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the FEE SIMPLE

The Journal of the
Virginia State Bar
Real Property Section

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

Vol. XLII, No. 1 Spring 2021

PROFESSOR CAROL N. BROWN
UNIVERSITY OF RICHMOND SCHOOL OF LAW

Academic Liaison to the Real Property Section
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SECTION NOTES

- The annual case law review will be published in the Fall issue of The Fee Simple. Anyone who would like to suggest a case for inclusion should send the citation to the Editor.

- The Traver Scholar award, normally announced at the Advanced Seminar in March, will be announced at the June meeting. If there is an award this year, it will be covered in the Fall issue.

- Congratulations to Susan Pesner and the Hon. Jane Marum Roush for their election to the Virginia Lawyers Hall of Fame.

The FEE SIMPLE *is published semiannually by the Virginia State Bar, 1111 East Main Street, Suite 700, Richmond Virginia, 23219. It is distributed to members of the Real Property Section of the Bar.*

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 William & Mary Law School.

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FALL 2021 SUBMISSION DEADLINE: FRIDAY, OCTOBER 1, 2021

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

THE VIDEO CONFERENCE
WILL BE HELD ON

THURSDAY, JUNE 17, 2021, AT 11:00 A.M.

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for the Real Property Section Membership form

https://www.vsb.org/docs/sections/realproperty/membershipapplication2018.pdf

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RESOLUTION OF THE WILLIAM & MARY BOARD OF VISITORS*

Retirement of Lynda L. Butler
William & Mary Law School

An undergraduate alumna of William & Mary, Lynda L. Butler joined the Law School's faculty in 1979. She was one of the Law School's first women to receive tenure, and later was named a Chancellor Professor and served as interim dean. Over her tenure at the Law School, she has distinguished herself through her scholarship and teaching. Her devotion to William & Mary is unmatched, and her decades of faithful service and leadership have made the Law School and William & Mary immeasurably better.

Professor Butler has held almost every leadership position of significance at the Law School. In 2008, after she had served eight years as vice dean, fate called then-dean of the Law School Taylor Reveley to the interim presidency of the university, leaving the Law School immediately in need of a new leader. Reveley turned to Professor Butler and asked her to take on the deanship on an interim basis; she was the obvious and perfect choice. Although she had been ready to leave administration and return full-time to teaching and scholarship, she did not hesitate to answer the call, and as a result she made history as the first woman to lead the School. Professor Butler did not just keep the seat warm during the year-plus of her deanship. Instead, she continued with new initiatives and ideas, including convening the first faculty retreat to help inform the School's priorities. In these leadership positions, as well as other roles such as chairing countless committees, Professor Butler has always acted with the highest integrity, putting the interests of the institution above her own, choosing the right way over the easy way.

In addition to her many roles at the Law School, Professor Butler has served the university with distinction. The high point was her service as vice president, and then president of the Faculty Assembly, where she led the effort to create and secure Board of Visitors approval of the Faculty Handbook. For more than a decade, she has been the co-chair of the university's Committee on Sustainability. Professor Butler has also served as a member of the William & Mary Design Review Board and Commencement Policy Committee. She has been chosen for these and other roles not just because of her work ethic and dedication – though they are unmatched – but because of her sound judgment, fairmindedness and ability to engender confidence.

Professor Butler has distinguished herself through decades of scholarship, primarily in the areas of property and environmental law. She has authored important articles in her fields and a book on Virginia coastal and tidal law. For many years she edited the journal of the state bar's Real Property Section. Professor Butler has produced a burst of novel scholarship in the last several years preceding her retirement. One of her great scholarly achievements, one that we hope will continue to flourish long after her retirement, is William & Mary's Property Rights Project. Its signature event, the annual Brigham-Kanner Property Rights Conference, annually brings together academics, judges, and lawyers to discuss cutting-edge issues in property law. The conference's high profile has significantly

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* Reprinted with permission. Board of Visitors, governing body of William & Mary and Lynda L. Butler, Chancellor Professor of Law, Emerita, William & Mary Law School, Williamsburg, Virginia. https://law.wm.edu/news/stories/2021/deans-message-on-bov-resolution-on-retirement-of-lynda-l.-butler.php

enhanced the Law School's reputation across the nation and indeed the world. The conference has also provided a valuable experience for William & Mary's students, who get to network with potential employers and edit a bound volume of the conference proceedings, a volume for which Professor Butler serves as editor.

Professor Butler has made a lasting mark on the profession through her four decades of teaching and mentoring. Since her arrival on campus, she has been a gifted and passionate educator. From the beginning, students had great respect and affection for her, often making her the subject of "Libel Night" in early years, a tribute she fondly remembers with amusement. Teaching mostly in the area of property and the environment, her courses have ranged from the large required 1L Property course to, in recent years, a seminar on Climate Change. She brings the abstractions of property law to life with modern examples. She has mentored countless students – future public servants, law firm partners, and law school deans – and remains in touch with students as their careers develop, cementing their lasting friendship to the institution. Her decades of outstanding teaching earned her the high honor of the 2019 Thomas A. Graves, Jr. Award for Sustained Excellence in Teaching.

In sum, Lynda Butler has led an exemplary career and has made everyone and everything around her better.

BE IT RESOLVED, That the Board of Visitors acknowledges the retirement of Lynda L. Butler; expresses its deep appreciation for the many contributions she has made to the William & Mary Law School and William & Mary during her decades of devoted service; and approves a change in status from Chancellor Professor of Law to Chancellor Professor of Law, Emerita.

BE IT FURTHER RESOLVED, That this resolution be spread upon the minutes of the Board and a copy of the same be delivered to Professor Butler with best wishes from a grateful Board for her years of dedicated service to William & Mary."

Professor Butler devoted untold hours to the Real Property Section, including as Editor of this Journal and as Academic Liaison. She was also a Traver Scholar award recipient. It is impossible to state the extent of her contributions to the growth and success of the section. Professor Butler's retirement after such a distinguished career was chronicled—as best as the inadequacy of words could ever do—in the Spring 2020 issue of the Fee Simple. –Ed.

WELCOME

PROFESSOR CAROL N. BROWN
ACADEMIC LIAISON TO THE REAL PROPERTY SECTION

The Real Property Section welcomes Professor Carol N. Brown of the University of Richmond, School of Law as the Section's new Academic Liaison, an *ex officio* member of the Board of Governors. Professor Brown spoke on "Discrimination in Land Use: Exclusionary and Inclusionary Zoning" at the 24th Annual Advanced Real Estate Seminar in 2020. Soon after joining the faculty at the University of Richmond School of Law in 2012, Professor Brown invited Ron Wiley, 2019-2020 Section Chair, to help teach a real estate transactions and finance class at the law school, a collaboration which continues to the present. In the years since, they became good friends (even though she's a Duke undergraduate and law school graduate) and he was pleased to invite her to join us.

Professor Brown teaches and writes in the areas of property, land use planning, real estate transactions, and housing law. She is the author or co-author of six books on these subjects, including West Academic Publishing's *Cases and Materials on American Property Law* (7th edition) and *Experiencing Housing Law,* Carolina Academic Press' *Planning and Control of Land Development: Cases and Materials* (10th edition), as well as a number of law review articles and book chapters. A leader in her field, Professor Brown is a frequent presenter at symposiums and conferences. She has served as the chair of the Association of American Law Schools (AALS) Section on Real Estate Transactions and Section on Property Law, among other leadership positions on AALS committees, and is a fellow with the American College of Real Estate Lawyers. Professor Brown is also a member of the Property Section of the National Conference of Bar Examiners which prepares property questions for the Multistate Bar Examination. Prior to joining the Richmond Law faculty, Professor Brown was a tenured professor at the University of North Carolina—Chapel Hill School of Law.

CHAIR'S MESSAGE

By Lori H. Schweller

Lori H. Schweller is the 2020-2021 Chair of the Real Property Section of the Virginia State Bar and Co-Chair of the Section's Land Use and Environmental Committee. She is a partner at Williams Mullen, based in its Charlottesville office. Lori's practice includes land use and transactional real estate matters. She is in her sixth year as a member of the Board of Directors of Greater Charlottesville Habitat for Humanity and serves on its Executive Committee.

Over the past six months, our Section members have shown an extraordinary commitment to our profession, to the Bar, and to our clients by quickly adapting to, and educating one another about, the new technologies that are transforming our practice. From video conferencing to e-recording, rapid technological advancements made their mark on 2020 and are here to stay. Local governments have found such an uptick in public participation at public hearings and community meetings that many intend to retain virtual opportunities to participate even after meetings are in-person again. DocuSign has become the execution vehicle of choice for many, and electronic recording has streamlined closings in many jurisdictions. As our Common Interest Community Committee reported, 2021 legislation will allow owners association meetings to be held completely electronically.

The delivery and content of the Annual Advanced Real Estate Seminar presented by Virginia CLE and the VSB Real Property Section illustrate the many advances in our profession this past year. For the first time in its 25-year history, the seminar was presented via webinar with a live question and answer period. Not only did the seminar run seamlessly and efficiently, it attracted the greatest number of attendees of any Advanced program – over 200 attendees. Practitioners who may have found a two-day trip to Williamsburg too time-consuming or expensive were able to benefit fully from this excellent, remote program.

As always, the Programs Committee of the Real Property Section and the VACLE developed timely seminar topics and engaged first-class experts. The program began with "Bridging the Digital Divide: Real Estate Primer for Broadband Access and 5G," in which Evan Feinman, Governor Ralph Northam's chief broadband adviser, informed us that Virginia's ambitious goal to provide universal broadband throughout the Commonwealth will actually be achieved two years earlier than the target 2028 date. Gary Clemens, Clerk of the Loudoun County Circuit Court, and Chip Dicks of Gentry Locke updated attendees on the many swiftly-moving electronic advances in our practice in "Hot Topics in E-Real Estate (E-Notarization, E-Recordation, and E-Signatures)."

The virtual format allowed the organizers to engage experts from around the country. For example, Professor Dale Whitman, Dean Emeritus of the University of Missouri and Visiting Professor of Law at Arizona State University, spoke to us about laws and legal theories relating to leasing, mortgaging, and selling real estate during COVID-19. Professor Barlow Burke, law professor at American University, gave us insight into real estate brokerage.

The concept of "wellness" has received heightened attention as many of us deal with challenges of new and unusual working environments. We heard a personal story from Justin Earley, received a report from the Supreme Court of Virginia's Committee on Lawyer Well-Being, and learned about the Virginia Lawyer's Wellness Initiative. Note that the former Lawyers Helping Lawyers has expanded and changed its name to Virginia Judges & Lawyers Assistance Program.

To close the seminar, Howard Gordon and Susan Pesner regaled us with the 24-year history of the Annual Advanced Real Estate Seminar, including stories about Advanced program legends like Gus Bauman and his "little old ladies with blue hair" (the most successful eminent domain plaintiffs at the U.S. Supreme Court), Tom Spahn's famous ethics programs, and Doug Dewing's invaluable primer, "As a Matter of Fact I Do Own the Road," a well-thumbed title on all of our bookcases.

I'm pleased and grateful to report that our Ethics Committee continues to work on a database of Legal Ethics Opinions affecting real estate practice. With the contributions of our Section members, Kay Creasman has led the Committee's efforts to synthesize and categorize the LEOs. Many thanks to Christina Meier for all her early work on the project. Our Technology Committee is working on a LinkedIn page for our Section and making The Fee Simple searchable for practitioners. We look forward to these valuable resources.

We expect to close out our 2020-21 year in June with our last virtual meeting, to be scheduled during the week of the VSB Annual Meeting, which will be hosted virtually June 14-15, 2021.

I'm sure I speak for many of us when I say that I'm looking forward to seeing you all in person this fall, fortified with all our new technical skills.

2021 ALTA/NSPS MINIMUM STANDARD DETAIL REQUIREMENTS FOR ALTA/NSPS LAND TITLE SURVEYS (EFFECTIVE FEBRUARY 23, 2021)[1]

By E. Duffy Myrtetus

E. Duffy Myrtetus, of Eckert Seamans in Richmond, is an experienced real estate, business transactions, and commercial litigation attorney. His practice is principally centered on the representation of various parties involved in transactional and litigation matters related to the acquisition, sale, lease, financing, development, and operation of real property assets and interests. Mr. Myrtetus is admitted to all state and federal courts in Florida and Virginia, and to the United States Supreme Court. He is the past chair of the Real Estate Section of the City of Richmond Bar Association, is a past president of the Out of State Practitioner's Division of the Florida Bar, and currently serves as a member of the Florida Bar's Board of Governors. He is AV rated by Martindale Hubbell, and has been recognized as one of Virginia Business *magazine's Legal Elite.*

The *2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys* (the "**2021 Standards**") approved by the National Society of Professional Surveyors, Inc. (the legal successor to ACSM – the American Congress on Surveying and Mapping) and the American Land Title Association (ALTA) took effect February 23, 2021. The **2021 Standards** replace the prior 2016 revised standards. As of the new effective date, all previous versions of the Standard Detail Requirements for ALTA/ACSM Land Title Surveys are superseded by the **2021 Standards**. A complete copy of the revised **2021 Standards** is available on-line at the NSPS website at: https://www.nsps.us.com/page/2021ALTA[2]

Additionally, one other document, which is also available at the NSPS website, is an excellent resource and quick reference to facilitate a review of operative changes in the **2021 Standards** vis-a-vis **the 2016 Standards**. It is a redline of the 2016 Standards, reflecting specific revisions, inclusive of changes to standard *Table A*:

https://cdn.ymaws.com/www.nsps.us.com/resource/resmgr/alta_standards/2021_ALTANSPS_Standards_redL.pdf

This is an incredibly useful tool in the form of a redlined mark-up of the 2016 Standards compared against the new **2021 Standards**, which reflects detailed redline additions and deletions of revised terms, inclusive of changes to standard *Table A*.

The changes were unanimously adopted by the members of the joint ALTA/NSPS Committee, which is comprised of members of both NSPS and ALTA. The majority of the revisions represent what some commentators have argued is the next step in a continuing retreat from the more stringent historic minimum standards preceding the 2011 Minimum Standards. For example, the shift from use of the word "shall" to "must" throughout the revisions reflects something more than a nuanced change in syntax – it reflects the additional risk that is now retained by/shifted to the requesting party seeking a survey.

The Committee apparently relied upon the ruling in *Gutierrez de Martinez v. Lamagno,* 515 U.S. 417 (1995) to make this particular change. That case involved an action where a federal employee was sued for wrongful or negligent acts, triggering provisions of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the "Westfall Act" which modified the Federal Tort Claims Act (FTCA)). Justice Ginsburg delivered the Supreme Court's opinion, overruling

[1] The opinions expressed herein are solely those of the author. –Ed.

[2] Multiple electronic versions are available in a .PDF format. Note that the ALTA website includes a copyright reservation and registered trademark notations as to the 2021 Standards.

the Fourth Circuit. In part, the opinion includes an analysis of the use of the word "shall," inferring contextual ambiguity upon the general mandatory connotation of the word in legal usage. The Committee apparently was not persuaded by Justice Souter's dissent, including that the Court has "… repeatedly recognized the normally uncompromising directive that it [shall] carries"…"The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes … this word is generally imperative or mandatory"….). In that sense – and reviewing comparable changes made in the most recent revisions to the Minimum Standards – the Committee appears to have continued a trend to relax the scope of minimum surveyor required action.

Other selected changes:

Standard of Care 3(D) - "Boundary Resolution" is now just "Boundary" in terms of corners and boundary lines to be established. It is unclear what improved clarity or precision in establishing boundaries is achieved with this change.

Standard of Care 3(E)(i) – "Measurement Standards" for Relative Positional Precision (an apparent counter-intuitive effort to address "Precision") incorporates (in the author's opinion) one of the worst run-on sentences ever adopted by the Committee, culminating with the introduction of a new Ninety Five Percent (95%) confidence level in determining the required positions. Does this mean that there is now a Five Percent (5%) acceptable range of error in establishing positions? What happens when two surveyors contest the 5% delta in the new Standard? Note the ripple effect of this new standard into Sections relating to Fieldwork; Lines of Possession and Improvements along the Boundaries; etc. (*see* Standard 5).

Standard of Care 4 – "Records Research" is a revamped provision, but does not generally appear to reflect material substantive changes. However, the author has recently received a requirement from a surveyor to provide "…*The current record descriptions of any adjoiners to the property to be surveyed, except where such adjoiners are lots in platted, recorded subdivisions….* " (Standard of Care 4(c)(i)). Where this requirement is interposed by the surveyor, title companies no doubt will require the added expense of determining record title ownership to adjoining parcels.[3]

Standard of Care 5(ii), (iii), and (iv) – "Easement and Servitudes" seem to narrow the surveyor's duty to include easements that are not disclosed in the record chain of title, but are physically observed in conducting fieldwork in subpart (ii), including deletion of the conjunctive reference to: "…*and on adjoining properties*…." This seems to be an unusual deletion. The explanatory notes at the NSPS website are vague at best. Query whether an old unrecorded easement/path/road/access way originating off site of the property to be surveyed, that vaguely appears to affect all (or portions) of the topography of the property to be surveyed, and then reappears off site on a contiguous parcel must still be noted after this change?

Table A revisions are extensive, but all remain subject to negotiation. One of the most notable changes is the deletion of former Section 18 as to delineation of wetlands. This again seems like an unhelpful change, as the requesting party would have been required to mark the former Section 18 and negotiate the detail to be provided.

In the context of title insurance coverages, Covered Risk 2(c) in the 2006 (and proposed 2021) ALTA Policy forms requires a "survey reading" of a **2021 Standards** compliant plat by the underwriter in order to obtain a deletion of the otherwise applicable standard survey exception. Moreover, endorsement coverages for the ALTA 9 series, ALTA 17-06, ALTA 17.1-06, ALTA 19-06 and ALTA 19.1-06, among other special endorsements, also presumably require additional new underwriting of a **2021 Standards** compliant survey. The standard policy terms and conditions do not expressly

[3] Recent discussions with staff counsel at several national title underwriters indicates that these requests have historically not been regularly made to date.

adopt the ALTA/NSPS standards; however, they have been the practical benchmark for underwriting purposes for decades.

As the new **2021 Standards** are implemented, the ripple effect will additionally beget a broad range of timely practical issues worthy of consideration:

(i) In the context of foreclosures, deed-in-lieu, and related transactions, lenders/loan servicers/trustees, etc. will need to consider how the newer standards may impact a prospective disposition of distressed property. Updated survey data would presumably require compliance with the newest **2021 Standards**; and, existing mortgagee coverage with exceptions under the older standards may not be adequate for coverage on survey related matters for a purchaser at a foreclosure auction, grantee in a deed-in-lieu, or other transferee of title pursuant to an insured deed of trust/mortgage;

(ii) In the commercial real estate transaction context, it remains to be seen how the new procedures and commensurate expense of satisfying underwriting conditions will affect the timing and costs of CRE transactions. Presumably institutional lenders, conduit lenders, etc. will adopt objective underwriting criteria that mirror the new minimum standards and detail in the **2021 Standards**; and,

(iii) It remains to be seen how the new **2021 Standards** and detail will affect local planning, zoning, subdivision and related requirements and procedures.

Under Standard 7 of the **2021 Standards**, the requirements provide limitations upon a surveyor's ability to deviate from the mandatory form certification, confirming compliance with the **2021 Standards**. A deviation is permitted only if required under applicable federal, state and/or local laws, rules, regulations, etc. Pursuant to Standard 3(B), the surveyor must complete the survey in compliance with the requirements of the **2021 Standards**, and the requirements of applicable federal, state and local statutes, administrative rules, regulations and/or ordinances that set out standards regulating the practice of surveying within a subject jurisdiction. In Virginia, reference should also be made to the provisions of Va. Code §54.1-400, *et seq.*; 18VAC10-20; and, 18VAC10-20-370, *et seq*., as well as the applicable locality's planning, zoning and subdivision ordinances for minimum plat requirements and detail.

The **2021 Standards** on balance reflect changes that continue a trend away from historic minimum requirements for surveyor scope of work. It is essential that lenders, attorneys and others, who order, use and rely upon surveys become familiar with the **2021 Standards**.

ILLEGAL SUBDIVISIONS AND TITLE INSURANCE COVERAGE

By Jon W. Brodegard

Jon W. Brodegard has a deep appreciation for the things that stay the same as well as the regional differences that exist in real estate matters. Following a clerkship with the Department of Housing and Urban Development's Office of Hearings and Appeals, Jon conducted business from Baltimore, MD to Fredericksburg, VA as an in-house attorney with a title company. Subsequently, Jon maintained his focus on real estate by joining a law practice located in the Hampton Roads area. Currently, Jon serves as counsel with Old Republic Title Insurance Company.

When first told that property is or may be the subject of an illegal subdivision, those who are unfamiliar with the concept of illegal subdivision – especially residential buyers and sellers – may become quite concerned. I have found that the best way to introduce the concept is to acknowledge the shock effect of the phrase "illegal subdivision," and then proceed to explain the concept and its effect.

Property that is or may be subject to an illegal subdivision may still be conveyed between sellers and purchasers, but, because development or use of the property may be impacted by the local subdivision ordinance, the parties involved in a real estate transaction should be made aware of any potential illegal subdivision and the benefits and limitations of title insurance so that the parties can make an informed decision regarding how to proceed.

As used here, an 'illegal subdivision' is any adjustment to a boundary line that does not comply with the relevant local[1] subdivision ordinance. The current version of Va. Code § 15.2-2240 requires "[t]he governing body of every locality" to "adopt an ordinance to assure the orderly subdivision of land and its development."

Failure to comply with the subdivision ordinance cannot prevent the recordation of the instrument by which noncomplying land is transferred "or the passage of title as between the parties to the instrument."[2] As a result, many parcels or lots of land have been subdivided without the approval required by law. In my experience, the likelihood of enforcement of subdivision ordinance violations varies between localities. Enforcement is more common in some areas of Virginia, such as the Hampton Roads area.

If the violation of a subdivision ordinance is overlooked when title to real property is acquired, then the violation may be discovered when a building permit is not approved. In many cases, the monetary cost to bring an improperly subdivided lot into compliance with the subdivision ordinance is relatively low. If a lot or parcel of land otherwise complies with current zoning requirements, then all that may be required to resolve an illegal subdivision is approval of a plat by the subdivision or zoning office.

Unfortunately, however, the monetary cost to bring an improperly subdivided lot into compliance with the local subdivision ordinance may not be the only cost that results from failure to comply with the subdivision ordinance.[3] Obtaining an appropriate survey, submitting the plat, and waiting for approval from the subdivision or zoning office may cause unwanted and unexpected delay in a construction schedule. Worse, failure to comply with the subdivision ordinance may indicate that the

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[1] *See* Douglass W. Dewing, A Virginia Title Examiner's Manual, § 41-3 (Juris Publishing, Inc. 4th Ed. 2017) (1973) for a discussion of subdivision regulation at the state level.

[2] Va. Code § 15.2-2254(3).

[3] *See* Sara Fleishman, *Many Lots in Fairfax Now Illegal*, The Washington Post, March 20, 2003 for examples of high costs associated with the negative effects of failure to comply with the local subdivision ordinance.

lot does not conform to zoning requirements. If the lot does not comply with zoning requirements, then a zoning variance may be required, and such a variance may or may not be approved. Likewise, a current illegal subdivision may complicate future development, such as when a developer wishes to develop and resubdivide an existing parcel. Thus, it makes sense to determine if a specific lot or parcel of land complies with or violates the local subdivision ordinance before purchase.

Determining whether a specific lot or parcel of land complies with or violates the local subdivision ordinance begins with a review of the legal description used to describe the land. If the boundaries of a parcel or lot of land are set out in a recorded plat, then the recorded plat may indicate that it was approved by a subdivision agent or other County or City officer responsible for enforcing local subdivision ordinances. Such approval ends the inquiry in most instances. If the legal description does not reference a recorded plat, or if the recorded plat does not display the necessary approval, the next step is to determine when the locality first adopted a subdivision ordinance. If the boundaries of a lot or parcel of land described by reference to a recorded plat or by metes and bounds or other physical description predate adoption of the local ordinance, no further inquiry may be necessary. If the date of the ordinance predates boundary changes then further inquiry is in order. Specifically, review the ordinance in effect at the time of the division to determine if there is a violation.

Note that, because some ordinances may have changed over time, the current subdivision ordinance may not be the ordinance that was in effect when the boundaries were modified.

While many current ordinances are available online, prior versions can be difficult to locate without visiting local government offices. The subdivision office, zoning office, or city or county attorney's office may be able to assist in determining if a specific lot or parcel of land complies with the subdivision ordinance. Many such offices are willing to issue a letter that states whether a specific lot complies with or is in violation of the subdivision ordinance. However, obtaining such a letter may delay a purchase or refinance. Parties to real estate transactions may prefer to accept the risk of illegal subdivision rather than wait for a formal determination that a violation exists or may prefer to proceed notwithstanding the violation.

Understanding the covered risks and the limitations of title insurance may help to inform the decision to wait or proceed.

Whether and how subdivision issues are covered by title insurance generally depends on what policy is purchased.

Covered Risk 5 in the standard Owner's Policy and the standard Lender's Policy promulgated by the American Land Title Association ("ALTA"), which are available to both residential and commercial parties, insures against:

> "…loss or damage . . . sustained or incurred by the Insured by reason of . . . The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to . . . the subdivision of land . . . **if a notice, describing any part of the Land, is recorded in the Public Records** setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice." [Emphasis added.]

In practical terms, then, illegal subdivisions are not covered by the standard Owner's Policy or the standard Lender's Policy.

The ALTA Homeowner's Policy of Title Insurance (frequently referred to as the enhanced policy) takes a different approach. Covered Risk 15 (subject to a deductible) covers "actual loss" from "The violation or enforcement of those portions of any law or government regulation concerning . . . land division."

Under Covered Risk 16, and subject to the deductible, the Homeowner's Policy of Title Insurance further covers loss if:

> "Because of an existing violation of a subdivision law or regulation affecting the [insured's] Land:
>
> a. [The insured is] unable to obtain a building permit;
> b. [The insured is] required to correct or remove the violation; or
> c. Someone else has a legal right to, and does, refuse to perform a contract to purchase the Land, lease it or make a Mortgage loan on it."

On its face, then, the ALTA Homeowner's Policy provides additional coverage that the ALTA Owner's Policy does not. This expanded coverage is offered under the ALTA Homeowner's Policy of Title Insurance, but not the standard ALTA Owner's or ALTA Lender's Policy because the ALTA Homeowner's Policy of Title Insurance is uniquely designed for residential properties.[4]

However, the effect of the deductible should not be overlooked in connection with the coverage offered under the Homeowner's Policy of Title Insurance. The cost of obtaining a plat and the fees associated with submitting the plat for approval may be less than the applicable deductible under the Homeowner's Policy. As a result, the coverage offered under the Homeowner's Policy may not, in every instance, reduce the insured's cost of correcting an illegal subdivision.

Regardless of which owner's policy is offered, if there appears to be a potential violation of a subdivision ordinance, the title commitment may include a requirement such as:

> "Confirm that there is no violation of any subdivision ordinance. If there is a violation, then the Homeowner's Policy of Title Insurance may not be issued, and additional requirements and/or exceptions may be made."

If it is determined that the subdivision ordinance has been violated, then, in residential contexts, the agent will likely refuse to issue the Homeowner's Policy of Title Insurance unless and until the illegal subdivision has been resolved. In both residential and commercial contexts, however, the agent may be able to issue the standard Owner's Policy with an exception as to "the violation, if any, of the effective subdivision ordinance." Keep in mind that illegal subdivision is not generally covered by the standard Owner's Policy or lender's policy, whether such an exception is noted in the policy or not.

Once the risk of an illegal subdivision has been discovered, and the parties have been informed, then the next step should usually be to determine if there is an actual violation. If there is a violation, then, in many cases, the parties will agree that the best course of action is to resolve the illegal subdivision prior to completing a real estate transaction. The local subdivision ordinance will set forth what actions must be taken to bring the property into compliance. In many cases, a new survey will need to be approved by local officials and then recorded. Because the purchaser's title insurance will usually not cover a known violation of the relevant subdivision ordinance, the purchaser will usually request that the current owner resolve the violation prior to the purchase. Whether the current owner of property that is discovered to be the subject of an illegal subdivision may be able to benefit from making a claim under the owner's policy depends on what policy was issued and the terms of that policy. Likewise, the benefit of any such claim to the owner depends upon the terms of the policy – especially the impact of the deductible under the Homeowner's Policy of Title Insurance.

While the existence of an illegal subdivision may not prevent a valid conveyance of land, the parties involved in a real estate transaction should be made aware of any potential illegal subdivision so that the parties can make an informed decision regarding how to proceed. In a purchase transaction, if the seller will not resolve the illegal subdivision prior to closing, then the purchaser should be

[4] According to its terms, the ALTA Homeowner's Policy "covers only Land that is an improved residential lot on which there is located a one-to four family residence and only when each insured named in Schedule A is a Natural Person."

advised of the risks and potential costs associated with an illegal subdivision before agreeing to proceed with the purchase. The purchaser should also be made aware of the limitations of any available title insurance policy.

A 2021 UPDATE ON C-PACE IN VIRGINIA*

By William L. Nusbaum

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

Since the last Virginia Commercial Property Assessed Clean Energy ("C-PACE") update in this publication (in the Fall 2019 issue), much has happened – but unfortunately, neither of the two most awaited events has yet occurred. Before I recap the past eighteen months in Virginia C-PACE and explain that mysterious opening sentence, let me save you from scurrying to find your copy of the Fall 2019 Fee Simple and first provide this brief summary of C-PACE financing.

C-PACE financing provides funding for certain types of improvements to commercial real estate without incurring mortgage debt or adversely impacting the property owner's balance sheet. Rather than being secured by a deed of trust lien, a C-PACE financing is secured by a voluntary special assessment lien recorded against the real estate being improved. The financing comes from a private capital provider (e.g., a bank or a non-bank lender), although, in a few states (not Virginia) public money has been used to originate C-PACE financings. Unlike the shorter maturities common in the mortgage market, the maturity of a C-PACE financing often matches up with the much longer useful life of the financed improvements. By facilitating new construction and renovation projects, creating jobs and enhancing the real estate tax base, C-PACE can become a valuable economic development tool for Virginia localities. To launch a C-PACE program, localities must first adopt a C-PACE ordinance.

A BRIEF RECAP

The 2009 General Assembly created C-PACE in Virginia as a local option vehicle to finance energy efficiency, water efficiency, and renewable energy improvements.[1] The statute was amended in 2015[2] to cure a structural defect, elevating the priority of the current and any delinquent installments of the C-PACE special assessment lien to be on a par with the lien of real estate taxes, and again in

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* This article provides a further update on Virginia developments in Commercial Property Assessed Clean Energy ("C-PACE") since the previous articles in this publication, introducing C-PACE, by the author and Abigail C. Johnson (*See* William L. Nusbaum & Abigail C. Johnson, *Property Assessed Clean Energy ("PACE") Financing Comes to Virginia*, THE FEE SIMPLE, Spring 2016, at 49), and an initial update by the author (*See* William L. Nusbaum, *C-PACE Today – a Virginia Update*, THE FEE SIMPLE, Fall 2019, at 8). Ms. Johnson is President of Abacus Property Solutions and, since 2018, President and Executive Director of the Virginia PACE Authority.

[1] Act of Mar. 30, 2009, ch. 773, 2009 Va. Acts 1656 (codified as amended at VA. CODE ANN. § 15.2-958.3 (Cum. Supp. 2020)).

[2] Act of Mar. 23, 2015, ch. 389, 2015 Va. Acts 738; Act of Mar. 23, 2015, ch. 427, Va. Acts 816 (codified as amended at VA. CODE ANN. § 15.2-958.3 (Cum. Supp. 2020)).

2019[3] to add resiliency and storm water management improvements to the list of what can be financed with C-PACE, and to clean up some minor issues in the statute.

As of October 2019, five localities (Arlington County, the City of Fredericksburg, Loudoun County, Fairfax County and the City of Petersburg) had adopted C-PACE ordinances. Arlington County had engaged Sustainable Real Estate Solutions ("SRS"), a for-profit third-party program administrator (often referred to as the "P. A."), while Loudoun County had engaged Virginia PACE Authority, a non-profit P. A., to operate Loudoun's C-PACE program. Fairfax County had opted to pursue its own RFP process to select its P. A., which process was still ongoing when the preceding article was submitted. Fredericksburg on its own attempted to generate and close a C-PACE deal to finance numerous components of the minor league baseball stadium it was developing without engaging a P.A., but the baseball team changed course and instead financed the stadium using bonds. Meanwhile, in the Loudoun C-PACE program, Virginia PACE Authority accepted applications for multiple commercial (including a couple of hotels) and nonprofit C-PACE projects, with several prospects to be Virginia's first C-PACE project in early to mid-2020. Several other Virginia localities watched with interest and were in the early stages of considering adoption of their own C-PACE ordinances. It appeared C-PACE was about to break out all around Virginia. But then COVID-19 broke out instead.

A STATEWIDE C-PACE PROGRAM?

In the Summer of 2019, Abby Johnson and Bill Nusbaum organized a group of C-PACE advocates to meet with Virginia Department of Mines, Minerals and Energy ("DMME") senior staff to discuss supporting legislation in the 2020 General Assembly session to authorize a statewide C-PACE program with a single, statewide P. A. Establishing a statewide program would bring uniformity to participating local programs, thereby facilitating localities' use of C-PACE (all they would have to do is adopt an ordinance opting into the statewide program) and encouraging lenders, contractors, and developers to use C-PACE by assuring them that the C-PACE program would work the same in each locality that had opted in. DMME staff agreed it was worth pursuing, the Northam Administration agreed and added it to its 2020 legislative program, including budget funding for a DMME staff member to oversee the preparation of an RFP for the statewide P. A. and the resulting program. The budget funding passed, and HB 654 (carried by Del. Nancy Guy of Virginia Beach) added a new paragraph to the end of Virginia Code§ 15.2-958.3:

> G. The Department of Mines, Minerals and Energy shall have the authority to serve as a statewide sponsor for a clean energy financing program that meets the requirements of this section. The Department of Mines, Minerals and Energy shall engage a private entity through a competitive selection process to develop and administer the program.[4]

COVID-19 STALLS C-PACE, BUT RECOVERY IS COMING

Deal Flow. As happened to so many economic development projects, COVID-19 stalled the progress of C-PACE in Virginia on multiple fronts in the Spring of 2020. First, the most likely prospects for the "first deal" in Loudoun County, hospitality industry developments and a nonprofit organization, dried up. Then, as travel slowed dramatically and lenders pivoted to processing PPP loans, the hospitality projects ground to a halt (and have not as yet revived). Most discretionary lending ceased for several months, and the Loudoun nonprofit project, after twelve months in limbo, has only recently shown signs of revival.

[3] Act of Mar. 21, 2019, ch. 753, 2019 Va. Acts 749 (codified as amended at VA. CODE ANN § 15.2-958.3 (Cum. Supp. 2020)).

[4] Act of Apr. 6, 2020, ch. 664, 2020 4 Va. Adv. Legis. Serv. 371 (LexisNexis) (codified as amended at VA. CODE ANN. § 15.2-958.3 (Cum. Supp. 2020)).

Local Governing Bodies. Second, the governing bodies of localities that were considering establishing a C-PACE program suspended meeting, and when they resumed meeting virtually, they were largely focused (and properly so) on managing their community's response to the pandemic; indeed, the early opinions from Attorney General Herring required that the governing bodies limit their use of electronic meetings to decisions that must be made immediately and where failure to do so could result in irrevocable public harm.[5] Only later in the Summer of 2020, after the General Assembly acted to loosen the constraints on what local governing bodies could consider in a virtual meeting, have localities resumed adopting ordinances to launch their own, local C-PACE programs.

The list of localities that have now adopted C-PACE programs has more than doubled, from the five localities listed above as of October 2019 to twelve localities, adding the Cities of Richmond, Norfolk, Danville, Lynchburg, Roanoke and Alexandria and the Town of Dumfries. Three more jurisdictions, in Hampton Roads, Central Virginia and the Valley, have been consulting with the Virginia PACE Authority and are expected to adopt C-PACE ordinances by early Summer. In addition, since October 2019, the Virginia PACE Authority has been selected as the P. A. to operate the C-PACE programs in Fairfax County, Norfolk, Roanoke, Fredericksburg, Alexandria and Dumfries, establishing it as the P. A. now in eight localities, and giving it a statewide footprint.

State Budget Internal Freeze. Third, the Northam Administration imposed an internal budgetary freeze on new spending (including the funding for the statewide C-PACE program) until the General Assembly reconvened and adopted COVID-influenced budget amendments. Ultimately, though, the General Assembly worked its way through the COVID-budget amendments, and, upon their adoption, the Northam Administration relaxed its separate, internal budget freeze, enabling DMME to proceed with drafting an RFP to engage a P. A. to operate a statewide C-PACE program. Even that process had to contend with the challenges of coordinating virtually the stakeholder group advising DMME on the process, but the RFP drafting team finally got the Request for Proposals nearly finished–only to have the key DMME employee make a lateral job change, leaving the process without an internal champion in DMME and stalling the RFP process once again. As of early May, 2021, the RFP is expected to be released in late Spring or early Summer. Best estimates are that, once the RFP is finally released, it will likely be six months before DMME selects the winning proposal, the new statewide P. A. adopts a statewide program guide complete with model financing documents and a model ordinance that localities can adopt to opt into the program, and the statewide P. A. begins accepting deal applications.

ACTIVITY AT THE 2021 GENERAL ASSEMBLY SESSION

After the legislative successes for C-PACE in 2019 and 2020, leaders of the Virginia PACE Authority once again approached DMME and Delegate Nancy Guy about making additional curative improvements to Va. Code § 15.2-958.3. Working closely with DMME and the Division of Legislative Services, Abby Johnson and the author helped craft HB 1859, which was adopted and signed by the Governor.[6] Accordingly, amendments to § 15.2-958.3 will take effect on July 1, 2021:

- to allow commercial and hotel condominiums to utilize C-PACE;
- to delete certain provisions from the original 2009 enactment which have proven to be irrelevant to C-PACE as it has evolved in Virginia; and
- to permit "look-back financing" to finance, reimburse or refinance clean energy, resiliency, or stormwater management improvements for which a certificate of occupancy (or comparable evidence of completion) has been issued within the past two (2) years.

[5] 2020 Op. Va. Att'y Gen. No. 20-011 at 7 (Mar. 20, 2020), available at https://www.oag.state.va.us/files/Opinions/2020/Sullivan-Opinion-Request.pdf.

[6] Act of Mar. 1, 2021, ch. 6 (to be codified at VA. CODE ANN. § 15.2-958.3).

LOOKING FORWARD

With the surprising resilience that many sectors of commercial real estate have exhibited in the face of the pandemic, it seems very likely that Virginia will finally see its first C-PACE deals closed in the second half of 2021. Examples of C-PACE deals at various stages of development in local pipelines include:

- Enhancements to a new sports facility;
- HVAC improvements to a church and to a nonprofit community center;
- Rooftop solar panels on an existing warehouse that is leased to a municipality, with the parties amending the lease to include a power purchase agreement whereby the municipality buys the power generated by the solar panels;
- Renovation of a long-closed movie theater by a local nonprofit theater organization, pairing C-PACE with Historic Rehabilitation Tax Credits;
- A new hotel project; and
- A new construction resort hotel condominium property.

If you have clients who could benefit from a C-PACE financing and your locality hasn't yet adopted a C-PACE ordinance, talk to your local governing body's members about doing so now. If your pitch is met with sentiment to wait for the statewide C-PACE program and opt into that, suggest instead that there are deals to be done now if they move ahead with a local C-PACE program, and they can easily include in the ordinance permission to opt into the statewide program once it launches. If you feel you need to be armed with more information about C-PACE for those discussions, visit the websites for the Virginia PACE Authority, (www.virginiapace.com for Virginia C-PACE information); Mid-Atlantic PACE Alliance, (www.pacealliance.org for D. C., Maryland and Virginia regional C-PACE information); and PACE Nation, (www.pacenation.org for national PACE information).

So, to return to the opening sentence, much has indeed transpired in the past eighteen months, but the two most awaited occurrences – the launch of the statewide C-PACE program and the closing of the first C-PACE deal in Virginia, remain tantalizingly just around the corner, in large part due to the pandemic. As the effects of the pandemic wane and the health of our economy and the commercial real estate sector continue to recover and strengthen, the prospects for achieving both of those goals in the remainder of this year are good.

1031 VS. OPPORTUNITY ZONE — WHICH TO USE AND WHEN

By Richard B. "Rick" Chess and Louis J. Rogers

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Sally Blackacre, the 65 year-old recent widow of your firm's biggest client, will be in your office today at 2 pm. She has informed you that she plans to liquidate all of the family assets (properties and business) purchased over the last 40 years and would like to do so in the next 18 months so she can retire to "the rivvah". Her deceased husband, Johnny Blackacre, has always taken care of the properties and the business while she has been a homemaker. Sally is not educated in the ways of business, but, in prior meetings, has expressed her strong desire for passive investments that generate stable income ("coupon clippers") with the least amount of federal and state taxes.

The lead senior partner working with this family died 30 days ago along with her husband, Johnny Blackacre, in a failed skydiving adventure on their joint 75th birthday. You (aka "You") are the only one in the firm with any connection to the family, as you were the silent junior corporate associate in all the meetings...and you date the only child of the new widow. For reasons no one understands, the husband died without executing either a will or trust.

This morning you are meeting with your firm's senior tax and real estate partners for their guidance on how to minimize tax to maximize the net proceeds for the widow. Both are headstrong yet are recognized as two of the best in the legal community. You have prepared for them a summary of the assets owned by the widow (which you have provided to the partners in advance of the meeting).

Louis Kay Esquire (aka "LKE") was the first attorney nationally to use a 506(b) Regulation D offering, wrapped around a tenant-in-common structure, to aggregate 1031 exchange replacement property investments from multiple investors. He may not walk on water, but in the world of tax, he certainly knows the location of the rocks on which to walk. He has the biggest office in the firm, so the meeting is in his office.

The Honorable Bruce "Bricks and Sticks" Sites (aka "BS") has served as a legislator, acquired billions in real estate assets for clients, and served as Audit Committee Chair of a NYSE REIT. He is more businessperson than lawyer, but likes the respect that lawyers get from laypeople and other lawyers. You believe he has an office, but no one has actually seen him sit down anywhere for more than a few minutes.

<u>ASSETS OWNED</u>

IT DEPENDS, manufacturer of useful desk devices for lawyers, an asset held in a Delaware LLC

- Estimated value $2 million, was owned 50% by Johnny and 50% by Sally

Inventory & Equipment of IT DEPENDS

- Estimated value of $500,000

Land & building, headquarters of IT DEPENDS located in Virginia

- Estimated value $1 million, owned 100% by Sally (as a part of their estate plan to equalize the value of their separate estates), and encumbered by a $500,000 first mortgage.

Blackacre Estates, a 50-unit apartment in North Carolina

- Estimated value, $5 million, owned by a partnership where Johnny had a 40% interest.

DISCUSSION

A. TAX DEFERRAL

YOU – My understanding is that while the widow wants stable income, she is loath to pay taxes, particularly to the federal government (which she distrusts). What are our options in regard to the sale of the real estate owned 100% by her?

LKE – That is an easy one. On the sale of real estate held for investment or used in a trade or business, your client may defer, via a Section 1031 like-kind exchange, the capital gains tax by investing 100% of the net cash generated by the sale and acquiring eligible real property. Eligible replacement property must be either held for investment or used in a trade or business and equal to or exceeding the value of what she sold. The net proceeds of sale must be held by an unrelated third party (Qualified Intermediary) in accordance with an Exchange Agreement and will be used to acquire the replacement property.

In addition, because there was debt on Sally's relinquished property, Section 1031 requires her to place equal (or greater) debt on the replacement property. This is known as debt equalization; a reduction in debt results in taxation on the relief of indebtedness, sometimes called debt "boot" and can be eliminated (or reduced) if Sally is prepared to invest outside cash (cash from a source other than the exchange) in the replacement property. In this way, she can de-leverage by using other cash not from the exchange.

Do remember that any net cash received in the sale of the relinquished property needs to be invested in the replacement property, or will deemed taxable.

BS – There's a more complicated but equally valuable option. Opportunity Zone investing – I'll call it OZ - defers recognition of capital gain until filing of the clients 2026 taxes – with a 10% reduction – plus tax forgiveness on the new OZ property if held for 10 years – and there is no requirement for an unrelated Qualified Intermediary to hold the sale proceeds.

LKE – While an investor in OZ must recognize their capital gain on their 2026 tax return with a 10% reduction, a Section 1031 investor can effectively "swap til' they drop" – meaning until they die – and their heirs receive a stepped-up basis to the fair market value, at which time tax deferral under 1031 may essentially turn into tax forgiveness when the property can be sold generally without taxation.

BS - Alternatively, the OZ statute only requires investing the capital gain. If the inherited assets appreciate at a very rapid pace, Sally can sell and invest just the capital gain in an OZ fund to defer/exclude gain as described above.

B. INVESTMENT TIMING

YOU – What time frames must be followed to gain the benefits?

LKE – With a 1031, the investor has 45 days to acquire all the replacement property OR, if the investor wants more time, will have 45 days to identify in writing the proposed replacement properties and then, up to 180 days after the sale to acquire all of the replacement properties.

PRIOR to the closing of the sale, it is best practice to engage a Qualified Intermediary to hold the proceeds (to avoid constructive receipt issues and obtain the benefit of an IRS "safe harbor"). The investor has 45 days after the sale to either acquire all the replacement properties or to narrow the options down and (generally) to "identify" no more than 3 prospective replacement properties.

BS – There are none of these hoops with OZ – your investor holds the proceeds and can complete an investment into an OZ within 180 days and reinvests just the capital gains (versus 100% of net proceeds and equal debt with a 1031). Note that if the "taxpayer" is a partnership, the partners may have an additional 180 days following the partnership's tax year end to make the election to invest in an OZ.

C. PERSONAL PROPERTY

YOU – What can we do with the inventory and equipment of IT DEPENDS?

LKE – Now that the idiots in Washington[1] dropped personal property like-kind exchanges, not much.

BS – The very law which wisely dropped personal property like-kind exchanges created tax-advantaged OZs. The capital gain on the sale of personal property assets, actually of any assets (including real estate), can be deferred by investing in an OZ.

D. COMPANY SALE

YOU – Does 1031 or OZ apply on the sale of the IT DEPENDS company her husband owned 100%?

LKE – A like-kind exchange is not available to the widow when she eventually sells the operating company. After the 2017 legislation, only real estate qualifies for 1031.

BS – Like with the sale of the personal property, capital gains on the sale of the business would be OZ eligible.

LKE – Depending on the buyer, some variation of an installment sale may allow her to spread out the recognition of gain over time.

BS – Dig into the assets of the company; my guess is that there is some life insurance there to help with taxes and debt on the untimely demise of the owner.

E. REQUIRED HOLD

YOU – Once the widow makes her investment, is she stuck in it forever?

LKE – In theory, as long it can be shown that the replacement property was acquired with the original intent to hold for investment purposes or use in a trade or business, the investor could sell the property shortly after it was acquired. It is a "facts and circumstances" analysis based on the original intent. For example, if the taxpayer acquires an "investment property" and someone unexpectedly makes an offer "too good to be true" that was not contemplated when the property was acquired, the replacement property can be sold and exchanged again in short order.

BS – While an investor could exit an OZ fund earlier, the tax benefits come in deferral of capital gains taxes through 2026 (with a 10% reduction) and no federal taxes due on sale of the OZ's property if

[1] The characterization of various lawmakers throughout this article is solely that of the authors. –Ed.

held 10 years. This requires a 10 year or longer holding period. Thus, an OZ fund is a long-term investment.

F. CONFORMING LAW

YOU –I recognize that some states conform to federal tax laws and some do not; but this does not lessen the significant benefits of both 1031 and OZ under federal tax code. Are the rules the same in all the states and territories?

LKE -1031 has been around for over 100 years. Almost all states have conformed their state tax code to the federal rules for 1031. [Note: BS' family comes from PA. PA residents do not qualify for tax deferral under 1031 because PA law does not conform to federal law on 1031. Even worse, BS was once a member of the General Assembly in PA. No wonder PA is in the dark ages when it comes to 1031!]

BS – OZ Funds came on us in late 2017 under the Tax Cuts & Jobs Act. Many states, including California, have elected not to conform their tax code to provide the same OZ tax benefits on the state level. Consider yourself fortunate in Virginia, where we generally conform to federal tax laws, including 1031 and OZ. The crazies in California do not to conform to federal law when it comes to OZs BUT are prolific exchangers under 1031.

G. FEDERAL LEGISLATION

YOU - Our new president has campaigned on limiting the 1031 benefits to those taxpayers with taxable income under $400,000 of income. How likely is this change a problem in 2021?

LKE - With a 50/50 split in the Senate, it is possible that significant tax code adjustments may come to his desk in this Congress because the Vice President has the tie breaking vote in a budget reconciliation vote.

BS – Our new president also campaigned in favor of expanding the OZ legislation to include more census tracks, extending some of the tax benefits, requiring that OZ be requalified under the 2020 census, and reporting requirements be expanded.

H. SECURITY

YOU – My girlfriend is concerned that her mother is not capable of managing real estate and would prefer "passive" investments.

LKE – The widow could use the sales proceeds held by the QI in the exchange account to invest in real estate held in a Delaware Statutory Trust ("DST"). A DST is a passive investment where the manager of the DST does all the work. Most managers of DST programs acquire high quality real estate that generates stable returns ("coupon clippers") with the potential for capital appreciation. The Treasury Department recognized DSTs as an acceptable replacement property back in 2004 when it issued a published revenue ruling. DSTs are available through broker-dealers and wealth managers and typically are projected to hold the underlying real property for 7 to 10 years. Many DSTs are structured with non-recourse debt to satisfy the 1031 debt rule. It is important to note that the debt is non-recourse – the investor is not required to be on the note.

Also, the manager of an OZ investment does all the work for the investors, making OZ investments passive, similar to DSTs. In an OZ investment, only the capital gain is reinvested and there is no debt offset rule like you have with 1031.

BS – If the widow is not in need of immediate cash flow, OZ also provides a place to hold and grow value over a 10 year projected holding period. Most OZs are constructing new developments, typically mixed-use residential communities; it may take 18-24 months before the project is completed and tenants begin to pay rent to the OZ. Thereafter, once developed and leased-up, OZs

generate recurring income for their investors until the property is sold after 10 years to obtain the desired tax forgiveness on the sale. Typically, OZ investments will have higher overall profit potential since they develop (construct) new properties and hold then for at least 10 years.

I. ISSUES IN VIRGINIA

YOU – What are the unique issues for a Virginia taxpayer with either 1031 or OZ?

LKE – None.

BS – For once we agree. The Virginia General Assembly brought the Commonwealth in conformity with the Federal 1031 and OZ legislation.

J. WHERE TO INVEST

YOU – Are there any limits on where the replacement property is located?

LKE – A 1031 investment can be in any state or territory (except Puerto Rico).

BS –Sally may invest in one of the many OZs in her home state, a short drive from the rivvah, or out of state.

K. PROPERTY EVOLUTION

YOU – May the investor change the use of the property?

LKE – No; investors in DSTs delegate management to the sponsor of the DST and the tax rules limit the amount of development activity that is permitted. But not to worry, most DSTs acquire completed apartment communities, medical or industrial facilities or retail properties that are leased to strong tenants paying rent; typically, this is the highest and best use for DST properties, so significant change of use is not needed. For a 1031 replacement property acquired directly (a “whole property”), the replacement property must be held for investment purposes or use in a trade or business.

BS – An OZ investment is designed to improve or develop a new use for a property. Typically, OZs buy land and build new buildings for rent and hold the completed property for at least 10 years; once built, there is no need to change the use.

L. WHY CAN’T WE BE FRIENDS

YOU – Is it an “all or nothing” for an investor between 1031 and OZ?

LKE – The investor has the opportunity to mix and match.

BS – Some portion can go into a 1031, another portion into OZ, and on yet a third portion, they can pay taxes now and have use of the remaining after-tax proceeds.

LKE – There is a difference in tax rate between gain due to recapture and growth. Depreciation deductions previously claimed are recaptured at a higher rate and the balance at the capital gains rate. The recapture and capital gains can be deferred in 1031 while the OZ investment only defers capital gains.

BS – There is a timing issue to consider. When the QI is holding your proceeds from a sale of real estate, if it is possible that any of the prospective replacement properties could close, the QI may hold the funds until after the 180th day. For this reason, you should cash out at closing all funds needed for an OZ investment.

This would typically generate taxable “boot” but, not to worry, qualifies for OZ tax benefits. You would need to make your OZ investment by the 180th day. If the QI is holding your cash, you may need to make the OZ investment with other cash and use the funds from the QI to replace those funds.

LKE – The beauty of a blended investment – spread between 1031 and OZ - is that the investor can allocate assets according to projected need for liquidity and growth and current cash flow. Keep in mind that DST replacement property generates immediate recurring monthly income while the OZs require some time to build a building and generate distributable cash flow from tenants. 1031 permits “swap till ya drop” while OZ investments are taxable in 2026 with a 10% break and complete tax deferral on sale of the OZ’s property if held for 10 years. Mixing and match the two can optimize tax benefits and economic returns.

M. Partnership

You – What are her options with the husband’s investment in the partnership owning the real estate in North Carolina?

LKE – With only a 40% interest in the property, let us assume there is no way to force a sale. You will want to open a discussion with the attorney representing the partnership, as some variation of what we call a “swap and drop” or “drop and swap” might be possible to pull out the interest of the husband into a tenancy in common for a 1031 transaction.

BS – If and when the partnership sells, the capital gain (if any), can be rolled into an OZ investment. Keep in mind that with an interest in a partnership, you might be entitled to more than 180 days to make your investment decision. The timer for investment starts when the partnership elects at its tax year end not to make an OZ investment, giving the partners an additional 180 days thereafter to elect OZ tax benefits.

LKE – Since at death there would be a step-up in the basis of the interest owned by the husband, unless there is significant further appreciation prior to the sale of the property, the widow may just want to sell the property with minimal or no tax and move on.

N. GIFTING

YOU – If she wants to make my girlfriend financially secure, how might that wish tie into what you two are discussing?

LKE – The widow may be able to gift more value by having her accountant provide a letter appraisal of a non-controlling interest in the company to the daughter at less than its percentage value of the whole.

BS – If the widow invests in a DST or OZ Fund discussed earlier, she can direct the cash flow to her daughter.

O. NEXT STEP.

YOU – When I meet with the widow today, once I’ve brought her up to speed on the options we have discussed, what else would I want to ask of her?

LKE – What are her annual cash needs going forward once all these assets are sold? Solving her tax issues without looking at her projected future living expenses is malpractice!

OZ – How much in easy-to-access and liquidate assets does she need for emergency purposes? The DST and OZ Fund investments discussed can tie up assets for 7 to 10 years.

LKE – Sally gaining an understanding from you that some form of like-kind exchange has been around for over 100 years may give her comfort in the game plan you propose.

BS – And note that many members of both political parties have shown continued support for 1031 exchanges and Opportunity Zones.

YOU – Thank you. I'll keep you both informed of our progress.

COMMON INTEREST COMMUNITIES AND HOSTILE ENVIRONMENT HARASSMENT UNDER THE FAIR HOUSING ACT

By Susan Bradford Tarley

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Hate crimes in the United States have steadily increased over the past 6 years. (An alarming increase of 29.8% was reported from 2014 to 2019.[1]) The statistics for 2018-2019 showed a relatively low increase of 3%; however, there were more incidents of assaults on people as compared to property, and many of the incidents were more violent than in the past.[2] Hate crimes have a direct relationship to hostile environment harassment as approximately 25% of reported hate crimes happen at someone's home. Many of these criminal incidents are not only reported to the police but also to the property management company, landlord, or the common interest community association for the neighborhood. We do not have any verified statistical reports for 2020, but based on discussions with colleagues in the common interest community industry, we are experiencing an increase in animus among residents in our communities. In many instances, this hostility directed at one another manifests as aggressive statements, threats, insults, and slurs based on discriminatory biases–conduct that meets the elements of hostile environment harassment. In the past we may have categorized these types of incidents as neighbor-to-neighbor disputes. With changes made to the Department of Housing and Urban Development ("HUD") regulations in October 2016, community associations must dive a little deeper when they receive a complaint or are aware of a neighbor-to-neighbor dispute, as it may give rise to a Fair Housing complaint against the community association.

October 2016 Final Rule

On October 14, 2016, HUD amended the HUD regulations pertaining to fair housing by enacting a rule to provide standards to evaluate and adjudicate housing discrimination complaints. The stated purpose of the Final Rule is to provide a framework to analyze housing discrimination under Title VIII of the Civil Rights Act of 1968 addressing housing discrimination. The Final Rule recognized that there were no formal standards for analyzing claims, and that courts were using standards adopted under Title VII of the Civil Rights Act of 1968 addressing employment discrimination to assess claims of harassment in housing.[3] HUD took the position that there were critical differences in how to analyze a fair housing claim and drafted a rule that (i) defines quid pro quo and hostile environment harassment in housing; (ii) specifies standards to use for administrative adjudications and court proceedings; and (iii) clarifies when a housing provider, entity or individual can be held directly or

[1] https://www.statista.com/chart/16100/total-number-of-hate-crime-incidents-recorded-by-the-fbi/ (last visited March 30, 2021).

[2] https://www.nytimes.com/2019/11/12/us/hate-crimes-fbi-report.html (last visited March 21, 2021).

[3] 81 CFR 63054.

vicariously liable for housing discrimination.[4] "Housing provider" includes common interest community associations.[5]

Background of HUD Final Rule

In 1989 HUD published its initial fair housing regulations. The initial regulations addressed discrimination in housing in a general manner. The regulations provided examples of discrimination that had been found to constitute hostile environment harassment, although the regulations did not define hostile environment harassment. [6]

HUD was concerned about the varying analyses being used by the courts in evaluating hostile environment harassment in housing claims using elements of harassment in employment under Title VII. As stated in the preamble to the Final Rule: "… the home and the workplace are significantly different environments such that strict reliance on Title VII case law is not always appropriate. One's home is a place of privacy, security, and refuge (or should be), and harassment that occurs in or around one's home can be far more intrusive, violative and threatening than harassment in the more public environment of one's workplace."[7]

The difference in how we approach workplace harassment and harassment when we are in our homes or neighborhoods has been acknowledged by the courts. In *Williams v. Poretsky Management*,[8] the tenant, Ms. Williams alleged that an employee of the landlord's management company sexually assaulted her. The abuse was reported to the management company. No action was taken, and the abuse continued. The Court found that "…although courts have looked to employment cases to determine housing claims, the settings are not completely analogous. At least one court has recognized that sexual harassment in the home may have more severe effects than harassment in the workplace."[9]

In *Quigley v. Winter*,[10] the Court found the behavior of the landlord, Mr. Winter, to be particularly egregious and awarded punitive damages for his behavior in sexually harassing the tenant, Ms.

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[4] Id. at 63054.

[5] See HUD Comments, 81 CFR 63069 which favorably compares Title VII authorities as appropriate to Fair Housing objectives. "The principle of liability codified in § 100.7(a)(1)(iii) of this final rule is consistent with these Title VII authorities and, in HUD's view, appropriately serves the Fair Housing Act's parallel antidiscrimination objectives in the housing context. In sum, the proposed rule and this final rule reflect HUD's considered judgment, consistent with prevailing precedent and EEOC regulations, that a **housing provider (including a homeowner's association)** or property manager is liable under the Act for negligently failing to take corrective action against a third-party harasser when the provider or manager knew or should have known of the harassment and had the power to end it." (Emphasis added).

[6] 24 C.F.R. § 100.400 identified generally unlawful conduct, including the following, that could be alleged as hostile environment harassment:
(2) Threatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons, or of visitors or associates of such persons.
(4) Intimidating or threatening any person because that person is engaging in activities designed to make other persons aware of, or encouraging such other persons to exercise, rights granted or protected by this part.

[7] Id. at 63055.

[8] 955 F. Supp. 490 (1996).

[9] Id. at 494.

[10] 598 F.3d 938 (2010).

Quigley. The Court stated, “[w]e emphasize that Winter subjected Quigley to these unwanted interactions in her own home, a place where Quigley was entitled to feel safe and secure and need not flee, which makes Winter's conduct even more egregious.”[11]

From this line of cases, HUD sought to revise its regulations in 2016 to specifically address *quid pro quo* and hostile environment harassment in housing. HUD had determined that the protection of persons in their home from hostile environment and quid pro quo harassment to be of critical importance in the enforcement and purpose of fair housing. Through the Final Rule, HUD sought to provide specific guidelines to evaluate and adjudicate hostile environment harassment claims in the housing context.

The importance of the Final Rule is that it creates “legally binding rights and obligations of the agency and the public.”[12] The courts have recognized giving deference to agency rules in certain instances. Known as the *Chevron* deference,[13] courts defer to an agency’s interpretation when it has the authority to formulate policy and make rules, and such policy or rule represents a permissible construction of the statute. As stated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al*: "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[14]

Direct and Vicarious Liability

Direct and vicarious liability of common interest community associations for discrimination is not a new concept nor did it first arise with the Final Rule.[15] As set forth in the Final Rule, a person is

[11] Id. at 947.

[12] Retrieved March 18, 2021. https://www.hud.gov/program_offices/general_counsel/Rulemaking -101

[13] The *Chevron* deference is not absolute and has been found not to apply to the scope of judicial review in certain matters. *See Smith v. Berryhill*, 139 S. Ct. 1765, 1778 (2019) stating “Chevron deference “‘is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”” *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015). The scope of judicial review, meanwhile, is hardly the kind of question that the Court presumes that Congress implicitly delegated to an agency.”

[14] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al*, 467 U.S. 837 (1984).

[15] Courts have analyzed housing cases alleging harassment using the same evaluation used in Title VII cases. *See Beliveau v. Caras*, 873 F. Supp. 1393 (C.D. Cal. 1995) (Quoting *Honce v. Vigil,* 1 F.3d 1085 (10th Cir.1993), “Applied to housing, a claim is actionable when the offensive behavior unreasonably interferes with use and enjoyment of the premises. The harassment must be `sufficiently severe or pervasive' to alter the conditions of the housing arrangement ... The offensive acts need not be purely sexual; it is sufficient that they would not have happened but for claimant's gender.” *See Shellhammer v. Lewallen,* Fair Hous. Fair Lend. Rep. (P-H) ¶ 15,472 (W.D.Ohio Nov. 22, 1983) ((“Hostile environment harassment based on sex recognized as a cognizable claim of discrimination in housing. Court adapted the elements of sexual harassment in employment to housing discrimination finding that it requires five elements: 1. Membership in the protected group. 2. Being subjected to unwelcome and extensive sexual harassment, in the form of sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, which has not been solicited or desired by the plaintiff, and which is viewed as undesirable or offensive. 3. The

directly liable for (i) his or her own conduct, (ii) for failing to take prompt action to correct and end discriminatory conduct by the person's agent or employee; and (iii) for failing to take prompt action to correct and end discriminatory housing practice by a third-party when the person knew or should have known of the behavior and has the authority to correct it.[16] Vicarious liability applies to a person if an employee or agent engages in discriminatory conduct regardless of whether the person knows or should have known of the conduct.

The Final Rule codifies court rulings on direct and vicarious liability. When we receive a complaint or have knowledge of a dispute between neighbors that involves allegations of statements or conduct that are discriminatory in nature, we cannot assume that this is a dispute that does not involve the common interest community association. If the required elements of a hostile environment harassment claim exist under 21 CFR 100.7(a)(1)(iii), the common interest community association may have direct liability if it fails to take any action. To allege a cognizable direct liability claim for hostile environment harassment against a common interest community association, the common interest community association must have the authority to correct and end the behavior, and it must know or should have known of the discriminatory conduct.

The case that we are most familiar with in establishing direct liability for a common interest community association is *Reeves v. Carrollsburg Condo. Unit Owners Ass'n.*[17] The facts in *Reeves* are particularly shocking and egregious. Ms. Reeves sued the Association for the harassing conduct of another resident when the Association failed to take any action on her complaint. Mr. Schongalla, a resident, harassed Ms. Reeves by making sexist and racist slurs, threatening gestures, and threats to rape and kill her.[18] Ms. Reeves reported the abuse to the Association. The Association wrote letters

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harassment was based upon sex; i.e., but for the plaintiff's gender, the harassment would not have occurred. 4. The harassment makes continued tenancy burdensome and significantly less desirable than if the harassment were not occurring, and 5. If vicarious liability is asserted, the plaintiff must show that the owner knew or should have known about the particular harassment and failed to remediate the situation promptly."))

[16] 24 C.F.R. § 100.7 Liability for discriminatory housing practices. (a) Direct liability. (1) A person is directly liable for: (i) The person's own conduct that results in a discriminatory housing practice. (ii) Failing to take prompt action to correct and end a discriminatory housing practice by that person's employee or agent, where the person knew or should have known of the discriminatory conduct. (iii) Failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it. The power to take prompt action to correct and end a discriminatory housing practice by a third-party depends upon the extent of the person's control or any other legal responsibility the person may have with respect to the conduct of such third party. (2) For purposes of determining liability under paragraphs (a)(1)(ii) and (iii) of this section, prompt action to correct and end the discriminatory housing practice may not include any action that penalizes or harms the aggrieved person, such as eviction of the aggrieved person. (b) Vicarious liability. A person is vicariously liable for a discriminatory housing practice by the person's agent or employee, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice, consistent with agency law.

[17] No. 96-2495, 1997 WL 1877201, at 6 (D.D.C. Dec. 18, 1997).

[18] "In August 1993, Schongalla left a note for Reeves at the front desk of their building. Among other things, it said, "See you in the backyard – hanging from a tree. Schongalla pleaded guilty to a charge of making threats and was placed on probation for a year. In return, prosecutors dropped 18 other charges against him stemming from incidents involving Reeves and another black resident. In an interview this week, Schongalla said he regretted writing the note, which he called as an act of stupidity. "It was a mistake," he said. Reeves said the episode left her desperate to move. She rented an apartment but couldn't afford two places. She persuaded the condominium association to buy her unit in 1995, but the association backed out. So she sued. In his deposition, Schongalla was asked whether he considers himself ethnically biased. "I do," he replied. "I have had enough blacks,

to Mr. Schongalla but he continued to harass Ms. Reeves. Ms. Reeves requested that the Association purchase her condominium unit so that she could move away from Mr. Schongalla. The Association agreed to the purchase but then failed to close on the transaction for more than 2 years. The Association failed to take any other action.

The Court relied on cases in other jurisdictions that had found for plaintiffs on allegations of hostile environment harassment in housing and noted the findings of sexual harassment in Title VII cases. The Court specifically found that sexual harassment is an actionable claim in a housing complaint, and further found that the plaintiff had presented a *prima facie* case against the Association for discrimination because it failed to take action against Mr. Schongalla when it had the authority to do so. The Bylaws for the condominium authorized the Association to take action to stop conduct that was against the law, and further stated that violations of local or federal law constituted violations of the Bylaws. Based on the Courts ruling, the parties subsequently settled the matter with the Association purchasing Ms. Reeves unit for $52,000 and making a payment of $550,000 to her for the emotional injuries she suffered.[19]

Additional cases have followed that have found hostile environment harassment in housing based on other discriminatory factors. The Court in *Neudecker v. Boisclair Corporation*,[20] addressed hostile environment harassment based on disability. Mr. Neudecker lived in an apartment owned by Boisclair. Mr. Neudecker filed a complaint against Boisclair for discrimination based on his disability of obsessive-compulsive disorder. The conduct attributed to Boisclair included an employee releasing medical information about Mr. Neudecker, the children of Boisclair employees harassing and targeting Mr. Neudecker verbally and physically based on his disability, false claims by Boisclair employees against him, and seven threats of eviction.[21] The harassment against Mr. Neudecker occurred over an almost 20-year period. Mr. Neudecker's mental and physical health deteriorated as a result.[22] The Court ruled that the disability-based harassment is actionable under the Fair Housing Act basing the ruling on other court decisions that found sexual harassment actionable in the context of housing.

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enough aggressive feminist women and enough aggressive Jews for two lifetimes."" *See*, https://www.washingtonpost.com/archive/politics/1998/06/10/dc-condo-owners-to-pay-for-members-racial-insults/198e1599-166b-4ba7-847f-33e32df43076/

[19] *See*, https://www.washingtonpost.com/archive/politics/1998/06/10/dc-condo-owners-to-pay-for-members-racial-insults/198e1599-166b-4ba7-847f-33e32df43076/

[20] 351 F.3d 361 (8th Cir. 2003).

[21] Upon remand to the U.S. District Court for the District of Minnesota, the factual recitation of the Court stated "Neudecker alleges that at unspecified frequencies during the course of his tenancy, other residents, including children of Boisclair managers, harassed him by making unwanted and repeated telephone calls to him; ringing his doorbell or knocking on his door and then running away; making offensive gestures; calling him names such as "psycho"; posting a threatening note on his door signed "The Demon that will haunt you" (the Demon note); shining and holding flashlights on him; and peeking into his window." *See Neudecker v. Boisclair Corporation,* Civil No. 02-4099 (JNE-JGL), (D.Minn. 2005). Interestingly, the Court on remand found that the name-calling and demon note *could be* discriminatory based on Neudecker's disability, but that other conduct was not related to his disability. The Court found that Neudecker did not allege facts sufficient to establish that he satisfies the definition of disabled under the FHA. Second, Neudecker failed to allege any facts that could establish that Boisclair or its employees exhibited any animus against Neudecker because of his membership in a protected group. Therefore, the Court dismissed the claims.

[22] "The harassment and retaliation continued throughout Neudecker's tenancy at Penn Place and exacerbated his mental health problems, resulting "in alcohol and food abuse that caused damage to [his] liver, pancreas and other body systems."" Id. at 363.

Elements of Hostile Environment Harassment Claim

The Final Rule defines hostile environment harassment as "unwelcome conduct that is sufficiently severe or pervasive to interfere with the availability, sale, rental, or use or enjoyment of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision or enjoyment of services or facilities in connection with the sale or rental; or the availability, terms, or conditions of a residential real estate-related transaction."[23] It provides express guidance that "[h]ostile environment harassment does not require a change in the economic benefits, terms, or conditions of the dwelling or housing-related services or facilities, or of the residential real-estate transaction."[24] While common interest community associations are not involved in "residential real estate-related transactions" per se, the courts have found that the protections of the Fair Housing Act extend to post-acquisition matters, including, the use and enjoyment of a dwelling, and the provision or enjoyment of services or facilities. [25]

Fair housing investigative agencies and courts are provided with a non-exclusive list of factors that are to be considered in evaluating and adjudicating a hostile environment harassment housing claim. "Factors to be considered to determine whether hostile environment harassment exists include, but are not limited to, the nature of the conduct, the context in which the incident(s) occurred, the severity, scope, frequency, duration, and location of the conduct, and the relationships of the persons involved." [26] The harassment can be written, verbal, or other conduct and there is no requirement that it include physical contact. [27]

The Final Rule expressly provides that the aggrieved person does not have to suffer psychological or physical harm from the harassment, and a determination on whether the harassment is "sufficiently severe or pervasive" is determined from the perspective of a "reasonable person in the position of the aggrieved person."[28] The Final Rule imposes a totality of the circumstance standard which permits the investigating agency or court to look at all of the factors surrounding the claimed harassment.[29] Contrary to the analysis of sexual harassment under Title VII which requires conduct termed as "extreme" and requires "more than a few isolated incidents", a claim of hostile environment harassment can be raised based on a single, yet, severe incident of harassment.[30]

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[23] 24 CFR § 100.600(a)(2).

[24] Id.

[25] *See, e.g., Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327 (7th Cir. 2004) (a suit against a homeowners' association for allegations of religious discrimination); *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009) (allowing plaintiffs to proceed with religious discrimination claims against a homeowners' association under an intentional discrimination theory); *Savanna Club Worship Service, Inc. v. Savanna Club Homeowners' Association, Inc.*, 456 F.Supp.2d 1223 (2005) (""…the rights and privileges associated with membership within the community" are "part and parcel of the purchase of a home within a planned community" and "discriminatory conduct which deprives [members] of exercising those rights would be actionable un the FHA""); *Llanos v. Estate of Coehlo*, 24 F. Supp. 2d 1052, 1060 (E.D. Cal. 1998)(The community association's rules prohibiting children from using two of the community's pools were "facially discriminatory" because they "effectively confine[d] children to the family section and prohibit[d] them from enjoying the privileges accorded to adults living in the adult section.").

[26] 24 CFR § 100.600(a)(2)(i)(A).

[27] 24 CFR § 100.600(a)(2)(i)(B).

[28] Id.

[29] 24 CFR § 100.600(a)(2)(i).

[30] https://www.eeoc.gov/sexual-harassment. According to the EEOC website: "Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work

Hostile environment harassment in housing is viewed from the perception of a reasonable person in the position of the aggrieved person while harassment in the workplace is evaluated in a more objective manner.[31]

To proceed on a direct hostile environment harassment claim against a common interest community association a plaintiff must allege three elements:

1. a third-party created a hostile environment for the plaintiff;
2. the common interest community association knew or should have known about the conduct creating the hostile environment; and
3. the common interest community association failed to take prompt action to correct and end the harassment while having the power to do so.

The cited elements do not include any requirement that the plaintiff show the common interest community association acted with "animus." The concern about requiring "racial animus" on behalf of a housing provider was raised with HUD during the comment period. HUD responded that it did not agree that a housing provider's failure to act to correct third-party harassment must be motivated by a discriminatory intent or animus before the provider can be held liable for a Fair Housing Act violation.[32] HUD supported its position by stating that it "...considered its own experience in administering and enforcing the Fair Housing Act, the broad remedial purposes of the Act[,] . . . . the views of the EEOC regarding Title VII [and] relevant case law including the Supreme Court's recent ruling in *Texas Department of Community Affairs v. Inclusive Communities Project, Inc.*[33] holding that the Fair Housing Act is not limited to claims of intentional discrimination."[34]

Analysis of a Hostile Environment Harassment Complaint

The Final Rule has created a different standard for the analysis and evaluation of Title VIII housing claims as compared to Title VII employment claims of harassment. The first component in analyzing and evaluating a complaint received by the common interest community association is whether the complaint alleges that a third-party created a hostile environment for the complainant. To determine whether the complained of conduct has created a hostile environment it must be determined whether the complainant is in a protected class; whether the conduct was unwelcome; whether the conduct was related to the complainant's protected class; and whether the conduct was sufficiently severe or pervasive to alter the complainant's living conditions and to create an abusive

environment or when it results in an adverse employment decision (such as the victim being fired or demoted)." *See*, *LeGrand v. Area Resource for Community and Human Services*, 394 F.3d 1098, (8th Cir. 2005) ("Sexual harassment 'standards are demanding-to be actionable, conduct must be extreme and not merely rude or unpleasant.' " *Tuggle*, 348 F.3d at 720 (quoting *Alagna v. Smithville R-II Sch. Dist*., 324 F.3d 975, 980 (8th Cir.2003)). " 'More than a few isolated incidents are required,' and the alleged harassment must be 'so intimidating, offensive, or hostile that it poisoned the work environment.' " Id. (quoting *Scusa v. Nestle* U.S.A. Co., 181 F.3d 958, 967 (8th Cir.1999)). LeGrand must prove his workplace was "permeated with discriminatory intimidation, ridicule, and insult." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993).)" *See*, 24 CFR § 100.600(a)(2).

[31] *Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 993 (8th Cir. 2003) (Meriwether failed to demonstrate the unwelcome harassment was sufficiently severe or pervasive as to affect a term, condition, or privilege of employment by creating an ***objectively*** hostile or abusive environment (emphasis added)).

[32] 81 CFR at 63068-63069.

[33] 135 S. Ct. 2507 (2015) (Recognizing disparate impact as a cognizable claim under the Fair Housing Act.)

[34] 81 CFR at 63068.

environment.[35] This initial analysis may present possible evidentiary issues for determining what happened as it may be an event where there are only two parties with knowledge of the incident – the aggrieved person and the third-party who is alleged to have engaged in the discriminatory conduct. At this point in the investigation and analysis, the common interest community association may take the position that if the facts are not verifiable, it cannot or should not take any further action. The HUD comments in the Final Rule state: "If the housing provider has no information from which a reasonable person would conclude that one resident or a third-party was harassing another resident, the housing provider is not liable for failing to take action to correct and end the harassment."[36] However, it is recommended that the common interest community association should continue in its analysis and evaluation to address the alleged behavior as such continued investigation is arguably what a reasonable person would do. It is also a small step to take to avoid a fair housing complaint.

The second component is an analysis of whether the common interest community association has the power to correct and end the harassment.[37] Some of the pertinent questions to this analysis will include the location of the alleged conduct, whether the governing documents of the community address the alleged conduct, the authority of the common interest community association to adopt rules related to use of the common areas in the community (if the conduct occurred on common area), the enforcement capabilities of the common interest community association with respect to covenants, and the authority of the common interest community to address an owner or occupants failure to comply with the law.

The third component is determining how the common interest community association will investigate a claim, including who conducts such an investigation, and what types of questions are asked during the investigation. Suggested inquiries include: "… a fact-specific assessment of a variety of factors, including, but not limited to:

1. Nature of the conduct;
2. Context in which the conduct occurred;
3. Severity of the conduct;
4. Scope of the conduct;
5. Frequency of the conduct;[38]
6. Duration of the conduct;[39]
7. Location of the conduct;
8. Relationships of the persons involved.

Reasonable person standard: Evidence is to be evaluated from perspective of a reasonable person in the aggrieved person's position."[40]

The fourth component, after analysis and evaluation of the claim, is what corrective action is required of the common interest community association. The Final Rule provides us with some guidance on this issue broadly stating that the common interest community association must take effective

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[35] *See* FN 19, *supra*.

[36] 81 CFR at 63067.

[37] *See* FN 12, *supra*.

[38] Frequency of the conduct is relevant to the investigation however, hostile environment harassment can be based on a single, severe incident.

[39] Duration of the conduct is relevant to the investigation however, hostile environment harassment can be based on a single, severe incident.

[40] Retrieved December 30, 2020. https://files.hudexchange.info/resources/documents/National-Fair-Housing-Forum-Investigating-Complaints-of-Sexual-Harassment-in-Housing-Situations-Slides.pdf

action that ends the unwelcome conduct.[41] It provides that it is not necessary to take the action requested by the complainant, and that a verbal or written notice to the third-party regarding the conduct may be sufficient.[42] In response to a commenter who requested details on what type of corrective action would be acceptable, HUD responded "There is no one way that a housing provider must respond to complaints of third-party harassment…"[43] HUD's response included the following types of corrective action that may be appropriate to a complaint:

1. verbal and written warnings;
2. enforcing lease provisions to move, evict, or otherwise sanction tenants who harass or permit guests to harass;
3. issuing no trespass orders against guests; or
4. reporting conduct to the police.

In most instances, common interest community associations do not have the ability to evict or issue no trespass orders with respect to residents in the community, however, common interest community associations have the authority to enforce covenants, and often, to adopt and enforce rules and regulations for the community. This ability to enforce covenants and adopt rules and regulations related to the use of the property or common areas within a community is why a responsibility is placed on common interest community associations to address hostile environment harassment. It is imperative that the common interest community association is aware of the actions that it can take with respect to a claim of hostile environment harassment.

Writing a letter or talking to the third-party may be the starting point in addressing the third-party's behavior but it is not where the common interest community association's responsibility ends. There needs to be follow-up with the complainant to determine whether the unwelcome conduct has stopped.[44] If the conduct has continued, the common interest community has to determine the next steps it will take. What remedies does the common interest community association have to end the unwelcome conduct? A review of state law and the governing documents is necessary to determine whether fines or charges can be imposed or if rights to the use of common area may be suspended to "encourage" the third-party to cease in their conduct. If such action is not available to the common interest community association, or if the action does not end the unwelcome conduct, the common interest community association will have to determine whether to file a lawsuit seeking injunctive relief; whether the common interest community association facilitates mediation between the parties; or any other actions that may be taken to end the conduct.

Avoiding Hostile Environment Harassment Claims

Common interest community associations are not in a position to completely preclude discriminatory conduct by its residents. However, they are in a position to communicate with their residents on this issue and that may help to influence behavior within the community. Communications on non-discrimination and its importance to our communities should address the legal requirements of Fair

[41] 81 CFR at 63071.

[42] Id.

[43] Id.

[44] HUD's Comments: "While in some cases a single verbal reprimand by a housing provider may be sufficient to effectively end discriminatory harassment of one tenant by another, the housing provider should notify the victim that such action was taken, and it is advisable for the housing provider to document this action in its records. Additionally, the housing provider should follow up with the victim of the harassment after the corrective action is taken to ensure that it was effective. If the housing provider knows or should have known that the corrective action was ineffective, the provider has a responsibility to take additional corrective actions within its power. If, however, corrective action is effective in ending the discriminatory conduct, a housing provider is not required to take additional action simply because the victim believes further action should have been taken." Id at 63071.

Housing laws, and the importance of diversity in our communities. Educating board members and residents on the application of Fair Housing laws to common interest community associations, the penalties associated with a Fair Housing complaint, and the attendant costs of a lawsuit that will likely not be covered by the common interest community association's insurance policy can be persuasive in governing behavior. Discussing the importance of diversity in our communities, sensitivity to others, and encouraging a sense of community sets the tone for a community, and will hopefully, also have a positive effect on behavior.

Best Practices for Common Interest Community Associations

Common interest community associations should provide annual education and information to its board members and residents. This can be accomplished by providing board of director training, a presentation at the annual meeting, or an article in a newsletter or web posting. The presentation or written materials should include information on Fair Housing and how it applies to the common interest community setting. It should include some of the history of Fair Housing and the importance of diversity. There are numerous agencies that have helpful and informative material that can be used by common interest communities. Displaying the Fair Housing logo on common areas is a suggested practice as it provides a reminder to all that the common interest community association is committed to complying with Fair Housing.

Adopting a non-discrimination policy and providing it to all residents on an annual basis confirms the common interest community associations commitment to complying with all Fair Housing laws, and to the importance of having a diverse community and respecting each and every resident. It further permits the common interest community to include guidelines or standards on how a hostile environment or quid pro quo harassment complaint should be processed. Establishing clear guidelines and procedures assures that complainants are treated equally in any investigation or evaluation of their complaint.

Conclusion

Hate crimes and hostile environment harassment are plagues to our communities. Not only is there the potential for significant financial liability to the common interest community association, but there is major and permanent harm to the victim. There is also impact on the neighborhood. It affects the diversity and goodwill of a neighborhood, it discourages the willingness of residents to participate and volunteer in the community, and it deters whether someone wants to be part of the neighborhood. Understanding the importance of promptly responding to a hostile environment harassment claim, how to competently and effectively respond to any claims, and how to get this message to common interest community association board members will help to counteract the animus and upheaval that can occur in our communities.

HOA BOOKS AND RECORDS REQUESTS: CAN THEY REALLY WITHHOLD THAT?

By John C. Cowherd

John C. Cowherd is the property litigation attorney at Cowherd, PLC in the Washington D.C. area. He is a member of the Virginia State Bar Real Property Section with a focus on Northern Virginia clients. He has over 14 years of experience litigating and arbitrating community association, neighbor, construction, and real property disputes.

Homeowners frequently complain that their community association's leadership conducts business without adequately disclosing what they are doing. While the owners' rights and duties are defined in the governing instruments, the practical exercise of such rights often requires access to records kept by management. Virginia statutes require condominium and HOAs, with limited exception, to deliberate in previously announced, open meetings conducted in person or by videoconference. HOAs often decline to divulge records and correspondence to their members. Landowners have statutory rights to inspect books and records, as set forth in the Virginia Condominium Act, Property Owners Association Act, and Nonstock Corporation Act. The Condo Act and POAA provide broad access: "all books and records kept by or on behalf of the association shall be available for examination and copying." However, Va. Code § 55.1-1815's inspection rights are subject to enumerated exceptions and limitations.[1] Management frequently asserts such exceptions as grounds to withhold certain records from review. In this article, I will examine the scope of those statutory exceptions.

Proper Purpose. Subsection (B) requires that the request be, "for a proper purpose related to his membership in the association."[2] What is a "proper purpose?" Is the manager allowed to object on the grounds that they do not like the owner's motive in trying to discern what the HOA is doing with the assessment money, the maintenance obligations, and architectural controls? I don't think that's what this means. To define "proper purposes," one ought not look to a subjective standard, but rather the declaration of covenants, which functions as the "contract" between the lot owners and the board.[3] Looking to the rights and duties of the parties under the governing instruments and applicable law provides a context for the relevance of a particular request. A request submitted in good faith can be tied to a proper purpose.

Member in Good Standing. The statutes allow HOAs to resist books and records requests on the grounds that the member is not in good standing.[4] The POAA doesn't define what "good standing" means. Suppose the HOA sends out a notice stating that the owner hasn't paid an assessment or is in violation of the covenants. The owner responds with a books and records request relating to disputed issues. The HOA then refuses to produce the documents, asserting that the owner is in violation. Few governing instruments define "in good standing." However, if the HOA and owner are in a dispute where one or both sides are accusing the other of violating the instruments, it is incumbent upon the HOA to answer questions and provide documentation to substantiate the alleged violation. The "good standing" limitation is inappropriate where the request concerns the alleged violation. If the HOA is using a debt collector or law firm to collect an assessment, the federal Fair Debt Collection Practices Act allows the owner to request, independent of limitations under state

[1] Analogous rules for condominiums are at Va. Code § 55.1-1945.

[2] Va. Code § 55.1-1815(B)(POAA) &Va. Code § 55.1-1945(B)(Condo Act).

[3] The Supreme Court has held that the relationship between a community association and its members is "contractual" in nature. *Unit Owners Ass'n of Buildamerica-1 Condo. v. Gillman* 223 Va. 752, 766 (1982) & *White v. Boundary Ass'n, Inc.,* 271 Va. 50, 55 (2006).

[4] Va. Code § 55.1-1815(B)(POAA) & Va. Code § 55.1-1945(B)(Condo Act).

law, that the law firm or collector "validate" the debt.[5] This pauses the debt collection activity during the verification process.

Personnel Matters. Subsection (C)(1) allows HOAs to deny requests for records pertaining to "personnel matters relating to specific, identified persons."[6] Generally speaking, employers are not allowed to divulge employee files to shareholders or customers. In 1992, the Supreme Court of Virginia considered *Grillo v. Montebello Condominium,* where a unit owner sought disclosure of the salaries of certain employees under an older (and since revised) version of Va. Code § 55.1-1945.[7] The court found the statute to be clear and unambiguous, rejecting the association's argument that because the statute did not specifically allow disclosure of salary information, such records could not be obtained. The specific amounts paid by the association to identified employees were, "records of the receipts and expenditures" of the condominium. Montebello's board had adopted a resolution excluding employee compensation figures from the books and records inspection. The court ruled that a condominium board could not abrogate an owner's statutory rights by adopting a contrary policy resolution.[8]

Contracts in Negotiation. Subsection (C)(2) allows HOAs to withhold, "Contracts, leases and other commercial transactions to purchase or provide goods or services, currently in or under negotiation."[9] HOAs are continually making, renewing, or cancelling contracts with managers, vendors, and contractors. To qualify as a "property owners association" under law, the HOA must be obligated to maintain common areas.[10] Written contracts effectuating such duties pertain to community-wide interests. Many contracts are renegotiated every year or two. A "plain meaning" reading of this section would limit it to contracts that are actively in negotiation. Otherwise, a vendor could have a friend in the community use a books and records request to interfere with the board's deliberation regarding a contract.

Pending or Probable Litigation. Books or records concerning pending or probable litigation may be redacted or withheld pursuant to (C)(3).[11] The POAA defines "probable litigation" as "those instances where there has been a specific threat of litigation from a person." When a dispute between the HOA and an owner, vendor or other party rises to active or threatened litigation, this may be of general interest to the community. If the HOA mismanages a common area, resulting in flooding on an owner's lot, documents may reveal its causes. The lot owner may threaten litigation if the HOA refuses to abate the stormwater diversion. Nothing in this subsection suggests that it applies to the underlying facts of the case. When HOAs are sued, some presidents like to communicate with their members about the lawsuit to present their own views.

Communications with Legal Counsel. The HOA's attorney answers to the board. Many owners mistakenly believe the attorney working for the association ought to answer to the members at

[5] 15 U.S.C. § 1692(g).

[6] Va. Code § 55.1-1815(C)(1)(POAA) & Va. Code § 55.1-1945(C)(1)(Condo Act).

[7] *Grillo v. Montebello Condo. Unit Owners Ass'n*, 243 Va. 475 (1992)(Hassell, J.).

[8] *Id*., 477-78.

[9] Va. Code § 55.1-1815(C)(2)(POAA) & Va. Code § 55.1-1945(C)(2)(Condo Act).

[10] *Shepherd v. Conde*, 293 Va. 274, 282 (2017); Va. Code § 55.1-1800 & § 55.1-1801.

[11] Va. Code § 55.1-1815(C)(3)(POAA) & Va. Code § 55.1-1945(C)(3)(Condo Act).

large.[12] However, it's important that the board be able to obtain legal advice confidentially.[13] Otherwise, their ability to comply with state law and the governing instruments could be impaired.

Individual Lot Owner or Member Files. In my opinion, subsection (C)(9) is frequently used in an overbroad fashion.[14] HOAs keep files related to their owners for purposes of collecting assessments, architectural applications, covenant violations, parking, and common area privileges. Lot owners can usually easily access files pertaining to their own lots, including architectural applications made by their predecessors. HOAs conduct email correspondence with lot owners about a variety of matters. Disputes among lot owners is a recurring concern. The "member files" exception is controversial when it comes to architectural controls and notices of violation. In many HOA governing instruments, the purpose of the restrictive covenants is to maintain architectural uniformity, keep the community looking nice, and handle things such as easements. These stated concerns made a part of the "contractual" relationship are by their very nature a "public" or "community-wide" concern. Easements reflected on the subdivision plat that affect various lots are often treated as common areas or at least affect the rights of a group of homes. If a neighbor is using their property in a way that constitutes a nuisance to an adjoining lot, then it is useful for the affected owner to know whether the changes made by the offending owner were consistent with any decided architectural applications. If a condominium manager refuses to give an owner authorization to lease a unit because that would result in too many rental units in the development, should the manager be required to disclose all the records pertaining to rentals of units when all of them concern individually owned properties? Almost everything that is regulated by the HOA pursuant to the declaration is a matter of both personal and community concern. For purposes of Va. Code § 55.1-1815(C)(9), what does "member files" mean? There are instances where disclosure of certain HOA records by other owners could lead to harassment. Some documents legitimately are withheld pursuant to this statute. However, the approach shown in the *Grillo* case for employee matters may be analogous here for owners' files.

Timing and Costs. The statutes impose some housekeeping limitations, such as giving the association a number of days in which to respond, limiting inspection to normal business hours, and charging copy work fees to reproduce records.[15] The statutes allow the HOA to charge not only for copies to include "materials and labor, not to exceed the actual costs of such materials and labor." Many HOAs have a resolution establishing a cost schedule.

Rules of Statutory Construction. The aforesaid exceptions to the scope of generally "discoverable" materials are a source of confusion. However, there are helpful judicial doctrines of statutory construction. Enactments constituting exceptions to a well-defined statutory policy are given strict construction.[16] For example, the principle of general disclosure in freedom of information statutes is construed broadly and courts generally construe FOIA exceptions narrowly.[17] An exception ought to be construed in the context of the statute as a whole. Virginia courts interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal. A statute is not to be construed by singling out a particular phrase.[18] The POAA and Condominium Act include

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[12] *Batt v. Manchester Oaks Homeowners Ass'n*, 80 Va. Cir. 502 (Fairfax July 6, 2010)(Ney, J.)(declining to extend the fiduciary-beneficiary exception to attorney-client privilege in the HOA context) *affirmed in part and reversed in part, on other grounds by Manchester Oaks HOA v. Batt*, 284 Va. 409 (2012).

[13] Va. Code § 55.1-1815(C)(5)(POAA) & Va. Code § 55.1-1945(C)(5)(Condo Act).

[14] Va. Code § 55.1-1815(C)(9)(POAA) & Va. Code § 55.1-1945(C)(9)(Condo Act).

[15] Va. Code § 55.1-1815(E)(POAA) & Va. Code § 55.1-1945(E)(Condo Act).

[16] *Commonwealth v. Edwards*, 235 Va. 499, 506 (1988)(cite omitted).

[17] *Roanoke City School Bd. v. Times-World Corp.,* 226 Va. 185, 191 (1983).

[18] *Va. Electric & Power Co. v. Bd. of Supervisors of Prince William Co.,* 226 Va. 382, 388 (1983).

"open meeting" requirements that limit what the board can do outside of a properly noticed meetings that members can attend in person or online.[19] Information that ought to be handled in an "open" meeting ought not to be withheld from disclosure from a books and records request. In 1999, Mark Earley, Attorney General of Virginia issued a formal opinion that because the general purpose of the association books and records statutes is to promote openness and availability of information, a HOA could not withhold the disclosure of meeting minutes until after they are formally approved by the board at a subsequent meeting.[20] Because the POAA does not include draft minutes as an exception, a homeowner can obtain them through a books and records request.

Nonstock Corporation Act & Common Law. In addition to the POAA and Condominium Act, community associations incorporated under the Nonstock Corporation Act ("NSCA") must disclose certain materials upon member request.[21] Document inspection under the NSCA varies from the POAA or Condominium Act. The NSCA enumerates specific materials that can be inspected such as accounting records, member lists, articles of incorporation, bylaws, resolutions, annual meeting minutes, communications to members, and the names and addresses of directors.[22] In the 1957 case *Bank of Giles County v. Mason*, the Supreme Court of Virginia construed the statutory record inspection rights for stock corporations.[23] The court observed that the statutory record inspection rights affirmed common law rights preceding those amendments. The court observed that the common law right of inspection rests upon the proposition that those in charge of the corporations are merely the agents of the stockholders, who are the real owners.[24] At common law, a stockholder is entitled to inspect corporate records at a proper time and place and for a proper purpose. The right must be exercised in good faith and for a reasonable purpose germane to his interest as a stockholder. However, the right is not absolute and cannot be enforced in a detrimental way. In 2018, the Circuit Court of Greene County applied the holding of *Bank of Giles County v. Mason* in an incorporated HOA case.[25]

Express or Implied Covenants. Although state statutes regulate HOA and condominium matters, it is the governing instrument, and the declaration in particular, that function as the "contract" between the parties.[26] The covenants, articles of incorporation, or bylaws may contain specific rules about the making, keeping and disclosure of association books and records. The statutes ought to be read in conjunction with the governing instruments. Even where the declaration does not expressly require the board to disclose relevant documentation, it is possible that the recorded covenants imply such an obligation. The Supreme Court of Virginia has found legally enforceable requirements in covenants where the language may not be explicit but to hold otherwise would deny something necessarily implied by the words used.[27] The declaration may require that certain materials be provided because they concern community-wide concerns regarding the board's obligations. This is consistent with the court's observation in the *Bank of Giles County* case that the directors, as fiduciaries, are agents of the owners with respect to the "business" of a corporation and a properly purposed request ought not to be denied. This is analogous to a common situation in commercial leasing. Most commercial leases require the tenant to pay a percentage of the "common area

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[19] Va. Code § 55.1-1815 (POAA) & § 55.1-1949 (Condo Act)

[20] Mark L. Earley, 1999 Op. Atty Gen. Va. 164.

[21] Va. Code § 13.1-932, § 13.1-933, & § 13.1-934.

[22] Va. Code § 13.1-932.

[23] *Bank of Giles County v. Mason*, 199 Va. 176 (1957).

[24] *Id*., 181 (citation omitted).

[25] *Dogwood Valley Citizen's Ass'n v. Miller*, 99 Va. Cir. 479, 481 (Greene Co. Aug 28, 2018)(Durrer, J.).

[26] *Gillman,* 223 Va. at 766 & *White,* 271 Va. at 55.

[27] *Friedberg v. Riverpoint Bldg. Committee*, 218 Va. 659, 665 (1977).

maintenance" (CAM) for the commercial development. Landlords and tenants frequently get in disputes over CAM. Sometimes the lease expressly provides for the tenant to have a right to inspect the landlord's contracts, orders, bills, et cetera. pertaining to the disputed charges. In other instances, the lease imposes the obligation to pay, but is silent regarding the right to audit or inspect. The 2008 California appellate decision *McLain v. Octagon Plaza, LLC* is illustrative.[28] Kelly McLain signed a five-year lease with landlord Octagon Plaza, LLC to rent one of several retail shops in a commercial center. A dispute arose regarding CAM charges. McLain brought various causes of action, including a demand for an accounting of her share of CAM. McLain argued that the implied covenant required the landlord to substantiate its CAM charges. The appellate court decided that McLain was not entitled to dispute the need for the expenses or to audit the landlord's books generally. She was only entitled to disclosure of the documents supporting the landlord's itemized statement of charges for the limited purpose of verifying the accuracy of the statement. Under California law, when one-party exercises effective control over the records pertaining to a profit-sharing agreement, the implied covenant of good faith and fair dealing affords the other party the right to an accounting.[29] While not precedent in Virginia, the *McLain* case illustrates how common law principles may help construe real estate instruments.

Control over the creation, use, and dissemination of HOA and condominium records determines and delimits the practical exercise of property rights of the individual owners. To resolve an HOA dispute, one needs to know what one is looking for and how to resolve discrepancies between documents or what to conclude when a document is silent on a given question. Community associations create, amass and store large amounts of documents and information necessary to fulfill their legal duties. The exceptions and limitations on disclosure referenced in the statutes are frequently used in ways where it appears that management believes that the exceptions swallow up the general rule of disclosure. Sometimes an owner may try to abuse the books and records statutes, especially in acrimonious matters without lawyer involvement. There is scant case law interpreting the statutory books and records request rules. However, more general judicial doctrine may help attorneys construe the statutory exceptions in the context of the whole and the governing instruments. When it comes to amicably resolving disputes between HOAs and landowners, best practices call for the parties to make a good faith effort to resolve the matter without the necessity of litigation. To do this, it is necessary to properly understand the associations' duties when it comes to disclosing relevant information.

[28] *McLain v. Octagon Plaza, LLC,* 71 Cal. Rptr. 3d 885, 159 Cal. App. 4th 784 (Jan. 31, 2008).

[29] *McLain*, 71 Cal. Rptr. 3d at 902.

THE RECORDATION TAX EXEMPTION THAT YOU LIKELY NEVER KNEW EXISTED

By William L. Nusbaum

William L. Nusbaum is a shareholder at Williams Mullen, practicing in its Norfolk office. His practice focuses on commercial real estate, municipal bonds, economic development incentives, Commercial Property Assessed Clean Energy ("C-PACE") financing, and alcoholic beverage licensing. He graduated with an A.B. from Harvard College in 1977 and received his J.D. from the University of Virginia School of Law in 1980. A past Chair of both the Board of Governors of the Real Property Section of the Virginia State Bar and its Commercial Real Estate Committee, he now serves on the Boards of Directors of the Virginia Association for Commercial Real Estate ("VACRE") and the Hampton Roads Association for Commercial Real Estate ("HRACRE"), and as Secretary of HRACRE. *The author expresses his profound gratitude to his Williams Mullen bankruptcy partner, Jennifer McLain McLemore, for her assistance with the bankruptcy law aspects of this article.*

There is a full exemption from the Virginia grantor's tax and state and local recordation taxes available on certain deeds and deeds of trust, which you have probably never heard of – and for good reason. You will not find the exemption anywhere in Chapter 8 of Title 58.1 of the Virginia Code; in fact, the exemption does not appear anywhere in the entire Code of Virginia. Who knew? But when the time came last fall to record a first and a second deed of trust on a large commercial property (each deed of trust securing over $500,000,000 of principal), that largely unknown exemption saved a client a considerable sum (and probably ruined the day of a very disappointed Circuit Court Clerk). However, there's one drawback to being able to take advantage of the exemption – someone in the deal needs to be bankrupt!

11 U.S.C. § 1146(a) (formerly § 1146(c)[1] is the improbable home of this hidden exemption, nestled in the United States Bankruptcy Code. It provides, with brevity, "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." The phrase "an instrument of transfer" is broadly construed, and thus would include a bankrupt debtor's recordation of a deed of trust (transferring title to the deed of trust trustee). The reference to "a stamp tax or similar tax," of course, is similarly broadly construed to include Virginia's recordation taxes.

In a case which originated in the United States Bankruptcy Court for the Eastern District of Virginia, *NVR Homes, Inc. v. Clerks of the Circuit Court for Anne Arundel County, et al.* (*In re* NVR, LP), 189 F.3d 442 (4th Cir. 1999), the Fourth Circuit Court of Appeals considered a large residential real estate developer's claim against numerous Pennsylvania and Maryland local taxing authorities for the refund of transfer and recordation taxes paid on transfers the developer recorded pursuant to its reorganization plan, but which recordings occurred prior to the Bankruptcy Court's confirmation of the developer's plan. While the Fourth Circuit ruled against NVR, holding that Section 1146(c) did not extend NVR's exemption from "a stamp tax or similar tax" to transfers occurring outside of the plan confirmation process, the Court did confirm that Section 1146(c) of the Bankruptcy Code indeed exempted from recordation taxes transfers occurring in conjunction with the confirmation of the debtor's plan.

In the financing described above, the debtor's bankruptcy counsel went to great lengths to include in the Court order confirming the debtor's plan language detailing the proposed bankruptcy exit financing's terms and specifically invoking the Section 1146(a) exemption from recordation taxes. The front page of both Deeds of Trust bore the following "NOTE TO CLERK":

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[1] References herein to (a) or (c) depend on whether it arose before or after its recodification

> ***NOTE TO CLERK*: THIS DEED OF TRUST IS BEING RECORDED PURSUANT TO THE AUTHORITY AND APPROVAL OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF [X] BECAUSE THE GRANTOR IS ONE OF THE DEBTORS IN A CONFIRMED CHAPTER 11 CASE IN THAT BANKRUPTCY COURT, STYLED "IN RE [X], CHAPTER 11, CASE NO. [X]," WHICH, INTER ALIA, AUTHORIZED AND APPROVED THE CREATION, MODIFICATION, CONSOLIDATION, TERMINATION, REFINANCING AND/OR RECORDING OF ANY MORTGAGE, DEED OF TRUST, OR OTHER SECURITY INTEREST OR THE SECURING OF ADDITIONAL INDEBTEDNESS BY SUCH OR OTHER MEANS BY ANY DEBTOR, AND ANY SUCH ACTION (IMPLEMENTED IN THIS INSTANCE BY THIS [...] DEED OF TRUST) WAS SPECIFICALLY AUTHORIZED AND APPROVED IN THE CONFIRMATION ORDER OF SUCH CHAPTER 11 CASE BY THAT BANKRUPTCY COURT, DATED [X], 2020 (THE "CONFIRMATION ORDER"). FURTHER, THE CONFIRMED CHAPTER 11 PLAN AND THE CONFIRMATION ORDER SPECIFICALLY PROVIDE THAT ANY RECORDED DEED OF TRUST *SHALL NOT BE SUBJECT TO ANY* DOCUMENT RECORDING TAX, STAMP TAX, CONVEYANCE FEE, INTANGIBLES OR SIMILAR TAX, MORTGAGE TAX, REAL ESTATE TRANSFER TAX, MORTGAGE RECORDING TAX, UNIFORM COMMERCIAL CODE FILING OR RECORDING FEE, REGULATORY FILING OR RECORDING FEE OR OTHER SIMILAR TAX OR GOVERNMENTAL ASSESSMENT UNDER 11 U.S.C. SECTION 1146(a), AND PURSUANT TO THE CONFIRMATION ORDER, THE APPROPRIATE STATE OR LOCAL GOVERNMENTAL OFFICIALS OR AGENTS SHALL FOREGO THE COLLECTION OF ANY SUCH TAX OR GOVERNMENTAL ASSESSMENT AND ACCEPT FOR FILING AND RECORDATION ANY OF THE FOREGOING INSTRUMENTS OR OTHER DOCUMENTS WITHOUT THE PAYMENT OF ANY SUCH TAX, RECORDATION FEE OR GOVERNMENTAL ASSESSMENT. ACCORDINGLY, THIS FILING IS EXEMPT FROM VIRGINIA STATE RECORDATION TAX IN VA. CODE SECTION 58.1-803 AND ANY OTHER SIMILAR VIRGINIA TAXES UNDER THAT FEDERAL LAW.**
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> [Details marked [X] have been omitted from this article to preserve client confidentiality.]

Interestingly, the Virginia Tax Commissioner has issued two rulings further extending the reach of Bankruptcy Code § 1146(a). In PD 88-271, the taxpayer requested "a refund of state and local recordation taxes and the grantor's tax paid upon recording a deed which was pursuant to a disposition order confirmed by the U. S. Bankruptcy Court." The Commissioner noted that "the deed stated that it was pursuant to a plan of reorganization which had been confirmed by the U. S. Bankruptcy Court and cited the Bankruptcy case number and other relevant information. The deed also cited the code section under which it claimed an exemption as required by §17-59." (Va. Code § 17-59 has since been recodified at Va. Code § 17.1-223.) The Commissioner ruled that the Virginia grantor's tax and state and local recordation taxes were sufficiently like a "stamp tax" as to be covered by Section 1146(c), and then concluded with the most interesting portion of his ruling: "The federal exemption clearly applies to the transfer *and all documents to implement the transfer, not merely to the bankrupt party*. [Therefore,] *the deed in question may be recorded free of the state and local recordation tax as well as the state grantor's tax*." (emphasis added) Thus, the recordation tax exemption extended to the grantee of the deed, who was not a bankrupt debtor.

Emboldened by the Commissioner's generous interpretation in PD 88-271, the following year another creative taxpayer succeeded in pushing the envelope even further. In PD 89-352, the Virginia Tax Commissioner considered a taxpayer's request for "a refund of state and local recordation taxes paid upon recording a deed of trust. The Taxpayer purchased property from the debtor pursuant to a sale confirmed by the U. S. Bankruptcy Court. To obtain financing for the purchase, the Taxpayer executed a deed of trust with a financial institution, secured by the property purchased from the debtor." To the Commissioner's credit, he did not shy away from the implications of his ruling in PD 88-271 that "the federal exemption under 11 U.S.C.A. §1146(c) 'applies to the

transfer *and all documents to implement the transfer*, not merely to the bankrupt party' [Emphasis added]." Rather, the Commissioner held steadfast to his prior ruling, stating:

> The order of the bankruptcy court confirming the sale stated that the sale of the debtor's real property "is hereby ratified, confirmed and approved as per the terms of the said settlement sheet." The settlement sheet listed under Summary of Borrower's Transaction, line 202. "Principal amount of new loan(s)***** (the amount of the deed of trust). By confirming the sale as per the terms of the settlement sheet, the court implicitly confirmed this item, which represents the financing of the sale. The financing, obtained in this case through a deed of trust, was confirmed as part of the sale. Consequently, the deed of trust was entitled to an exemption from the recordation tax under 1146(c) as a document to implement the transfer.

So, somewhat amazingly, PD 89-352 extended the reach of 11 U.S.C. 1146(c) to allow a purchaser of property from a bankrupt debtor, in a transaction where the parties took care to ensure the order confirming the debtor's plan included details of the purchaser's financing, to claim the tax exemption for the purchaser's deed of trust.

To recap, the keys to claiming this arcane tax exemption are: (1) the transfer must occur after the debtor's plan has been confirmed by the Bankruptcy Court, and the transfer must follow the requirements set forth in the plan confirmation order; (2) the plan confirmation order must specifically invoke the § 1146(a) tax exemption; (3) if the § 1146(a) tax exemption is going to be claimed by any party other than the debtor, the extended details of the other party's transaction also need to be recited with specificity in the Bankruptcy Court's plan confirmation order; (4) the first page of the instrument being recorded must include a reference to 11 U.S.C. § 1146(a) to satisfy the requirement of Va. Code § 17.1-223.A.(iv) that (unless there's a cover sheet), "the laws of the United States or the Commonwealth under which any exemption from recordation taxes is claimed is clearly stated on the face of the writing"; and (5) although not statutorily mandated, including on the front page of the instrument to be recorded a detailed "Note to Clerk," specifying the foregoing compliance with all the bankruptcy requirements is highly recommended.

FIRPTA EXPLAINED[1]

By Kevin T. Pogoda

Kevin T. Pogoda serves as First Vice President and Virginia State Manager, Northern Division at Old Republic National Title Insurance Company. In his capacity as Virginia State Manager, Kevin regularly speaks as an instructor before various groups, including attorneys, real estate agents, title examiners and title settlement agents. Kevin is also a Past President of the Virginia Land Title Association and is the proud recipient of VLTA's Distinguished Service Award for 2017 and the 2021 VLTA Presidential Award for Service.

Enacted in 1980, the Foreign Investment in Real Property Tax Act (FIRPTA) requires foreign persons to pay U.S. income tax on gains they make from selling U.S. real estate. To explain FIRPTA comprehensively, we will discuss the following:

- The General Rule
- Exemptions to the General Rule
- Limitations on the Amount Required to be Withheld
- Some Special Rules
- Procedures for Withholding
- Delayed Reporting
- Liability of Agents and the Transferee
- FIRPTA and Title Insurance
- FIRPTA Checklist

The General Rule

The General Rule as set forth in FIRPTA is as follows:

> *Except as otherwise provided in this section, in the case of any disposition of a United States real property interest (as defined in section 897 (c)) by a foreign person, the transferee shall be required to deduct and withhold a tax equal to 15 percent of the amount realized on the disposition.*[2]

Let's pull out and define some of these terms:

- *United States real property interest* is an interest in real property (including an interest in a mine, well, or other natural deposit) located in the United States or the Virgin Islands.[3]
- *Foreign person* means any person other than a United States person.[4]
- *Transferee* means the person acquiring the United States real property interest (*i.e.,* the purchaser).[5] More specifically, *transferee* includes any person, foreign or domestic, that acquires a U.S. real property interest by purchase, exchange, gift, or any other transfer.[6]

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[1] The information presented herein represent the views of the author only and not those of Old Republic National Title Insurance Company. This information is provided for educational use only and may not be relied upon for legal advice or tax advice. Please consult with an attorney or CPA.

[2] 26 USC § 1445(a).

[3] 26 USC § 897(c).

[4] 26 USC § 1445(f)(3).

[5] 26 USC § 1445(f)(2).

[6] 26 CFR § 1.1445-1(g)(4).

- *Amount realized* is the contract sales price, not the amount of sales proceeds.[7] The fact that the seller may have no proceeds at all is irrelevant.

Putting it all together, the General Rule can be restated simply as follows:

> *Unless an exemption applies, the purchaser must withhold 15% of the contract sales price if the seller is a foreign person.*

Of course, the General Rule is not so simple. There are exemptions, limitations, and some special rules to consider—to which we now turn.

Exemptions to the General Rule

The General Rule for withholding tax does not apply if any one of several exemptions applies, only three of which are relevant to real estate transactions: (1) the transferor furnishes a nonforeign affidavit; (2) the transferee receives a qualifying statement from the IRS; and (3) the real property is a residence where the amount realized does not exceed $300,000.

(1) The transferor furnishes a nonforeign affidavit.

This is the most common exemption and requires the greatest amount of discussion. Remember that FIRPTA tax applies only to *foreign persons*, so if the transferor (*i.e.,* the seller) is not a foreign person within the meaning of the statute, then no tax need be withheld.

To apply, *the transferor furnishes to the transferee an affidavit by the transferor stating, under penalty of perjury, the transferor's United States taxpayer identification number and that the transferor is not a foreign person.*[8] This affidavit is a safe harbor to prove that the transferor is not a foreign person. A transferee can rely on other means to ascertain that the transferor is not a foreign person but may be subject to tax liability if he or she (the transferee) proves to be wrong.[9] For sample certifications provided by regulation[10] for both individual and entity transferors, see Appendix 1.

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[7] 26 CFR § 1.1445-1(g)(6). The *amount realized* is a little curious. In one place in the regulations, *amount realized* is defined as having 3 components: (1) the *cash paid, or to be paid* (*i.e.,* the cash the purchaser brings to closing); (2) the *fair market value of other property transferred, or to be transferred* (this is atypical in a real estate transaction—the purchaser brings cash to pay for the property, not *other property* like cattle or cars); and (3) the *outstanding amount of any liability assumed by the transferee or to which the U.S. real property interest is subject immediately before and after the transfer* (*i.e.,* the loan). 26 CFR § 1.1445-1(g)(5). Put simply, the *amount realized* is the cash the purchaser brings to closing plus the loan amount. Because of the transactional costs incidental to the closing (*e.g.,* loan fees and settlement fees), the *amount realized* would be slightly higher than the contract sales price—if we looked solely at 26 CFR § 1.1445-1(g)(5). And yet the CFR states immediately thereafter the following: *The contract price of a U.S. real property interest is the sum that is agreed to by the transferee and transferor as the total amount of consideration to be paid for the property. That amount will generally be equal to the amount realized by the transferor . . . .* 26 CFR § 1.1445-1(g)(6). This makes sense. If it were not so, if we were to look solely to the prior section and it's 3 components, the purchaser, by selecting an expensive loan, could increase the amount of withholding tax a foreign seller is required to pay. Consequently, the settlement agent should rely on the contract sales price for determining the amount of tax to withhold.

[8] 26 USC § 1445(b)(2).

[9] 26 CFR § 1.1445-2(b)(1).

[10] 26 CFR § 1.1445-2(b)(2)(iv).

The idea that the affidavit is a safe harbor for a transferee should not be overlooked. The statute regulations are phrased to allow the transferee to take the seller at his or her word.[11] That is to say, *there is no statutory duty to verify the substance of the affidavit—either on the part of the transferee or (by extension) the settlement agent administering this transaction.*

What is the substance of this affidavit? The answer to that question depends on whether we are talking about the nonforeign affidavit for *individuals* or the nonforeign affidavit for *entities*. Let's discuss each in turn.

The Nonforeign Affidavit for Individuals

On this affidavit, the individual transferor makes 3 simple assertions:

1. I am not a nonresident alien for purposes of U.S. income taxation;
2. My U.S. taxpayer identifying number [Social Security number] is ___________; and
3. My home address is: ________________.

Remember, *there is no duty in FIRPTA or its regulations for the transferee or settlement agent to prove any of these affirmations.* The transferor need not furnish proof that he or she is *not a nonresident alien* any more than he or she needs to prove that the social security number or home address provided is correct.

And yet for whatever reason, some settlement agents (and sometimes transferees) persist in wanting proof that the transferor is speaking the truth in this affidavit. So, for argument's sake, how does one prove that he or she is *not a nonresident alien*? Understanding this phrase is tricky because of the double negative.

Let's start with the definition of *alien*. An *alien* is any individual who is not a U.S. citizen or U.S. national. There are two kinds of aliens: *resident aliens* and *nonresident aliens*. At a minimum, we know that we are dealing with a *resident alien* if that person passes the *green card test* or the *substantial presence test*. Conversely, a *nonresident alien* (which is the subject of the affidavit) is an alien who has not passed both tests.[12]

The *green card test* is simple. An individual passes the green card test if he or she has an alien registration card, Form I-551, also known as a *green card*. For more detailed information on this test, see Appendix 2.

The *substantial presence test* is not so simple. See Appendix 3 for details. (A review of these materials in Appendix 3 will reveal that those who hold a visa are likely NOT to meet the substantial presence test. Or, to put it another way, those that hold certain visas, do NOT typically qualify as a *resident* alien, but a *nonresident* alien, and therefore CANNOT sign the nonforeign affidavit.)

As a practical matter, for those who insist on finding support for a seller's nonforeign affidavit, obtaining a copy of a seller's green card is feasible, but determining whether that seller passes the substantial presence test is well beyond the expertise of a typical settlement agent. Perhaps a compromise worth considering is to require the seller's CPA or tax attorney to issue an opinion letter that the seller meets the requirements of the substantial presence test or otherwise meets the

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[11] Of course, this reliance does have limitations. The transferee and settlement agent cannot, for example, turn a blind eye when the affidavit is known to be fraudulent. But the point here is that neither the transferee or the settlement agent has an independent duty to verify the veracity of the transferor.

[12] *See generally* "Taxation of Nonresident Aliens" at www.irs.gov.

requirements of a resident alien or U.S. Citizen or U.S. National—or simply that no FIRPTA withholding is due.

When attempting to corroborate the seller's nonforeign affidavit, it is tempting to think that if the seller has a social security number, we are "good"—no FIRPTA tax need be withheld. This is a mistake. Social security numbers can be issued to foreign persons, both resident and nonresident.[13] Having a social security number is not determinative—whether the seller signs the nonforeign affidavit is determinative.

In conclusion, what has been said before bears repeating here: *this nonforeign affidavit is a safe harbor to conclusively prove that the transferor is not a foreign person, and the transferee is entitled to rely on it.* A transferee can choose to rely on other means to prove that the transferor is not a foreign person but may be subject to tax liability if he or she proves to be wrong.[14]

The Nonforeign Affidavit for Entities

Remember the nonforeign affidavit comes in two flavors: one for individual sellers and one for entity sellers. We now turn to the latter, whereby the entity transferor makes the following assertions:

> 1. [Name of transferor] is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);
>
> 2. [Name of transferor] is not a disregarded entity as defined in §1.1445-2(b)(2)(iii);
>
> 3. [Name of transferor]'s U.S. employer identification number is ___; and
>
> 4. [Name of transferor]'s office address is _______.

The third and fourth assertions are straightforward and warrant no discussion. But the first and second assertions do.

With respect to the first assertion, note that *foreign* in this context means foreign to the United States. For example, if the seller is a corporation created in Canada, the seller cannot sign the nonforeign affidavit. The one exception to this rule is when a foreign corporation has made an election to be treated as a domestic corporation and attaches a copy of the acknowledgement of the election from the IRS to this affidavit.[15]

Note further that when it comes to these entities (corporations, partnerships, and trusts), if these entities are domestic entities (*i.e.,* created in the U.S.), *the citizenship status of the stockholders, partners, and beneficiaries, respectively, is irrelevant.* What makes an entity *foreign* is where the entity was created, not the citizenship status of the stockholders, partners, or beneficiaries of the entity. If the entity seller can certify the remaining elements of the nonforeign affidavit, the entity may sign the affidavit, and the transferee is entitled to rely upon it.

The keen observer will see that a popular entity is missing from the list in the first assertion: limited liability companies (LLCs). For that entity, we must turn our attention to the second assertion: [*Name of transferor] is not a disregarded entity as defined in §1.1445-2(b)(2)(iii).*

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[13] See IRS Publication 519, which discusses (among other things) SSN's for aliens—both resident and nonresident.

[14] 26 CFR § 1.1445-2(b)(1).

[15] 26 CFR § 1.1445-2(b)(2)(iii).

What is a *disregarded entity* within the meaning of this affidavit? At this point, the analysis becomes difficult. The regulation offered by the affidavit to define *disregarded entity* is a complex one leading to 26 CFR § 301.7701-3, which is even more complex—and lengthy. For those that want to walk down the difficult road of this analysis, see Appendix 4. For those that just want the answer, it can be summarized as follows:

- If a domestic LLC is a single-member LLC, then inquiry must be made as to how it has elected to be treated for tax purposes. Either it has elected to be taxed like a domestic corporation, or it is considered a disregarded entity by default.
    - If the former, then the single-member LLC may sign the nonforeign affidavit for entities, provided it can affirm the remaining elements of the affidavit. It is not a disregarded entity. It is treated like a domestic corporation. The citizenship of the single member is irrelevant.
    - If the latter, we must look to the citizenship of the single owner to determine whether FIRPTA withholding is due. That owner might be an individual or another entity, which will determine which version of the nonforeign affidavit should be signed, if applicable.
- If a domestic LLC is a multi-member LLC, then inquiry must be made as to how it has elected to be treated for tax purposes. Either it has elected to be taxed like a domestic corporation, or it is considered a partnership entity by default.
    - If the former, then the multi-member LLC may sign the nonforeign affidavit for entities, provided it can affirm the remaining elements of the affidavit. It is treated like a domestic corporation. It is not a disregarded entity. The citizenship of the members is irrelevant. These members may be individuals or entities.
    - If the latter, then the multi-member LLC may sign the nonforeign affidavit for entities, provided it can affirm the remaining elements of the affidavit. It is treated like a domestic partnership. FIRPTA withholding is administered by the entity; there is no duty to withhold imposed on the transferee. (See Appendix 5). It is not a disregarded entity. The citizenship of the members is irrelevant. These members may be individuals or entities.

Who Gets the Affidavit?

With either affidavit (individual or entity), the seller must provide this affidavit to the purchaser, thereby disclosing his or her taxpayer/employer identification number. Understandably, sellers have legitimate privacy concerns with this requirement. Fortunately, there is a procedure to fulfill this requirement without compromising a seller's privacy. FIRPTA permits the transferor to furnish the nonforeign affidavit to a *qualified substitute*, who then *furnishes a statement to the transferee stating, under penalty of perjury, that the qualified substitute has such affidavit in his possession.*[16] A *qualified substitute* is defined as *(A) the person (including any attorney or title company) responsible for closing the transaction, other than the transferor's agent, and (B) the transferee's agent.*[17]

Having discussed at great length the first exemption to the General Rule, we now turn our attention to the remaining two.

(2) The transferee receives a qualifying statement from the IRS.

Put simply, a *qualifying statement* means a statement by the IRS that the transferor either: (i) reached an agreement with the IRS as to the payment of any tax due under this section; (ii) is exempt from such tax; OR (iii) such tax has been satisfied or adequate security has been provided to cover

[16] 26 USC § 1445(b)(9).

[17] 26 USC § 1445(f)(6).

such liability.[18] The bases and procedures for obtaining such a qualifying statement from the IRS (also known as a *withholding certificate*) are set forth in 26 CFR § 1.445-3.[19] The IRS must process a request for a qualifying statement within 90 days of receiving the request.[20] (There does not appear to be any recourse for the taxpayer if the IRS fails to meet this timeline.)

Practically, this exemption becomes relevant for a transaction when a transferor balks at the idea of paying FIRPTA withholding—for whatever reason—or when the settlement agent is being put in the position of determining whether FIRPTA withholding is appropriate, which at times can be difficult or simply beyond the scope of the settlement agent's services or expertise. In such cases, why guess at the right answer? Simply request the IRS to determine whether FIRPTA withholding is due, and if so, how much.

While this seems like good advice—and it is—sometimes there is not enough time before closing to request such a certificate. In such cases, the parties may need to negotiate a later settlement date or agree to delayed reporting, discussed below under *Procedures for Withholding*.

(3) The real property is a residence where amount realized does not exceed $300,000.

This is the last of the exemptions. For this exemption to apply, two criteria must be met: (i) *the property is acquired by the transferee for use by him as a residence*, AND (ii) *the amount realized [i.e., the contract sales price] does not exceed $300,000.* [21] This exemption is only available when the transferee is an individual.[22]

With respect to the residency requirement, there is a common misunderstanding that the transferee must live in the property as his or her primary residence. This notion is false.

To establish the residency requirement, only one of several transferees need establish the subject property as his or her residence.[23] According to regulation, such transferee must have:

> *definite plans to reside at the property for at least 50 percent of the number of days that the property is used by any person during each of the first two 12-month periods following the date of the transfer. The number of days that the property will be vacant is not taken into account in determining the number of days such property is used by any person. A transferee shall be considered to reside at a property on any day on which a member of the transferee's family, as defined in section 267(c)(4), resides at the property. No form or other document need be filed with the Internal Revenue Service to establish a transferee's entitlement to rely upon [this] exception . . . .*[24]

The transferee's family includes brothers and sisters (whether by the whole or half-blood), spouse, ancestors, and lineal descendants.[25]

In plain English, the residency requirement is simply this: at the time of closing, the purchaser must intend that in Year 1 following the sale, the purchaser (or members of the purchaser's family) will

[18] 26 USC § 1445(b)(4).

[19] *See also* 26 CFR § 1.1445-6.

[20] 26 USC § 1445(c)(3)(B).

[21] 26 USC § 1445(b)(5).

[22] 26 CFR § 1.1445-2(d).

[23] 26 CFR § 1.1445-2(d).

[24] 26 CFR § 1.1445-2(d).

[25] 26 U.S.C. § 267(c)(4).

reside in the property at least 50% of the time it is used by anyone. The purchaser must intend the same for Year 2 as well. There is no duty of the purchaser to document these intentions or file any such form with the IRS. Likewise, there is no duty for the settlement agent to document such intentions, although some settlement agents may find it desirable to do so to foreclose later allegations that the settlement agent was negligent in not withholding FIRPTA tax.

Limitations on the Amount Required to be Withheld

Recall that the General Rule requires 15% withholding of the amount realized (i.e., the contract sales price). But there are 2 ways this withholding can be limited.

First, certain transactions qualify for a reduced rate of 10% withholding. To qualify, ALL the following criteria must be met:

- The transferee must use the property as a personal residence;
- The amount realized does not exceed $1,000,000; AND
- The $300,000 exception does not apply.[26]

Second, the amount to be withheld is also reduced when the subject property is owned jointly by foreign and non-foreign transferors:

> *The amount subject to withholding . . . shall be determined by allocating the amount realized from the transfer between (or among) such transferors based upon the capital contribution of each transferor with respect to the property and by aggregating the amounts allocated to any foreign person (or persons). For this purpose, a husband and wife will each be deemed to have contributed 50 percent of the aggregate capital contributed by such husband and wife.*[27]

In short, FIRPTA tax that is due may be allocated according to capital contribution, so if some of the transferors are foreign and others are U.S. citizens/nationals, then the total FIRPTA tax is lessened by apportionment.

To illustrate these concepts, suppose Ted and George are brothers selling property held as joint tenants. Ted is a foreigner; George is a U.S. citizen. Sales price is $400,000. Purchaser is an individual who intends to use the property as her personal residence. No exemption applies. 10% (not 15%) withholding is appropriate as a starting point. That amount is $40,000. But only one of them is a foreigner. Capital contribution between them is presumed 50/50 because joint tenancy creates that presumption. 50% of $40,000 is $20,000, the amount that should be withheld and sent to the IRS.

But suppose further when you (the settlement agent) tell Ted and George about this proposed withholding, they affirm that George (the U.S. citizen) made all the capital contributions; therefore, no FIRPTA tax is due. In support, they offer you an affidavit that George made all the capital contributions, as well as receipts that trace certain expenditures to George's separate account. Furthermore, they instruct you that George will get all the proceeds from the closing wired into his separate account. Do you agree to remove the $20,000 FIRPTA tax line-item off the settlement statement or keep it on?

[26] 26 USC § 1445(c)(4); 26 CFR § 1.1445-1(b)(2).

[27] 26 CFR § 1.1445-1(b)(3). The phrase *will each be deemed* seems to imply that this presumption is irrebuttable.

In response, a couple of thoughts may be helpful:

- Who gets the proceeds is irrelevant; who made the capital contributions is dispositive. With only a little imagination one could envision after such a closing, George giving to Ted his share of the proceeds, saying, "We sure fooled them, didn't we?"
- In the end, Ted and George may be telling the truth, or they could be lying to save themselves $20,000, or they could just be mistaken, not remembering that Ted in fact made some capital contributions 10 years ago. Neither you (the settlement agent) nor the purchaser (upon whom is placed the duty to withhold) will ever know for sure. But what we do know for sure is that if FIRPTA tax is not withheld when it is due, the purchaser may be liable for all of it. In the end, it should be purchaser's choice whether to proceed without withholding based on sellers' representation—although a prudent settlement agent would be wise to document this choice in writing.
- If a purchaser did not want to rely on sellers' representation, other choices are available, such as obtaining a qualifying statement from the IRS and delaying closing if need be, or (if settlement is impending) agreeing to delayed reporting, discussed below. Perhaps another option worth considering is a statement from sellers' CPA or tax attorney, certifying that no FIRPTA withholding is due.

Some Special Rules

Not everything fits well into categories when discussing all the ins and outs of FIRPTA. Now we turn to the junk drawer of weird stuff that doesn't have a home anywhere else.

(1) Special rules where transferor is a domestic partnership, domestic trust, or domestic estate

Whenever the seller is a domestic partnership, domestic trust, or domestic estate, no FIRPTA tax need be withheld by the transferee. The seller entity need only sign the nonforeign entity affidavit, and the transferee may rely on it. The citizenship of the partners, beneficiaries, devisees or heirs is irrelevant. FIRPTA tax may in fact be due, but FIRPTA places the burden of withholding on the selling entity, not the transferee. For the legal analysis supporting these conclusions, see Appendix 5.

(2) Special rules where transferee is a governmental body

No withholding is required when the purchaser is the United States, a state or possession of the United States, a political subdivision thereof, or the District of Columbia.[28]

(3) Special rules relating to foreclosures

Foreclosures are not exempt from the ordinary withholding requirements of FIRPTA if the debtor being foreclosed upon is a *foreign person* within the meaning of the statute.[29] However, special rules, if followed, allow for the payment of a lesser amount that would ordinarily be due. This lesser amount, called the *alternative amount*, takes into consideration that the debtor in a foreclosure sale is unlikely to have gain on the disposition of the subject property.

The *alternative amount* is any amount that the trustee determines to accrue to the debtor after outstanding balance of the loan and applicable fees and costs are paid.[30] If this amount is zero (as it usually is), then no withholding is due. If, however, there is such an amount, the appropriate withholding (10% or 15%) must be paid. In any event, even if there were such an amount to be paid, it is likely to be less than withholding based upon the amount realized (i.e., contract sales price). To

[28] 26 CFR § 1.1445-2(d)(5).

[29] 26 CFR § 1.1445-2(d)(3)(i)(A).

[30] 26 CFR § 1.1445-2(d)(3)(i)(A)(2).

take advantage of these rules, a transferee must comply with strict notice requirements to the trustee and the IRS.[31]

But one may well ask: How is a purchaser at a foreclosure sale to know whether the debtor being foreclosed upon is a foreign person as defined by FIRPTA so that these rules can be taken advantage of? The answer is: He doesn't. But a purchaser should be mindful that foreclosure sales are subject to FIRPTA withholding so that if FIRPTA withholding is in fact due and the purchaser fails to withhold, the purchaser may be liable for all of it—just like any other transaction. And so, as the saying goes, *caveat emptor*—let the buyer beware.

Perhaps a buyer at a foreclosure sale will recognize that it is unlikely that the debtor is a foreign person because the name of the buyer "sounds American"—whatever that may mean. And that will be enough. Foreclosures, after all, present a certain amount of risk above a routine sale transaction.

A buyer at a foreclosure sale, seeking to address that risk, may ask the foreclosing lender to sign a nonforeign affidavit on behalf of the debtor, certifying that the debtor is *not a nonresident*. The foreclosing lender presumably would have access to the debtor's information and should be able to determine whether such individual is a foreigner subject to FIRPTA withholding.

It may be that the *$300,000 or Less/Residence Exemption*, discussed above, applies —again, let the buyer beware.

(4) Special rules relating to deeds in lieu

Deeds in lieu of foreclosure are subject to the ordinary withholding rules. However, no withholding is required if:

- The transferee is the only person with a security interest in the property;
- No cash or other property (other than incidental fees incurred with respect to the transfer) is paid, directly or indirectly, to any person with respect to the transfer; AND
- The notice requirement of § 1.1445-2(d)(3) is satisfied.[32]

(5) Special rules relating to short sales

FIRPTA applies to short sales just like any other transaction. Remember that withholding is based not on the proceeds due to the seller but on the amount realized (*i.e.,* the contract sales price). Given the nature of a short sale (the sales price being below the loan amount), it is likely that the seller has no taxable gain—the value of the property as sold likely being lower than when purchased. The solution, therefore, is to recognize this situation early and request from the IRS a qualifying statement (withholding certificate) verifying that no FIRPTA withholding is due.

(6) Special rules relating to gift transfers

As stated above, when property is owned jointly by foreign and non-foreign transferors, withholding tax is collected based on the foreign person's capital contribution. Recall the example above with Ted (a foreigner) and George (a U.S. citizen) selling property. Suppose they propose that Ted conveys to George his interest in the property with a Deed of Gift prior to closing so that George is the only transferor at your closing. Does that strategy lawfully skirt FIRPTA so that no withholding need be made?

The short answer to this question is that gift transfers are subject to FIRPTA, and as such, FIRPTA withholding may be due when Ted conveys his interest to George—regardless of what Ted and George

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[31] 26 CFR § 1.1445-2(d)(3)(i)&(ii).

[32] 26 CFR § 1.1445-2(d)(3)(i)(B).

may believe. It is true that in the subsequent sale transaction, where George conveys to a purchaser for value, no FIRPTA withholding would be due because George is a U.S. Citizen. But if you are the settlement agent aware of such re-titling prior to the transaction, ask yourself whether what Ted and George are doing sounds like tax evasion. If so, do you think that turning a blind eye to such an approach could be construed by the IRS as you being an accomplice to tax evasion?[33]

With so many other alternatives to addressing FIRPTA withholding issues, such as delayed reporting (discussed below), it seems prudent for the settlement agent to avoid strategies like the one suggested by Ted and George. For a more comprehensive analysis of gifts under FIRPTA, see Appendix 6.

Procedures for Withholding

The transferee must report and pay over any tax withheld by the 20th day after the *date of the transfer*.[34] In Virginia, the date of the transfer is the settlement date.[35] Use forms 8288 and 8288-A and the instructions thereto, all downloadable from the IRS website.[36]

When filling out these forms, it is important to remember that FIRPTA places the burden on the transferee (buyer) to be the withholding agent. Practically, however, the settlement agent will be holding the money and may act in accordance with the buyer's instructions.

Note on page 2 of the instructions *withholding agent* is defined as the buyer. Example 1 on page 6 is also instructive:

> ***Example 1.*** B, a corporation, purchases a U.S. real property interest from F, a foreign person. On settlement day, the settlement agent pays off existing loans, withholds 15% of the amount realized on the sale (after February 16, 2016), and disburses the remaining amount to F. B, not the agent, must complete Part I of Form 8288 and Form 8288-A.

See also instructions for Line 1:

> **Lines 1.** In Part I, enter the name, address, and identifying number of the buyer or other transferee responsible for withholding under section 1445(a). Do not enter the name, address, and identifying number of a title company, mortgage company, etc. unless it happens to be the actual buyer or transferee.

It seems that the instructions require the information to be entirely the buyer's, not the buyer's title/settlement company or the seller's title/settlement company. As a practical matter, however, the buyer will not be holding the money. More likely, it will be the buyer's agent holding the money on behalf of the buyer.

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[33] 26 USC § 7201 provides: *Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution*. According to 18 USC § 2(a): *Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.*

[34] 26 CFR § 1.1445-1(c)(1).

[35] According to page 3 of the instructions for filling out Form 8288, the *date of transfer* means the first date on which consideration is paid or a liability is assumed by the transferee. In Virginia, the buyer tenders money on the day of settlement and becomes liable for paying interest on the new loan on the day of settlement. Consequently, the date of transfer would be the day of settlement.

[36] 26 CFR § 1.1445-1(c).

Delayed Reporting

Delayed reporting is a great solution when the seller objects to remitting FIRPTA tax to the IRS and there is no time before closing to obtain a withholding certificate from the IRS to verify what, if any, FIRPTA tax is due.

Delayed reporting is possible if, prior to closing, either the transferor or the transferee applies for a withholding certificate (*i.e.,* a statement from the IRS that either no tax is due or some lesser tax is due).[37] If such application is made by the transferor, notice of the application must be furnished to the transferee.[38] *No particular form is required but the notice must set forth the name, address, and taxpayer identification number of the transferor, a brief description of the property which is the subject of the application, and the date the application was submitted to the [IRS]*.[39] The IRS has 90 days to respond to such a request after receipt thereof.[40] The transferee (or more practically, the settlement agent) has then 20 days from when the IRS sends the letter to report and pay over any tax that is due.[41]

A settlement agent should exercise caution, however, in utilizing this approach because if the IRS determines that this rule was used *for a principal purpose of delaying the transferee's payment to the IRS of the amount withheld*, then the transferee may be liable not only for the amount withheld, but also for interest and penalties as well.[42] *A principal purpose of delaying payment of the amount withheld shall be presumed if the transferee applies for a withholding certificate . . . based upon a determination of the transferor's maximum tax liability, and such liability is ultimately determined to be equal to 90 percent or more of the amount that was otherwise required to be withheld and paid over.*[43]

Sometimes, a practical problem arises with delayed reporting: the buyer's consent. A buyer may not want to take the risks that delayed reporting presents. For example, if the settlement agent (acting on behalf of the transferee) withholds the proper amount of tax but sends it to the IRS late, then the transferee will not be held liable for the tax, but may be held liable for the interest insofar as the payment is late.[44] Understandably, a transferee may not want to take this risk and simply instruct you as the settlement agent to send the money immediately after closing, so getting the buyer's approval for delayed reporting seems like an appropriate thing to consider.

What if the seller does not have a social security number or other taxpayer identification number? Does that disqualify a seller from requesting a withholding certificate or delayed reporting? The short answer is *no*. If the seller does not have a taxpayer identification number, he can apply for one. The

[37] 26 CFR § 1.1445-1(c)(2).

[38] 26 CFR § 1.1445-1(c)(3)(B).

[39] 26 CFR § 1.1445-1(c)(3)(B).

[40] 26 USC § 1445(c)(3)(B).

[41] 26 CFR § 1.1445-1(c)(2)(i).

[42] 26 CFR § 1.1445-1(c)(2)(ii).

[43] 26 CFR § 1.1445-1(c)(2)(ii)(B).

[44] How is lateness measured? Generally speaking, if FIRPTA tax was due at settlement and not paid timely, then the transferee is liable for the interest that accrues from the time from when it was due to when it was actually paid—either by the settlement agent or by the seller, such as when the seller pays the tax in his annual tax filing.

lack of such a number does not nullify the duty to pay the FIRPTA tax; the IRS simply cannot credit money back to the transferor without one.[45] The Instructions to these forms explain:

> *For a nonresident alien individual who is not eligible for an SSN, the identifying number is an IRS individual taxpayer identification number (ITIN). If the individual does not already have an ITIN, he or she should complete Forms 8288 and 8288-A and mail the forms along with any payment to the address shown under Where To File, earlier. In a separate package mail a completed Form W-7, Application for IRS Individual Taxpayer Identification Number, with supporting documentation and a copy of Forms 8288 and 8288-A to the IRS at the address given in the Form W-7 instructions.*

Liability of Agents and the Transferee

(1) Agents

If the transferor provides a false affidavit (*i.e.,* non-foreign certification), agents involved in the transaction may be liable for the withholding tax that should have been collected. This includes agents for the transferor, agents for the transferee, and the qualified substitute.[46] The settlement agent who closes the transaction falls within the scope of this rule. For purposes of this rule, an *agent* is any person who represents the transferor or transferee in any negotiation with another person (or another person's agent) relating to the transaction, or in settling the transaction.[47]

If any such agent has actual knowledge of the false affidavit, the requisite amount must still be withheld, and the agent must notify the transferee and the IRS that the affidavit is false.[48] This duty to notify extends after settlement has occurred.[49] If the agent fails to do so, the agent may be liable for the withholding tax, but in no event does the settlement agent's liability under FIRPTA exceed his or her compensation received for the subject transaction.[50]

(2) Transferee

Remember it is the *transferee* that has the duty to withhold the tax the transferor is liable to pay, according to the General Rule.[51] *A person that is required to deduct and withhold tax but fails to do so may be held liable for the payment of the tax and any applicable penalties and interest*.[52] In certain circumstances, civil and criminal penalties may also apply.[53]

[45] 26 CFR § 1.1445(c)(1).

[46] 26 USC § 1445(d).

[47] 26 CFR § 1.1445-4(f). Settlement officers and clerical personnel are excluded if they perform one or more of the following activities: (1) the receipt and disbursement of any portion of the consideration for the transaction; (2) the recording of any document in connection with the transaction; (3) typing, copying, and other clerical tasks; or (4) or the transmission or delivery of documents between the parties.

[48] 26 USC § 1445(d); 26 CFR § 1.1445-4(c) & (e).

[49] 26 USC § 1445-4(c).

[50] 26 USC § 1445(d); 26 CFR § 1.1445-4(e).

[51] 26 USC § 1445(a).

[52] 26 CFR § 1.1445-1(e)(1).

[53] 26 CFR § 1.1445-1(e)(2).

FIRPTA and Title Insurance

As has been noted from the beginning of this article, if FIRPTA tax is not withheld, the IRS can demand payment of the withholding from the transferee. Ultimately, this could result in a federal tax lien on the property:

> *If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.*[54]

Such a demand (and resulting lien) could only occur after the transfer of the subject property. Consequently, there would be no coverage under a loan or owner's policy because Exclusion 3(d) of those policies exclude from coverage:

> *Defects, liens, encumbrances, adverse claims, or other matters . . . attaching or created subsequent to Date of Policy.*

FIRPTA Checklist

To make sure nothing gets overlooked, consider using a checklist. See attached.

[54] 26 USC § 6321.

APPENDIX 1

SAMPLE CERTIFICATION: INDIVIDUAL TRANSFEROR

Section 1445 of the Internal Revenue Code provides that a transferee (buyer) of a U.S. real property interest must withhold tax if the transferor (seller) is a foreign person. To inform the transferee (buyer) that withholding of tax is not required upon my disposition of a U.S. real property interest, I, [*name of transferor*], hereby certify the following:

1. I am not a nonresident alien for purposes of U.S. income taxation;

2. My U.S. taxpayer identifying number [Social Security number] is ____; and

3. My home address is:

I understand that this certification may be disclosed to the Internal Revenue Service by the transferee and that any false statement I have made here could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct, and complete.

[Signature and Date]

SAMPLE CERTIFICATION: ENTITY TRANSFEROR

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. For U.S. tax purposes (including section 1445), the owner of a disregarded entity (which has legal title to a U.S. real property interest under local law) will be the transferor of the property and not the disregarded entity. To inform the transferee that withholding of tax is not required upon the disposition of a U.S. real property interest by [name of transferor] , the undersigned hereby certifies the following on behalf of [name of the transferor]:

1. [Name of transferor] is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);

2. [Name of transferor] is not a disregarded entity as defined in §1.1445-2(b)(2)(iii);

3. [Name of transferor]'s U.S. employer identification number is ___; and

4. [Name of transferor]'s office address is _______.

[Name of transferor] understands that this certification may be disclosed to the Internal Revenue Service by transferee and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct, and complete, and I further declare that I have authority to sign this document on behalf of [name of transferor].

[Signature(s) and date]

[Title(s)]

APPENDIX 2

ALIEN RESIDENCY—GREEN CARD TEST

You are a resident, for U.S. federal tax purposes, if you are a lawful permanent resident of the United States at any time during the calendar year. This is known as the *green card test*.

You are a lawful permanent resident of the United States, at any time, if you have been given the privilege, according to the immigration laws, of residing permanently in the United States as an immigrant. You generally have this status if the U.S. Citizenship and Immigration Services (USCIS) issued you an alien registration card, Form I-551, also known as a *green card*.

You continue to have U.S. resident status, under this test, unless:

- You voluntarily renounce and abandon this status in writing to the USCIS,
- Your immigrant status is administratively terminated by the USCIS, or
- Your immigrant status is judicially terminated by a U.S. federal court.

If you meet the green card test at any time during the calendar year, but do not meet the substantial presence test for that year, your residency starting date is the first day on which you are present in the United States as a Lawful Permanent Resident.

APPENDIX 3

ALIEN RESIDENCY—SUBSTANTIAL PRESENCE TEST

You will be considered a United States resident for tax purposes if you meet the *substantial presence test* for the calendar year. To meet this test, you must be physically present in the United States (U.S.) on at least:

1. 31 days during the current year, and
2. 183 days during the 3-year period that includes the current year and the 2 years immediately before that, counting:
   - All the days you were present in the current year, and
   - 1/3 of the days you were present in the first year before the current year, and
   - 1/6 of the days you were present in the second year before the current year.
3. **Example:**

You were physically present in the U.S. on 120 days in each of the years 2018, 2019 and 2020. To determine if you meet the substantial presence test for 2020, count the full 120 days of presence in 2020, 40 days in 2019 (1/3 of 120), and 20 days in 2018 (1/6 of 120). Since the total for the 3-year period is 180 days, you are not considered a resident under the substantial presence test: for 2020.

4. **Days of Presence in the United States**

You are treated as present in the U.S. on any day you are physically present in the country, at any time during the day. However, there are exceptions to this rule. Do not count the following as days of presence in the U.S. for the substantial presence test:

- Days you commute to work in the U.S. from a residence in Canada or Mexico, if you regularly commute from Canada or Mexico.
- Days you are in the U.S. for less than 24 hours, when you are in transit between two places outside the United States.
- Days you are in the U.S. as a crew member of a foreign vessel.
- Days you are unable to leave the U.S. because of a medical condition that develops while you are in the United States.
- Days you are an exempt individual (see below).

For details on days excluded from the substantial presence test for other than exempt individuals, refer to Publication 519, U.S. Tax Guide for Aliens.

The term United States (U.S.) includes the following areas:

- All 50 states and the District of Columbia.
- The territorial waters of the United States.
- The seabed and subsoil of those submarine areas that are adjacent to U.S. territorial waters and over which the United States has exclusive rights under international law to explore and exploit natural resources.

The term does not include U.S. territories or U.S. airspace.

5. **Exempt Individual**

Do not count days for which you are an exempt individual. The term "exempt individual" does **not** refer to someone exempt from U.S. tax, but to anyone in the following categories:

- An individual temporarily present in the U.S. as a foreign government-related individual under an "A" or "G" visa, other than individuals holding "A-3" or "G-5" class visas.
- A teacher or trainee temporarily present in the U.S. under a "J" or "Q" visa, who substantially complies with the requirements of the visa.
- A student temporarily present in the U.S. under an "F," "J," "M," or "Q" visa, who substantially complies with the requirements of the visa.
- A professional athlete temporarily in the U.S. to compete in a charitable sports event.

If you exclude days of presence in the U.S. for purposes of the substantial presence test because you were an exempt individual or were unable to leave the U.S. because of a medical condition or medical problem, you must include Form 8843, Statement for Exempt Individuals and Individuals With a Medical Condition, with your income tax return. If you do not have to file an income tax return, send Form 8843 to the address indicated in the instructions for Form 8843 by the due date for filing an income tax return.

If you do not timely file Form 8843, you cannot exclude the days you were present in the U.S. as an exempt individual or because of a medical condition that arose while you were in the U.S. This does not apply if you can show, by clear and convincing evidence that you took reasonable actions to become aware of the filing requirements and significant steps to comply with those requirements.

6. **Closer Connection Exception to the Substantial Presence Test**

Even if you met the substantial presence test you can still be treated as a nonresident alien if you qualify for one of the following exceptions:

1. The closer connection exception available to all aliens. Please refer to Closer Connection Exemption to the Substantial Presence Test.
2. The closer connection exception available only to students. Please refer to The Closer Connection Exception to the Substantial Presence Test for Foreign Students.

APPENDIX 4

LIMITED LIABILITY COMPANIES (LLCs)

The applicability of FIRPTA to LLCs depends on several factors. To begin the analysis, remember that with entities, unless another exemption applies, a settlement agent should utilize the entity nonforeign affidavit, which contains the following affirmations:

1. [Name of transferor] is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);

2. [Name of transferor] is not a disregarded entity as defined in §1.1445-2(b)(2)(iii);

3. [Name of transferor]'s U.S. employer identification number is ___; and

4. [Name of transferor]'s office address is _______.

Notice that the entity seller must be able to affirm that it is not a *disregarded entity*, and the affidavit provides a definition in 26 CFR § 1.1445-2(b)(2)(iii):

> *Disregarded entities.* A disregarded entity may not certify that it is the transferor of a U.S. real property interest, as the disregarded entity is not the transferor for U.S. tax purposes, including sections 897 and 1445. Rather, *the owner of the disregarded entity is treated as the transferor of property and must provide a certificate of non-foreign status to avoid withholding under section 1445. A disregarded entity for these purposes means an entity that is disregarded as an entity separate from its owner under § 301.7701-3* of this chapter, a qualified REIT subsidiary as defined in section 856(i), or a qualified subchapter S subsidiary under section 1361(b)(3)(B). Any domestic entity must include in its certification of non-foreign status with respect to the transfer a certification that it is not a disregarded entity. This paragraph (b)(2)(iii) and the sample certification provided in paragraph (b)(2)(iv)(B) of this section (to the extent it addresses disregarded entities) is applicable for dispositions occurring September 4, 2003.

Admittedly, there is a lot going on in this paragraph. But there are two simple takeaways relevant to limited liability companies, emphasized in italics: (1) the owner of a disregarded entity is considered the transferor for FIRPTA analysis and must provide the nonforeign affidavit, and (2) a disregarded entity includes an entity that is disregarded under 26 CFR § 301.7701-3.

So let's turn our attention to 26 CFR § 301.7701-3. It is lengthy and complex. It states that if an entity is not otherwise classified as a corporation, it is an *eligible entity*.[55] An LLC is not otherwise classified as a corporation, so it is an *eligible entity*.

An eligible entity with at least two members can elect to be classified as a corporation or a partnership.[56] If it fails to make an election, it is considered a partnership by default.[57] An eligible entity with a single owner can elect to be classified as a corporation or to be disregarded as an entity separate from its owner.[58] If it fails to make an election, it is a disregarded entity by default,

[55] 26 CFR § 301.7701-3(a).

[56] *Id.*

[57] 26 CFR § 301.7701-3(a)&(b).

[58] 26 CFR § 301.7701-3(a).

and we must look to the citizenship of its single owner, whether that single owner is an individual or another entity.[59]

[59] 26 CFR § 301.7701-3(a)&(b).

APPENDIX 5

SPECIAL RULES WHERE TRANSFEROR IS A DOMESTIC PARTNERSHIP, DOMESTIC TRUST OR DOMESTIC ESTATE

Put simply, when one of these enumerated entities is the seller, no FIRPTA tax need be withheld by the transferee. The seller entity need only sign the nonforeign entity affidavit, and the transferee may rely on it. The citizenship of the owners/members of such entities is irrelevant. FIRPTA tax may in fact be due, but FIRPTA places the burden of such reporting on the selling entity, not the transferee.

As stated in 26 USC § 1445(e)(1):

> ***(e) Special rules relating to distributions, etc., by corporations, partnerships, trusts, or estates***
>
> ***(1) Certain domestic partnerships, trusts, and estates*** *In the case of any disposition of a United States real property interest as defined in section 897(c) (other than a disposition described in paragraph (4) or (5)) by a domestic partnership, domestic trust, or domestic estate, such partnership, the trustee of such trust, or the executor of such estate (as the case may be) shall be required to deduct and withhold under subsection (a) a tax equal to 35 percent (or, to the extent provided in regulations, 20 percent) of the gain realized to the extent such gain—*
>
>> ***(A)*** *is allocable to a foreign person who is a partner or beneficiary of such partnership, trust, or estate, or*
>>
>> ***(B)*** *is allocable to a portion of the trust treated as owned by a foreign person under subpart E of part I of subchapter J.*

In order to determine that an interest holder in one of the above entities is not a foreign person, an entity or fiduciary may rely upon an affidavit of nonforeign status from the individual or entity interest holder. This is made clear by 26 CFR § 1.1445-5(c). This regulation is quite lengthy.

Remember that the general rule of FIRPTA places a burden on the *transferee* to withhold the applicable tax.[60] But when it comes to certain domestic partnerships, trusts, and estates, there is no burden on the transferee. Look at 26 USC § 1445(e)(1) above—the burden to withhold is on the partner, fiduciary or other representative of said domestic entity. This nuance is also articulated in 26 CFR § 1.1445-5(b)(1):

> *If tax is required to be withheld with respect to a* ***transfer of property*** *in accordance with the* ***rules*** *of this section, then no additional tax is required to be withheld by the* ***transferee*** *of the* ***property*** *with respect to that* ***transfer*** *pursuant to the* ***general rules*** *of section 1445(a) and* ***§ 1.1445-1****.*

This makes sense. We impose FIRPTA tax due from a foreign seller on a purchaser because after closing the foreign seller can go back to his or her home country, making it difficult for the IRS to reach such a seller. But the IRS can reach the purchaser of a U.S. property interest. Likewise, the IRS can reach a domestic partnership, trust or estate. Even when one or more interest holders of such an entity is a foreign person, the entity itself is domestic and can be reached by the IRS, thus making it unnecessary to impost a burden of withholding on the transferee.

[60] 26 USC § 1445(a).

APPENDIX 6

FIRPTA AND GIFT TRANSFERS

Are gift transfers exempt from FIRPTA withholding? At first blush, it may seem that gift transfers are exempt from FIRPTA withholding, but a closer examination of pertinent regulations reveal that they are not.

Recall the General Rule with its references to *transferor* and *transferee*. The definition of *transferor* includes gift transfers, being defined as *any person, foreign or domestic, that disposes of a U.S. real property interest by sale, exchange, gift, or any other transfer*.[61] Similarly, the definition of *transferee* is defined as *any person, foreign or domestic, that acquires a U.S. real property interest by purchase, exchange, gift, or any other transfer*.[62] If this is so, then in following the General Rule we would expect to withhold 10% or 15% of the amount realized on gift transfers like ordinary sales. What is the *amount realized* in a gift transfer? Practically, the regulations define *amount realized* as cash paid by the transferee plus liability assumed.[63] For a gift transfer, this must be zero—no cash is paid, and no liability is assumed. And if that is so, then no withholding should be required because 10% or 15% of zero is zero.

This reasoning is sound. In fact, in discussing the duty to withhold generally, the regulations state this reasoning explicitly:

> *If two or more persons are joint transferees of a U.S. real property interest, each such person is subject to the obligation to withhold. That obligation is fulfilled with respect to each such person if any one of them withholds and pays over the required amount in accordance with the rules of this section. If the amount realized . . . by the transferor is zero, then no withholding is required. For example, if a real property interest is transferred as a gift (i.e., the recipient does not assume any liabilities or furnish any other consideration to the transferor) then no withholding is required*.[64]

But if this is all true, then why does the definition of *transferor* and *transferee* include gift transfers in the first place? Under what circumstances could gift transfers be subject to FIRPTA withholding? The answer is found in an example offered in a Treasury Regulation and a closer examination of how *amount realized* is defined.

To illustrate how FIRPTA withholding can be due on gift transfers, Treasury Regulation § 1.897-1(h) offers the following example:

> *Foreign individual C has an undivided fee interest in a parcel of real property located in the United States. The fair market value of C's interest is $70,000, and C's basis in such interest is $50,000. The only liability to which the real property is subject is the liability of $65,000 secured by a mortgage in the same amount. C transfers his fee interest in the property subject to the mortgage by gift to D. C realizes $15,000 of gain upon such transfer. As a transfer by gift constitutes a disposition for purposes of the Code, and as gain is realized upon that transfer, the gift is a disposition for purposes of sections 897, 1445, and 6039C and is subject to section 897(a) to the extent of the gain realized. However, section 897(a) would not be applicable to the transfer if the mortgage on the U.S. real property were equal to or less than*

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[61] 26 CFR § 1.1445-1(g)(3).

[62] 26 CFR § 1.1445-1(g)(4).

[63] 26 CFR § 1.1445-1(g)(5).

[64] 26 CFR § 1.1445-1(b)(1).

> *C's $50,000 basis, since the transfer then would not give rise to the realization of gain or loss under the Internal Revenue Code.*[65]

This example is consistent with the definition of *amount realized*:

> *The amount realized by the transferor for the transfer of a U.S. real property interest is the sum of.*
>
> *(i) The cash paid, or to be paid.*
>
> *(ii) The fair market value of other property transferred, or to be transferred, and*
>
> *(iii) The outstanding amount of any liability assumed by the transferee or to which the U.S. real property interest is subject immediately before and after the transfer.*

It is the underlined portion of this definition that is the key to reconciling the statement, "*if a real property interest is transferred as a gift . . . then no withholding is required*" with the example in the Treasury regulation involving Foreign individual C who realized $15,000 in the process of gifting his real estate to D. Admittedly, the statement may be a bit misleading in light of the example. Perhaps a more gracious assessment is to say the statement is incomplete—it does not refer to a gift in which an outstanding liability is present both before and after the transfer. The example brings out this detail and illustrates why gift transfers can trigger withholding requirements under FIRPTA.

[65] 26 CFR § 1.897-1(h).

FIRPTA CHECKLIST

FIRPTA tax must be withheld when seller is foreign UNLESS one of the following applies:

- Seller is a domestic corporation, partnership, or trust. The citizenship of the stockholders, partners and beneficiaries is irrelevant. FIRTPA tax may be due, but it is paid by the seller after closing; no duty to withhold at closing.
- The contract sales price is for $300,000 or less and purchaser has a present intention to use the property as a residence at least 50% of the time it used by anyone for the first two 12-month periods following the sale.
- Seller has received a qualifying statement from the IRS that no tax is due.
- Seller furnishes a nonforeign affidavit
  - FIRPTA does not require a seller to prove he is "not a nonresident alien"; the purchaser (and settlement agent) may rely on the affidavit unless they know it to be false.
  - Someone is "not a nonresident alien" if he or she is a resident alien—someone who either has a green card or passes the substantial presence test. Merely having a SSN or VISA is not determinative because a nonresident alien can have a SSN or VISA.
  - Any domestic LLC and any foreign corporation can elect to be treated as a domestic corporation. Such a seller may sign the nonforeign affidavit; attach acknowledgment from the IRS that it has made this election. Citizenship of the members or stockholders is irrelevant.
  - If seller is a single-member LLC and has not made the election to be treated as a domestic corporation, disregard the entity and look to the citizenship of the single member, which may be an individual or another entity.
  - If seller is a multi-member LLC and has not make the election to be treated as a domestic corporation, it is considered a domestic partnership and may sign the nonforeign affidavit. Citizenship of the partners is irrelevant.
  - Once affidavit is signed, settlement agent must either: (1) provide affidavit to purchaser (identifying seller's SSN) or (2) receive seller's affidavit as the "qualified substitute" and give to the purchaser an affidavit stating that the settlement agent has received the seller's affidavit.

If FIRPTA tax is due, withhold 15% of the contract sales price. It is irrelevant if seller's proceeds are zero or less than zero. The tax must be paid. A lesser amount may be withheld if any of the following applies:

- Collect 10% if ALL the following apply:
  - The transferee must use the property as a personal residence;
  - The amount realized does not exceed $1,000,000; AND
  - The $300,000 exception does not apply
- If there are 2 or more sellers, only some of whom are foreign, apportion FIRPTA tax based on capital contribution. Husband and wife are considered 50/50 owners. Who gets the proceeds is irrelevant; capital contribution is determinative.

Remember the Special Rules (See Outline for Specifics)

- No withholding required when the purchaser is a governmental body (state or federal)
- Foreclosures are subject to FIRPTA tax based on the citizenship of the debtor. A lesser amount (alternative amount) may be withheld if special rules are followed.
- Deeds in lieu are subject to FIRPTA tax unless some special rules are followed.
- Gift transfers may be subject to FIRPTA tax. Do not allow sellers to avoid FIRPTA by having foreign seller gift property to non-foreign seller prior to closing.
- Short sales are subject to FIRPTA tax. The fact that there may be no seller proceeds is irrelevant. FIRPTA withholding is based off contract sales price.

If in doubt whether FIRPTA tax is due, request a qualifying statement (withholding certificate) from the IRS and let the IRS tell you whether FIRPTA tax is due!

- IRS must process request within 90 days
- Request must be made either at or before closing by either the seller or the purchaser; but if by the seller, purchaser must be given notice.
- If IRS does not respond before closing, settlement agent may (on behalf of purchaser) hold FIRPTA tax in escrow until a qualifying statement is received.

If FIRPTA tax must be withheld, use forms 8288 and 8288-A, downloadable from www.IRS.gov. Read the instructions!

- Purchaser, not settlement agent, should be listed as the withholding agent.
- The instructions tell you what to do if the seller does not have a SSN.
- FIRPTA tax must be remitted to IRS by 20th day following the date of transfer (settlement date).

E-NOTARY: WHERE WE'RE GOING, WE WON'T NEED ROADS

By Heather R. Steele

Heather R. Steele is a partner at Pesner Altmiller Melnick & DeMers PLC in Northern Virginia, where she practices in the area of real estate litigation, with a specific focus on HOA/Condo and Landlord/Tenant matters. She enjoys writing things that make people smile.

There's a memorable line from the movie *Back to the Future II*, when an elderly Biff Tannen eavesdrops on Marty McFly and Doc Brown as they discuss how to get Marty's girlfriend Jennifer back to the flying DeLorean in the (future) year of 2015. Marty and Doc drive (fly?) away, and Old Biff takes center stage with his newfound knowledge.

"So...." He sneers, clearly delighted with the circumstances... "So...Doc Brown invented a Time Machine!"

When the shutdowns of the COVID-19 Pandemic began in earnest in mid-March 2020, I sat at my laptop in my dining room, to the soundtrack of my children squabbling for the 87th time that day, and I wondered how on earth my clients would be able to get affidavits notarized for court. I had heard the concept of electronic notary through the grapevine that day, but I knew nothing about it. I leaned back in my chair, cracked my knuckles, and researched like crazy.

What I found was Virginia's long-existing remote e-notary laws, which were originally passed in 2012. What I said to myself in that moment felt a bit like Biff.

"So.... Virginia invented a Time Machine!" Some brilliant mind from 2012 must have traveled forward in time to the year 2020, realized there would be a sudden exploding need for e-notarization, then traveled back in time a decade and showed the prescience to make e-notary into Virginia law. (Also, if anyone has the Sports Almanac from 2035, please do let me know...)

Come to find out, Virginia has been a leader in the universe of e-notarization, having passed the first eNotarization laws in the country in 2007, and having passed the first Remote Online Notarization (RON) laws in the country in 2012.

After stumbling onto the e-notary laws in mid-March 2020, I realized my quarantine time would be well spent trying to get registered as an e-notary. This article is not so much a treatise on e-notary, but more a catalog of my own experience becoming an e-notary during the height of the pandemic. For an excellent explanation of the history and creation of Virginia's eNotary laws, John G. (Chip) Dicks from Gentry Locke and the Honorable Gary M. Clemens, Clerk of the Circuit Court of Loudoun County, gave an excellent presentation during the 25th Annual Advanced Real Estate Seminar in early March 2021.[1] If you're looking to learn the history of eNotarization and the latest legislative developments, I highly recommend watching their seminar.

We were still wiping down our groceries with Clorox® wipes when I first submitted my application. I believe it was early April 2020. I looked at the list of software options available on Virginia's e-notary FAQ[2] and picked the first one on the list: DocVerify.[3] Admittedly not the most in-depth selection process, but it also seemed the simplest of the options.

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[1] You can watch the entire 2021 Annual Advanced Real Estate Seminar through Virginia CLE at: https://www.vacle.org/product.aspx?zpid=7240&zskuid=27960

[2] https://www.commonwealth.virginia.gov/official-documents/notary-commissions/enotary-faq/

I swiped the credit card and we were on our merry way. I read through the instructions and came across the requirement to obtain an X.509 digital certificate, and I was stumped for a goodly while. A bit more research and I found a place to buy a digital certification.[4] After purchasing the certification, I remained stumped for another week or two, attempting to upload my X.509 to Adobe Acrobat. Once I figured that process out (a highly technical process I won't even attempt to explain here[5]), I spent another several days attempting to e-sign the Commonwealth's Application for Appointment as an eNotary Public using my fancy new X.509 digital certificate as my signature.

After several attempts wherein the Commonwealth sent back my application and told me to try again, I finally got the digital signature correct, and I was officially anointed as a Virginia e-Notary. I put the news out on social media and a friend wrote me and asked if she could be a guinea pig, as she needed a document notarized for her child's school. We connected and chatted a bit, and then I logged into DocVerify and performed my first-ever Remote Online Notarization. It went off without too much of a hitch. The difficult portion was communicating to my friend, the signer, as to where and how she should click. Having never seen the "consumer" side of the software, I couldn't very clearly direct her on what the anticipated steps would be. (I recommend that before you attempt any online notarizations, have a colleague act as the guinea pig and take a look at what his/her screen shows the signer so that you will be aware of what your signers are seeing when they log into the RON session.)

All in all, being an eNotary is not an inexpensive endeavor. The X.509 digital certificate itself cost $100. The cost to use the Remote Online Notarization through DocVerify was around $50/month per eNotary user, plus additional fees of $3-5 for each use of the software to create a notarial session and to check the signer's identification. These per-use fees are called "credits," and there are two types of credits: Transaction credits, which are used each time a new notarial or e-signature "transaction" is created, and ID Verify Tokens, or "KBA" (knowledge based authentication). Each time a Remote Online Notarization ("RON") is performed, the signer must go through a series of five questions that are generated from the public records associated with the signer. For example, it could include things you would know, like whether your first car was a flying Delorean or if your parents' first kiss was at the Enchantment Under the Sea Dance. (Okay, maybe not that specific, but the records usually include cars you owned or places you or family members may have lived).[6]

Once the KBA questions are completed, the signer is allowed into the notary portal, where the signer and the notary connect by video through the software to conduct the RON ceremony. A small portion of the RON ceremony is recorded by video so that there is audio and video of both notary and signer discussing the signing. In the DocVerify software specifically, the notary is requested to instruct the

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[3] *This article documents the author's experience with electronic notarization and the identity of the vendor herein should not be considered an endorsement of the vendor nor a rejection of other vendors in the marketplace. Anyone wishing to become an e-Notary should determine for him/her self the vendor that best suits that person's needs and requirements. –Ed.*

[4] https://www.digicert.com/faq/faq-general.htm

[5] Generally, in Adobe Acrobat, you would go to "Tools," then to "Digitally Sign" and then when the pop-up box asks you how you want to sign, you would use the drop-down menu to select "New ID" and follow the prompts to create a new digital ID, to which you would attach your X.509 certificate. It's more complicated than that, and it took this fairly tech-savvy author many, many attempts to get it right. I recommend talking to your IT folks before attempting it on your own.

[6] Very occasionally, a signer will not be able to use the KBA ID verification. This can happen when the signer is young and has not lived at many addresses or created much of a credit history and therefore does not have enough public info from which to create KBA questions, or because the signer cannot correctly answer the KBA questions. Either way, without the KBA process completed, you will not be able to even begin a RON session, so you would not be able to use e-Notarization for those signers.

signer as follows during the recorded portion of the video call: (1) Please look in the camera so that I can clearly see your face, and state your full name; (2) Please show your identification to the camera; and (3) Please tell me what kind of document you would like to have notarized today. Thus, in a way, the process is very similar to in-person notarizations. The notary looks at the signer's ID card, then looks at the signer's face to identify the signer, and then proceeds to notarize the signature. In a RON session, the signature is electronic, so the notary requests the signer to "click" his or her signature. Once the signer does so, the notary will see the signature show up on the notary's screen. In the DocVerify software, the signature line is yellow until clicked by the signer, at which point it turns green to show it has been successfully "signed" by the signer. After all signatures are completed, the notary will confirm by checking a box to certify that the notary witnessed the document being electronically signed (which I have interpreted to mean that I witnessed the box change color from yellow to green, and I have verbally confirmed with the signer that he or she indeed just clicked the signature box), and the notary then "signs" and ends the RON session.[7]

Once the RON session is complete, the signer and notary both receive an emailed copy of the electronically notarized document. I also prepare a separate invoice for my notarial services. Virginia Code §47.1-19 allows an electronic notary to charge a fee of not more than $25. The statute can be interpreted to allow for a $25 charge for *each* notarization, such that if you were notarizing five signatures in a given session, you could charge $125 for the session; however, I have been charging only $25 per RON session, figuring that it was sufficient to cover the costs incurred for the transaction and KBA credits used for that session. We did experience a hiccup once when attempting to e-notarize a large plat for filing. As it turned out, the PDF of the plat was so high-quality that the file size was enormous, and when uploaded into the DocVerify software, the signatures that resulted were correspondingly microscopic. I am told from DocVerify that the way to fix this issue is to scan a 8x11 copy of the plat for notarizing; however, when a plat is required to be submitted electronically at the high-def size, the limitations of the DocVerify software became apparent.[8]

For most of 2020, I was the sole electronic notary in my office, and there were quite a few occasions when it worked out well to have someone who could notarize electronically. We used the RON sessions for remote closings, for signing of liens, and for various other matters that needed a notary. Most of my work is litigation, so we recognized a hiccup in the situation when I could not notarize my own client's affidavits for court (as presumably that would make me a possible fact witness in the case). Thus, we have now gotten two of our other staff authorized as eNotaries, and I was able to benefit from their services recently during a snow day when I needed an attorneys' fees affidavit signed for the next day's court appearance. No need to drive to the office at 6 am before court to meet the notary; instead, I called up one of our e-Notaries at the office and she and I did a RON session so that I could e-sign my affidavit and she could e-notarize my signature, all while my children drank their hot cocoa in front of the fire, wet snow clothes dripping by the door. To say that it can be a life-saving convenience is an understatement; in these pandemic times, remote notarizations allow folks to remain home and remain safe, while still accomplishing the necessary signatures to move their legal transactions forward.

The law on eNotary is continuing to evolve. The 2021 General Assembly passed amendments to update the requirements for approval of electronic identity standards (effective July 1, 2021).[9] My experience has been that clients are surprised and delighted that this technology exists, and they are willing to be patient and learn how to use it in order to take advantage of the convenience it offers. The Virginia Notary Act can be found at Virginia Code §47.1-1, et seq. I would never claim to be anything of an expert on the subject, but I have successfully completed around fifteen Remote Online

[7] The DocVerify software rather abruptly ends the video call once the notary signs, so I try to remember to thank the signer and tell them goodbye before I click the last box to "notarize."

[8] Other software may not have this issue, and there may have been another techie solution that I was not able to discover. Your mileage may vary.

[9] https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+SB1458ER

Notary sessions now, and I would be happy to answer questions on the process. And a hearty congratulations to the Virginia General Assembly and their time-machine clarity in taking the steps to become the nation's leader in e-notary and remote online notarizations. Marty and Doc both tip their hats to you.

COMPARE & CONTRACTS: A COMPARISON OF FOUR REAL ESTATE CONTRACTS USED IN VIRGINIA

By Laura Farley

Laura Farley serves as General Counsel for Virginia REALTORS®, the state trade association representing 36,000 real estate licensees in Virginia. Before joining Virginia REALTORS® in 2014, she served as Staff Attorney at the Northern Virginia Association of REALTORS®. In her position at both Associations, she has worked closely with the committees responsible for drafting the standard forms used by REALTORS®,[1] taught extensively on a wide variety of topics including the differences between various standard contracts, and provided general legal information through the Association's Legal Hotline.

Although there are multiple contracts used by real estate licensees in transactions for the sale of real property in Virginia, a vast majority use standardized forms provided by one of four entities: Central Virginia Multiple Listing Service (CVRMLS)[2], Northern Virginia Association of REALTORS® (NVAR)[3], Real Estate Information Network (REIN)[4], and Virginia REALTORS® (VAR)[5]. Some real estate brokerage firms have forms for their agents to use and two local REALTOR® Associations – the Roanoke Valley Association of REALTORS® and the Lynchburg Association of REALTORS® - also offer forms that are used in those marketplaces.

Most agents use the standardized form that is common in their region, but as clients have begun seeking properties in different parts of the state, agents have also started to expand their services. This leads to agents and attorneys seeing different contracts that handle common provisions in different ways.

All four of the main contracts in the Commonwealth contain provisions which are identical, based on both state and federal law. This article focuses on the differences between the four contracts[6] to assist attorneys and their clients when presented with a sales contract with which they may be less familiar.

1. Earnest Money Deposits

The contracts have fairly standard language that allows the buyer to select whether they have already deposited the Earnest Money Deposit (EMD) with the escrow agent or whether they will do it by a specific date after ratification. The CVRMLS, NVAR, and VAR contracts all have blanks that can be

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[1] REALTOR® is a federally registered collective membership mark which identifies a real estate professional who is member of the NATIONAL ASSOCIATION OF REALTORS® and subscribes to its strict Code of Ethics. The term REALTOR® should not be used as a substitute to refer to an individual who is a real estate licensee or part of the real estate profession. As a federally registered collective membership mark, there are limitations and restrictions on the use of the term REALTOR®.

[2] CVRMLS, a multiple listing service owned and operated by the Richmond Association of REALTORS®, provides forms that are used in central Virginia.

[3] NVAR is a local REALTOR® Association that offers forms used in the northern Virginia region, as far south as Fredericksburg and as far west as Winchester.

[4] REIN is a multiple listing service located in Virginia Beach that provides forms in the Hampton Roads region.

[5] Virginia REALTORS® is the statewide REALTOR® Association that provides forms for use by REALTORS® located anywhere in the Commonwealth.

[6] These contracts are updated periodically and provisions may change over time.

filled in to establish when the extended deposit date is, while the REIN contract only allows the buyer an additional two business days after ratification.

This language is important for two reasons. First, the CVRMLS, REIN, and VAR contracts are explicit that the buyer failing to get the EMD to the escrow agent under the terms of the contract is a default or breach which allows the seller to terminate the contract. Second, the Virginia Real Estate Board (VREB) has found real estate licensees in violation of state regulations if they fail to ensure that the buyer delivers the EMD to the escrow agent by the deadline in the contract and fails to notify the seller or listing agent. This means that real estate licensees have an affirmative obligation to contact the escrow agent to ensure that the EMD was received.

All four forms also have standard language regarding when escrow funds must be deposited. When the EMD is being held by a real estate licensee, the VREB regulations require such funds to be deposited within five business banking days of contract ratification, unless otherwise agreed to by the parties. On each of the contracts, language has been added to clarify that a real estate licensee holding the EMD will deposit it within five banking business days of ratification or receipt, whichever is later, to ensure compliance with the regulations. All forms also include language that says that if a non-real estate licensee, such as an attorney or settlement agent, will be holding the EMD, it will be deposited in accordance with any applicable law or regulations.

2. Financing & Appraisal

Each of the contracts handles financing and appraisals slightly differently. The deadlines and provisions that are included in the contract (versus an addendum) can lead to some complications for agents and clients who do not read the contract carefully. None of the contracts includes an automatic appraisal contingency for cash or conventional financing transactions; however the VAR contract is the only one that does not include the appraisal contingency as part of the contract or financing addendum. Several template appraisal contingencies are available for use in an addendum in the VAR standard clauses booklet.[7]

The CVRMLS contract includes the details of any loan in the body of the contract, with information such as the loan type, percentage of the sales price or specific dollar amount, interest rate, term, and points all being spelled out. The buyer is required to apply for any specified financing within seven days of ratification, and the contingency goes until 5:00 p.m. on the day of settlement. If the buyer fails to lock in interest rates or points at the time of application, the financing contingency based on such points or interest rates is waived. The buyer may seek alternative financing so long as settlement is not delayed and there is no additional cost to the seller; however, failing to obtain alternative financing would not provide the buyer the same protections as failing to obtain the specified financing. If the buyer is unable to obtain financing, then the contract automatically terminates.

The NVAR contract includes the type of loan and loan amount in the contract while the rest of the terms are a part of the contingency addendum. Each type of financing has its own addendum, which includes the loan terms and a cap on interest rates but does not discuss a specific lender. Because the financing is handled through a contingency, if the buyer wishes to pursue alternative financing using a different loan program, they[8] would either forgo their contingency or have the seller agree to the change by signing a new contingency addendum. The buyer is required to apply for financing within seven days; however, the buyer may change within the first seven days from the lender to

[7] The “Standard Clause Booklet” contains clauses that REALTORS® can add to the additional terms section of the contract or an addendum. We have 5 vendors that we license our forms to for members to use – some have these clauses in a library where the members can just select them & they are added to the contract. Others don’t have this feature, so the Standard Clause Booklet is just a Word document where the members can copy & paste from.

[8] Pronoun use is at the insistence of the author to foster inclusivity in the legal community. –Ed.

which they applied to another lender so long as there is no change in the settlement date or additional charges for the seller. Within the financing addendum, there are two paragraphs between which the buyer must select. One allows for an automatic extension of the financing contingency past the contingency date, through settlement date, unless the seller delivers a notice requiring the buyer to void the contract within three days. If the buyer fails to void the contract within three days, the contract will continue without the financing contingency. Alternatively, the buyer can select a paragraph that sets a financing contingency deadline by which they must void the contract by delivering a written rejection from the lender, or if they do not act, the financing contingency will expire, and the contract will continue.

The REIN contract goes into different details from the other contracts in that the buyer must specify the name of the lender in the contract itself. If the buyer wishes to change lenders, they must obtain written permission from the seller. As with the CVRMLS and NVAR contracts, the buyer must apply for financing within seven days of ratification. If, during the term of the contract, the buyer receives a written rejection from the lender, the buyer must provide that to the seller within three days of receiving that denial. This is different from the other three contracts, which do not require the buyer to communicate a denial within a set period, because any changes in loan type or lender must be agreed to by the seller in the REIN contract. Once the denial has been provided to the seller, either party may terminate the contract.

The VAR contract details the type of loan, amount, interest rate, and other standard terms. The financing contingency paragraph includes a date that the contingency will run to, which if left blank defaults to the settlement date. The VAR contract potentially has the shortest deadline for the buyer to apply for financing since it requires application within five business days, rather than the seven days called for in the other three agreements. Like the NVAR option with automatic extension, if the parties fill a date into the VAR contract, the financing contingency will automatically extend past that date until the seller provides notice to the buyer that if the buyer does not remove the financing contingency, the contract will terminate at 5:00 p.m. on the third day. If the buyer delivers a written commitment and removes the financing contingency, but then subsequently receives a notice that the lender will not provide financing, the buyer must notify the seller within three days. The VAR contract allows the buyer to pursue alternative financing so long as it does not delay settlement or increase costs to the seller without the seller's written agreement.

3. Settlement

a. Settlement Date

All four of the contracts handle the timing of settlement differently, and this is one of the leading contracts questions from agents on the VAR legal hotline.

The CVRMLS contract calls for settlement on or before a specific date with two options. The first allows for a reasonable time after the date specified if the purchaser or seller is making diligent effort to satisfy any contingencies contained in the agreement. The other only allows for an extension for the seller's right to cure any title defects. Under the second option, if settlement does not occur within 10 days of the date listed in the contract, the party who is ready, willing, and able to close may terminate by written notice to the other party.

The NVAR contract is explicit that the entire contract is "time is of the essence" and the only automatic extension allowed for in the contract is if the title report and survey, if required, have been promptly ordered but are not available. In this case, settlement may be delayed for up to ten business days to obtain the title report and survey. Any other delays or extensions must be agreed to in writing through an amendment to the contract. In the "time is of the essence" paragraph, the contract does note that any delay of settlement necessary to comply with a lender's obligations under the RESPA-TILA Integrated Disclosure rule is not a default by the buyer, but the seller may declare the contract void in writing. Unlike with the other contracts, the NVAR contract does not explicitly address either party's ability to terminate the contract if settlement does not occur by the settlement date.

The REIN contract calls for settlement to be on or before a set date with an automatic extension for a set number of days for two specific reasons. The contract contains a blank to be filled in by the parties, but if left blank defaults to ten days. Settlement can be extended only for the purpose of processing and closing the specified loan in compliance with applicable law and/or correcting any defects reported by a title examiner. The language in the form, in bold, clearly reiterates a second time that settlement only includes an extension for one of these two reasons. Any other delay of settlement must be agreed to as part of an amendment to the contract. If settlement does not occur through no fault of a party, that party may terminate the agreement with written notice to the other.

The VAR contract, unlike the others, contains language that states settlement shall occur "on or about" a specified date. The contract does not go into further detail about what length of time would constitute "on or about." When asked by members of the association, VAR generally answers that so long as one or both parties are diligently working to resolve or address a right under the contract, there is no time limit; however, for risk management purposes, written extensions are always advisable. The title paragraph of the contract does explicitly say that if the seller has agreed to cure title defects, the settlement date shall be extended as necessary to enable the seller to cure the defect, but not for more than 60 days without agreement of both parties.

b. Title & Title Defects

All contracts require the seller to convey the property by general warranty deed and with access to a public road, either directly or by a recorded easement. Each of the contracts handles how title defects are to be addressed slightly differently. All require the seller to cure title defects, but the timeframes are different.

The CVRMLS contract requires the seller to take prompt action to cure title defects that can be cured within a reasonable time. If title defects are not cured within 30 days after the seller receives notice of the defect, either party can terminate the contract at the expiration of the 30-day period with notice to the other party.

While the NVAR contract requires the seller to promptly correct any title defects, it does not provide any additional time or automatic extension of the settlement date to correct those defects. If title does not meet the standards in the contract on settlement date, the buyer has the option to declare the contract void in writing or pursue all available legal and equitable remedies.

The REIN contract requires the seller to pay for all expenses related to the removal of title defects and allows the settlement date to be extended up to a set number of days to correct any defects reported by a title examiner. If the blank in the contract is not filled in, a default of ten days is included in the standard language.

The VAR contract is the only contract that places a limit on the amount the seller must pay to correct title defects by including it with other items in the Remediation Limit.[9] Although the VAR contract is the most limiting regarding the cost of addressing title defects, it is the most generous with time. The seller has 60 days from notice of the defect to remedy it before the buyer has the right to terminate the contract.

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[9] The "Remediation Limit" included in the "Seller's and Purchaser's Option" paragraph is a cap on the aggregate total the seller must spend in addressing title issues, equipment and systems if the buyer does not obtain a home inspection, and the well if the property is served by a well. This field is a blank to be filled out by the parties, and if left blank, defaults to $1,000. In the event that the total cost to the seller exceeds the Remediation Limit, the seller may elect to fulfill all obligations under the contract or pay or credit the Remediation Limit to the buyer and refuse to pay any excess over that amount.

c. Possession

All four contracts state that possession will be delivered at settlement, but custom and practice in different parts of the state have led to different interpretations of when settlement occurs for the purposes of possession. In some regions, it is customary to not give possession until after recordation and disbursement, while in other areas it is customary for possession to be given once both parties have complied with the terms of the contract – the deed has been signed and the settlement agent has received the funds. In an attempt to standardize the practice of when possession occurs, VAR updated its contract on January 1, 2021, to include the definition of settlement found in Virginia Code Section 55.1-900.[10] Buyers and sellers that have certain expectations, such as recordation before possession or possession at signing, should ensure that language is added to the contract to meet those expectations.

4. Property Condition & Inspections

All four contracts set a basic expectation that the property will be free of trash and in broom-clean condition when possession is given, but the condition of the property and systems, as well as inspections are handled differently. All contracts do require the seller to have all utilities on if there is a home inspection and include an automatic extension of the home inspection contingency deadline if the seller fails to have the utilities on. Under all contracts, the failure of the buyer to meet inspection deadlines or deliver the required documents results in a removal of the contingency while the contract remains in full force and effect.

The CVRMLS contract requires the seller to deliver the property in the same physical condition as of the date of ratification, except as otherwise agreed. Further, the CVRMLS contract is the only one that requires the seller to warrant that all appliances and major systems will be in working order when possession is delivered. The seller also agrees to exercise reasonable and ordinary care in the maintenance and upkeep of the property between the date of ratification and possession. The contract also addresses wood infestations, requiring the seller to provide a certificate dated not more than 30 days before settlement, and address any issues identified. If the property is served by a well or septic system, the seller must provide the buyer a certificate dated not more than 30 days before settlement that the well water meets certain standards and that the septic system is not malfunctioning. The contract does allow the parties to select the level and extent of the inspection of the septic system, but the seller retains responsibility for selecting the inspection company and paying for the inspection.

The CVRMLS home inspection process is included in the body of the contract. Under the inspection paragraph, the buyer, at their own expense, may conduct inspections, and must provide the seller with all inspection reports, cost of repairs, and the buyer's written repair request no later than a set deadline. The contract creates a default of ten days after the date of ratification if the parties fail to select an option or fill in blanks. Once the buyer provides the required documents to the seller, the seller has seven days to respond and begin negotiations. If the seller accepts the buyer's request, the contingency is removed, and the contract moves forward. If the seller fails to respond or the parties do not reach an agreement by 5:00 p.m. on the seventh day, the buyer has until 5:00 p.m. two days later either to terminate the agreement or accept the seller's last repair offer. In the base contract, the buyer does not have the option to terminate immediately after the inspection and must enter

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[10] §55.1-900 in pertinent part reads: "Settlement" means the time when the settlement agent has received the duly executed deed, loan funds, loan documents, and other documents and funds required to carry out the terms of the contract between the parties and the settlement agent reasonably determines that prerecordation conditions of such contracts have been satisfied. A determination by a settlement agent that prerecordation conditions have been satisfied shall not control the rights and obligations of the parties under the contract, including whether settlement has occurred under the terms and conditions of the contract. "Parties," as used in this definition, means the seller, purchaser, borrower, lender, and settlement agent.

negotiations with the seller; however, there is an optional paragraph that can be checked, which would allow the buyer to terminate the contract immediately after the home inspection.

Unlike the CVRMLS contract, the NVAR contract has flexibility in the date the physical condition of the property is fixed. The parties can select the date of offer[11], date of home inspection, or other. The NVAR contract also allows the parties to select whether and who will be responsible for providing the written report regarding wood-destroying insects. Well and septic inspections and repairs are handled through a separate addendum that allows the parties to negotiate who will pay for the inspection and report, and in the context of a septic inspection, what the inspection will involve. Under both, after the inspection is completed, the parties enter a negotiation process similar to the home inspection contingency detailed below.

The NVAR home inspection contingency is a separate addendum and includes a radon testing contingency. Under this document, the buyer has until 9:00 p.m. on a set number of days after the date of ratification to conduct inspections. Prior to the inspection deadline, the buyer must provide the seller either an entire copy of the report(s) and a written addendum with specific deficiencies and proposed remedies or an entire copy of the report and notice voiding the contract. If the buyer asks for repairs, the parties enter into a negotiation period for a set number of days where offers and counteroffers can be exchanged freely. If, at the end of that period, no agreement has been reached, the buyer may terminate the contract. In addition to a more traditional home inspection contingency, the NVAR addendum also has a paragraph that the parties can use in which the home inspection will only allow the buyer to void the contract, rather than enter negotiations with the seller for repairs.

The REIN contract requires the seller to provide the property in substantially the same condition as at contract, except as noted in the agreement. Like the CVRMLS contract, the REIN contract includes many of the inspections in the sales contract itself rather than in an addendum. The wood-destroying insect and moisture inspection, drinking water and septic, and walk-through inspection are all included in the same paragraph and have a repair cap that also includes any lender required repairs.[12] The wood-destroying insect, moisture, drinking water, and septic paragraph all allow the parties to select who will pay for the various inspections and reports.

The REIN property inspection contingency is an addendum to the contract where the buyer identifies all the types of inspections they wish to conduct: home inspection, exterior insulation and finish system, lead-based paint, and other. Within a set number of days of ratification, the buyer must deliver to the seller a complete copy of the inspection report with a removal addendum that lists deficiencies and repairs, or a release, and/or a termination. Once the buyer delivers a proposed removal addendum, the parties have five days to negotiate and agree upon the addendum. If the parties cannot reach an agreement by the end of the fifth day, the buyer has the option to terminate the agreement within one day.

The VAR contract states that the seller will deliver the property in the same physical condition, ordinary wear and tear excepted, as of the date of contract. Like the CVRMLS contract, the VAR contract requires the seller to exercise reasonable and ordinary care in the maintenance and upkeep of the property. The contract also requires the seller to provide the purchaser a report, dated not more than 30 days before settlement, regarding the presence and damage of wood-destroying

[11] A frequent comment made about parties selecting the date of offer or having the date of offer established as in other contracts, is that there is not a third-party assessment of the house to establish the condition at the date of the offer or ratification. Many lawyers will recommend, and many agents do select the date of home inspection because the home inspection will create a record of the condition of the property.

[12] The repair cap is a blank to be filled in, but if left blank has a default of one percent of the purchase price.

insects.[13] If the property is served by a well, the seller must also provide a certificate dated not more than 30 days before settlement that the water meets certain requirements.

The VAR contract bifurcates the seller's responsibility for major systems depending on whether there is a home inspection contingency or not. If there is not a contingency, then the seller warrants that all appliances and major systems will be in working condition at settlement. Any repairs to ensure the appliances and systems are in working condition at settlement are subject to the remediation limit that also applies, in aggregate, to any title defects or issues with the well water. If the contract is contingent on a home inspection, an addendum must be used that follows a process nearly identical to the NVAR home inspection contingency. The VAR home inspection contingency covers all inspections that the buyer may want to do, including a traditional home inspection, septic inspection, radon inspection, or any other inspections. In essence, this is a due diligence period for the buyer.

5. Miscellaneous

a. Items to Convey

Each contract handles differently what items will convey at settlement and this can quickly become a source of dispute between the parties. Many issues arise because a contract has been filled out incorrectly or there is a dispute over how an item is classified.

The CVRMLS contract spells out what categories of personal property are included, if such items are located within the property at the time the contract is signed. These categories include items such as window coverings, specific appliances, landscaping, and other items. The contract includes a catchall of "and all other items attached to the real estate." The contract does not specify what is included, or identify specific numbers of items to convey, but it does include space for specific items the parties may want to address.

The NVAR contract similarly lists categories of items that will convey "if existing." However, unlike the CVRMLS contract, the NVAR contract also provides a list of various, specific items, to be checked "yes" or "no" as to whether they are currently installed or offered, as well as fields for the number of the item. This check list includes items such as specific appliances, garage door openers, alarms, and other items. Disputes between parties have arisen when mistakes are made in filling out this paragraph. There are stories of recalcitrant buyers insisting on garage door remotes for a house that does not have a garage because the box was checked in the contract. So, while the specificity provided by such a list can clarify expectations for items such as playground equipment, hot tubs, and sheds, it can also create ambiguity when an item is checked but does not exist in the house currently.

The REIN contract says that all "fixtures" and any personal property specifically described in the contract will convey, then provides a list of various appliances, equipment, and other categories of items with check boxes and blanks for the number of items. As with the NVAR contract, incorrectly filling this section out can lead to disputes or confusion over what must be with the house at settlement.

The VAR contract says that all "fixtures" located on the property will convey and then, like the CVRMLS contract, includes a list of personal property categories that must transfer at settlement. There is an additional paragraph where further personal property can be listed, or, alternatively, VAR offers an agreement for the sale of personal property, which contingent upon the settlement of the real property.

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[13] Additional language for a report on wood destroying organisms, such as mold or fungus, is available in a standard clauses booklet.

All but the CVRMLS contract reference "fixtures." There is no clear definition is statute or case law of what is a fixture, but the general understanding within the real estate industry is that items that require tools to remove have been affixed to the property and will convey unless otherwise specified in the contract. Real estate licensees are cautioned to always list specific items that their client expects to convey or be removed to avoid any ambiguity.

b. Time Periods

One thing to note about time periods is that the CVRMLS, REIN, and VAR contracts all calculate days and time periods as extending until 11:59 p.m., unless otherwise noted; however, the NVAR contract specifies that time periods will end at 9:00 p.m. on the date specified. For example, a notice delivered at 10:00 p.m. on the last day of a contingency would, generally, be considered "on time" under the CVRMLS, REIN, and VAR contracts, while the contingency would have expired under the NVAR contract.

2021 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 2021 General Assembly session follows with in-depth summaries of most of the 46 bills listed below.

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, and individual hyperlinks have been added to each bill number for use in 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 2053	Delegate Ibraheem S. Samirah	Affordable & market-rate housing; DHCD to evaluate growing demand. [An act to direct the Department of Housing and Community Development to convene a stakeholder advisory group to evaluate the construction of internal, attached, and detached accessory dwelling units.]
Authorities		
HB 2072	Delegate Kelly K. Convirs-Fowler	Virginia Good Neighbor Next Door program; VHDA shall report recommendations for creating Program. [An act to direct the Virginia Housing Development

		Authority to report on recommendations for the creation of a Virginia Good Neighbor Next Door Program.]
	Building Code	
HB 2227	Delegate Kaye Kory	Uniform Statewide Building Code; amendments, energy efficiency and conservation. [An act to direct the Board of Housing and Community Development to consider adopting amendments to the Uniform Statewide Building Code relating to energy efficiency and conservation.]
	Civil Remedies and Procedure	
HB 2175 SB 1327	Delegate Luke E. Torian Senator Jennifer L. McClellan	Homeowners and tenants of manufactured home parks; housing protections, foreclosures, etc. [An act to amend and reenact §§ 8.01-463, 36-139, 55.1-320, 55.1-321, and 55.1-1303 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 15.2-2223.5.]
	Commissions, Boards and Institutions Generally	
HB 1775	Delegate Terry G. Kilgore	State Corporation Commission; access to local land records. [An act to amend and reenact § 17.1-276 of the Code of Virginia.]
HB 1898	Delegate Danica A. Roem	Board of zoning appeals; appointments. [An act to amend and reenact § 15.2-2308 of the Code of Virginia.]
HB 1928	Delegate Lashrecse D. Aird	Historic resources; acquisition and lease of land. [An act to amend and reenact §§ 10.1-2202 and 10.1-2204 of the Code of Virginia.]
SB 1110	Senator Lionell Spruill, Sr.	Real estate settlement agents; duties. [An act to amend and reenact § 55.1-1004 of the Code of Virginia.]
SB 1280	Delegate John J. Bell	Dams; negotiated settlement agreements. [An Act to amend the Code of Virginia by adding in

		Article 2 of Chapter 6 of Title 10.1 a section numbered 10.1-613.6]
SB 1396	Senator Ghazala F. Hashmi	Onsite Sewage Indemnification Fund; use of Fund for grants to certain property owners. [An Act to amend and reenact §§ 32.1-164 and 32.1-164.1:01 of the Code of Virginia and to amend the Code of Virginia by adding in Title 62.1 a chapter numberedz 21.1.]
SJ 293	Senator Lionell Spruill, Sr.	Assisted living and auxiliary grants; Joint Commission on Health Care to study available data. Requesting the Joint Commission on Health Care to study available data regarding assisted living and auxiliary grants
Common Interest Communities		
HB 1816 SB 1183	Delegate David L. Bulova Senator Siobhan S. Dunnavant	Property Owners' Association Act/Condominium Act; use of electronic means for meetings and voting. [An act to amend and reenact §§ 55.1-1800, 55.1-1815, 55.1-1816, 55.1-1832, 55.1-1900, 55.1-1935, 55.1-1949, 55.1-1952, and 55.1-1953 of the Code of Virginia.]
HB 1842	Delegate Mark L. Keam	Property owners' associations & unit owners' associations; rulemaking authority concerning smoking. [An act to amend and reenact §§ 55.1-1819 and 55.1-1959 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 55.1-1819.1 and 55.1-1960.1.]
Conservation		
HB 1760 SB 1199	Delegate Michael J. Webert Senator J. Chapman Petersen	Conservation easements; construction. [An act to amend the Code of Virginia by adding in Chapter 10.1 of Title 10.1 a section numbered 10.1-1016.1 and by adding in Chapter 17 of Title 10.1 a section numbered 10.1-1705.1.]

HB 1833	Delegate Suhas Subramanyam	Conservation and Recreation, Department of; leasing of land. [An act to amend and reenact § 10.1-109 of the Code of Virginia.]
Counties, Cities and Towns		
HB 1778	Delegate Jeion A. Ward	Removal of clutter from property; definition, civil penalty. [An act to amend and reenact § 15.2-901 of the Code of Virginia.]
HB 1969	Delegate Betsy B. Carr	Administration of blighted and derelict properties; modifies definition of "qualifying locality." [An act to amend and reenact §§ 58.1-3221.6 and 58.1-3970.1 of the Code of Virginia.]
SB 1309	Senator Adam P. Ebbin	Local stormwater assistance; flood mitigation and protection. [An act to amend and reenact § 15.2-2114.01 of the Code of Virginia.]
Eminent Domain		
SB 1260	Senator John J. Bell	Transportation purposes; entry onto land for inspection. [An act to amend and reenact §§ 25.1-203 and 33.2-1011 of the Code of Virginia.]
SB 1270	Senator John A. Cosgrove, Jr.	Eminent domain; notice of intent to file certificate. [An act to amend and reenact § 25.1-306 of the Code of Virginia.]
Energy Conservation and Resources		
HB 2201 SB 1207	Delegate Jerrauld C. "Jay" Jones Senator George L. Barker	Solar and energy storage projects; siting agreements throughout the Commonwealth. [An act to amend and reenact §§ 15.2-2288.8 and 15.2-2316.6 through 15.2-2316.9 of the Code of Virginia.]

Fair Housing and Discrimination		
HB 1971	Delegate Betsy B. Carr	Virginia Fair Housing Law; reasonable accommodations, disability-related requests for parking. [An act to amend and reenact § 36-96.3:2 of the Code of Virginia.]
HB 2046	Delegate Jeffrey M. Bourne	Virginia Fair Housing Law; unlawful discriminatory housing practices. [An act to amend and reenact §§ 36-96.3 and 36-96.17 of the Code of Virginia.]
Landlord and Tenant		
HB 1889	Delegate Marcia S. "Cia" Price	Virginia Residential Landlord and Tenant Act; landlord remedies; noncompliance with rental agreement; payment plan; extend sunset. [An Act to amend and reenact the second enactment of Chapter 46 of the Acts of Assembly of 2020, Special Session I, relating to the Virginia Residential Landlord and Tenant Act; landlord remedies; noncompliance with rental agreement; payment plan; extend sunset.]
HB 1900 SB 1215	Delegate Sally L. Hudson Senator Adam P. Ebbin	Virginia Residential Landlord and Tenant Act; tenant remedies for exclusion from dwelling unit. [An act to amend the Code of Virginia by adding a section numbered 55.1-1243.1 and to repeal § 55.1-1243 of the Code of Virginia.]
HB 1981	Delegate Betsy B. Carr	Virginia Residential Landlord and Tenant Act; access to dwelling unit during certain emergencies. [An act to amend and reenact § 55.1-1229 of the Code of Virginia.]
HB 2014	Delegate Marcia S. "Cia" Price	Virginia Residential Landlord and Tenant Act; landlord's acceptance of rent with reservation. [An act to amend and reenact §§ 36-139 and 55.1-1250 of the Code of Virginia.]

HB 2161 SB 1410	Delegate Kathy K.L. Tran Senator John J. Bell	prohibits discrimination in public accommodations, etc. for active military or a military spouse; [An act to amend and reenact §§ 2.2-2901.1, 2.2-3004, 2.2-3900, 2.2-3901, 2.2-3902, 2.2-3904, 2.2-3905, 15.2-853, 15.2-854, 15.2-965, 15.2-1500.1, 15.2-1507, 15.2-1604, 22.1-295.2, 22.1-306, 36-96.1 through 36-96.3, 36-96.4, 36-96.6, 55.1-1208, and 55.1-1310 of the Code of Virginia.]
HB 2249	Delegate Delores L. McQuin	Virginia Residential Landlord and Tenant Act; landlord charges for security deposits. [An act to amend and reenact §§ 17.1-275, 55.1-1200, 55.1-1204, 55.1-1206, 55.1-1208, 55.1-1211, 55.1-1226, 64.2-2008, and 64.2-2012 of the Code of Virginia.]
Notaries and Out-of-State Commissioners		
HB 2064	Delegate Marcus B. Simon	Recording an electronic document; electronic notarial certificate; emergency effective date. [An Act to amend and reenact §§ 17.1-223, 47.1-2, 47.1-16, and 55.1-606 of the Code of Virginia].
Professions and Occupations		
HB 2229	Delegate Marcus B. Simon	Virginia Residential Landlord and Tenant Act; responsibilities of real estate brokers, etc. [An act to amend and reenact §§ 54.1-2108.1 and 55.1-1237 of the Code of Virginia.]
Property and Conveyances		
HB 1882	Delegate Steve E. Heretick	Deeds of trust; amendment to loan document, statement of interest rate of a refinanced mortgage. [An act to amend and reenact § 55.1-319 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 55.1-318.1.]
HB 2009	Delegate Martha M. Mugler	Chamberlin Hotel at Fort Monroe; reverts certain property to the

		Commonwealth. [An act to revert certain property upon which the Chamberlin Hotel at Fort Monroe is located to the Commonwealth and to repeal § 1 of Chapter 809 of the Acts of Assembly of 1998.]
HB 2099	Delegate Carrie E. Coyner	Judgments; limitations on enforcement, judgment liens, settlement agents, effective date. [An act to amend and reenact §§ 8.01-251, 8.01-458, and 55.1-339 of the Code of Virginia.]
Residential Property Disclosures		
HB 1824	Delegate Alex Q. Askew	Virginia Residential Property Disclosure Act; required disclosures for buyer to beware, mold. [An Act to amend and reenact § 55.1-703 of the Code of Virginia.]
HB 2320 SB 1389	Delegate Kelly K. Convirs-Fowler Senator Lynwood W. Lewis, Jr	Real property; required disclosures for buyer to exercise due diligence, flood risk report. [An act to amend and reenact § 55.1-703 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 55.1-708.2.]
Scenic Rivers System		
HB 1819	Delegate Joshua G. Cole	Rappahannock State Scenic River designation. [An Act to amend and reenact § 10.1-415 of the Code of Virginia]
Taxation		
HB 2165	Delegate Patrick A. Hope	Tax delinquent property; sale of land for delinquent taxes. [An Act to amend and reenact § 58.1-3965 of the Code of Virginia.]
SB 1197	Senator Mamie E. Locke	Virginia housing opportunity; tax credit established. [An Act to amend the Code of Virginia by adding in Chapter 3 of Title 58.1 an article numbered 13.4, consisting of sections numbered 58.1-439.29 and 58.1-439.30.]

Waters of the State, Ports and Harbors		
SB 1404	Senator Lynwood W. Lewis, Jr.	Stormwater Local Assistance Fund; grants awarded for projects related to Chesapeake Bay. [An Act to amend and reenact § 62.1-44.15:29.1 of the Code of Virginia.]

2021 VIRGINIA GENERAL ASSEMBLY REPORT: REAL ESTATE LEGISLATION

By Jeremy R. Moss*

Jeremy R. Moss is the VP, Legal & Entitlements for Bonaventure, a full-service real estate investment and development firm with offices in Alexandria, Virginia Beach and Richmond, Virginia. As Vice President, Jeremy is responsible for the development and implementation of rezoning and entitlements strategy for all Bonaventure real estate development projects. He has been active in local, state and Federal legislative and regulatory matters throughout most of his practice. Jeremy previously served in leadership capacities with the Virginia State Bar Real Property Section, Virginia Bar Association Real Estate Section Council, and Community Associations Institute. An AV Preeminent rated lawyer, Jeremy has been recognized for his various contributions to our profession and the community, having been named as an "Up & Coming Lawyer" by Virginia Lawyers Weekly, "Top 40 under 40" by Inside Business, "Top Lawyer," "Millennial on the Move," and "Outstanding Emerging Professional" by Coastal Virginia Magazine, "Rising Star" by the Virginia and District of Columbia SuperLawyers list, and "Legal Elite" by Virginia Business Magazine. *Jeremy would like to thank Connor Reece, Legal & Entitlements Analyst at Bonaventure, for his efforts and research related to this Report and the Bill List.*

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 continues to routinely address a wide range of real estate-related topics – from traditional real estate matters (e.g., deeds, deeds of trust, eminent domain and disclosure), to more tangentially-related fields (e.g., conservation and scenic rivers) to evolving areas of real estate practice.

THE 2021 SESSION AT A GLANCE

The 2021 Session of the Virginia General Assembly convened on the second Wednesday of January, as it does every year–this year January 13, 2021. For many reasons, some of which are discussed below, the 2021 Session was unique.

This was a "short" session of the General Assembly. In odd-numbered years, the Virginia Constitution provides that the legislature convene for thirty calendar days, with an option to extend the session for a maximum of thirty additional days.[1] It is typical for the General Assembly to extend "short" sessions to forty-five days, but in 2021 the requisite two-thirds vote of both chambers (the House of Delegates and Senate) was not obtained and the session adjourned *sine die* on February 8, 2021.

A special session of the General Assembly was called by Governor Ralph Northam to provide additional opportunities for the legislature to introduce and consider bills in light of the failed vote to extend the thirty-day session.

For the House of Delegates, the 2021 Sessions were wholly remote, with the members participating virtually. The Senate of Virginia convened in person, albeit at the Science Museum of Virginia. All public participation in committee meetings was done virtually through a Zoom® platform.

A reconvened session, sometimes referred to as at the "veto session," was convened on April 7, 2021.

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[1] Virginia operates on a biennium budget, which must be adopted every other year. In even numbered years, the legislature convenes for sixty days with an option to extend the session for a maximum of thirty additional days.

For ease of reference in this report, we will combine the 2021 Session and Special Session.

Several of the bills summarized below are listed among the *2021 Session Highlights*, a summary of significant legislation considered by the 2021 Session of the General Assembly as selected by the staff of the Virginia Division of Legislative Services,[2] including legislation:

- Extending the sunset date from July 1, 2021, to July 1, 2022, of certain provisions enacted during the 2020 Special Session related to the Virginia Residential Landlord and Tenant Act (see Senate Bill 1899 listed among legislation related to Landlord and Tenant); and,
- Related to siting agreements and special exceptions throughout the Commonwealth (*see* House Bill 2201 and Senate Bill 1207 listed among legislation related to Energy Conservation and Resources).

2021 SESSION (AND SPECIAL SESSION) *BY THE NUMBERS*

In all, 2,588 bills and resolutions were introduced during the 2021 sessions. This is a significant decrease in the number of bills introduced in last year's long session (2020 - 3,910 bills) and the most recent "short" session (2019 - 3,128 bills).

Of all the bills and resolutions considered, 1,275 were passed by both the Senate and the House of Delegates. Excluding commending and memorializing resolutions, 622 bills passed.[3] Of those bills that passed, 297 passed unanimously while 325 passed with opposition.

A total of 871 bills failed. Excluding commending and memorializing resolutions, 447 bills were killed, and 23 bills were consolidated into other bills.

147 bills were killed in a subcommittee of the House of Delegates, 139 and 135 bills each were killed in committees of the House and Senate respectively (the Senate does not seat subcommittees), , and only 26 bills died on the House or Senate floors or in Conference Committee (when differences between the House and Senator could not be reconciled). Of those bills that failed, only 97 bills failed with no recorded vote.

2021 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 http://leg1.state.va.us/lis.htm. The summaries below are heavily derived from abstracts prepared by the Virginia Division of Legislative Services.[4] 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, 2021. Several pieces of legislation include emergency clauses or delayed effective dates.Although this summary attempts to identify those dates, careful attention should be given to the effective dates of specific legislation.

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[2] See *2021 Session Highlights* (http://dls.virginia.gov/pubs/hilights/2021/Highlights2021.pdf). Last accessed May 6, 2021.

[3] According to the Virginia Public Access Project, *Pass or Fail? Fate of 2021 General Assembly Bills* (https://www.vpap.org/visuals/visual/fate-2021-legislation/)(Last accessed May 6, 2021).

[4] 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, with some appearing later in this article under different subject headings.

The General Assembly directed the Department of Housing and Community Development ("DHCD") to convene a stakeholder advisory group to evaluate the construction of internal, attached, and detached accessory dwelling units as a strategy to address the Commonwealth's growing demand for affordable and market-rate housing.

The stakeholder advisory group is required to report its findings, including any legislative recommendations, to the Director of the Department, the Secretary of Commerce and Trade, the commissioners of the Virginia Housing Development Authority, and the Virginia Housing Commission no later than November 1, 2021, and allows a possible extension but to no later than November 1, 2022 (*House Bill 2053 – Samirah*).

AUTHORITIES

The Virginia General Assembly required the Virginia Housing Development Authority ("VHDA") to report to the Governor, the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology, and the Virginia Housing Commission no later than July 1, 2022, on recommendations for the creation of a Virginia Good Neighbor Next Door program, similar to the Good Neighbor Next Door program administered by the U.S. Department of Housing and Urban Development, to provide financial incentives for law-enforcement officers, firefighters, emergency medical services personnel, and teachers to purchase homes within designated revitalization areas in the localities in which they are employed (*House Bill 2072 – Convirs-Fowler*).

BUILDING CODE

The Virginia General Assembly directed the Board of Housing and Community Development, upon each publication by the International Code Council of a new version of the International Energy Conservation Code ("IECC"), to consider adopting amendments to the Uniform Statewide Building Code to address changes in the IECC related to energy efficiency and conservation (*House Bill 2227 – Kory*).

CIVIL REMEDIES AND PROCEDURE

The Generally Assembly provided various protections for homeowners and tenants of manufactured home parks, including:

- restricting the circumstances under which a court may order a person's primary residence be sold to enforce a judgment lien;
- requiring localities to incorporate into their comprehensive plans strategies to promote manufactured housing as a source of affordable housing;
- requiring the Director of Housing and Community Development to develop a statement of tenant rights and responsibilities explaining in plain language the rights and responsibilities of tenants under the Virginia Manufactured Home Lot Rental Act;
- in the case of a deed of trust conveying owner-occupied residential real estate, prohibiting a trustee of such deed of trust from selling such property in a foreclosure sale without receiving an affidavit signed by the party that provided notice of the sale to the owner

confirming that such notice was sent to the owner, with a copy of such notice attached to the affidavit;[5]

- in the case of a deed of trust conveying owner-occupied residential real estate, increasing the notice period for a foreclosure sale from 14 to 60 days and requiring such notice to provide the grantor with information regarding housing counseling; and,
- requiring the landlord of a manufactured home park to provide tenants who own their manufactured home information about housing assistance and legal aid organizations.

The General Assembly also required DHCD to convene a stakeholder group to assist in the development of the statement of tenant rights and responsibilities (*House Bill 2175 – Torian* and *Senate Bill 1327 - McClellan*).

COMMISSIONS, BOARDS AND INSTITUTIONS GENERALLY

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

The State Corporation Commission has been added to the list of agencies that are exempt from paying fees for remote access to local land records (*House Bill 1775 – Kilgore*).

The General Assembly established an exception to the general rule that an elected official cannot be appointed to a board of zoning appeals by allowing an elected official from a town to serve on the board of zoning appeals of the county in which the member also resides (*House Bill 1898 – Roem*).

The Department of Historic Resources and the Board of Historic Resources are authorized to undertake additional leasing and property acquisition activities related to battlefield properties, designated landmarks, and other properties of historic significance (*House Bill 1928 – Aird*).

The State Corporation Commission may share information collected from a settlement agent or agency regarding any errors and omissions or malpractice insurance policy or surety bond with any party to the real estate transaction in connection with the actions of such agent or agency arising out of a settlement (*Senate Bill 1110 – Spruill*).

The Virginia Soil and Water Conservation Board is authorized to enter into a negotiated settlement with the owners of certain impounding structures (dams) who have allegedly violated or failed, neglected, or refused to obey any permit condition, provision of the Dam Safety Act, or Board regulation or order. The settlement must require the dam owner to correct deficiencies at the dam structure and to pay civil charges for past alleged violations instead of any appropriate civil penalty that could be imposed (civil charges must be suspended upon compliance with the settlement agreement) (*Senate Bill 1280 – Bell*).

The State Board of Health is now authorized to use the Onsite Sewage Indemnification Fund to provide grants and loans to property owners with income at or below 200 percent of the federal poverty guidelines to repair failing onsite sewage systems or install onsite sewage systems on properties that lack adequate sewage disposal. No expenses shall be paid from the Fund to support the program for training and recognition of onsite soil evaluators, or to provide grants or loans to repair failing onsite sewage systems or install onsite sewage systems on properties that lack adequate sewage disposal in lieu of payment to any owner or owners qualified to receive payment from the Fund. The State Board of Health must adopt regulations that include consideration of the impacts of climate change on proposed treatment works (*Senate Bill 1396 – Hashmi*).

The bill sets out the policy of the Commonwealth regarding wastewater infrastructure and establishes the four-member Wastewater Infrastructure Policy Working Group as an advisory board

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[5] The provisions of the legislation related to the specifics of the notice that is required before a trustee can sell a property in a foreclosure sale have a delayed effective date of October 1, 2021.

in the executive branch of state government to continually assess wastewater infrastructure needs and develop policy recommendations. The bill provides that the Working Group shall expire in 2030. The bill also directs the Department of Environmental Quality, in partnership with the Virginia Department of Health and in consultation with stakeholders, to estimate and report every four years the amount of wastewater infrastructure funding that is necessary to meet policy goals but is not eligible to be covered by grant funding pursuant to the Virginia Water Quality Improvement Act of 1997.

By joint resolution, the General Assembly requested the Joint Commission on Health Care study available data regarding assisted living and auxiliary grants and develop a blueprint for implementing recommendations that will allow the Commonwealth to provide a more realistic system of addressing housing and care needs (*Senate Joint Resolution 293 – Spruill*).

COMMON INTEREST COMMUNITIES

As an extension to emergency measures passed during the 2020 Special Sessions, the General Assembly voted to allow meetings of property owners' associations, boards of directors, unit owners' associations, executive boards, and committees to be held entirely or partially by electronic means, provided that the board of directors or executive board, as applicable, has adopted guidelines for the use of electronic means for such meetings.

Guidelines adopted for the use of electronic means for meetings must ensure that persons accessing such meetings are authorized to do so and that persons entitled to participate in such meetings have an opportunity to do so. Authority for determining whether any such meeting may be held entirely or partially by electronic means is granted to the board of directors or executive board, as applicable.

Under current law, if a meeting of a board of directors or executive board is conducted by telephone conference or video conference, at least two members of the board of directors or executive board, as applicable, are required to be physically present at the meeting place included in the meeting notice.

The definition of "electronic means" has been amended to provide that a meeting conducted by electronic means includes a meeting conducted via teleconference, videoconference, Internet exchange, or other electronic methods.

Members of property owners' associations or unit owners' associations may also now vote at meetings of such associations by absentee ballot, and allows such members to vote in person, by proxy, or by absentee ballot by electronic means, provided that the board of directors or executive board, as applicable, has adopted guidelines for such voting.

Finally, if a vote, consent, or approval required to be obtained by secret ballot is accomplished through electronic means, the electronic means shall protect the identity of the voter, and provides that if the electronic means cannot protect the identity of the voter, another means of voting shall be used (*House Bill 1816 – Bulova* and *Senate Bill 1183 – Dunnavant*).

As a recommendation from the Virginia Housing Commission and except to the extent that the declaration or condominium instruments provide otherwise:

- the board of directors of a property owners' association may establish reasonable rules that restrict smoking in the development, including (a) rules that prohibit smoking in the common areas and, (b) for developments that include attached private dwelling units, rules that prohibit smoking within such dwelling units, and,
- the executive board of a condominium unit owners' association to establish reasonable rules that restrict smoking in the condominium, including rules that prohibit smoking in the common elements and within units.

The General Assembly also clarified the authority of executive boards of condominium unit owners' associations to establish, adopt, and enforce rules and regulations with respect to the use of the common elements of the condominium and with respect to such other areas of responsibility assigned to the unit owners' association by the condominium instruments, except where expressly reserved by the condominium instruments to the unit owners. Unit owners, by a majority of votes cast at a meeting of the unit owners' association, may repeal or amend any rule or regulation adopted by the executive board (*House Bill 1842 – Keam*).

CONTRACTS

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

An easement held pursuant to the Virginia Conservation Easement Act or the Open-Space Land Act shall be construed in favor of achieving the conservation purposes for which it was created (*House Bill 1760 – Webert* and *Senate Bill 1199 – Petersen*).

The process by which the Department of Conservation and Recreation may lease certain lands was changed from one that is subject to the consent and approval of the Governor and the General Assembly to one that is subject to the written recommendation of the Department of General Services to the Governor and the written approval of the Governor and excludes the sale of such land from such process. Only certain activities for which the Department may lease land are authorized and information about leasing activities is required to be included in an annual report to the General Assembly (*House Bill 1833 – Subramanyam*).

COUNTIES, CITES AND TOWNS

A locality may by ordinance require the removal of clutter from property, except on land zoned for or in active farming operation, or may, whenever the governing body deems it necessary, after reasonable notice, have such clutter removed by its own agents or employees, in which event the cost or expenses thereof shall be chargeable to and paid by the owners of such property and may be collected by the locality as taxes are collected.

"Clutter" is defined to include mechanical equipment, household furniture, containers, and similar items that may be detrimental to the well-being of a community when they are left in public view for an extended period or are allowed to accumulate. Violations of the adopted ordinances are subject to the existing civil penalty applicable to violations of provisions relating to the removal of trash, garbage, refuse, litter, and similar substances from property (*House Bill 1778 – Ward*).

For purposes of the administration of blighted and derelict properties in certain localities, the definition of "qualifying locality" has been modified to include any locality with a score of 100 or higher on the fiscal stress index, as published by DHCD in July 2020. Under current law, a qualifying locality is one with a score of 107 or higher on the fiscal stress index, as published by DHCD using revised data for 2017.

Qualifying localities are able to (i) classify blighted and derelict properties as a separate class of taxable property and assess such property at a higher rate and (ii) sell delinquent tax lands 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. Additional qualifying localities have been added to the list of localities that have different requirements for having a special commissioner appointed to convey tax-delinquent real estate to the locality in lieu of a public sale at auction (*House Bill 1969 – Carr*).

The General Assembly authorized grants from a local Stormwater Management Fund to an owner of private property or a common interest community to be used for flood mitigation and protection measures that are part of a comprehensive flood mitigation and protection plan adopted by the

locality, and requires such grants, where practicable, to prioritize projects that include nature-based practices. Current law allows such funds to be used only for the construction, improvement, or repair of a stormwater management facility or for erosion and sediment control (*Senate Bill 1309 – Ebbin*).

EMINENT DOMAIN

For any project wherein the power of eminent domain may be exercised, any locality or the Commissioner of Highways must provide a landowner with a request to enter and inspect property at least 30 days in advance. The request must be on official letterhead and notify the landowner that even if permission is withheld, the locality or the Commissioner of Highways will be permitted to enter the property on the proposed date (*Senate Bill 1260 – Bell*).[6]

The notice required to be sent to a landowner prior to an authorized condemnor recording a certificate of take or certificate of deposit must provide that:

- the certificate of take or certificate of deposit will be recorded between 30 and 45 days from the date of the notice; and,
- the property will transfer to the condemnor upon recordation and that the owner has the right to petition the court for distribution of the funds represented in the certificate (*Senate Bill 1270 – Cosgrove*).

ENERGY CONSERVATION AND RESOURCES

The General Assembly expanded existing provisions related to siting agreements and zoning special exceptions for solar projects located in an opportunity zone to include energy storage projects and makes the provisions statewide (*House Bill 2201 – Jones* and *Senate Bill 1207 – Barker*).[7]

FAIR HOUSING AND DISCRIMINATION

For the purposes of the Virginia Fair Housing Law, when a person receives a request for accessible parking to accommodate a disability, the person receiving the request shall treat such request as a request for reasonable accommodation (instead of, for example, a reasonable modification) (*House Bill 1971 – Carr*).

No locality, its employees, or its appointed commissions may discriminate:

- in the application of local land use ordinances or guidelines, or in the permitting of housing developments, on the basis of race, color, religion, national origin, sex, elderliness, familial status, source of funds, sexual orientation, gender identity, military status, or disability;
- in the permitting of housing developments because the housing development contains or is expected to contain affordable housing units occupied or intended for occupancy by families or individuals with incomes at or below 80 percent of the median income of the area where the housing development is located or is proposed to be located; or,

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[6] Current law requires the locality or the Commissioner of Highways to send a request to enter and inspect the property and, if written permission is not received within 15 days, a subsequent notice of intent to enter with the date on which the locality or the Commissioner of Highways will be entering the property.

[7] The bill provides that its provisions shall not apply to any energy storage project that has received zoning and site plan approval, preliminary or otherwise, from the host locality before January 1, 2021. The bill also provides that its provisions shall not become effective with respect to energy storage projects unless the General Assembly approves legislation that authorizes localities to adopt an ordinance for taxation of energy storage projects such as solar projects with a local option for machinery and tools tax or solar revenue share.

- by prohibiting or imposing conditions upon the rental or sale of dwelling units, provided that the provisions of this subsection shall not be construed to prohibit ordinances related to short-term rentals.

It shall not be a violation of the Virginia Fair Housing Law if land use decisions or decisions relating to the permitting of housing developments are based upon considerations of limiting high concentrations of affordable housing. The Fair Housing Board is now required, after determining the existence of an unlawful discriminatory housing practice and after consultation with the Attorney General, to immediately refer the matter to the Attorney General for civil action (*House Bill 2046 – Bourne*).

LANDLORD AND TENANT

The General Assembly made various changes to the laws affecting landlords and tenants. A general district court shall enter an order upon petition by a tenant that his landlord has:

- removed or excluded the tenant from the dwelling unit unlawfully,
- interrupted or caused the interruption of an essential service to the tenant, or
- taken action to make the premises unsafe for habitation.

A preliminary order may be entered *ex parte* to require the landlord to allow the tenant to recover possession of the dwelling unit, resume any such interrupted essential service, or fix any willful actions taken by the landlord or his agent to make the premises unsafe for habitation if there is good cause to do so and the tenant made reasonable efforts to notify the landlord of the hearing. Any *ex parte* order entered shall further indicate a date for a full hearing on the petition that is no later than 10 days from the initial hearing date. Finally, at a full hearing on a petition and upon proper evidence presented, the tenant shall recover actual damages, the greater of $5,000 or four months' rent, and reasonable attorney fees (*House Bill 1900 – Hudson* and *Senate Bill 1215 – Ebbin*).

Tenant shall now be deemed to have reasonable justification for declining to permit a landlord or managing agent to exhibit the tenant's dwelling unit for sale or lease if the tenant has reasonable concern for his own health, or the health of any authorized occupant, during a state of emergency declared by the Governor in response to a communicable disease of public health threat and the tenant has provided written notice to the landlord informing the landlord of such concern.

The tenant must, however, in such circumstances provide to the landlord or managing agent a video tour of the dwelling unit or other acceptable substitute for exhibiting the dwelling unit for sale or lease.

During a state of emergency declared by the Governor in response to a communicable disease of public health threat a tenant may provide written notice to the landlord requesting that one or more nonemergency property conditions in the dwelling unit not be addressed in the normal course of business of the landlord due to such communicable disease of public health threat. In such case the tenant shall be deemed to have waived any and all claims and rights under the Virginia Residential Landlord and Tenant Act against the landlord for failure to address such nonemergency property conditions.

Lastly, in the case of a tenant who has provided notice that he does not want nonemergency repairs made during the state of emergency due to a communicable disease of public health threat, the landlord may nonetheless enter the dwelling unit, provided that the employees and agents sent by the landlord are wearing all appropriate and reasonable personal protective equipment as required by state law:

- to do nonemergency repairs and maintenance with at least seven days' written notice to the tenant and at a time consented to by the tenant, no more than once every six months, and,

- if the landlord is required to conduct maintenance or an inspection pursuant to the agreement for the loan or insurance policy that covers the dwelling units (*House Bill 1981 – Carr*).

A landlord may not accept full payment of rent, as well as any damages, money judgment, award of attorney fees, and court costs, from a tenant and receive an order of possession pursuant to an unlawful detainer action and proceed with eviction, unless there are bases for the entry of an order of possession other than nonpayment of rent stated in the unlawful detainer action filed by the landlord.[8]

The General Assembly provided specific language that must be included within a notice, and requires a landlord who elects to seek possession of the dwelling unit to provide a copy of the notice to the court for service to the tenant along with the summons for unlawful detainer. Tenants may exercise the right of redemption in unlawful detainer actions an unlimited number of times except that a landlord with four or fewer rental dwelling units, or up to a 10 percent interest in four or fewer rental dwelling units, may limit a tenant's use of the right of redemption to once per lease period, provided that the landlord provides written notice of such limitation to the tenant.[9]

The General Assembly also directed the Director of the DHCD to develop a sample termination notice to be maintained on the DHCD's website that includes language referencing acceptance of rent with reservation by a landlord following a breach of a lease by a tenant, and requires the DHCD to convene a stakeholder group to provide input to the Director regarding the development of such sample termination notice (*House Bill 2014 – Price*).

The General Assembly, among other things, prohibited terms in a rental agreement in which the tenant agrees to waive remedies or rights under the federal Servicemembers Civil Relief Act prior to the occurrence of a dispute between the landlord and the tenant (*House Bill 2161 – Tran* and *Senate Bill 1410 – Bell*).

No landlord may require a tenant to pay a security deposit, insurance premiums for damage insurance, and insurance premiums for renter's insurance prior to the commencement of the tenancy that exceed the amount of two months' periodic rent. A landlord is, however, permitted to add a monthly amount as additional rent to recover additional costs of such renter's insurance premiums.

Nonresident property owners must also file in the office of the clerk of the State Corporation Commission the name and office address of the agent appointed by such nonresident property owner (*House Bill 2249 – McQuinn*).[10]

NOTARIES AND OUT-OF-STATE COMMISSIONERS

If a clerk has an eRecording System, the clerk shall follow the provisions of the Uniform Real Property Electronic Recording Act. If a clerk does not have an eRecording System, the clerk shall record a legible paper copy of an electronic document, provided that such copy otherwise meets the

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[8] Under current law, a landlord may accept full or partial payment of all rent and receive an order of possession pursuant to an unlawful detainer action and proceed with eviction, provided that he has stated in a written notice to the tenant that any and all amounts owed to the landlord by the tenant, including payment of any rent, damages, money judgment, award of attorney fees, and court costs, would be accepted with reservation and would not constitute a waiver of the landlord's right to evict the tenant from the dwelling unit.

[9] Under current law, tenants may only exercise the right of redemption once during any 12-month period of continuous residency in the dwelling unit, regardless of the term of the rental agreement or any renewal term of the rental agreement.

[10] Under current law, such information must be filed in the office of the clerk of the court in which deeds are recorded in the county or city in which the property lies.

requirements for recordation and is certified to be a true and accurate copy of the electronic original by the party who submits the document for recordation.

An electronic notarial certificate is required to include the county or city in the Commonwealth where the notary public was physically located and indicate whether the notarization was done in person or by remote online notarization, defined in the bill as an electronic notarization where the signer is not in the physical presence of the notary. Additional forms of "satisfactory evidence of identity" have been added for instances when a notary is using video and audio communication. The bill contains an emergency clause and is effective as of March 11, 2021 (*House Bill 2064 – Simon*).

PROFESSIONS AND OCCUPATIONS

If a dwelling unit used as a single-family residence is foreclosed upon and there is a tenant in such dwelling unit on the date of the foreclosure sale, if the successor in interest acquires the dwelling unit for the purpose of occupying such unit as his primary residence, the rental agreement terminates and the tenant is required to vacate the dwelling unit on a date not less than 90 days after receiving written notice.

If the successor in interest acquires the dwelling unit for any other purpose, the successor in interest acquires the dwelling unit subject to the rental agreement and is required to permit the tenant to occupy the dwelling unit for the remaining term of the lease.[11]

PROPERTY AND CONVEYANCES

A deed of trust that has been recorded and that states that it secures indebtedness or other obligations under a loan document and that it also secures indebtedness or other obligations under such loan document as it may be amended, modified, supplemented, or restated shall secure such loan document as amended, modified, supplemented, or restated from time to time, without the necessity of recording an amendment to such deed of trust. The interest rate of a prior mortgage must be stated on the first page of a refinance mortgage[12] (*House Bill 1882 – Heretick*).

The property upon which a hotel known as the Chamberlin Hotel at Fort Monroe, Virginia, is located and that is leased to an operator for use as a senior living facility with an assisted living component shall revert to the Commonwealth subject to such lease or with such lease being assigned or otherwise conveyed to the Commonwealth by the United States. Provisions of the Acts of Assembly suspending the provision of the deed from the Commonwealth to the United States by which such site would revert and revest in the Commonwealth have been repealed (*House Bill 2009 – Mugler*).

The General Assembly also reduced from 20 years to 10 years from the date of a judgment the period of time within which an execution may be issued or action may be taken on such judgment. The limitation of the enforcement of a judgment may be extended up to *two* times by a recordation of a certificate prior to the expiration period in the clerk's office in which a judgment lien is recorded.

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[11] Under current law, the foreclosure sale acts as a termination of the rental agreement by the owner, but the tenant is permitted to remain in possession of the dwelling unit as a month-to-month tenant on the terms of the terminated rental agreement until the successor owner gives a notice of termination of the month-to-month tenancy.

[12] The inclusion of the prior mortgage interest rate in refinance deeds of trust was a priority of the Virginia Land Title Association. Under the existing language of §55.1-319, "automatic subordinations" required that the interest rate be stated in the *prior* deed of trust in order for the refinance deed of trust to have priority over junior liens without the necessity of a recorded subordination. –Ed.

Such recordation shall extend the limitations period for 10 years per recordation from the date of such recordation.[13]

A settlement agent or title insurance company may release a judgment lien, in addition to a deed of trust as provided under current law, provided that the obligation secured by such judgment lien has been satisfied by payment made by the settlement agent and whether or not the settlement agent or title insurance company is named as a trustee under such lien or received authority to release such lien. The bill has a delayed effective date of January 1, 2022, for all provisions except those related to the recordation of a certificate for the extension of a judgment (*House Bill 2099 – Coyner*).

RESIDENTIAL PROPERTY DISCLOSURES

The General Assembly added to the provision of the required disclosure statement directing a buyer to beware and exercise necessary due diligence with respect to determining the condition of real property or any improvements thereon a provision advising the buyer to obtain a mold assessment conducted by a business that follows the guidelines provided by the U.S. Environmental Protection Agency (*House Bill 1824 – Askew*).

The Real Estate Board is now required to make available on its website a flood risk information form, the details of which are outlined in the legislation. An owner of residential real property located in the Commonwealth who has actual knowledge that the dwelling unit is a repetitive risk loss structure, as defined in the legislation, shall disclose such fact to the purchaser on a form provided by the Real Estate Board on its website. The bill has a delayed effective date of January 1, 2022 (*House Bill 2320 – Convirs-Fowler* and *Senate Bill 1389 – Lewis*).

SCENIC RIVERS SYSTEM

A 79-mile portion of the Rappahannock River located in Caroline, King George, Westmoreland, Essex, and Richmond Counties to the Rappahannock State Scenic River, a component of the Virginia Scenic Rivers System (*House Bill 1819 – Cole*).[14]

TAXATION

The General Assembly extended from 36 to 60 months the time period for which a local tax official may suspend an action for the sale of tax delinquent property, which under current law is authorized if the owner enters into an agreement with the official to pay delinquent taxes in installments. An official is also authorized to suspend an action if a person who is not a party to the action gives notice asserting ownership rights, by virtue of testate or intestate succession, in the property subject to the action. If a court determines such person has ownership rights in the property, such person may enter into an installment plan similar to what is authorized under current law.

A final court order confirming sale of tax delinquent property shall not be entered sooner than the later of: (i) 90 days after the official gives notice of the action, or (ii) 90 days after the official receives notice from a person who is not a party to the action asserting ownership rights (*House Bill 2165 – Hope*).

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[13] Under current law, such limitation period may be extended on motion of the judgment creditor or his assignee.

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

The General Assembly, for taxable years 2021 through 2025, established a Virginia housing opportunity tax credit, which is equal to the amount of the federal low-income housing tax credit allocated or allowed by the Virginia Housing Development Authority to a low-income building that is eligible for the federal credit. The credit would be nonrefundable and could be carried forward for up to five years. No more than $15 million in credits shall be granted per calendar year (*Senate Bill 1197 – Locke*).

WATERS OF THE STATE, PORTS AND HARBORS

Grants from the Stormwater Local Assistance Fund may be awarded for projects related to Chesapeake Bay total maximum daily load (TMDL) requirements to take into account total phosphorus reductions or total nitrogen reductions. The General Assembly also authorized grants awarded for eligible projects in localities with high or above average fiscal stress as reported by the Commission on Local Government to account for more than 50 percent of the costs of a project (*Senate Bill 1404 – Lewis*).

CONCLUSION

While the environment, criminal justice, commerce and labor, education, elections, firearms, 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 forty-six bills impact areas of the law routinely encountered by real estate practitioners.

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR

MINUTES

WINTER MEETING OF THE BOARD OF GOVERNORS AND AREA REPRESENTATIVES

Thursday, January 21, 2021

Virtual Meeting via Microsoft Teams

I. **Attendees (Officers):** Lori Schweller, Chair; Kathryn Byler, Vice-Chair; Karen Cohen, Secretary

Attendees (Board of Governors – Non-Officer)*: Stephen Gregory; Robert Hawthorne, Jr.; Blake Hegeman; Sarah Petcher; Rick Chess; Mark Graybeal; Whitney Levin; Ronald Wiley, Jr., Ex Officio

* The Section's Board of Governors is 10 members: 3 officer members plus 7 non-officer members.

Attendees (Members) (names appear as they appeared in email attendance confirmations): David Helscher; Kay Creasman; Harry Purkey; H. Matson Coxe, IV; William Nusbaum; Barbara Wright Goshorn; Susan S. Walker; Eric Zimmerman; Sarah Louppe Petcher; Pam Fairchild; Tara Boyd; Ron Wiley; Page Williams; Cartwright Reilly; Whitney J. Levin; Susan Pesner; Benjamin Winn; Mark Graybeal; Maxwell H. Wiegard; Rick Richmond; Jeremy B. Root; Ross Allen; Michael Lafayette; William G. Homiller; Ralph E. Kipp; Brian T. Wesley; Douglass W. Dewing; Edward Waugaman; Howard Gordon; Jon Brodegard; Ron Wiley; Tom Lipscomb; Heather Steele; Paul Melnick; Randy Howard

Other Attendees: Dolly Shaffner, VSB Liaison; Tracy Winn Banks, VA CLE Liaison

II. ADOPTION OF MINUTES—Upon motion made by Steve Gregory and seconded by Blake Hegeman, the Minutes of the Fall Meeting of the BOG and Section, held virtually on September 18, 2020, were unanimously adopted.

III. FINANCIAL REPORT — **Lori Schweller**

Lori Schweller presented the Section's November 2020 financial report. There are no expense vouchers. 2020 was a cost-saving year.

IV. STANDING COMMITTEES

1. Membership — **Rick Chess and Pamela Fairchild**

   a. New member welcome. The Section welcomed new member, Olaun Simmons of Vanderpool, Frostick & Nishanian, P.C. in Manassas, Virginia.

   b. Committee Report.

   Co-Chair Rick Chess reminded Section members that one way to bring in newer lawyers is to ask senior members of firms to talk to junior members about the Section and inform them that it is a great way for a junior person to get involved. Pam Fairchild noted that, in the past, at every real estate CLE, a Committee member would ask attendees to join. She suggested that perhaps the Section prepare a recording to play before CLEs and offer a discount for new bar members.

   Steve Gregory mentioned reaching out to law professors. Kathryn Byler said she is a real property professor at Regent and that she spoke with law students about an article for *The*

Fee Simple. She asked whether there is a student membership available. Ron Wiley said that because the Section is part of the State Bar, there is no realistic option for a student membership. Rick suggested there may be a creative way to provide such membership.

Bill Nusbaum said that the Section has offered steeply discounted tuition to law students for seminars and that the Section can continue to promote that in addition to Section member discounts. He noted that the cost-savings from the lack of in-person events may provide an opportunity to increase the Section member discount for in-person learning.

Sarah Petcher pointed out that on the VSB website, it says that section memberships are open to all members in good standing and that many sections also have law student memberships; therefore, VSB seems to recognize a law student category, even though a student cannot be a bar member. Rick moved to create a law student category. Pam asked whether the bylaws allow it. Dolly Shaffner explained that student Section members would get emails and would receive *The Fee Simple* but they would not get a dues statement with the "section membership" box pre-checked so the onus is on the student to get their membership dues paid. Rick and Pam said they would follow up on creating a law student membership category.

c. Section members were reminded to send contact information updates to lschweller@williamsmullen.com and kcohen@protoraelaw.com

d. Nomination of new Area Representatives. Larry McElwain introduced Justin Ritter, a Charlottesville practitioner with a focus on common interest communities. Upon motion made by Larry McElwain and seconded by Tom Lipscomb, the Board elected Justin Ritter as an Area Representative. Kay Creasman introduced Regina Neumann, a practitioner in Leesburg, focusing on real estate transactions. Upon motion made by Kay Creasman and seconded by Susan Pesner, the Board elected Regina Neumann as a new Area Representative.

2. Fee Simple – **Steve Gregory and Rick Chess**

Steve Gregory reminded members of the article submission deadline of **April 2, 2021**. He noted that because this is the legislative/case law update issue, the deadline is likely to be extended. Steve said he is contacting the Committee Chairs for articles. He requested suggestions for an author to cover the topic of remote online notarizations.

Rick Chess said the Committee had talked about law schools selecting the best student written article and offering a $500 prize and suggested that we do that, especially given that the Section has the funds. Rick said the Committee also discussed the need to try to increase internet exposure to articles. Regarding republication, Steve said that *The Fee Simple* has always allowed republication so long as there is proper attribution to the article's first publication in *The Fee Simple*. Bill Nusbaum said that it might help to incentivize people to step up for authorship if the Section sends emails and includes testimonials from Section authors who have obtained work as a result of a published article.

3. Programs – **Sarah Louppe Petcher**

Sarah Petcher reported that the advanced program is finalized and all speakers are secured. The program is two days on March 4 (1:30 pm – 5:30 pm) and March 5 (9:00 a.m. – 4:00 p.m.). Topics include broadband access and 5G, electronic real estate transactions, specifically electronic notarization, recordation and signatures, wellness and habit formation for the real estate practitioner (ethics credit), force majeure and other Covid-19 related topics, brokerage, series LLCs, occupational risks for lawyers (ethics credits), and looking forward and backward at the Section's 25-year history. The program will be pre-recorded with live Q&A, which qualifies as live CLE. Sarah also said

that Ben Leigh expressed interest in retiring as Co-Chair, so the Committee is seeking a Co-Chair.

Dolly Shaffner informed that the Annual Meeting will be June 14 and 15 and is likely going to be a hybrid with virtual sessions and an in-person Executive Committee meeting on June 17 or 18.

4. Technology — **Matson Coxe**

Matson Coxe reported that the Technology Committee met on January 20. While he is not aware of recent case law yet arising out of Covid's impact on in-person proceedings, technology certainly is an issue with all the remote proceedings now taking place. Matson noted that some counties have made land records available without a subscription (e.g., Isle of Wight).

Matson has solicited authors for technology topics for *The Fee Simple*. Regarding promoting broader distribution of *The Fee Simple*, Matson suggested that a Section LinkedIn page might be a good way to distribute *The Fee Simple*, pointing out that new law grads often join LinkedIn. Dolly Shaffner noted that the social media policy is in the Section chairs' handbook. She said the content must be run by volunteers; the Communications Department would have to approve it. Dolly said she thinks it is a great idea and will send the social media policy from the handbook.

V. SUBSTANTIVE COMMITTEES

a. Commercial Real Estate — **John Hawthorne** – Not present; no report.

b. Common Interest Community — **Josh Johnson & Sue Tarley** – Not present; no report.

c. Creditor's Rights and Bankruptcy – **Lewis Biggs** – Not present; no report.

d. Eminent Domain — **Chuck Lollar** – Not present; no report.

e. Ethics — **Ed Waugaman and Blake Hegeman**

Blake Hegeman acknowledged Kay Creasman for doing an incredible job disseminating LEO opinions. Kay noted that they still need 50% of comments to come in by the end of the month. The next step is to make sure the LEOs are collated in a useable fashion. The goal is to finish by the end of February to send to VSB Ethics Counsel, Jim McCauley, for review. Blake suggested an article alerting members about this resource. Ed commended all who worked on this important project, and encouraged those who had not yet participated to contact Kay.

f. Land Use and Environmental — **Karen Cohen and Lori Schweller**

(Report attached to agenda) The Committee met by telephone conference on January 14, 2021. Karen Cohen led a discussion of vested rights based on her article in *The Fee Simple* entitled "The Language of Vested Rights – Ironing Out the Confusion." The Committee also discussed issues related to private roads in development projects and jurisdictions that do not have zoning ordinances.

g. Residential Real Estate — **Susan Walker and Benjamin Winn**

(Report attached to agenda) The Committee met by teleconference on January 7, 2020. Hope Payne, who has served as co-chair of the Residential Subcommittee for several years, announced her decision to step down as co-chair and then announced that Benjamin Winn would succeed her as co-chair. The Committee discussed recording taxes paid on a deed where the property's assessed value is greater than the purchase price and members' experience with Clerks rejecting alternative

evidence of value. The Committee discuss remote and electronic closings and experiences acting as power of attorney for a buyer who cannot attend a closing. The Committee also discussed an opinion from Loudoun County that resulted in the voluntary closure of White's Ferry, one of the few Potomac Crossings between Maryland and Virginia and in operation for more than 200 years. Several legal issues, including public rights-of-way and the Byrd Act, were thought to be of interest to the Section.

h. Title Insurance — **Cynthia Nahorney** – Not present; no report.

VI. VBA UPDATE — **Will Homiller**

Usually, the Section's winter meeting follows the VBA January meeting. The VBA meeting is cancelled, so Will Homiller is still the Chair; however, Jeremy Root of Blankingship & Keith will be taking over. Will informed of possible legislation affecting the timeline for action for judgment liens affecting how land is sold after delinquent taxes. He said that VBA is sponsoring legislation for better clarity regarding deeds of trust and how they are amended and noted that Kay Creasman provided input on that legislation. Will reminded members that the value VBA members have is the opportunity to provide input on legislation; VBA members take pride in that and if you are interested in being involved, reach out.

VII. NEW BUSINESS

Karen Cohen informed the Section about upcoming meetings on February 12 and March 12 of the Black Family Land Trust (BFLT) and the effort to launch a Legal Services Advisory Committee to assist Black families with heir property issues. There may be an opportunity for Section members to provide pro bono / reduced fee work related to these issues. If interested, members should reach out to Karen.

VIII. NEXT MEETING — The next meeting is proposed to be held on Thursday, March 4 at 11:00 a.m.

X. ADJOURNMENT – The meeting was adjourned the meeting at approximately 3:30 p.m.

BOARD OF GOVERNORS
REAL PROPERTY SECTION
VIRGINIA STATE BAR
(2020-2021)

[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.

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