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Virginia State Bar
Real Property Section*

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SPRING 2022



Douglass Warren Dewing

October 7, 1954 - April 9, 2022

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FALL 2022 SUBMISSION DEADLINE: FRIDAY, OCTOBER 7, 2022

THE NEXT MEETING OF THE BOARD OF GOVERNORS OF THE REAL PROPERTY SECTION
OF THE VIRGINIA STATE BAR WILL BE HELD ON
FRIDAY, JUNE 17 AT 12:30
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MESSAGE FROM THE CHAIR

By Kathryn N. Byler



Kathryn N. Byler is the 2021-2022 Chair of the Real Property Section of the Virginia State Bar and Chair of the VSB Second District Committee. She has practiced with Pender & Coward, PC at their Virginia Beach office since being admitted to the VA bar in 1998. As a licensed real estate broker and commercial property owner, Kathryn brings a heightened understanding of her clients' real estate and business needs. She holds a BSBA from Old Dominion University, an MBA from Golden Gate University and a JD from Regent University School of Law where she is an adjunct professor teaching Real Estate Transactions, Contracts and Business Entities.

Just when you thought it was safe to go back in the water, Omicron appeared. What a turbulent year it's been for planning purposes! Thanks to our creative and capable team of section members, VSB staff and VA MCLE representatives, we continued to stay active, serving our clients and our profession throughout the pandemic.

In March, 220 attorneys attended the Advanced Real Estate Seminar. The virtual seminar had a live opportunity after each pre-recorded presentation that enabled attendees to post questions and receive full credit for a live CLE. With an esteemed faculty including two law school professors and a judge, the seminar provided 7.5 credit hours, including 2 hours of ethics. The Program Committee Co-chairs, Sarah Loupe Petcher and Heather Steele, moderated for a seamless experience. Feedback confirmed that the topics, such as "Condo Maintenance in the Aftermath of the Surfside Collapse" and "State of the Market and Local Policy: Accessory Dwelling Units in the Commonwealth of Virginia," were important and timely.

The Annual Real Estate Practice Seminar also came in a new format. Instead of live presentations in three locations as past years or an all-virtual program as last year, we brought a hybrid of live at the Kingsmill Resort with a live webcast option. This creative solution offered the personal interaction many prefer and the ease of a webcast for those wanting to avoid travel or potential exposure to lingering COVID-19. The stellar faculty included Justice Stephen R. McCullough, Supreme Court of VA, Judge William E. Glover, Spotsylvania County Circuit Court, and brilliant real estate attorneys throughout the Commonwealth. The program opened with the important legislative and case law update followed by valuable presentations for attorneys who focus on real estate as well as those with a broader practice. The one-day program offered at a discount for section members carried 6.5 credit hours, including 1 hour of ethics, followed by a cocktail reception hosted by Pesner Altmiller Melnick & DeMers—proving again that the section offers great benefits for a nominal fee.

Efforts by the Membership Committee are bound to increase the section membership which is already among the largest in the State Bar. Under the leadership of Rick Chess and Pam Fairchild, the committee has identified four key initiatives, including student development, support for early years of real property practice, area representative development, and promoting cross-section expansion.

At the upcoming Annual VSB Conference in Virginia Beach, we will proudly offer a CLE entitled, "Heirs Property and Partition Reform in Virginia: How Attorneys Are the Key to Stabilizing Land Ownership in Vulnerable Communities." This program will be co-sponsored by the Trust & Estates Section and the Bankruptcy Section. Due to the hybrid nature of the conference, only 8 CLE proposals were accepted. It's an honor to present this important topic. Co-sponsorships and exposure to all conference attendees will give us an opportunity to feature the Real Property Section and invite non-members to join.

It has truly been an honor and a career highlight to serve as chair of this stellar section. At the end of June, I will join the esteemed group of past-chairs. While my term as an officer will end, I hope to stay active with committee work. If anyone reading this isn't actively involved in a committee, I

encourage you to do so. There's no question that the rewards, in terms of professional development and collegial fellowship, far out-weigh the effort. Thanks to all who contributed to making this another banner year for the Real Property section.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'KBYL', with a stylized flourish at the end.

Kathryn N. Byler

CALL FOR COMMITTEE MEMBERS

The Fee Simple Committee of the Real Property Section is putting out a call for new members. The committee meets quarterly by telephone to plan the upcoming twice-yearly issues of the journal. Please contact either of the Editors if you are interested in participating:

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IN MEMORY OF DOUGLASS W. DEWING



October 7, 1954 - April 9, 2022

Douglass Warren Dewing, 67, of Henrico County, son of the late Bruce and Martha, passed away Saturday, April 9th. He was born in Louisville, Kentucky, and was a graduate of Churchland High School in Portsmouth, Virginia, and Washington & Lee University in Lexington, Virginia where he was an active member of both ROTC programs and a student athlete. He earned a Juris Doctor degree from the Washington University in St. Louis School of Law. He explored his Catholic faith by continuing his education with a Master of Arts in Theology from St. Leo University and walking the Camino de Santiago as a pilgrim in 2015.

While at Washington & Lee Doug majored in Journalism and Politics, was president of the Psi Upsilon fraternity, and a diver on the swim team. His work at the campus radio station led to a large record collection, a lifelong love of music, and a brief career as a reporter. After law school, he was of Counsel at the law firm of Kellam, Pickrell, and Lawler, before beginning a thirty-year career with Lawyer's Title Insurance Corporation (later Fidelity National Title Group) rising to State Counsel for commercial transactions. He authored the third, fourth, and fifth editions of *A Virginia Title Examiners' Manual* and co-authored Virginia CLE's *Real Estate Transactions in Virginia*. A former Chair of the Real Property Section of the Virginia State Bar, he was widely regarded as the state's premier expert in title law. He recently retired from self-employment as a Consulting Examiner.

It's considered a compliment and a commentary on a person's expertise in an area to say, "He wrote the book on it." Doug Dewing *literally* wrote the book on title searching in Virginia; his [A Virginia Title Examiners Manual](#) is now in its fifth edition. There likely isn't a real estate lawyer or settlement agent in the Commonwealth who doesn't consider Doug a friend and/or a mentor, including this author.

Doug was a person who always had time for colleagues, and he considered his colleagues his friends. He was the go-to resource for obscure title questions, which he relished. He had an encyclopedic knowledge of statutes and cases which he was only too happy to share.

Doug was the chair of the Real Property Section in 2005–2006, and was the fourth recipient of the Traver Award, in 2008.

All of us—and those who follow us—will be forever in his debt. We are better lawyers because of Doug Dewing, and we are better persons for having known him.

–Steve Gregory

Doug Dewing was a friend, a business associate whom I could contact to discuss obscure legal issues related to real estate ownership in Virginia without him thinking the discussion was unusual. But even he could not find out why the traditional search period in Virginia is 60 years. That may be the only thing he couldn't pin down. He was very, very good at details, at searching title to the very source of initial ownership in the land records, at finding the source of ownership of our 2 acres, when it was originally hundreds of acres. He enjoyed complex issues.

Doug was also good at explaining things in writing. His editions of *A Virginia Title Examiner's Manual* followed in the footsteps of Lucian B. Cox and Sidney F. Parham. It continues to "provide a succinct and quick means of reference to statutes and cases pertinent to examination of title to real estate." The book is ubiquitous, found in every title examiner's and most title underwriter's offices. It's a solid foundation of information related to real estate issues. Replacing him as author will be a significant challenge for the publisher.

Whenever anyone passes away, it's similar to digging a hole in the sand at the beach. We all know the hole will eventually be filled with sand, sooner or later. With Doug's passing, a large hole is left in the real estate community that will take significant time to be filled. He will be missed by us all.

–Kay Creasman

Doug's reputation of being the eminent title insurance scholar preceded him. I was fortunate to work across the hall from him for more than a decade and because of his willingness to teach and to guide, I learned so much and became a better "dirt" lawyer for it.

About the only thing I didn't adopt was his style of keeping huge piles of papers on his desk – and really being upset when some tried to help him out by cleaning it up while he was away.

When I left to join TowneBank, Doug gave me a copy of his book, *A Virginia Title Examiners' Manual* (second edition, because it is the gold standard, and very popular!) and the inscription ended with: May you always find joy!

Doug, you are sorely missed by so many and we are fortunate to have known you.

–Ute Heidenreich

With Doug Dewing's passing, we have lost a dear friend and brilliant colleague. I had the honor and privilege of working with Doug as a fellow title underwriter, title examiner and Virginia State Bar Real Estate Section Board Member and Officer. Doug had an encyclopedic knowledge of real estate and title insurance law. He freely shared this gift with others and was always available to answer a question or share an opinion. His book, *A Virginia Title Examiner's Manual, Fifth Edition*, is an invaluable resource for all real estate practitioners.

Doug had the best sense of humor and always had a joke or anecdote to share to "lighten up" any situation. He was devoted to his family. Every time we chatted; he relayed his kid's current activities. He was so proud of them and their endeavors.

Doug had a kind heart and a gentle soul. He was a lifelong learner and innately curious. Later in life, he obtained his master's degree in theology. While our hearts are saddened at Doug's passing, we also are glad for him. He has attained his life's goal and is now at peace, pain-free and rejoicing with God in Heaven. We were blessed to know him and have him in our lives.

–Paula Caplinger

Doug was a renaissance real estate practitioner. Doug could analyze various legal issues contained in one cause and arrive at a solution that complied with all necessary statutes all from the top of his head. My sincere condolences to the passing of Doug.

–Ann Gourdine

Oh, my, I am so sorry to hear of Doug’s passing! He was such a smart, witty, and wonderful colleague. We will miss him dearly.

–Jim McCauley

Doug was the best.

–Lawrence Daughtrey

This is indeed a very sad day. He will be missed.

–Susan Pesner

Doug’s passing is a significant loss to the Virginia legal and real estate community. He was always willing to give advice (which was always accurate and timely) for any number of legal and title insurance issues and was my “go to” person for many years and for answers to my numerous inquiries. He was pragmatic and was an advocate for title insurance coverages, endorsements, and claims. He had a knack for making complex things become simple. Although I have been told that everyone is “replaceable,” I don’t think that applies to Doug. I am not aware of anyone who can replace him.

–Neil Kessler

Most definitely- he will be missed. He provided so many insightful comments in our Real Property Section meetings.

–Lynda Butler

That’s so very sad to hear! Just last week I referred to Doug’s Virginia Title Examiners Manual for guidance. He has left a lasting legacy (with a twist of humor).

–Susan Walker

We have lost an iconic member of our profession.

–Harry Purkey

I grew up two blocks away from Doug in Portsmouth and have known him and his younger brother since elementary school. This is tragedy for his family and all of us in the real estate bar and title insurance community. His dry humor and deep knowledge of real estate in Virginia will be missed by us all. I endorse the great suggestions on what the Real Property Section can do to help his legacy live on through the *Title Examiners Manual*.

–Rob Barclay

I just wanted to say how sad I am to hear of Doug's passing. He was a wealth of information and was always willing to help the newbie's find the answers. He was a wonderful person, and the real estate world will be dimmer without him in it. My thoughts and prayers go out to his family and friends.

–Lisa Owen

Doug was a member of my staff after LandAmerica was purchased by Fidelity; and I knew him for many years prior to that. He was an articulate, resourceful, very knowledgeable and most kind individual.

–Randy Howard

To close this remembrance, Doug's oldest son:

Since Dad's passing on April 9th, I have received several kind messages from colleagues who knew him at every stage of his career. Invariably, they mention his wit and good humor, his mastery of his profession, and his willingness to help others. I'm personally grateful for that. Work was a part of Dad's life I did not know all that well. I always knew that he was very good at what he did (how many can say they literally wrote the book on their field?), but he was frustratingly modest whenever I would attempt to pay him a compliment. I take immense pride in learning just how very well-regarded he was.

It may not surprise the reader to learn that Dad had not fully retired and was still working in a part-time capacity for the Commonwealth. When I called them to share the sad news, they said something that gave me perhaps my first genuine laugh that week. Apparently, Dad had mentioned he knew of three people who could do what he did, only better...and would he happen to have shared those names with me? While it will forever remain a mystery just who he had in mind, how like my father that was: to the last, a thorough and consummate professional, his advice leavened with a fair measure of self-deprecation.

Your kind words and reminiscences have been a true comfort to us on the difficult days. On behalf of the entire Dewing family, thank you.

–Neal Dewing

2022 RECIPIENTS OF THE TRAVER AWARD

The Traver Award is awarded by the Real Property Section of the Virginia State Bar and Virginia Continuing Legal Education to honor men and women who embody the highest ideals and expertise in the practice of real estate law. Traver Award recipients are VBA Real Property Section members who have made significant contributions to the practice of real property law generally and the Section specifically and have generously shared their knowledge with others. The award is named for the “father” of Virginia real estate lawyers, Courtland L. Traver, whose outstanding legal ability and willingness to share his knowledge and experience was an inspiration to others.

In 2022 the Section was fortunate enough to have dual recipients.



Richard B. “Rick” Chess has been mentored by the best, particular the leadership of Real Property Section of the Virginia State Bar. Courtland L. Traver set the mentoring standard for the section, by helping all who asked for help – including Chess - and he always encouraged us to gift forward the knowledge we gained.

Frederic Lee Ruck, then Fairfax County Attorney, introduced Chess in 1975 to local government law, engaging Rick as Assistant Secretary of the Local Government Attorneys of Virginia, where he would digest for publication Virginia Supreme Court opinions impacting municipal law practitioners. Jim Flaherty, then Chair of the Allegheny County (PA) Board of Commissioners, brought Rick back to Pittsburgh, where six months out of law school, he was placed in charge the Consumer Affairs Department of the Allegheny County Law Department. A tour as a member of the Pennsylvania General Assembly followed and then a return to Virginia leading economic development for the Metro Richmond Chamber of Commerce for Carlton Moffatt.

John McCann engaged Rick at United Dominion Realty Trust (UDR), where he acquired 50,000 apartments and 10 retail centers over 10 years. Chess later served for 20 years - as consultant, then Trustee, and eventually Chair of the Audit Committee - for First Potomac Realty Trust (FPO). Louis Rogers introduced Rick to the world of 1031 Like-Kind Exchanges in 2000, which eventually led to Rick being elected in 2010 as the President of REISA (now ADISA), the national association representing those engaged in non-traded securities.

Rick has developed a 40+ year practice at the intersection of real property law and government, including appealing property assessments, providing tax-on-asset-sale mitigation, helping grow portfolios via acquisitions and mergers, and accessing equity needed by clients for growth via REITs, 1031 DSTs, and Qualified Opportunity Zone funds.

Mr. Chess is a graduate of the University of Pittsburgh and the T.C. Williams School of Law of the University of Richmond. Chess served the Chair of the Commercial Real Property Committee, serves on the board of the Real Property Section, has presented CLE programs for over 20 years, and has published four articles in the FEE SIMPLE law journal of the section.



Ronald D. “Ron” Wiley, Jr. is Underwriting Counsel for Old Republic National Title Insurance Company. Mr. Wiley has been a real estate lawyer in Charlottesville since 1983 after he graduated from the T. C. Williams School of Law at the University of Richmond. He was in private practice until 1991 when he became a high school Earth Science teacher, continuing in private practice during his summer breaks until 1993 when he became Senior Vice President & Regional Counsel for a regional title insurer. Ron remained in that position until 2010, when he returned to private practice. Ron joined Old Republic Title as Underwriting Counsel in August 2016.

Ron is active in the Virginia State Bar Real Property Section and served on its Board of Governors through June 2021, including as Section Chair in 2019-2020. He also remains active with the Charlottesville-Albemarle Bar Association and its Real Property Section. Ron enjoys teaching and has been a continuing education instructor for numerous Virginia CLE® programs over the years, as well as having coordinated the continuing education program for Virginia agents and approved attorneys of the company where he worked for nearly 18 years. Ron has helped teach Real Estate Transactions & Finance at the University of Richmond law school every year since 2013.

Ron has been married to Gail Hyder Wiley since 1980. They have two adult sons. He is an Eagle Scout and was a Philmont Ranger.

WISE COUNTY MAY BE FIRST IN NATION WITH BLOCKCHAIN PROJECT*

Software developer: “We think we’re going to be the first in the nation” to auto-generate title abstracts



by [Sarah Wade](#)**
March 2, 2022

If you’ve ever bought a house, you’ve probably paid someone to help you do a title search. That typically requires sifting decades of title transfers, liens and other court records about the property—something that can take hours, even for a trained expert. What if it only took a few minutes, though, and you could pull up all of that information with a single click?

That’s the goal of a Southwest Virginia project that’s using blockchain technology to enable “faster, better, cheaper access” to its land records, according to the clerk spearheading the project.

Read more on the [Cardinal News website](#).

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** Sarah Wade is an award-winning freelance reporter and writer based in Bristol, a city straddling Northeast Tennessee and Southwest Virginia. She previously worked for the Bristol Herald Courier. Contact her at swade316@gmail.com.

OMBUDSMAN'S DETERMINATIONS OF COMMON INTEREST COMMUNITY LAW MADE DURING THE PANDEMIC

By Chad Rinard



Chad Rinard has been a legal counselor and litigator for property owners' associations and condominiums in Northern Virginia, Fredericksburg, and Richmond for 20 years. He has extensive experience advising boards at their meetings; advising presiding officers at meetings of associations' members; and representing associations before the Supreme Court of Virginia, the Circuit and General District Courts in Virginia, and cities' and counties' Boards of Supervisors. Chad advises boards considering complaints submitted by owners through their associations' complaint procedures and writes the boards' Notices of Final Adverse Decisions to those complaints. He also is a frequent speaker and presenter at educational events for managers and boards of directors on these topics, among many others.

Created in 2008, the Office of the Common Interest Community Ombudsman has provided an opportunity for residents living in Common Interest Communities to resolve, without the intervention of a court, any complaints that their associations, boards or associations' managers are violating Common Interest Community laws, of which the most pertinent are Virginia's Condominium and Property Owners' Association Acts.¹ By statutory mandate, each Common Interest Community in Virginia must have procedures to resolve their residents' written complaints.² By design, those complaints that residents and their associations' boards of directors cannot resolve among themselves may be appealed by residents to the Ombudsman for determinations on the validity of their complaints. The Ombudsman then considers the complaints herself and writes non-binding determinations.³ As a result, Ombudsman's determinations can be quick, less expensive, and, candidly, kinder legal opinions than are often the results of contested litigation. The Ombudsman may include recommendations on how communities may comply with Common Interest Community laws going forward, should the Ombudsman determine that those communities are in fact in violation of those laws.

The determinations of the Common Interest Community Ombudsman have been a wellspring of legal opinions for associations' managers and lawyers who cannot wait for the more random assortment of legal opinions that come from Virginia's Circuit Courts and Supreme Court. COVID-19 required unexpected interpretations of both Virginia's Condominium Act and Property Owners' Association Act as associations conduct business during the pandemic, and the determinations of the Ombudsman have been at the forefront of addressing the new legal issues that have arisen. This article surveys several of those determinations that the Ombudsman has written since the onset of the pandemic; and, citations to them can be found in the footnotes to this article. (The full text can be found on the Office of the Common Interest Community Ombudsman's page of the Virginia Department of Professional and Occupational Regulation website.⁴)

Ombudsman's Determinations about Meetings

An association must still hold a meeting of its members annually.⁵ The pandemic has not excused any association from this statutory requirement. However, for an association that had not held a meeting of its members, in any recent memory, much less the last year, the Ombudsman determined

¹ See Virginia Code § 54.1-2345, *et seq.*

² Virginia Code § 54.1-2354.4.

³ See *generally* 18 Virginia Administrative Code §§ 48-70-10 - -130.

⁴ www.dpor.virginia.gov/CIC-Ombudsman

⁵ *Baumgarten v. The Villas at River Point Condominium Association, Inc.*, File No. 2021-02069 (CICO April 22, 2021) (interpreting Virginia Code § 55.1-1949).

that the association had violated Common Interest Community law and as a remedy suggested that the association notice a meeting of its members within 45 days of the date of her determination.⁶ This is likely a less harsh result than a Circuit Court would have ordered had one of that association's members sued to compel it to hold a meeting.

The Ombudsman has also confirmed what the Virginia legislature has recently passed: two directors are no longer required to be physically present at any virtual or hybrid board meeting.⁷ All other statutory requirements of a board of directors appear to remain intact, however. A board must still review its association's most recent reserve study annually, and a board must still make any adjustments to its budget that the board believes to be necessary based on its review of its association's reserve study.⁸ The five-year requirement to conduct a new reserve study begins upon the board's receipt of the final version of its association's last reserve study.⁹

Meetings of both an association's members and its board must still be noticed, of course. Owners must still first consent to their electronic receipt of any notice of a meeting of the members for such notice to be compliant with the statute.¹⁰ On the other hand, an electronic notice for a board meeting sent to an individual member can be used to supplement the notice an association posted of its board meetings on its website for which this particular owner refused to sign up.¹¹ The notice for an association's board of directors' meeting does not have to include that meeting's agenda.¹² There is no requirement for an association to disseminate the board of directors' agenda packets in advance of a board's meeting, but the association must still ensure agenda packets are available for inspection at the same time that the agenda packets are provided to the board,¹³ regardless of whether the meeting is held in person or virtually. Finally, an association is not required to distribute the minutes of its meetings,¹⁴ except in response to a proper request to examine the books and records of an association from a member in good standing who asks to examine those minutes.

Ombudsman's Determinations about the Business of an Association conducted over Email

The use of emails by directors to decide motions unanimously was already on the uptick before the pandemic began. Unsurprisingly, the Ombudsman tends to decline to make determinations on complaints by owners about the use of email by their associations' directors. The Ombudsman has determined that the validity of a motion decided unanimously by a board is not governed by Common Interest Community law and therefore outside of her jurisdiction to consider; instead the use of emails by directors to decide motions unanimously is governed by an association's governing documents and/or the Virginia Nonstock Corporation Act, which are not in the Ombudsman's

⁶ *Id.*

⁷ *Panayides v. Lafayette Park Condominium*, File No. 2022-00066 (CICO July 26, 2021) (interpreting Virginia Code § 55.1-1949 (B)(4), which has since been amended and effectively abolished).

⁸ *Panayides v Lafayette Park Condominium*, File No. 2021-02473 (CICO June 18, 2021) (interpreting Virginia Code § 55.1-1965).

⁹ *Jackson v. Cedar Lakes Condominium Association*, File No. 2021-1593 (CICO February 11, 2021) (interpreting Virginia Code § 55.1-1965).

¹⁰ *Baumgarten v. The Villas at River Point Condominium Association, Inc.*, File No. 2021-02070 (CICO April 28, 2021) (interpreting Virginia Code § 55.1-1949).

¹¹ *Phillip Coletti v. Clark's Corner Homeowners Association, Inc.*, File No. 2021-2064 (CICO April 22, 2021) (interpreting Virginia Code § 55.1-1816).

¹² *York v. Hiddenbrooke Condominium Unit Owners Association*, File No. 2022-00092 (CICO August 13, 2021) (interpreting Virginia Code § 55.1-1949).

¹³ *Melissa Peery v. Astoria Condominium*, File No. 2021-00738 (CICO October 20, 2020) (interpreting Virginia Code § 55.1-1949 (B)(3)).

¹⁴ *Kim v. Clark's Corner Homeowners Association, Inc.*, File No. 2021-2514 (CICO June 6, 2021) (interpreting Virginia Code § 55.1-1807 (1)).

authority to consider.¹⁵ Further, the Ombudsman has determined, yet again, not to consider allegations against individual board members—including allegations that the board member violated Common Interest Community law when he/she asked an owner not to send emails to his or her personal email address, particularly because this board's association had adopted another way for members to communicate with their association's board as statutorily required.¹⁶

Ombudsman's Determinations about Owners' Requests to Examine their Association's Books and Records

The pandemic has not relaxed the statutory time period within which an association must arrange for owners to examine their books and records, upon receipt of a request complaint with the Code.¹⁷ Regarding the records that an owner may examine, the Ombudsman has clarified that an association has discretion about the documents that it wishes to include in a member's file;¹⁸ and any document in one member's file may be withheld from the examination of another member in the association under the statutory exemption that allows select documents to be withheld.

Conclusion

In sum, the best value of the Ombudsman's determinations remains the guidance that she can provide for an association should the association receive a complaint that a Common Interest Community law or regulation has been violated. These determinations provide further value in encouraging practices by associations that are compliant with Common Interest Community laws, conversely discouraging those practices that associations should avoid. Regarding the Ombudsman's determinations issued during the pandemic, we genuinely hope that many of these determinations become stale as quickly as possible because the pandemic has subsided. We still encourage reading these determinations, however as a supplement to any legal advice that the association may need as we all continue to grapple with the interpretation of Common Interest Community laws as the pandemic continues.

¹⁵ Raymond and Nancy Long v. Arlington Plantation Property Owners Association, File No. 2021-00757 (CICO October 21, 2020) (interpreting Virginia Code § 55.1-1807 (3)).

¹⁶ Panayides v. Lafayette Park Condominium, File No. 2022-00063 (CICO July 28, 2021) (interpreting Virginia Code § 55.1-1950).

¹⁷ Greg Hilson v. Cameron Station Community Association, Inc., File No. 2020-02705 (CICO June 16, 2020) (interpreting Virginia Code § 55.1-1815).

¹⁸ Robins v. Swift Run Trails Homes Association, File No. 2021-2516 (CICO June 22, 2021) (interpreting Virginia Code § 55.1-1815).

HUD FORECLOSURES UNDER 12 U.S.C. § 3701, ET SEQ. AND 12 U.S.C. § 3751, ET SEQ

By Jon W. Brodegard



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FORECLOSURE UNDER 12 U.S.C. § 3701, ET SEQ. AND 12 U.S.C. § 3751, ET SEQ.

The Multi-Family Foreclosure Act of 1981, 12 U.S.C. § 3701, et seq. authorizes nonjudicial foreclosure of multifamily mortgages held by the Secretary of Housing and Urban Development pursuant to various statutes, including the National Housing Act.¹ The Single Family Foreclosure Act of 1994, 12 U.S.C. § 3751, et seq., authorizes nonjudicial foreclosure of 1-4 unit properties unless property consists of one or more dwelling units mixed with nonresidential space.² This article includes background material regarding foreclosure under these statutes and model checklists to review in connection with a foreclosure sale conducted under these statutes.

BACKGROUND

Except as noted, this background information applies to both multifamily and single family foreclosures.

In order to qualify for foreclosure under either statute, the foreclosing security instruments must be held by the Secretary of the Department of Housing and Urban Development pursuant to the National Housing Act.³ The Secretary may choose to foreclose under the relevant federal statute or through state proceedings but may not pursue foreclosure under both procedures at the same time.⁴ Provided that there is no contemporaneous state-level foreclosure proceeding, nonjudicial foreclosure may commence *upon the breach of a covenant or condition in the mortgage agreement for which foreclosure is authorized under the mortgage.*⁵ In multifamily foreclosures, the foreclosure sale may not take place until 30 days after the default.⁶ No such restriction exists for single family foreclosures.

In both multifamily and single family foreclosures, a foreclosure commissioner has the power of sale.⁷ The foreclosure commissioner must be designated in writing by the Secretary of Housing and Urban Development or, in multifamily foreclosures, the General Counsel of the Department of Housing and Urban Development or the General Counsel's designee or, in single family foreclosures,

¹ See 12 U.S.C. §§ 3702(2) and 3703.

² See 12 U.S.C. §§ 3752(10), and 3753.

³ See 12 U.S.C. §§ 3702(2) and 3752(10).

⁴ 12 U.S. Code § 3705 and 12 U.S. Code § 3755(a)(2).

⁵ 12 U.S. Code § 3705 and 12 U.S. Code § 3755(a).

⁶ 12 U.S. Code § 3710(a).

⁷ 12 U.S.C. §§ 3704 and 3754(b).

an authorized designee of the Secretary who is not the foreclosure commissioner.⁸ The foreclosure commissioner, if a natural person, must be a Virginia resident.⁹ The foreclosure commissioner may also be the employee of a legal entity authorized to do business in the Commonwealth or a state or local government employee.¹⁰ *No person shall be designated as a foreclosure commissioner unless that person is responsible, financially sound, and competent to conduct a foreclosure.*¹¹ The designation of foreclosure commissioner must state *the name and business or residential address of the commissioner or substitute commissioner* or, if the foreclosure commissioner is a government employee, such employee's unique title or position.¹² In single family foreclosures, the designation may also identify the employee of a corporate entity by such employee's unique title or position.¹³ In both multifamily and single family foreclosures, the Secretary or the General Counsel or the designee of either may also designate a substitute foreclosure commissioner after the foreclosure commences, but before the sale.¹⁴ The substitute foreclosure commissioner, if any, must also be designated in writing.¹⁵

Foreclosure commences with service of a notice of default and foreclosure sale.¹⁶ As set forth in 12 U.S. Code § 3706 and 12 U.S. Code § 3757, the notice of default and foreclosure sale must contain the following information:

- (1) The name, address and (for single family foreclosures) telephone number of the foreclosure commissioner;
- (2) The date on which the notice is issued;
- (3) The names of—
 - (A) The Secretary;
 - (B) The original mortgagee (if other than the Secretary); and
 - (C) The original mortgagor;
- (4) The street address or a description of the location of the security property, and a description of the security property or (for multifamily properties) so much thereof as is to be offered for sale, sufficient to identify the property to be sold;
- (5) The date of the mortgage, the office in which the mortgage is recorded, and recording information for the instrument that is to be foreclosed;
- (6) Identification of the failure to make payment, including the due date of the earliest installment payment remaining wholly unpaid as of the date on which the notice is issued upon which the foreclosure is based, or a description of any other default or defaults upon which foreclosure is based, and the acceleration of the secured indebtedness;
- (7) The date, time, and location of the foreclosure sale;
- (8) Identification of the statutory authority under which the foreclosure is being conducted (meaning 12 U.S.C. § 3701, *et seq.* or 12 U.S.C. § 3751, *et seq.*);

⁸ See 12 U.S. Code § 3704 and 24 CFR §§ 27.1 and 27.10 and 12 U.S. Code §§ 3754 and 3756(b) and (c) and

24 CFR § 27.101.

⁹ 12 U.S.C. §§ 3704 and 3754(c).

¹⁰ *Id.*

¹¹ *Id.*

¹² 12 U.S. Code §§ 3704 and 3754(c) and (d).

¹³ 12 U.S. Code § 3754(d).

¹⁴ 12 U.S. Code §§ 3711 and 3756.

¹⁵ 12 U.S. Code §§ 3704 and 3754.

¹⁶ 12 U.S. Code §§ 3707(a) and 3756(a).

- (9) A description of the types of costs, if any, to be paid by the purchaser upon transfer of title;
- (10) The amount and method of deposit to be required at the foreclosure sale (except that no deposit shall be required of the Secretary) and the time and method of payment of the balance of the foreclosure purchase price; and
- (11) Any other appropriate terms of sale or information, as the Secretary may determine.¹⁷

Copies of the notice of default and foreclosure sale and, in multifamily foreclosures, a copy of the designation of foreclosure trustee must be served *by certified or registered mail, postage prepaid and return receipt requested* upon the following persons:

- (1) The current owner of record, as the record existed 45 days before the date originally set for the foreclosure sale;
- (2) The original mortgagor and all subsequent mortgagors of record or other persons who appear of record or in the mortgage agreement to be liable for part or all of the mortgage debt, as the record exists forty-five days prior to the date originally set for foreclosure sale, except any such mortgagors or persons who have been released;
- (3) All persons holding liens of record upon the security property, as the record existed 45 days before the date originally set for the foreclosure sale.¹⁸

Note that *person* includes *any individual, group of individuals, association, partnership, corporation, or organization*.¹⁹ In addition, for single family foreclosures, *owner* is defined as *any person who has an ownership interest in property and includes heirs, devisees, executors, administrators, and other personal representatives, and trustees of testamentary trusts if the owner of record is deceased*.²⁰

The statutes do not provide a remedy for the situation in which ownership has changed or liens or judgments are recorded fewer than 45 days prior to the date originally set for the foreclosure and the new owners, lienholders, or judgment creditors are not served with the notice of default and foreclosure sale.

Documents sent to the owners and mortgagors

shall be mailed to the owner or mortgagor at the address stated in the mortgage agreement, or, if none, to the address of the security property, or, at the discretion of the foreclosure commissioner, to any other address believed to be that of such owner or mortgagor

and documents sent to other lienholders *shall be mailed to each such lienholder's address as stated of record or, at the discretion of the foreclosure commissioner, to any other address believed to be that of such lienholder*.²¹

Notice by mail . . . shall be deemed duly given upon mailing, whether or not received by the addressee and whether or not a return receipt is received or the letter (or notice) is returned.²²

In multifamily foreclosures, in addition to the mailed notices:

¹⁷ See also 24 CFR § 27.15 and 27.103.

¹⁸ 12 U.S. Code §§ 3704, 3708(1) and 3758(2)(A) and 24 CFR § 27.105.

¹⁹ 12 U.S. Code §§ 3702(5) and 3752(7).

²⁰ 12 U.S. Code § 3752(6).

²¹ 12 U.S. Code §§ 3708(1)(C) and 3758(2)(B).

²² 12 U.S. Code §§ 3708(2) and 3758(2)(C).

*A copy of the notice of default and foreclosure sale shall be posted in a prominent place at or on the real property to be sold at least seven days prior to the foreclosure sale If the property consists of two or more noncontiguous parcels of land, a copy of the notice of default and foreclosure sale shall be posted in a prominent place on each such parcel. If the security property consists of two or more separate buildings, a copy of the notice of default and foreclosure sale shall be posted in a prominent place on each such building.*²³

Also:

*[T]he Notice shall also be posted in the project office and in such other appropriate conspicuous places as the commissioner deems appropriate for providing notice to all tenants.*²⁴

But note that:

*Posting at or on the premises shall not be required where the foreclosure commissioner, in the commissioner's sole discretion, finds that the act of posting will likely cause a breach of the peace or that posting may result in an increased risk of vandalism or damage to the property.*²⁵

In single family foreclosures, *[a]ll dwelling units in the security property must also be served the notice of default and foreclosure sale.*²⁶ This may be accomplished by mail if the names of the occupants are known to the Secretary and if the security property consists of a single dwelling.²⁷ *If the names of the occupants of the security property are not known to the Secretary, or the security property has more than 1 dwelling, the notice shall be posted at the security property[.]*²⁸ In single family foreclosures, a copy of the notice of default and foreclosure sale must also be recorded in the land records for the city or county in which the security property is located.²⁹

In multifamily foreclosures, notices of default and foreclosure sale and the designation of foreclosure trustee sent to the current owner of record, the original mortgagor, subsequent mortgagors, and other liable parties *shall be mailed at least twenty-one days prior to the date of foreclosure sale.*³⁰ The notice of default and foreclosure sale and the designation of foreclosure trustee sent to other lienholders *shall be mailed at least ten days prior to the date of foreclosure sale.*³¹

²³ 12 U.S. Code § 3708(3).

²⁴ 24 CFR § 27.15(e).

²⁵ 12 U.S. Code § 3708(3) and 24 CFR § 27.15(e).

²⁶ 12 U.S. Code § 3758(2)(A)(3).

²⁷ 12 U.S. Code § 3758(2)(B)(ii).

²⁸ *Id.*

²⁹ 12 U.S. Code § 3758(1).

³⁰ 12 U.S. Code § 3708(1).

³¹ *Id.*

In single family foreclosures, the mailed notices of default and foreclosure must be sent, and the notice to be recorded in the land records must be filed, *not less than 21 days before the date of the foreclosure sale.*³²

In both multifamily and single family foreclosures, the notice of default and foreclosure must also be *published once a week during 3 successive calendar weeks before the date of the foreclosure sale . . . in a newspaper or newspapers having general circulation in the [county or city] in which the security property being sold is located.*³³ In multifamily foreclosures, the final publication must take place within 4 and 12 days of the date of the foreclosure sale.³⁴ Alternative means of publication are set forth in 12 U.S. Code § 3708(2) and 12 U.S. Code § 3758(3) if no newspaper of general circulation is available. Note that in multifamily foreclosures, the published notice of default and foreclosure may omit recitation of the failure to make payment or other default.³⁵ No such exception applies to single family foreclosures.

The foreclosure commissioner may adjourn or cancel the foreclosure sale *prior to or at the time of sale.*³⁶ The foreclosure commissioner may adjourn the sale to a *later hour the same day*, or to another day.³⁷ For multifamily foreclosures, *[t]he foreclosure commissioner may adjourn a sale to a later hour the same day without the giving of further notice.*³⁸ In single family foreclosures, *[t]he foreclosure commissioner may adjourn a foreclosure sale to a later hour the same day by announcing or posting the new time and place of the foreclosure sale.*³⁹ In both multifamily and single family foreclosures, if the foreclosure is adjourned to another day, then the new sale date may not be earlier than nine days after the original sale date.⁴⁰ For multifamily foreclosures, the new sale date may not be later than 24 days after the original sale date.⁴¹ For single family foreclosures, the new sale date may not be later than 31 days after the original sale date.⁴² Days are calculated as *consecutive calendar days, including the day or days on which the actions or events occur or are to occur for which the period of time is provided and including the day on which an event occurs or is to occur from which the period is to be calculated.*⁴³

In both multifamily and single family foreclosures, if the foreclosure sale is adjourned to another day, then revised notices of default and foreclosure sale must be served in the same manner as the originals, but

- (1) Mailed notices must be sent at *least seven days prior to the date to which the foreclosure sale has been adjourned*; and

³² 12 U.S. Code §§ 3758(1) and (2)(B).

³³ 12 U.S. Code §§ 3708(2) and § 3758(3).

³⁴ 12 U.S. Code § 3708(2).

³⁵ 12 U.S. Code § 3708(2).

³⁶ 12 U.S. Code § 3710(c). See also 12 U.S. Code § 3760(c).

³⁷ 12 U.S. Code §§ 3710(c) and 3760(c)(2).

³⁸ 12 U.S. Code § 3710(c).

³⁹ 12 U.S. Code § 3760(c)(2).

⁴⁰ 12 U.S. Code §§ 3710(c) and 3760(c)(2).

⁴¹ 12 U.S. Code § 3710(c).

⁴² 12 U.S. Code § 3760(c)(2).

⁴³ 12 U.S. Code §§ 3715 and 3766.

(2) [P]ublication may be made on any of three separate days prior to the revised date of foreclosure sale.⁴⁴

The revised notices of default and foreclosure sale must be sent to the same persons who were served with the initial notices of default and foreclosure sale: the owner(s), mortgagor(s), and lienholder(s) shown of record 45 days prior to the original foreclosure sale date.⁴⁵

In single family foreclosures, the foreclosure trustee is directed to provide notice of cancellation in the same manner as the notice of default and foreclosure sale.⁴⁶ In both multifamily and single family foreclosures, if the foreclosure sale is cancelled, *the mortgage shall continue in effect as though acceleration had not occurred*, and cancellation of one foreclosure sale has no effect on the commencement of another foreclosure.⁴⁷

As noted above, the Secretary may designate a substitute foreclosure commissioner after commencement of a foreclosure.⁴⁸ Any such substitute foreclosure commissioner must be designated in writing by the Secretary.⁴⁹ A copy of the written designation shall be served by mail in the same manner as the notice of default and foreclosure, except that the minimum time periods between the mailing and the date of the foreclosure sale do not apply.⁵⁰ Alternatively, the written designation of substitute commissioner may also be served *in any other manner which, in the substitute commissioner's sole discretion, is conducive to achieving timely notice of such substitution*.⁵¹ In multifamily foreclosures, if the substitute foreclosure commissioner is designated more than 48 hours prior to the time of the foreclosure sale, then the foreclosure *may continue unless the substitute commissioner, in his or her sole discretion, finds that continuation of the foreclosure sale will unfairly affect the interests of the mortgagor* but, if the substitute trustee is designated less than 48 hours prior to the sale, then *the pending foreclosure shall be terminated and a new foreclosure shall be commenced by commencing service of a new notice of default and foreclosure sale*.⁵² In single family foreclosures, the foreclosure sale may continue regardless of the date or time of the substitution of foreclosure commissioner *unless the substitute commissioner, in that commissioner's sole discretion, finds that continuation of the foreclosure sale will unfairly affect the interests of the mortgagor*.⁵³

The foreclosure commissioner shall conduct the foreclosure sale in accordance with the provisions of [the relevant chapter of the U.S. Code] and in a manner fair to both the mortgagor and the Secretary.⁵⁴ In multifamily foreclosures, *[t]he foreclosure commissioner shall attend the foreclosure sale in person*.⁵⁵ No such duty exists for single family foreclosures. In both multifamily and single family foreclosures, the foreclosure commissioner may serve as auctioneer or may employ an

⁴⁴ 12 U.S. Code § 3710(c). See also 12 U.S. Code § 3760(c)(2).

⁴⁵ 12 U.S. Code §§ 3708(1) and 3758(2)(A).

⁴⁶ 12 U.S. Code § 3759(d).

⁴⁷ 12 U.S. Code §§ 3709(c) and (d) and 3759(c).

⁴⁸ See 12 U.S. Code §§ 3707(b), 3754(d)(2), and 3756(b).

⁴⁹ See 12 U.S. Code §§ 3707(b) and 3756(c).

⁵⁰ 12 U.S. Code §§ 3707(b) and 3756(c).

⁵¹ *Id.*

⁵² 12 U.S. Code § 3707(b).

⁵³ 12 U.S. Code § 3756(b).

⁵⁴ 12 U.S. Code §§ 3710(b) and 3760(b).

⁵⁵ 12 U.S. Code § 3710(b).

auctioneer.⁵⁶ The foreclosure commissioner and any relative, related business entity or employee of such commissioner or entity are not permitted to bid at the auction.⁵⁷

Following the foreclosure sale, the foreclosure commissioner executes the deed and delivers it in accordance with the terms set out in the notice of default and foreclosure sale.⁵⁸ Under 12 U.S. Code § 3714, in multifamily foreclosures,

To establish a sufficient record of foreclosure and sale, the foreclosure commissioner shall include in the recitals of the deed to the purchaser or prepare an affidavit or addendum to the deed stating—

- (1) that the mortgage was held by the Secretary;*
- (2) the particulars of the foreclosure commissioner's service of notice of default and foreclosure sale in accordance with sections 3708 and 3710 of this title;*
- (3) that the foreclosure was conducted in accordance with the provisions of this chapter and with the terms of the notice of default and foreclosure sale;*
- (4) a correct statement of the costs of foreclosure, calculated in accordance with section 3711 of this title; and*
- (5) the name of the successful bidder and the amount of the successful bid.*

In multifamily foreclosures,

[T]he foreclosure deed or deeds shall convey all of the right, title, and interest in the security property covered by the deed which the Secretary as holder, the foreclosure commissioner, the mortgagor, and any other persons claiming by, through, or under them, had on the date of execution of the mortgage, together with all of the right, title, and interest thereafter acquired by any of them in such property up to the hour of sale, and no judicial proceeding shall be required ancillary or supplementary to the procedures provided in this chapter to assure the validity of the conveyance or confirmation of such conveyance.

and

A purchaser at a foreclosure sale held pursuant to this chapter shall be entitled to possession upon passage of title to the mortgaged property, subject to an interest or interests senior to that of the mortgage and subject to the terms of any lease of a residential tenant for the remaining term of the lease or for one year, whichever period is shorter. Any other person remaining in possession after the sale

⁵⁶ 12 U.S. Code §§ 3710(b) and 3760(b)(1)(C).

⁵⁷ 12 U.S. Code §§ 3710(b) and 3760(b)(2)(C).

⁵⁸ See 12 U.S. Code §§ 3713(A), 3714(b), 3763(a), and 3764(c).

*and any residential tenant remaining in possession after the applicable period shall be deemed a tenant at sufferance.*⁵⁹

Under 12 U.S. Code § 3764, in single family foreclosures,

To establish a sufficient record of foreclosure and sale, the foreclosure commissioner shall include in the recitals of the deed to the purchaser, or prepare as an affidavit or addendum to the deed, a statement setting forth—

- (1) the date, time, and place of the foreclosure sale;*
- (2) that the mortgage was held by the Secretary, the date of the mortgage, the office in which the mortgage was recorded, the [date of recordation] and the [book and page number or instrument number] of the recordation of the mortgage;*
- (3) the particulars of the foreclosure commissioner's service of the notice of default and foreclosure sale in accordance with sections 3758 and 3760 of this title;*
- (4) the date and place of filing the notice of default and foreclosure sale;*
- (5) that the foreclosure was conducted in accordance with the provisions of this chapter and with the terms of the notice of default and foreclosure sale; and*
- (6) the sale amount.*⁶⁰

In single family foreclosures, these statements shall –

- (1) be prima facie evidence of the truth of such facts in any Federal or State court; and*
- (2) evidence a conclusive presumption in favor of bona fide purchasers and encumbrancers for value without notice.*⁶¹

In single family foreclosures, the purchaser shall be presumed to be a bona fide purchaser.⁶² *Bona fide purchaser means a purchaser for value in good faith and without notice of any adverse claim, and who acquires the security property free of any adverse claim.*⁶³

Also, as to single family foreclosures:

A sale, made and conducted as prescribed in this chapter to a bona fide purchaser, shall bar all claims upon, or with respect to, the property sold, for each of the following persons:

⁵⁹ 12 U.S. Code §§ 3713(b) and (c).

⁶⁰ 12 U.S. Code § 3764(a) and 24 CFR § 27.121 .

⁶¹ 12 U.S. Code § 3764(b).

⁶² 12 U.S. Code § 3763(d).

⁶³ 12 U.S. Code § 3752(1).

(1) Notice recipients

Any person to whom the notice of default and foreclosure sale was mailed as provided in this chapter, and the heir, devisee, executor, administrator, successor, or assignee claiming under any such person.

(2) Subordinate claimants with knowledge

Any person claiming any interest in the property subordinate to that of the mortgage, if such person had actual knowledge of the foreclosure sale.

(3) Nonrecorded claimants

Any person claiming any interest in the property, whose assignment, mortgage, or other conveyance was not duly recorded or filed in the proper place for recording or filing, or whose judgment or decree was not duly docketed or filed in the proper place for docketing or filing, before the date on which the notice of the foreclosure sale was first served by publication, as required by section 3758(3) of this title, and the executor, administrator, or assignee of such a person.

(4) Other persons

Any person claiming an interest in the property under a statutory lien or encumbrance created subsequent to the recording or filing of the mortgage being foreclosed, and attaching to the title or interest of any person designated in any of the foregoing paragraphs.⁶⁴

Having reviewed the statutory requirements, the following checklists are provided, based on the statutes described above. The checklists below should be read as applying *in addition to*, not *in place of* general foreclosure procedures, such as verifying that no bankruptcy stay applies, checking for any Notice of Federal Tax Lien, or verifying the foreclosed owner's status under the Servicemembers Civil Relief Act. The checklists relate to the requirements set forth in the statutes discussed, but are not intended to be used as complete requirements, for example, for issuing title insurance policies.

Suggested checklist for multifamily foreclosures conducted under 12 U.S. Code § 3701, et seq.:

- (1) Obtain a copy of the Notice of Default and Foreclosure Sale that conforms to the requirements of 12 U.S. Code § 3706. Compare the Notice of Default and Foreclosure Sale with the recorded deed of trust to confirm that the default or defaults set forth in the Notice of Default and Foreclosure Sale constitute a default under the recorded deed of trust.
- (2) If possible, obtain a copy of the proposed deed from the Foreclosure Commissioner or Substitute Foreclosure Commissioner to the purchaser at foreclosure sale and, if the deed does not contain the recitals required under 12 U.S. Code § 3714, the affidavit or addendum to the deed that contains such recitals. The recitals contained in the deed, affidavit, or memorandum may be used to satisfy requirements (3), (4), (5), (6), and, if applicable, (7) and (8)(b).
- (3) Confirm that any other foreclosure proceedings were dismissed or terminated prior to service of the Notice of Default and Foreclosure Sale.
- (4) Confirm that the deed of trust to be foreclosed secures a mortgage held by the Secretary of Housing and Urban Development pursuant to

⁶⁴ 12 U.S. Code § 3765.

- a. section 608 or 801, or title II or X, of the National Housing Act [12 U.S.C. 1743, 1748, 1707 et seq., 1749aa et seq.];
 - b. section 312 of the Housing Act of 1964 [42 U.S.C. 1452b], as it existed immediately before its repeal by section 289 of the Cranston-Gonzalez National Affordable Housing Act;
 - c. section 202 of the Housing Act of 1959 [12 U.S.C. 1701q], as it existed immediately before its amendment by section 801 of the Cranston-Gonzalez National Affordable Housing Act;
 - d. section 202 of the Housing Act of 1959 [12 U.S.C. 1701q], as amended by section 801 of the Cranston-Gonzalez National Affordable Housing Act; and
 - e. section 811 of the Cranston-Gonzalez National Affordable Housing Act [42 U.S.C. 8013].
- (5) Confirm that, at least 21 days prior to the date of the foreclosure, the Notice of Default and Foreclosure Sale was recorded in the land records of in the City or County in which the property described in Schedule A is located and sent by certified or registered mail, postage prepaid and return receipt requested, to the following parties (as of 45 days prior to the date originally set for the foreclosure sale):
- a. Current owner(s);
 - b. The original mortgagor and all subsequent mortgagors of record or other persons who appear of record or in the deed of trust or other mortgage agreement to be liable for all or part of the mortgage debt; and
 - c. Any other lienholder(s), including the IRS or judgment creditors, if applicable.
- NOTE: You may also wish to determine if ownership has changed or liens or judgments have been recorded less than 45 days prior to the date originally set for the foreclosure and the new owners, lienholders, or judgment creditors are not served with the notice of default and foreclosure sale.
- (6) Confirm that the Notice of Default and Foreclosure Sale was published once a week during 3 successive calendar weeks before the date of the foreclosure sale in a newspaper or newspapers having general circulation in the City or County in which the property described in Schedule A is located.
- (7) Confirm that the Notice of Default and Foreclosure Sale was posted in a prominent place at or on the real property to be sold at least 7 days prior to the foreclosure sale.
- (8) If the foreclosure sale was adjourned to a date other than the date set forth in the original Notice of Default and Foreclosure Sale:
- a. Confirm that the revised date of foreclosure sale is not less than 9 nor more than 24 days after the original sale date;
 - b. Confirm that, at least seven days prior to the revised date of foreclosure sale, a revised Notice of Default and Foreclosure Sale setting forth the revised date of foreclosure sale was sent by certified or registered mail, postage prepaid and return receipt requested to the current owner(s), the property address(es) and any other lienholder(s); and
 - c. Confirm that the revised Notice of Default and Foreclosure Sale setting forth the revised date of foreclosure sale was published on any of three separate days prior to the revised date of foreclosure sale in a newspaper or newspapers having general circulation in the City or County in which the property described in Schedule A is located.
- (9) Obtain a copy of the writing designating the Foreclosure Commissioner signed by the Secretary or an authorized designee of the Secretary other than the Foreclosure Commissioner. If the foreclosure is completed by a Substitute Foreclosure Commissioner:
- a. Obtain a copy of the written designation of Substitute Foreclosure Commissioner signed by the Secretary or an authorized designee of the Secretary other than the Foreclosure Commissioner or Substitute Foreclosure Commissioner;
 - b. Confirm that the Secretary designated the Substitute Commissioner no less than 48 hours prior to the time of the foreclosure sale; and

- c. Confirm that a copy of the written designation of Substitute Foreclosure Commissioner was sent by certified or registered mail, postage prepaid and return receipt requested to the current owner(s), the property address(es) and any other lienholder(s).
- (10) If the designation of the Foreclosure Commissioner or substitute Foreclosure Commissioner has not previously been recorded, record a copy of such appointment with the deed made by the Foreclosure Commissioner or Substitute Foreclosure Commissioner

Suggested checklist for single family foreclosures conducted under 12 U.S. Code § 3751, et seq.:

- (1) Obtain a copy of the Notice of Default and Foreclosure Sale that conforms to the requirements of 12 U.S. Code § 3757. Compare the Notice of Default and Foreclosure Sale with the recorded deed of trust to confirm that the default or defaults set forth in the Notice of Default and Foreclosure Sale constitute a default under the recorded deed of trust. NOTE: If a title search is obtained, the Notice of Default and Foreclosure Sale should be provided with the title search. If it is not, confirm that the Notice of Default and Foreclosure Sale has been recorded in the appropriate land records as required by 12 U.S. Code § 3758(1).
- (2) If possible, obtain a copy of the proposed deed from the Foreclosure Commissioner or Substitute Foreclosure Commissioner to the purchaser at foreclosure sale and, if the deed does not contain the recitals required under 12 U.S. Code § 3764, the affidavit or addendum to the deed that contains such recitals. The recitals contained in the deed, affidavit, or memorandum may be used to satisfy requirements (3), (4), (5), (6), and, if applicable, (7) and (8)(b).
- (3) Confirm that any other foreclosure proceedings were dismissed or terminated prior to service of the Notice of Default and Foreclosure Sale.
- (4) Confirm that the deed of trust to be foreclosed
 - a. Secures a mortgage held by the Secretary of Housing and Urban Development pursuant to Title I or Title II of the National Housing Act (12 U.S.C. §§ 1702 et seq. or 1707 et seq.); or
 - b. secures a loan obligated by the Secretary of Housing and Urban Development under section 42 U.S. Code § 1452b, as it existed before the repeal of that section by 42 U.S. Code § 12839.
- (5) Confirm that, at least 21 days prior to the date of the foreclosure, the Notice of Default and Foreclosure Sale was recorded in the land records of in the City or County in which the property described in Schedule A is located and sent by certified or registered mail, postage prepaid and return receipt requested, to the following parties:
 - a. Current owner(s), including any persons who take title as a result of the record owner's death;
 - b. All mortgagors of record or other persons who appear on the basis of the record to be liable for part or all of the mortgage debtThe property address(es) ("all dwelling units"); and
 - c. Any other lienholder(s), including the IRS or judgment creditors, if applicable.NOTE: You may also wish to determine if ownership has changed or liens or judgments have been recorded less than 45 days prior to the date originally set for the foreclosure and the new owners, lienholders, or judgment creditors are not served with the notice of default and foreclosure sale.
- (6) Confirm that the Notice of Default and Foreclosure sale was published once a week during 3 successive calendar weeks before the date of the foreclosure sale in a newspaper or newspapers having general circulation in the City or County in which the property described in Schedule A is located.
- (7) If the foreclosure sale was adjourned to a date other than the date set forth in the original Notice of Default and Foreclosure Sale:
 - a. Confirm that the revised date of foreclosure sale is not less than 9 nor more than 31 days after the original sale date;

- b. Confirm that, at least seven days prior to the revised date of foreclosure sale, a revised Notice of Default and Foreclosure Sale setting forth the revised date of foreclosure sale was sent by certified or registered mail, postage prepaid and return receipt requested to the current owner(s), the property address(es) and any other lienholder(s); and
 - c. Confirm that the revised Notice of Default and Foreclosure Sale setting forth the revised date of foreclosure sale was published on any of three separate days prior to the revised date of foreclosure sale in a newspaper or newspapers having general circulation in the City or County in which the property described in Schedule A is located.
- (8) Obtain a copy of the writing designating the Foreclosure Commissioner signed by the Secretary or an authorized designee of the Secretary other than the Foreclosure Commissioner. If the foreclosure is completed by a Substitute Foreclosure Commissioner:
 - a. Obtain a copy of the written designation of Substitute Foreclosure Commissioner signed by the Secretary or an authorized designee of the Secretary other than the Foreclosure Commissioner or Substitute Foreclosure Commissioner; and
 - b. Confirm that a copy of the written designation of Substitute Foreclosure Commissioner was sent by certified or registered mail, postage prepaid and return receipt requested to the current owner(s), the property address(es) and any other lienholder(s).
- (9) If the designation of the Foreclosure Commissioner or substitute Foreclosure Commissioner has not previously been recorded, record a copy of such appointment with the deed made by the Foreclosure Commissioner or Substitute Foreclosure Commissioner.

EMINENT DOMAIN: TEN THINGS EVERY REAL ESTATE ATTORNEY NEEDS TO KNOW

By Michael J. Coughlin



Michael J. Coughlin is a shareholder with Walsh, Colucci, Lubeley & Walsh, P.C., and the leader of the firm's Eminent Domain Practice Group. Michael represents landowners, business and other parties impacted by public projects throughout Virginia.

Every real estate attorney will encounter an eminent domain issue in his or her career. Transactional attorneys will encounter condemnation or eminent domain clauses in loan documents, leases, or purchase agreements. You may have a client who owns property that will be impacted by an upcoming road project or a new overhead power transmission line. Therefore, understanding these ten things every real estate attorney needs to know about Eminent Domain should help you provide better counsel to your clients when they encounter an eminent domain issue.

#1. (Almost) Everything is Negotiable

- The project design can be modified (sometimes). This is only possible if the property owner interacts with the design team for the project early in the planning stages for the project.
- The timing of the taking can be modified (somewhat). If an agreement is reached before the filing of a Certificate of Take or a Petition in Condemnation, the property owner can work with the settlement agent for the condemning agency to delay the closing so that, for example, an additional month of rent is collected from the tenant leasing the property.
- The property taken can be leased back temporarily (sometimes). When the owner also occupies the property, this may be necessary to help accomplish a less disruptive move from the location being taken to the new location for the business owner/property owner.
- The initial offer from the condemnor is not the final offer.

#2. The Eminent Domain Process Takes an Extraordinarily Long Time

There can be as many as 20 steps in a condemnation matter from start to finish. They are:

- *Step 1.* Projects start with an idea, and then becomes included in a locality's comprehensive plan or it become part of a 6-year plan.
- *Step 2.* Funding must be secured for preliminary design.
- *Step 3.* Concept drawings must be developed and shared with the public.
- *Step 4.* Funding for final design, right-of-way acquisition, utility relocation, and construction must be secured.
- *Step 5.* Environmental studies and surveys must be undertaken.
- *Step 6.* 60% design drawings must be shared with the public in a public meeting.
- *Step 7.* Property owners must be sent letters inviting them to meet with an appraiser at their property.
- *Step 8.* A written offer, typically supported by an appraisal, must be prepared.
- *Step 9.* The written offer must be provided to the property owner. In Virginia, the appraisal must be shared with the owner.

- **Step 10.** A displaced person¹ should be offered relocation assistance.
- **Step 11.** Negotiations take place, and if an agreement is reached, a closing must be scheduled.
- **Step 12.** If negotiations fail, in Virginia, condemnors using quick-take must provide written notice that a certificate of take will be filed 30-45 days from the date of the letter.
- **Step 13.** A certificate of take or petition in condemnation must be filed if no agreement is reached.
- **Step 14.** Utilities must be relocated.
- **Step 15.** The construction contract must be put out to bid.
- **Step 16.** Within 180 days from the filing of a certificate of take, a Petition in Condemnation must be filed.
- **Step 17.** Construction of the project can take 1 or more years.
- **Step 18.** Money must be withdrawn from the court.
- **Step 19.** A trial takes place if no agreement is reached.
- **Step 20.** An appeal can be filed by either party to the Virginia Court of Appeals and then the Virginia Supreme Court.

#3. Condemnation Provisions in Leases Matter

The condemnation provision in a lease is often overlooked but it should not be, especially if the property involved is on a major road. The drafting of the provision largely depends on whom the attorney represents—the landlord or the tenant. Here are some drafting considerations for each side.

- **Landlord friendly lease provision:** The Tenant is not entitled to any compensation that reduces the award to Landlord, provided that the Tenant can receive a separate award for lost profits and relocation expenses.
- **Tenant friendly lease provisions may include:**
 - The Landlord must provide notice to the Tenant of the taking.
 - The Tenant is entitled to participate in the condemnation proceedings.
 - The Tenant is entitled to the value of its leasehold interest.
 - The Tenant is entitled to receive compensation for fixtures and improvements it made to the property.
- **Practice Pointer—**include in the lease a list that delineates who owns what property that is located on the parcel being acquired. For example, in a restaurant, the tenant may own all of the equipment, and may actually be entitled to a portion of the just compensation, in light of the holding in *Taco Bell of Am., Inc. v. Commonwealth Transp. Comm’r of Va.*, 282 Va. 127 (2011).

#4. Condemnation Provisions in Loan Documents Matter

Similar to leases, the drafting of a condemnation provision in a loan agreement or deed of trust will depend on whether you represent a lender or borrower/property owner. The condemnation provisions related to total takings are straightforward—the proceeds pay off the loan, and the balance goes to

¹ Va. Code § 25.1-400 includes a definition for a “displaced person,” with the most commonly displaced person being a person who moves his personal property from real property as a result of receiving a notice of a pending taking, or as a result of an actual taking. The term “person,” defined in the same Code section means “any (i) individual or (ii) partnership, corporation, limited liability company, association, or other business entity.”

the borrower. But in a partial taking, the disbursement of the condemnation proceeds may depend on the type of loan (commercial v. residential), the type of property, and the bargaining power between the lender and borrower.

- Commercial Loan (partial taking):
 - Option A: Broad Lender rights—The Lender has discretion over what to do with the condemnation funds, which can pay down principal, go into a fund to repair the property, and then the balance is released to the borrower.
 - Option B: Commercial Mortgage Backed Security—The loan agreements associated with loans that are pooled to create a CMBS often have provisions in which the proceeds go into a fund to be used to repair the property and any leftover proceeds go to the Borrower. Here, no proceeds go to pay down the principal balance because that may impact the monthly payments made by the borrower and in turn reduce the amount of interest the investors in the CMBS receive.
- “Standard” condemnation provisions in loan documents include:
 - A requirement that the borrower provide notice to the lender of a pending condemnation.
 - A provision giving the lender the right to participate in the condemnation proceedings.
- Drafting suggestions for transactional attorneys:
 - Do not mix the condemnation process with the casualty/insurance proceeds process. Often the insurance provisions will create defined terms, like “miscellaneous proceeds,” that do not fit within a discussion of condemnation proceeds. It is best if the condemnation provision stands on its own and creates a clear process for the borrower and lender to follow in the event of a taking.
 - Require the Lender to respond timely to requests for a partial release and/or a subordination of easements. Condemnation proceeds cannot be distributed, absent a court hearing, without the lender agreeing to the distribution of the condemnation proceeds and executing a release of their lien over the property taken, or at least a release to any claim to the funds. However, most lenders are slow to respond to these requests. It would be to the benefit of the borrower if the lender had to respond to requests for releases or subordination within a set time.
- Residential loans:
 - Option A: The loan to value (LTV) stays at a minimum fixed percentage, and condemnation proceeds are used to pay-down principal if needed to maintain the LTV; otherwise, they are distributed to the borrower.
 - Option B: Borrower can apply proceeds to repair property and keep the balance.

#5. Appraisers Determine Just Compensation

Although a fact finder (jury, commissioners, or a judge) determines just compensation, in reality condemnation cases are a battle of appraisers over the value of the taking and damages to the remaining property. Therefore, understanding some basic principles about the valuation process is important.

- Just compensation=the fair market value of the property taken and damages to the remaining property.
- Fair market value and damages are best determined by an appraiser.
- Real estate brokers are not allowed to testify about value in most courts.
- There are only a handful of appraisers licensed in Virginia that are competent to perform condemnation appraisals.

- In a damage case for an improved property, 3 appraisals are performed (land, “before property” as improved, “after property” as improved). This highlights the complexity involved in partial takings where the remaining property is less valuable because of the taking.

#6. There Are Three Valuation Approaches

- **1: Sales Comparison Approach**
 - All property types (residential, commercial, special properties) can be appraised by finding sales of similar properties and relating them to the property taken.
- **2: Income Approach**
 - This typically applies to improved property that can be leased, typically a commercial or multifamily property.
 - $\text{Net Income} \div \text{Capitalization Rate} = \text{Value}$. This is the basic formula for determining the value of an income producing property. However, calculating the inputs for each variable is fairly complicated and reliant on market data.
 - The discounted cash flow approach is not accepted by most condemning agencies or courts.
- **3: Cost Approach**
 - This approach applies typically to recently built improvements, where the value is largely determined by calculating the cost to replace the improvements.

#7. Lost Profits for Some Businesses Are Recoverable

- **2012 Amendment to Article I, Section 11 of the Constitution of Virginia:**
 - Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms “lost profits” and “lost access” are to be defined by the General Assembly....
- **Effective January 1, 2013**
- **Va. Code Sec. 25.1-100 and -230.1 contain the definitions. There have been 3 amendments since enactment, with the latest version effective July 1, 2022.**
- **As of April 1, 2022**
 - **Business or farm operation must occupy all of the land subject to the taking to recover lost profits;**
 - **Up to 3 years of lost profits are recoverable;**
 - **Lost profits are determined by comparing the “net income” reported in federal tax returns for 3 years prior to the taking or the start of construction, whichever is later, to the returns for the next 3 years;**
 - **Any payment for lost profits is reduced by payments made for lost profits through other awards (damages) or benefits (relocation benefits).**
- **As of July 1, 2022: The major change to the Virginia Code provisions related to lost profits in condemnation matters is to move away from having federal tax returns serve as the main source for determining lost profits. In addition, SB666 also appears to permit more business owners to pursue lost profits claims, including those that do not occupy the entirety of the property that is the subject of the taking.**

#8. Displaced “Persons” Are Entitled to Relocation Benefits

Federal law requires that persons displaced by a federal action (a taking), or by a project receiving federal funding, receive relocation assistance. The source for this is what is known as the Uniform

Act (Uniform Relocation Assistance and Real Property Acquisitions Policies Act); 42 U.S.C. 4601-4655. Virginia also law requires every state agency to provide relocation assistance.

Relocation assistance provides additional financial and logistical benefits beyond just compensation.

- **Benefits Available to Displaced Persons (individuals, businesses and churches forced to move because of a public project):**
 - Moving expenses are paid dollar-for-dollar.
 - Residential owners may receive a replacement housing payment when the value of their home is less than the price to move into a similar home that meets the owner's needs.
 - Businesses can receive reestablishment expenses of up to \$25,000 for things like new interior signage, or new lighting in the new location.
 - Businesses can receive an "in lieu of" payment (as opposed to moving expense reimbursement) of up to \$75,000, if certain financial criteria are met.
 - Miscellaneous benefits include payment for search expenses, change of address expenses.
- Relocation benefits are not taxable.

#9. IRC Sec. 1033 Permits Deferral of Capital Gains

Similar to IRC § 1031, IRC § 1033 provides an option to defer payment of capital gains taxes to property owners who receive condemnation proceeds. There are some major differences, however, between these two IRC code provisions.

- A 1033 election must be made within three years from i) the date that the property is conveyed by agreement or ii) the date the condemnation funds are available to the property owner (if no agreement is reached).
- Election options:
 - Reinvest in a like-kind property or in the property itself (if there is a residue)
 - If there are severance damages, (meaning the remaining property after a partial taking is less valuable) the owner can elect to reduce the basis of the property.
 - Paying down principal on a loan balance is *not* a valid 1033 election.
- Tax liability is not an issue for most residential takings because of capital gains exclusion associated with the sale of a primary residence (\$250,000 for single, \$500,000 for married)
- No qualified intermediary is needed for a 1033 election, but specific IRS forms must be filed.

#10. Not Every Condemning Entity Has Quick Take Powers

- Who does have quick take powers? VDOT, Localities, School Boards
- Who does not have quick take powers? Utility companies, but...utility companies can obtain early entry.

#11. No property owner or tenant wants to be involved in eminent domain.

This item is added to the list of important things for attorneys to consider because condemnation matters can have a dramatic impact on the lives of property owners, farmers, and businesses. People view their property and business as an extension of themselves, and their property or business is often their biggest asset. When their property is taken away, or negatively impacted by a taking, they need good counsel to help them obtain all the just compensation and other benefits the law requires.

RIGHTS IN THE LANDS OF THE NATIONS WRONGED: A REVIEW OF PROPERTY RIGHTS IN NATIVE NATION LAND HOLDINGS

By Flannery E. O'Rourke



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"Where is this ground unstained with blood?" poet and Eastern Shawnee citizen Laura Da' asks in her poem "American Towns."¹ The words of Da' call to mind the destructive acts that the federal and state governments inflicted on Native Nations over the course of four centuries. Perhaps best known is the Trail of Tears, where the U.S. forced Cherokee Nation to remove 1,200 miles west, causing the deaths of one-third of the Nation's citizens.² This removal not only constituted forced assimilation, derogation of sovereignty, and even genocide, but also the further dispossession of Cherokee Nation of its eastern land.³ In the case of the Cherokee (and of other Nations as well), land dispossession may be the easiest injustice for federal and state governments to remediate. Thus, "Land Back" is an increasingly common form of federal and state remediation for harms to Native Nations. But though common, property rights in the land returned are complex. Native Nation land holdings vary based on the political relationship of a Nation with the federal and state governments, as well as the Nation's unique history. To clarify the issue, here I first provide a brief overview of federal and state political relationships with Native Nations. Then, I review the land holdings of Nations historically recognized by the federal government. I conclude with a review of Native Nation land holdings in Virginia.

A Native Nation may be in a political relationship with the federal government, a state government, both, or neither. A Nation is "recognized" when the federal or state government forms a government-to-government relationship with the Nation.⁴ Historically, the federal government's recognition of a Nation relied primarily on the existence of a treaty or, alternatively, a judicial determination.⁵ Over time, congressional acts played a greater role in federal recognition.⁶ For example, the 1934 Indian Reorganization Act (IRA) formalized "federal recognition" as a prerequisite for receipt of federal services.⁷ Presently, a Nation may be federally recognized by the Bureau of Indian Affairs (BIA), an act of Congress, or a judicial decision.⁸

¹ Laura Da', "American Towns" in *Tributaries* (2018).

² 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03 (2019) [hereinafter COHEN'S].

³ Eight states now occupy what was originally Cherokee Nation land: North Carolina, South Carolina, Georgia, Alabama, Tennessee, Kentucky, Virginia, and West Virginia. Ben O. Bridgers, *An Historical Analysis of the Legal Status of the North Carolina Cherokees*, 58 N.C. L. Rev. 1075, 1077 (1980).

⁴ COHEN'S, *supra* note 3, at § 3.02.

⁵ *Id.*

⁶ *Id.*

⁷ David E. Wilkins, *Breaking into the Intergovernmental Matrix: The Lumbee Tribe's Efforts to Secure Federal Acknowledgment*, 23 *Publius* 123, 137 (Oct. 1993).

⁸ Nat'l Cong. of American Indians, *Tribal Nations and the United States* (Feb. 2019), https://www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf

Native Nations desire federal recognition for several reasons. First, federal recognition places a Nation in a permanent government-to-government relationship with the United States.⁹ Federal recognition also allows a Nation to operate as a quasi-sovereign entity, including establishing legal jurisdiction over its citizens and land.¹⁰ A Nation also must be federally recognized to receive BIA services.¹¹ Finally, federal recognition is required for land to be placed in federal trust for the benefit of a Nation.¹² Currently, there are 574 federally recognized Nations.¹³

As compared to federally recognized Nations, state recognized Nations are relatively few and the benefits of recognition more limited. There are currently 66 state recognized Nations.¹⁴ Only thirteen states, including Virginia, recognize Native Nations.¹⁵ State recognition initially arose from relationships between Native Nations and the colonies.¹⁶ Although some federal statutes expressly extend benefits to state recognized Nations,¹⁷ the benefits of state recognition generally inhere in state law and vary from state to state.¹⁸ For example, as compared with other states, Virginia acknowledges greater autonomy for its recognized Nations.¹⁹ Finally, as is the case for several Nations in Virginia, Nations may be both federally and state recognized.²⁰

A Nation's present and historical status as federally or state recognized impacts the Nation's land holdings. For example, many historically federally recognized Nations endured U.S. Native Nation policies in the nineteenth century that coupled land dispossession with forced assimilation. These policies include the westward removal of eastern Nations from 1830²¹ to 1850,²² confining Nations to reservations starting in 1853,²³ and the allotment of reservations starting in 1887.²⁴ Although it

⁹ COHEN'S, *supra* note 3, at § 3.02.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4,636 (Jan. 28, 2022).

¹⁴ Nat'l Conf. St. Legislatures, *Federal and State Recognized Tribes* (Mar. 2020), <https://www.ncsl.org/legislators-staff/legislators/quad-caucus/list-of-federal-and-state-recognized-tribes.aspx#State> [hereinafter NCSL].

¹⁵ *Id.* The states are Alabama, Connecticut, Delaware, Georgia, Louisiana, Maryland, Massachusetts, New Jersey, New York, North Carolina, South Carolina, Vermont, and Virginia. *Id.*

¹⁶ COHEN'S, *supra* note 3, at § 3.02.

¹⁷ *Id.*

¹⁸ *Id.* For example, citizens of Virginia recognized Nations may hunt and fish without permits in the Commonwealth. 2013 WL 3864408 (Va.A.G.).

¹⁹ COHEN'S, *supra* note 3, at § 3.02.

²⁰ *Id.*

²¹ Indian Removal Act, 4 Stat. 411 (May 28, 1830).

²² COHEN'S, *supra* note 3, at § 1.03.

²³ Jason Edward Black, RHETORIC OF REMOVAL AND ALLOTMENT 82 (2015). The reservations were "at once a diminished homeland and a concentration camp." WELCOME TO OGLALA NATION: A DOCUMENTARY READER IN OGLALA LAKOTA POLITICAL HISTORY 16 (Akim D. Reinhardt ed., 2015).

²⁴ Lands in severalty to Indians, 24 Stat. 388, 49 Cong. Ch. 119 (1887). Allotment was the breaking up of Native Nation Reservations into parcels, with each citizen of a Native Nation receiving 40 to 160 acres of the land previously collectively held by the Native Nation. Frank Pommersheim, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 160 (2009). Cherokee Nation held its lands in

is outside the scope of this article to detail each policy, the result is that many historically federally recognized Nations' current landholdings do not bear uniform property rights.²⁵ Instead, land holdings may vary by parcel, thereby making up a "checkerboarded" pattern of different trust, fee, and restricted fee land holdings.

Common forms of historically federally recognized Nation landholdings include trust, restricted fee, and fee land.²⁶ Land may be held in federal trust, either for the benefit of a Nation or an individual citizen of a Nation.²⁷ Trust parcels held by individual citizens commonly resulted from the IRA's freezing the allotment process of transferring allotted Native Nation reservation land from federal trust into fee patent land for the individual citizen.²⁸ Consequently, these parcels now are highly fractionated with the number of undivided interest holders growing exponentially over time.²⁹ A Nation's land also may be held in fee or restricted fee by the Nation or a citizen of the Nation.³⁰ Restricted fee land held by the Nation cannot be alienated.³¹ Likewise, restricted fee land held by citizens of the Nation can generally only be conveyed to other citizens.³² Finally, a federal Native Nation reservation may include all of the aforementioned types of land holdings, but these land holdings also exist outside of federal reservations. Federal reservations' boundaries indicate land under the Nation's jurisdiction, not a singular form of land holding.

Given the complexity of historically federally recognized Nations' land holdings, land back remediation for these Nations is distinct. Federal legislation focuses on consolidating a Nation's land holdings and facilitating the fee to trust process so that all of a Nation's land is held in federal trust.³³

fee simple absolute, and therefore was not covered by the General Allotment Act. David E. Wilkins & Shelly Hulse Wilkins, *DISMEMBERED: NATIVE DISENROLLMENT AND THE BATTLE FOR HUMAN RIGHTS* 131 (2017). However, the U.S. still eventually subjected the Nation to allotment. Act to Provide for the Allotment of the Lands of the Cherokee Nation, for the Disposition of Town Sites Therein, & for Other Purposes §§ 11-23, 63, 32 Stat. 716, 717-19, 725 (1902).

²⁵ Charles Wilkinson, *INDIAN TRIBES AS SOVEREIGN GOVERNMENTS* 10 (2d ed. 2004).

²⁶ *Id.*

²⁷ Thomas M. Fitzpatrick, *Land Use Regulation on Reservation Fee Lands: Where do We Go from Here?* Washington Assoc. of Prosecuting Attorneys (Jun. 21, 2003), <https://mrsc.org/getmedia/12B1A3A4-2B95-43A8-A5B9-815B97A2853A/La>.

²⁸ *Id.*

²⁹ Federal Reserve Bank of Minneapolis & Enterprise Community Partners, *Tribal Leaders Handbook on Homeownership* (Patrice H. Kunesh, ed, 2018), <https://www.minneapolisfed.org/~media/files/community/indiancountry/resources-education/cicd-tribal-leaders-handbook-on-homeownership.pdf?la=en>.

³⁰ Fitzpatrick, *supra* note 28.

³¹ *Id.*

³² *Id.* However, under the Stigler Act of 1947, land held in restricted fee by citizens of Cherokee Nation was only protected for citizens with one half or more Cherokee blood. Five Civilized Tribes of Oklahoma, 61 Stat. 731 (Aug. 4, 1947). The Act was not amended to restrict alienation on land held by all Cherokee citizens, regardless of lineage, until 2018. 115 P.L. 399, 132 Stat. 5331, 2018 Enacted H.R. 2606, 115 Enacted H.R. 2606.

³³ See Claims Resolution Settlement, 111 P.L. 291, 124 Stat. 3064 (establishing a Trust Land Consolidation Fund known as the Land Buy-Back Program); see also Indian Land Consolidation Act, 25 U.S.C. §§2201-2219 (2004) (facilitating the conversion of fractionated trust land held for individuals into Tribal trust land).

There are economic benefits, such as tax credits, specific to federal trust land.³⁴ Moreover, federal trust land protects a Nation's land holding from further dispossession by states or noncitizens of a Nation. The tradeoff of trust land is that Native citizens can merely lease, but not own their parcels on trust land.³⁵ This creates barriers to homeownership, as the land cannot be used as collateral for a mortgage.³⁶ However, the U.S. and individual Nations are working to facilitate homeownership on leaseholds,³⁷ particularly given the prevalence of lands held in trust. More than 94 percent of federally recognized Nations' land is held in federal trust for the benefit of the Nation or individuals.³⁸ However, this varies greatly by Nation, with only a third of Cherokee land holdings held in trust.³⁹ Regardless of this variability, much of Native American Property literature focuses on land issues and opportunities unique to historically federally recognized Nations and their citizens.

By comparison to historically federally recognized Nations, Virginia's Native Nations' land holdings are unique. First, the federal government only recently recognized Virginia's Native Nations. The Bureau of Indian Affairs (BIA) recognized Pamunkey Indian Tribe in 2016.⁴⁰ In 2018, Congress passed the Thomasina E. Jordan Act in federal recognition of the Chickahominy Indian Tribe, Chickahominy Indian Tribe - Eastern Division, Rappahannock Tribe, Upper Mattaponi Tribe, Nansemond Indian Tribe, and Monacan Indian Nation.⁴¹ Second, Virginia, as noted above, is one of only thirteen states that recognizes Native Nations.⁴² Virginia currently recognizes eleven Nations,⁴³ a total that includes the seven Nations also federally recognized.

Virginia's state recognition of Nations, along with the recency of the federal recognition of some Nations in Virginia, impacts the type of land holdings among the Nations. Virginia is home to two of only ten state Native Nation reservations nationwide.⁴⁴ The two reservations were established in the

³⁴ Dep't of the Interior, *Converting Fee Land into Trust Land and the Associated Economic Benefits*, https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/pdf/Fee_to_Trust.pdf (last visited Apr. 3, 2022).

³⁵ Fitzpatrick, *supra* note 28.

³⁶ Yair Listokin, *Confronting the Barriers to Native American Homeowners on Tribal Lands: The Case of the Navajo Partnership for Housing*, 33 URB. LAW. 433, 440 (2001).

³⁷ *Id.*

³⁸ Native Land Information System, *BIA Land Area Totals for US Native Lands* (2019), <https://nativeland.info/blog/dashboard/land-area-totals-for-us-native-lands/>.

³⁹ *Id.*

⁴⁰ U.S. Dep't of the Interior Indian Affairs, *Petitioner #323: Pamunkey Indian Tribe, VA*, <https://www.bia.gov/as-ia/ofa/323-pamunk-va> (last visited Apr. 3, 2022).

⁴¹ Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, PL 115-121, January 29, 2019, 132 Stat 40.

⁴² NCSL, *supra* note 15.

⁴³ Sec. of the Commonwealth, *State Recognized Tribes*, <https://www.commonwealth.virginia.gov/virginia-indians/state-recognized-tribes/> (last visited Apr. 3, 2022). Virginia recognizes the following Nations: Mattaponi Indian Tribe, Pamunkey Indian Tribe, Chickahominy Tribe, Chickahominy Indian Tribe - Eastern Division, Rappahannock Tribe, Upper Mattaponi Tribe, Nansemond Indian Tribe, Monacan Indian Nation, Cheroenhaka Nottoway Indian Tribe, Nottoway Indian Tribe, and Patawomeck Indian Tribe.

⁴⁴ United States Census Bureau, *American Community Survey 2020 (5-year estimates): American Indian Area/Alaska Native Area/Hawaiian Home Land*, https://www.sociaexplorer.com/tables/ACS2018_5yr/R12610439.

mid-1600s.⁴⁵ These are the Mattaponi Reservation and Pamunkey Reservation, named for the respective Native Nation.⁴⁶ Both reservations are held in fee by the Commonwealth for the exclusive use of each Nation.⁴⁷ Each Nation's claim to the land can only be extinguished only if the state and the Nation consent.⁴⁸

To better understand the arrangement, I spoke with Tribal Councilmember Brandon Custalow of Mattaponi Indian Tribe.⁴⁹ Councilmember Custalow reports that the Nation has complete jurisdiction over who resides on the reservation.⁵⁰ The land is free of state tax,⁵¹ but pursuant to a 1677 Treaty, the Nation pays tribute to the Governor each year at Thanksgiving.⁵² Presently, the land is allotted to Mattaponi citizens (and their families) for life.⁵³ The allotment functions as a leasehold does on federal trust lands, where the allottee has exclusive rights to make, occupy, and benefit from improvements on the land.⁵⁴ After the death of the "leasing" citizen and, where applicable, the spouse, the citizen's extended family has two years to locate another citizen to take over the allotment.⁵⁵ If the family fails to do so, the Mattaponi Tribal Council will determine the disposition of the property.⁵⁶

Mattaponi Indian Tribe's arrangement on its state reservation is remarkably similar to one Native legal scholar's proposed arrangement for federal trust land. Judge, Professor, and Cherokee Nation citizen Stacy Leeds calls for greater tribal sovereignty in management of Cherokee lands.⁵⁷ She wants Native Nations to manage both leaseholds on federal trust land and disposition of restricted fee lands upon the death of Cherokee citizen owners.⁵⁸ While the federal government, through the passage of the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act of 2012, has ceded some control over leaseholds on federal trust land,⁵⁹ Mattaponi Indian Tribe's autonomy over its state reservation stands in stark contrast to the frequent historical federal involvement on federal trust land.

⁴⁵ Pamunkey Indian Tribe, *Reservation*, <https://pamunkey.org/reservation> (last visited Apr. 3, 2022); Mattaponi Nation, *History*, <https://www.mattaponination.com/history.html> (last visited Apr. 3, 2022).

⁴⁶ *Id.*

⁴⁷ 1976-77 Va. Op. Atty. Gen. 107 (Va.A.G.).

⁴⁸ *Id.* However, each Reservation is still under state criminal jurisdiction. 2001 WL 1265220 (Va.A.G.).

⁴⁹ Phone Interview with Brandon Custalow, Council Member, Mattaponi Indian Tribe, (Mar. 31, 2022).

⁵⁰ *Id.*

⁵¹ 2003 WL 21403095 (Va.A.G.).

⁵² Treaty Between Virginia and the Indians, 1677, <https://encyclopediavirginia.org/entries/articles-of-peace-1677/> (last visited Apr. 3, 2022).

⁵³ Phone Interview with Brandon Custalow, *supra* note 50.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Phone Interview with Stacy Leeds, Professor, Arizona State University, (Nov. 16, 2021).

⁵⁸ Stacy L. Leeds, *The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10 KAN. J.L. & PUB. POL'Y 491, 497 (2000).

⁵⁹ Pub. L. No. 112151, 126 Stat. 1150 (codified as amended at 25 U.S.C. § 415 (2017)). Nations first must pass a law subject to BIA approval. *Id.* Then, the Nation can issue 75-year leases without having to seek federal approval, which is otherwise required. *Id.*

Notwithstanding the Nation's autonomy, Mattaponi Indian Tribe is currently state recognized but is still seeking federal recognition in light of the benefits discussed above.⁶⁰ Federal recognition has been an uphill battle for Virginia Nations. The Racial Integrity Act of 1924, which barred marriage between white persons and non-white persons,⁶¹ was part of a larger effort by Walter Plecker, the head of the Bureau of Vital Statistics, to erase Native existence.⁶² The Act's so-called Pocahontas exception allowed marriage with persons who were 1/16 or less Native.⁶³ While ostensibly meant to allow powerful members of the Virginia elite to count as white,⁶⁴ it also meant that Native persons with fractured lineage had to leave the state to marry other Native persons.⁶⁵ In furtherance of Native erasure, Plecker also did not allow an "Indian" designation on marriage or birth records.⁶⁶ This "pencil genocide"⁶⁷ made Virginia Nations' applications for federal recognition through the BIA nearly impossible to substantiate.⁶⁸ Thus, it took more than three quarters of a century for a single Native Nation in Virginia to receive recognition through the BIA.⁶⁹ The 2017 Act of Congress that federally recognized six Virginia Nations expressly names Plecker as a barrier to recognition.⁷⁰

Even among the Virginia Nations now federally recognized, the available land holdings are not uniform. The 1934 IRA authorized the Secretary of the Interior to place fee land in federal trust for the benefit of federally recognized Nations.⁷¹ Although lower courts interpreted this section of the Act to mean Nations recognized at the time the land was placed in trust, the U.S. Supreme Court disagreed.⁷² In 2009, the Supreme Court ruled in *Carciere v. Salazar* that the IRA only authorizes the Secretary of the Interior to complete the fee-to-trust process for Nations that were under federal jurisdiction as of the 1934 Act.⁷³ The Department of the Interior (DOI) subsequently clarified the meaning of "under federal jurisdiction." In 2014, the DOI issued M-37029, which established a two-part test for "under federal jurisdiction."⁷⁴ Six years later, the DOI abandoned the two-part test and

⁶⁰ Phone Interview with Brandon Custalow, *supra* note 50.

⁶¹ 1924 VA. Acts ch. 371, § 5. The U.S. Supreme Court found the Racial Integrity Act unconstitutional in *Loving v. Virginia* in 1967. *Loving v. Virginia*, 388 U.S. 1 (1967).

⁶² Arica L. Coleman, From the 'Pocahontas Exception' to a 'Historical Wrong': The Hidden Cost of Formal Recognition for American Indian Tribes, TIME (Feb. 9, 2018), <https://time.com/5141434/virginia-indian-recognition-pocahontas-exception/>.

⁶³ 1924 VA. Acts ch. 371, § 5.

⁶⁴ Coleman, *supra* note 63.

⁶⁵ 1924 VA. Acts ch. 371, § 5.

⁶⁶ Coleman, *supra* note 63.

⁶⁷ *Id.*

⁶⁸ The BIA requires that Native Nations meet seven criteria for federal recognition. The Nations must prove they have been continuous singular political entities. Nat'l Cong. of American Indians, *Tribal Nations and the United States* (Feb. 2019), https://www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf.

⁶⁹ U.S. Dep't of the Interior Indian Affairs, *supra* note 41.

⁷⁰ Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, *supra* note 42.

⁷¹ Indian Reorganization Act, 48 Stat. 984 (1934).

⁷² COHEN's, *supra* note 3, at § 3.02.

⁷³ *Carciere v. Salazar*, 555 U.S. 379, 395 (2009). In his concurrence, Justice Breyer noted that a Nation may be under federal jurisdiction as of 1934 without having been formally recognized. *Id.* at 396 (Breyer, J. concurring).

⁷⁴ Dep't of Interior, Op. M-37029 (Mar. 12, 2014) available at <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf>.

replaced it with a four-part test.⁷⁵ The following year, under the Biden Administration, the DOI reinstated the original two-part test.⁷⁶ As the IRA does not give the Secretary of the Interior blanket authority to place land into trust for *any* Nation, this means that the Nations for which the Secretary can place land into trust has changed three times in the past eight years as presidential administrations have changed. Thus, the definition of Nations covered by the IRA appears vulnerable to further modifications.⁷⁷

The changing determination of Nations covered by the IRA means that the fee-to-trust process may look different for Virginia's federally recognized Nations. A BIA-recognized Nation, such as Pamunkey Indian Tribe, can only have land placed into trust if the Secretary of the Interior is authorized to do so under the IRA. Thus, Pamunkey Indian Tribe will need to pass the DOI's current test of "under federal jurisdiction." As that test could change with a new presidential administration, Pamunkey Indian Tribe has an unpredictable path to placing land into federal trust for the benefit of the Nation.⁷⁸ The remaining six federally recognized Nations should have a more predictable path, because the Congressional Act recognizing the Nations also expressly authorizes the Secretary of the Interior to place land into trust for those Nations.⁷⁹ Thus, for these six Nations, the Secretary's authority to convert land from fee to trust is not reliant on the IRA.

While placing land in federal trust is not an available or easy path for all Virginia Nations, both the U.S. and Virginia are nevertheless engaged in land back remediation. Current Secretary of the Interior Deb Haaland recently gave fee title to 465 acres at Fones Cliffs to Rappahannock Tribe.⁸⁰ The Nation plans to place the land in federal trust.⁸¹ In 2019, the Commonwealth returned 100 acres to Mattaponi Indian Tribe, thereby expanding Mattaponi Reservation.⁸² Chickahominy Tribe received \$7 million in state funding over a three-year period to expand its land holdings.⁸³ Further, Monacan Indian Nation recently successfully fought off use of a sacred burial site for a water authority project outside Richmond.⁸⁴

As more Virginia Nations achieve federal and state recognition and as their land holdings increase and are increasingly protected, it is important to recall that "Land Back" is more than a slogan.

⁷⁵ Dep't of Interior, Op. M-37055 (Mar. 9, 2020), available at <https://www.doi.gov/sites/doi.gov/files/m-37055.pdf>.

⁷⁶ Dep't of Interior, Op. M-37070 (Apr. 27, 2021), available at <https://www.doi.gov/sites/doi.gov/files/m-37070.pdf>.

⁷⁷ E-mail from Dr. Sam Cook, Presidential Advisor on American Indian Initiatives, Director, American Indian Studies, Virginia Tech, Mar. 31, 2022.

⁷⁸ *Id.*

⁷⁹ Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, *supra* note 42.

⁸⁰ Press Release, Dep't of Interior, *Secretary Haaland Celebrates Rappahannock Tribe's Reacquisition of Ancestral Homelands* (Apr. 1, 2022), <https://www.doi.gov/pressreleases/secretary-haaland-celebrates-rappahannock-tribes-reacquisition-ancestral-homelands>.

⁸¹ *Id.*

⁸² Erin Patterson, *Governor Northam Signs Land Trust Agreement with Mattaponi Tribe* 12 News Now (Aug. 26, 2019), <https://www.13newsnow.com/article/news/local/virginia/governor-northam-signs-land-trust-agreement-with-mattaponi-tribe/291-c609b22c-ecba-4d83-91fb-eee86406a245>.

⁸³ Evan Visconti, *Va. Native American Tribes Acquiring More Lands for Cultural and Environmental Preservation* Virginia Mercury (Sep. 9, 2021), <https://www.virginiamercury.com/2021/09/09/va-native-american-tribes-acquiring-more-lands-for-cultural-and-environmental-preservation/>.

⁸⁴ Gillian Brockell, *Battle Over Native American Burial Site in Virginia Ends in Tribal Victory* Wash. Post (Mar. 16, 2022), <https://www.washingtonpost.com/history/2022/03/16/monacan-rassawek-resolution/>.

Returning land to Native Nations is one of the most feasible ways to remediate the wrongs that the United States and Virginia have committed against Native Nations. But the property rights secured by each Native Nation in returned or retained land are not uniform. And ultimately complete remediation would allow each Nation full autonomy to choose the rights in, and disposition of, their land. For, long before Chief Justice John Marshall's declaration in *Johnson v. McIntosh* (1823) that citizens of Native Nations are mere occupants of the land, the land was held by Native Nations alone.⁸⁵ As Citizen of Monacan Indian Nation Karenne Wood once wrote, "Nothing was discovered / Everything was already loved."⁸⁶

⁸⁵ *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 591 (1823).

⁸⁶ Karenne Wood, "Homeland" in *Weaving the Boundaries* (2016).

VIRGINIA REAL ESTATE CASE LAW UPDATE (SELECTED CASES)

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A. FEDERAL CASES

1. ***Celebrate Virginia South Holding Company, LLC v. CVAS Property Management LLC, 2021 WL 5015732 (E.D. Va. 2021).***

Facts: Tax-sale purchasers of property within Celebrate Virginia South development brought declaratory judgment action against original and successor declarants and property owners association seeking to have the Court declare that (i) the assignments of Declarant rights to the successor declarants violated Declaration for the development, (ii) the Gondola Easement was unenforceable, and (iii) the Gondola easement was abandoned. Defendants moved to dismiss all counts.

Holding: The court denied the motion to dismiss as to the claim that the assignments of declarant rights were invalid but granted the motion to dismiss as to the validity of the Gondola Easement and as to the claim that it had been abandoned.

Discussion: As an initial matter, the Court rejected the defendants' claims that plaintiffs were unable to challenge the validity of the various instruments because the plaintiffs took title to their property with record notice thereof. The Court recognized that, although the plaintiffs were charged with notice of the instruments, that does not foreclose their ability to challenge the validity of those instruments. Although the Virginia Supreme Court has never directly addressed this claim, the Court cited examples of cases where the Virginia Supreme Court considered challenges to instruments of which the plaintiff was on record notice. The Court also noted that to hold otherwise would inappropriately "shield many encumbrances from a reasonableness review – even those enacted in violation of public policy."

The Court determined that the plaintiffs stated a claim for relief on the ground that the assignments of declarant rights were invalid because the Declaration provided that the Declarant could only transfer "Declarant Rights" to a person "acquiring Parcels . . ." Accordingly, a transfer of Declarant Rights could only occur in connection with a conveyance of property. Neither of the assignments of Declarant Rights at issue was made in connection with a conveyance of property; therefore, Plaintiffs stated a claim on this basis.

The Court determined that the plaintiffs failed to state a claim as to the validity of the Gondola Easement. Plaintiffs claimed that the Gondola Easement was recorded for the sole purpose of frustrating the foreclosure of certain parcels of property and to obstruct development of plaintiffs' property. Defendants claimed that the easement was created for the purpose of connecting the development with a sister development across the river. The Court found as a matter of law that the easement was valid – finding that under Virginia law an easement is valid and enforceable so long as (a) it proves reasonable between the parties, and (b) does not violate public policy by harming the public.

The Court rejected plaintiffs' argument that the easement was created for an improper purpose – determining that even if it were created to frustrate foreclosure to protect its business interests, that would constitute a valid and reasonable purpose. The Court also found that plaintiffs' claim that it was intended to frustrate their development interests was belied by the plain language of the document which set forth a number of appropriate purposes, including to construct a Gondola in the future. The Court also found that the easement was reasonable between the parties because plaintiffs took title with record notice of the easement. Finally, the Court found that the easement did not infringe any public policy interests.

The Court also rejected plaintiffs' claim that the easement was vague, overly broad, or ambiguous. Plaintiffs alleged that the easement was unenforceable because it expressly reserved “the right to reconfigure, relocate, modify and/or release any portion, or entirely, of the Gondola Easement.” The Court determined that this language did not render the easement void or unenforceable for vagueness or ambiguity. The Court recognized that under Virginia law, an easement is not unenforceable “even if the language of the easement allows the easement-holder to alter the easement in the future without including specifics.” Specifically, the Court held that “[i]n Virginia, an easement may allow for future indeterminate alteration without rendering the restriction unenforceable.”

Finally, the Court rejected plaintiffs claim that the easement had been terminated by abandonment. The Court noted that Virginia recognizes two ways to terminate an easement by abandonment (i) pure abandonment by the holder of the easement and (ii) prescriptive termination by the party burdened by the easement. The Court quoted *Helms v. Manspile*, 277 Va. 1 (2009) for the proposition that “[n]onuse of an easement coupled with acts which evidence an intent to abandon or which evidence adverse use by the owner of the servient estate, acquiesced in by the owner of the dominant estate, constitutes abandonment.” The Court noted that there was no dispute that the easement had not been used and that there was no claim of any adverse use, thus the only issue to address was whether plaintiffs alleged sufficient facts to evidence an intent to abandon.

Plaintiffs alleged that defendants' release of portions of property from the restrictions of the easement constituted abandonment. Although the failure to enforce an easement can be evidence of abandonment, that is not the case when the evidence shows that the holder continues to recognize the easement despite nonuse – which defendants did when they released property from the easement. Moreover, doing so was consistent with the right to modify the easement. Accordingly, the Court determined that plaintiffs failed to state a claim for abandonment.

Finally, the Court found that amendment would be futile so refused to grant leave to amend.

2. *Deutsche Bank National Trust Company v. Fegely*, 2021 U.S. Dist. LEXIS 63079 (E.D. Va. March 30, 2021).

Facts: Fegely defaulted on a mortgage with Deutsche. Deutsche purchased the property at the foreclosure sale. During the sale and after the sale, Fegely placed three clouds on title – a UCC financing statement, and two memoranda of *lis pendens*. Deutsche filed suit in state court and Fegely removed it to federal court. After much litigation, including a trip to the Fourth Circuit, Deutsche filed a motion for summary judgment. The timeline of this matter is as follows:

January 11, 2012, Fegely filed the UCC-1. No one other than Fegely signed the financing statement. Fegely had no documentation on any alleged debt owed from IndyMac to her.

August 16, 2012, Fegely filed the first *lis pendens* indicating the filing of a lawsuit in federal court. The same day, the federal court dismissed that action. Fegely appealed to the Fourth Circuit and the appeal was dismissed on October 25, 2012. Fegely did not release the *lis pendens*.

June 27, 2013, Fegely filed suit in the state court seeking declaratory judgment to void the foreclosure sale. She filed the second *lis pendens* on June 28, 2013. The state court dismissed the case and the Virginia Supreme Court denied the appeal. Fegely did not release the *lis pendens*.

Holding: The court granted the motion for summary judgment.

Discussion: The court found that it was proper for it to issue a declaratory judgment in the case. On the two *lis pendens*, the court analyzed a quiet title claim under Virginia law and iterated that such action requires a plaintiff to prove that she has superior legal or equitable title. The court further stated that once an action giving rise to a *lis pendens* is dismissed, the court *must* release the *lis pendens*. Having found that Fegely did not identify any material facts that were genuinely disputed pertaining to who held superior title to the property and finding there was no pending litigation that made the *lis pendens* filings justified, summary judgment was proper to declare that the two *lis pendens* had to be released.

The federal court did not have jurisdiction to order the release of the *lis pendens* but found that Deutsche could seek it from the state court. Interestingly, the federal court did note “that because the litigation underlying each *lis pendens* had terminated, the *lis pendens* should be deemed null and void.”

On the UCC1, citing Virginia Code § 8.9A – 509(a)(1) – (2), the court found that in order to file an authorized UCC1, the debtor must do so in an authenticated record, by authenticating or becoming bound as a debtor by a security agreement, or by acquiring collateral. Importantly, “an unauthorized filing of a financing statement renders the record ineffective.” The court found that Fegely presented no genuine issue of material fact to conclude that her filing of the UCC1 was authorized due to her failure to evidence debt to her and failure to acquire signatures on the UCC1. As a result, summary judgment was proper to declare that the UCC1 was ineffective.

B. VIRGINIA SUPREME COURT CASES

1. *California Condominium Association v. Peterson*, 2022 Va. LEXIS 16 (March 17, 2022)

Facts: Peterson failed to pay assessments for two condominium units he owned alone after a divorce. His ownership came from a settlement in the divorce proceedings where he agreed to hold his wife harmless from any liability on the units. Having learned of the divorce settlement, the association filed suit in 2017 for a non-judicial foreclosure on the liens recorded in 2006 and for damages for breach of the declaration.

Peterson filed a plea in bar claiming that the cause of action for unpaid assessments in 2006 was barred by the statute of limitations under both Virginia Code § 55.1-1966(D) and Virginia Code § 8.01-246. The association disagreed, claiming § 55.1-1966(D) applies only to liens and not personal claims; that § 8.01-246 did not bar the claims because the divorce settlement created a new promise

to pay; Peterson could not approbate and reprobate¹; and Peterson breached the declaration when he failed to pay assessments upon conveyance of the condominium (as a result of the divorce).

There was an evidentiary hearing on the plea in bar. The association presented an exhibit binder to the court and Peterson noted he would object as exhibits were asked to be admitted. However, none of them were admitted into evidence. Peterson also stipulated to the facts as alleged in the complaint only for purposes of the plea in bar.

Lower Court Holding: The circuit court granted the plea in bar and dismissed the case finding it could not consider the association’s argument pertaining to breach of the declaration because it had not been admitted into evidence.

Supreme Court Holding: The Virginia Supreme Court reversed and remanded.

Discussion: The Virginia Supreme Court provided a good summary of the difference in and comparison of a demurrer and plea in bar. The court stated that “separating law from fact in the plea-in-bar context is no easy task.” The court then recognized that Peterson stipulated that the plea in bar assumed *arguendo* the factual allegations in the amended complaint. One of those was the declaration, which was attached as exhibit 1. The court reversed the trial court’s finding that it could not consider the declaration and found that “[t]here is no need to offer evidence at an evidentiary hearing on issues that involve disputes of law concerning undisputed facts alleged in a complaint.”

Footnote 5 provides interesting information from the court. There, the Supreme Court stated “[i]t is a convenient practice to use such binders, but a circuit court has no obligation to sua sponte treat exhibits within a lodged binder as admitted evidence. It does not matter that the documents are admissible under Rule 2:803 or that the opposing party conceded in response to requests for admission that the documents were relevant, genuine, and authentic, see Rule 4:11. The admissibility of an exhibit is a legal abstraction. The admission of an exhibit is a legal act that only a court can perform.”

2. *Canova Land and Investment Co. v. Lynn*, 299 Va. 604 (2021)

Facts: Purchaser at foreclosure sale brought action against church seeking to quiet title to a one acre portion of the five acre property, which portion was subject to a possibility of reverter under clause in an 1875 deed that provided that the one acre would “revert to the grantors or their heirs if it ceases to be used . . . for the worship of God in accordance with the customs and regulations of [the Woodbine Baptist Church].” In 2007 trustees of the church gifted the property to the Woodbine Family Worship Center and Christian School (the “Worship Center”). In 2007, the Worship Center took out a loan secured by a deed of trust on a five-acre parcel, which included the one-acre parcel that was the subject of the 1875 deed. The Worship Center defaulted on the loan and Canova acquired the property at the foreclosure sale. Canova did a title search before its acquisition that only traced the title to 1900 so the 1875 deed did not come up in the title search. Canova filed suit seeking to void the clause as an unreasonable restraint on alienation because it only allowed use by the Woodbine Baptist Church. The heirs of the grantor argued that the limitation allowed use by the broader Baptist denomination so was not unreasonably limited and argued a charitable exception to restraints on alienation.

Trial Court: The circuit court dismissed the complaint with prejudice at trial finding that the reverter clause was a reasonable land use restriction on a charitable gift.

Supreme Court Holding: The Virginia Supreme Court affirmed.

¹ Maintain or assert inconsistent positions in the same or successive lawsuits.

Discussion: The Supreme Court noted that one limitation on a grantor's absolute right to transfer property is the rule against restraints on alienation. A condition totally prohibiting alienation of a fee simple estate or requiring forfeiture upon alienation is void. Reasonable restraints are valid, however, and courts use a "liberal interpretation to uphold" deeds involving land for charitable purposes. The Court found that the 1875 deed conveyed a fee simple estate subject to a possibility of reverter and noted that restrictions triggering reverters of fee simple estates are generally valid. The Court found that the clause merely limited the use of the land "for the worship of God" and was not unreasonably restrictive. The Court also noted that charitable gifts are "favored creatures under the law."

3. *Emmanuel Worship Center v. City of Petersburg*, 867 S.E.2d 291 (2022)

Facts: In August of 2018 City of Petersburg sued the Emmanuel Worship Center to recover delinquent taxes and obtain a decree of sale. The Circuit Court found in favor of the City and ruled that EWC was barred from asserting that it was exempt from taxation and therefore didn't owe the taxes because the 3-year statute of limitations for challenging erroneous assessments had expired for the tax years in question.

EWC did not appeal but redeemed the property by paying the delinquent taxes. EWC then filed a Bill of Review pursuant to Va. Code § 8.01-623 asking the Circuit Court to review its decree of sale and reverse, modify, or nullify its order and award EWC the amounts it paid the City to redeem.

Trial Court: The Circuit Court denied the Bill of Review on the ground that a bill of review is only allowed for an action in equity and not an action at law, such as one for recovery of delinquent taxes.

Supreme Court Holding: Reversed and remanded.

Discussion: The Court ruled that for taxes to be "delinquent" they must first be "owed" and that if EWC is exempt under the self-executing provisions of the Virginia Constitution, then the taxes would not be "owed." The Court also held that EWC's ability to raise this argument as a defense to payment in an action for a decree of sale is not affected by the expiration of the statute of limitations for a correction of erroneous assessments. Although the expiration of that period bars EWC from initiating a legal challenge under that statute, it does not preclude EWC from raising its tax-exempt status as a defense.

The trial court also erred in denying the Bill of Review on the ground that the action for a decree of sale is one at law. Such an action is equitable in nature.

The Court remanded the case for a determination as to whether the property was used for religious purposes and, consequently, whether EWC owed any delinquent taxes.

4. *Garner v. Joseph*, 866 S.E.2d 583 (2021).

Facts: The court was asked to decide whether owners of an easement were indispensable (necessary) parties to a boundary adjustment case filed by their neighbors. The Garners acquired an easement and right of way over land owned by the Edwards. In 2015, the Garners filed suit against the Edwards seeking a determination of their right to use the easement. The Newport News Circuit Court decided that the Garners had an "absolute and unfettered right of ingress and egress" within the perpetual easement and right of way as stated in the deed. In 2018, the Josephs filed suit against the Edwards to establish riparian boundaries between their parcels. That case led to an apportionment that located the Garner's pier (built after the 2015 case) partly within the Josephs riparian area. The Garners were not parties to the 2018 suit.

In 2018, the Garners filed suit to set aside the 2018 apportionment order from the other suit. The Josephs filed a demurrer stating that the Garners were not necessary parties to the prior suit because they did not have fee simple interested in the affected property.

Lower Court Holding: The circuit court granted the demurrer and plea in bar of the Josephs finding that they had no standing to challenge the apportionment order. The Garners filed a motion for reconsideration that the circuit court also denied.

Supreme Court Holding: The Virginia Supreme Court reversed and remanded.

Discussion: The Virginia Supreme Court provided a thorough analysis of what necessary and indispensable parties are in litigation cases. Citing earlier decisions, it stood by its prior position that necessary parties include those who have an interest in the outcome of the case. It further stated that parties that are necessary should be joined in the case unless it is practically impossible to join them, or the absent parties' interests are separable from the parties before the court. This requirement, to join necessary parties, is "designed to prevent a multiplicity of litigation and to avoid depriving a person of his property without giving that person an opportunity to be heard."

Finding that an easement is a privilege to use the land of another and that an easement over a riparian area grants riparian rights "necessary to fulfill the intent of the grant," the Supreme Court found that the Garners were necessary parties to the 2018 apportionment proceeding. The Supreme Court did warn that holders of an easement are not always necessary parties, but they are in cases like this one where the parties in the litigation do not represent their interests. The Supreme Court found that the apportionment order took away some of the Garner's easement rights and redrew their riparian boundary, leaving them open to claims of trespass from the Josephs. As a result, they had a right to participate in the 2018 apportionment proceeding.

5. *Givago Growth, LLC. v. iTech AG, LLC, 300 Va. 260 (2021)*

Facts: Givago and its principal entered into a partnership agreement with Artifact LLC – a construction company – pursuant to which each would contribute funding to develop land in McLean and, upon a sale of the property, they would receive a percent of the proceeds based on the proportionate share of their initial contributions. Title would remain with Givago and its principal until the property was sold.

Artifact and its principal borrowed the money for the contribution from iTech and, upon default, entered into a joint venture agreement with iTech pursuant to which Artifact agreed to record a deed of trust encumbering the property to secure iTech's contribution.

In July of 2018, Artifact informed counsel for iTech that it could not provide the deed of trust because it didn't own the property and assigned the proceeds of any sale to iTech.

In September of 2018, iTech filed suit against Givago and its principal for specific performance of iTech's joint venture agreement with Artifact. iTech recorded a lis pendens in connection with that suit. The property was under contract at the time and went to closing, though over \$800,000 was held in escrow pending the outcome of the litigation.

In 2019, iTech nonsuited and withdrew its lis pendens. Givago then filed suit against iTech and its counsel for abuse of process, slander of title, tortious interference, and civil conspiracy arising out of the recordation of the lis pendens. Defendants filed a demurrer asserting that the recordation of the lis pendens was absolutely privileged and therefore no liability could be associated with that act.

Trial Court: Sustained the demurrer.

Supreme Court: Reversed and remanded.

Discussion: In this case involving a question of first impression, the Supreme Court considered whether the recordation of a *lis pendens* is part of a judicial proceeding for purposes of establishing an absolute privilege against a defamation claim. The absolute privilege provides that “words spoken or written in a judicial proceeding *that are relevant and pertinent to the matter under inquiry* are absolutely privileged from subsequent charges of defamation.” (emphasis supplied).

The Court cited to a case from “our sister court in Kentucky” for several reasons why the privilege should apply to a *lis pendens*:

- 1) With few exceptions, any publication in a judicial proceeding enjoys absolute privilege from later charges of defamation.
- 2) The sole purpose of recording a notice of *lis pendens* is to give prospective buyers constructive notice of the pendency of the proceedings.
- 3) The notice of *lis pendens* is purely incidental to the action wherein it is filed, and refers specifically to such action and has no existence apart from that action.
- 4) The recording of a notice of *lis pendens* is in effect a republication of the proceedings in the action and therefore, it is accorded the same absolute privilege as any other publication incident to the action.

The Court also analogized to its ruling in *Donohoe Construction Co. v. Mt. Vernon Assoc.*, 235 Va. 531 (1988), in which it found that an absolute privilege applied to the recordation of a mechanic’s lien. Although recording a lien is a prerequisite to filing a suit to enforce – and a memorandum of *lis pendens* is not required – the two instruments are similarly intertwined with the filing of a complaint. Moreover, a *lis pendens* merely republishes information contained in the complaint – so it would not make sense for the complaint to be privileged but not the *lis pendens*.

The Court also confirmed that the defense of absolute privilege applies only to defamation claims, including claims for sander of title – not to other torts such as tortious interference, conspiracy, and the like.

The Court noted that whether the privilege applied in this instance was dependent on whether the information in the *lis pendens* was sufficiently “relevant and pertinent to the matter under inquiry” for absolute privilege to apply. A liberal rule applies to this determination – “the matter to which the privilege does not extend must be so palpably wanting in relation to the subject matter of the controversy that no reasonable man can doubt its irrelevancy and impropriety.”

In this case, the Court distilled the inquiry as follows “Do the facts alleged in the complaint bear any relation to the title of the property encumbered by the *lis pendens*?”

The Court reversed and remanded the matter for further proceedings, noting that “the facts alleged in the complaint, if proven true, are concerning and may not even satisfy this ‘liberal rule’ regarding relevancy.”

6. *Gregory v. Northam*, 2021 WL 3918894 (2021).

Facts: Gregory claimed that pursuant to wills of Bettie F. Allen Gregory and Roger Gregory and the wills of their heirs he inherited the rights of the “covenantees” of deeds signed by Bettie and Roger Gregory in 1887 and 1890 which conveyed ownership of the Lee Monument and parcel on which it was erected. The 1890 deed contained a clause pursuant to which the Commonwealth provides “her guarantee that she will hold said Statue and Pedestal and Circle of ground perpetually sacred to the Monumental purpose to which they have been devoted and that she will faithfully guard it and affectionately protect it.” Gregory argued that he had the right to compel the Commonwealth to maintain the Lee Monument in its present location.

Trial Court: The circuit court sustained the defendants' demurrer, concluding that the parties to the deeds intended to create an easement appurtenant, not an easement in gross. Because the plaintiff sued to enforce an easement in gross – and not as the owner of a benefitted parcel of land, the court sustained the demurrer

Supreme Court Holding: The Virginia Supreme Court affirmed.

Discussion: The trial court noted that an easement in gross – or a personal easement – is one that is not appurtenant to any estate in land, “but in which the servitude is imposed upon land with the benefit thereof running to an individual.” An easement appurtenant “runs with the land,” meaning that “the benefit conveyed or the duty owed under the easement passes with the ownership of the land to which it is appurtenant.”

The Court noted that a “court will never presume that an easement is an easement in gross; it must plainly appear from the granting instrument or deed that the parties intended to create an easement in gross.” Indeed, the Court noted the existence of a long-standing rule that an easement is “never presumed to be in gross when it [can] fairly be construed as appurtenant.” Following that rule, the court held that the easement was appurtenant because the plain language of the deeds at issue do not state in intent to create an easement in gross.

7. *Historic Alexandria Foundation v. City of Alexandria*, 299 Va. 694 (2021)

Facts: Historic preservation group brought suit challenging City's approval of landowner's application to renovate Justice Hugo Black's historic residence. Group owned property approximately 1500 feet from the property at issue, both of which were located in a historic district. The landowner and the City filed demurrers arguing that the suit failed to allege sufficient facts to establish standing to pursue the appeal.

Trial Court: The circuit court noted that to be an “aggrieved” party within the meaning of the zoning ordinance at issue, the party must suffer “a harm that is particularized to them and different than that which would be suffered by the public at large.” The court determined that the petition failed to allege sufficient facts to make this showing, sustained the demurrers, and dismissed the case with prejudice.

Supreme Court Holding: The Virginia Supreme Court affirmed.

Discussion: The Supreme Court noted that to have standing a complainant must (i) own or occupy property within or in close proximity to the subject of the land use determination to establish that it has “a direct, immediate, pecuniary and substantial interest in the decision” and (ii) allege facts demonstrating a particularized harm to some personal or property right, or the imposition of a burden different than that suffered by the public generally. The Court found that the group failed to allege sufficient facts to meet the particularized harm test. The harm alleged – that the proposed renovation would compromise the integrity of the historic residence on the property and diminish the open space easements on the subject property – was shared by the public generally.

8. *Mount Aldie, LLC v. Land Trust of Virginia, Inc.*, 2021 WL 728888 (2021)

Facts: The LLC owns 60 acres of property adjacent to the Little River in Loudoun County. The Indian Spring Trail was a footpath along the river, which was named for the spring that flows into the river near the end of the trail.

In 2008, the LLC's predecessor in title conveyed a conservation easement to LTV that, among other things, required that a 100 foot riparian buffer be maintained along the edge of Little River, and that no earth disturbing activity was to take place within the easement area except to remove individual trees or to create and maintain horse trails with unimproved surfaces.

In 2013, LTV sued the LLC for violation of these provisions, asserting that the LLC constructed a road in the buffer, including removal of vegetation and rock outcroppings.

The trial court awarded LTV summary judgment, which was reversed upon appeal to the Supreme Court.

On remand, an advisory jury was empaneled and heard evidence that the LLC had widened and leveled the trail and jackhammered the rock to turn the path into a horse trail. The LLC also installed brick paving stones to allow water from the Spring to drain across the trail.

Trial Court: The jury determined that there was no breach of the conservation easement. The trial court then ruled that the brick pavers were in violation of the easement and ordered their removal and awarded LTV its attorney's fees and costs.

Supreme Court: Reversed the trial court's decision, vacated the award of fees and the injunction to remove the pavers, and entered final judgment for the LLC.

Discussion: LTV failed to raise the issue of the pavers in its complaint and therefore could not recover at trial on that claim.

9. *Payne v. Danville Doctors Building, 2022 WL 120884 (2022)*

Facts: On October 9, 2017, purchasers entered into a contract to purchase two commercial buildings for \$700,000, with a \$25,000 earnest money deposit. The Contract provided for a closing date of January 9, 2018, and a 60-day feasibility period during which time the purchasers could terminate the Contract if they were "not satisfied in [their] sole and absolute discretion with all aspects of the Property. . ." Although purchasers discovered asbestos in some ceiling tiles during the study period, they did not notify sellers of that issue – choosing instead to inform sellers that they were not closing due to some medical issues that one or both of the purchasers had suffered.

The Contract included non-standard default provisions. Paragraph 13 addressed default and the first part of paragraph 13(A) was crossed out and initialed with the notation, "See substituted language on Addendum." The addendum provided as follows:

Paragraph 13. Default

The following language is substituted:

Upon default by the Purchaser except for any material breach of any of the provisions contained herein, the Sellers shall be entitled to retain Purchaser's deposit in the amount of \$25,000. [sic], and may avail itself of all remedies available to it in law or in equity including the right of specific performance.

The rest of paragraph 13(A) (which continued onto the following page of the Contract) was not crossed out. The crossed-out language in paragraph 13(A) provided that the seller's sole remedy in the event of the buyer's default was to terminate the Purchase Agreement and retain the deposit. The portion of paragraph 13(A) that was not crossed out stated that "Seller hereby specifically waives the right to seek specific performance of this Agreement by Purchaser or any other remedy at law or in equity" except those necessary to enforce the indemnity provisions.

Trial Court: In May of 2018, Sellers sued purchasers seeking specific performance. While suit was pending, Sellers sold the property for \$500,000. After a bench trial, the Court awarded judgment in favor of Sellers for \$200,000, plus an award of attorney's fees and costs.

Supreme Court: Affirmed.

Discussion: The primary issue on appeal related to the award of damages. Purchasers claimed that Sellers were limited to retention of the security deposit – not benefit of the bargain damages –

because of the ambiguity in the damages provisions in the Contract. Specifically, while the addendum provided for specific performance, the portion of paragraph 13(A) waiving the right to specific performance was not crossed out so Purchasers claimed that Sellers could not seek that relief.

The Court rejected this argument, finding that the addendum provided a complete substitution of the remedies provisions of paragraph 13(A) – even though the portion of paragraph 13 waiving the right to seek specific performance was not crossed out. The Court found that the only logical interpretation of the addendum was that it was intended to be a complete substitution of paragraph 13(A) addressing Sellers’ remedies in the event of Purchasers’ default.

10. *Stafford v. D.R. Horton, Inc.*, 299 Va. 567 (2021)

Facts: Real estate developers filed petitions against county challenging planning department’s determination that developers’ plans needed to undergo a comprehensive plan compliance review. In 2005 and 2007, two developers submitted preliminary subdivision plans to the planning commission, which included a request to extend public water and sewer to portions of each of the properties – some portions of each property were in areas designated to be served by public water and sewer and others were not. The extension requests were approved but the developers did not proceed with their subdivision plans.

In 2012, both developers submitted plans for cluster developments on their properties, which plans relied on the previous approval to extend sewer and water and increased the number of lots on each property. The planning department required a comprehensive plan review. The developers objected on the grounds that their developments were by right. The developers appealed the determination to the Board of Supervisors, which upheld the determination.

Trial Court: The trial occurred on July 2 and 3, 2014 and “[f]or reasons that are not clear from the record, the circuit court did not rule until approximately five years later, on August 16, 2019.” The circuit court entered an order directing the County to approve the cluster development plans.

Supreme Court Holding: Reversed and remanded.

Discussion: The Court found that because only parts of the properties were served by public water and sewer, Virginia Code § 15.2-2286.1 – the cluster development statute – did not apply. That statute prohibits a locality from refusing to extend water and sewer from an adjacent property to a cluster development if such development is “located within an area designed for water and sewer service.” Because the properties were only partially within the service area, they did not meet the requirements of the statute and the developers were required to submit their plans to the planning commission for review. The Court reversed the trial court’s ruling and remanded the case to the planning commission for a review pursuant to Virginia Code § 15.2-2232.

11. *Taylor v. Northam*, 2021 WL 391840 (2021).

Facts: On July 15, 1887, the descendants of William C. Allen conveyed the Circle at the intersection of Monument Avenue and Allen Avenue to the Lee Monument Association “to have and to hold the said property . . . to the following uses and purposes and none other, to wit, as a site for a monument to General Robert E. Lee.” The Deed was countersigned by the President of the Association signifying his agreement to be bound by the terms of the deed. The Association then prepared the Circle and acquired the pedestal and monument in anticipation of transferring the property to the Commonwealth.

On December 19, 1889, the General Assembly approved a joint resolution authorizing and requesting the Governor to accept a gift of the monument – including the pedestal and Circle – from the Association.

On March 17, 1890, the Association conveyed the monument, pedestal and Circle to the Commonwealth by deed, which provided that the conveyance was with the approval and consent of the grantors of the 1887 Deed. The 1890 Deed further required that the Commonwealth provide “her guarantee that she will hold said Statue and Pedestal and Circle of ground perpetually sacred to the Monumental purpose to which they have been devoted and that she will faithfully guard it and affectionately protect it.” The deed was signed by the grantors of the 1887 Deed, by the President of the Association, and by the Governor of Virginia.

On June 4, 2020 Governor Northam announced that he was going to remove the statue and directed the Department of General Services to develop a removal plan.

Plaintiffs alleged that (i) the 1889 Joint Resolution is binding, and the Governor’s intended removal would violate various provisions of the Virginia Constitution, and (ii) that the Commonwealth is bound by the restrictive covenants in the 1887 Deed and the 1890 Deed.

Plaintiffs Massey, Heltzel and Hostetler established at trial that they all own property in the area of the Circle and are successors in title from the original Allen heirs who executed the 1887 Deed and the 1890 Deed.

Trial Court: The court determined that the restrictive covenants were unenforceable because they are in violation of public policy and that, because of the change in public policy, the removal of the statue would not be in violation of the Virginia Constitution

Supreme Court Holding: Affirmed.

Discussion: The Court’s ruling focused on the principle that governmental speech is a vital power and addressed the impact of the restrictive covenant on that governmental right. The Court noted that “a restrictive covenant against government is unreasonable if it compels the government to contract away, abridge, or weaken any sovereign right because such a restrictive covenant would interfere with the interest of the public.” Because the state cannot “barter away” its essential powers, contracts purporting to do so are void. The Court concluded that the 1890 Deed was unenforceable because it constituted an attempt to “barter away the free exercise of government speech.”

The Court also found that, if the language in the 1887 and 1890 Deeds created restrictive covenants, those covenants are unenforceable as contrary to public policy.

The Commonwealth introduced the text of the House and Senate Budget Bills which both included provisions authorizing the removal of the Statue and repealing the 1889 Joint Resolution as evidence of public policy and relied on ample other evidence of public policy.

12. *White v. Llewellyn*, 299 Va. 658 (2021)

Facts: Husband and wife were defendants in personal injury action arising out of an accident in 2013 in which the vehicle wife was driving collided with plaintiff White. In 2015 while suit was pending, the Defendants finalized their divorce. In 2016, the husband was dismissed from the suit and, several months later, wife executed a deed of gift transferring title to the marital home as part of their property settlement agreement. In 2018, White filed suit seeking to set aside the deed of gift as a fraudulent conveyance.

Trial Court: The court found that White established a prima facie case, thereby establishing a presumption of a fraudulent conveyance and shifting the burden of production to the defendants “but not the burden of persuasion.” The trial court found that the defendants satisfied their burden of production of countervailing evidence showing that the conveyance was not done with the intent to evade the plaintiff. The trial court then held that White failed to satisfy her burden of persuasion and entered judgment for defendants.

Supreme Court Holding: Reversed and remanded.

Discussion: The Court on this issue of first impression found that the trial court erred by only shifting the burden of production – and not the burden of persuasion – to defendants once White established a badge of fraud. The Court held that once a presumption of a fraudulent conveyance is established upon the proof of a badge of fraud, the burdens of both production and persuasion shift to the defendant to uphold the validity of the transaction by rebutting the presumption by establishing the bona fides of the transaction by “strong and clear evidence.”

C. VIRGINIA CIRCUIT COURT CASES

1. *In Re: March 10, 2021 Hearing of the Board of Zoning Appeals of Fairfax County (Fairfax County 2021).*

Facts: Issue before the court is whether the Fairfax County Board of Supervisors can file a demurrer to a petition appealing a decision of the BZA pursuant to Virginia Code § 15.2-2314.

Holding: The Board has no authority to pursue a demurrer in an action where the circuit court is exercising its appellate jurisdiction under Virginia Code § 15.2-2314.

Discussion: An appeal to the circuit court of a decision by the BZA is a hybrid of an appeal and a trial, the requirements of which are controlled by the provisions of the code and decisions interpreting the statute, not by default rules applicable to ordinary actions. The appeal process under § 15.2-2314 is simple, streamlined, and different from most civil actions. Because an action under the statute is an appeal and the statute itself governs procedure, the procedural rules relating to ordinary actions – like the right to take a nonsuit – are not available.

2. *Rustgi v. Webb, 105 Va. Cir. 199 (Fairfax County 2020).*

Facts: In 1966 the owners of Lots 612, 613, and 615 in the Barcroft Lake Shores Subdivision recorded an easement to provide lake access to Lots 613 and 615, which do not directly abut Lake Barcroft. The easement granted the owners of those lots access to a 20-foot area on Lot 612 for “the purposes of ingress and egress to Lake Barcroft.” The owner of Lot 612 reserved “the right to use said area on said plat for their own use.”

At the time of the grant, Lot 613 was owned by the Robinsons, who proceeded to build a retaining wall, dredge portions of the lake, install an electrical outlet outside of the easement area, and regularly docked a pontoon boat at the retaining wall.

In 2013, Rustgi purchased Lot 613 and used the easement in the same manner the Robinsons did. In 2017, the Webbs purchased Lot 612 and, in 2019, sent a letter to Rustgi and the owner of Lot 615 requesting that they “make arrangements to conform to the original obligations of the easement” which they asserted did not include boat docking, electrical wiring, or storage of personal property.

In July of 2019, Rustgi filed a declaratory judgment action seeking to establish that the easement permitted his use or, alternatively, that he and his predecessors in title had established a prescriptive easement for such use. Defendants counterclaimed for trespass and nuisance.

Holding: The court held that (i) the express easement did not permit docking of a boat or installation of an electrical outlet, (ii) a prescriptive easement was not established, and (iii) defendants established their claims for trespass and nuisance and ordered injunctive relief.

Discussion: In holding that the easement did not include the right to dock a boat, the court relied on the plain language of the easement – that it was for “ingress and egress to Lake Barcroft” – and that expanding the easement to include the right to dock a boat would be inconsistent with the limitations

of the easement. In reaching this conclusion, the court analogized to cases regarding whether an easement allows parking of vehicles, which generally hold that parking is not implicit in an easement for ingress and egress and must be explicitly enumerated in the easement. Moreover, long-term docking of a boat hinders the ability of others to access the lake across the easement. Finally, the court found that there was no implicit grant of riparian rights.

The court also determined that no prescriptive easement was established because the evidence showed that the Robinsons' docking of their boat was with the consent of the owners of Lot 612. The testimony – from the Robinsons' son – also established that he and his parents believed the electrical outlet was within the easement area.

Finally, the court ruled that, because there was no right to dock the boat or install the electrical outlet, Rustgi's actions were trespassory and constituted a nuisance. The court required that Rustgi remove the boat. Because the outlet was not installed by Rustgi and the statute of limitations for its removal had passed, Rustgi was not required to remove the outlet but was ordered to cease electrifying the outlet so that it could be safely removed by the Webbs.

3. *Willems v. Batcheller*, Fairfax County Circuit Court Case No. CL2020-6575 (March 6, 2022)

Facts: Plaintiffs sued for trespass and nuisance due to encroachment of Defendants' bamboo into Plaintiffs' property and for nuisance relating to a landscape spotlight that was directed at Plaintiffs bedroom window and relating to Christmas lights hung from a fence between the properties.

In 2002, Defendants bought their property and installed a split rail fence in 2003. In 2005, Defendants planted bamboo in the corner of their lot for privacy and screening. The bamboo was planted next to the split rail fence and near a shed on what is now Plaintiffs' property.

In 2015, Plaintiffs bought their property, which adjoins Defendants' property.

In 2020, Plaintiffs filed suit. The issues in the case were (i) whether the bamboo is a nuisance or trespassory, (ii) whether the spotlight and Christmas lights constitute a nuisance, and (iii) whether Plaintiff's claims are barred by the statute of limitations or laches.

The court held that (i) the spread of bamboo into Plaintiffs' property was both a nuisance and a trespass, (ii) the spotlight constituted a nuisance, (iii) the christmas lights were not a nuisance, and (iii) the statute of limitations did not apply because the relief sought was only equitable and laches did not bar the continuing trespasses and nuisances.

4. *Virginia Housing Development Authority, et al. v. Ononuju, et al.*, 2021 Va. Cir. LEXIS 356 (Norfolk Circuit Court Case CL20-1540-00, -01, December 20, 2021)

Facts: These parties litigated in state and federal courts at the lower court level, trial court level, and appeal court level over several years. This portion of the case, which is near the end of the matters, addressed the moratorium and its application to unlawful detainer actions. Ononuju filed a motion to cancel execution of a writ of possession alleging that the VHDA did not execute its writ within the 180-day deadline imposed by Virginia Code § 8.01-470. That code section provides that an order of possession shall remain valid for 180 days from the date granted by the court. § 8.01-471 requires writs of eviction to be issued within 180 days from the judgment for possession. VHDA was awarded possession of the property on August 9, 2018. On September 5, 2018, Ononuju filed an action challenging title and seeking an order rescinding the foreclosure sale. Due to the pending litigation, VHDA waited until January 23, 2020, to file a writ of possession. The general district court refused to execute the writ due to VHDA's failure to seek eviction within 180 days.

VHDA filed in the Norfolk Circuit Court for possession on February 5, 2020. The eviction moratorium on all FHA-insured single-family mortgages went into place on March 18, 2020. The Norfolk Circuit

Court held a four-day trial that concluded on January 22, 2021 and it awarded possession to VHDA on March 23, 2021. On August 26, 2021, VHDA filed a request for writ of eviction. HUD then extended the moratorium eventually until September 30, 2021 (from multiple extensions). On November 10, 2021, VHD again requested the writ of eviction. Ononuju filed action to stop the writ from being processed claiming non-compliance with the 180-day deadline.

Lower Court Holding: The Norfolk circuit court found that the writ of eviction filed on November 10, 2021, even though more than 180 days from judgment, was timely filed due to the moratorium acting as an injunction envisioned by Virginia Code § 8.01-229(C) and denied Ononuju’s request to enjoin the writ of eviction.

Discussion: The Norfolk Circuit Court addressed the moratorium and Virginia law extensively in deciding this portion of the case. The court found that VHDA was “prohibited from obtaining a writ of eviction during the pendency of the Moratorium, which expired on October 1, 2021.” The court then cited to Virginia Code § 8.01-229(C) which states that when commencement of an action is stayed by injunction, the length of time of the injunction is not computed as part of any time where a deadline to act is required. The court found that the moratorium was an injunction under that code section. After a lengthy analysis of the steps VHDA took to gain possession of the property, the court found that “VHDA did everything it could to preserve its right to evict Ononuju.”

2022 VIRGINIA GENERAL ASSEMBLY REPORT: REAL ESTATE LEGISLATION

By Jeremy R. Moss*



Jeremy R. Moss is a Vice President of Multifamily Development at DHI Communities, a D.R. Horton company. Jeremy has been active in local, state, and Federal legislative and regulatory matters throughout most of his career. 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.

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

The General Assembly continues to routinely address a wide range of real estate-related topics – from traditional real estate matters (e.g., deeds, deeds of trust, taxation, and disclosure), to more tangentially-related fields (e.g., conservation and cemeteries) to evolving areas of real estate practice (e.g., data centers and supportive housing).

2022 SESSION BY THE NUMBERS

The 2022 Session of the Virginia General Assembly convened, as it does every year, on the second Wednesday of January, January 12, 2022. The General Assembly adjourned *sine die* on Saturday, March 12.

This was a “long” session of the General Assembly. In even-numbered years, like 2022, the legislature convenes for sixty calendar days. Virginia operates on a biennium budget, which must be adopted every other year. In odd numbered years (like 2019 and 2021), the legislature convenes for thirty days with an option to extend the session for a maximum of thirty additional days. The legislature generally meets for forty-six calendar days in odd-numbered years.

The General Assembly did not adopt a budget prior and did not reconcile the 45 bills left in conference prior to adjourning on March 12, 2022. A “special” session was, therefore, called by the Governor and convened on April 4, 2022.

A reconvened session, sometimes referred to as at the “veto session,” was convened on April 27, 2022.Co

In all, 3,143 bills and resolutions w(ere) introduced during the 2022 session. (Compare to the most recent “long” session,2020, in which 3,910 bills were introduced.

Of all the bills and resolutions considered, 1,767 were passed by both the Senate and the House of Delegates. Excluding commending and memorializing resolutions, 892 bills passed. Of those bills that passed, 574 passed unanimously while 318 passed with opposition.

A total of 1,163 bills failed. Excluding commending and memorializing resolutions, 1,082 bills were killed, 166 bills were carried over to the 2023 session and 65 bills were consolidated into other bills.

509 bills were killed in a subcommittee of the House of Delegates, 555 bills each were killed in committees of the House and Senate (the Senate has not, historically, seated subcommittees), and only 18 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 206 bills failed with no recorded vote.

Governor Glenn Youngkin vetoed twenty-six bills, several of which would have affected real estate practitioners in the Commonwealth:

- House Bill 802 related to the Virginia Residential Landlord and Tenant Act and enforcement by localities;
- Senate Bill 286 related to Historic districts and required disclosures for buyer to beware and to exercise due diligence; and,
- Senate Bill 311 related to real property and a duty to disclose ownership interest and *lis pendens*.

THE 2022 SESSION AT A GLANCE

As the General Assembly focused on other major issues, including tax reform and the budget, casinos and gaming, education and criminal justice, the number of bills affecting real estate that *passed* was relatively small.

Several of the bills summarized below are listed among the *2022 Session Highlights*, a summary of significant legislation considered by the 2022 Session of the General Assembly as selected by the staff of the Virginia Division of Legislative Services, including legislation related to:

- Senate Bill 537 - Powers of local government; trees during development process; replacement and conservation (passed); and,
- House Bill 1362 - Short-term rentals; localities' ability to restrict (carried over).

Both the House of Delegates and Senate met in person in 2022 and, although virtual committee testimony remained in place, in-person participation by the public was again permitted (allowing face-to-face meetings with legislators).

2022 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. Because of the nature of a legislative summary, individual pieces of legislation should be reviewed carefully 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, 2022. Several pieces of legislation include emergency clauses or delayed effective dates; although this summary attempts to identify the bills that aren't effective July 1, careful attention should be given to the effective dates of specific legislation.

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

BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

Several bills with impacts on behavioral health and developmental services in the Commonwealth, a topic heading that does not often make an appearance on the Real Estate Legislation report, were adopted by the General Assembly,

The General Assembly directed the Department for Housing and Community Development to expand the existing Housing and Supportive Services Interagency Leadership Team (ILT) initiative to include adults 65 years of age or older as a target subpopulation and to seek input from appropriate stakeholders to facilitate the development of strategies for increasing the supply of permanent supportive housing for adults 65 years of age or older (*House Bill 239 – Dawn M. Adams; Senate Bill 263 – Ghazala F. Hashmi*).

All recovery residences are now required to be certified by the Department of Behavioral Health and Developmental Services and that recovery residences, as a condition of such certification, comply with any minimum square footage requirements related to beds and sleeping rooms established by the credentialing entity, which shall be no less than the square footage requirements set forth in the Uniform Statewide Building Code.

Every person who operates a recovery residence must disclose to potential residents its credentialing entity. If the credentialing entity is the National Alliance for Recovery Residences, the recovery residence must disclose the level of support provided by the recovery residence and, if the credentialing entity is Oxford House, Inc., the recovery residence must disclose that the recovery residence is self-governed and unstaffed.

The Department of Behavioral Health and Developmental Services must include such information on the list of all recovery residences maintained by the Department on its website. Recovery residences are also now exempt from the provisions of the Virginia Landlord and Tenant Act (*House Bill 277 – Carrie E. Coyner; Senate Bill 622 – Barbara Favola*).

CEMETERIES

The date of establishment that qualifies historical African American cemeteries for appropriated funds to care for such cemeteries was changed from prior to January 1, 1900, to prior to January 1, 1948, and the total number of graves in a qualifying cemetery shall be the number of markers of African-Americans who were interred in such cemetery prior to January 1, 1948 (*House Bill 140 – Delores L. McQuinn; Senate Bill 477 – Jennifer L. McClellan*).¹

No cemetery owned by a county or city shall be sold to a private owner unless the county or city has made a good faith effort to ensure, prior to sale, that the ownership of such cemetery is vested in the estate of the last owner of record or that permission for the sale has been granted by the family members or descendants of such owner. A “good faith effort” is an attempt by the county or city to contact all known family members and descendants of the last owner of record no less than three separate times by phone, mail, or visiting the last known address of record for such family members or descendants. The county or city shall keep written records of each attempt to contact a family member or descendant (*House Bill 615 – Danica A. Roem*).

The definition of a qualified organization that may receive funds for maintenance of a historical African-American cemetery was expanded to include any locality whose purpose for applying for funding from the Department of Historic Resources is to maintain a neglected historical African-American cemetery, or a portion thereof, that is located within its jurisdictional bounds. An exemption was also created allowing localities that are eligible for funding for the maintenance and care of historical African-American cemeteries to apply to the Director of the Department for a grant to perform extraordinary maintenance, renovation, repair, or reconstruction on any such cemeteries

¹ Under current law, the total number of graves is the number of markers of African Americans who lived at any time between January 1, 1800, and January 1, 1900.

and graves without first having received initial funding for the maintenance and care of those cemeteries and graves (*House Bill 727 – Jeion A. Ward; Senate Bill 23 – Mamie E. Locke*).²

The General Assembly also expanded provisions that allow localities to adopt an ordinance setting forth a register of identified cemeteries, graveyards, or other places of burial located on private property not belonging to any memorial or monumental association by providing that such localities shall publish a notice prior to the public sale of any publicly owned property that contains a known cemetery, graveyard, or other place of burial, or as soon thereafter as possible. The notice shall specify that a cemetery is present on the property. If the property falls under an exception provided for significant historic and archeological sites that would be jeopardized by public disclosure of their location, then no such notice is required (*House Bill 961 – Danica A. Roem*).

Virginia law now requires the Cemetery Board to petition a court of record having equity jurisdiction over the licensee or any of the funds held by him if the Board has reason to believe that (i) the licensee is not able to adequately protect the interest of the person involved; (ii) the licensee has had his license suspended, revoked, or surrendered; and (iii) the conduct of the licensee or the operation of the cemetery threatens the interests of the public.³ If a receiver is appointed, the expenses of such receivership and a reasonable fee, as determined by the court, shall be paid from the assets of the cemetery company (*Senate Bill 183 – Frank M. Ruff, Jr.*).

COMMISSIONS, BOARDS AND INSTITUTIONS

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

Any regulation of the Real Estate Appraiser Board setting out continuing education requirements for real estate appraiser licensees as a prerequisite of license renewal shall include at least two hours of fair housing or appraisal bias courses if the Board requires continuing education for the renewal of such licenses. The Real Estate Appraiser Board must promulgate regulations to implement the provisions of this act that include a course of at least two hours relating to fair housing or appraisal bias and exempts the initial adoption of such regulations from the Administrative Process Act, except that the Board shall provide an opportunity for public comment prior to adoption of the regulations. *The bill has a delayed effective date of July 1, 2023 (House Bill 284 – Carrie E. Coyner).*

The General Assembly directed the Board of Housing and Community Development to consider, during the next code development cycle, revising the Uniform Statewide Building Code to provide an exemption from any requirements in the energy efficiency standards in the Building Code and the 2018 Virginia Energy Conservation Code, and any subsequent amendments to the Building Code and the Energy Conservation Code, for the use and occupancy classifications of:

- Section 306, Factory Group F;
- Section 311, Storage Group S; and
- Section 312, Utility and Miscellaneous Group U.

(House Bill 1289 – Christopher T. Head).

The Board of Housing and Community Development is now authorized to promulgate regulations related to agritourism event buildings, defined in the bill as a building or structure located on property where farming operations or agritourism takes place and which is primarily used for holding events

² Current law requires a qualified organization to apply for any such grant only after it has received initial funding for the maintenance and care of a historical African American cemetery.

³ Current law allows, but does not require, the Board to file such petition upon a showing of at least one of the three requirements.

and entertainment gatherings, open to the public, of 300 people or less. The Board is directed to appoint a nine-member Agritourism Event Structure Technical Advisory Committee to assist the Board in administering its powers and duties pertaining to the construction and rehabilitation of agritourism event buildings (*Senate Bill 400 – Emmett W. Hanger, Jr.*).

A licensed real estate broker who is engaged in a sole proprietorship or is the only licensed broker in a business entity is required to designate, at the time of his application for broker licensure and at the time of his application for renewal of his license, another licensed broker to carry on the business for 180 days for the sole purpose of concluding the business of such designating broker in the event of the designating broker's death or disability. In the event that the original designated licensed broker is unable or unwilling to perform the act of concluding a deceased or disabled broker's business, the Real Estate Board shall grant approval to conclude the affairs of the business to one of a list of individuals.⁴ Finally, in the event that no listed individual is available or suitable to conclude the business affairs of the deceased or disabled broker, the Board is required to appoint any other licensed broker, with such broker's written consent, within 30 days of receiving written notification of a broker's death or disability, to carry on the business of the deceased or disabled broker for the sole purpose of concluding the business within 180 days.

The Department of Professional and Occupational Regulation must amend the real estate broker license renewal application form to require applicants for real estate broker license renewal to state that there has been no change to the designated licensed broker. *The bill has a delayed effective date of January 1, 2023 (Senate Bill 510 – David R. Suetterlein).*

COMMON INTEREST COMMUNITIES

The General Assembly clarified the prohibition on property owners' associations and unit owners' associations⁵ refusing to recognize a licensed real estate broker that is designated by the lot owner or unit owner as such lot owner's or unit owner's authorized representative, provided that the property owners' association or unit owners' association is given a written authorization signed by the lot owner or unit owner designating such licensed individual as his authorized representative and containing certain information for such designated representative.

The list of authorized persons to whom a seller or seller's authorized agent may provide a written request for the delivery of the association disclosure packet or resale certificate was also expanded (*House Bill 470 – David L. Bulova; Senate Bill 197 – T. Montgomery “Monty” Mason*).

The Department of Professional and Occupational Regulation was directed to establish a work group to study the adequacy of current laws addressing standards for structural integrity and for maintaining reserves to repair, replace, or restore capital components in common interest communities.

The Department of Professional and Occupational Regulation was also directed to report the work group's findings and provide recommendations, including any legislative recommendations, to the Chairs of the House Committee on General Laws and the Senate Committee on General Laws and Technology no later than April 1, 2023 (*Senate Bill 740 – Scott A. Surovell*).

⁴ Under current law, the Board must grant such approval to such individuals in a specific order of priority.

⁵ Property Owners' Association Act (§ 55.1-1800 et seq.); Virginia Condominium Act (§ 55.1-1900 et seq.).

COMPUTER SERVICES AND USES

If data center fixtures are taxed as part of the real property where they are located, they shall be valued based on depreciated reproduction or replacement cost, rather than based on the amount of income they generate (*House Bill 791 – Joseph P. McNamara; Senate Bill 513 – Jeremy S. McPike*).

The Rockingham County Circuit Court is permitted to establish a pilot project for an index of wills lodged for safekeeping, with a searchable database available to the public (*Senate Bill 221 – Mark D. Obenshain*).

CONSERVATION

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

The General Assembly implemented certain recommendations from the first Virginia Coastal Resilience Master Plan, including providing guidelines for the development of a Virginia Flood Protection Master Plan for the Commonwealth and requiring that the Coastal Resilience Master Plan be updated by December 31, 2022, and every five years thereafter.

The Virginia Coastal Resilience Technical Advisory Committee has been established to assist with the updates and requires the development of a community outreach and engagement plan to ensure meaningful involvement by affected and vulnerable community residents. The Chief Resilience Officer report is required to report on the status of flood resilience in the Commonwealth every two years, beginning July 1, 2023 (*House Bill 516 – David L. Bulova; Senate Bill 551 – David W. Marsden*).

The Virginia Business Ready Sites Program Fund was established to be administered by the Governor and the Virginia Economic Development Partnership Authority to provide grants on a competitive basis to political subdivisions to prepare sites for industrial or commercial development.

The existing law that created the Major Employment and Investment Project Site Planning Grant Fund was repealed and any remaining funds from the Major Employment and Investment Project Site Planning Grant Fund are to be allocated to the Virginia Business Ready Sites Program Fund.

Grants from the Virginia Brownfields Restoration and Economic Redevelopment Assistance Fund are now authorized for site remediation and require the prioritization of sites with potential for redevelopment and economic benefits to the surrounding community (*Senate Bill 28 – David W. Marsden*).

CONTRACTS

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

A general contractor or subcontractor, regardless of tier, may submit a written certification, under oath, as evidence in defending against a claim for nonpayment from any lower-tier subcontractor, stating that (i) the subcontractor and each of his sub-subcontractors has paid all employees all wages due for the period during which the wages are claimed for the work performed on the project and, (ii) to the subcontractor's knowledge, all sub-subcontractors below the subcontractor, regardless of tier, have similarly paid their employees all such wages (*House Bill 889 – Terry G. Kilgore; Senate Bill 538 – Mark J. Peake*).

Construction contracts awarded by state or local government agencies, as well as certain private construction contracts in which there is at least one general contractor and one subcontractor, must include a payment clause that obligates the contractors to be liable for the entire amount owed to any subcontractor with which it contracts.

A contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract; however, the contractor must notify the subcontractor in writing of the contractor's intent to withhold all or a part of the subcontractor's payment with the reason for such nonpayment.

Payment by the party contracting with the contractor shall not be a condition precedent to payment to any lower-tier subcontractor. A payment clause is now required to be included in any construction contract between an owner and a general contractor that requires (i) the owner to pay the general contractor within 60 days of receipt of an invoice following satisfactory completion of the contracted-for work, and (ii) a higher-tier contractor to pay a lower-tier subcontractor within the earlier of 60 days of satisfactory completion of the work for which the subcontractor has invoiced or seven days after receipt of amounts paid by the owner to the general contractor for work performed.

Lastly, the Department of General Services shall convene the Public Body Procurement Workgroup to review whether the issue of nonpayment between general contractors and subcontractors necessitates legislative corrective action and report its findings and legislative recommendations to the General Assembly on or before December 1, 2022. *The bill has a delayed effective date of January 1, 2023 and applies to construction contracts executed on or after January 1, 2023 (Senate Bill 550 – John J. Bell).*

COUNTIES, CITIES AND TOWNS

In any instance in which a locality has submitted a correct and timely notice request to a newspaper published or having general circulation in the locality and such newspaper fails to publish the notice, or publishes the notice incorrectly, such locality shall be deemed to have met the appropriate notice requirements so long as the notice was published in the next available edition of a newspaper having general circulation in the locality (*House Bill 167 – Margaret B. Ransone*).

A locality may, by ordinance, to provide that a parcel of real property shall not be removed from the land use program for delinquent taxes if such taxes are paid no later than December 31 of the year in which the taxes became delinquent. No parcel of real property shall be removed from the land use program for delinquent taxes if (i) such taxes become delinquent during a state of emergency declared by the Governor, (ii) the treasurer determines that the emergency has caused hardship for the taxpayer, and (iii) the taxes are paid no later than 90 days after the original deadline (*House Bill 199 – Michael J. Webert*).

The sunset date for various local land use approvals that were valid and outstanding as of July 1, 2020 has been extended from July 1, 2022, to July 1, 2023 (*House Bill 272 – Daniel W. Marshall, III; Senate Bill 501 – Lynwood W. Lewis, Jr.*).

Upon request of the board of zoning appeals (BZA), a governing body shall consider appropriation of funds so that the BZA may employ or contract for secretaries, clerks, legal counsel, consultants, and other technical and clerical services. If a BZA has needs that surpass the budgeted amount, the governing body shall review the BZA's request (*House Bill 616 – Danica B. Roem*).⁶

The General Assembly clarified provisions related to whether certain public facilities are substantially in accord with the adopted comprehensive plan by adding parks to the types of public uses that may, with certain types of land use applications, be excepted from the requirement for submittal to and approval by the planning commission or the governing body for the purpose of determining substantial accord (*House Bill 648 – Kaye Kory*).

⁶ Existing law allows such BZA expenditures "within the limits of funds appropriated by the governing body."

Any notice, summons, order, or other official document of any type that is required to be posted on or at the front door of a courthouse or on a public bulletin board at the courthouse must also be posted on the public government website of the locality served by the court or on the website of the circuit court clerk.⁷ As introduced, this bill was a recommendation of the Boyd-Graves Conference. *The bill has a delayed effective date of July 1, 2024 (House Bill 677 – Patrick A. Hope).*

The definition of "subdivision" has been changed to provide that it does not preclude different owners of adjacent parcels from entering into a valid and enforceable boundary line agreement with one another so long as such agreement is only used to resolve a bona fide property line dispute, the boundary adjustment does not move by more than 250 feet from the center of the current platted line or alter either parcel's resultant acreage by more than five percent of the smaller parcel size, and such agreement does not create an additional lot, alter the existing boundary lines of localities, result in greater street frontage, or interfere with a recorded easement, and such agreement shall not result in any nonconformity with local ordinances and health department regulations. For any property affected by this definition, any division of land subject to a partition suit by virtue of order or decree by a court of competent jurisdiction shall take precedence over the requirements of certain existing subdivision provisions and the minimum lot area, width, or frontage requirements in the zoning ordinance so long as the lot or parcel resulting from such order or decree does not vary from minimum lot area, width, or frontage requirements by more than 20 percent (*House Bill 1088 – James A. "Jay" Leftwich*).

The General Assembly directed the Virginia Code Commission to convene a work group to review requirements throughout the Code of Virginia for localities to provide public notice for intended actions and events, including (i) the varying frequency for publishing notices in newspapers and other print media, (ii) the number of days required to elapse between the publications of notices, and (iii) the amount of information required to be contained in each notice, and make recommendations for uniformity and efficiency. The Virginia Code Commission must submit a report to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology summarizing the work and any recommendations of the work group by November 1, 2022 (*House Bill 1131 – Wren M. Williams; Senate Bill 417 – William M. Stanley, Jr.*).

An industrial development authority may make grants associated with the construction of affordable housing to promote safe and affordable housing in the Commonwealth and to benefit thereby the safety, health, welfare, and prosperity of the inhabitants of the Commonwealth (*House Bill 1194 – Betsy B. Carr*).

Localities may now petition the circuit court to appoint a special commissioner in lieu of a sale at public auction to , convey certain real estate having delinquent taxes or liens to the locality's land bank entity or an existing nonprofit entity designated by the locality to carry out the functions of a land bank entity.⁸ Real estate that contains a derelict building and has delinquent taxes and liens exceeding 10 percent of its assessed value may be conveyed via special commissioner, in lieu of a sale at public auction, to the locality, the locality's land bank entity, or such existing nonprofit entity. A land bank entity or existing nonprofit entity that receives such parcels is required to pay any surplusage above the amount of unpaid taxes or liens to the former owners or other parties with an interest in the property (*Senate Bill 142 – John S. Edwards*).

⁷ Under current law, the website posting is sufficient when such official document is required to be posted at the courthouse.

⁸ Currently, such real estate may be conveyed only to the locality itself.

DEEDS

A conveyance of a cooperative interest is included in the meaning of a transfer on death deed (*House Bill 887 – Anne Ferrell Tata*).

EMINENT DOMAIN

Attorney fees are to be awarded in eminent domain cases in which there is a judgment for a property owner if such judgment is not paid within the time required by law (*Senate Bill 9 – J. Chapman Petersen*).

"Lost profits" have been redefined for the purposes of determining just compensation in eminent domain cases (*Senate Bill 666 – J. Chapman Petersen*).

Various changes were made to the laws pertaining to condemnation procedures, including:

- providing that localities shall not condition or delay the timely advancement or approval of any application for or grant of any permit or other approval for real property for the purpose of allowing the condemnation or acquisition of the property;
- redefining "lost access" for the purposes of determining just compensation;
- requiring a condemnor to provide the property owner with a copy of its title report and all recorded instruments found in the title examination;
- requiring the clerk of the court, when funds are paid into the court during a condemnation proceeding, to deposit such funds into an interest-bearing account;
- requiring the court to order the condemnor to reimburse the property owner for the reasonable costs and fees, not to exceed \$7,500, for a survey (under current law, this amount is capped at \$1,000);
- requiring temporary construction easements to have an expiration date included in the recorded certificate and requiring condemnors to record a certificate of completion within 90 days upon completion of construction of any public use project for which a portion of private property was taken;
- requiring a condemnor that has been sued for just compensation pursuant to a "quick-take" condemnation procedure to reimburse the property owner for his fees and costs incurred in filing the petition; and,
- permitting the owner of property that the Commissioner of Highways has taken to petition the circuit court for the appointment of commissioners or the empanelment of a jury to determine just compensation under certain circumstances and requiring the Commissioner of Highways to reimburse the owner for his fees and costs incurred in filing the petition

(*Senate Bill 694 – Mark D. Obenshain*).

FINANCIAL INSTITUTIONS AND SERVICES

Provisions prohibiting a person from acting as a mortgage broker in connection with any real estate sales transaction in which such person has acted as a real estate broker or real estate salesperson and has received or will receive compensation in connection with such transaction have been removed. If a mortgage broker negotiates, places, or finds a mortgage loan and acts as a real estate broker or real estate salesperson in connection with the sale of the real estate that secures such loan, the mortgage broker is required to conspicuously provide to the borrower a written disclosure at the time the mortgage broker services are first offered to the borrower (*House Bill 1153 – R. Lee Ware; Senate Bill 303 – R. Creigh Deeds*).

FIRE PROTECTION

Building officials enforcing the Uniform Statewide Building Code and fire officials enforcing the Virginia Statewide Fire Prevention Code Act are exempt from the certification requirements applicable to automatic fire sprinkler inspectors (*House Bill 474 – Emily D. Brewer*).

FISHERIES AND HABITAT OF THE TIDAL WATERS

The right to use and occupy the ground for the terms of a lease in Chesapeake Bay waters includes the right to propagate shellfish by whatever legal means necessary (*House Bill 189 – Michael J. Webert; Senate Bill 509 – Richard H. Stuart*).

The General Assembly set out in the Code of Virginia amendments for clarity sections in Title 28.2 (Fisheries and Habitat of the Tidal Waters), Title 29.1 (Wildlife, Inland Fisheries and Boating), and Title 62.1 (Waters of the State, Ports and Harbors) that are currently carried by reference only. The bill also makes technical revisions to the description of the Historic Falls of the James State Scenic River. This bill is a recommendation of the Virginia Code Commission (*House Bill 562 – Don L. Scott*).

"Other structural and organic materials" authorized to be used in a living shoreline is defined to include a variety of natural or man-made materials (*House Bill 1322 – M. Keith Hodges*).

The maintenance or replacement of previously authorized piers are excluded from Virginia Marine Resources Commission permitting requirements, so long as the reconstructed pier is in the existing footprint of the original pier (*Senate Bill 145 – John A. Cosgrove, Jr.*).

HOUSING

A locality that establishes a redevelopment and housing authority may name such authority an appropriate name and title (*House Bill 214 – Roxann L. Robinson*)⁹.

Repealed: the requirement that any housing authority required to submit an application to the U.S. Department of Housing and Urban Development to demolish, liquidate, or otherwise dispose of such housing project also serve a notice to any agency that would be responsible for administering tenant-based rental assistance to persons who would otherwise be displaced from the housing project. Also, the period required before the housing authority serves notice of intent to the Virginia Department of Housing and Community Development and each tenant residing in the housing project has been shortened from 12 to six months prior to such application submission date.. The housing authority is prohibited from requiring a tenant currently residing in such housing project to surrender possession of his unit until at least 12 months after serving the notice required by the bill, except as otherwise provided by law (*House Bill 1286 – Sally L. Hudson*).

HUNTING LAWS AND PERMITS

Hunting on Sunday on public or private land is now permitted, so long as it takes place more than 200 yards from a place of worship (*Senate Bill 8 – J. Chapman Petersen*).

⁹ Current law requires the authority to be known as the " _____ (insert name of locality) Redevelopment and Housing Authority."

LANDLORD AND TENANT

The tax credit for participating landlords to all census tracts in Virginia in which less than 10 percent of the residents live below the poverty level has been expanded (*House Bill 402 – Rodney T. Willett*)¹⁰.

A rental agreement may contain provisions allowing for the tenant's operation of properly licensed and authorized childcare services (*Senate Bill 69 – Barbara A. Favola*).

The General Assembly and Governor continue to consider whether to extend from July 1, 2023, to July 1, 2024 the expiration date of the Eviction Diversion Pilot Program, which would require the Virginia Housing Commission to submit an interim report no later than November 30, 2022 and a final report no later November 30, 2023. The Governor's deadline for action is 11:59 p.m., May 27, 2022 (*Senate Bill 24 - Mamie E. Locke*).

MANUFACTURED HOMES

The Commissioner of the Department of Motor Vehicles is required to furnish vehicle information for a manufactured home to a *bona fide* prospective purchaser or home owner, real estate agent, title insurer, settlement agent, attorney, manufactured home dealer, manufactured home broker, or loan officer upon such individuals meeting certain requirements, and prohibits the Department from disposing of any vehicle information for any manufactured home (*House Bill 1122 – Jeffrey L. Campbell*).

PROFESSIONS AND OCCUPATIONS

A real estate licensee has an affirmative duty, upon having substantive discussions about specific real property, to disclose in writing to the purchaser, seller, lessor, or lessee of the property if he, any member of his family, his firm, any member of his firm, or any entity in which he has an ownership interest has or will have an ownership interest as a party to the transaction and must also disclose in writing that he is a licensee. An owner of a residential dwelling unit who has actual knowledge of a *lis pendens* filed against the dwelling unit must provide to a prospective purchaser a written disclosure of such fact on a form provided by the Real Estate Board on its website (*House Bill 281 – Carrie E. Coyner*).

PROPERTY AND CONVEYANCES

The owner of residential real property must include in the residential property disclosure statement provided to a potential purchaser of such residential real property a statement that the owner makes no representation with respect to current lot lines or the ability to expand, improve, or add any structures on the property and that the potential purchaser is advised to exercise necessary due diligence, including obtaining a property survey and contacting the locality to determine zoning ordinances or lot coverage, height, or setback requirements on the property (*House Bill 702 – Mark L. Keam*).

Telecommunications companies have been added to the list of entities to which a state department, agency, or institution may grant an easement (*House Bill 1019 – Emily M. Brewer; Senate Bill 444 – Jennifer B. Boysko*).

The Department of Wildlife Resources is authorized to convey certain property to the Shenandoah Valley Battlefields Foundation. Any deed of conveyance shall include a condition that the property be

¹⁰ Under current law, the credit is limited to census tracts in the Richmond Metropolitan Statistical Area, the Washington-Arlington-Alexandria Metropolitan Statistical Area, or the Virginia Beach-Norfolk-Newport News Metropolitan Statistical Area in which less than 10 percent of the residents live below the poverty level

open to public use, including public fishing, and shall provide that the property shall revert to the Commonwealth if the condition is not met (*House Bill 1278 – Bill D. Wiley*).

A seller shall not be prohibited from retaining a licensed attorney to represent his interests and provide legal advice pertaining to escrow, closing, or settlement services. This bill is declarative of existing law (*House Bill 1364 – James A. “Jay” Leftwich; Senate Bill 775 – Lynwood W. Lewis, Jr.*).

REAL PROPERTY TAX

Provides that the property of an organization that is tax exempt by classification shall include the property of a single member limited liability company whose sole member is such an organization (*House Bill 200 – Michael J. Webert*).

Counties may conduct a general reassessment of real estate every three years if determined by majority vote of a county's board of supervisors (*House Bill 951 – M. Keith Hodges; Senate Bill 77 – Thomas K. Norment, Jr.*)¹¹.

Beginning with taxable year 2022, any locality may declare real property owned by a surviving spouse of a member of the Armed Forces of the United States who died in the line of duty with a line of duty determination from the U.S. Department of Defense, where such death was not the result of criminal conduct, and where the spouse occupies the real property as his or her principal place of residence and does not remarry, a separate class of property for local taxation of real property that may be taxed at a different rate than that imposed on the general class of real property, provided that the rate of tax is greater than zero and does not exceed the rate of tax on the general class of real property (*House Bill 957 – Kathy K.L. Tran*).

The owner of a majority interest in an undivided parcel of real estate that is eligible for land use assessment may file the application on behalf of himself and for owners of any minority interest (*House Bill 996 – Michael J. Webert*).

Notice requirements for public hearings held to increase property taxes in localities that conduct their reassessment of real estate more than once every four years have been adjusted. Such localities shall provide notice of any such hearing on a different day and in a different notice from any notice published for the annual budget hearing (*House Bill 1010 – Tara A. Durant*)¹².

Any locality may by ordinance accept documentation establishing eligibility for the real property tax exemption for the elderly and handicapped on a rolling basis throughout the year (*Senate Bill 648 – Jeremy S. McPike*)¹³.

The forms used for revalidation of applications for land use assessment shall be prepared by the Department of Taxation.¹⁴ The General Assembly directed the Department of Taxation to seek input from localities across the Commonwealth in developing such forms (*House Bill 238 – Robert D. Orrock, Sr.*).

¹¹ Current law requires counties to conduct a general reassessment every four years, with exceptions authorized for specified counties

¹² Under current law, such hearings are required when a locality seeks to raise its property tax rate above a rate that would collect more than 101 percent of the amount of taxes collected for the previous year

¹³ Current law states that localities shall accept such documentation after January 1 but before April 1 or a later date fixed by ordinance

¹⁴ Under current law, such forms are prepared by the locality.

The Rental Assistance Demonstration program has been included in the list of federal laws whose restrictions shall be considered in determining the fair market value of real property that is operated as affordable rental housing (House Bill 400 – Rodney T. Willett).

SCENIC RIVERS SYSTEM

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

- A 23.2-mile segment of the Maury River previously designated as a state scenic river (*House Bill 28 – Ronnie R. Campbell; Senate Bill 292 – R. Creigh Deeds*);
- An additional 37-mile portion of the James River running through Nelson and Appomattox Counties as a component of the Virginia Scenic Rivers System, clarifying that nothing in the Scenic Rivers Act shall preclude the construction, use, or removal of any asset that traverses certain portions of the James River (*House Bill 49 – C. Matthew Fariss*); and,
- An 8.8-mile portion of the North Fork of the Shenandoah River as the North Fork of the Shenandoah State Scenic River (*House Bill 1223 – G. “John” Avoli*).

SURPLUS PROPERTY

The Department of General Services may determine that a boundary line of surplus property is in need of adjustment and may work with landowners to make such adjustment. The Department of General Services may determine that a grant or acceptance of an easement may facilitate such adjustment and may enter into such easement in a form approved by the Attorney General and subject to the written approval of the Governor. The approved legislation also makes changes regarding the notice of sale of surplus property (*House Bill 644 – Betsy B. Carr*).

CONCLUSION

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

So You Think You Know Property

By Stephen C. Gregory

I remember from my youth that the late, lamented, Saturday Evening Post had a regular feature titled, "So You Think You Know Baseball." The author would describe a scenario from a game that could only be resolved by a deep dive into the obscure sections of the rule book.

We thought we would resurrect that idea with a legal theme, so your first "problem" is:

Alice, Bertrand, and Candace own property as joint tenants with rights of survivorship. (Alice ("A") and Bertrand ("B") are Candace's ("C") parents.) After A dies, B and C decide to restructure their ownership, intending to give fee simple to C with a life estate to B. However, when the deed is drafted, A and B convey a life estate to C with remainder to her heirs, reserving a life estate to B. Now B is deceased and C wants to sell the property. (The attorney who prepared the deed is also deceased.)

Q. What will it take for C to be able to convey the property?

Send your responses to either of the editors (75cavalier@gmail.com or hbreedlove@oldrepublictitle.com); we will print them in the next issue. We hope to make this a recurring article; please send any interesting situations you've encountered with multiple possible answers to the editors as well.

Please also let us know if you think this feature should be continued.

**REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR
AUTUMN MEETING OF THE BOARD OF GOVERNORS and
AREA REPRESENTATIVES**

Meeting Minutes

Friday, September 17, 2021, 11:00 a.m.

Hillsdale Conference Center
550 Hillsdale Drive
Charlottesville, VA 22911

Conference Call#: 866-845-1266
Participant Passcode: 7907-7438

Present:

Board of Governors: Kathryn Byler, Karen Cohen, Sarah Louppe Petcher; Stephen Gregory; Robert Hawthorne, Jr., Blake Hegeman, Mark W. Graybeal, Rick Chess, Whitney Levin, Heather Steele and Lori Schweller.

Area Representatives: Alyssa Dangler, Ben Leigh, Bill Nusbaum, Brian Wesley, Chuck Lollar, Cynthia Nahorney, Douglass Dewing, Ed. Waugaman, Eric V. Zimmerman; Harry R. Purkey, Jr Hayden-Anne Breedlove, Hope Payne, Howard E. Gordon, Jean Mumm, Jeremy Root, Kay Creasman, Larry McElwain, Max Wiegard, Michael Coughlin, Page Williams, Pam Faber, Pam Fairchild, Paul Melnick, Paula Caplinger, Ralph Kipp, Randy Howard, Rick Richmond, Richard Campbell, Sandy Buchko, Stephen Romine, Susan Pesner, Theodora Stingham; Tom Lipscomb, Vanessa Carter, Will Homiller

VSBS Staff Liaison: Maureen Stengel

Absent:

Board of Governors: None.

Area Representatives: Barbara Goshorn, Benjamin Winn, Brooke Barden, Ross Allen; Brooke S. Barden; F. Lewis Biggs; Steven W. Blaine; Charles Land, Tara R. Boyd; Connor J. Childress; Neil S. Kessler; Otto W. Konrad; Michele R. Freemyers; Collison F. Royer; Susan H. Siegfried; John W. Steele; Stephen Bryce Wood; Dianne Boyle; Sandra (Sandy) Buchko; Todd E. Condron; Henry Matson Coxe; Lawrence A. Daughtrey; David C. Hannah; Jack C. Hanssen Tracy Bryan Horstkamp; Ralph E. Kipp; Andrew A. Painter; Jordan M. Samuel; David W. Stroh; Lawrence M. Schonberger, Lucia Anna Trigiani; Michael E. Barney; Jon W. Brodegard; Brian O. Dolan; Alyssa C. Embree, Thomas Gladin, , Ann A. Gourdine, Joshua M. Johnson, Kristen R. Jurjevich, Naveed Kalantar, Christy L. Murphy, Cartwright R. "Cart" Reilly Allen C. Tanner, Jr. William W. Sleeth, III Benjamin P. Titter Susan S. Walker, Andrae J. Via, Mark D. Williamson, K. Wayne Glass, James L. Johnson, Mark N. Reed, David C. Helscher, DR Goodman, C. Cooper Youell, IV, Joseph M. Cochran, Edward B. Kidd, James B. (J.B.) Lonergan, Michael M. Mannix,

R. Hunter Manson, G. Michael Pace, Jr., Joseph W. Richmond, Jr. Michael K. Smeltzer, James McCauley, J. Philip Hart, Jon Brodegard, Justin Ritter, Michael Barney, Michael Lafayette, Michelle Rosati, Ray W. King, Regina Petruzzi Neumann, Robert Barclay, Ronald D. Wiley, Jr., Timothy I. Kelsey, Tyler Rosa.

I. CALL TO ORDER AND WELCOME —**Kathryn Byler** called the meeting to order at 11:05 and made a few welcome remarks.

II. ADOPTION OF MINUTES — Annual Meeting of the BOG and Section was held virtually via Microsoft Teams and conference call on June 17, 2021, at 11:00 AM

The minutes as drafted indicated the wrong dates for the annual advanced real estate seminar.

A Motion was Made, Seconded and Carried to adopt the minutes as amended of the June 17th, 2021 meeting.

III. FINANCIAL REPORT — Ms. Petcher presented the budget which begins at Page 13 of the agenda. Ms. Byler reminded all those in attendance in Charlottesville that all vouchers have to be completed and returned to Kathryn within 30 days of the event with all attachments. For the first one of the year, make sure to attach a W9.

IV. STANDING COMMITTEES

1. Membership

No formal report. Nomination of new Area Representatives: Pam Fairchild introduced Rachel Hinson, nominated by Kathryn Byler. Ms. Hinson introduced herself to the group. The committee is seeking for a new chair.

A motion was made, seconded and carried to approve the nomination of Rachel Hinson as Area Representative.

Kathryn Byler shared a new procedure for updating the BOG, Area Reps and Committee Chairs roster for The Fee Simple and our email communications. The changes are automatically saved. Please take a moment to see if your info is correct and if not, please update it.

<https://docs.google.com/document/d/1Z0BYWAKfrhj0CVX4oSX18zdQP9biG7VX/edit?usp=sharing&oid=117844011034303536972&rtoref=true&sd=true>

2. Fee Simple

Written report is attached. Rick Chess resigned from his position as co-chair of the Fee Simple Committee. Ms. Hayden-Anne Breedlove will now take on some of the responsibilities associated with the publication. Steve Gregory reminded the attendees of the publication deadline of October 1st. Ms. Breedlove reminded the group to submit article ideas for upcoming publications.

3. Programs

Heather Steele presented the report on the Advanced Real Estate Seminar 2022. Three confirmed topics/speakers: Opportunity zones and other tax matters, Eminent Domain and Condo Associations and Maintenance Responsibilities. Looking for speakers on the topics of address and naming rights and co-housing; ethics speakers and alternative housing arrangements and co-housing agreements. Suggestion of topic: New ALTA title insurance policies.

4. Technology

No Report.

V. SUBSTANTIVE COMMITTEES – *Reminder: if you are an Area Representative and are not on at least one committee, please choose one to join and contact the committee chair(s). Area Representatives who are not active in Section meetings and at least one committee may be removed from the A/R roster. Committee Chairs please report to an officer if you have members who have not attended the past three meetings (or more).*

a. Commercial Real Estate — John Hawthorne - No Report

b. Common Interest Community — Josh Johnson & Sue Tarley - No Report.

c. Creditor's Rights and Bankruptcy – Lewis Biggs - No Report.

d. Eminent Domain — Chuck Lollar provided a report to the group. 28 members on the committee. It has been very productive committee submitting a number of articles to the Fee Simple. The committee has been active in discussing issues which maybe of interest to the VBA for potential statutory update including issues related to compensation, loss of access, issues related to future money disbursements and corrections to the model jury instructions for related cases. Please remember that much of the work each committee does may have overlap with the work of other committees and Ms. Byler encouraged cross-pollination.

e. Ethics — Ed Waugaman and Blake Hegeman – No Formal Report. The committee is continuing to work on the LEO reports. They have done their preliminary reviews and are expecting to provide a final product to the Board soon. A recommendation was made that this committee be more pro-active and consider adding a CLE topic/Fee Simple article addressing issues related to common drafting errors.

f. Land Use and Environmental — Karen Cohen & Lori Schweller – No Formal Report. The committee will focus on the following topics for future meetings: middle density, inclusionary zoning. Looking to recruit environmental lawyers.

g. Residential Real Estate — Susan Walker & Benn Winn - No Report

h. Title Insurance — Cynthia Nahorney — No Report. The Committee will meet in October to review the ALTA new title commitment and policy forms with the goal of drafting an article of the Fee Simple.

VI. VBA UPDATE — Jeremy Root presented an update on the VBA's activities. One of the main responsibilities of the VBA is lobbying activities. They have put more manpower in the legislative committee. One of their focus this year is looking at how the recent supreme court case on fair market value of a property should be addressed in the legislative context, including the possibility of defining the term. They are seeking input. The VBA is hosting a social event today in Charlottesville, Virginia. Members of the VSB's Board of Governors and Area Reps are cordially invited to join us.

VII. NEW BUSINESS — A suggestion was made that we appoint a historian,

VIII. NEXT MEETING — The Winter meeting will be held on Friday, January 21, 2022 at the Williamsburg Lodge.

IX. ADJOURNMENT — Meeting was adjourned at 12:18.

IBIS MEMBERSHIP REPORT
SECTION COUNT REPORT 01/14/2022

Section	Act/Aso	Judicial	Non-Bar	Other	Total
Administrative Law	567	63	0	6	636
Antitrust Law	213	4	0	4	221
Bankruptcy Law	653	25	0	4	682
Business Law	1,890	49	0	17	1,956
Construction Law	779	26	0	4	809
Corporate Counsel	1,580	8	0	69	1,657
Criminal Law	2,036	362	0	11	2,409
Education of Lawyers	246	44	91	11	392
Environmental Law	391	14	0	1	406
Family Law	1,738	235	1	13	1,987
General Practice	729	105	0	7	841
Health Law	634	23	0	13	670
Intellectual Property	1,437	52	0	12	1,501
International Practice	430	7	0	9	446
Litigation	3,308	194	0	20	3,522
Local Government Law	737	47	0	0	784
Military Law	248	15	0	4	267
Real Property	2,005	48	0	13	2,066
Taxation	729	17	0	7	753
Trusts & Estates	2,038	55	0	14	2,107
TOTAL	22,388	1,393	92	239	24,112

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EXPERIENCE

PENDER & COWARD, P.C., Suffolk, VA (July 2007-Present)

Partner

- Chairman of the Eminent Domain / Right of Way Practice Group;
- Represents condemning authorities with regard to right-of-way projects, with clients including state government agencies, utilities, municipalities, and right-of-way consultants;
- Right-of-way practice includes the following:
 - Litigation in state and federal courts regarding eminent domain / condemnation and inverse condemnation cases;
 - Negotiation and settlement of property acquisitions;
 - Title reviews/searches and providing title services;
 - Real estate closings for voluntary acquisitions;
 - Addressing issues with estates, trusts, churches, and non-profits either in the chain of title or as landowners; and
 - Advising clients regarding relocation issues and compliance with federal and state Uniform Relocation Acts;
- Represents and advises clients in real estate matters including residential and commercial transactions and related litigation;
- Represents banks and other lenders and serves as lender's counsel;
- Represents and advises clients with regard to wills, trusts, powers of attorney, other estate planning opportunities, estate administration, and related litigation.

PENDER & COWARD, P.C., Virginia Beach, VA (May 2006-August 2006)

Law Clerk

OFFICE OF THE ATTORNEY GENERAL, Richmond, VA (May 2005-June 2005)

Law Clerk

- Assisted attorneys in the Contracts and Transportation divisions with legal research and writing in areas such as procurement contracts and grants.

VIRGINIA PORT AUTHORITY, Norfolk, VA / Brussels, Belgium (Summer 2001, Summer 2002)

Intern

- Researched and edited a manual of Code of Virginia statutes relevant to the work of the VPA for use by VPA's General Counsel;
- Assisted the Director of the Brussels office with marketing and database management.

HONORS AND AWARDS

- A/V Rated ("Preeminent") in Eminent Domain, Litigation, and Real Estate, Martindale-Hubbell Peer Review Ratings System;
- Super Lawyers 2016, 2017, 2018, 2019, 2020 – Virginia Rising Stars (Under 40);
- Virginia's Legal Elite 2013, 2014, 2015, 2016 – Rising Stars (Under 40).

EDUCATION

UNIVERSITY OF RICHMOND SCHOOL OF LAW, Richmond, VA

Juris Doctor, *magna cum laude*, May 2007

Cumulative GPA: 3.6

- **University of Richmond Law Review**, *Articles & Comments Editor*

HAMPDEN-SYDNEY COLLEGE, Hampden-Sydney, VA

Bachelor of Arts, Political Science, *summa cum laude*, May 2003

Cumulative GPA: 3.8

- **Phi Beta Kappa**, *Member*
- **Omicron Delta Kappa**, *Member*
- **The Union-Philanthropic Literary Society**, *President*
- **The Madisonian Society**, *President*
- **Honors Program**, *James Madison Merit Scholar*

OTHER ACTIVITIES

- Vice Chairman, Region 4, International Right of Way Association;
- Legal Committee Chair, Newsletter Editor, Past President, Chapter 52, International Right of Way Association;
- Lecturer, "Commissioners: Who Can Serve," Virginia Eminent Domain, CLE International, 2021;
- Lecturer, "Ethically Trying Condemnation Cases in Virginia," Virginia Eminent Domain, CLE International, May 2019;
- Lecturer, "A Peak Around the Bend: Emerging Landowner Tactics to Maximize Just Compensation," IRWA International Education Conference, Edmonton, Canada, June, 2018;
- Lecturer, "Relocation Benefits and Pitfalls: Understanding the Uniform Relocation Act," Virginia Eminent Domain, CLE International, May 2017;
- Lecturer, "Trends in Eminent Domain Law", S.E.E. Annual Conference and Trade Show, June 2016;
- Lecturer, "A Condemnor's Minefield", Virginia Eminent Domain, CLE International, May 2016;
- Lecturer, "Relocation of Graveyards and Cemeteries", IRWA Fall Forum, October 2015.
- Lecturer, "What You Need to Know Now", Advanced Eminent Domain and Condemnation CLE, NBI, October 2015;
- Lecturer, "Eminent Domain, Legal Issues for Virginia Civil Engineers and Surveyors CE," August 2015;
- Lecturer, Eminent Domain from Start to Finish CLE, NBI, September 2013;
- Past President, Suffolk Bar Association;
- Member, Virginia Bar Association;
- Graduate, Class of 2012, Leadership Hampton Roads;
- Graduate, Class of 2008, Suffolk Leadership Academy;
- Area Chairman, Suffolk Ducks Unlimited.

CERTIFICATIONS

- Senior Right of Way Agent, International Right of Way Association;
- CLIMB Certified Instructor, International Right of Way Association.

LICENSURE

- Virginia State Bar, admitted 2007;
- North Carolina State Bar, admitted 2019.

COURT ADMISSIONS

- Supreme Court of Virginia (2007);
- United States District Court for the Eastern District of Virginia (2007);
- United States Court of Appeals for the Fourth Circuit (2010).

REPORTED CASES

- Johnson v. City of Suffolk, 851 S.E.2d 478, 2020 Va. LEXIS 142, 2020 WL 7251969 (Va. 2020);
- Michael Fernandez, D.D.S., Ltd. v. Comm'r of Highways, 298 Va. 616, 842 S.E.2d 200, 2020 Va. LEXIS 57, 2020 WL 2761282 (Va. 2020);
- City of Chesapeake v. Clear Sky Car Wash, L.L.C., 89 Va. Cir. 27, 2014 Va. Cir. LEXIS 145 (Chesapeake Cir. Ct. March 11, 2014);
- City of Chesapeake v. Clear Sky Car Wash LLC, 2012 U.S. Dist. LEXIS 126265, 2012 WL 3866508 (E.D. Va. 2012);
- Commonwealth DOT v. Burton, 2012 AMC 2230, 2012 U.S. Dist. LEXIS 94015, 2012 WL 2785900 (E.D. Va. 2012);
- Davis v. Smith, 2010 U.S. Dist. LEXIS 103208, 2010 WL 3835026 (E.D. Va. 2010) (affirmed Davis v. Smith, 415 Fed. Appx. 483, 2011 U.S. App. LEXIS 4865 (4th Cir. Va. 2011));
- Gray v. Wages, 2010 U.S. Dist. LEXIS 82412, 2010 WL 3187045 (E.D. Va. 2010);
- Holloway v. City of Suffolk, 660 F. Supp. 2d 693, 2009 U.S. Dist. LEXIS 92596 (E.D. Va. 2009);
- Ricky B's, Inc. v. Smith, 2008 Va. App. LEXIS 123, 2008 WL 630474 (Va. Ct. App. Mar. 11, 2008).

Minutes of the Fee Simple Committee Telephone Conference

The Fee Simple Committee held a telephone conference on 13 January 2022 at 10:00 AM. On the call were the co-chairs Steve Gregory and Hayden-Anne Breedlove. The Spring 2022 edition was the focus of the conversation.

Mr. Gregory and Ms. Breedlove discussed possible article topic ideas for the upcoming Spring 2022 edition. Topics that were discussed included:

1. Federal foreclosures—Ms. Breedlove has a prospective author whom she will contact.
2. The installation of solar collection devices and panels in HOA/Condominium Associations—John Cowherd had previously expressed an interest in such an article, and Mr. Gregory will contact him for confirmation.
3. Balancing redaction concerns and issues relating to what is in the public record—Mr. Gregory mentioned the experience of Florida in trying to enact such protections. Mr. Gregory will attempt to find an author.
4. *Taylor v. Northam*, -- suggested by Susan Pesner. Ms. Breedlove will ask Ms. Pesner if she has a suggestion for an author.
5. The legislative and case law updates – assumption is these will be provided by Mr. Moss and Mr. Derdeyn, as in prior years. The committee will get confirmation.

Ms. Breedlove mentioned a possible topic of real estate and blockchain; it was tabled because articles have recently been published in the *Fee Simple* on this topic.

Another topic that was mentioned but was tabled related to “one stop shops” for real estate transactions. It was tabled because of lack of broad application.

Mr. Gregory and Ms. Breedlove discussed the upcoming real property section meeting, and that Ms. Breedlove will be providing the report of the Fee Simple Committee.

There were no further topics for discussion. The call was adjourned at 10:38 AM.

Respectfully submitted,

Hayden-Anne Breedlove

Co-chair

**BOARD OF GOVERNORS
REAL PROPERTY SECTION
VIRGINIA STATE BAR
(2021-2022)**

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

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

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TBD

AREA REPRESENTATIVES

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

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