS, the SeLLC, or any of their respective members. As noted, the Virginia Business Trust by its statutory terms has a similar horizontal liability shield,[26] but its

[18] Va. Code §§ 13.1-1089 and 1094.1.

[19] Va. Code § 13.1-1090.A.

[20] Va. Code § 13.1-1090.D.

[21] Va. Code § 1094.

[22] Va. Code § 13.1-1099.2.

[23] Va. Code § 13.1-1039.A.

[24] Va. Code § 13.1-1099.3.A.

[25] Except perhaps for Virginia Business Trusts, see Va. Code § 13.1-1219.B.

[26] Va. Code § 13.1-1231.D.

language for a separate series is more limited, now 20 years old, and judicially untested in Virginia. More on this comparison below.

1. *Exclusive Charging Order Remedy*. A significantly critical protective feature of the SeLLC is that the ultimate creditor remedy against a Member's interest in a SeLLC is a "charging order." As with Members of an LLC, [27] Virginia's exclusive remedy for a creditor against a Member's or assignee's interest in a SeLLC is a "charging order" on that interest[28] – a remedy arising out of the Uniform Partnership Act[29] and akin to a garnishment. A creditor holding a charging order collects the economic returns for the LLC interest until the lien is satisfied, but they cannot seize or sell that Member's interest in the LLC. This is substantial protection of a Member's ownership interest, and can result in a bargaining advantage in settlement of claims, because if there are no SeLLC distributions, the creditor gets nothing and has to sit and wait for the possibility there will be distributions in the future. In contrast, a shareholder's ownership of stock in a corporation does not have similar protection - the stock can be seized and sold through judicially ordered processes as with other personal assets. In closely held entities where the Member/owner has control or a significant voice over distributions, the practical benefits of this exclusive charging order are even more substantial.

2. *Comparison to the Virginia Business Trust*. Comparing this asset protection advantage of the SeLLC to the Virginia Business Trust, the only other Virginia entity that provides for separate series of asset ownership, the SeLLC is superior at its basic statutory level. A Virginia Business Trust does not have exclusive charging order protection under Virginia law. A creditor of a beneficial owner of an interest in a Virginia Business Trust can pursue all remedies available under law against that beneficiary's interest. This disadvantage can be remedied by interposing an LLC as the owner of the business trust interest, but that extra layer begs the question of the selection of the business trust as the entity of choice in the first place. However, if the business trust were already in place, this extra step might make sense (if a conversion of entity type or merger of the Virginia Business Trust were not possible or desired).

F. Taxation

The SeLLC will be subject to the same kinds of tax analysis as an LLC. It will be able to elect corporate tax treatment, or otherwise be classified under the default provisions depending on whether it has a sole owner or multiple owners.[30] If there are multiple members but all their respective SeLLC and PS interests are all the same, then one partnership tax return should be the logical answer. In an SeLLC with a more complicated structure, each protected series of an SeLLC will be subject to a similar analysis, so an SeLLC that has PSs with different associated members among those PSs could easily be treated as a partnership of partnerships (i.e., "tiered partnerships") for income tax purposes. If the SeLLC with such PSs with differing associated members desired to only file one partnership income tax return, it still should be able to do so for at least the time being,[31] but will have to observe and its operating agreement reflect the detailed special allocation rules of IRC § 704 to accurately track the income from each PS, and of course meticulously maintain capital accounts to give economic

[27] Va. Code § 13.1-1041.1.

[28] Va. Code § 13.1-1099.9.

[29] Va. Code § § 50-73.108.

[30] 26 CFR § 301.7701-2. Federal tax regulations proposed in 2010 would treat each series within a SeLLC as a separate entity for federal income tax purposes. REG-119921-09, filed 9/13/10, published 9/14/10 (F.R. Doc. 2010-22793; 75 Fed. Reg. 55699 et seq.), adding Prop. Treas. Regs. §§301.6011-6, 301.6071-2, and 301.7701-1(a)(5), and amending §§301.7701-1(e) and (f). Each series would be classified as a partnership, disregarded, or as an association taxable as a corporation. To date, these have not been finalized.

substance to those PS allocations in liquidation. Thus, in complex SeLLCs, the tax treatment will be at least as complex as their organizational structures.

G. Observations on Adoption and Use of the SeLLC

The SeLLC will likely be accompanied by the perception of consolidation, simplification and economy in having one entity that has many component parts, but in matter of fact such thinking will largely be disappointing. While some consolidation simplification results from having a common registered agent[31] and the possibility of a common manager for the SeLLC and all of its protected series, each protected series will need to be registered with and pay annual fees to the Virginia SCC (as if a separate entity), and will need to be the subject of detailed provisions in the SeLLC's operating agreement (though there will likely be occasion for replication of similar provisions by extrapolation and cross-reference). Separate accounts and accounting will be required in all cases. Of course, something can be said about having just one operating agreement despite it being more complex; it certainly should be able to be review and/or amended easier than multiple agreements of sibling LLCs, regardless of how similar they may be. Unless and until there is widespread adoption of the SeLLC across the United States to add more certainty to the issues caused by jurisdictions that do not recognize SeLLCs, SeLLCs will be best suited for assets and activities that are clearly subject only to Virginia law (or only the laws of a sister UPSA state). There are also other uncertainties resulting from the interaction with other laws, such as federal bankruptcy and securities laws to name just two. Additionally, there is the not insubstantial consideration that novelty invokes its own complexity and uncertainty that can only be addressed with gaining legal and operational familiarity over time. As such, at least for a while, the SeLLC will likely only be used by advanced practitioners for specific subsets of types of aggregated asset structures.

H. Observations for Use of the SeLLC for Real Estate Holdings

The SeLLC may prove to be a useful form of Virginia entity for certain assets that merit one-level tiered structures, such as for a real estate investor that owns and manages multiple rental or investment properties - they could from an SeLLC and put each separate property into a different PS. At the top of the list of advantages is the combined benefit of horizontal and vertical liability protections as well as the exclusive creditor remedy of the charging order. Especially for single owner or very closely held ownership of SeLLCs, an SeLLC may offer some simplification and cost savings over time, particularly as familiarity and acceptance become more commonplace. For multi-owner SeLLCs, there will be additional complications in design and drafting of SeLLC documentation, (presumably no less simple than a tiered LLC structure) particularly in the initial setup, but also perhaps in ongoing operational complexities, especially with changing assets and Members.

As for concerns and potential disadvantages of SeLLCs, novelty and unfamiliarity are likely to at least initially cause issues for SeLLCs and their PSs–particularly with title, borrowing and security. Title issues should be the easiest to resolve, as the separate entity provisions should be readily applied to the SeLLC and each PS. Authority in PS managers to contract for and convey real property should also be readily established, because they are simultaneously managers of the SeLLC.[32] The SeLLC itself is deemed to be the manager of any PS without associated members.[33] Based on anecdotal experience, the novelty and complexity of the SeLLC and PS are likely to cause lenders to be more concerned about the SeLLC. The early adopter of the SeLLC is likely to face additional compliance issues with banks and financial institutions for lending either to the SeLLC or a PS, and in documenting authority for the securing of such loans, including UCC financing statement issues. Virginia has addressed this as much as possible in the relatively uncharted SeLLC environment, clarifying that a PS is a separate entity capable of acting as a separate juridical entity for almost all

[31] Va. Code § 13.1-1097.

[32] Va. Code § 13.1-1094.A.5.

[33] Va. Code § 13.1-10994.B.

transactions except for certain limited entity-level transactions. Perhaps the most likely result in the authority arena is that signoffs will be asked of both the SeLLC and the PS involved; time will tell.

I. Conclusion

Some have and will suggest the SeLLC is an entity that no one asked for and no one needed. They may be correct, as they have been for more than 20 years in the case of early-adopting jurisdictions, though a brighter future may in fact exist for the Virginia SeLLC. No new form of entity has been quick to be adopted, and the SeLLC is likely to be no different. Over time, however, the SeLLC will become more recognized and accepted, and will no doubt take its place in the tool chest of the planners that think, advise, and choose the best tools for the job at hand.

NEGOTIATING SOLAR LEASES

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The solar energy industry in Virginia is poised to enter a new phase of accelerated growth, driven by the recent adoption of the Virginia Clean Economy Act.[1] The new law establishes a schedule for closing fossil fuel power plants in Virginia, and requires 100 percent of the electricity sold by Virginia's two largest utilities to come from renewable sources by 2045 and 2050. The Act also declares that 16,100 megawatts of solar and onshore wind is "in the public interest," setting the stage for significant investment in utility-scale solar energy in Virginia during the coming years. This growth will continue to increase the demand for open land in the Commonwealth. The most common device used by developers to secure real estate for solar development is a ground lease. This article discusses some of the issues that counsel for developers[2] and landowners should consider when negotiating leases for utility-scale solar energy projects.

Structure of Transaction

Solar lease transactions are typically structured one of two ways, both of which give developers an opportunity to perform due diligence before committing to a long-term agreement. Due diligence items include evaluating the suitability of the site, obtaining necessary zoning and SCC permits, and entering into power purchase agreements with utilities for the sale of the electrical power. One deal structure is a basic ground lease that provides for reduced rent during a due diligence period that ends when the developer begins or completes construction, or the project comes online (a point to be negotiated). Under this structure, the developer is allowed to terminate the lease for convenience without penalty during the due diligence period with respect to any part of the property (except forfeiture of any paid rent). Counsel for landowners should ensure the lease clearly defines the length of the due diligence period and the landowner's right to terminate if the project is not constructed within a certain period.

The other common structure is an option to lease agreement which provides the developer an exclusive option to enter into a binding ground lease, a copy of which is usually attached to the option agreement. The option agreement also grants the developer a license to enter the property to perform due diligence. Developer should expect to pay a fee (equivalent to reduced rent) in exchange for the option and license. Counsel for developers and landowners should ensure their clients understand and agree to all the terms of the form ground lease, as that will become the lease if the option is exercised.

[1] The Virginia Clean Economy Act, H.B. 1526, Virginia Acts of Assembly (adopted 2020). *The Act encompasses multiple sections, most of which are in Title 56—Public Service Companies. –Ed.*

[2] References in this article to "developers" include single-purpose entities created by developers to hold leasehold interests.

Leased Area

Developers need broad rights to adjust the boundary of the leased area in response to information learned during due diligence. It is possible that a developer will not need all of a landowner's property or that a landowner will want to exclude certain portions of her property from the leased area. Developers and landowners should make sure they understand exactly what real property is subject to the option or lease, and whether the landowner will have the right to approve the final location of the leased area. Other issues to consider are whether the developer will have the right to demolish existing structures and trees on adjacent property owned by landowner and what, if any, parts of the property the owner may want preserved. If a landowner wants to exclude specific portions of property from solar development (e.g. old houses, conservation easements, etc.), counsel should ensure these areas are carved out of the leased area or the landowner reserves the right to approve the boundary.

If the lease grants the developer the right to choose the boundary for the leased area without the landowner's consent, there may be a risk the developer's boundary will landlock the residue of the owner's property. To prevent this possibility, landowners should request a provision either prohibiting the developer from landlocking any residue or reserving for the landowner the right to cross over the leased area (using the developer's roads) to access the residue.

Easements

Developers will need exclusive, unobstructed access to the sunlight that shines onto the leased area. This means that the developer may need to be able to restrict the use of property that is adjacent to the leased area to prevent the growth or construction of anything that will shade the arrays (e.g. trees, cellular towers, etc.). Furthermore, to the extent the leased area is not adjacent to a public right of way or an electrical power line, the developer will need one or more easements for access and/or transmission of electrical power to the grid. If the leased area is insufficient to handle the construction of the project, including the storage and staging of materials and equipment, the developer may need to secure a construction easement from the non-leased portion of an owner's property. These easements should be a part of the ground lease and carefully reviewed by each party. If the developer needs to use or limit the use of surrounding property owned by a third party, the developer should negotiate separate recordable easements with the third-party landowners before or during the due diligence phase of the project.

Third Party Protections

Landowners should understand that solar projects are funded by lenders and investors whose primary objective is ensuring a marketable, steady, and low-risk stream of payments. In this vein, lenders and investors look for solar leases to include certain protections that are becoming standard in the industry. Landowners may be alarmed by some of these protections because they are not found in traditional leasing arrangements. Examples of such protections include longer cure periods, the right of developer to assign the lease without the landowner's consent, the right of lenders or investors to receive notices of any default by developer, the right of lenders and investors to cure a default by the developer, and the right to assign the lease to a third party without the landowner's consent in the event the developer defaults on either the lease or the developer's obligations to the lender or investor. Additionally, lenders and investors may require the landowner to subordinate any statutory lien to which the landowner may be entitled (e.g. landlord's lien) to the security interests of the lenders and/or investors. Many of these protections are non-negotiable, as they are necessary to ensure the marketability of the lease. Landowners are compensated for this risk with the prospect of higher than normal rental income over a long period of time. Counsel for landowners should ensure that the right to assign the lease by the developer, lender or investor is conditioned on the assignee (1) assuming all of the developer's obligations under the lease including the payment of any past due rent, (2) having adequate experience and financial resources to operate a solar facility, and (3) posting a new decommissioning bond to ensure the facilities are removed at the end of the term. This will minimize risks associated with the landowner having to deal with an unknown successor-in-interest.

Mortgages and Liens

Developers prefer land that is not encumbered by existing mortgages or liens. If a landowner's property is encumbered, the landowner should expect the developer to condition any lease on the landowner obtaining a subordination agreement from the holder of the mortgage or lien. Additionally, a landowner should expect the lease to condition the landowner's ability to encumber the property with mortgages on the landowner obtaining a subordination agreement from its lender.

The lease should prohibit the developer from allowing any mechanic's liens being filed against the property and should require the developer to bond off or otherwise obtain releases of any such liens within a specific period of time (e.g. within five days of notice).

Tax and Green Energy Credits

It is possible that during the term of the lease the laws governing tax credits, renewable energy credits, and related benefits will change in such a way that the developer becomes ineligible for the credits due to the structure of the transaction with landowner. For example, tax credits may become unavailable to holders of leasehold estates. Developers and landowners have a shared interest in the developer or its successor qualifying for any and all of these benefits. To mitigate (but not eliminate) this risk, the lease should include a provision that requires the landowner to negotiate in good faith with the developer a modification to the lease or the developer's interest in the leased area if that modification will maintain or restore the developer's eligibility for any tax credits, renewable energy credits, or related benefits.

Maintenance

The lease should require the developer to maintain the leased area in good repair and condition, including the control of vegetation and noxious weeds. Landowners who farm adjacent properties should consider requesting restrictions regarding the use of herbicides on the leased area in order to mitigate the risk of pesticide drift. If a landowner is concerned about how the leased area will be maintained, the landowner should attempt to negotiate a right of first refusal to perform the maintenance work on behalf of the developer.

Property Taxes

The lease should clarify which party will be responsible for each type of tax that could be levied against the solar project or property, including real property taxes on the land and leasehold interest, machinery and tool taxes, sales taxes, etc. In general, developers should expect to be responsible for any taxes attributable to the developer's equipment and its leasehold interest.

Decommissioning

The lease should address the decommissioning of the solar project upon the expiration or termination of the lease. Developers are typically responsible for decommissioning, which generally entails removal and proper disposal of the solar equipment and restoration of the leased property. The lease should address how soon decommissioning must be accomplished and the extent to which underground equipment must be removed (three feet appears to be common). In general, the developer should expect to have to commit to restoring the surface of the property to a condition reasonably similar to the condition immediately prior to commencement of construction of the project. The lease should also clarify whether the developer has any obligation to restore or replant vegetation. An alternative decommissioning provision would give the developer the option (but not the obligation) to remove the equipment. If the option is not exercised, the equipment would be deemed to have been assigned to the landowner. (This would shift considerable risk to the landowner.) Another variation would give the landowner the option to keep the equipment on the leased property at the end of the term.

If the developer is required to remove the facilities at the end of the term, a landowner would face a worst-case scenario if a developer or successor entity abandoning the project at the end of the term had little to no assets to satisfy a judgment except for 20-to-30-year-old solar equipment. To address this risk, the lease should require the developer to obtain, prior to beginning any construction, a decommissioning bond naming the landowner as an obligee and guaranteeing the removal of the solar facility at the termination or expiration of the lease. The bond should be in an amount equal to the estimated cost of decommissioning at the expiration of the lease, with or without any discount for the salvage value of the equipment (a point to be negotiated), as determined by a licensed professional engineer with experience estimating decommissioning costs. The developer should have no objection to purchasing this bond, inasmuch as the developer will be unable to obtain a conditional use permit or other approvals without a bond in place in favor of the locality. Virginia law requires localities to condition local approvals (e.g. conditional use permits, site plan approvals, etc.) on the developer or landowner entering into decommissioning agreements with the locality. These agreements must grant the locality the right to enter the leased property and complete the decommissioning if not performed within a certain timeframe and require the developer or landowner to provide some type of financial assurance that the decommissioning will occur (decommissioning bond, letter of credit, escrowed funds, etc.) based on an estimated cost of decommissioning.[3] Virginia law allows localities to decide which financial assurance device is acceptable, but most jurisdictions require bonds.

Condemnation

The lease should address the parties' rights in the event the leased area or easement areas are condemned through eminent domain. This provision should address how the parties will share in any compensation awarded by the condemnor, how rent will abate (if at all), and whether it will trigger any right to terminate by either party. Although the risk of a condemnation is small, developers and landowners should discuss these issues in light of the long duration of the lease.

[3] Va. Code § 15.2-2241.2 (2019).

2020 VIRGINIA GENERAL ASSEMBLY: SELECTED REAL ESTATE LEGISLATION BILL LIST

Compiled by Jeremy R. Moss

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The following bills relate to real estate, real estate financing, taxation or land use. A report of the 2020 General Assembly session follows with in-depth summaries of most of the 133 bills listed below. Some of the bills included in this list have been omitted from the report because they have only a tangential connection to real estate (like those related to Wills, Trusts and Fiduciaries) or because the summaries provided below (from the Virginia Division of Legislative Services) sufficiently identified the nature and scope of the bill.

Actual copies of the legislation, together with bill summaries and history of legislative action on those bills, may be viewed on the General Assembly website at http://leg1.state.va.us/lis.htm; hyperlinks have been added to each bill number for the electronic version of *The Fee Simple.*

In instances where a bill has multiple patrons, only the primary patron listed in the Virginia Legislative Information System is included. Identical House and Senate bills are ordered in accordance with the corresponding House bill number.

Bill Number	Patron	Bill Description
AFFORDABLE HOUSING		
HB 854	Delegate Kathleen Murphy	Study; Department of Housing and Community Development and Virginia Housing and Development Authority; ways to incentivize the development of affordable housing in the Commonwealth of Virginia; report. [Requests the Department of Housing and Community Development and the Virginia Housing and Development Authority to study ways to incentivize the development of affordable housing in the Commonwealth of Virginia.]
HB 1101; SB 834	Delegate Betsy B. Carr; Senator Jennifer L. McClellan	Affordable housing; certain localities allowed to adopt

		dwelling unit ordinances. [Amends the Code of Virginia by adding a section numbered 15.2-2305.1.]
AUTHORITIES		
HB 810	Delegate Jeffrey M. Bourne	Department of Housing and Community Development and the Virginia Housing Development Authority; stakeholder advisory group; Virginia housing opportunity tax credit program. [Directs the Department of Housing and Community Development and the Virginia Housing Development Authority to convene a stakeholder meeting on the establishment of a Virginia opportunity tax credit program.]
HB 921; SB 708	Delegate Jerrauld C. "Jay" Jones; Senator Jennifer L. McClellan	Housing authorities; notice of intent to demolish, etc., housing projects. [Amends the Code of Virginia by adding a section numbered 36-7.2.]
BUDGET BILLS		
HB 29	Delegate Luke E. Torian	Budget Bill. [Amends Chapter 854 of the 2019 Acts of Assembly.]
HB 30	Delegate Luke E. Torian	Budget Bill. [Provides for all appropriations of the Budget submitted by the Governor of Virginia in accordance with the provisions of § 2.2-1509, Code of Virginia, and provides a portion of revenues for the two years ending respectively on the thirtieth day of June 2021, and the thirtieth day of June 2022.]
BUILDING CODE		
SB 1065	Senator Bill DeSteph	Board of Housing and Community Development; Uniform Statewide Building Code; installation of key boxes on high-risk structures. [Directs the Department of General Services to determine which state-owned structures are

		high-risk and the necessity of having key boxes installed in strategic locations on the outside of such structures.]
CEMETERIES		
HB 210	Delegate Chris L. Hurst	Historical African American cemeteries; Montgomery County and City of Radford. [Amends and reenacts § 10.1-2211.2 of the Code of Virginia.]
HB 314	Delegate Wendy W. Gooditis	Historical African American cemeteries; Loudoun County. [Amends and reenacts § 10.1-2211.2 of the Code of Virginia.]
HB 950; SB 519	Delegate Margaret B. Ransone; Senator Ryan T. McDougle	Department of Professional and Occupational Regulation; cemeteries; exemptions. [Amends and reenacts § 54.1-2312 of the Code of Virginia.]
HB 1523; SB 881	Delegate Delores L. McQuinn Senator Mamie E. Locke	Historical African American Cemeteries and Graves Fund. [Amends and reenacts §§ 10.1-2202 and 10.1-2211.2 of the Code of Virginia and amends the Code of Virginia by adding a section numbered 10.1-2211.3.]
SB 445	Senator John S. Edwards	Cemeteries; acquisition of abandoned lots in cities and certain towns. [Amends and reenacts §§ 57-39.2 through 57-39.7 of the Code of Virginia.]
SB 1070	Senator Siobhan S. Dunnavant (by request)	Cemeteries, special interments; pets. [Amends and reenacts § 54.1-2312.01 of the Code of Virginia.]
CIVIL REMEDIES AND PROCEDURE		
HB 651	Delegate Patrick A. Hope	Recoupment. [Amends and reenacts § 8.01-422 of the Code of Virginia.]
HB 834	Delegate Richard C. "Rip" Sullivan, Jr.	Order of publication; electronic notice. [Amends and reenacts § 8.01-317 of the Code of Virginia.]

HB 1581	Delegate Steve E. Heretick	Tax delinquent real property; correction of tax records. [Amends and reenacts §§ 8.01-98 and 58.1-3981 of the Code of Virginia.]
HB 1605; SB 553	Delegate Patrick A. Hope; Senator Frank M. Ruff, Jr.	Partition of property. [Amends and reenacts §§ 8.01-81 and 8.01-83 of the Code of Virginia; amends the Code of Virginia by adding sections numbered 8.01-81.1, 8.01-83.1, 8.01-83.2, and 8.01-83.3; repeals § 8.01-82 of the Code of Virginia.]
SB 640	Senator Scott A. Surovell	Unlawful detainer; expungement. [Amends the Code of Virginia by adding in Article 13 of Chapter 3 of Title 8.01 a section numbered 8.01-130.01.]
CODE OF VIRGINIA		
HB 1340	Delegate James A. "Jay" Leftwich	Revision of Title 55. [Amends and reenacts §§ 54.1-2345, 55.1-1602, 55.1-1805, 55.1-1808, 55.1-1810, 55.1-1815, 55.1-1904, 55.1-1906, 55.1-1911, 55.1-1919, 55.1-1937, 55.1-1940, 55.1-1945, and 55.1-1974 of the Code of Virginia.]
HB 1341	Delegate James A. "Jay" Leftwich	Manufactured Housing Construction and Safety Standards Law; provisions not set out; applicability. [Amends and reenacts § 36-85.4 of the Code of Virginia.]
COMMISSIONS, BOARDS AND INSTITUTIONS GENERALLY		
HB 396	Delegate Kaye Kory	Redevelopment and housing authority; compensation of commissioners. [Amends and reenacts § 36-11.1:1 of the Code of Virginia.]
HB 513	Delegate David L. Bulova	Department of Professional and Occupational Regulation; Real Estate Board; death or disability of a real estate broker. [Amends and reenacts § 54.1-2109 of the Code of Virginia.]

HB 1205	Delegate Kathy K.L. Tran	Discharge of deleterious substance into state waters; notice. [Amends and reenacts §§ 62.1-44.5, as it is currently effective and as it shall become effective, and 62.1-44.19:6 of the Code of Virginia.]
HB 1569; SB 343	Delegate Kelly K. Convirs-Fowler; Senator Mamie E. Locke	Required disclosures; dams. [Amends and reenacts § 55.1-703 of the Code of Virginia.]
COMMON INTEREST COMMUNITIES		
HB 176; SB 672	Delegate Marcus B. Simon; Senator T. Montgomery "Monty" Mason	Property Owners' Association Act and Virginia Condominium Act; contract disclosure statement; extension of right of cancellation. [Amends and reenacts §§ 55.1-1808 and 55.1-1990 of the Code of Virginia.]
HB 720	Delegate David A. Reid	Property Owners' Association Act; notice on restrictions on display of political signs. [Amends and reenacts §§ 55.1-1809 and 55.1-1814 of the Code of Virginia.]
HB 1548	Delegate Marcus B. Simon	Common interest communities; Virginia Condominium Act; termination of condominium; respective interests of unit owners. [Amends and reenacts §§ 55.1-1937 and 55.1-1941 of the Code of Virginia.]
SB 630	Senator Scott A. Surovell	Common interest communities; electric vehicle charging stations permitted. [Amends the Code of Virginia by adding sections numbered 55.1-1823.1, 55.1-1962.1, and 55.1-2139.1.]
CONSERVATION		
HB 22; SB 320	Delegate Joseph C. Lindsey; Senator Lynwood W. Lewis, Jr.	Virginia Shoreline Resiliency Fund; grant program. [Amends and reenacts § 10.1-603.25 of the Code of Virginia.]
HB 443	Delegate Jennifer Carroll Foy	Coal combustion residuals impoundment; Giles and Russell Counties; closure. [Amends the Code of Virginia by adding a

		section numbered 10.1-1402.04.]
HB 504	Delegate Patrick A. Hope	Chesapeake Bay Preservation Areas; mature trees. [Amends and reenacts § 62.1-44.15:72 of the Code of Virginia.]
HB 537; SB 727	Delegate Betsy B. Carr; Senator Jennifer L. McClellan	Real estate tax exemption for property in redevelopment or conservation areas or rehabilitation districts. [Amends and reenacts § 58.1-3219.4 of the Code of Virginia.]
HB 668	Delegate Michael P. Mullin	Field investigations permit; archaeologist qualifications. [Amends and reenacts §§ 10.1-2300 and 10.1-2302 of the Code of Virginia.]
HB 1352	Delegate Wendy W. Gooditis	Solid waste disposal; unpermitted sites and open dumps; regulation and cleanup. [Amends and reenacts §§ 10.1-1402 and 10.1-1408.1 of the Code of Virginia.]
HB 1622	Delegate Kenneth R. Plum	Open-Space Lands Preservation Trust Fund; acquisition of interests in property; recordation fee. [Amends and reenacts §§ 10.1-1801.1 and 58.1-817 of the Code of Virginia.]
HB 1623	Delegate Kenneth R. Plum	Fee for open-space preservation. [Amends and reenacts §§ 58.1-812 and 58.1-817 of the Code of Virginia.]
HB 1641	Delegate Hala S. Ayala	Coal ash ponds; drinking water well; resident notification. [Amends the Code of Virginia by adding in Article 2.1 of Chapter 14 of Title 10.1 a section numbered 10.1-1413.3.]
CONTRACTS		
HB 1300; SB 607	Delegate Chris L. Hurst; Senator Thomas K. Norment, Jr.	Virginia Public Procurement Act; statute of limitations on actions on construction contracts; statute of limitations on actions on performance bonds. [Amends and reenacts §§ 2.2-4340, 2.2-

		4343, 22.1-212.2:2, and 23.1-1017 of the Code of Virginia and amends the Code of Virginia by adding sections numbered 2.2-4340.1 and 2.2-4340.2.]
SB 658	Senator Scott A. Surovell	Contracts with design professionals; provisions requiring a duty to defend void. [Amends and reenacts § 11-4.4 of the Code of Virginia.]
COUNTIES, CITIES AND TOWNS		
HB 150	Delegate Ibraheem S. Samirah	Derelict residential buildings; civil penalty. [Amends and reenacts § 15.2-907.1 of the Code of Virginia.]
HB 549; SB 340	Delegate Jeion A. Ward; Senator Mamie E. Locke	Overgrown vegetation; local authority. [Amends and reenacts § 15.2-901 of the Code of Virginia.]
EMINENT DOMAIN		
SB 951	Senator Mark D. Obenshain	Eminent domain; written offer to purchase property. [Amends and reenacts § 25.1-204 of the Code of Virginia.]
FAIR HOUSING AND DISCRIMINATION		
HB 99	Delegate Sam Rasoul	Virginia Fair Housing Law; unlawful discriminatory housing practices; status as a victim of family abuse. [Amends and reenacts §§ 36-96.1 through 36-96.3, 36-96.4, 36-96.6, and 55.1-1310 of the Code of Virginia].
HB 696	Delegate Danica A. Roem	Local human rights ordinances; sexual orientation and gender identity. [Amends and reenacts § 15.2-965 of the Code of Virginia.]
SB 868	Senator Adam P. Ebbin	Prohibited discrimination; public accommodations, employment, credit, and housing: causes of action; sexual orientation and gender identity. [Amends and reenacts §§ 2.2-520, 2.2-3004, 2.2-3900, 2.2-3901, 2.2-3902, 6.2-501, 15.2-853, 15.2-854,

		15.2-965, 15.2-1507, 15.2-1604, 22.1-306, 36-96.1 through 36-96.3, 36-96.4, 36-96.6, and 55.1-1310 of the Code of Virginia; Amends the Code of Virginia by adding a section numbered 2.2-2901.1, by adding in Chapter 39 of Title 2.2 sections numbered 2.2-3904 through 2.2-3907, and by adding sections numbered 15.2-1500.1 and 22.1-295.2; and repeals § 2.2-3903 of the Code of Virginia.]
FINANCIAL INSTITUTIONS AND SERVICES		
SB 293	Senator A. Benton "Ben" Chafin	Financial institutions; multiple-fiduciary accounts. [Amends and reenacts §§ 6.2-604, 6.2-605, 6.2-612, and 6.2-616 of the Code of Virginia and amends the Code of Virginia by adding a section numbered 6.2-615.1.]
FISHERIES AND HABITAT OF THE TIDAL WATERS		
HB 1375	Delegate M. Keith Hodges	Living shorelines; resiliency. [Amends and reenacts § 28.2-104.1 of the Code of Virginia.]
SB 702	Senator T. Montgomery "Monty" Mason	Marine Resources Commission permit fees; pier application; oyster fund. [Amends and reenacts §§ 28.2-1203 and 28.2-1206 of the Code of Virginia and amends the Code of Virginia by adding a section numbered 28.2-627.1.]
SB 776	Senator Lynwood W. Lewis, Jr.	Wetlands protection; living shorelines. [Amends and reenacts §§ 28.2-104.1, 28.2-1301, 28.2-1302, and 28.2-1308 of the Code of Virginia.]
HOMESTEAD AND OTHER EXEMPTIONS		
HB 790	Delegate Marcus B. Simon	Homestead exemption; bankruptcy exemptions. [Amends and reenacts §§ 8.01-512.4, 34-4, 34-6, 34-14, 34-17, and 34-21 of the Code of Virginia; amends the Code of Virginia by adding in Chapter 1 of Title 34 a section

		numbered 34-3.2; repeals § 34-3.1 of the Code of Virginia.]
LANDLORD AND TENANT		
HB 393; SB 707	Delegate Jeion A. Ward; Senator Jennifer L. McClellan	Landlord and tenant; tenant rights and responsibilities; Tenant Bill of Rights. [Amends and reenacts §§ 36-139 and 55.1-1204 of the Code of Virginia.]
HB 519; SB 115	Delegate David L. Bulova; Senator Barbara A. Favola	Virginia Residential Landlord and Tenant Act; certain notices of termination to contain legal aid contact information. [Amends and reenacts § 55.1-1202 of the Code of Virginia.]
HB 594; SB 388	Delegate Jeffrey M. Bourne; Senator Jeremy S. McPike	Virginia Residential Landlord and Tenant Act; security deposits; timing of application. [Amends and reenacts § 55.1-1226 of the Code of Virginia.]
HB 1333	Delegate Mark L. Keam	Landlord and tenant; damage insurance in lieu of security deposit. [Amends and reenacts §§ 55.1-1204, 55.1-1206, 55.1-1208, and 55.1-1226 of the Code of Virginia.]
HB 1401	Delegate Alex Q. Askew	Landlord and tenant; remedy for unlawful ouster; ex parte issuance of order to recover possession. [Amends and reenacts § 55.1-1243 of the Code of Virginia.]
HB 1420	Delegate Jeffrey M. Bourne	Landlord and tenant; charge for late payment of rent; restrictions. [Amends and reenacts §§ 55.1-1204 and 55.1-1250 of the Code of Virginia.]
SB 905	Senator William M. Stanley, Jr.	Landlord and tenant; tenant's remedy by repair. [Amends the Code of Virginia by adding to Article 4 of Chapter 12 of Title 55.1 a section numbered 55.1-1244.1.]

NOTARIES AND OUT-OF-STATE COMMISSIONERS		
HB 1222	Delegate Kathy K.L. Tran	Notaries; satisfactory evidence of identity; persons in nursing homes or assisted living facilities. [Amends and reenacts § 47.1-2 of the Code of Virginia.]
PARTNERSHIPS		
HB 1417	Delegate Vivian E. Watts	Income tax; reporting requirements for partnerships. [Amends and reenacts §§ 58.1-311, 58.1-499, and 58.1-1823 of the Code of Virginia and amends the Code of Virginia by adding in Chapter 3 of Title 58.1 a section numbered 58.1-311.2 and adds an article numbered 9.1, consisting of sections numbered 58.1-396 through 58.1-399.7.]
PIPELINES		
HB 646	Delegate Chris L. Hurst	Pipeline construction permit; amount of civil penalty for violation. [Amends and reenacts § 62.1-44.15.]
PROFESSIONS AND OCCUPATIONS		
HB 1346	Delegate Jeffrey M. Bourne	Claim for attorney fees. [Amends and reenacts § 54.1-3933 of the Code of Virginia.]
PROPERTY AND CONVEYANCES		
HB 334	Delegate Paul E. Krizek (by request)	Manufactured Home Lot Rental Act; relocation expenses. [Amends the Code of Virginia by adding a section numbered 55.1-1308.1.]
HB 788	Delegate Lamont Bagby	Restrictive covenants; certificate of release of certain prohibited covenants. [Amends and reenacts §§ 55.1-300 and 58.1-810 of the Code of Virginia and amends the Code of Virginia by adding a section numbered 55.1-300.1.]
HB 819	Delegate Marcus B. Simon	Real estate settlements; kickbacks and other payments; remedies; civil penalties.

		[Amends the Code of Virginia by adding sections numbered 55.1-1009.1 and 55.1-1015.1 and repeals § 55.1-904 of the Code of Virginia.]
HB 831; SB 794	Delegate Jennifer Carroll Foy Senator Lynwood W. Lewis, Jr.	Utility easements; location of broadband and other communications facilities. [Amends and reenacts § 55.1-306 of the Code of Virginia and amends the Code of Virginia by adding a section numbered 55.1-306.1.]
HB 1249	Delegate Luke E. Torian	Manufactured Home Lot Rental Act; manufactured home park; termination due to sale of park; notice. [Amends and reenacts §§ 55.1-1308, 55.1-1309, 55.1-1311, and 55.1-1316 of the Code of Virginia and amends the Code of Virginia by adding a section numbered 55.1-1308.1.]
PROPERTY, GROUNDS AND BUILDINGS, STATE-OWNED		
SB 948	Senator Bryce E. Reeves	Conveyance and transfers of real property by state agencies; Department of Military Affairs; lease of state military reservation property. [Amends the Code of Virginia by adding a section numbered 2.2-1150.3.]
SB 1065	Senator Bill DeSteph	Department of General Services; identifying high-risk structures; desirability and feasibility of certain key boxes. [Directs the Department of General Services to determine which state-owned structures are high-risk and the necessity of having key boxes installed in strategic locations on the outside of such structures.]

SB 1094	Senator R. Creigh Deeds	Property conveyance; Department of Conservation and Recreation; New River Trail State Park. [Authorizes the Department of Conservation and Recreation to divest itself of certain property that was conveyed to it by Norfolk Southern Railroad for the New River Trail State Park.]
PUBLIC BUILDINGS, FACILITIES AND PROPERTY		
HB 421; SB 35	Delegate Marcia S. "Cia" Price; Senator Scott A. Surovell	Control of firearms by localities. [Amends and reenacts §§ 15.2-915 and 15.2-915.5 of the Code of Virginia and repeals § 15.2-915.1.]
HB 587	Delegate Elizabeth R. Guzman	Department of General Services; baby changing facilities in restrooms located in public buildings. [Amends the Code of Virginia by adding a section numbered 2.2-1147.3,]
HB 906; SB 163	Delegate C.E. Cliff Hayes, Jr.; Senator Lionell Spruill, Sr.	Entitlement to sales tax revenues from certain public facilities; authorized localities and facilities; sunset. [Amends and reenacts § 58.1-608.3 of the Code of Virginia.]
REAL ESTATE TAX		
HB 535	Delegate Betsy B. Carr	Real estate with delinquent taxes or liens; sales by nonprofit organizations. [Amends and reenacts § 58.1-3970.1 of the Code of Virginia.]
HB 537; SB 727	Delegate Betsy B. Carr; Senator Jennifer L. McClellan	Real estate tax exemption for property in redevelopment or conservation areas or rehabilitation districts. [Amends and reenacts § 58.1-3219.4 of the Code of Virginia.]
HB 755	Delegate Lashrecse D. Aird	Real property taxes; blighted and derelict properties in certain localities. [Amends and reenacts § 58.1-3965 of the Code of Virginia and amends the Code of Virginia by adding a section numbered 58.1-3221.6.]

HB 1434; SB 763	Delegate Jerrauld C. "Jay" Jones; Senator George L. Barker	Local tax exemption; solar energy equipment. [Amends and reenacts § 58.1-3660 of the Code of Virginia.]
SB 1039	Senator Jill Holtzman Vogel	Classification of solar energy and recycling equipment. [Amends and reenacts § 58.1-3661 of the Code of Virginia.]
RESIDENTIAL PROPERTY DISCLOSURES		
HB 174	Delegate Paul E. Krizek (by request)	Virginia Residential Property Disclosure Act; required disclosures for buyer to beware; marine clays. [Amends and reenacts § 55.1-703 of the Code of Virginia.]
HB 175	Delegate Paul E. Krizek (by request)	Virginia Residential Property Disclosure Act; disclosures for a buyer to beware; radon gas. [Amends and reenacts § 55.1-703 of the Code of Virginia.]
HB 518; SB 628	Delegate David L. Bulova; Senator Scott A. Surovell	Virginia Residential Property Disclosure Act; disclosures for a buyer to beware; residential building energy analyst. [Amends and reenacts § 55.1-703 of the Code of Virginia.]
HB 838	Delegate Kelly K. Convirs-Fowler	Virginia Residential Property Disclosures Act; Real Estate Board; disclosure statement. [Amends and reenacts §§ 54.1-2105.1, 55.1-700, and 55.1-714 of the Code of Virginia.]
HB 1161	Delegate Alfonso H. Lopez	Virginia Residential Property Disclosure Act; required disclosures for buyer to beware; lead pipes. [Amends and reenacts §§ 54.1-2133 and 55.1-703 of the Code of Virginia.]
HB 1342	Delegate Alex Q. Askew	Virginia Residential Property Disclosure Act; required disclosures for buyer to beware; lead pipe; defective drywall. [Amends the Code of Virginia by adding sections numbered 55.1-705.1 and 55.1-1218.1.]

SCENIC RIVERS SYSTEM		
HB 5; SB 478	Delegate James W. Morefield; Senator A. Benton "Ben" Chafin	Clinch State Scenic River. [Amends and reenacts §§ 10.1-408 and 10.1-410.2 of the Code of Virginia.]
HB 282; SB 288	Delegate Ronnie R. Campbell; Senator R. Creigh Deeds	Scenic river designation; Maury River. [Amends the Code of Virginia by adding in Chapter 4 of Title 10.1 a section numbered 10.1-418.10.]
HB 1145	Delegate William C. Wampler III	Scenic river designation. [Amends the Code of Virginia by adding a section numbered 10.1-411.5.]
HB 1598	Delegate C. Matthew Fariss	James State Scenic River designation. [Amends and reenacts § 10.1-413 of the Code of Virginia.]
HB 1601	Delegate James E. Edmunds, II	Staunton State Scenic River designation. [Amends and reenacts § 10.1-418 of the Code of Virginia.]
HB 1612; SB 1090	Delegate Emily M. Brewer; Senator Thomas K. Norment, Jr.	Virginia Scenic Rivers System; Grays Creek. [Amends the Code of Virginia by adding a section numbered 10.1-411.5.]
SPORTING EXHIBITIONS, EVENTS AND FACILITIES		
HB 120	Delegate Barry D. Knight	Virginia Beach Sports or Entertainment Project; extend expiration date of tax incentive; modify financing structure. [Amends and reenacts §§ 15.2-5113, 15.2-5928, 15.2-5931, 15.2-5932, and 15.2-5933 of the Code of Virginia.]
SB 773	Senator William M. Stanley, Jr.	Heritage trail for motor racing locations in Virginia. [An Act to create a heritage trail for motor racing locations in Virginia.]
TAXATION		
HB 316	Delegate Wendy W. Gooditis	Refunds of local taxes; authority of treasurer. [Amends and reenacts § 58.1-3981 of the Code of Virginia.]

HB 590; SB 200	Delegate Elizabeth R. Guzman; Senator George L. Barker	Tax credit for participating landlords; eligible housing areas. [Amends and reenacts § 58.1-439.12:04 of the Code of Virginia.]
HB 839; SB 93	Delegate Kelly K. Convirs-Fowler; Senator Bill DeSteph	Taxes on wills and administrations; exemption for victims of the Virginia Beach mass shooting. [Amends the Code of Virginia by adding in Article 3 of Chapter 17 of Title 58.1 a section numbered 58.1-1718.01.]
HB 1580	Delegate Richard C. "Rip" Sullivan, Jr.	Deeds not taxable; deeds involving only spouses. [Amends and reenacts § 58.1-810 of the Code of Virginia.]
HB 1582	Delegate Steve E. Heretick	Delinquent tax lands; threshold for nonjudicial sale. [Amends and reenacts § 58.1-3975 of the Code of Virginia.]
WATERS OF THE STATE, PORTS AND HARBORS		
HB 859	Delegate Kelly K. Convirs-Fowler	Stormwater management facilities; private residential lots; disclosure. [Amends and reenacts §§ 55.1-703 and 62.1-44.15:28, as it is currently effective and as it shall become effective, of the Code of Virginia and amends the Code of Virginia by adding a section numbered 55.1-708.1.]
HB 882	Delegate David L. Bulova	Stormwater management; proprietary best management practices. [Amends and reenacts § 62.1-44.15:28, as it is currently effective and as it shall become effective, of the Code of Virginia.]
HB 1422; SB 704	Delegate Kenneth R. Plum; Senator T. Montgomery "Monty" Mason	Chesapeake Bay Watershed Implementation Plan initiatives; nutrient management plans; stream exclusion. [Amends the Code of Virginia by adding in Title 62.1 a chapter numbered 3.8, containing articles numbered 1, 2, and 3, consisting of sections numbered 62.1-44.119 through 62.1-44.123.]

HB 1458	Delegate Kathleen Murphy	Water protection permits; administrative withdrawal. [Amends and reenacts § 62.1-44.15:21 of the Code of Virginia.]
WILLS, TRUSTS, AND FIDUCIARIES		
HB 305; SB 940	Delegate Patrick A. Hope; Senator Barbara A. Favola	Circuit court clerk's fee; lodging of wills. [Amends and reenacts §§ 17.1-275 and 64.2-409 of the Code of Virginia.]
HB 1166; SB 261	Delegate William C. Wampler III; Senator A. Benton "Ben" Chafin	Accounts filed by fiduciaries and reports filed by guardians; civil penalty. [Amends and reenacts §§ 64.2-1305 and 64.2-2020 of the Code of Virginia.]
HB 1380	Delegate James A. "Jay" Leftwich	Uniform Directed Trust Act. [Amends and reenacts §§ 64.2-701, 64.2-703, 64.2-706, 64.2-752, and 64.2-756 of the Code of Virginia; amends the Code of Virginia by adding in Chapter 7 of Title 64.2 an article numbered 8.2, consisting of sections numbered 64.2-779.26 through 64.2-779.38; and repeals § 64.2-770 of the Code of Virginia.]
HB 1411	Delegate James A. "Jay" Leftwich	Fiduciaries; good faith reliance on certificate of qualification. [Amends and reenacts § 64.2-2011 of the Code of Virginia and amends the Code of Virginia by adding in Article 3 of Chapter 5 of Title 64.2 a section numbered 64.2-520.2.]
SB 700	Senator Mark D. Obenshain	Indexing of wills. [Amends and reenacts §§ 17.1-249 and 64.2-409 of the Code of Virginia.]
SB 1072	Senator T. Montgomery "Monty" Mason	Prohibition against appointing certain persons as guardian or conservator. [Amends and reenacts § 64.2-2007 of the Code of Virginia.]

ZONING		
HB 505	Delegate Barry D. Knight	Board of zoning appeals; writ of certiorari. [Amends and reenacts § 15.2-2314 of the Code of Virginia.]
HB 554	Delegate Schuyler T. VanValkenburg	Zoning for wireless communications infrastructure. [Amends and reenacts § 15.2-2316.4:2 of the Code of Virginia.]
HB 585	Delegate Elizabeth R. Guzman	Comprehensive plan; transit-oriented development. [Amends the Code of Virginia by adding a section numbered 15.2-2223.4.]
HB 657	Delegate Steve E. Heretick	Comprehensive plan; solar facilities review. [Amends and reenacts § 15.2-2232 of the Code of Virginia.]

2020 VIRGINIA GENERAL ASSEMBLY REPORT: REAL ESTATE LEGISLATION

By Jeremy R. Moss

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As has become the tradition of the Virginia State Bar Real Property Section, this annual compilation of legislation passed by the General Assembly includes those bills of interest to real estate practitioners in the Commonwealth.

The General Assembly routinely addresses a wide range of real estate-related topics, from traditional real estate matters (e.g., deeds, deeds of trust, taxation and disclosure), to more tangentially-related fields (e.g., conservation and cemeteries), to evolving areas of real estate practice (e.g., shoreline resiliency and expanding discrimination statutes related to the provision of housing).

2020 SESSION *BY THE NUMBERS*

The 2020 Session of the Virginia General Assembly convened, as it does every year, on the second Wednesday of January (January 8, 2020). The General Assembly adjourned *sine die* on Saturday, March 7.

This was a "long" session of the General Assembly. In even-numbered yearsthe legislature convenes for sixty calendar days.[1] In odd-numbered years, the legislature convenes for thirty days (usually spanning 46 calendar days) with an option to extend the session for a maximum of thirty additional days. A reconvened session, sometimes referred to as the "veto session," was convened on April 22, 2020.

In all, 3910 bills and resolutions were introduced during the 2020 session, an increase in the number of bills introduced in last year's short session (3,128 bills) and the most recent "long" session (3,722 bills in 2018).

Of the bills and resolutions considered, 1,833 were passed by both the Senate and the House of Delegates. Excluding commending and memorializing resolutions, 1,351 bills passed.[2] Of those that passed, 511 passed unanimously while 840 passed with opposition.

A total of 1,683 bills failed. Excluding commending and memorializing resolutions, 981 bills failed outright, 385 bills were carried-over to the 2021 session and 284 bills were consolidated into other bills.

[1] Virginia operates on a biennium budget, which must be adopted every other year.

[2] According to the Virginia Public Access Project, *Pass or Fail? Fate of 2020 Legislation* (https://www.vpap.org/visuals/visual/fate-2020-legislation/) (Last accessed April 24, 2020).

Governor Northam vetoed one bill.

THE 2020 SESSION AT A GLANCE

This year, the greatest number of bills covered in this compilation relate to taxation and real estate taxation (14), conservation (11), and landlord-tenant matters (10). A number of bills amend statutes related to the Virginia Scenic River System (9), cemeteries (8),[3] and residential property disclosures (7).[4]

Several of the bills summarized below are listed among the *2020 Session Highlights*, a summary of significant legislation considered by the 2020 Session of the General Assembly as selected by the staff of the Virginia Division of Legislative Services,[5] including legislation related to:

- Chesapeake Bay watershed implementation plan initiatives and nutrient management plans for cropland (*see* House Bill 1422 and Senate Bill 704 listed among legislation related to Waters of the State, Ports and Harbors);
- Control of firearms by localities (*see* House Bill 421 and Senate Bill 35 listed among legislation related to Public Buildings, Facilities and Property);
- Prohibited discrimination in public accommodations, employment, credit, and housing related to sexual orientation and gender identity (*see* Senate Bill 868 listed among legislation related to Fair Housing and Discrimination);
- Local human rights ordinances related to sexual orientation and gender identity (*see* House Bill 696 listed among legislation related to Fair Housing and Discrimination);
- Affordable housing dwelling unit ordinances (*see* House Bill 1101 and Senate Bill 834 listed among legislation related to Affordable Housing); and,
- Electric vehicle charging stations in common interest communities (*see* Senate Bill 630 listed among legislation related to Common Interest Communities).

IMPACT OF COVID-19 AND RESULTING LEGISLATION

Although the full impact of the novel coronavirus (COVID-19) on real estate practice in the Commonwealth is well-beyond the scope of this article, a failure to acknowledge its impact on the 2020 session of the General Assembly would be a disservice to those reading this summary.

As provided above, the General Assembly adjourned on Saturday, March 7, before the initial impact of COVID-19 became apparent. For context, Governor Northam:

- Declared a state of emergency in the Commonwealth of Virginia on March 12;
- Issued a public health emergency order prohibiting more than 10 patrons in restaurants, fitness centers, and theaters on March 17;
- Issued Executive Order Fifty-Three on March 23 (closing certain non-essential businesses, prohibiting public gatherings of more than 10 people, and directing all K-12 schools to remain closed for the rest of the academic year);
- Issued Executive Order Fifty-Five (a statewide Stay at Home order); and,
- Requested federal disaster assistance on March 30.

[3] Mostly as they relate to the Historical African American Cemeteries and Graves.

[4] The General Assembly adopted at least eight bills related to wills, trusts and fiduciaries which are listed in the accompanying bill list, but omitted from this report.

[5] See *2020 Session Highlights* (http://dls.virginia.gov/pubs/hilights/2020/Highlights2020.pdf). Last accessed April 24, 2020.

With the session already over, the only opportunity for the legislature to react to COVID-19 was the reconvened session, and, most significantly, through the Governor's amendments to the budget bills (House Bills 29 and 30).

House Bill 29 is the Session's "caboose" bill.[6] Normally, the caboose bill receives only technical revisions (changing allocation amounts) because it adjusts only the final few months of the current fiscal year that ends on June 30.

As provided in his recommended amendments, Governor Northam was clear that "COVID-19 makes this year different." The Governor proposed a number of measures in response to the pandemic in House Bill 29 valid through June 30, 2020.

Longer term responses to the pandemic have been included in the Budget Bill, House Bill 30. Governor Northam remarked in his amendments:

> The economic effects of COVID-19 will not be clear for some time. While it is too soon to obtain an accurate reforecast of revenues, we will need to do it once the economic fog has lifted, so that we can then identify a path to return to the progressive investments we have made together. Until that can happen, I do not want to eliminate specific appropriations without first knowing the overall level of spending reductions that is required.

Ultimately, the Governor requested adoption of 144 amendments to the Budget, including 83 amendments specifically to "unallot" new, discretionary spending across all agencies, 49 "language-only" amendments, and 12 amendments that changed spending.[7]

Several amendments are of interest to real estate practitioners in the Commonwealth, and summaries of those amendments are included below under the "Budget Bills" heading.

2020 LEGISLATIVE SUMMARIES

Actual copies of the legislation, together with bill summaries and history of legislative action on those bills, may be viewed on the General Assembly website at leg1.state.va.us/lis.htm. The summaries below are heavily derived from abstracts prepared by the Virginia Division of Legislative Services.[8] Because of the nature of a legislative review and summary, individual pieces of legislation should be carefully reviewed to gain a complete understanding of the legislation's impact and implications.

Unless otherwise noted, measures that passed the General Assembly will become effective July 1, 2020. Several pieces of legislation include emergency clauses or delayed effective dates—although this summary attempts to identify those dates, attention should be given to the effective dates of specific legislation.

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[6] In an even session year, like 2020, the 2 year biennium budget (House Bill 2020) is introduced along with a smaller bill, often called the "caboose" bill that are amendments to the previous biennium budget (House Bill 2019). These amendments are necessary because predictions of revenues vary from what actually occurred. The "caboose" bill allows for adjustments to appropriations on the previous biennium budget.

[7] The Governor's recommendations related to the Budget Bill, House Bill 30, are available at https://lis.virginia.gov/cgi-bin/legp604.exe?201+amd+HB30AG (last accessed April 24, 2020).

[8] A directory of the Division of Legislative Services, a group of dedicated attorneys, civil servants and staff persons is available here: http://dls.virginia.gov/staff_directory.html. The author wishes to extend his sincere "thank you," to all those who carry out the very important functions DLS provides the Commonwealth.

Legislation below is organized first by topic area, then chronologically, then separated by House, then Senate, within each topic area.

AFFORDABLE HOUSING

Several bills with impacts on the provision of affordable housing in the Commonwealth were adopted by the General Assembly, (some appearing later in this article under different subject headings).

The General Assembly requested the Department of Housing and Community ("DHCD") Development and the Virginia Housing and Development Authority ("VHDA") to convene a stakeholder advisory group to (i) determine the quantity and quality of affordable housing across the Commonwealth, (ii) conduct a review of current programs and policies to determine the effectiveness of current housing policy efforts, (iii) develop an informed projection of future housing needs in the Commonwealth and determine the order of priority of those needs, and (iv) make recommendations for the improvement of housing policy in the Commonwealth (*House Bill 854 - Murphy*).

In companion bills, the General Assembly authorized certain localities to adopt affordable housing dwelling unit ordinances. The governing body of any locality, other than localities to which certain current affordable housing provisions apply, may by amendment to the zoning ordinances of such locality provide for an affordable housing dwelling unit program. Such program shall address housing needs, promote a full range of housing choices, and encourage the construction and continued existence of housing affordable to low-and-moderate-income citizens by providing for increases in density to the applicant in exchange for the applicant voluntarily electing to provide such affordable housing.

Any local ordinance may authorize the governing body to (i) establish qualifying jurisdiction-wide affordable dwelling unit sales prices based on local market conditions, (ii) establish jurisdiction-wide affordable dwelling unit qualifying income guidelines, and (iii) offer incentives other than density increases, such as reductions or waiver of permit, development, and infrastructure fees, as the governing body deems appropriate to encourage the provision of affordable housing.

Any zoning ordinance establishing an affordable housing dwelling unit program may include reasonable regulations and provisions as to any or all of the following, among other things provided in the bill: (a) for application of the requirements of an affordable housing dwelling unit program to any site, as defined by the locality, or a portion thereof at one location that is the subject of an application for rezoning or special exception or site plan or subdivision plat that yields, as submitted by the applicant, at an equivalent density greater than one unit per acre and that is located within an approved sewer area; (b) the waiver of any fees associated with the construction, renovation, or rehabilitation of a structure, including building permit fees, application review fees, and water and sewer connection fees; and, (c) for standards of compliance with the provisions of an affordable housing dwelling unit program and for the authority of the local governing body or its designee to enforce compliance with such standards and impose reasonable penalties for noncompliance, provided that such local zoning ordinance provide for an appeal process for any party aggrieved by a decision of the local governing body.

Any zoning ordinance establishing such an affordable housing dwelling unit program shall adopt the regulations and provisions set out in the bill to establish an affordable housing density bonus and development standards relief program (*House Bill 1101 - Carr and Senate Bill 834 - McClellan*).

AUTHORITIES

The General Assembly directed the Department of Housing and Community Development and the Virginia Housing Development Authority to convene a stakeholder advisory group to develop draft legislation establishing a Virginia housing opportunity tax credit program for the purpose of providing incentives for the utilization of private equity in the development and construction of affordable housing in the Commonwealth and regulations for implementing such program.

The stakeholder advisory group convened by Department of Housing and Community Development and Virginia Housing Development Authority shall also conduct financial modeling to determine the fiscal impact to the Commonwealth of various levels of funding for a Virginia housing opportunity tax credit, determine the most effective and efficient way to administer the program in conjunction with the federal Low-Income Housing Tax Credit Program, and report its recommendations to the Governor, the Secretary of Commerce and Trade, the Director of the Department of Housing and Community Development, and the commissioners of the Virginia Housing Development Authority by September 1, 2020 (*House Bill 810 - Bourne*).

The General Assembly also passed legislation that requires that any housing authority required to submit an application to the U.S. Department of Housing and Urban Development to demolish, liquidate, or otherwise dispose of a housing project must also serve a notice of intent to demolish, liquidate, or otherwise dispose of such housing project, containing specified information, at least 12 months prior to any application submission date to (i) the Virginia Department of Housing and Community Development, (ii) any agency that would be responsible for administering tenant-based rental assistance to persons who would otherwise be displaced from the housing project, and (iii) each tenant residing in the housing project.

The authority must also provide such notice to any prospective tenant who is offered a rental agreement subsequent to the initial notice. During the 12-month period subsequent to the initial notice of intent to demolish, liquidate, or dispose of the housing project, the housing authority is prohibited from (a) increasing rent for any tenant above the amount authorized by any federal assistance program applicable to the housing project; (b) changing the terms of the rental agreement for any tenant, except as permitted under the existing rental agreement; or (c) evicting a tenant or demanding possession of any dwelling unit in the housing project, except for a lease violation or violation of law that threatens the health and safety of the building residents. *The bills have a delayed effective date of January 1, 2021* (*House Bill 921 - Jones* and *Senate Bill 708 - McClellan*).

BUDGET BILLS

The Budget Bills, particularly through amendments recommended by the Governor, includes a number of provisions related to real estate and housing.

A $2.5M deficit for the Department of Housing and Community Development has been authorized through June 30, 2020 due to the state of emergency declared in Executive Order 51 (*House Bill 29, Amendment 1 - Torian, as recommended by Northam*).

The General Assembly, at the Governor's recommendation, also permitted public bodies and governing boards of common interest communities to meet virtually. Notwithstanding any other provision of law, any public body, including any state, local, regional, or regulatory body, or the governing board of a common interest community association (including the executive organ of a condominium unit owners' association, the executive board of a cooperative proprietary lessees' association, and the board of directors or other governing body of a property owners' association) may meet by electronic communication means without a quorum of the public body or any member of the governing board physically assembled at one location when the Governor has declared a state of emergency, provided that:

- the nature of the declared emergency makes it impracticable or unsafe for the public body or governing board to assemble in a single location;
- the purpose of meeting is to discuss or transact the business statutorily required or necessary to continue operations of the public body or common interest community association and the discharge of its lawful purposes, duties, and responsibilities;
- a public body shall make available a recording or transcript of the meeting on its website in accordance with the timeframes established in §§ 2.2-3707 and 2.2-3707.1 of the Code of Virginia; and,

- the governing board shall distribute minutes of a meeting held pursuant to this subdivision to common interest community association members by the same method used to provide notice of the meeting.

A public body or governing board convening a meeting in accordance with this authority shall:

- Give notice to the public or common interest community association members using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided to members of the public body or governing board conducting the meeting;
- Make arrangements for public access or common interest community association members access to such meeting through electronic means including, to the extent practicable, videoconferencing technology. If the means of communication allows, provide the public or common interest community association members with an opportunity to comment; and,
- Public bodies must otherwise comply with the provisions of § 2.2-3708.2 of the Code of Virginia.

The nature of the emergency, the fact that the meeting was held by electronic communication means, and the type of electronic communication means by which the meeting was held shall be stated in the minutes of the public body or governing board (*House Bill 29, Amendment 28 - Torian, as recommended by Northam* and *House Bill 30, Amendment 137 - Torian, as recommended by Northam*).

Additional funding in the amount of $1.5M for the Virginia State Bar to hire additional housing attorneys to combat Virginia's housing crisis has been unalloted pending the assessment of the impact of a potential general fund revenue shortfall caused by the COVID-19 pandemic (House Bill 30, Amendment 4 - Torian, as recommended by Northam).

Additional funding for the Department of Housing and Community Development totalling $45.955M for FY 2021 and $43.944M for FY 2022 has been unalloted pending the assessment of the impact of a potential general fund revenue shortfall caused by the COVID-19 pandemic (*House Bill 30, Amendment 17 - Torian, as recommended by Northam*) related to:

- Increased funding for Enterprise Zone Grants
- Affordable Housing Pilot Program
- Increased support for Planning District Commissions
- Establishment of an Eviction Prevention and Diversion Pilot Program
- Increased funding for the Southeast Rural Community Assistance Project
- Increased funding for the Virginia Housing Trust Fund
- Increased support for the Virginia Telecommunication Initiative (VATI) for broadband deployment; and,
- the Industrial Revitalization Fund.

CEMETERIES

The General Assembly authorized cremated pets to be interred with human remains (*Senate Bill 1070 - Dunnavant*).[9]

"Church," is now defined, for the purpose of determining whether a cemetery that is owned and operated by a church is exempt from regulation by the Department of Professional and Occupational

[9] Current law provides that no pet (cremated or not) may be interred in the same grave, crypt, or niche as the remains of a human.

Regulation, to include a church that operates as a historic landmark (*House Bill 950 - Ransone* and *Senate Bill 519 - McDougle*).

The General Assembly created the Historical African American Cemeteries and Graves Fund and provides that any funds that are appropriated to the Department of Historic Resources but not used for the maintenance of graves, in particular the listed historical African American cemeteries, shall be deposited in that Fund. The legislation authorizes the Director of the Department to manage and administer the Fund and to disburse monies in the Fund to maintain additional graves that have been certified by the Department and documented in the Department's cultural resources database (*House Bill 1523 - McQuinn* and *Senate Bill 881 - Locke*).

The General Assembly added a number of cemeteries to the list of cemeteries for which qualified organizations may receive funds from the Department. The cemeteries added include:

- Calloway Cemetery, with 29 eligible graves, in Arlington County (*House Bill 1523 - McQuinn* and *Senate Bill 881 - Locke*);
- Cuffeytown Cemetery in the City of Chesapeake, with 52 eligible graves (*House Bill 1523 - McQuinn* and *Senate Bill 881 - Locke*);
- Lomax Cemetery, with 66 eligible graves, in Arlington County (*House Bill 1523 - McQuinn* and *Senate Bill 881 - Locke*);
- Mountain View Cemetery, which contains 91 eligible graves, in the City of Radford (*House Bill 210 - Hurst*);
- Mount Salvation Cemetery, with 29 eligible graves, in Arlington County (*House Bill 1523 - McQuinn* and *Senate Bill 881 - Locke*);
- Mt. Zion Old School Baptist Church Cemetery in Loudoun County, with 33 eligible graves (*House Bill 314 - Gooditis*);
- Newtown Cemetery in the City of Harrisonburg, with 400 eligible graves (*House Bill 1523 - McQuinn* and *Senate Bill 881 - Locke*);
- Stanton Family Cemetery in Buckingham County, with 36 eligible graves (*House Bill 1523 - McQuinn* and *Senate Bill 881 - Locke*);
- Wake Forest Cemetery, which contains 40 eligible graves, in Montgomery County (*House Bill 210 - Hurst*); and,
- Westview Cemetery, which contains 47 eligible graves, in Montgomery County, (*House Bill 210 - Hurst*).

The General Assembly also clarified existing law related to acquisition of unoccupied cemeteries and abandoned lots in Scott and Wythe Counties (*Senate Bill 445 - Edwards*).

CIVIL REMEDIES AND PROCEDURE

A recommendation of the Boyd-Graves Conference, the General Assembly specifies what actions qualify for statutory recoupment to include all defenses arising out of the transaction, whether such defenses are in law or equity (*House Bill 651 - Hope*).[10]

[10] The Boyd-Graves Conference was created by Thomas V. Monahan, a former president of the Virginia Bar Association. Monahan believed that civil law practice in Virginia would be improved if lawyers with different types of practices, from all regions of the state, would meet and attempt to reach consensus about ways to improve the law.

Beginning in 1978, Monahan began arranging annual meetings of lawyers at the Tides Inn in Irvington. At first a small and informal gathering known as the "Tides Inn Conference," the meeting eventually became a carefully planned event for nearly 100 lawyers, professors and judges representing a wide variety of practices throughout the Commonwealth. Later, the conference was renamed the Boyd-Graves Conference. The name honors the contributions of revered law professors T. Munford Boyd and Edward S. Graves to the advancement of Virginia's civil procedure.

Another recommendation of the Boyd-Graves Conference, legislation adopted by the General Assembly in the 2020 Session allows a court to permit notice of an order of publication to be given by electronic means in addition to or in lieu of publication in a newspaper, under such terms and conditions as the court may direct (*House Bill 834 - Sullivan*).

Local treasurers, not local clerks of court, now have the duty of maintaining records of delinquent real property taxes and sales of such property and of correcting records relating to such property (*House Bill 1581 - Heretick*).

Incorporating major provisions of the Uniform Partition of Heirs Property Act, the General Assembly adopted legislation providing that in partition actions the court shall order an appraisal to determine fair market value of the property, unless the parties have agreed to the value of the property or to another valuation method. The bills also provide factors to be considered by the court when making an allotment of the property when there is a dispute among the parties and further provide that if the court orders a sale of property in a partition action, the sale shall be conducted on the open market, unless the court finds that a sale by sealed bids or at auction would be more economically advantageous to the parties as a group. A procedure for an open-market sale is included in the legislation (*House Bill 1605 - Hope* and *Senate Bill 553 - Ruff*).

The General Assembly created a process by which unlawful detainer actions filed in a general district court that have been dismissed or nonsuited may be expunged upon request of the defendant to such action (*Senate Bill 640 - Surovell*). *The bill has a delayed effective date of January 1, 2022.*

CODE OF VIRGINIA

As reported in the Spring 2019 edition of *The Fee Simple*, on recommendation of the Virginia Code Commission,[11] the General Assembly created a new Title 55.1 to revise the current Title 55 (Property and Conveyances). Title 55.1 is designed to organize laws in a logical manner, remove obsolete and duplicative provisions, and improve clarity of statutes relating to real and personal property

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More information about the Boyd-Graves Conference can be found at https://www.vba.org/page/boyd_graves.

[11] The Commission on Code Recodification was created in 1946 as a permanent commission of Virginia's legislative branch. In 1948, the Commission was renamed the Virginia Code Commission. The original purpose of the Commission was to create the 1950 Code of Virginia by codifying the Acts of Assembly of 1948 and all statutes enacted prior to and subsequent to 1948.

Today, the Commission's duties, expressly provided in the Code of Virginia (Section 30-145 et seq.), include:

- Supervising the codification of the statutes after each session of the General Assembly;
- Revising and recodifying individual titles of the Code of Virginia;
- Reviewing the Code of Virginia and Acts of Assembly to identify obsolete provisions;
- Arranging for the codification and incorporation into the Code of Virginia of all general, special and limited compacts to which the Commonwealth of Virginia is a party;
- Compiling and codifying all of the administrative regulations of state agencies into the Virginia Administrative Code;
- Overseeing the bi-weekly publication of the Virginia Register of Regulations; and,
- Monitoring, with the assistance of the Administrative Law Advisory Committee, the operation of the Administrative Process Act and the Virginia Register Act , to ensure that the laws provide the most practical means for administrative agencies of the Commonwealth to promulgate, amend, and repeal administrative law.

For more information about the Virginia Code Commission, visit http://codecommission.dls.virginia.gov/.

conveyances, recording deeds, rental property, common interest communities, escheats, and unclaimed property. The Title 55 rewrite became effective October 1, 2019.

On further recommendation of the Virginia Code Commission, the General Assembly in 2020 made technical amendments relating to the revision and recodification of Title 55 enacted in the 2019 Session, implementing clarifying changes and other changes made in the revision and recodification (*House Bill 1340 - Leftwich*).

In another recommendation from the Code Commission, the General Assembly set out a section from Chapter 37 of the Acts of Assembly of 1986 establishing the applicability of the Manufactured Housing Construction and Safety Standards Law (§ 36-85.2 et seq.), removed an obsolete provision relating to the purpose of the chapter and made technical changes (*House Bill 1341 - Leftwich*).

COMMISSIONS, BOARDS AND INSTITUTIONS

The General Assembly adopted several bills providing clarification or direction to state regulatory boards and commissions.

The maximum compensation (stipend) that may be paid to a redevelopment and housing authority commissioner has been increased from $150 to $500 per month (*House Bill 396 - Kory*).

In a clarification to the law, the General Assembly enacted legislation providing that upon the death or disability of a licensed real estate broker who was the only licensed broker in a business entity, the Real Estate Board shall grant approval to certain persons enumerated by law to carry on the business of such broker for 180 days following the death or disability of the broker solely for the purpose of concluding the business of the broker (*House Bill 513 - Bulova*).[12]

Through legislation adopted this Session, the Department of Environmental Quality must give certain information about an unlawful discharge of a deleterious substance into state waters to the Virginia Department of Health and local newspapers, television stations, and radio stations, and to disseminate such information through official social media accounts and email notification lists when Department of Environmental Quality determines that the discharge may impair state waters or the Virginia Department of Health determines that it may be detrimental to public health.

The bill requires the Department of Environmental Quality to report to the General Assembly (i) a protocol for determining whether a discharge would have a de minimis impact on state waters and (ii) a proposed implementation procedure if the law were amended to require public dissemination of all discharges reported except for those determined to have a *de minimis* impact (*House Bill 1205 - Tran*).

In other legislation, the General Assembly directed the Real Estate Board to include in the residential property disclosure statement provided on its website a disclosure relating to the condition or regulatory status of any impounding structure or dam on the owner's property or under the ownership of a common interest community that the owner of the property is required to join (*House Bill 1569 - Convirs-Fowler* and *Senate Bill 343 - Locke*).

COMMON INTEREST COMMUNITIES

In 2020, the General Assembly continued efforts to refine rights and responsibilities relative to disclosure in common interest communities. A limited extension of the right of cancellation related to the provision of a resale certificate or association disclosure packet is now permitted where such

[12] Currently, the law only addresses the death or disability of the sole licensed broker in a corporation or partnership.

extension is provided for in a ratified real estate contract *(House Bill 176* - Simon and *Senate Bill 672 - Mason*).

An association disclosure packet must contain a statement of any restrictions on the size, place, duration, and manner of placement or display of political signs by a lot owner on his lot (*House Bill 720 - Reid*).

In legislation affecting the termination of a condominium, the General Assembly provides that the respective interests of condominium unit owners upon the termination of a condominium shall be as set forth in the termination agreement, unless the method of determining such respective interests is other than the relative fair market values, in which case the association shall provide each unit owner with a notice stating the result of that method for the unit owner's unit and, no later than 30 days after transmission of that notice, any unit owner disputing the interest to be distributed to his unit may require that the association obtain an independent appraisal of the condominium units. The bill provides a method of adjusting the respective interests of the unit owners if the amount of such independent appraisal of an objecting unit owner's unit is at least 10 percent more than the amount stated in the association's notice (*House Bill 1548 - Simon*).

Certain common interest community associations may not prohibit the installation of an electric vehicle charging station within the boundaries of a member's unit or limited common element parking space appurtenant to the unit owned by the unit owner or, in the case of a property owners' association, a lot owner's property, and sets forth provisions governing the installation and removal of such charging stations. The association member installing an electric vehicle charging station to indemnify and hold the association harmless from all liability resulting from a claim arising out of the installation, maintenance, operation, or use of such charging station (*Senate Bill 630 - Surovell*).

CONSERVATION

The General Assembly adopted a number of conservation-related bills that affect real estate in the Commonwealth.

In continued efforts to address the effects of recurrent and community flooding, the General Assembly continues the Virginia Shoreline Resiliency Fund as the Virginia Community Flood Preparedness Fund, directs the Department of Conservation and Recreation to administer the Fund, and authorizes localities to lend or grant money from the Fund to implement flood prevention and protection projects and studies. At least 25 percent of the money disbursed from the Virginia Community Flood Preparedness Fund each year must be used for projects in low-income geographic areas. Localities are now authorized to forgive the principal of a loan it grants in a low-income geographic area so long as the total amount of loans forgiven by all localities does not exceed 30 percent of the amount appropriated to the Virginia Community Flood Preparedness Fund during the fiscal year (*House Bill 22 - Lindsey* and *Senate Bill 320 - Lewis*).

The preservation of mature trees or planting of trees, both as a water quality protection tool and as a means of providing other natural resource benefits, has been added to the list of activities that the State Water Control Board is directed to encourage and promote as it adopts criteria for local governments to use as they consider development in Chesapeake Bay Preservation Areas (*House Bill 504 - Hope*).

The General Assembly increased the maximum duration of a local real estate tax exemption for structures in redevelopment or conservation areas or rehabilitation districts from 15 to 30 years (*House Bill 537 - Carr* and *Senate Bill 727 - McClellan*).

The legislation adopted during the 2020 Session, the General Assembly established standards for education, experience, ability, and other factors for a field supervisor who is identified in an application to the Director of the Department of Conservation and Recreation for a permit to conduct

a field investigation, exploration, or recovery operation involving any object of antiquity on state-controlled land or on a state archaeological site or zone.

The legislation provides that the Director of the Department of Conservation and Recreation may consider the field supervisor's performance on any prior permitted investigation in determining whether the person meets such standards. The bill provides that conducting an investigation without a permit or willfully misrepresenting information (i) on a permit application or (ii) collected during a permitted field investigation is a crime punishable as a Class 1 misdemeanor (*House Bill 668 - Mullin*).

The disposal of solid waste in an unpermitted facility is now prohibited and the presence of unpermitted solid waste on a person's property is *prima facie* evidence that the person allowed solid waste to be disposed of on his property without a permit. Open dumps have now been added to the types of site that the Department of Environmental Quality is authorized to require to be cleaned up and provides that the party responsible for such cleanup shall include any party who caused the site to become an open dump or caused the improper management of waste at the site (*House Bill 1352 - Gooditis*).

The Virginia Outdoors Foundation, in administering the Open-Space Lands Preservation Trust Fund, is now authorized to provide grants to persons conveying to the Foundation fee simple title or other rights, interests, or privileges in property on agricultural, forestal, or other open-space land and to provide grants to localities acquiring such interests (*House Bill 1622 - Plum*).[13]

The fee for open-space preservation charged for every deed, deed of trust, contract, or other instrument admitted to record in those jurisdictions in which open-space easements are held by the Virginia Outdoors Foundation has been increased from $1 to $3. In a clarification, the General Assembly confirmed the fee applies to any "deed, deed of trust, contract, or other instrument" admitted to record, replacing the term "deed" (*House Bill 1623 - Plum*).

A utility, defined in the bill as the owner or operator of a coal ash pond in the Chesapeake Bay watershed, is required to complete a survey of all private wells and public water supply wells within 1.5 miles of each of its ponds by October 1, 2020, and to notify residents by mail and a local newspaper posting that the survey will be conducted (*House Bill 1641 - Ayala*).

CONTRACTS

The General Assembly continues to address contract rights and responsibilities, particularly as they relate to contracts involving the Commonwealth or localities.

Among changes related to Virginia Public Procurement Act, the General Assembly adopted legislation providing that an action against the surety on a performance bond must be brought within five years after the completion of the contract and that the statute of limitations on construction contracts and architectural and engineering contracts is 15 years after completion of the contract. Completion of the contract is the final payment to the contractor pursuant to the terms of the contract, but that if a final certificate of occupancy or written final acceptance of the project is issued prior to final payment, the period to bring an action shall commence no later than 12 months from the date of the certificate of occupancy or written final acceptance of the project (*House Bill 1300 - Hurst* and *Senate Bill 607 - Norment*).

The General Assembly also addressed contracts with design professionals, adopting legislation providing that that any provision contained in any contract relating to the planning or design of a building, structure, or appurtenance thereto, including moving, demolition, or excavation connected

[13] Current law authorizes the Foundation to provide such grants for the acquisition of open-space and conservation easements.

therewith, or any provision contained in any contract relating to the planning or design of construction projects by which any party purports to impose a duty to defend on any other party to the contract, is against public policy and is void and unenforceable (*Senate Bill 658 - Surovell*).

COUNTIES, CITES AND TOWNS

In addition to the authority for public bodies to meet virtually (see Budget Bills above), the General Assembly adopted several pieces of legislation related to counties, cities and towns.

Certain localities are now allowed to impose a civil penalty not exceeding $500 per month on owners of derelict residential property that have not submitted a required plan to renovate or demolish the derelict structure, so long as the total fee imposed does not exceed the cost to demolish the building (*House Bill 150 - Samirah*).

Authorizes any locality within Planning District 23[14] to include provisions for cutting overgrown shrubs, trees, and other such vegetation in an ordinance requiring certain landowners to cut the grass, weeds, and other foreign growth on certain property (*House Bill 549 - Ward* and *Senate Bill 340 - Locke*).

EMINENT DOMAIN

A condemnor's written offer to purchase property prior to instituting a condemnation proceeding, and its written statement of the amount established as just compensation, must be on such condemnor's letterhead and signed by an authorized employee of such condemnor (*Senate Bill 951 - Obenshain*).

FAIR HOUSING AND DISCRIMINATION

An applicant for a lease is now allowed to recover actual damages, including all amounts paid to the landlord as an application fee, application deposit, or reimbursement for any of the landlord's out-of-pocket expenses that were charged to the applicant, along with attorney fees, if the landlord does not consider evidence of the applicant's status as a victim of family abuse to mitigate any adverse effect of the otherwise qualified applicant's low credit score (*House Bill 99 - Rasoul*).

Creates causes of action for unlawful discrimination in public accommodations and employment in the Virginia Human Rights Act.[15] The causes of action may be pursued privately by the aggrieved person or, in certain circumstances, by the Attorney General. Before a civil cause of action may be brought in a court of the Commonwealth, an aggrieved individual must file a complaint with the Division of Human Rights of the Department of Law, participate in an administrative process, and receive a notice of his right to commence a civil action. Discrimination in public and private employment on the basis of sexual orientation and gender identity is now prohibited (*Senate Bill 868 - Ebbin*).

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[14] Planning District 23 includes Gloucester County, Isle of Wight County, James City County, Southampton County, Surry County, York County, City of Chesapeake, City of Franklin, City of Hampton, City of Newport News, City of Norfolk, City of Poquoson, City of Portsmouth, City of Suffolk, City of Virginia Beach, and the City of Williamsburg.

[15] Currently, under the Virginia Human Rights Act there is no cause of action for discrimination in public accommodations, and the only causes of action for discrimination in employment are for (i) unlawful discharge on the basis of race, color, religion, national origin, sex, pregnancy, or childbirth or related medical conditions including lactation by employers employing more than five but fewer than 15 persons, and (ii) unlawful discharge on the basis of age by employers employing more than five but fewer than 20 persons.

The adopted legislation also codifies for state and local government employment the current prohibitions on discrimination in employment on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, or status as a veteran, and

> (a) prohibits discrimination in public accommodations on the basis of sexual orientation, gender identity, or status as a veteran;
> (b) prohibits discrimination in credit on the basis of sexual orientation, gender identity, pregnancy, childbirth or related medical conditions, disability, and status as a veteran; and (c) adds discrimination on the basis of an individual's sexual orientation, gender identity, or status as a veteran as an unlawful housing practice (*Senate Bill 868 - Ebbin*).

Localities may prohibit discrimination in housing, employment, public accommodations, credit, and education on the basis of sexual orientation and gender identity (*House Bill 696 - Roem*).

FINANCIAL INSTITUTIONS AND SERVICES

Financial institutions may now enter into multiple-fiduciary accounts with more than one fiduciary to the same extent that they may enter into fiduciary accounts with one fiduciary. "Fiduciary account" is defined as (i) an estate account for a decedent, (ii) an account established by one or more agents under a power of attorney or an existing account of a principal to which one or more agents under a power of attorney are added, (iii) an account established by one or more conservators, (iv) an account established by one or more committees, (v) a regular trust account under a testamentary trust or a trust agreement that has significance apart from the account, or (vi) an account arising from a fiduciary relationship such as an attorney-client relationship. "Multiple-fiduciary account" is a fiduciary account where more than one fiduciary is authorized to act. Any multiple-fiduciary account may be paid, on request, to any one or more fiduciaries, including any successor fiduciary upon proof showing that the successor fiduciary is duly authorized to act, or at the direction of any one or more of the fiduciaries (*Senate Bill 293 - Chafin*).

FISHERIES INSTITUTIONS AND SERVICES

The General Assembly included a shoreline practice that may enhance coastal resilience and attenuation of wave energy and storm surge in the definition of "living shoreline" for purposes of establishing and implementing a general permit regulation that authorizes and encourages the use of living shorelines as the preferred alternative for stabilizing tidal shorelines (*House Bill 1375 - Hodges*).

An application must be submitted to the Marine Resources Commission for review and processing prior to the construction of a private pier by an owner of riparian land. A nonrefundable processing fee of $100 must accompany each application and application submitted to the Commission for a permit to use state-owned submerged lands. Permit fees for the use of such bottomlands have been increased from $25 to $100 for projects costing no more than $10,000, from $100 to $300 for projects costing more than $10,000, but less than $500,000, and imposes a fee of $600 for a new category of projects costing more than $500,000.

The range of royalties for the removal of bottom material is also increased from $0.20-$0.60 per cubic yard to $0.40-$0.80. The Marine Resources Commission may increase or decrease fees every three years for certain marine habitat applications, permits, leases, rents, and royalties at a rate no greater than the change in the Consumer Price Index. An Oyster Leasing, Conservation, and Repletion Programs Fund has also been established for the purpose of administering the Commission's oyster ground leasing program and its oyster conservation and repletion program (*Senate Bill 702 - Mason*).

The General Assembly also authorized the Virginia Marine Resources Commission to promulgate and periodically update minimum standards for the protection and conservation of wetlands and to

approve only living shoreline approaches to shoreline stabilization unless the best available science shows that such approaches are not suitable (*Senate Bill 776 - Lewis*).

HOMESTEAD AND OTHER EXEMPTIONS

The General Assembly made various changes to homestead exemptions, including providing that the official schedule of property claimed exempt filed with the United States Bankruptcy Court in a bankruptcy proceeding constitutes a sufficient writing to exempt such real and personal property from creditor process. A householder may also now hold exempt from creditor process real or personal property that the householder or his dependent uses as a principal residence not exceeding $25,000 in value (*House Bill 790 - Simon*).

LANDLORD AND TENANT

The Director of the Department of Housing and Community Development must develop a statement of tenant rights and responsibilities explaining in plain language the rights and responsibilities of tenants under the Virginia Residential Landlord and Tenant Act (§ 55.1-1200 et seq.) and maintain such statement on the Department's website along with a form to be signed by the parties to a rental agreement. The statement must be provided to any prospective tenant and that the form developed by the Department be signed by the parties to the rental agreement. A landlord may not file or maintain an action against a tenant in a court of law for any alleged lease violation until he has provided the tenant with the statement of tenant rights and responsibilities (*House Bill 393 - Ward* and *Senate Bill 707 - McClellan*).

No notice of termination of tenancy served upon a tenant receiving tenant-based rental assistance through (i) the Housing Choice Voucher Program, 42 U.S.C. § 1437f(o), or (ii) any other federal, state, or local program by a private landlord is effective unless it contains on its first page, in type no smaller or less legible than that otherwise used in the body of the notice, the statewide legal aid telephone number and website address (*House Bill 519 - Bulova* and *Senate Bill 115 - Favola*).

A landlord must return the tenant's security deposit, minus any deductions or charges, within 45 days of the termination of the tenancy or the date the tenant vacates the dwelling unit, whichever occurs last (*House Bill 594 - Bourne* and *Senate Bill 388 - McPike*).[16]

A landlord may permit a tenant to provide damage insurance coverage meeting certain criteria in lieu of the payment of a security deposit. Any combination of security deposit and rental insurance coverage required by the landlord is capped at twice the amount of the periodic rent payment and any tenant who initially opts to provide damage insurance in lieu of a security deposit may, at any time without consent of the landlord, may opt to pay the full security deposit to the landlord in lieu of maintaining a damage insurance policy (*House Bill 1333 - Keam*).

Upon receipt of a petition for an order to recover possession or restore essential services alleging a tenant's unlawful ouster from the rental premises and a finding that the petitioner has attempted to provide the landlord with actual notice of the hearing on the petition, the judge of the general district court may issue such order *ex parte* upon a finding of good cause to do so. An *ex parte* order shall be a preliminary order that specifies a date for a full hearing on the merits of the petition, to be held within five days of the issuance of the *ex parte* order (*House Bill 1401 - Askew*).

A landlord shall not charge a tenant for late payment of rent unless such charge is provided for in the written rental agreement, and that no such late charge shall exceed the lesser of 10 percent of the

[16] Under current law, the 45-day period to return the security deposit begins on the date of the termination of the tenancy.

periodic rent or 10 percent of the remaining balance due and owed by the tenant (*House Bill 1420 - Bourne*).

A tenant may, under certain circumstances, to have a condition that constitutes a material noncompliance by the landlord with the rental agreement or with provisions of law, or that if not promptly corrected will constitute a fire hazard or serious threat to the life, health, or safety of occupants of the premises, remedied by a third-party licensed contractor or a licensed pesticide business. Unless the tenant has been reimbursed by the landlord, the tenant may deduct from rent the actual costs incurred, not to exceed the greater of one month's rent or $1,500, after submitting to the landlord an itemized statement accompanied by receipts for purchased items and third-party contractor or pest control services (*Senate Bill 905 - Stanley*).

NOTARIES AND OUT-OF-STATE COMMISSIONERS

The General Assembly passed legislation that allows expired state issued driver's licenses or state issued identification cards and expired passports to be used as a means of identification for notarial purposes for individuals residing in nursing homes or assisted living facilities, provided such expired documents expired within five years of the date of use for such identification purposes (*House Bill 1222 - Tran*).

PIPELINES

The State Water Control Board is authorized to include civil penalties of up to $50,000 per violation, not to exceed $500,000 per order, in any order for a violation of a permit related to the construction of a natural gas transmission pipeline greater than 36 inches inside diameter.[17] At least two written notices of violation must be issued to the person constructing the pipeline, such violations must not have been resolved, and a hearing conducted before the penalty can be assessed (*House Bill 646 - Hurst*).

PROFESSIONS AND OCCUPATIONS

On the recommendation of the Boyd-Graves Conference, the General Assembly aligned the provision for a claim for attorney fees to be paid out of money or property under control of the court with Rule 3:25 of the Rules of Supreme Court of Virginia by providing that the claim for such attorney fees shall be made in a complaint, petition, or other proceeding and removing the provision that provides that such attorney fees may also be paid where the parties are notified in writing that application will be made to the court (*House Bill 1346 - Bourne*).

PROPERTY AND CONVEYANCES

If the termination of a manufactured home park rental agreement is due to the sale of the manufactured home park to a buyer that is going to redevelop the park and change its use, the landlord shall provide certain relocation expenses to each manufactured home owner in the park within the 180-day notice period for the purpose of removing the manufactured home from the park (*House Bill 334 - Krizek*).

Where the sale of a manufactured home park is due to a change in the use of all or any part of a manufactured home park by the landlord, including conversion to hotel, motel, or other commercial use, planned unit development, rehabilitation, or demolition, a 180-day written notice is required to terminate the rental agreement. A manufactured home park owner who offers or lists the park for sale to a third party must provide written notice to (i) the Department of Housing and Community Development, which shall make the information available on its website within five days of receipt, and (ii) each tenant of the manufactured home park at least 90 days prior to accepting an offer. Tenants who have been evicted from a manufactured home park have 90 days after a judgment has

[17] Current law limits such penalties to $32,500 per violation and $100,000 per order.

been entered in which to rent the manufactured home to a subtenant, contingent on the subtenant's making a rental application to the manufactured home park owner within such 90-day period and approval by the home park owner of such rental application from the subtenant (*House Bill 1249 - Torian*).

No deed recorded on or after July 1, 2020, shall contain a reference to the specific portion of a restrictive covenant purporting to restrict the ownership or use of the property on the basis of race, color, religion, national origin, sex, elderliness, familial status, or handicap. The clerk may refuse to accept any deed submitted for recordation that references the specific portion of any such restrictive covenant. An attorney who prepares or submits a deed for recordation has the responsibility of ensuring that the specific portion of such a restrictive covenant is not specifically referenced in the deed prior to such deed being submitted for recordation. A deed may include a general provision that states that such deed is subject to any and all covenants and restrictions of record; however, such provision shall not apply to the specific portion of a restrictive covenant purporting to restrict the ownership or use of the property as prohibited by subsection A of § 36-96.6. Any deed that is recorded in the land records on or after July 1, 2020, that mistakenly contains such a restrictive covenant shall nevertheless constitute a valid transfer of real property. The legislation provides the form for a Certificate of Release of Certain Prohibited Covenants to be recorded to remove any such restrictive covenant (*House Bill 788 - Bagby*).

The General Assembly relocated from Chapter 9 (Real Estate Settlements) to Chapter 10 (Real Estate Settlement Agents) within Title 55.1 the existing provision that prohibits persons from paying or receiving a kickback, rebate, commission, thing of value, or other payment pursuant to an agreement to refer business incident to a settlement.

This relocation authorizes the State Corporation Commission to impose penalties, issue injunctions, and require restitution in cases where a person who does not hold a license from the appropriate licensing authority has violated the provision. The measure also adds to Chapter 10 of Title 55.1 provisions that (i) authorize a court to assess civil penalties of not more than $5,000 per violation of the chapter and (ii) authorize the recovery of costs and reasonable expenses and attorney fees (House Bill 819 - Simon).

Through companion bills, the General Assembly declared that it is the policy of the Commonwealth that:

- Easements for the location and use of electric and communications facilities may be used to provide or expand broadband or other communications services;
- The use of easements to provide or expand broadband or other communications services is in the public interest;
- The installation, replacement, or use of public utility conduit, including the costs of installation, replacement, or use of conduit of a sufficient size to accommodate the installation of infrastructure to provide or expand broadband or other communications services, is in the public interest; among other things.

Absent any express prohibition on the installation and operation of broadband or other communications services in an easement that is contained in a deed or other instrument by which the easement was granted, the installation and operation of broadband or other communications services within any easement shall be deemed, as a matter of law, to be a permitted use within the scope of every easement for the location and use of electric and communications facilities and subject to compliance with any express prohibitions in a written easement, any incumbent utility or communications provider may use an easement to install, construct, provide, maintain, modify, lease, operate, repair, replace, or remove its communications equipment, system, or facilities, and provide communications services through the same, without such incumbent utility or communications provider paying additional compensation to the owner or occupant of the servient estate or to the incumbent utility, provided that no additional utility poles are installed.

The measure provides that any incumbent utility or communications provider may use a prescriptive easement to install, construct, provide, maintain, modify, lease, operate, repair, replace, or remove its communications equipment, system, or facilities, and provide communications services through the same, without such incumbent utility or communications provider paying additional compensation to the owner or occupant of the servient estate or to the incumbent utility, provided that no additional utility poles are installed (*House Bill 831 - Foy* and *Senate Bill 794 - Lewis*).

PROPERTY, GROUNDS AND BUILDINGS, STATE-OWNED

Subject to general provisions governing the lease of property owned by the Commonwealth by state agencies, the Department of Military Affairs may convey a leasehold interest in any portion of State Military Reservation property to governmental or private entities when it is deemed to be in the Department's best interest to (i) provide necessary services such as lodging, training capabilities, or logistical utility services that support the Department's mission or (ii) maintain a peripheral buffer with compatible uses, including ground parking leases.

The term of such lease may not exceed 50 years; however, any agreement may be extended upon the written recommendation of the Governor and the approval of the General Assembly. In the event that the Department enters into a written lease with a private individual, firm, corporation, or other entity, neither the real property that is the subject of the lease nor any improvements or personal property located on the real property that is the subject of the lease shall be subject to taxation by any local government authority, provided that the real property, improvements, or personal property is used for a purpose consistent with or supporting the Department's mission (*Senate Bill 948 - Reeves*).

The General Assembly directed the Department of General Services to (i) determine which state-owned structures have a higher likelihood of being involved in a natural or man-made emergency that may require special access by law-enforcement personnel and (ii) study the desirability and feasibility of coordinating with local law enforcement in the installation of certain key boxes permitting law-enforcement officials to gain access to such structure during an emergency.

The General Assembly also permitted the Department of General Services to implement procedures for installing such key boxes to the extent that the Department of General Services determines such action is desirable and feasible. The Department of General Services is required to report its findings to the Governor and General Assembly by December 1, 2020 (*Senate Bill 1065 - DeSteph*).

The Department of Conservation and Recreation is authorized to convey certain property that was previously conveyed to it by Norfolk Southern Railroad for the New River Trail State Park (*Senate Bill 1094 - Deeds*).

PUBLIC BUILDINGS, FACILITIES AND PROPERTY

Any locality may, by ordinance, prohibit the possession or carrying of firearms, ammunition, or components or any combination thereof in (i) any building, or part thereof, owned or used by such locality for governmental purposes; (ii) any public park owned by the locality; (iii) any recreation or community center facility; or (iv) any public street, road, alley, sidewalk or public right-of-way or any other place of whatever nature that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit (*House Bill 421 - Price* and *Senate Bill 35 - Surovell*).[18]

[18] The bills include provisions not directly related to the operation or real property, including repealing provisions limiting the authority of localities and state governmental entities to bring lawsuits against certain firearms manufacturers and others, and providing that any firearm received by the locality

The Department of General Services to include in its standards for capital outlay construction policies for the construction and installation of physically safe, sanitary, and appropriate baby changing facilities in restrooms. "Baby changing facility" is defined in the bill as a table or other device suitable for changing the diaper of a child age three or younger (*House Bill 587 - Guzman*).

The City of Chesapeake has been added to the list of localities that are authorized to issue bonds for the construction of public facilities and retain sales and use tax revenue generated within such facilities to pay off such bonds.[19] Outdoor amphitheaters have also been added to the list of authorized public facilities, provided that a locality owns, wholly or partly, and contributes to the construction of such amphitheater. The period of time during which authorized localities may issue bonds for the construction of public facilities and retain sales and use tax revenue generated within such facilities to pay off such bonds has been extended to July 1, 2024 (*House Bill 906 - Hayes* and *Senate Bill 163 - Spruill*).[20]

REAL ESTATE TAX

A nonprofit organization that acquires real estate with delinquent taxes or liens pursuant to the appointment of a special commissioner may sell to eligible purchasers either (i) both the land and structural improvements on a property or (ii) only the structural improvements of a property, without the land. A sale of only the structural improvements is permissible only if (a) the improvements are subject to a long-term ground lease with a community land trust and (b) the community land trust retains a preemptive option to purchase such improvements at a price determined by a formula that ensures that the improvements remain affordable in perpetuity to low-income and moderate-income families (*House Bill 535 - Carr*).

The maximum duration of a local real estate tax exemption for structures in redevelopment or conservation areas or rehabilitation districts is increased from 15 to 30 years (*House Bill 537 - Carr* and *Senate Bill 727 - McClellan*).

In certain "qualifying" localities,[21] blighted properties and derelict structures shall constitute a separate class of property for local taxation of real property. These localities may, by ordinance, levy a tax on blighted properties and derelict structures at a rate that exceeds the general real property tax rate by five and 10 percent, respectively. Any tax levied pursuant to such an ordinance shall be imposed upon a determination by the real estate assessor that a property constitutes a blighted property or derelict structure. Delinquent tax lands may be sold six months after the locality has incurred abatement costs for buildings that have been condemned, constitute a nuisance, are a derelict building, or are declared to be blighted (*House Bill 755 - Aird*).

The local property tax exemption for solar energy projects is changed from an 80 percent exemption for the life of the project to a step down scale of an 80 percent exemption in the first five years, 70 percent in the second five years, and 60 percent for all remaining years in service. The change applies to solar energy projects that are either (i) projects greater than 20 megawatts and less than 150 megawatts for which an initial interconnection request form has been filed with an electric utility or a regional transmission organization after January 1, 2015, and first in service on or after January 1,

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pursuant to a gun buy-back program shall be destroyed by the locality unless the person surrendering such firearm requests in writing that such surrendered firearm be sold.

[19] Joining the cities of Fredericksburg, Hampton, Lynchburg, Newport News, Norfolk, Portsmouth, Richmond, Roanoke, Salem, Staunton, Suffolk, Virginia Beach, Winchester, and the Town of Wise.

[20] Under current law, such authority expires on July 1, 2020.

[21] "Qualifying locality" means a locality with a score of 107 or higher on the fiscal stress index, as published by the Department of Housing and Community Development in July 2019 using the revised data for fiscal year 2017.

2017, and (ii) projects equaling more than five megawatts and less than 150 megawatts for which an initial interconnection request form has been filed on or after January 1, 2019. If a locality assesses a revenue share on a project, the step down scale shall not apply. The sunset date after which new projects may not qualify for the exemption is extended from January 1, 2024, to July 1, 2030 (*House Bill 1434 - Jones* and *Senate Bill 763 - Barker*).

For purposes of the real property tax exemption for certified solar energy and recycling equipment, the exemption shall be retroactive to the date of installation if the taxpayer obtains certification from the Department of Environmental Quality within one year of installation (*Senate Bill 1039 - Vogel*).[22]

RESIDENTIAL PROPERTY DISCLOSURES

The owner of residential property must make no representations with respect to whether the property is located on or near deposits of marine clays (marumsco soils). Purchasers are advised to exercise whatever due diligence is deemed necessary in accordance with terms and conditions as may be contained in the real estate purchase contract, including consulting public resources regarding local soil conditions and having the soil and structural conditions of the property analyzed by a qualified professional (*House Bill 174 - Krizek*).

The disclosure statement required to be furnished to the buyer by the owner of residential real property to a buyer must provide that the buyer beware and exercise necessary due diligence with respect to:

- whether the property is located in a locality classified as Zone 1 or Zone 2 by the U.S. Environmental Protection Agency's Map of Radon Zones (*House Bill 175 - Krizek*);
- obtaining a residential building energy analysis and determining the condition of real property or any improvements thereon (*House Bill 518 - Bulova* and *Senate Bill 628 - Surovell*);
- whether the property contains any pipe, pipe or plumbing fitting, fixture, solder, or flux that does not meet the federal Safe Drinking Water Act definition of "lead free," (House Bill 1161 and House Bill 1342) and any licensee who is engaged by a landlord and who has actual knowledge of the existence of any pipe, pipe or plumbing fitting, fixture, solder, or flux that does not meet the federal Safe Drinking Water Act definition of "lead free" must disclose such information to a prospective tenant (*House Bill 1161 - Lopez*); and,
- the existence of defective drywall on the property (*House Bill 1342 - Askew*).

The residential property disclosure statement form developed by the Real Estate Board and maintained on its website must include a statement signed by the parties acknowledging that the purchaser has been advised of the disclosures listed on the residential property disclosure statement (House Bill 838 - *Convirs-Fowler*).[23]

SCENIC RIVERS SYSTEM

Several rivers, and portions of rivers, have been added to the Virginia Scenic Rivers System,[24] including a:

[22] Under current law, the exemption is effective in the next tax year after the taxpayer obtains certification.

[23] Currently, the residential property disclosure statement form only requires an acknowledgment that the purchaser has been advised to review the residential property disclosure statement.

[24] According to the Virginia Department of Conservation and Recreation website (https://www.dcr.virginia.gov/recreational-planning/srmain), the Virginia Scenic Rivers Program's

- 66.8-mile segment of the Clinch River in Tazewell and Russell Counties as part of the Clinch State Scenic River (*House Bill 5 - Morefield* and *Senate Bill 478 - Chafin*);
- 20-mile portion of the James River located in Albemarle, Buckingham, and Fluvanna Counties as part of the James State Scenic River (*House Bill 1598 - Fariss*);
- 19.25-mile segment of the Maury River in Rockbridge County (*House Bill 282 - Campbell* and *Senate Bill 288 - Deeds*);
- 17-mile segment of the Pound River in Wise and Dickenson Counties (*House Bill 1145 - Wampler*);
- 11.5-mile segment and approximately 51.3 mile segment of the Staunton River (*House Bill 1601 - Edmunds*); and,
- Six-mile portion of Grays Creek in Surry County (*House Bill 1612 - Brewer* and *Senate Bill 1090 - Norment*).

SPORTING EXHIBITIONS, EVENTS AND FACILITIES

The City of Virginia Beach's entitlement to state sales and use tax revenue attributable to a sports or entertainment project, which under current law will expire on July 1, 2039, shall expire on July 1 following the twentieth anniversary of the completion of construction of the sports and entertainment project. The City of Virginia Beach is authorized to work with a community development authority established by the City to develop a sports or entertainment district, and authorizes it to use funds from the Sports or Entertainment Project Financing Fund to pay for debt maintenance costs of such authority (*House Bill 120 - Knight*).

The Virginia Tourism Corporation is directed to convene a group of stakeholders to initiate the creation, design, and implementation of a NASCAR and motor vehicle racing heritage trail (*Senate Bill 773 - Stanley*).

TAXATION

Increased from $2,500 to $5,000 the maximum amount at which the governing body of a locality may authorize its treasurer to approve and issue a refund of taxes paid as a result of an erroneous tax assessment (*House Bill 316 - Gooditis*).

Expands the definition of "eligible housing area" for the housing choice voucher tax credit to include Virginia census tracts in the Washington-Arlington-Alexandria Metropolitan Statistical Area in which less than 10 percent of the population lives below the poverty level and establishes a 2025 sunset date on the credit. Landlords who rent qualified housing units within such areas are eligible for an income tax credit. Current law only applies to such areas within the Richmond and Virginia Beach-Norfolk-Newport News Metropolitan Statistical Areas (*House Bill 590 - Guzman* and *Senate Bill 200 - Barker*).

Established an exemption from probate tax for a person killed or injured in the 2019 Virginia Beach mass shooting. If, prior to its enactment, a person eligible for a tax exemption pursuant to the bill paid tax to the Commonwealth or a locality for a will or grant of administration of a victim's estate, either the Commonwealth or the locality, as applicable, shall refund the tax (*House Bill 839 - Convirs-Fowler* and *Senate Bill 93 - DeSteph*). *This legislation became effective on March 11, 2020.*

Replaces the term "husband and wife" with "spouses" for purposes of the recordation tax exemption for certain deeds (*House Bill 1580 - Sullivan*).

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intent is to identify, designate and help protect rivers and streams that possess outstanding scenic, recreational, historic and natural characteristics of statewide significance for future generations. This program is managed by the state and should not be confused with the federal Department of the Interior's Wild and Scenic Rivers Program.

Raises the assessment threshold at which a local treasurer or other officer responsible for collecting taxes has general authority to sell real property with over three years of delinquent taxes from less than $5,000 to no more than $10,000 and extends such authority to improved as well as unimproved parcels of real property. The bill raises the assessment range at which such officer may sell parcels of real property with over three years of delinquent taxes and that meet certain criteria from at least $5,000 but less than $20,000 to more than $10,000 but no more than $25,000. The bill increases the size of unimproved parcels that may be sold from less than 4,000 square feet to one acre or less (*House Bill 1582 - Heretick*).

WATERS OF THE STATE, PORTS AND HARBORS

The State Water Control Board must adopt regulations requiring the owner of residential property on which is located a privately owned stormwater management facility serving one or more residential properties to record the long-term maintenance and inspection requirements for such stormwater management facility with the deed for the owner's property. An owner of residential real property who has actual knowledge of a privately owned stormwater management facility located on the property to disclose to a purchaser of the property the long-term maintenance and inspection requirements of the facility (*House Bill 859 - Convirs-Fowler*).

The State Water Control Board must adopt regulations providing for the use of a proprietary best management practice (BMP) only if another state, regional, or national certification program has verified and certified its nutrient or sediment removal effectiveness. Any proprietary BMP that is included on the Virginia Stormwater BMP Clearinghouse website prior to July 1, 2020, to provide documentation to the Department of Environmental Quality showing that its effectiveness has been verified by another state, regional, or national certification program and prohibits any such proprietary BMP that fails to provide such documentation from being used in any stormwater management plan submitted on or after January 1, 2022 (*House Bill 882 - Bulova*).

The General Assembly set December 31, 2025, as the target date to achieve the water quality goals contained in Virginia's final Chesapeake Bay Total Maximum Daily Load Phase III Watershed Implementation Plan (WIP). If the Secretary of Agriculture and Forestry and the Secretary of Natural Resources jointly determine on or after July 1, 2026, that such goals have not been met by a combination of agricultural best management conservation practices, including the coverage of a sufficient portion of Chesapeake Bay cropland by nutrient management plans or the installation of a sufficient number of livestock stream exclusion practices, then certain provisions requiring the use of nutrient management plans and livestock stream exclusions shall become effective. The Secretary of Agriculture and Forestry and the Secretary of Natural Resources jointly must convene a stakeholder advisory group to review annual progress toward the implementation of agricultural commitments in the WIP, develop a process to assist in creating nutrient management plans, and develop a plan for the stream exclusion program. The General Assembly also directed the Virginia Soil and Water Conservation Board to establish by December 31, 2020, the official method for identifying perennial streams and the Department of Conservation and Recreation to establish by July 1, 2021, a portable stream fencing practice for inclusion in the Virginia Agricultural Best Management Practice Cost-Share Program (*House Bill 1422 - Plum* and *Senate Bill 704 - Mason*).

The State Water Control Board is authorized to administratively withdraw an individual or a general coverage water protection permit application if it is incomplete or for failure by the applicant to provide the required information after 60 days from the date of the latest written information request made by the Board. Prior to an administrative withdrawal, the Board must provide (i) notice to the applicant and (ii) an opportunity for an informal fact-finding proceeding. An applicant may request suspension of an application review by the Board that does not affect the Board's ability to administratively withdraw the application (*House Bill 1458 - Murphy*).

ZONING

Once the writ of certiorari is served in response to a petition from a party aggrieved by a board of zoning appeals decision, the board of zoning appeals shall have 21 days or as ordered by the court to respond (*House Bill 505 - Knight*).

Authorizes a locality to disapprove an application submitted for an administrative review-eligible project or for any zoning approval required for a standard process project that proposes to locate a new structure, or to co-locate a wireless facility, in an area where all cable and public utility facilities are required to be placed underground by a date certain or encouraged to be undergrounded as part of a transportation improvement project or rezoning proceeding as set forth in objectives contained in a comprehensive plan, on grounds that an applicant has not given written notice to adjacent landowners at least 15 days before it applies to locate a new structure in the area (*House Bill 554 - VanValkenburg*).

Each city with a population greater than 20,000 and each county with a population greater than 100,000 consider incorporating into the next scheduled and all subsequent reviews of its comprehensive plan strategies to promote transit-oriented development for the purpose of reducing greenhouse gas emissions through coordinated transportation, housing, and land use planning (*House Bill 585 - Guzman*).

Certain solar facilities shall be deemed to be substantially in accord with a locality's comprehensive plan if the locality waives the requirement that solar facilities be reviewed for substantial accord with the comprehensive plan (*House Bill 657 - Heretick*).

CONCLUSION

While criminal justice, commerce and labor, education, firearms, gambling and health care continue to dominate discussion of the General Assembly, legislation affecting real estate practitioners continues to be introduced and adopted every session. Although only a few dozen (or so) adopted bills address traditional issues in “real estate law,” more than one hundred-thirty bills impact areas of the law routinely encountered by real estate practitioners. I hope these summaries are helpful to your firms, practice groups and individual practices.

VIRGINIA REAL ESTATE CASE LAW UPDATE (SELECTED CASES)

By Michael E. Derdeyn

Michael E. Derdeyn, of Flora Pettit PC, gratefully acknowledges and expresses his appreciation to Shannon A. Temlak, of Flora Pettit and Hayden-Anne Breedlove, Esq., law clerk with the Henrico County Circuit Court and Assistant Editor of the Fee Simple, for their assistance in preparing this outline.

A. VIRGINIA SUPREME COURT CASES

1. *Bragg Hill Corp. v. City of Fredericksburg*, 297 Va. 566 (2019).

Facts: Property owner brought declaratory judgment action against City in 2017 asserting that owner had a right to develop property to a density of 8 dwelling units per acre pursuant to a master plan submitted to Spotsylvania County prior to annexation of the property by the City, and pursuant to its R-2 zoning classification by the County at the time of annexation. Upon annexation in 1984, the property was automatically rezoned to R-1 by City ordinance. Owner claimed that the City's change in zoning was void *ab initio* because (i) automatic rezoning pursuant to annexation violated Virginia law (Count I) and (ii) violated owner's due process rights by failing to provide notice and an opportunity to be heard (Count III). The Owner also claimed that it had a vested right to develop the property according to the master plan it submitted to the County (Count II).

The City filed pleas in bar asserting that Counts I and III were time-barred and that the court lacked jurisdiction because the owner did not contest the rezoning within the 30-day appeal period. The City also filed a special plea to Count II claiming that the owner failed to exhaust administrative remedies when it failed to appeal the Board of Zoning Appeals (BZA) determination in 2010 that owner had no vested rights in the master plan. Finally, the City demurred to Count I.

Trial Court: The trial court granted the City's pleas, sustained the demurrer, and dismissed the case, with prejudice.

Holding: The Supreme Court affirmed the trial court's rulings.

Discussion: With respect to Count I, the Supreme Court determined that the City had the authority to rezone the annexed land under Virginia Code § 15.1-491(b) (1984), which provided that a zoning ordinance may include provisions "for the temporary application of the ordinance to any property coming into the territorial jurisdiction of the governing body by annexation or otherwise." Although the City ordinance did not indicate that it applied only "temporarily," the Supreme Court reasoned that all zoning ordinances are by their nature temporary because they are subject to amendment.

With respect to Count II, the Supreme Court found that the owner failed to exhaust administrative remedies when it failed to appeal the BZA 2009 decision upholding the zoning administrator's determination that the owner had acquired no vested rights in the master plan. The Supreme Court made clear that the owner was not obligated to seek a vested rights determination from the zoning administrator pursuant to Virginia Code § 15.2-2286 and could have elected to seek a determination from the circuit court because the zoning administrator and the circuit court have concurrent jurisdiction over vested rights determinations. Where, however, the owner elects to seek an administrative determination, the owner cannot make a direct judicial attack on that decision if the owner fails to exhaust administrative remedies. Here, the owner failed to appeal the BZA's decision to the circuit court and, therefore, the denial of the owner's vested rights claim was a "thing decided" that the owner could not collaterally attack.

With respect to Count III, the Supreme Court determined that there was no due process violation because (i) according to the zoning administrator and the BZA, the owner had no vested property right and (ii) if the owner had a vested right, the rezoning would not have affected that vested right, i.e. the vested right would not have been affected by the rezoning. Thus, the City's rezoning did not deprive the owner of any vested property right.

2. *Callison v. Glick,* 297 Va. 275 (2019).

Facts: Auto dealership leased property from lessor, Callison. Lease gave dealership an assignable option to purchase the property subject to the lease and, upon the exercise of such option, the property was to be conveyed "free and clear of all liens and encumbrances." Option price was fixed at $550,000. Dealership wanted to renovate its existing building on the property and construct a second building. Dealership financed the construction costs with a note and Callison executed a Construction Deed of Trust securing the note with the property. Callison passed away in 2011, and his wife was his only heir. In 2012, the note amount was increased to $600,000 and Mrs. Callison executed a modification to the Deed of Trust reflecting that increase.

In 2016, the dealership ceased operations, stopped paying rent, and stopped making payments on the note, which had an outstanding balance of $544,000. The dealership also assigned the purchase option to an individual named Mark Bowles.

Mrs. Callison brought an action seeking, among other things, to enjoin foreclosure proceedings and to declare that in the event the option was exercised, the option holder was required to pay the $550,000 option price and accept the property subject to the Deed of Trust. Mrs. Callison sought to have the court declare that she was a sub-surety and sought to enjoin the acceleration of the note and to prevent the assignee of the option from exercising the option. Bowles filed suit seeking specific performance of the option, including the conveyance of the property free and clear from all encumbrances.

Trial Court: After a trial, the court dismissed Mrs. Callison's claims. The trial court ruled that the injunction action was mooted because the foreclosure sale was canceled. The trial court also granted Bowles specific performance.

Holding: Affirmed.

Discussion: Supreme Court ruled that the trial court did not abuse its discretion in refusing to declare Mrs. Callison a sub-surety and, on that basis, to prevent acceleration of the note and exercise of the option. Supreme Court found that Mr. Callison and Mrs. Callison voluntarily entered into the business arrangement with knowledge of the potential liability and all acts of others were contractually permissible.

The Supreme Court also rejected the claim that the holder of the option was required to take subject to the Deed of Trust. The language of the Lease was clear that the tenant auto dealership had "the unqualified right to assign" the option and that Callison was required to convey the property upon exercise of the option "free and clear of all liens and encumbrances." Accordingly, the Court affirmed the trial court's ruling granting Bowles specific performance.

3. *Davis v. Davis*, 835 S.E.2d 888 (Va. 2019).

Facts: After an accident in 1993 that rendered him a quadriplegic, Dickey Davis executed a durable power of attorney granting his mother, Agnes, the power to "sell and convey" his real property and to otherwise "execute and perform all and every act or acts" that Dickey could do if acting personally.

In 2005, Dickey executed a will that named Garnett Davis (Dickey's brother), as executor. In 2013, Dickey fell ill and was hospitalized. He was then moved to a nursing facility where he suffered periods of confusion because of his illness. While in the facility, Dickey married "Rae." Shortly after the

marriage, Dickey's health declined quickly. With death being imminent. Agnes, using her power of attorney, transferred the vast majority of Dickey's personal property to herself and executed three deeds of gift transferring all of Dickey's real property – valued in excess of $2 million – to his siblings. Agnes did not inform Dickey of these transfers. Dickey passed away shortly thereafter.

In 2016, Garnett, in his capacity as executor of Dickey's will, filed a Complaint in the Circuit Court of Wythe County on behalf of Dickey's Estate seeking aid and direction regarding the validity of Agnes' transfers of Dickey's property just prior to his death.

Trial Court: The trial court held that the property transfers made by Agnes in her role as power of attorney were valid.

Holding: Reversed and remanded. The Court held that the transfers were not valid because the power of attorney document did not expressly authorize the attorney-in-fact's transfers and the attorney-in-fact did not have the statutory authority to make such transfers.

Discussion: The Court determined that a power of attorney authorizing the agent to "sell and convey" did not authorize gifting because the phrase requires both a selling and a conveyance such that the attorney-in-fact is authorized to cause transfers only for "adequate consideration." As there was no consideration, the reliance on the "sell and convey" power was ineffective. Thus, a power of attorney document must expressly grant the authority to make gifts.

Agnes also argued that Va. Code § 64.2-1622(H), which authorizes an agent to make gifts in accordance with the principal's personal history of making gifts," provided Agnes with the authority to make the gifts. At trial, however, there was no evidence of any gifts of real estate during Dickey's lifetime. As a result, Agnes was unable to rely on this statute.

4. *Futuri Real Estate, Inc. v. Atlantic Trustee Services*, 835 S.E.2d 75 (2019).

Facts: Dispute over proceeds of foreclosure sale involved a question of first impression in Virginia as to the impact of a subordination agreement pursuant to which a first-priority lien holder subordinates its lien to that of a third-priority lien holder. Wells Fargo Bank, N.A. held the first lien position (a loan of $415,000.00), Suntrust Bank held the second lien position (a loan of $220,000.00), and Wells Fargo held the third lien position (a loan of $252,007.33). A subordination agreement was recorded pursuant to which Wells Fargo agreed to subordinate its lien in first position to its lien in third position.

Subsequently, the owner defaulted on the Suntrust lien, the property went into foreclosure and Atlantic Trustee Services as substitute trustee sold the property at foreclosure for $468,000 and proposed to pay Suntrust the full amount of its lien before applying the remainder to the other liens. After disputes arose regarding the allocation of proceeds, the Trustee filed an interpleader action and Futuri – the purchaser at foreclosure – filed a cross-claim against Wells-Fargo seeking a declaratory judgment that the subordination agreement (i) ousted Wells Fargo out of first lien position and put it behind Wells' Fargo's third lien position (ii) moved Suntrust into first lien position, and (iii) because Suntrust's lien was a first lien deed of trust, the foreclosure extinguished both Wells Fargo liens.

Trial Court: In this case of first impression, the trial court determined that Virginia would follow the partial subordination rule and not the complete subordination rule. Under the complete subordination rule, where A is the senior lienholder, B the second lienholder, and C the third, and A subordinates its lien to C, it would move B into first lien position. Under the partial subordination rule, where A subordinates it's lien to C, C moves into first-lien position (up to the amount of A's lien), B remains in second position, and A moves to third position (except to the extent that C's lien is for less than the amount of A's lien, in which case A remains superior to B for the amount that A's lien exceeds C's lien). The trial court adopted the partial subordination rule – which is the majority rule – and ruled that the subordination agreement did not affect Suntrust's priority status.

Holding: Affirmed.

Discussion: The Supreme Court agreed with the trial court, finding that the complete subordination rule deviates from Virginia law because it results in elevating the priority of a non-party lienholder–thereby making that lienholder a third-party beneficiary. This is inconsistent with Virginia law requiring a contract to clearly identify any intended beneficiaries. The Supreme Court found that the complete subordination rule is also inconsistent with Virginia law because it "incorporates an inference that the contracting parties intended to affect lienholders who are not a party to the agreement, notwithstanding that such intent is not contained in the language of the agreement."

5. *Helmick Family Farm, LLC v. Comm'r of Highways*, 297 Va. 777 (2019).

Facts: Prior to the taking, Helmick Family Farm consisted of about 168 acres and was zoned Agricultural, but a portion of it was designated as Commercial within the Culpepper County Comprehensive Plan and was within the County's Urban Services Area. The property also had more than 2,000 feet of road frontage and access to Route 666. The land was being used for cattle grazing and for growing hay.

On August 20, 2014, the Commissioner of Highways filed a Certificate of Take for a portion of the farm for the purpose of building an interchange at the intersection. Commissioner took 2.155 acres, a permanent drainage easement, a temporary construction easement, and a utility easement. After the landowner refused the Commissioner's offer of $20,281, the Commissioner filed a condemnation petition.

Trial Court: Prior to trial, the circuit court granted Commissioner's motion in limine to exclude all evidence concerning "a hypothetical rezoning of the subject property from Agricultural (A-1) to Light industrial or Commercial before the take on August 20, 2014." The circuit court reasoned that such evidence was too speculative and remote. At trial, the court instructed the jury not to consider evidence concerning the reasonable probability of a rezoning. The condemnation commissioners awarded compensation of $22,592 to the landowner.

Holding: Reversed and remanded. Commissioners' award was set aside.

Discussion: Question of first impression in Virginia as to whether evidence concerning the reasonable probability of rezoning is admissible to establish the fair market value of a property. The Court determined that the trial court improperly excluded evidence of a future rezoning and recognized that evidence concerning the reasonable probability of a rezoning is admissible in a condemnation proceeding, noting that such a rule is consistent with the court's previous decisions as well as "[a]n avalanche of authority from other jurisdictions."

The Court set forth the following framework for considering rezoning evidence: (1) property owner has the burden of proving a reasonable probability of rezoning; (2) to be admissible, evidence of the likelihood of rezoning must rise to the level of a probability; (3) the reasonable probability must be in the "near future" rather than "at some time in the future"; (4) trial court must determine if there is sufficient evidence of a reasonable probability to permit the property owner to present testimony of the property's market value based on that probability; (5) if the trial court finds that there is insufficient evidence, the trial court must exclude all such evidence and opinions of the property's value based on a use permitted by the rezoning alone; (6) relevant factors to consider as to whether a reasonable likelihood of rezoning exists include the rezoning of nearby property, growth patterns, change of use patterns and character of neighborhood, demand within the area for certain types of land use, sales of related or similar properties at prices reflecting anticipated rezoning, physical characteristics of the subject and of nearby properties and, under proper circumstances, the age of the zoning ordinance; and (7) property value must be evaluated under existing zoning restrictions with consideration given to the likelihood of a zoning change's impact upon the property value.

The Court applied this framework and concluded that Helmick presented sufficient facts to create a jury issue of reasonable probability of rezoning.

6. *Lane v. Bayview Loan Servicing*, LLC, 297 Va. 645 (2019).

Facts: On March 30, 2007, Gloria Lane executed a deed of trust to secure a note. Lane's loan servicer was Bayview Loan Servicing. The Deed of Trust provided that if Lane failed to make payment, she would be in default and Bayview would notify Lane by certified mail of the breach and required action to cure before accelerating and foreclosing.

On May 10, 2016, Bayview mailed Lane a notice of default which stated that Bayview would foreclose on the property if the amount by which the loan was delinquent remained unpaid. On August 9, 2016, Bayview mailed Lane a second notice of default. On December 12, 2016, BWW Law Group – on behalf of Equity Trustees, the substitute trustee – mailed Lane a foreclosure notice.

On December 30, 2016, Lane, acting pro se, filed an action against BWW to enjoin the foreclosure sale. The trial court denied the injunction and the foreclosure sale occurred as scheduled. Lane did not appeal the trial court's ruling.

On February 3, 2017, Equity executed a Substitute Trustee's Deed conveying the property to Bayview, the highest bidder at the foreclosure sale. On March 15, 2017, Bayview conveyed the property to Von Allman.

In the Fall of 2017, counsel for Lane filed a complaint against Bayview, Equity, and Von Allman. Lane alleged that Bayview breached the requirements of the Deed of Trust by mailing the May notice first class rather than by certified mail and by incorrectly stating that Lane missed two payments (Count I); that Equity breached Code § 55-59 because it was not lawfully appointed as substitute trustee (Count II); that Bayview breached Code § 55-59, -59.2, and -59.3 when it breached the Deed of Trust as alleged in Counts I and II (Count III); and that Bayview breached implied covenants of good faith and fair dealing as the noteholder's agent when it conducted the Foreclosure Sale in breach of the terms of the Deed of Trust and Virginia statutes (Count IV).

Trial Court: The trial court sustained Bayview's plea in bar of res judicata based on the previous injunction action and dismissed the complaint with prejudice as to Bayview and as to Von Allman and Equity.

Holding: Reversed and remanded.

Discussion: Bayview argued it was in privity with BWW – the defendant in the injunction action – because of their attorney-client relationship and because BWW's interests were aligned with Bayview's with respect to the issues in the injunction action. In ruling on a question of first impression in Virginia as to whether the attorney-client relationship is sufficient to establish privity for res judicata or collateral estoppel, the Court held that such relationship is insufficient in itself. The Court explained, "[W]e agree with the several jurisdictions that narrowly construe privity and have found that an attorney does not share the same legal interest as his or her client merely by virtue of his or her representation of that client."

Applying that rule to the case at bar, the Court found that BWW did not share Equity or Bayview's interest in the injunction action. Whereas Bayview and Equity had legal interests in the foreclosure sale because the Deed of Trust gave Bayview the right to foreclose and Bayview appointed Equity to do so, BWW was merely a "stranger to the Deed of Trust and the obligations it imposed upon Bayview and Equity." The Court explained that "something more than obtaining a favorable outcome for Bayview and Equity was required for the court to find that that BWW was in privity with Bayview and Equity in the Injunction Action."

Because there was no privity between BWW and Bayview or Equity, and neither Bayview nor Equity was a party to the injunction action, the ruling in the injunction action had no preclusive effect upon any claims or issues asserted in Lane's complaint. Therefore, the court found that the circuit court erred in sustaining the plea in bar.

7. *Loch Levan Limited Partnership v. Board of Supervisors*, 297 Va. 674 (2019).

Facts: In 1989, a developer sought and obtained the rezoning of 1,089 acres in Henrico County for a master planned community to be known as Wyndham. The plans included Dominion Club drive as a "spine" road running through Wyndham and ending at the Chickahominy River on the Hanover County line. Beginning in 1991, Henrico County included the road in its Major Thoroughfare Plan. In 1992, the developer recorded a plat dedicating the right of way for the completion of the road to the Hanover County line. That plat did not subdivide any property into lots. No construction was commenced on that section of the roadway extending Dominion Club Drive to the Hanover County Line.

In 2016, the developer filed a rezoning application in Hanover County, which showed its property located there as being accessed via Dominion Club Drive. Residents in Wyndham were concerned about increased traffic and the Henrico County Board of Supervisors responded by removing the unbuilt road from its Major Thoroughfare Plan–and subsequently abandoned the unbuilt road.

The developer filed suit claiming that it had a vested right to develop the road and that the County had improperly abandoned the road.

Trial Court: The trial court determined that the developer had no vested rights in the road and that the County had properly abandoned the road.

Holding: Affirmed.

Discussion: The Supreme Court determined that Virginia Code § 15.2-2261(C) governed the developer's statutory vested rights claim, noting that its plain language prohibited the Board from adversely affecting the developer's rights to complete an approved development "in the case of a recorded plat for five years after approval." Because the road was not constructed within the five-year period, the developer's statutory rights expired. The Court rejected the developer's claim that Section 15.2-2261(F) controlled; that section provides that an approved and recorded subdivision plat "from which any part of the property subdivided has been conveyed to third parties . . . shall remain valid for an indefinite period of time." Because the plat at issue dedicated a right of way only and did not subdivide any property, this provision was not controlling. Had the developer dedicated the right of way on the same plat as the subdivision plat – which is permissible – then the indefinite right under Section 15.2-2261(F) would have applied to the road.

The Court also rejected the developer's claim that it held a constitutionally vested property, noting that the "dedication of a road 'shall operate to transfer, in fee simple," the property set forth in the plat. Because the developer transferred fee simple title to the property, it had no property right in the road and, therefore, no constitutionally protected property right.

Finally, the Court determined that the County had properly abandoned the road.

8. *McDiarmid v. Northern Virginia Regional Park Authority*, 2019 WL 827080 (2019) (Unpublished)

Facts: Land trust owned property in Fairfax County. In 2014, the defendant constructed a connector trail "in the vicinity" of the land trust's property. The trustees filed a complaint alleging that the defendant constructed part of the trail on the land trust's property and sued for, among other things, trespass and inverse condemnation.

Trial Court: The trial court granted defendant's motion to strike the trespass and related declaratory judgment counts for failing to prove title to the disputed area where the trail was built. The trial court also granted the motion to strike the other counts for failure to present evidence of damages.

Holding: Affirmed.

Discussion: The trustees appealed only the trial court's ruling granting the motion to strike the trespass and related declaratory judgment claim. The Court affirmed on the ground that the plaintiff in such a claim is required to establish a present right to possess the land in question to establish a prima facie case. Because the land trust was claiming the right to possession by virtue of title, the trustees were required to show that "the land in dispute is covered by the title papers." The Court determined that the trustees failed to "set forth evidence of clear title or *prima facie* title to the disputed area of land."

9. *McKee Foods Corporation v. County of Augusta*, 297 Va. 482 (2019).

Facts: Plaintiff food processor filed a petition to correct erroneous assessment of real estate taxes for a four-year period from 2011-2014. The County assessed the property at $28,525,300 for tax years 2011-2013 and at $31,745,800 for tax year 2014. The plaintiff's expert valued the property at $16,400,000 for tax years 2001-2013 and at $17,200,000 for tax year 2014. The County's expert valued the property between $32,000,000 and $33,000,000 for each tax year in question.

Trial Court: The trial court, relying on the presumption of correctness that attaches to real estate assessments, ruled in favor of the County.

Holding: Reversed and remanded.

Discussion: There is a presumption of correctness that attaches to tax assessments and the burden is on the taxpayer to overcome that presumption before the taxpayer establishes the elements required by § 58.1-3984 to obtain relief. One way to overcome that presumption is to show that the assessor did not consider all three approaches to value in arriving at the assessment, i.e. cost approach, income approach, and sales comparison approach.

The Court determined that the assessor did not properly use any of the three approaches to value. As a result, the assessments were not entitled to a presumption of validity which the trial court erroneously afforded to the assessments. The Court reversed the ruling and remanded the issue to the circuit court to apply the less stringent standard of review – whether the assessment was erroneous.

The Supreme Court noted that the standards to be applied on remand differed depending on the tax year at issue because of an amendment to the relevant statute – Virginia Code § 58.1-3984. The version applicable to the 2011 tax year provided that the burden was on the taxpayer to show (i) that the property is valued at more than its fair market value, **or** (ii) that the assessment is not uniform in its application, **or** (iii) that the assessment is otherwise invalid or illegal. That statute was amended in 2011 to provide that the taxpayer must show (i) that the property is valued at more than its fair market value, **or** (ii) that the assessment is not uniform in its application, **and** (iii) that it was not arrived at in accordance with generally accepted professional appraisal practices.

10. *Portsmouth 2175 Elmhurst, LLC v. City of Portsmouth*, 837 S.E.2d 504 (2019).

Facts: Taxpayer filed petition for correction of erroneous real estate tax assessments for tax years 2013-2015 pursuant to Virginia Code § 58.1-3984. The city assessed the property at $6,132,520 for tax years 2013 and 2014 and for $3,768,160 for tax year 2015. The taxpayer purchased the property – a former Smithfield Foods hot dog manufacturing facility – for $875,000 in 2013. The taxpayer then stripped and sold certain equipment and fixtures and then sold the property in 2015

for $575,000. At trial, the taxpayer's expert valued the property at $950,000 for the tax years in question.

Trial Court: The trial court upheld the assessments and in doing so noted that the taxpayer's experts had not shown that the City had "violated any generally accepted practices" in reaching its assessments.

Holding: Affirmed.

Discussion: The Court noted that *McKee Foods* established that a taxpayer can overcome the presumption of correctness by proving (i) that the property is valued at more than its fair market value, **or** (ii) that the assessment is not uniform in its application, **and** (iii) that it was not arrived at in accordance with generally accepted professional appraisal practices. The Court also noted that, in the context of a mass appraisal, the presumption can be overcome by proving that (i) the property is valued at more than fair market value and (ii) the mass appraisal has indefensibly inflated the fair market value – which can occur where a property is a "special use" property or possesses peculiar characteristics. The Court noted that mere differences in opinion are not sufficient to rebut the presumption.

The Court determined that the taxpayer failed to rebut the presumption of correctness. Although the taxpayer showed that the City had overvalued the property, the taxpayer failed to show that the assessment did not conform to generally accepted appraisal practices or that any peculiar characteristics of the property resulted in an indefensible inflation of the fair market value.

11. *Robinson v. Norquist*, 297 Va. 503 (2019).

Facts: This case involved a dispute between neighbors in Alexandria over an easement granted "for purposes of admitting light and air" to the predecessor in interest to plaintiff. In 1960, the former owner of defendant's property executed a Deed of Bargain and Sale Easement granting plaintiff's predecessor in interest "a perpetual easement to keep and maintain openings on the west side of [dominant estate holder's property] for the purpose of admitting light and air through said openings, and to locate ventilation outlets on and in said west side." The 1960 easement failed to provide any dimension for the easement. In 1969, the servient estate executed a Deed to "affirm and enlarge" the 1960 easement, which provided that a three foot strip of land "shall forever be and remain open and free of all buildings and structures … and shall be and remain open yard…" Subsequently, the servient estate holder expanded an existing brick wall, "constructed an arbor and made major changes in their landscaping including planting of numerous trees and bushes" within the 3-foot strip. The dominant estate holder brought suit alleging, among other things, violations of the light and air easement.

Trial Court: The trial court dismissed the easement claim on demurrer, finding that the term "light and air" in the 1960 easement was ambiguous without any dimensions and was therefore unenforceable. The trial court found that the 1969 easement merely established an easement to a three-foot median and was limited to prohibiting construction of a building or structure and that nothing the servient estate holder had placed in the median violated the requirement that the strip remain "open and free of all buildings and structures and shall remain open yard."

Holding: The Supreme Court reversed the trial court's ruling on the demurrer.

Discussion: The Court noted that where a deed does not define the dimensions of an easement, the determination of the scope of the easement is "made by reference to the intention the parties to the grant" which is ascertained "from the circumstances pertaining to the parties and the land at the time of the grant." Because the 1960 easement described its purpose—to admit light and air—the case was remanded to determine the dimensions as contemplated by the original parties at the time of the grant.

The Supreme Court also reversed the trial court's determination that the "open yard" requirement was limited to prohibiting buildings and structures. The Court reasoned that the requirements that the three-foot strip remain (i) "open and free of all buildings and structures" and (ii) "open yard" were separate provisions under the easement. In failing to differentiate between these two provisions, the trial court "disregarded the conjunction between these phrases and rendered the term 'open yard' meaningless." The Court determined that the 1969 easement required that the median be both "open yard" and "free of all buildings and structures."

The case was remanded to determine what the original parties intended by such language.

12. *Sainani v. Belmont Glen Homeowner's Ass'n*, 297 Va. 714 (2019).

Facts: In 2014, the board of directors of a homeowner's association adopted seasonal guidelines as part of the Community Association Handbook and Architectural Design Guidelines. The guidelines permit "tasteful special decorative objects and lightings that are consistent with recognized Federal Holidays, Religious Holidays, Valentine's Day and Halloween" and included a specific length of time for certain holidays. Outside the approved holidays, residents were required to apply to the HOA's ARB to display decorations.

The board contended that it had the authority to impose the seasonal guidelines pursuant to the certain restrictive covenants in the HOA's amended declaration that placed restrictions on exterior lighting, modifications and alterations and authorized the ARB to regulate the external design and appearance of improvements.

Between December 2013 and February 2016, the Sainanis received multiple violation letters from the HOA for their use of holiday lighting. When the Sainanis failed to respond to the violation letters or comply with the requests to correct the violations, the ARB held a hearing in November 2014 regarding the violations. The Sainanis did not attend the hearing despite being mailed notice, nor did the Sainanis correct the violations after being mailed the decision.

The Sainanis continued to receive violation letters from the HOA for their use of holiday lighting in 2015 and early 2016. The ARB held a second hearing in January 2016, imposed the same penalty, and suspended the Sainanis' voting privileges and access to HOA facilities until violations were corrected.

In September 2015, the HOA filed a warrant in debt to recover the unpaid fines from the Sainanis. When the Sainanis failed to respond, the court entered judgment for the HOA. The Sainanis appealed to the circuit court and filed counterclaims against the HOA.

Trial Court: Finding that the Sainanis violated the seasonal guidelines, the circuit court granted the HOA's motion to strike the homeowners' counterclaims and awarded to the HOA a monetary judgment of $884.17 for the unpaid fines and $39,148.25 in attorney fees and costs. The circuit court also enjoined the Sainanis from continuing to violating the seasonal guidelines.

Holding: Reversed and remanded.

Discussion: The Sainanis contended that the HOA's seasonal guidelines were unenforceable because they exceed the HOA's authority under the 2014 amended declaration. The HOA argued that it did not exceed the scope of its authority by enforcing the seasonal guidelines because (i) pursuant to the 2014 amended declaration, the HOA has authority to adopt rules and regulations that supplement the restrictive covenants; (ii) the restrictive covenant prohibits nuisances on lots and "nuisances are defined as "anything done or placed thereon which is or may become an annoyance or nuisance to the neighborhood" including exterior lighting causing "an adverse visual impact to adjacent lots"; and (iii) the restrictive covenants prohibit any modifications or alterations to a lot without the ARB's approval. In response, the Sainanis argued that the HOA's justification for the seasonal guidelines is not reasonably related to any of the restrictive covenants.

Agreeing with the Sainanis, the court found that the seasonal guidelines exceeded the scope of HOA's authority because none of the restrictive covenants could be construed to authorize the seasonal guidelines. The court applied the Virginia law of restrictive covenants and noted that "[r]estrictive covenants are to be construed most strictly against the grantor and persons seeking to enforce them, and substantial doubt or ambiguity is to be resolved in favor of the free use of property and against restrictions." The seasonal guidelines exceeded the scope of the restrictive covenants because (i) the exterior-lighting covenant only regulated adverse visual impact to adjacent lots, whether by location, wattage or other features, not the dates or the time of day that residents could display exterior lighting; (ii) the modifications-and-alterations covenant was not applicable to a temporary display of lights; and (iii) the HOA did not have the broad authority to adopt design-control rules or the implied power to regulate the aesthetics of individually owned lots.

13. *Sumner Partners LLC v. Venture Investments LLC*, 2019 WL 5268643 (Va. 2019) (Unpublished).

Facts: In February of 2015 Sumner entered into a contract to purchase a parcel of commercial property from Venture in Stafford County. The contract provided that closing would occur "on or before the date that is thirty (30) days after the later of the expiration of the Study Period or thirty (30) days after all conditions precedent to [Sumner's] obligations to close have been satisfied; *provided that, in no event shall Closing occur later than the date that is Ninety (90) Days after the Effective Date hereof (the "Closing Date").*

Among the conditions precedent to closing was that the property "be free of Hazardous Materials" and that all of the representations of Venture – including its representation that there were "no hazardous wastes or substances" on the property – were true and correct as of the time of Closing.

The contract also provided that if the conditions precedent were not satisfied, Sumner had the option to (i) waive the condition and close, (ii) terminate the contract, or (iii) take actions necessary to satisfy the conditions, "in which case the Closing Date shall be extended for the period of time necessary to permit" Sumner to complete such work and that "all costs and expenses incurred" by Sumner would be offset against the purchase price.

The Phase I and Phase II environmental studies performed for Sumner concluded that there was diesel fuel and VOCs on the property. The parties agreed to extend the Closing Date to July 7, 2015. On July 6, 2015, Sumner gave a notice that due to the diesel fuel and VOCs, the conditions precedent had not been met and Sumner was exercising its right to extend the Closing Date, perform the corrective work, and would offset the cost of such work against the purchase price.

Sumner filed a complaint for declaratory judgment seeking to establish its right to enter the property to perform the corrective work and to deduct the cost from the purchase price. Venture counterclaimed seeking specific performance and damages for Sumner's failure to close.

Trial Court: The trial court found that Sumner was in breach because the substances found on the property did not constitute hazardous waste under the agreement and, therefore, there was no basis for Sumner's refusal to close. The trial court ruled that Venture was only entitled to retain the deposit under the default paragraph of the Agreement.

Holding: Reversed and remanded.

Discussion: The Court determined that the contract was unambiguous and that it explicitly defined "hazardous waste" and "hazardous substances" to include "any oil, petroleum products, and their by-products." As a result, the conditions precedent in the contract were not satisfied and, therefore, Sumner was entitled to extend the Closing Date, perform the corrective work, and deduct the cost thereof from the purchase price.

The Court also rejected Venture's argument that Section 3 of the contract "sets an absolute 90-day boundary for the closing date" and that Sumner cannot extend the Closing Date beyond that 90-day

deadline for purposes of performing corrective work. The Court reasoned that while Section 3 defines the Closing Date as "the date that is Ninety Days (90) after the Effective Date hereof" the provision regarding the failure to satisfy the conditions precedent provides that, if Sumner elects to perform the corrective work, "the Closing Date shall be extended." Thus, because the Closing Date is defined as 90 days after the effective date, the extension of the Closing Date by definition would result in closing occurring more than 90 days after the effective date.

14. *Thoburn Limited Partnership v. Brisa Fund LLP*, 2019 WL 5460194 (Va. 2019) (Unpublished Opinion).

Facts: Plaintiff TLP owned property in Vienna and entered into three loans using the property as collateral. In 1989, TLP's general partner John Thoburn borrowed $320,000 and secured the loan with a deed of trust in favor of Wilmington Savings Fund (DOT 1). Subsequently, TLP borrowed money from Brisa Fund secured by a second deed of trust (DOT 2). Finally, Thoburn borrowed additional money from Brisa, also secured by a deed of trust (DOT 3).

In February of 2012, TLP filed bankruptcy after TLP and Thoburn defaulted on the loans. During the bankruptcy proceedings, TLP settled a dispute with a neighboring property owner – Oakcrest School – over easement rights. Oakcrest purchased several rights of way (ROWs) on the property. The bankruptcy court approved the settlement and, in its order, allowed the ROWs to be transferred free and clear of liens provided that the proceeds from the settlement would be substituted for the ROW property as collateral for the lienholders. The court ordered the creation of an escrow account to hold the payments and appointed counsel for Brisa as escrow trustee. The bankruptcy court ordered that the monies could be distributed only upon entry of an order from an appropriate court or by agreement of the parties.

In 2016, the substitute trustee for DOT 3 foreclosed on the property. Brisa purchased the property at foreclosure for $50,000 pursuant to a contract of sale that provided that the sale was "subject to "liens, encumbrances, and rights, actual or inchoate having priority over [DOT 3]." Brisa assigned its contract to an LLC created by Brisa - Hunter Mill Vista, LLC – and Hunter Mill closed on the property.

In 2017, Brisa, Hunter Mill, the substitute trustee for DOT 3, and the escrow trustee filed a declaratory judgment action in the Circuit Court of Fairfax County seeking to direct the escrow trustee to distribute the ROW proceeds according to their priority and to declare that TLP had no right to those proceeds.

TLP filed a counterclaim for declaratory relief (i) claiming the merger and/or extinguishment of DOT 2 upon Brisa's purchase of the property at the DOT 3 foreclosure sale, and (ii) that TLP would be subrogated to Wilmington's rights under DOT 1 if the ROW proceeds fully satisfied the amounts due on DOT 1 or that TLP "would be equitably subrogated to Wilmington's rights under DOT 1 if TLP paid 'the difference between the indebtedness and the amount satisfied by the funds held in escrow.'" TLP also requested that Wilmington be ordered to foreclose on the property before any order distributing the ROW proceeds.

Trial Court: The trial court granted the relief sought by plaintiff creditors and granted their motion to strike TLP's counterclaims.

Holding: Affirmed.

Discussion: The Court rejected TLP's claim that the circuit erred in not requiring the creditors to look to the property first to satisfy their liens before ordering the distribution of the ROW proceeds. The Court relied on the bankruptcy court's order stating that the DOTs would attach to the net proceeds of the ROW proceeds "in the order of priority with the same validity, force, and effect as they now have against the ROWs." Based on this, the Court determined that the ROW proceeds were not collateral "above and beyond" the property. In addition, because the bankruptcy court order did not require foreclosure before distribution of the ROW proceeds – and because Virginia Code § 8.01-

389(B) requires that full faith and credit be given to the order – the trial court did not err in refusing to order the foreclosure on the property.

The Court also rejected TLP's claim that the circuit erred in refusing to merge and extinguish DOT 2 because of Brisa's purchase of the property at the foreclosure sale on DOT 3. The Court noted that (i) the "merger doctrine deals with extinguishing a previous contract by an instrument of higher dignity, the deed," (ii) "[w]hen one acquires absolute title to property which secures his debt, *in the absence of evidence showing a contrary intention* it is presumed that he intended to merge his secured interest into the legal title acquired," (iii) "[i]f the intention not to merge has been expressed, however, it controls," and (iv) "[w]hether a party has expressed intention to merge is an issue of fact." Based on these principles, the Court determined that the trial court was not plainly wrong in finding that Brisa expressed an intent not to merge DOT 2 because the contract of sale "stated that title to the [p]roperty would be transferred subject to 'liens, encumbrances, and rights, actual or inchoate, having priority over [DOT 3]'" and because Brisa transferred to the contract to Hunter Mill, which actually took title to the property.

The Court noted that the circuit court's finding that Brisa expressed an intent not to merge DOT 2 into the deed acquired after the DOT foreclosure sale, along with the fact that the debt reflected in DOT 2 was secured by both the property and the ROW proceeds and that a merger would have left Brisa without recourse to recover, supported the trial court's refusal to equitably merge DOT 2 into the deed.

The Court also determined that the trial court did not err in refusing to subrogate TLP to the rights of Wilmington. The Court recited the basic principles of subrogation: (i) "[s]ubrogation is the substitution of another person in the place of the creditor to whose rights he succeeds in relation to the debt;" (ii) subrogation "arises where one having a liability . . . in the premises pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor;" (iii) subrogation "to the rights of another cannot occur, however, 'until the whole debt is paid' by the party seeking subrogation;" and (iv) subrogation is "generally 'not appropriate where intervening equities are prejudiced.'"

Based on these principles, the Court determined that the trial court did not abuse its discretion in refusing to subrogate TLP to Wilmington's rights because the ROW proceeds were not sufficient to satisfy debt secured by DOT 1 and TLP had not satisfied the debt. For these reasons, "subrogation cannot occur." In addition, the Court held that allowing subrogation would result in prejudice to "intervening equities" because it "would permit the debtor to interfere with the rights of its secured creditor," i.e. "TLP could foreclose on the Property and potentially eliminate Brisa's secured interest under DOT 2."

15. *Tingler v. Graystone Homes, Inc.*, 834 S.E.2d 244 (Va. 2019).

Facts: The Tingler's entered into a contract with Graystone Homes, Inc. to have a home built on property owned by a family company, Belle Meade Farm, LLC. Shortly after the completion of the home, the Tinglers found that rainwater leaks resulted in mold growth inside the home. Graystone unsuccessfully tried to fix the leaks and remediate the mold issue. The Tinglers then filed personal injury claims and the family company filed breach of contract claims for property damage and economic losses. The builder filed demurrers to all claims.

Trial Court: The trial court granted the builder's demurrer, finding that under the source of duty rule, the Tinglers failed to state negligence claims because the claims arose out of the failure to perform contractual duties. The court dismissed the property owners' contract claims because the company was not a party to the construction contract. Finally, the court dismissed the Tinglers' contract claims on the theory that the Tinglers lacked standing because the home had become a fixture of the land owned by the company.

Holding: Affirmed in part, reversed in part, and remanded.

Discussion: The Court engaged in a comprehensive review of the source of duty rule in Virginia and its role in preventing litigants from "turning every breach of contract into a tort." Justice Kelsey, following Prosser and Keeton on the Law of Torts, drew a distinction between nonfeasance, i.e. the failure to do what one is contractually obligated to do – which carries with it no tort liability – and misfeasance ("broadly, a transgression or trespass") or malfeasance ("an affirmative, wrongful, unlawful, or dishonest act"), for which tort liability may be imposed in certain circumstances.

The Court then affirmed the dismissal of the Tinglers' "construction phase" personal injury claims based on the builder's failure to do what the contract required – which was to deliver a weatherproof home – because the builder's failure to do so constituted "nonfeasance."

The Court reversed and remanded the Tinglers' "repair phase" personal injury claims to the extent they were based on allegations of misfeasance, i.e. that the builder's repair attempts "made the original problems worse and, by doing so, caused new personal injuries or aggravated preexisting injuries."

Likewise, with respect to the Tinglers' "repair phase" property damage claims, the Court held that the complaints asserted viable claims to the extent that they sought damage "caused by [the builder's] misfeasance during the repair phase after construction of the home was completed." The Court reversed the trial court's dismissal of repair phase property damage claims based on "damage caused to personal property that is not a subject of the contract." The Court affirmed the dismissal of claims based on property damage to the home itself.

With respect to the contract claims, the Court found that the trial court erred in dismissing the property owners' contract claims because there were sufficient allegations that (i) the Tinglers were acting as agents for the property owner and (ii) the property owner was a third-party beneficiary.

B. VIRGINIA COURT OF APPEALS

1. *City of Va. Beach v. Va. Marine Resources Comm'n*, 70 Va. App. 68 (2019).

Facts: In January 2015, the City of Virginia Beach enacted an ordinance establishing a Neighborhood Dredging Special Service District ("NDSSD") for Hurd's Cove. The NDSSD's path extended through an oyster-planting ground lease held by the Zipperer family ("Zipperer Lease"). Subsequently, a waterfront property owner who opposed the dredging project, Philip Hightower, applied to the Virginia Marine Resources Commission ("VMRC") for an oyster-planting riparian lease ("Hightower Lease"). The Hightower Lease abutted the Zipperer Lease and was within the dredging project's path.

VMRC granted the Hightower Lease application over the City's objection. The circuit court affirmed VMRC's decision and the Virginia Court of Appeals affirmed.

While litigation over the Hightower Lease was pending, the City negotiated an agreement to acquire a portion of the Zipperer Lease pursuant to Virginia Code § 28.2-265. The City submitted the signed agreement to VMRC with an application to receive a transfer of an oyster-planting ground lease under Code § 28.2-265. In rejecting the transfer application, VMRC stated that the City did not qualify for a transfer pursuant to Code § 28.2-265 because the City is not a Virginia resident or "a firm or corporation authorized by Virginia law to occupy and hold oyster planting grounds."

Trial Court: Circuit court affirmed VMRC's decision.

Holding: Reversed and remanded.

Discussion: The City contended that it was eligible to receive transfers of oyster-planting ground leases under Code § 28.2-625(1)'s plain language, which authorized transfers to a "firm or

corporation authorized by Virginia laws to occupy and hold oyster-planting ground." The City argued that it satisfied that requirement because it fell within the category of "firm or corporation."

VMRC argued that municipalities are not included in Code § 28.2-625(1) because the General Assembly, in listing municipalities listed separately from corporations in Code § 28.2-604, differentiated between those entities for purposes of the statutory scheme. VMRC argued that (i) the General Assembly's inclusion of the term "municipalities" in Code § 28.2-604 and its omission from Code § 28.2-625(1) reflected an intent to exclude municipalities from the types of entities eligible to receive lease transfers.

The Court determined that the phrase "firm or corporation" as used in Code § 28.2-625(1) included municipalities. The Court identified several examples of other statutes where the General Assembly specifically excluded municipalities from the term "corporation" and reasoned that, if the General Assembly had intended to do so with respect to Code § 28.2-625(1), it would have likewise expressly excluded municipalities. The Court also determined that Code § 28.2-625(1) was a short-form reference to all eligible applicants listed in Code § 28.2-604 and when Code § 28.2-625(1) and Code § 28.2-604 are considered in conjunction, municipal corporations are entitled to receive oyster-planting ground leases by transfer. Because the contextual language in the statutes resolved any potential ambiguity in the use of the term "corporation," the Court was not required to consider the legislative history.

C. VIRGINIA CIRCUIT COURTS

1. *Bates v. Purdon*, 101 Va. Cir 104 (City of Norfolk 2019).

Facts: On May 7, 2017, Bates and Purdon entered into a purchase agreement for the sale of a house by Bates to the Purdons. The contract contained a provision which required the parties to mediate disputes arising out of the agreement before pursuing litigation. The Agreement also contained a notice provision, which required that all notices required to be sent to Bates be sent to their agent, BHHS Towne Realty, and all notices required to be sent to Purdon be sent to their agent, VA Home Realty.

Pursuant to the notice provision, counsel for Bates sent a letter dated December 6, 2017 to then-counsel for Purdon with a copy to each party's respective agent. The letter requested that the Purdons participate in mediation. No one responded on behalf of the Purdons. Counsel for Bates sent a second request for mediation dated February 23, 2018 to then-counsel for Purdon with a copy to each party's respective agent. Again, no one responded on behalf of Purdon.

On June 6, 2018, Bates - viewing the non-responses as the Purdons' waiver of their right to mediate - filed a complaint alleging that the Purdons breached the agreement by failing to complete the purchase. On September 28, 2018, the Purdons filed a plea in bar contending that the case should be dismissed with prejudice and sanctions should be awarded because the parties did not mediate the dispute.

Holding: Plea in bar sustained. Complaint dismissed without prejudice.

Discussion: The Purdons noted that, under the purchase agreement, mediation was a condition precedent to litigation. They contended that Bates did not give them an opportunity to mediate. Purdson further contended that they did not waive their right to mediation because they did not intentionally relinquish that right.

Although Bates conceded that mediation was a condition precedent to litigation, Bates argued that they satisfied such condition by requesting mediation before filing suit. Specifically, because the Purdons failed to respond to their two mediation requests, the Purdons waived their opportunity to mediate and Bates could proceed with litigation.

The court rejected the Bates' argument that the Purdons waived their contractual right to mediate by not responding to the mediation requests. The court noted that waiver of a contractual provision requires an intentional relinquishment of a known right and Bates, as the party relying on the purported waiver, had the burden to prove that the Purdons waived their right to mediate. Because Bates did not present evidence that the Purdons expressly or intentionally waived their contractual right to mediate, they failed to satisfy their burden.

2. *Marines Plumbing, LLC v. Durbin*, 101 Va. Cir. 319 (City of Fairfax 2019)

Facts: Marines Plumbing recorded a mechanic's lien after performing plumbing repairs on defendant's property. Defendant's property is subject to a deed of trust securing a loan, which was recorded prior to the plumbing repair work. Defendant filed a motion to dismiss the complaint to enforce the lien on the ground that the plaintiff failed to name as parties the trustees and the beneficiary under the deed of trust.

Holding: The trial court denied the motion to dismiss on the ground that the trustees and beneficiary were not necessary parties. The court cited Virginia Code § 43-21, which provides that liens for performing repair work "shall be subject to any encumbrance against such land and building or structure of record prior to the commencement of the improvements or repairs." Because the plaintiffs' lien was explicitly "subject to" the deed of trust, the interests of the trustees and beneficiary was not "likely to be defeated or diminished" by the lien.

3. *Nassabeh v. Montazami*, 101 Va. Cir. 151 (Fairfax County 2019).

Facts: A divorce order entered on May 31, 2015, required (i) Khashayar Montazami to refinance the marital home to remove his ex-wife from two deeds of trust and, once that occurred, (ii) the ex-wife was to transfer her interest to Montazami. If Montazami failed to refinance the marital home by October 15, 2015, the court would appoint a special commissioner of sale. Montazami failed to refinance and the court, by order dated May 6, 2016, appointed a special commissioner to sell the marital home and instructed the commissioner to prepare an accounting of all outstanding encumbrances upon the property.

On June 7, 2016, the commissioner filed a Motion for Approval of Contract which included a request that any unpaid liens associated with the marital home not paid at settlement be transferred to the sale proceeds. On June 17, 2016, the court approved the contract for sale.

After the judicial sale closed on August 4, 2016, which included the pay-off of the deeds of trust, the commissioner filed a Motion for Confirmation of Sale and on August 26, 2016 the Court entered an order confirming the sale. The Confirmation Order provided that Montazami was to receive all of the proceeds remaining after satisfaction of the deeds of trust - $79,452.28. The order also provided that all liens encumbering the property before settlement were transferred to the proceeds of sale and no longer encumbered the marital home. The Confirmation Order also discharged the commissioner.

Prior to the divorce and judicial sale, two judgments were entered against Montazami: one on January 6, 2010 in favor of Chris Heald in the amount of $186,662.56 and the other on August 11, 2011 in favor of FIA Card Services in the amount of $38,611.61. As Heald's lien had first priority, the $79,452.28 remaining after satisfaction of the deeds of trust should have been paid to Heald instead of to Montazami.

Heald petitioned the court to hold the commissioner personally liable pursuant to Virginia Code § 8.01-105, which authorizes a court to exercise civil contempt powers over commissioners. Heald alleged that funds due to him were misdirected to Montazami because the commissioner caused the Court to enter an order that divested the creditor of enforcement of his judgment lien respecting the marital home.

Holding: The court held the commissioner personally liable pursuant to Code § 8.01-105. The commissioner was ordered to interplead $79,452.28 to the Court and provide notice to then-existing lien creditors who may have a valid legal claim to the judicial sale proceeds.

Discussion: The court recognized that the commissioner owed fiduciary duties to the court due to the commissioner's agency relationship with the court. The commissioner also owed duties to the court consistent with the court's Appointment Order which set forth the commissioner's obligations. Because the commissioner failed to file a proper accounting as ordered and made representations which caused the court to infer that Heald agreed with the court-ordered distribution (which resulted in the failure to honor Heald's lien), the court determined that the commissioner did not "faithfully discharge" the duties of the office of special commissioner of sale. The Court explained, "The Commissioner's noncompliance with the Court's mandate in the Appointment Order, as well as the incorrect statement of facts aforesaid, caused the commissioner to shirk the duty, albeit without any apparent ill motive, to account for the amount and relative priority of all encumbrances and induce the Court to distribute prematurely proceeds of the sale without the identified lienholders first being given notice and an opportunity to be heard." Consequently, the court held the commissioner personally liable for civil contempt pursuant to Code § 8.01-105.

4. *Ononuju v. VHDA*, 101 Va. Cir. 228 (City of Norfolk 2019).

Facts: On January 24, 2014, Ononuju purchased real property by obtaining a loan from C&F Mortgage, which later transferred the loan to Virginia Housing Development Authority ("VHDA"). The related promissory note was secured by a deed of trust. The deed of trust incorporated certain regulations by the Department of Housing and Urban Development. Such regulations set forth conditions precedent to VHDA's exercise of loan default remedies, including that VHDA meet, or make reasonable efforts to meet, in-person with Ononuju. Ononuju failed to make his mortgage payments in December 2017, January 2018, and February 2018. In March 2018, Ononuju was incarcerated for an unrelated matter.

On May 2, 2018, Evans & Bryant sent a debt collection letter to Ononuju on behalf of VHDA stating that Ononuju was in default, that the mortgage balance repayment was accelerated, and that VHDA requested Evans & Bryant to conduct a foreclosure sale of the property. On May 18, 2018, Evans & Bryant sent a second letter to Ononuju that stated it had been appointed as substitute trustee of the deed of trust. Around June 2018, Evans & Bryant mailed a third letter to Ononuju that stated the property was sold via a foreclosure sale to VHDA.

On August 9, 2018, Ononuju appeared at an unlawful detainer hearing where VHDA sought possession of the property as the purported property owner by virtue of the foreclosure sale. The court awarded possession of the property to VHDA over Ononuju's objection.

On September 18, 2019, Ononuju filed a complaint seeking compensatory damages for breach of contract, breach of fiduciary duty, and violation of the Fair Debt Collections Act, and for recession of the foreclosure sale. VHDA and Evans & Bryant demurred.

Holding: The Court sustained the demurrer in part and overruled the demurrer in part. The Court found the complaint alleged sufficient facts to support a claim for rescission based on the foreclosure sale having been conducted in material breach of the Deed of Trust. However, the court found that the complaint did not allege sufficient facts to support claims for damages for breach of contract, breach of fiduciary duty, an FDCPA violation, or rescission of the foreclosure sale based on fraud or collusion.

Discussion: As to the claim for damages for breach of contract, Ononuju contended that the HUD regulations – which the deed of trust incorporated by reference - required, as a condition precedent to loan repayment acceleration and foreclosure, an in-person meeting before there are three unpaid monthly mortgage payments. The court noted that 24 CFR § 203.604(b) provides that [t]he mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to

arrange such a meeting, before three full monthly installments due on the mortgage are unpaid" and held that the 24 CFR § 203.604(c)(1) qualifies that meeting requirement by providing that a face-to-face meeting is not required "if the mortgagor does not reside in the mortgaged property at the time the face-to-face meeting is required to take place, as opposed to the time of loan acceleration." Because VHDA failed to conduct a face-to-face meeting, Ononuju alleged that VHDA breached the deed of trust. The court, however, determined that Ononuju did not allege a breach of contract claim because Ononuju did not sufficiently allege a causal connection between the VHDA's breach and his damages.

As to the breach of fiduciary duty claim, Ononuju contended that Evans & Bryant owed him a fiduciary duty of impartiality when it fulfilled the roles of debt collector and substitute trustee. He alleged Evans & Bryant breached its duty by (i) failing to ensure the conditions precedent – as required by the deed of trust – were satisfied before it foreclosed; and (ii) being predisposed to conduct the sale for VHDA. The court noted that a trustee under a deed of trust owes the debtor and trustee a fiduciary duty of impartiality. However, Ononuju did not sufficiently allege causation. Thus, the court found that Ononuju did not sufficiently allege a breach of fiduciary duty claim.

The court also found that Ononuju failed to allege sufficient facts to support a FDCPA claim.

As to the claim for recession, the Court found that the complaint did not allege sufficient facts to support recession based on fraudulent activity. However, the court found that Ononuju, in alleging that the VHDA as the purchaser at foreclosure had notice of the failure to comply with the conditions precedent in the deed of trust, adequately alleged a claim for recession based on the failure to comply with those conditions.

5. *Swahn v. Hussain*, 101 Va. Cir. 57 (Fairfax County 2019).

Facts: This matter arises from a two-count complaint alleging a public nuisance and private nuisance stemming from, to quote the case text, "A cooking dispute between neighbors boils over." The Swahns and Hussains were neighbors in a town house community. The Hussains would cook copious amounts of food in their noncommercial kitchen. This food would emit odors that the Swahns found to be unpleasant. Based on this, the Swahns suspected that the Hussains were operating an illegal commercial catering business. The Swahns filed suit alleging that this conduct created a public nuisance in violation of the neighborhood's Declaration of Covenants, Conditions, and Restrictions, as well as a private nuisance at common law. The Hussains then filed a counterclaim for trespass against the Swahns in alleging they trespassed in obtaining the information regarding the illegal cooking operation. The Hussains also filed a counterclaim pursuant to Virginia Code § 55-515(A)[1] of the Virginia Property Owners' Association Act, which entitles a prevailing party in an action to enforce the provisions of a Declaration to recover attorney's fees.

Prior to trial, the Swahns sought to nonsuit their public nuisance claim, but the Hussains objected thereby forcing a trial on the public nuisance count. During trial, the Swahns waived the right to seek the only remedy for that count – injunctive relief. After a five-day jury trial, three counts were submitted to the jury: (i) the Swahns public nuisance claim against the Hussains under the Declaration, (ii) the Swahns private nuisance claim against the Hussains, and (iii) the Hussains counterclaim for trespass. The jury found for the Hussains for public nuisance under the Declaration and that count was dismissed. The jury found for the Swahns on Count II for private nuisance and awarded the Swahns $2,190.96 in damages. The jury also found for the Swahns on the Hussains' counterclaim for trespass. Thus, the Swahns prevailed on two out of the three claims before the jury.

The Hussains then petitioned the court for recovery of their attorney fees in the amount of $118,264.84 pursuant to Code § 55-515 because they prevailed on the public nuisance count based on the Declaration.

[1] Now 55.1-1828 –Ed.

Holding: The court determined that the Hussains were not the prevailing party in the litigation and therefore were not entitled to recovery of attorney's fees. Alternatively, even if the Hussains were the "prevailing party," the court held that the public nuisance count was "unnecessarily tried and submitted to the jury primarily due to the Hussains' own conduct."

Discussion: Regarding the award of attorney's fees, the general rule is: "in an action encompassing several claims, the prevailing party is entitled to an award of costs and attorneys' fees only for those claims for which (i) there is a contractual or statutory basis for such an award and (ii) the party has prevailed." Virginia Code § 55–515(A) specifically "authorizes an award of costs and fees to the [prevailing party] … only on claims that (i) were brought to enforce the Declaration and (ii) they prevailed upon."

Here, it was clear that the public nuisance claim was brought to enforce the parties' Declaration and the Hussains prevailed on the claim, but the fact that they prevailed on that claim alone does not necessitate a conclusion that the Hussain's were a "prevailing party." In determining whether a party is the "prevailing party," a court looks to "the results obtained" and, in this case, the Hussains prevailed on only one of the three counts, leading the court to determine that they were not the "prevailing party" within the meaning of the statute.

Alternatively, the court held that, even if the Hussains were the prevailing party, they were not entitled to recover fees because the public nuisance count was unnecessary. The court reviewed the seven-factor Chawla v. Burgerbusters[2] analysis for an award of fees, noting that the "amount of the fee is within the sound discretion of the trial court." One of those seven factors is whether the "services were necessary and appropriate." Because the public nuisance count was heard only because of the Hussains refusal to permit a nonsuit, the court found the count to be an unnecessary claim. As a second alternative holding, the Court determined that the Hussains failed to carry their burden to apportion their fees among the claim for which fees were sought and the other claims.

D. U.S. FOURTH CIRCUIT

1. *Edmondson v. Eagle National Bank*, 922 F.3rd 535 (4th Cir. 2019).

Facts: Plaintiffs brought a putative class action alleging that between 2009 and 2014 certain lenders participated in "kickback schemes" prohibited by the Real Estate Settlement Procedures Act (RESPA). Between 2009 and 2014, Defendants, which consist of several banks and mortgage companies, originated or serviced residential mortgages obtained by Plaintiffs. The mortgage brokers and loan officers employed by the Lenders referred Plaintiffs to Genuine Title, LLC to procure title insurance and other escrow and settlement services. Plaintiffs allege that in order to induce these referrals, Lenders received "unearned fees and kickbacks" in violation of RESPA, which forbids any person from "giving or accepting any fee, kickback, or thing of value pursuant to any agreement or understanding … as part of a real estate settlement service involving a federally related mortgage loan." 12 U.S.C. § 2607(a).

Lower Court Decision: The district court dismissed the claims because the first of the five class actions was filed after the expiration of the one-year statute of limitations.

Fourth Circuit Decision: The Fourth Circuit reversed and held that, under the allegations set forth in their complaints, plaintiffs were entitled to relief from the limitations period under the fraudulent concealment tolling doctrine.

[2] Chawla v. Burgerbusters, Inc. 499 S.E. 2d 829, 255 Va. 616 (Va. 1998).

Discussion: Regarding whether RESPA's one-year statute of limitations is subject to tolling based on fraudulent concealment, the Court found that when Congress makes a limitations period a jurisdictional prerequisite, then the courts may not toll the limitations period on any equitable grounds. The Court determined that RESPA's limitation provision was not jurisdictional, however, and that plaintiffs adequately alleged entitlement to tolling based on fraudulent concealment.

2. *Manotas v. Ocwen Loan Servicing*, LLC, 2019 WL 6698121 (4th Cir. 2019).

Facts: In January 2006, Carlos and Jacqueline Manotas refinanced their home, signing a promissory note and deed of trust in connection with the mortgage loan. Pursuant to the promissory note, Manotas agreed to make monthly payments to the lender. If Manotas failed to make payment, he would be in default and the loan servicer could demand accelerated payment. The deed of trust contained a notice provision similar to that of the promissory note, requiring the lender to notify Manotas before acceleration.

From 2006 through July 2009, Manotas made timely payments on the mortgage. In August 2009, Manotas deliberately defaulted on the mortgage – allegedly in reliance on the loan servicer's advice and representations – in attempt to secure a loan modification. After Manotas defaulted, the loan servicer offered a Trial Period Plan ("TPP") which would reduce Manotas' regular monthly payment and modify the loan if Manotas made three timely payments and otherwise qualified. Manotas made twelves such payments, but the loan servicer denied the modification.

Starting in September and October 2010, the loan servicer sent pre-acceleration notices to Manotas.

In March 2011, the loan servicer indicated that Manotas may be eligible for a second TPP if he made three timely payments. Manotas made the payments but did not make additional TPP payments after not receiving a decision from the loan servicer

From November 2011 until September 2017, the loan servicer stopped collection activities. In September 2017, the loan servicer informed Manotas that a foreclosure sale was scheduled.

On October 25, 2017, Manotas filed suit alleging claims for breach of contract, declaratory and injunctive relief, fraud, and violations of the Real Estate Settlement Procedures Act ("RESPA"). Manotas alleged separate claims for breach of contract based on breach of the mortgage loan contract and breach of the TPP agreement. Defendants moved to dismiss the amended complaint, asserting that the breach of contract claims were time barred under Virginia's five-year statute of limitations for written contracts.

Trial Court: District Court dismissed the complaint holding, that Manotas' claims were barred by the applicable statute of limitations and that Manotas failed to state a plausible claim for a RESPA violation.

Holding: Affirmed.

Discussion: Manotas contended the statute of limitations does not apply to their claims for breach of contract or declaratory and injunctive relief because (i) the statute of limitations does not apply to claims for prospective relief; (ii) their claims are in the nature of recoupment and setoff; (iii) the contract at issue is an installment contract; and (iv) defendants were estopped from raising the statute of limitations.

The Court determined that, even though Manotas brought a claim for declaratory relief to enjoin or collaterally attack a future foreclosure sale, their claim was still subject to Virginia's statute of limitations for breach of contract. The Court thus concluded that the claim was subject to the five-year statute of limitations for beach of a written contract and that it was barred because at the latest, the complaint alleged that the mortgage lender, servicer and trustee breached the mortgage loan contract more than six years before the filing of the lawsuit.

The court also rejected Manotas' other three contentions. Noting that recoupment is raised defensively to breach of contract claims, the court determined the statute of limitations for breach of contract applied because Manotas tried to cast their breach of contract and fraud claims as a claim of recoupment. The statute of limitations also applied because installment contracts are subject to the statute of limitations and the Manotas failed to establish the necessary elements to establish equitable estoppel.

E. U.S. DISTRICT COURTS

1. *Columbia Gas Transmission, LLC v. Grove Avenue Developers, Inc.,* 357 F.Supp.3d 506 (E.D. Va. 2019).

Facts: Columbia Gas Transmission brought action to enjoin developer from constructing an asphalt driveway over land subject to CGT's easement for underground high-pressure natural gas transmission pipelines, contending that the asphalt driveway would unreasonably interfere with CGT's rights under the easement. Developer counterclaimed for declaratory judgment that it was allowed to construct the roadway because it did not interfere with the dominant estate owner's rights and because the easement explicitly provided that the "Grantors may fully use and enjoy the premises, subject to the rights of the Grantee to maintain and operate said line or lines." The driveway was to serve as the only means of access to a condominium development.

Holding: Court granted CGT's request to enjoin construction of driveway because developer's plans did not include appropriate mitigation measures, including installation of "flowable fill" to ensure that vehicle weight would not damage buried pipelines and because of increased time and cost of repairs necessitated by the removal of asphalt to access the pipeline. The court denied the developer's request for declaratory relief to allow the construction to proceed as proposed because the driveway, if constructed without mitigation measures, would unreasonably interfere with CGT's easement rights.

Discussion: Court applied Virginia law of easements and noted that the easement was non-exclusive and allowed the developer as the servient estate-holder to use the property in any way that would not unreasonably interfere with CGT's use. The court noted that the party alleging that a proposed use is unreasonably burdensome or inconsistent with the easement has the burden of proof.

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

The Court determined that the "collective" impacts from the proposed crossing, which included (i) the increased risk of damage due to vehicular traffic and (ii) increased time and cost of repair due to the existence of the asphalt road (and the need to keep one lane open during repairs because the road would be only means of ingress and egress to the development), constituted an unreasonable interference with CGT's rights under the easement.

2. *Hall v. JP Morgan Chase Bank*, 2020 WL 603480 (W.D. Va. 2020).

Facts: In 2010, the Halls purchased a house in Augusta County as tenants by the entirety. Only Mr. Hall signed the note and deed of trust to encumber the property. In 2012, the Halls filed for Chapter 7 bankruptcy and received their discharge that same year.

In 2015, Chase filed a complaint in Augusta County Circuit Court asserting that the deed of trust signed by Mr. Hall was valid as against the property or, alternatively, for reformation to make the deed of trust valid. The Halls filed a motion to reopen their bankruptcy case and sought sanctions against Chase for violating the discharge injunction. The resolution of the Halls' motion was dependent on whether Chase had a valid deed of trust against the Halls' property. Accordingly, the

bankruptcy court issued a temporary injunction to stay the state court action in part, allowing the state court action to proceed solely to determine the validity of the deed of trust.

In June of 2016, the Augusta County Circuit Court determined that, as of the date of the court's ruling, the deed of trust was not valid or enforceable against the property– although the property was owned as tenants by the entirety, only Mr. Hall signed the deed of trust. The court later ruled that the deed of trust could not be reformed.

In October of 2016, the Halls divorced which, by operation of law, converted their interests in the property to tenants in common. Chase filed another complaint in circuit court against Mr. Hall seeking foreclosure of his interests in the property and partition by sale of the property. Chase asserted that its deed of trust was valid as to Mr. Hall's interests based of Virginia Code §55-52,[3] which makes a deed valid with respect to after-acquired property.

In response, the Halls again filed a motion to re-open their bankruptcy case and sought to enjoin Chase from proceeding in state court.

Bankruptcy Court: The court denied the Halls' motion, who appealed that ruling to the District Court.

Holding: Affirmed.

Discussion: The Halls contended that the 2016 state court decision declared that the deed of trust was void *ab initio* and, therefore, Chase had no *in rem* rights under its deed of trust. As a result, Chase could not pursue its state court action without violating the discharge order, which prohibits Chase from pursuing any action to impose personal liability on the Halls. In other words, the discharge order extinguishes actions against a debtor *in personam* but not actions against the debtor *in rem*.

Chase contended that the deed of trust was valid as to Mr. Hall's after-acquired property and that the state court in 2016 merely ruled that the deed of trust was not enforceable "at that time."

The District Court did not rule that Chase's position was correct, but determined that it was free to pursue its *in rem* rights – whatever those might be – in state court and that the ultimate decision as to the validity of the deed of trust rested with the state court.

The District Court also rejected the Halls argument that the deed of trust should be treated like a judgment lien, which is wiped out in bankruptcy. There was no authority for this position, and the District Court noted a significant distinction between the two – a judgment lien is involuntary while a deed of trust creates a consensual security interest.

3. *Stewart Title & Guaranty v. Closure Title & Settlement*, 2019 WL 97045 (W.D. Va. 2019).

Facts: In May of 2007, Stewart and Closure entered into an agreement authorizing Closure to issue policies underwritten by Stewart. Closure's duties under that agreement included issuing policies: (a) "according to recognized underwriting practices," (b) based on written title reports, and (c) taking appropriate exceptions for liens, defects and objections disclosed by title searches.

In 2015, Closure conducted the closings on the sale of two lots in Albemarle County and issued lender's title policies underwritten by Stewart. Closure recorded deeds of trust for the benefit of the lender, but each deed of trust erroneously identified the grantor. After these deeds of trust were recorded, two additional deeds of trust were recorded on each lot in favor of other creditors, each of which correctly identified the grantor.

[3] Now 55.1-310—Ed.

In 2016, the lender commenced foreclosure proceedings against one of the lots. One of the subsequent creditors did the same and notified the lender of its defective deed of trust.

In October of 2016, the lender, using legal counsel funded by Stewart, filed suit in Albemarle County seeking, among other things, a declaratory judgment as to its rights in the lots. The case was settled after two-years of litigation pursuant to which Stewart funded the $120,000 settlement amount to secure title in the name of the lender. Stewart spent $72,786.98 in attorney's fees.

Stewart then sued Closure seeking to recoup the litigation and settlement costs. Closure filed a motion to dismiss for failure to state a claim.

Holding: Motion to Dismiss denied.

Discussion: The Court rejected Closure's claim that Stewart failed to allege a breach of duty under the agreement. Closure argued that the misidentification of the grantor in the deed of trust was a scrivener's error and that the agreement imposed no duty to inspect deeds of trust for scrivener's errors. Stewart alleged that Closure breached its duties under the agreement by, among other things (i) issuing title policies for lots in which the owner of each lot was not same entity listed in the deed of trust as the entity granting the lien, (ii) recording the deeds in the name of a grantor who was not the owner, and (iii) failing to conform to recognized underwriting practices when issuing the policies.

Closure argued that Stewart's ability to recover under Section 5 of the agreement was limited to five categories of losses attributable to Closure's intentional acts, fraud, or negligence – but imposed no duties on Closure to "second guess" deeds prepared by outside counsel. The Court, however, determined that Stewart's allegations constituted a breach of at least two of the duties under Section 5 – losses stemming from a "failure to follow underwriting guidelines and/or instructions" and losses stemming from the "failure to prepare a title policy which shows defects and matters affecting title disclosed in the title search or which should have been disclosed in the title search." The Court also noted that Section 5 of the agreement explicitly provided that Stewart could recover for losses that "include" but "are not limited to" the five enumerated categories.

Closure also argued that the breach alleged by Stewart was attributable only to the lender's attorney's committing the scrivener's errors. The Court, noting that Stewart alleged that Closure was under a duty not to issue a lender's policy without scrutinizing the underlying deeds for obvious errors, determined that the fact that the attorneys may have also been negligent does not insulate Closure from damages for its beach of the agreement.

F. U.S. BANKRUPTCY COURT

1. *In Re Vardan*, 2009 WL 654764 (Bankr. E.D. Va. 2019).

Facts: Vardan filed for bankruptcy on November 13, 2017. Wells Fargo filed a motion requesting *in rem* relief from the automatic stay. The court granted the motion on the morning of May 23, 2018 and also dismissed the bankruptcy for the debtor's failure to propose a feasible chapter 11 plan by order entered later that day. The order granting *in* rem relief was entered on May 26 and, on June 14, the debtor filed a notice of appeal of that order.

On September 10, GREI, LLC purchased the property at a foreclosure sale. At the time of the foreclosure sale, although the *in rem* order was on appeal, a stay pending appeal had not been requested. On September 21 the trustee executed a deed conveying the property to GREI.

On November 2, the District Court vacated the *in rem* order and remanded the case to the bankruptcy court.

On November 18, GREI filed a brief requesting a finding that the sale of the property pursuant to the *in rem* order terminated the debtor's interest in the property.

On November 19, an evidentiary hearing was held on Wells Fargo's motion for relief from stay. GREI appeared at the hearing, by counsel, to argue its brief – including its claim that Wells Fargo's motion was moot because the debtor didn't have any interest in the property.

On November 30, the bankruptcy court issued another order granting *in rem* relief from stay to Wells Fargo. The court did not address the validity of the foreclosure sale.

On December 14, the debtor filed a notice of appeal of the second *in rem* order. On the same date, GREI simultaneously filed a motion to amend the second *in rem* order in the bankruptcy court and a notice of appeal of that order to the district court.

On December 28, GREI filed a suggestion of a stay of the effective date of the notices of appeal until its motion to amend could be resolved.

On January 15, 2019, the court held a hearing on the motion to amend.

Holding: The bankruptcy court granted an amended order *in rem* effective as of May 31, 2018.

Discussion: The court determined that the foreclosure sale was valid and properly terminated any interest that the debtor may have had in the property. The *in rem* order was a final order and was therefore enforceable. Although it was on appeal, the debtor did not obtain a stay pending appeal so the order was valid at the time of the foreclosure sale.

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

FALL MEETING

Minutes

Friday, September 13, 2019
VA CLE Offices, Charlottesville, VA

Chair Ron Wiley called the meeting to order at 10:00 AM.

Ron opened by stating that a quorum of the Board was established. He acknowledged immediate past-chair Kay Creasman and her committee for their work on behalf on the VA Lawyer initiative. Positive feedback has been received from the editorial staff on both the quality of the articles and the professionalism in meeting deadlines. Ron thanked Susan Tarley, Lewis Biggs, Paul Melnick and Kay as authors for the upcoming section publication. Kay thanked the authors and especially Lewis for their work. Publication is expected in early October.

The chair called for adoption of the minutes of the combined summer/annual meeting as presented by former secretary/treasurer, Lori Schweller. It was confirmed that the dates for the Advanced Real Estate Seminar should be March 6th and 7th 2020. Lori noted that items left blank in the minutes had been filled in based on input from Kay and that the final minutes would be provided to Ron. The revised minutes were adopted by a unanimous vote.

The 2018-2019 year-end financial report was presented by the chair with special notice of the $7,068.02 excess balance that is no longer available to the section but reverts to the VSB. Ron encouraged all area representatives and members of the board of governors to turn in expense vouchers for travel then asked for suggestions of ways future funds could be spent for the good of the section. Rick Chess suggested additional hard copies of the Fee Simple could be printed for distribution and orders of individual articles by teachers. He also suggested an advertisement in the VA Lawyer promoting the section. Kay Creasman noted that we could use funds for payment of honorariums to attract top-tier speakers to the Annual Advanced Real Estate Seminar. Robert Hawthorne suggested that marketing to rural areas could attract more attorneys to the practice of real estate law and to participation in our section. Ron suggested the possibility of waiving section membership fee for Young Lawyers. Brian Wesley, Young Lawyers Conference past-chair and ex-officio member of the Board of Governors, was present. He noted various events that his conference holds throughout the year.

The Fee Simple Committee report was submitted in writing and distributed with the agenda. Committee Chair Steve Gregory was unable to attend due to illness.

Programs Committee Co-chair Sarah Louppe Petcher reported that most of the topics and speakers are confirmed for the Advanced Real Estate Seminar in March. The program includes 1.5 hours on Housing Discrimination and Policy by Professor Carol Brown of University of Richmond Law School, a commercial break-out session on ADA leasing and rehabilitation, a residential break-out session by Sharon Horskampt, a session on Advancements and Nuances in Residential Housing Loans by VHDA attorney, Emmett Gardner and Kim Hart of Good Works, Ethics by John Altmiller, followed by a cocktail hour and dinner at La Yaca. The program for Saturday will begin with more ethics by John Altmiller, followed by Gus Bauman talking on a recent Supreme Court of the United States decision that impacts real estate practitioners, Professor Andrew Karl of University of VA talking on unique African-American issues and Clarence Broque presenting on partition suits.

Dates for the Annual Real Estate Seminar are May 6, May 19 and May 21, 2020.

Tracy Banks of VA CLE asked for contact names and numbers for firms with whom the section members do business so that she can approach them regarding a potential sponsorship. The cost of the cocktail hour varies but is in the range of $3,000 to $5,000. There was some discussion regarding appropriate sponsors for the cocktail hour. In particular, it was noted that software vendors for the settlement process, accounting for real estate trust accounts, surveyors and title companies are prime potential sponsors. The potential of favoring one lender source over another (such as Blue Ridge Bank that is expanding from Richmond) was noted. While there was no motion or vote, the consensus seemed to be that any real estate related firm or entity could sponsor the cocktail hour.

Ron stated that he received a message via email from Tom Edmonds, former dean of University of Richmond Law School and former executive director of the VA State Bar. Professor Edmonds is working on a commission to draft uniform laws for receiverships of real property. Lewis Biggs indicated that he would participate but he will be "wearing his VBA hat." Max Wiegand indicated similarly that the VBA Real Estate Section would assist.

Ron suggested that the section meetings might be more productive if we spend less time on committee reports and more time on one or more substantive topics of interest. Potential topics for suggestion are the new Title 55.1, Series LLCs, funding sources, § 1031 tax-deferred exchanges and Opportunity Zones. We would need to rely on committee chairs to conduct business as appropriate and submit written reports. Comments indicated that this is a good idea provided that the committee chairs are held accountable and the work of the section is progressing smoothly.

At 11:15 AM the meeting was adjourned so all present could pose for a photograph that will be used on the cover of the upcoming VA Lawyer magazine. The photography session was followed by lunch and general discussion for the good of the section.

Respectfully submitted:

Kathryn N. Byler, secretary/treasurer

List of Attendees
Fall Board of Governors and Section Meeting
Friday, September 13, 2019

Board Members
Ronald D. Wiley, Jr., Chair
Lori H. Schweller, Vice-chair
Kathryn N. Byler, Secretary/Treasurer
Kay Creasman, Immediate Past-Chair
Karen Cohen
Richard B. "Rick" Chess
F. Lewis Biggs*
Robert E. Hawthorne, Jr.
Sarah Louppe Petcher*

Area Representatives
K. Wayne Glass
Steve Wood
Barbara Goshorn
Susan Pesner
Cynthia Nahorney
Hope V. Payne
Page Williams
Larry McElwain
Rick Richmond
Max Wiegard
Whitney Levin
Ed Waugman*
Kristen Jurjevich*
Brian Dolan*
Josh Johnson*
James Johnson*
Paula Caplinger*
Douglass Dewing*
Tracy Horstkamp*
Philip Hart*
Tara Boyd*
Harry Purkey*
Jean Mumm*
Pamela Fairchild*
Reilly Cartwright*

Brian Wesley, Young Lawyers Conference
Tracy Banks, VA CLE

*Attended by conference call

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

WINTER MEETING

Minutes

Friday, January 24, 2020
Williamsburg Inn, VA

Chair Ron Wiley called the meeting to order at 1:00 PM.

The chair opened by welcoming all attendees, both those physically present and those via telephone. He asked all physically present to sign the list being passed around and requested that all those on the phone notify Secretary/Treasurer Kathryn Byler via text or email. The chair announced that a quorum of the Board was established. He reminded everyone that participation by area representatives is welcomed and encouraged but only board members may vote on the business of the section.

The chair called for adoption of the minutes of the fall meeting as presented by the secretary/treasurer, Kathryn Byler. Two changes were noted regarding attendees. Immediate Past-Chair Kay Creasman should be included in the attendance and both Josh Johnson and James Johnson attended. Karen Cohen noted that she is with a new firm. The revised minutes were adopted by a unanimous vote.

Chair Wiley noted that he had submitted a proposed budget for July 1, 2020 to June 30, 2021. Although the submitted budget was balanced, there was considerable discussion about a potential surplus. Past chairs Bill Nusbaum, Whitney Levin, and Kay Creasman commented about their experiences when submitting a proposed budget. There was a discussion of potentially giving free membership to new members under 30 years old. It was suggested that VA CLE might offer first-time attendees to the Annual and Advanced CLEs a 50% discount. Larry McElwain suggested an anticipated surplus could be used to bring in out-of-state speakers for the Advanced CLE. The chair encouraged everyone to think of ways that any surplus could best be spent and to send their ideas to him via email. The chair further encouraged all attending members to submit a voucher for travel.

A review of the upcoming Advanced and Annual CLE's was given by committee co-chairs, Ben Leigh and Sarah Louppe Petcher. Dates for the Advanced are March 6 and 7, 2020. The Annual Real Estate Seminars are May 6, May 19 and May 21, 2020. A review of committed speakers and topics for the Advanced ensued. Professor Carol Brown from University of Richmond Law School will speak on housing discrimination in land use. Robert Duston will speak on ADA issues in real estate development and use. Sharon Horstkampt will address e-notes and e-contracts. Everett Gardner and Kim Hart will speak on VHDA's incentive programs for efficient development and the Low Income Housing Tax Credit Program. John Altmiller will present on ethics on both Friday and Saturday. Gus Bauman will address regulatory takings and changes since *Knick v. Township of Scott.* And, Professor Andrew Kahrl and David Cogal will speak on African American farmlands partition suits.

It was noted that the Program Committee welcomes suggestions for topics for both the Annual and the 2021 Advanced CLEs. The chair noted that some might consider the topics to advance a progressive social agenda. Any comments regarding the programming should be directed to Ron Wiley. A suggestion was made to do a presentation on time-shares.

Christina Meier addressed the group in a touching announcement of her retirement and appreciation for the professional relationships she's enjoyed over the years. As a parting contribution, Christina acknowledged the completion of the Real Estate LEO project on which she addresses 1,800 LEO's, reduces the total to 175 specifically dealing with real property, and groups them into 20 or 25 subtopics so they can be easily searched. The summary is currently available for distribution. A

discussion of appropriate dissemination included suggestions of sending the summary electronically to all section members, posting on the section website, and including it in the spring Fee Simple. It was also noted that this might a good base for an upcoming ethics CLE.

A motion was made to add three new Area Representatives. Steve Gregory nominated Hayden-Ann Breedlove who graduated from University of Richmond Law School, passed the bar, is clerking in Henrico County, and has been serving as the student assistant to the Fee Simple. Susan Pesner nominated Heather Steele and Mark Graybeal nominated Sandra "Sandy" Buchko. The nomination was seconded and, by vote, all three were approved.

Steve Gregory made a motion that a new position called co-editor of the Fee Simple be created and that Hayden-Ann Breedlove be appointed the first co-editor. The motion was seconded by Mark Graybeal. During discussion of the motion it was suggested that the stipend be split 50/50 between the editor and co-editor. Pamela Faber, Whitney Levin, and others raised concerns that a new attorney without substantial experience be given such authority. Bill Nusbaum suggested that the motion be amended so the proposed newly created position will be called assistant-editor to indicate that it was subordinate instead of equal. After more discussion, the nomination was tabled for a future date.

Mark Graybeal asked all present to make sure they have submitted a photo for the website roster. He offered to take pictures of anyone without a current photo. He also offered to switch out photos from time-to-time as desired.

A suggestion was made that each participant at the table introduce him/herself. Chair Wiley agreed and initiated a round of short, self-introductions.

It was announced that Richard Howard Smith will submit an article on Series LLC's for publication in the spring Free Simple.

The allocated time for the meeting having lapsed, the meeting was adjourned at 2:30 PM.

Respectfully submitted:

Kathryn N. Byler, secretary/treasurer

List of Attendees
Fall Board of Governors and Section Meeting
Friday, January 24, 2020

Board Members
Ronald D. Wiley, Jr., Chair
Lori H. Schweller, Vice-chair
Kathryn N. Byler, Secretary/Treasurer
Kay Creasman, Immediate Past-Chair
Richard B. "Rick" Chess
Robert E. Hawthorne, Jr.
Blake Hegeman
Whitney Levin
Steve Gregory*
Sarah Louppe Petcher*
Will Homiller, Ex-officio Board

Area Representatives
Pamela Faber
Matson Coxe
Max Wiegard, VBA representative
Brian Wesley, Young Lawyers Conference representative
Vanessa Carter
Susan Walker
Steven W. Blaine
K. Wayne Glass
Steve Wood
Susan Pesner
Paula Caplinger
Larry McElwain
Howard Gordon
Page Williams
Thomson Lipscomb
Eric Zimmerman
David Helscher
Benjamin Leigh
Bill Nusbaum
Christina Meier
Harry Purkey
Doug Dewing*
Alyssa Embree*
Pam Fairchild*
Jon Brodegard*
Cynthia Nahorney*
Reilly Cartwright*
James Johnson*
Tara Boyd*
Randy Howard*

Tracy Banks, VA CLE

*Attended by telephone conference call

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

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

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

Ex Officio

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Vacant

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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).

Central Region

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Membership Application

1. Contact Information

Please provide contact information where you wish to receive the section's newsletter and notices of section events.

Name: _____

VSB Member Number: _____

Firm Name/Employer: _____

Official Address of Record: _____

_____

_____

Telephone Number: _____

Fax Number: _____

E-mail Address: _____

2. Dues

Please make check payable to the Virginia State Bar. Your membership will be effective until June 30 of next year.

☐ $25.00 enclosed

3. Subcommittee Selection

Please indicate any subcommittee on which you would like to serve.

Standing Committees

- ☐ Fee Simple Newsletter
- ☐ Programs
- ☐ Membership
- ☐ Technology

Substantive Committees

- ☐ Commercial Real Estate
- ☐ Creditors Rights and Bankruptcy
- ☐ Residential Real Estate
- ☐ Land Use and Environmental
- ☐ Ethics
- ☐ Title Insurance
- ☐ Eminent Domain
- ☐ Common Interest Community
- ☐ Law School Liaison

4. Print and return this application with dues to

Dolly C. Shaffner, Section Liaison Real Property Section
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-0026

VIRGINIA STATE BAR
1111 EAST MAIN STREET, SUITE 700
RICHMOND, VIRGINIA 23219-3565