VSB RPS

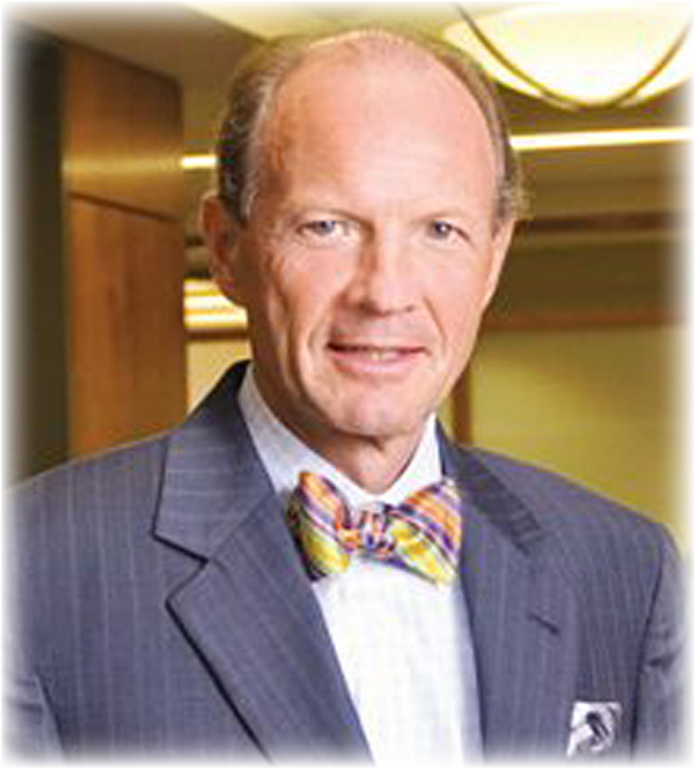
the FEE SIMPLE

The Journal of the
Virginia State Bar
Real Property Section

https://vsb.org/RP/groups/RP/home.aspx

Vol. XLV, No. 1

SPRING 2024



G. MICHAEL "MIKE" PACE, JR.

MARCH 11, 1957--JANUARY 8, 2024

CHAIR OF THE REAL PROPERTY SECTION 1991-92

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

Anyone wishing to submit an article for publication should send it in Microsoft Word format to the Co-Editors. Authors are responsible for the accuracy of the content of their article(s) in the FEE SIMPLE *and the views expressed therein must be solely those of the author(s). Submission will also be deemed consent to the posting of the article on the Real Property Section website,* https://vsb.org/RP/groups/RP/rp-newsletters.aspx.

The FEE SIMPLE *reserves the right to edit materials submitted for publication.*

Co-Editor
Stephen C. Gregory, Esquire
1334 Morningside Drive
Charleston, WV 25314
(703) 850-1945 (mobile)
Email: 75cavalier@gmail.com

Co-Editor
Hayden-Anne Breedlove, Esquire
Old Republic Title
Old Republic Insurance Group
7960 Donegan Drive, Suite 247
Manassas, VA 20109
(804) 332-1907
Email: hbreedlove@oldrepublictitle.com

Fall 2024 SUBMISSION DEADLINE: FRIDAY, OCTOBER 4, 2024

MEETINGS

Dates and Locations to be announced.

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IN MEMORIAM

TRIBUTE TO MIKE PACE FROM HIS COLLEAGUES AT GENTRY LOCKE

G. MICHAEL "MIKE" PACE, JR.
GENTRY LOCKE MANAGING PARTNER 1999-2012
Chair of the Real Property Section 1991-1992.

(Reprinted with permission from Gentry Locke)

Mike Pace admired Atticus Finch. No doubt Mike aspired to live like Atticus Finch. To many, Mike Pace was Atticus Finch. And if you ever met Mike, you know that he enjoyed talking about Atticus and all that Atticus stood for in the legal world and in the real world. For those of us who had the pleasure of knowing Mike, in working with him in practice, and in watching him operate in the community and the bar, he may be as close to Atticus as we will ever know.

To describe the impact and the influence that Mike seamlessly and positively supplied to this firm, and the bar, and the community, would take volumes. To portray it succinctly, Mike was the one person who simultaneously never met a stranger or an impossible task, and somehow seemed to have 48 hours in a day to make it happen. With Mike's passing at a way-too-early age, we can rest easier knowing that Mike squeezed at least twice as much into his professional career and his family commitment as any other person we know. And he did it all well, very well.

Mike's contributions to the firm were immense. From day one, Mike was a natural leader, full of ideas, energy, confidence, and contagious friendliness. He quickly worked his way through the leadership ranks to become the firm's second managing partner at the early age of 41, being tasked with filling the shoes of one of his mentors, Bill Rakes. Mike helped build on the strong base that Bill had begun in adding a commercial practice to the firm. Under Mike's leadership, Gentry Locke grew in numbers, in stature, and in focus. No one spent more hours, even into the late-night/early-morning caring for his clients and for the firm that he called home.

Mike extended his leadership skills well beyond just the firm, exhibiting that same passion and commitment to bar groups, including being President of the Roanoke Bar Association and the Virginia Bar Association, and to the community, where he provided leadership as President of the Roanoke Regional Chamber of Commerce and as President of the Roanoke Regional Partnership, among many other groups. While leading these bar groups, he helped form the Center for the Study of the Rule of Law which he planted at Roanoke College during the years when he became the school's first general counsel, and helped to spread the recognition of the importance of the Rule of Law across the entire state, country, and other parts of the world. Mike was the epitome of commitment, and of getting done what he said he would do.

Like his mother, Mike was an educator at heart. Beyond his time at Roanoke College and with the Rule of Law program, Mike spent countless hours providing support, leadership, and creative ideas to his alma maters, Hampden Sydney College and Washington & Lee Law School, where he helped to establish the third-year externship program for students to gain real-life experience and was an adjunct professor. At Gentry Locke, he led the formation of an in-house education program, Gentry

Locke University (GLU), that continues to help young attorneys learn more about the practical elements of legal practice.

Mike's commitment did not stop there. There was never a minute that he was not bragging on his parents, his wife Nancy, or his two scholarly and athletic daughters. Returning for a late night at the office after leaving to watch a girl's lacrosse game was just the way Mike was wired. He was proud of them, and all of their accomplishments.

We too are proud. Proud to have called Mike Pace one of our own, a member of the Gentry Locke team and family. Though he is no longer present with us, the indelible and positive marks he has made on us individually, on our families, on this firm, on our communities, and on his family will last eternally. Well done. Here's to you Mike. Or shall we say …. Atticus!

ANNOUNCEMENT FOR FORECLOSURE CHAPTER OF THE VSB LIVING LIBRARY

Featuring Speakers Vanessa Steltenpohl Carter and Ray W. King

The Membership Committee of the Virginia State Bar Real Property Section is pleased to announce another exciting "Chapter" of the Living Library video series! Attorneys Vanessa Steltenpohl Carter and Ray W. King of Woods Rogers Vandeventer Black speak at length about the practice of Foreclosure law in Virginia.

In the first video of the Chapter, Vanessa provides a quick overview of residential real estate foreclosures in Virginia, discussing the intersection of contract law, federal regulations, and statutory requirements. Click here or visit https://www.youtube.com/watch?v=gXImiupqamo to watch the full video.

In part two, Ray discusses commercial real estate foreclosures, including the various roles an attorney can serve. He covers the benefits of additional advertisement sources for unique commercial properties and touches on commercial foreclosure roadblocks. Click here or visit https://www.youtube.com/watch?v=_VElngQq1z8 to watch the full video.

In part three, Vanessa and Ray team up to present tips and potential minefields for practitioners of residential and commercial real estate foreclosures in Virginia, including a discussion of superpriority liens, title issues, and the bidding and sale process. Click here or visit https://www.youtube.com/watch?v=PiaEZ75MBkA to watch the full video.

For more information, please visit the Virginia State Bar website and gain access to past Living Library Chapters on Easements, Title Insurance, and Real Estate Litigation.

The Membership Committee plans on releasing exciting new Chapters on Environmental Law, Land Use, Common Interest Communities and Eminent Domain and Condemnation. Check it out – no library card is needed!

LIVING LIBRARY – CALL TO ACTION

We need your help! If you have a great idea for a new chapter or speaker for the Virginia State Bar Real Property Section's Living Library, please contact Harry Purkey at hpurkey@hrpjrpc.com.

2024 RECIPIENT OF THE TRAVER AWARD

JIM WINDSOR

[Presentation by Paula Caplinger]

It is my distinct honor to present the Traver Scholar Award to this year's recipient. This year's winner is a distinguished individual whose commitment to excellence mirrors the legacy of our esteemed colleague, Court Traver.

In reflecting upon the achievements of this year's recipient, I cannot help but draw parallels between the winner's illustrious career and that of Court's career. Like Court, this year's recipient has a profound commitment to the pursuit of legal excellence and has displayed an unparalleled work ethic. Both Court and this year's recipient have demonstrated exceptional legal acumen, leaving an indelible mark on the legal landscape. Both have tirelessly given of their time in teaching seminars and authoring articles and resource materials to benefit their fellow real estate professionals. Since 1996 this year's recipient has presented over 120 seminars on real estate related topics.

Furthermore, the commitment to family and community that both our 2024 winner and Court Traver exemplified is truly commendable. Like Court did, our recipient understands the importance of balancing a successful career with a deep commitment to one's family and community. Our winner's involvement in charitable endeavors and community initiatives echoes the spirit of service that Court held dear to his heart.

Perhaps most notably, Court and this year's recipient have exhibited a passion for mentorship. Much like Court, our recipient has consistently shown a willingness to invest time and energy in guiding and nurturing the next generation of legal minds. His commitment to mentorship goes beyond professional development, extending into the realms of personal growth and ethical responsibility. This dedication to fostering the success of others is a true embodiment of the values that the Traver Scholar Award seeks to honor.

In conclusion, it is with immense pride and admiration that I present the Traver Scholar Award to my longtime friend and colleague, Jim Windsor. His career achievements, commitment to family and community, and outstanding mentorship reflect the essence of Court Traver's legacy. May Jim's story inspire us all to strive for excellence, embrace our roles within our communities, and invest in the growth of those who will follow in our footsteps.

Congratulations, Jim, on this well-deserved recognition. Thank you.

2024 RECIPIENT OF THE TRAVER AWARD

JIM WINDSOR

James L. Windsor is the 2024 recipient of the Traver Award, which is awarded by the Real Property Section of the Virginia State Bar and Virginia Continuing Legal Education to honor men and women who embody the highest ideals and expertise in the practice of real estate law. Traver Award recipients are Real Property Section members who have made significant contributions to the practice of real property law generally, and the Section specifically, and have generously shared their knowledge with others. The award is named for the "father" of Virginia real estate lawyers, Courtland L. Traver, whose outstanding legal ability and willingness to share his knowledge and experience was an inspiration to others.

Jim has been practicing in Virginia since 1985 and is an AV Preeminent rated lawyer with extensive experience in a broad range of counseling, negotiation, mediation, and civil litigation involving real estate, title insurance, construction/mechanic's liens, local government, legal malpractice defense, mortgage lending, and creditors' rights. He is a member of Kaufman & Canoles, P.C. and is based in the firm's Virginia Beach office. Jim is the Chairman of the firm's Real Estate Claims & Title Insurance Solutions Group.

Jim covered the Virginia case law updates at the Annual Real Estate law seminars following Courtland Traver most of the years from 2009 through 2016. He has an impressive list of publications, including: co-authoring a textbook, Virginia Supplement for Modern Real Estate Practice; writing an article regarding Virginia mechanic's lien law published in the University of Richmond Law Review; writing articles for *The Fee Simple*, *VLTA Examiner Magazine*, and other publications; drafting and updating the chapters on "Mechanic's Liens" for many years in VaCLE publications such as *Enforcement of Judgments and Liens*, and the *Virginia Construction Law Deskbook*. In addition, since 1996, Jim has presented over 120 seminars on topics primarily involving real estate and construction.

Jim has received many recognitions and honors including being listed in Best Lawyers in America, Real Estate, 2018-2024; Virginia Super Lawyers; and Virginia Business Magazine, Virginia's "Legal Elite." In 2015, Jim also received the Distinguished Service Award from the Virginia Land Title Association.

In the award presentation at the Real Property Section's spring meeting in March, Newport News attorney Paula Caplinger said that Windsor "has consistently shown a willingness to invest time and energy in guiding and nurturing the next generation of legal minds."

"His commitment to mentorship goes beyond professional development, extending into the realms of personal growth and ethical responsibility," she said. "This dedication to fostering the success of others is a true embodiment of the values that the Traver Scholar Award seeks to honor."

In 2022, Jim became an Area Representative for the VSB Real Property Section and has been very active on the Education Committee with planning topics and speakers for the Advanced Real Estate seminar each March, the Annual Real Estate program each May, and the Annual Summer Meeting each June. In 2023, he became co-chair of the Education Committee. Jim is a welcome addition to the Traver Award recipients.

When asked about receiving the Traver Award, Jim said the following:

> Humbled and grateful sum it up.
>
> I am very humbled to receive the Traver Award, named to honor and remind all of us of the late Courtland L. Traver, affectionately called the "father of Virginia real estate law". Courtland Traver was an exceptional real estate lawyer, and a dedicated mentor and friend to so many. He was the consummate Virginia lawyer who remains an inspiration for all of us.
>
> Receiving the Traver Award was truly the result of a team effort, and I am very grateful for the support and encouragement of many mentors, partners, associates, colleagues, friends and, of course, my family, over the past 38 years.
>
> I had the distinct pleasure to speak with Court Traver one afternoon years ago after he retired and was living in Williamsburg. I contacted him to ask if he would assist me with a real estate conundrum which I had been laboring over for some time. Court was so gracious with his time and kindly shared, without so much as cracking a book, his in-depth knowledge of the topic. I remember being impressed by how thoughtful and giving he was with his time and wisdom. I have learned over the years, this was par for the course for Court. To my friends at McGuireWoods, you were very fortunate and blessed to call him your partner, colleague and friend for many years.
>
> I am also honored to join the roster of past recipients of the Traver Award, which includes some of the most revered, knowledgeable, and experienced real estate lawyers and gurus in the Commonwealth. I count many past recipients as friends and respected colleagues, and I could go on at length about many of them, however, one name stands out – Doug Dewing.
>
> Doug was a scholar's scholar and a good friend for over 35 years. He had an encyclopedic knowledge of Virginia real estate and title law, particularly ancient, arcane principles with long Latin names. Doug, among other things, was the author of *A Virginia Title Examiner's Manual* (2nd ed. - 5th ed.) originally written (1st ed.) by another giant in the annals of Virginia real property law – Sidney F. Parham, Jr. (1918-1996). Doug possessed a pleasant demeanor and a tireless work ethic. Doug liked to search titles, pull the old heavy books in the clerks' offices around the Commonwealth, and solve legal puzzles. To brainstorm a complex real estate issue and banter with Doug, a fellow title geek, was great fun. If Doug didn't have the answer, he would find it – usually followed by a long stream of consciousness email sent in the wee hours (e.g., 2:34 a.m.) in the morning, chock full of citations to Virginia cases, quotes from pertinent authorities, and, most importantly, Doug's interpretation of the law. Doug, like Court, is sorely missed.
>
> As a recipient of the Traver Award, I also hearken back to a whole host of mentors from my legal home for over 36 years, Kaufman & Canoles, P.C., including many brilliant lawyers, highly skilled paralegals, our two remarkable librarians, multitalented legal assistants, and, in particular, my extraordinary and dedicated executive assistant for the last 23 years, Laura Rait.
>
> In addition, I am thankful for the countless helpful lawyers with other law firms and judges from all over Southeastern Virginia and elsewhere across the Commonwealth, each of whom took time to show me the "right way" to practice, shared their superior knowledge, effective strategies, and practical approaches throughout my journey of over 40 years. "Get by with a little help from your friends." - The Beatles.

Although there are far too many to name, there are a few folks who took the time, early on, to teach, shape, and mentor me and without whose guidance and sage advice I would not be receiving the Traver Award. I am someone who remembers my roots and those who contributed, and in some cases made all the difference, along the way. Here are just a few:

In 1982, during my senior year in college, Ace Blatt, who is still practicing, was the first lawyer to take me to a record room in the City of Harrisonburg, and patiently taught me the fundamentals of how to adverse and examine a title. I was hooked.

After my first year at T.C. Williams School of Law at the University of Richmond, downtown Hampton lawyer John Ward Bane took me in as a summer intern at the firm of Bane, Harris & Smith. There, I worked with John, Bobby Harris, Les Smith, Kathy Gear Owens (the other summer intern), and their savvy legal assistant, Lisa Robertson. They taught me how to prepare a title report, draft pleadings, and how a law firm was run. In their own individual ways, they showed me the ropes.

After my second year in law school, I worked as a title examiner at Hunton & Williams in Richmond under the careful tutelage of Jimmy Rountree, a senior title examiner with H&W, who painstakingly showed me the "Rountree way", and gave me a graduate school-level course on how to thoroughly and accurately conduct a title examination and how to properly write up and present the title notes to the lawyers for review. Jimmy was an invaluable, skillful mentor.

Following graduation from law school, I returned to Hampton Roads and landed my first law job at Breeden, MacMillan & Green, at the time, a well-established 17-lawyer firm in downtown Norfolk headed by former Virginia State Senator, Eddie Breeden, Jr.; Bob MacMillan, and Berryman Green, IV. By divine intervention and sheer luck, I had the good fortune to work closely with a senior partner, David K. Sutelan. Dave was a Naval Academy grad, and I was his plebe. Dave was an accomplished and respected real estate/title litigator, a chancery lawyer, and was widely known as one of the best, if not *the* best, mechanic's lien defense lawyers in Southeastern Virginia. I could not have had a better mentor and role model as a lawyer in those early years. Like Court Traver, Dave was patient and graciously devoted his valuable time to training this young, very green associate.

In 1987, Kaufman & Canoles opened its Peninsula office in Newport News. I had grown up in nearby James City County and my father, Jim Windsor, was President of Christopher Newport College (now Christopher Newport University) in Newport News from 1970-1980, and was very involved in civic affairs. K&C recruited me to join its Peninsula office which, at the time, had five other lawyers – four partners and one associate named Paula Caplinger (still a close friend and now Vice President, Tidewater Agency Manager and Counsel with Chicago Title Insurance Company in Newport News). As much as I enjoyed working with Breeden, MacMillan & Green, the opportunity to practice on the Peninsula with K&C was very attractive. In November 1987, I became the sixth lawyer in K&C's newly-established Peninsula office. My formative years provided a solid foundation upon which the various niches and primary areas of my growing law practice (real estate, construction, mechanic's liens, civil litigation), were built and, in many ways, also laid the groundwork for receiving the Traver Award.

The last 36 years with K&C have provided a rich and vibrant working environment, a source of many longstanding friendships, and engendered the strong bonds and com-

radery which lawyers develop who work together to vigorously serve their clients and enhance the well-being of the partnership. In addition, K&C has been a fertile training ground to learn the practice of law, the business of law, and the profession of law from many skilled lawyers and to emulate many accomplished lawyers who lead by example.

I am grateful to my clients, some of whom I have represented the entire time I have been practicing, since 1985. Earnestly representing my clients, many of whom have become good friends, has been a true privilege. The *absolute highlight* of my career has been to diligently serve *their* interests and achieve *their* goals and objectives.

Also, I am thankful to my father, Jim Windsor, a decorated Marine, college president, community leader, trusted advisor, and life-long best friend. One of the many life lessons he taught me was, "People need to know you care before they care what you know." Genuinely caring for my clients and client service have been a primary emphasis of my practice since day one.

Finally, and most importantly, in reflecting on the myriad of relationships, mentors, colleagues, and friends, I think, above all else, of my family:

My son, Jay (29), my daughter, Anne Taylor (28), and my son, Tyler (25)...

...and, of course, the glue that holds it all together is my wife, Kay Hardy Windsor. Kay and I met in law school, were married in 1991, and she has been a lawyer/manager with Fidelity National Financial (formerly Lawyers Title Insurance Corporation) since 1988. Kay has been a consistent source of support and encouragement for over 33 years of marriage and my "partnership" with her is the one I most cherish and for which I am most grateful. Kay, I could not have done it without you.

To the next and future generations of lawyers: it is a wonderful profession - leave it better than you found it and enjoy the journey.

As I said, humbled and grateful.

MY JOURNEY TO TITLE INSURANCE

**By Hayden-Anne Breedlove, Associate Counsel,
Old Republic National Title Insurance Company**

My journey into the title insurance industry began with a genuine fascination for real estate law. Long before law school, I dipped my toes into this field, interning at Long and Foster Realtors and a versatile law firm that delved into various legal areas, including real estate. These experiences at the University of Virginia laid the groundwork for what was to come.

During my law school tenure, my interest in real estate law only deepened. I became an active member of the Real Estate Law Society, immersing myself in discussions, events, and the collective wisdom of fellow real estate law enthusiasts. Yet, it was my role as the "Student Editorial Assistant" with the Virginia State Bar's *Fee Simple* publication that truly paved the way to my entry into the world of title insurance.

Working alongside Steve Gregory proved to be transformative. Steve, a guiding mentor who quickly became a friend, introduced me to the intricacies and nuances of title insurance. His encouragement to engage actively in the real property section and his invitations to attend meetings as a law student were instrumental in shaping my trajectory. At these meetings (and the dinners in Williamsburg), I was able to meet many of you in the section and discuss what your careers in real estate law were like. This reaffirmed my desire to be involved in real estate.

Another pivotal moment was Ron Wiley's guest lecture on title insurance during one of my real estate law classes at the University of Richmond School of Law. Ron, deeply involved in the Real Estate Law Society, further ignited my interest in this specialized field.

After law school, I undertook a clerkship, while maintaining the aspiration to work for an underwriter in an ideal scenario. However, circumstances—coupled with the onset of the pandemic—posed challenges in securing a position immediately. I briefly diverted into another area of law before the fortuitous discovery of an opening at Old Republic National Title Insurance Company, thanks to Steve's sharp eye and his gesture of passing the opportunity my way.

Old Republic wasn't just a job; it was an eagerly anticipated milestone. My familiarity with the company through Ron Wiley made joining their team as associate counsel in March 2021 all the more thrilling.

My journey since then has been a testament to the invaluable support and guidance received from Steve and Ron, and from my colleagues at Old Republic - Kay Creasman, Jon Brodegard, Stewart Rauch, and Kevin Pogoda. Their mentorship, assistance, and unwavering support have been the bedrock of my growth and success in this industry.

Reflecting on this journey, I am immensely grateful for the experiences, the mentors, and the opportunities that have shaped my career in title insurance. Each step, each connection, and each lesson learned has been instrumental in my evolution within this dynamic field.

HOW I GOT INTO THE TITLE INDUSTRY

By Helen Spence, Esq.
Virginia and West Virginia State Counsel
Fidelity National Financial Family of Underwriters

Helen J. Spence is a 1987 graduate of Radford University, and 1990 graduate of Washington and Lee University School of Law. She was in a small private practice in the New River Valley, handling primarily real estate transactions, wills and estates, and juvenile law, until joining Fidelity National Title in December, 2004. In her capacity as Virginia and West Virginia State Counsel for the Fidelity National Title, Chicago Title, and Commonwealth Land Title, Helen speaks regularly to title insurance agents, settlement agents, and real estate attorneys on real property and title insurance issues.

Helen is a member of the Virginia and West Virginia State Bars, the West Virginia Bar Association, the Virginia Land Title Association, and the American Land Title Association. She is an area representative to the Real Property Section of the Virginia State Bar.

I always loved maps. It started with wooden puzzles as a kid, fitting each US state into its place. Later, my family had a National Geographic subscription, and while my brothers were ogling the pictures of aboriginal women, I was unfolding the large, beautiful maps of different countries. In sixth grade geography, the teacher gave us a mimeograph page with the outline of Italy – we had to color it in and locate geographical features. I spent hours on that! It all came together in law school -- the Real Property textbook came complete with plats and sketches of property. I was transfixed.

My first summer job in law school was for a small Staunton firm, where I was taught to examine real property titles. I always started with the tax maps – tracing the outlines of the property, marking roads and adjoiners. But I also enjoyed the logic of the title exam: chaining back, adversing up, picking out the issues, and even typing up a report. I discovered the stories of the property and the people who lived there. I was engrossed in their lives, their deaths, their losses in bankruptcy and foreclosure. I loved tracing back tracts of land to the original parent tract and putting together the puzzle pieces of off-conveyances to find the right one.

My first job out of law school came from that experience, and I began handling real estate settlements, along with all the other matters that might walk in my door. The most satisfying work was the real estate – helping with the purchase or refinance of a home or business, reviewing the ever-larger surveys and plats, and digging into difficult or just plain messy titles. I always found time to pull out the colored pencils to mark up the plats and surveys: blue for water, red for roads, yellow to outline the parcel, green to mark other matters to call out.

After 14 years of private practice, I was offered the job of underwriting counsel with Fidelity National Title, in their new Roanoke office. The Germans have a great word for the justification of your existence - daseinsberechtigung. The French call it raison d'etre. Whatever name you use, I had found my passion. I spend every day engrossed in real property, reviewing exams and surveys, finding the proper requirements and exceptions to meet the situation. After twenty years in this industry, I still am learning something new every day. And I'm still coloring and marking up maps.

THE ROAD PROJECT UTILITY EASEMENTS THAT VDOT CONDEMNS FOR THE BENEFIT OF DOMINION POWER: ARE THEY CONSTITUTIONAL?

Henry Howell ("Hank") is the founder and managing partner of The Eminent Domain Litigation Group. Hank has over 42 years of litigation experience in a wide array of practice areas, but has focused on eminent domain litigation for the past twenty years. During that time Hank has obtained several multi-million dollar condemnation verdicts and settlements and has frequently argued before state and federal appellate courts. Hank is recognized as an authority in eminent domain law both in the state of Virginia and nationally. Hank has also written extensively and is the co-author of the Eminent Domain Chapter in The Virginia Lawyer, the go-to legal resource for eminent domain law in Virginia. Hank graduated from the University of Virginia, undergrad and law.

The Virginia Department of Transportation (VDOT) regularly condemns property of Virginia Electric and Power Company, Dominion Power's public service corporation operating in Virginia (hereafter "Dominion Power"), for road widening projects along roads servicing businesses and residences. VDOT does not pay Dominion Power just compensation for taking its property; instead, VDOT pays contractors to move and update Dominion Power's distribution infrastructure onto land that VDOT newly condemns from businesses and homeowners for the benefit of Dominion Power.

When VDOT condemns the land from business owners or homeowners, VDOT does not disclose to the owners the infrastructure that VDOT's contractors are building for Dominion Power. The owners are in the dark from the beginning when VDOT first negotiates with them, through the condemnation process, and until the contractors show up on their property and install the electrical and other utility infrastructure for the road project. Not only does VDOT fail to disclose to the owners any details of the infrastructure their contractors are installing in their former front yards or parking spaces, but the easementrights that VDOT condemns from owners do not include any legally enforceable language that limits the extent of the infrastructure that VDOT's contractors are installing for Dominion Power. The new easement that VDOT condemns for Dominion Power gives Dominion Power and its assigns the power to return to the easement in the future to install new infrastructure that is different and more burdensome than the newly installed infrastructure. A boilerplate utility easement is shown in Footnote 1.[1]

1. NOW, THEREFORE, under the provisions of Section 33.2-1014, Code of Virginia (1950), as amended, the Commissioner of Highways has also directed to be taken, in order that same may then be conveyed Dominion, its successors and assigns, an easement and right of way for the purpose of granting Dominion the exclusive and perpetual right to lay, construct, operate, maintain, inspect, reconstruct, remove, repair, improve, relocate, change, alter or extend its facilities, equipment, accessories and appurtenances necessary in connection therewith…(to be referred to as "the Dominion Relocated Easement.") The VDOT Utility Easement and the Dominion Relocated Easement (collectively referred to as the "Utility Easements") and the Permitted Utility Facilities and the Dominion Facilities, installed thereon as hereinabove described are subject to the following conditions: 1. The owners of the Dominion Utility Facilities, their respective agents, successors or assigns and the owners of the Permitted Utility Facilities to be situated within the VDOT Utility Easement by permit (to be collectively referred to as the "Utility Owners") shall have full and free use of their respective Utility Easements and right of way for the purposes named, and shall have all rights and privileges reasonably necessary to exercise use of the respective Utility Easements and right of way as their interests are set forth herein, including the right of reasonable ingress to and egress from this easement over the remaining land of Landowner by such private roads as may now or hereafter exist on the property of Landowner. The right, however, is reserved to Landowner to shift, relocate, close or abandon such private roads, if any, at any time. If there are no public or private roads reasonably convenient to the Utility Easements, then the Utility Owners, their agents, permittees, successors or assigns shall have such right of reasonable ingress and egress over the lands of Landowner adjacent to the Utility Easements. 2. The Utility Owners shall have the right to trim, cut and remove trees, shrubbery (including but not limited to weak, diseased and/or dead vegetation), fences, structures, or other obstructions or facilities outside the boundaries of the Utility Easements reasonably deemed to interfere with the proper and efficient use of the Utility Easements for the purposes named and/or the safe and proper operation of the Utility Facilities in order to eliminate the hazard; provided, however, the Utility Owners, their agents, permittees, successors or assigns, at their own expense, shall restore, as near as reasonably practical, the property to its origi-

Often road projects result in significantly larger and more burdensome electrical infrastructure compared to the smaller distribution lines serving homes and businesses before the condemnations. The owners experience firsthand how VDOT and the utilities it relocates use the newly condemned utility easement to build new and larger electrical equipment without any notice to the owners.

IS VDOT ALONE AMONG CONDEMNORS WHEN IT FAILS TO DISCLOSE TO OWNERS THE UTILITY INFRASTRUCTURE FOR WHICH IT IS CONDEMNING THE OWNERS' LAND?

When the government or its agencies condemn land, including easements, the law requires that the land is for a public use and that no more land is condemned beyond the amount of land needed to achieve the public use. Property owners have the constitutional right to know the specific public use for which the government is condemning their property. They have the right to challenge the public use and whether the public use justifies the amount of property condemned for the public use. Finally, especially in the case of easement condemnations, the owners have a right to know and need to know how the government and its agents will use the condemned property. Without knowing the amount of land taken and the public use to which that land is devoted, the owner lacks the information to determine fairly the amount of just compensation needed to be financially whole after the condemnation. The Constitution requires that the government fully indemnify the owner against any financial loss from the condemnation.

Federal jury instructions given in trials to determine just compensation for interstate natural gas pipeline condemnations instruct the jury that in determining just compensation, they must assume that the condemnor "will make the fullest use of the easement taken…[and] in a manner as injurious to the defendant-landowner's remaining rights in the property as the easement rights taken…

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nal condition, including the back-filling of trenches, the replacement of curbing and asphalt pavement, and the reseeding of grass areas, but not the replacement of structures, trees, or other obstructions. Any such trimming, cutting or removal outside the Utility Easements, however, shall be done in conformity with the appropriate industry standards including but not limited to the National Electric Safety Code, the Virginia State Corporation Commission Revised 04/19 Guidelines on Tree Trimming, the Virginia Overhead High Voltage Safety Act, Virginia Code §§59.1-406 through 59.1-414, ANSI A-300 and ANSI Z-133, as applicable. All trees and limbs cut by the Utility Owners, their agents, permittees, successors and assigns shall remain the property of the Landowner. 3. The Utility Facilities constructed hereunder are and shall remain the property of their respective Utility Owner, their agents, permittees, successors or assigns. The Utility Owners shall, consistent with the purposes named, have the right to inspect, rebuild, repair, remove and relocate their individual Utility Facilities or any part thereof, within the respective Utility Easement area, and may make such changes, alterations, substitutions, additions in and to, or extensions of their Utility Facilities as they deem advisable, and consistent with the purposes named, without the prior consent of the Landowner. In making any such changes, alterations, substitutions, additions in and to, or extensions of its Utility Facilities after the initial installations for the Project herein described, the Utility Owners, their agents, and successors shall not install any above ground pole, cabinet, transformer, fence or appurtenance within any existing paved parking area or entrance way without the prior consent of the Landowner; such consent shall not be unreasonably withheld. Manholes, vaults, hand holes and similar types of appurtenances can be installed under paved areas and sidewalks provided they are load-bearing and are set flush with the existing pavement or sidewalk. 4. The Landowner, his successors and assigns, may use the Utility Easements for any reasonable purpose not inconsistent with the rights hereby acquired, provided such use does not interfere with the Commissioner, his agents, permittees, successors or assigns, or the Utility Owners, in their exercise of any of the rights acquired hereunder. Landowner shall not have the right to construct any building, structure, or other above-ground obstruction or to change the existing ground elevation, or to impound any water, on the Utility Easements; provided, however, Landowner may construct on the Utility Easements fences, landscaping (subject, however to the tree trimming rights in Paragraph 2 hereof), paving, sidewalks, curbing, gutters, street signs, and below-ground obstructions as long as said fences, landscaping, paving, sidewalks, curbing, gutters, street signs and below- ground obstructions do not interfere with the Commissioner, his agents, permittees, successors or assigns, or the Utility Owners, in their exercise of any of the rights acquired hereunder. In the event such use by the Landowner does interfere with the exercise of any of the rights acquired by the Commissioner, his agents, permittees, successors or assigns, and/or the Utility Owners hereunder; the Commissioner, his agents, permittees, successors or assigns, and/or the Utility Owners may, in their reasonable discretion, relocate such of the Utility Facilities as may be practicable to a new site designated by Landowner and acceptable to the Commissioner, his agents, permittees, successors or assigns, and/or the Utility Owners, as appropriate. In the event any such Utility Facilities are so relocated, Landowner shall reimburse the Commissioner, his agents, permittees, successors or assigns, and/or the Utility Owners, as appropriate, for the cost thereof and convey to the Commissioner, his successors or assigns or the Utility Owners, as appropriate, an equivalent easement at the new site or sites, as appropriate.

will lawfully permit."[2] In these pipeline trials, the natural gas transmission company has received a certificate of public convenience and necessity from the Federal Energy Regulatory Commission ("FERC") that precisely describes all aspects of the pipeline installation. The Certificate identifies the specific public use justifying the use of the power of eminent domain; it thereby sets the limits on how much property the company may take to construct the pipeline. It is unlawful to take more property than the certified public use needs.

For electric transmission lines with voltage of 138 KV and greater, Dominion Power must apply to the Virginia State Corporation Commission for a Certificate of Public Convenience and Necessity describing the transmission lines, the route taken, and the land that Dominion will purchase or condemn for the transmission project. This process is comparable to FERC's process for interstate gas transmission lines.

For VDOT's road projects that involve infrastructure transmitting less than 138 KV, neither VDOT nor Dominion Power disclose to owners the nature of infrastructure that VDOT is installing for Dominion Power. The easements that VDOT takes from the owners to transfer to Dominion Power are broad, ungrounded in any identifiable infrastructure, and include the power for Dominion Power or its assigns to return to the owners' property and build wholly new and larger infrastructure that Dominion Power never discloses to the owners until they arrive on the first day of construction.

VDOT may assure the owners that they can trust them and Dominion Power to do the right thing for the good of the public and the owner. Unfortunately, VDOT and its utility easement do not disclose to the owner the nature of the infrastructure that VDOT is presently installing for Dominion Power nor what Dominion Power will build in the future under its newly acquired easement. The utility easement sets no limit on the extent of infrastructure that Dominion may install in the new easement.

Unfortunately, VDOT stands alone among condemnors as the only government agency which chooses not to disclose to property owners any information on the nature of the utility structures coming to their front doors now or at undisclosed times in the future.

A PROPERTY OWNER CANNOT TAKE VDOT'S OR DOMINION'S PROMISES TO THE BANK OR TO THE FREE AND FAIR MARKET

Condemnors of all stripes often try to escape liability for the extent to which they have taken property rights with promises that they will not use the property rights that they have taken. They will argue that they will not enforce the easement rights to the full extent. They ask the owner to ignore the easement language as it is written. They assure the owners again and again that they will be reasonable when enforcing their rights under the easement. A condemnor's mere promise to forego enforcing the easement rights they are presently taking will not be legally binding on anyone, including future management or assigns.[3] The owner gets only one bite at the just compensation apple. If a condemnor takes a property right, it must need it. If it needs it, it must use it. If it does not need it and will not use it, then the condemnor may not constitutionally condemn that unnecessary property right.

> The rule is well established that the intent of the condemnor, and even the actual use the condemnor makes of the rights acquired, is completely irrelevant in both determining what is taken and assessing damages. The rationale is that the condemnor has acquired a

2. 3A Fed. Jury Prac. & Instr. § 154:64 (6th ed.)
3. See *Davis v. Marr,* 200 Va. 479 (1959), where the Court reversed the trial court's ruling in landowner's favor and dismissed his suit against the highway department for breach of its promise, without more, to retain a median break or cross over allowing left turns directly in front of landowner's restaurant.

> right and it is assumed that the right will be exercised. A property owner has no assurance that the condemnor will not change its plans in the future, even if it represents otherwise, and damages are to be assessed once and for all time in determining just compensation. The condemnor's intent or use of its rights does not affect the legal rights acquired and therefore cannot effect the amount of damages to be paid. When a condemning authority acquires legal rights, those rights must be fully paid for, along with any severance damages to the remainder caused by the taking. [4]
>
> When property is taken by the power of eminent domain, the compensation of the owner is to be determined by the actual legal rights acquired by the condemner and not by the use he may make of the rights…There is a distinction between an appropriation subject to rights of the landowner excepted there from and left unaffected thereby in him, and an attempt to impose unaccepted promissory stipulations and proposed agreements by the condemning party in respect to undertakings to be performed subsequent to the time of the appropriation. The unaccepted promise or proposal to do something in the future upon the happening of some contingency does not affect the character or extent of the rights acquired or the amount required to be paid as just compensation.[5]

"The probability that the appropriator will not exercise, or the fact that there is no present intention of exercising, to the full extent the rights acquired should not be considered in reduction of the damages, where there is nothing to prevent a full exercise of such rights, since the presumption is that the appropriator will exercise his rights and use and enjoy the property taken to the full extent."[6]

The principle that a condemnor must pay for the rights it takes- including the ones that it promises not to use- has been a part of Virginia law for over a hundred years. In City of Roanoke v. Berkowitz, 80 Va. 616 (1885), Roanoke took part of an owner's land in fee to run a stream through it. Seeking to avoid liability for the damages, Roanoke passed an ordinance granting the owner the right to build structures across the stream and authorized a deed to convey the same. The trial court excluded evidence of the ordinance, and the Supreme Court of Virginia affirmed because the owner never solicited the ordinance or agreed to it. "[I]t [did] not appear that the ordinance was passed at the instance of Berkowitz, or that he has at any time acquiesced therein. On the contrary, the record shows that 'his assent thereto was distinctly denied.' Clearly, then, his rights are unaffected thereby, and the [trial] court properly so held." Id. at 624.

Where do VDOT's utility easements taken for Dominion Power fit into this constitutional scheme? The easements do not identify the uses of the easement except vaguely and generally as anything Dominion Power or its assigns build or own in the easement. Does the owner know the utility's use of the easement now and in the future through VDOT's disclosures? Can the owner determine just compensation without knowing how the easement will be used? Can one apply the law to VDOT's utility easements to determine the constitutionality of the use and, if a public use, the amount and value of the property rights needed for the public use?

The plain language of Article I, Section 11 of the Virginia Constitution limits takings to only the property needed for the public use. Condemnors should not take more than they need for the public use and must pay just compensation for the property that they condemn. Article I, Section 11 provides as follows:

4. 7 Nichols on Eminent Domain § G1B.05.

5. Little v. Loup River Public Power Dist., 150 Neb. 864, 866-67, 36 N.W.2d 261, 264 (1949).

6. Shell Pipe Line Corp. v. Woolfolk, 331 Mo. 410, 414, 53 S.W.2d 917, 918 (1932) (where rights in petition allowed pipeline company to fence easement, pipeline company could not introduce evidence of its practice of not fencing its easements).

> That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use.

Before the 2012 constitutional amendment to Article I, Section 11 of the Virginia Constitution that added significant new private property rights, the General Assembly had enacted Virginia Code §1-219.1, Limitations on eminent domain. Subsection C provides as follows: "No more private property may be taken than that which is necessary to achieve the stated public use."

What is VDOT's stated public use of the easements that it condemns for Dominion Power? Is it anything Dominion owns and builds in the easement now and in the future, as the easement language provides? How is one to determine just compensation for a use that empowers the utility to build whatever it wants whenever it wants? How easy or difficult would it be for VDOT and Dominion Power to give the owners the utility plans showing the utility infrastructure now and for the predictable future?

Maybe someday the Virginia Supreme Court will address these issues. Maybe the legislature will address the breadth of VDOT's utility easements through legislation. Until then, the probability that VDOT or Dominion Power will limit the scope of VDOT's utility easements unilaterally will be left to the oddsmakers in Las Vegas. They will put that bet along with the odds that the Chicago Bears will win the Super Bowl.[7]

7. Note: Mr. Howell wrote this article before Da Bears 2024 draft and free-agent acquisitions, all of which would seem to make the odds much more favorable. –Ed.

DESIGN CONTROL IN COMMON INTEREST COMMUNITIES – MODEL RESTRICTIONS

This article is the collaborative work of members of the Common Interest Community Sub-Committee of the Real Estate Section of the Virginia State Bar, which is comprised of attorneys across Virginia who primarily practice Common Interest Community Law. The Committee is chaired by William Sleeth with Gordon Rees. Attorneys on the Sub-Committee contributing to this article include: Kristen L. Buck with Rees Broome, Brett Herbert with Gordon Rees, Chad Rinard with Whiteford and Lucia Anna (Pia) Trigiani of MercerTrigiani each of whom, including Will, took turns as either author or editor of this article.

A central founding principle of common interest community associations is architectural control. Typically, associations have authority to establish and ensure compliance with the design of exterior features of improvements and lots. The recorded declaration of covenants, conditions and restrictions generally establishes the scope of associations' authority to regulate and control modifications.

Recorded covenants and restrictions are also the basis for the authority to develop and implement architectural design guidelines. Guidelines should be based on the recorded documents. Guidelines should be reviewed and updated periodically – as applicable law evolves and as product availability changes. Design guidelines should be reviewed, revised and updated periodically no matter the vintage of the association.

Design guidelines come in different forms and formats, driven by the vision of the community's developer, and supported and implemented by community members. Community members often want and expect uniform and consistent compliance with design guidelines. A comprehensive list of possible design guidelines may be a helpful tool in considering whether to update design guidelines or pursue amendments to recorded documents if documents are silent, vague, or inconsistent.

In Virginia, declarations are contracts,[1] which, if written with care, accomplish a well-intended result, i.e., preserving property values by encouraging harmonious design. Historically, detailed design controls are not expressed in declarations. Instead, far more declarations authorize associations' volunteer leaders to adopt and implement design guidelines. The theory was to create dynamic documents, giving community members flexibility to develop design preferences. The courts see it differently however, we are learning. As a result, design guidelines in many communities have been adopted with little attention to specific authority or in comprehensive detail.

Recently, there has been an increase in challenges to design controls, regardless of a community's age - particularly in circumstances where design controls have not been enforced or updated. Design controls that have not been reduced to writing, or that lack clarity, are disfavored by courts. We are learning that unartfully drafted covenants or broadly drafted restrictions are far more likely to be unenforced by courts.[2]

To be sure, *express* design-control powers granted in either a declaration or statute remain generally enforceable.[3] But, "[d]esign-control powers do not include 'an implied power to impose design controls for aesthetic purposes.'"[4] Consequently, it is apparent that if associations want architectural control over a certain exterior feature, then a written standard based on clear authority to adopt that standard is now a must.

So where to begin? Design control is as unique as the language in each declaration. We know that language used in a declaration is paramount.[5] For example, a prohibition in a declaration cannot be contradicted by board-approved design guidelines. The prohibition in the declaration controls. Consequently, boards should use the definition, architectural control and use restriction sections in their associations' declarations as the place to establish, or supplement via amendment, design controls that association members can support.[6]

Additionally, community leaders should be advised that documents other than the declaration may address improvements or alterations that can be made to a lot or structure. Deeds of dedication, proffers, and local government conditions may add restrictions on landscaping, require certain design features, or require prior consent from a master association or the city or county where the property is located. Statutory provisions, like the Virginia Property Owners' Association Act, must also be considered because the Act addresses modifications to lots and dwellings such as the installation of electric vehicle charging stations, solar panels, and flags.[7] These foundational documents and statutory provisions should be considered when drafting or revising design guidelines.

Design control authority should be defined in conjunction with other terms that are defined in a declaration or other foundational documents. A comprehensive definition for an improvement or other change in appearance to a lot should be broad enough to include changes that impact structures including any addition or alteration whether constructed such as a fence, or an organic item such as changes to landscaping or grading either permanent or temporary. A definition is recommended for the word or words used by a declaration or other foundational document to describe any change owners may make to lots or any improvement:

> [Insert the pertinent word(s) used in a declaration] means:
>
> - Any building, including but not limited to, a house, structure, or outbuilding including a shed or garage, and any appurtenances to any building.
> - Any addition or removal that changes the appearance of a lot or improvement situated thereon, regardless of material, size, location or purpose, or whether attached or detached, or whether permanent or temporary in nature, including but not limited to any deck, patio, gazebo, fence, retaining wall, pool, grill, playground equipment, tree house, light, decoration, pole, solar panel, antenna, generator or heating or cooling unit.
> - Any change in shape or material of a driveway or gate across.
> - Any change in landscaping such as adding or removing trees, hedges more than 3 feet high, gardens or grading of the lot.

If a community seeks to exercise design control, the association should publish the scope of improvements to be restricted. All restrictions should be based on authority established in the declaration, statutory provisions,[8] or other foundational document to adopt design guidelines. If that authority is unclear or weak, the community can seek to amend the declaration to provide greater control and clarity.

Finally, once the exterior features that can be addressed by design guidelines are identified, the board should adopt standards that inform association members of permitted features that may be installed or modified with approval, or without the need for additional or prior approval. Design standards also often address property condition – to guide owners in ensuring that the property is well-maintained.

And if the declaration establishes a process for adoption of design guidelines, that process must be followed carefully. Improperly adopted design guidelines invite challenge. The adoption process should include community input before and during consideration and their effective date should also be clear and clearly stated in the document. Once adopted, the approved design guidelines should be published,[9] and included in certificates for resale issued on behalf of an association.[10]

Ideally, adopted guidelines clearly identify the permitted item, size, location, color, and materials, as well as conditions - as suggested below and if desired, include:

- Shed, decks, patios or gazebos - materials, color, height, and location (front, side or rear yard).
- Fences or other walls - materials, color, height, style, and location. Pools and hot tubs - location including whether above ground, and if fencing or screening is required.
- Playground equipment, including basketball hoops, trampolines, swing sets, and treehouses - location, size, style, colors, and installation method.
- Lights, flag poles, solar panels, antennas, generators or heating or cooling units - location, screening, and installation method (ground or surface mount).
- Driveways - materials and location.
- Trees or hedges - types and location.
- Composting equipment and gardens - location.
- Electric vehicle charging station – location, utility access and other applicable restrictions.
- Grills, fire pits, and other open-flame devices - location and installation method.
- Designated drone landing - location.
- Trash and recycling can storage - locations and screening.
- Birdfeeders, statuary windchimes, seasonal flags and temporary decorations - location, size, and number of permitted items.
- Hammocks and clotheslines - location and installation method.
- Security or surveillance cameras - location, size, and color.
- Mailbox and delivery receptacles - size, style, color, and location.
- Property condition – ensure proper maintenance and repair.

Comprehensive design guidelines can be essential to maintaining property value by ensuring a harmonious look. Design guidelines should contain a complete list of features subject to regulation and approval, so property owners are fully informed before undertaking any changes. Clarity around requirements can aid the association in ensuring compliance and consistency in application.

(Endnotes)

1. *See Sully Station II Community Ass'n, Inc. v. Dye*, 259 Va. 282, 284, 525 S.E.2d 555, _ (2000) (holding a declaration "collectively represent[s] a contract entered into by all owners....").

2 *See Shepherd v. Conde*, 293 Va. 274, 288, 797 S.E.2d. 750, 757 (2017). *See also Colony Council Bd. of Directors v. Hightower Enterprises*, 228 Va. 197, 200, 319 S.E.2d 772, 773 (1984) (holding "[a]ny ambiguity in the language must be resolved against the drafter. Uncertainty as to meaning creates ambiguity.")

3 See *Sainani v. Belmont Glen Homeowners Association, Inc.*, 297 Va. 714, 727, 831 S.E.2d 662, 669 (2019).

4 *See Id.*, 297 Va. at 727.

5 *See White v. Boundary Ass'n, Inc.*, 271 Va. 50, 55, 624 S.E.2d 5, 8 (2006) (holding "[w]hen contract language is plain and unambiguous, as it is in the present Declaration, we determine the intent of the parties from the words they actually expressed.").

6 The Virginia Common Interest Community Board adopted *Best Practices for a Property Owners' Association Declarations* in 2015. The best practices document offers a helpful outline of recommended declaration contents and can be found on the Common Interest Community Board page of the website for the Department of Professional and Occupational Regulation: www.dpor.virginia.gov/sites/default/files/Reports%20and%20Studies/POA_Best%20Practices%20(1).pdf

7 *See* Va. Code §§ 55.1-1823.1; 55.1-1820.1 & 55.1-1820 respectively.

8 For example, Va. Code § 55.1-1819.A states that "[e]xcept as otherwise provided in this chapter, the board of directors shall have the power to establish, adopt, and enforce rules and regulations with respect to use of the common areas and with respect to such other areas of responsibility assigned to the association by the declaration, except where expressly reserved by the declaration to the members."

9 Va. Code §55.1-1819.A.

10 Va. Code §55.1-2310.A.2.

HOW TO ADD VALUE IN COMMERCIAL LEASE NEGOTIATIONS AND THE LEASE PROVISIONS

By Robert C Goodman, Jr.

Rob is a Member at Kaufman & Canoles. His practice focuses on business advice for transactions, legal aspects of commercial transactions including mergers and acquisitions, sales of businesses, commercial and land leases, formation of business entities, major system procurements, and split-up of family businesses. In addition to his commercial work, he works closely with families and family businesses in generational and estate tax planning, other tax issues, family dynamics, and charitable objectives. His strength is negotiation and creative solutions.

Value proposition

You can add value in a commercial lease negotiation first by learning about the physical site and the players involved in the transaction and then by using your ingenuity and experience. Value can be both economic and problem solving/risk avoidance. Value can also just be getting a fair deal for both sides without spending unnecessary legal time and expense. I like to think that the alternative to AI is "MOI" (my own intelligence).

Here are some general points that have stood me in good stead:

1. Of course, before you start, be sure you have cleared conflicts and have a signed engagement letter.

2. Resolving the business points upfront in a Letter of Intent (LOI) makes the lease drafting much easier, especially if the LOI includes issues which are often "challenging " in the lease draft negotiations. With respect to legal points that have business implications, I like to review them with my client and cover them in the LOI.

3. I tell my clients: "Put your dirty linen on the front steps and let the other side see it as they walk in." In other words flag, upfront, issues that are going to show up in due diligence anyway.

4. Where you can, visit the site in person to get a feel for the property. If that is not possible, take a Google Earth look at the site.

5. I also suggest that you and your client "go rogue" i.e. pretend you are the 'devil's advocate" working for the other side and think through what are the key concerns you would have and how would you handle them. That thought pattern will help you to negotiate and draft a fair LOI and later, the lease in many cases.

6. Understand what your client really wants and really needs. How strategic is the location? Are there any special problems such as access, environmental issues? Structural concerns? Competition? Financing?

7. What is the reasonable range for the rent (both locally and for national tenants, nationally)?

8. What do you know about the Landlord or Tenant? Is the deal a "flip" or a hold"?

9. In a negotiation you always need to be prepared to leave the table. Is your client prepared to do so?

10. And remember this fundamental for **all** agreements: **"You don't have a right without a remedy**". Practically, what will you be able to do if the other side defaults.

11. At the same time, your remedies should be commercially reasonable. And you should give the other party written notice and a reasonable cure period before your remedies can be exercised.

12. **Good clients make good agreements**.

    Have your client review carefully all provisions where there are business/factual/operational/management issues.

13. **It is risky for Landlords to rely on the Tenant's credit**.

    In bankruptcy the Tenant can renounce a lease.

    Remember, for example, K-Mart, Penn Central, WT Grant, Woolworths, JC Penney, Sports Authority, J Crew, Pier 1, Bed Bath & Gone, Toys "Were" Us, A&P Supermarkets, and Brooks Brothers.

    Take that risk into account when you structure your deal. You are better off with a tenant who has more " skin in the game" (i.e. is spending more for its improvements). For the Landlord's contribution, it is usually best to have the landlord provide free or reduced rent which is also more tax efficient. Also, for any real estate I like to say "location, location, location" to my clients. Think through how difficult may it be to replace a tenant.

14. When you represent the Landlord, advise your client to think of the Tenant as their partner or prospective partner**.**

    I have been told by a very experienced real estate agent who is also a significant owner of retail shopping centers that many national tenants keep a record of which Landlords are best to deal with. This can be helpful when a lease comes up for renewal.

15. **Document your advice and recommendations**: one simple technique is a thank you type of email where you summarize key points without using language like "this is to confirm" but rather "I am glad we were able to work out etc." or if the result was a compromise, "I recognize that --- a concession was necessary, etc."

16. **Be patient**: do not have "All the patience of a fish on a hook".

17. **Try to be a good listener to identify and understand the issues and potential solutions**.

18. **If you have a hint of an idea be sure you push it to the forefront of your mind and think it through**. Do not think later "I thought of that, but did not pay attention to my instinct".

When I speak on this topic I like to cover interesting lease provisions, but to keep this article brief enough, I will conclude with some short "war stories" which I hope you will benefit from:

Billboard Lease

Past history of Client's rental income from the traditional bill board: 1983 -2010 rent from $150/mo. to $550/mo.

I researched electronic billboards and, with my client's consent, offered the billboard tenant the opportunity to install an electronic billboard in lieu of its conventional sign. I went online and checked out pricing for digital billboards in similarly situated locations (i.e. those in similar markets and traffic volume) and computed estimated annual gross revenue based on various levels of usage.

Estimated initial gross revenue for the billboard company, assuming an 80% usage was in the $120,000 range; so, I asked for a minimum rent of $2000/month increasing 3% per year. I made the assumption that the billboard company's gross revenues would be expected to rise by at least that much. In addition, I asked for a percentage rent of 1/3rd of the gross revenue in excess of the $120,000 base (with the base adjusted upward by 3% each year since the base rent also increased by 3% each year). We settled on 25% of the excess.

Below is the definition of Gross Revenue. You can see how I tried to think through ways to keep the Gross Revenue from being manipulated.

> The term "Gross Revenue," as used in this Lease, means all income or other remuneration received by **LESSEE**, for the use of space, announcements or bulletins on the Sign or any other use of the Sign, and all other revenue derived from Lessee's operations with respect to the Sign, including, without limitation, forfeited deposits. In providing space on the Sign, *Lessee shall not manipulate prices for the Sign or treat the Sign differently from any other signs of* ***LESSEE with respect to discounts or package prices provided as part of a package sale or otherwise and LESSEE must not structure posted or actual pricing for the Sign as part of any combination or package transaction in a manner calculated to lower the payments based on Gross Revenue*****. By way of clarification, and not limitation, the posted pricing for the Sign as a digital bulletin should be consistent with pricing for comparable signs and the discounted price for the Sign should be comparable with other signs within a customer package.**

By 2020, the percentage rent was in excess of $30,000 in addition to the annual base rent which had increased from $24,000 by the 3% annual adjustment. The end result was that the total rent had increased about 10 times from what we started with in 2010.

The lease drafting was simple, other than having to think through how the sign holder might try to lower the gross for this sign as part of a "bundle" (and then dealing with the language on that). What was important was the upfront research and negotiations.

With a cell phone tower I suggested we look out for an "additional client and my client fully concurred.

Here is the clause which pleased his family

> Lessee shall maintain the Tower Facilities in a first class condition and in compliance with all laws and regulations and with best practices for the protection of wildlife, especially migratory and protected birds.

Solar panels

I am not going to discuss the details of a solar farm lease, but I would like to flag some points that are "less legal" but worth considering:

> Can the solar panels be high enough off the ground to permit other activity below?
>
> Will your client see the panels from their farm house or other place where they care about the view?
>
> If timber is being cut, does it have value for which the client should be paid?
>
> Is the project bonded so that the client are not left with a disposal problem at the end of the lease term?

Elephant Trains

I was reviewing a shopping center lease drafted by a national owner and in the midst of all the tenant prohibitions was the statement: "There may be no elephant trains." When I asked the landlord's attorney what that meant, he explained that they like to know which prospective tenants took the trouble to review their lease.

And last: One of my favorite negotiations:

I was representing a start-up fitness center needing a fully built-out space in a new property being constructed by a well-known local contractor/developer. Many years earlier, I had represented another contractor who had gone out of his way to help the current prospective landlord start his career/business. When we got together to discuss the lease, I deliberately spent a fair amount of time reminiscing about the landlord's support from my now deceased client. When we switched over to the discussion of the lease and the build out, he turned to my clients and said "--- did this for me when I started and I am going to do the same for you. One day I hope you will pass on this tradition." Needless to say the lease was an easy negotiation with very favorable (and fair) results.

THE LATEST SCAM VACANT LAND FRAUD

Protect Your Company by Knowing the Red Flags

By Jeremy Yohe

Reprinted from ALTA Title News

AIME KOSOFSKY had just spent a full day attending a cybersecurity conference hosted by Premier One. After eight hours of hearing about all the stuff that could go wrong, a founding partner of the North Carolina-based law firm Brady & Kosofsky, spent the night changing passwords, making adjustments and implementing new ideas to better protect his company.

But when Kosofsky got to the office the next morning, he didn't have to address a potential wire fraud scam. His firm was handling a transaction that had an alarming fact pattern similar to one being dealt with by other title and settlement companies across the country. The transaction involved vacant land, was free and clear of any mortgages or liens, had a cash buyer, used a local listing agent and an out-of-state seller.

"So, before I got in the office, my team had already started the procedure for this type of fact pattern," Kosofsky said. "We have seen it before, and I knew we would see it again."

Real estate transactions have been a prime target of cybercrime over the past decade. There is little sign of change in this focus—even as the housing market slows. Instead, fraudsters continue to improve their scams and money laundering tactics to avoid detection. This latest trend involves vacant lots or unencumbered properties. These scams involve bad actors posing as owners of these vacant lots or properties. This trend began to emerge before the winter holidays.

According to the National Association of Realtors (NAR), home sales continued to fall throughout the last several months of 2022. As a result, cybercrime rings have turned to new tactics to make up for the lower housing market transaction volume.

"This recent trend involving seller impersonation is particularly concerning, as the real property owner is typically not aware nor in a position to prevent the fraud, until it is too late," said Tom Cronkright II, co-founder of CertifID. "Unfortunately, it's just the latest evolution of wire fraud that affects title companies, law firms, lenders, Realtors and homebuyers and sellers. Our company has received hundreds of cases and helped recover over $52 million for victims in the last two years alone, by partnering with the U.S. Secret Service."

In Kosofsky's situation, his office hit the brakes on the transaction. They asked for picture IDs and reviewed old and new documents to compare signatures.

"The signatures weren't even close," he said.

The seller said he was in New York. His driver's license was from Texas. The documents were signed in Florida by a duly licensed notary public from that state.

Then, Kosofsky's team called the seller. What they learned proved something was awry.

"We told the seller that he needed to come to our office to sign and he responded that has been unable to travel for months," Kosofsky said.

At that point, the law firm called and asked the Florida-based notary public if they had performed notarial acts for anyone by the name appearing on the documents.

"Surprise, surprise, the notary had no record of it in the journal," Kosofsky said.

Cronkright said CertifID has worked recently with federal law enforcement on numerous cases like this one. In one such situation, a title agency reported to CertifID a loss of $33,000 from a vacant lot transaction. The title agency and the real estate agent were scammed by an imposter seller. Luckily, it was reported quickly. CertifID worked with the U.S. Secret Service to freeze and return the funds.

Here's how these new vacant property scams work:

- Scammers search public records to identify real estate that is free of mortgage or other liens. These often include vacant lots or rental properties. The identity of the landowner is also obtained through these public records searches.
- Posing as the property owner, the scammer contacts a real estate agent to list the property for sale. All communications are through email and digital means and not in person.
- The listing price of the property is typically set below the current market value to generate immediate interest in the property.
- When an offer comes in, the scammer quickly accepts it, with a preference for cash sales.
- At the time of closing, the scammer refuses to sign documents in person and requests a remote notary signing. The scammer impersonates the notary and returns falsified documents to the title company or closing attorney involved in the transaction.
- The title company or closing attorney transfers the closing proceeds to the scammer. The fraud is typically not discovered until the time of recording of transferring documents with the applicable county.

Another recent case with one of CerifID's title company customers in Ohio followed this playbook almost perfectly. The "seller" of a vacant lot contacted the real estate agent online, with no previous connection. The "seller" was very pushy about transferring money and the amount they'd make. They claimed to owe more than the $30,000 sale value and were anxious to receive the funds. There were many other markers of fraud identified during the CertifID verification process. Luckily, due to all of these red flags, the fraud was detected and stopped in time.

Another title company customer in Florida avoided a sizable $110,000 fraud loss by paying attention to the clues. A "seller" living in Vermont contacted a real estate agent online to list a vacant lot. The listing came from a real estate agent that the title company knew and trusted. However, red flags were identified by the CertifID verification process. The "seller" asked to use their own notary due to being out of state. Luckily, this too, was detected and prevented in time.

According to Cronkright, the best way to limit exposure is to supplement your teams' efforts with a solution that can verify wire instructions before any funds are sent. The human eye will not catch every spoofed email address or web domain. Having a solution that reduces your risk by using a combination of software, services, and insurance is a more comprehensive approach.

Federal law enforcement has been fielding a sharp increase in victim reports on this type of vacant land fraud. The U.S. Secret Service issued an advisory describing how these scams work and what to look for.

Similar stories have popped up in other states. A scam was attempted to purchase properties near Hilton Head, S.C., just before Thanksgiving. The Beaufort County Sheriff's Office received four reports of real estate scams since October 2022, including properties on Daufuskie Island and Fripp Island, said spokesperson Maj. Angela Viens. She said the number of scams could be higher, as many go unreported and others fall outside the jurisdiction of Beaufort County. At the beginning of January, the South Carolina Department of Labor, Licensing and Regulation sent out a letter warning real estate agents and property owners of the scam.

Hilton Head Island Realtor Mark Devers said he spoke with the fake seller about seven times on the phone, though the scammer tried to communicate primarily through email. Devers said he received multiple offers, but the scammer wanted to go with a lower offer because the deal would close faster. Once Devers and a real estate attorney started reviewing documents, the attempted fraud was identified—notarized forms didn't match the address of the seller and photos on IDs looked strange.

"That was really the straw that broke the camel's back," Devers said. "That sparked us to do some research online and then I found the actual seller after searching for a while. I called him up and it turns out that he was under contract in a private sale." The private sale was for between $200,000 and $400,000, according to Devers and the scammers had been prepared to accept much less as part of the fraudulent sale.

In January, Scott Mayausky, the Stafford County Commissioner of Revenue, helped a man who found out his vacant land was posted for sale on Redfin. Mayausky directed him to the Stafford County Sheriff's Office, where detectives are currently investigating cases of land fraud sales.

"Cases like this are under investigation and will be looked at from every possible angle," the Stafford County Sheriff's Office said in a statement. "For those currently looking to purchase or rent, it is important to take preventive measures to ensure cases like these do not continue. Those who are a victim are urged to contact their local law enforcement to report the fraud."

The Virginia Realtors Association said criminals are contacting real estate agents to list properties they don't own. The properties they want to sell typically don't have mortgages and the criminals are often willing to sell the land for below market value and for cash. The standard tactic is to sell these properties quickly before the true owners catch on.

Protect Your Company

All title companies should protect themselves and their clients from vacant land scams. The following are some tips to help identify potential scams:

- Look for misspellings of key information such as names, business and addresses.
- Monitor for sudden changes in voice or tone of the messages, especially invoking a sense of urgency.
- Be suspicious for changes in the next steps or instructions that the customer is supposed to follow.

- Be wary of unusual attachments or links.
- Independently search for the identity and a recent picture of the seller.
- Request an in-person or virtual meeting to see their government issued identification.
- Be on alert for a seller who accepts an offer price below market value in exchange for the buyer paying cash and closing quick
- Never allow a seller to arrange their notary closing. Use a trusted title company or closing attorney to coordinate the exchange of closing documents and funds.

The Virginia Department of Professional Occupational Regulation (DPOR) also is actively investigating cases of fraudulent sellers posing as property owners and trying to sell land they don't own. The department sent out a warning to real estate licensees after a number of complaints in neighboring states like North and South Carolina.

"This mortgage fraud stuff you hear about is real," Kosofsky said. "Keep your eyes open, live your policies and procedures, forget everything you know about doing real estate closings in the past because the bad guys are serious and they don't care how it used to be done. In fact, it just makes it easier for the bad guys when you do it the same way it's always been done. As the market gets shaky, people get desperate and get in a hurry. Don't lose your focus!"

CONSUMER AND INDUSTRY ADVOCATES OUTLINE REFORMS TO PROPERTY TAX FORECLOSURE LAWS TO PROMOTE SUSTAINABLE HOMEOWNERSHIP

Property tax systems can provide needed revenue while being fair and reasonable to property owners

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WASHINGTON, D.C., May 22, 2024 – Across the nation, homeowners are losing their homes and the equity they've built in them due to unpaid property tax debts, and older adults, those on a low or fixed incomes, and Black and Latino/Hispanic households are most at risk. In 2023, the U.S. Supreme Court ruled in Tyler v. Hennepin County that it is unconstitutional for a local government to take a property in a tax foreclosure and keep the excess surplus after the tax debt and costs are paid. However, many states have yet to revise these out-of-date laws.

The National Consumer Law Center (NCLC), AARP, and the American Land Title Association (ALTA) have produced a new issue brief with recommendations for states to revise their laws to protect property owners from unnecessary tax foreclosures.

"States must enact laws that protect those most at risk of losing their homes to tax foreclosure, particularly lower-income homeowners and those aged 65 or older," said Andrea Bopp Stark, senior attorney at the National Consumer Law Center. "States should actively promote available tax relief programs that include prepayment and repayment plans, affordable interest rates and limited penalties on past due taxes and reasonable time periods and terms to redeem the property."

"Homeownership sustainability is a key part of wealth creation and preservation," said Elizabeth Blosser, vice president of government affairs at the American Land Title Association. "Good public policy should promote preventative measures to avoid the loss of property to tax foreclosure sales. This is a critical component of housing opportunity and long-term affordability."

One of the most important steps a state can take to prevent tax foreclosure is requiring clear, comprehensive, plain language notices at every stage of the tax foreclosure process. States should ensure that notices delivered to the homeowners are translated into the consumer's language of choice and include information about remedies and assistance programs available, and that they note the consequences of each stage of the tax foreclosure process.

"States must ensure that the tax foreclosure process leaves the consumer who lost their home in the best position to recover financially," said Jenn Jones, vice president of financial security and livable communities at AARP. "Property tax debts are often well below the value of a home, and many foreclosed homes sell for more than 10 times the amount owed in unpaid taxes. And in some states, homeowners do not receive any of the proceeds from the sale. AARP is working in statehouses across the country to ensure this money is rightfully returned to homeowners."

Additionally, heirs' property — property passed down among family members without going through probate — is too often lost in a tax sale when heirs fail to receive notification of the tax sale foreclosure and lack access to tax relief programs.

To ensure that homeowners receive the maximum amount of their home equity possible, NCLC, AARP, and ALTA are calling for states to require that municipalities attempt to sell properties using a real estate agent before conducting a public auction and return any excess sale proceeds to the former owner, including heirs if the former owner is deceased, and create a simple process for claiming the excess proceeds.

Read the issue brief, Reforming Property Tax Foreclosure Laws to Promote Sustainable Homeownership.

Reforming Property Tax Foreclosure Laws to Promote Sustainable Homeownership

April 2024

A retired grandmother lost her home and became homeless after she could not pay a tax debt of around $9,000, which ballooned to close to $30,000 with interest and fees. Her home later sold for $242,000, and she was not given any of the proceeds from the sale.

Unfortunately, her story is not uncommon. Older adults, those on a low or fixed incomes, and Black and Latino/Hispanic households are most at risk of losing their homes in a tax foreclosure. Additionally, heirs' property—property passed down among family members without going through probate—is too often lost in a tax sale. Without record title to the property, heirs lack access to tax relief programs and may not be given notice of the tax sale foreclosure process.

In 2023, the U.S. Supreme Court ruled in *Tyler v. Hennepin County* that it is unconstitutional for a local government to take a property in a tax foreclosure and keep the equity after the tax debt and costs are paid. Many states will now need to take a close look at their tax foreclosure laws to make sure that they are aligned with the precedent set by *Tyler*. As they do, they should revise the laws to protect property owners from unnecessary tax foreclosures and preserve the equity in their homes.

Property tax systems can foster sustainable homeownership, be fair and reasonable for property owners, and still provide the revenue needed for quality public services.

Opportunities for State Action

Require Clear, Meaningful Notice at Every Stage of the Tax Foreclosure Process

Require comprehensive notices that use plain language, are translated into the consumer's language of choice, include information about tax exemptions and repayment plans, and note the consequences of each stage of the tax foreclosure process, including at a minimum:

- Notice of delinquency, remedies and assistance programs available, including an itemization of the total amount of taxes and fees owed
- Require documentation of attempts to reach homeowners and heirs prior to moving to the tax sale stage,
- Notice of time and place of the tax foreclosure hearing and sale, after the delinquency notice has been sent and if no response has been received by the homeowner or heirs
- Notice of the results of the sale, including:

  - Information about any third-party purchaser or other entities involved
  - Clear explanation of the owner's redemption rights and any action the owner must take to preserve their ownership rights

Make Sure that Notice Reaches the Homeowner, including any heirs

Ensure the owners, including persons who have inherited an ownership interest, receive notice of the foreclosure stages:

- By USPS First Class mail, certified mail, and, when possible, email
- By publication in local media, posting at the property, and posting online
- By personal service with hand delivery using a process server, delivered upon the initiation of the process used to terminate the owner's rights in the property

If the owner is deceased, the state should appoint an attorney ad litem to conduct due diligence in locating heirs, including a search of land, court, and other records and online resources.

Make Redemption Costs Affordable and Accessible

- Establish clear rights of redemption with reasonable, accessible processes
- Limit interest and penalty rates on redemption amounts by municipalities and private tax certificate purchasers

Establish Alternatives to Tax Sales

Create payment options to help owners avoid tax sales and retain valuable equity, including:

- Allowing payment plans with low interest rates and waiver of penalties
- Deferring taxes owed until the property is sold
- Requiring a minimum of four years between initiation of a property tax lien and the final tax foreclosure, to give the owner, including any heirs, time to resolve the delinquency

To Prevent Root Causes of Foreclosure, Protect Older Adults and Low-Income Households Who Struggle to Pay Property Taxes

Enact laws to protect those most at risk of losing their property to tax foreclosure, including:

- Deferring payment of taxes on a primary residence owned by someone 65 or older
- Setting a minimum amount of debt incurred before a tax foreclosure can be initiated
- Limiting taxes on primary residences to a percentage of the owner's income for certain lower-income owners
- Promoting available property tax relief programs through property tax statements, online resources, and other mailings
- Establishing a monthly payment schedule for property taxes

Create and Improve Property Tax Exemptions

Enact laws that favor expanded access to property tax exemptions, including:

- Creating flat dollar exemptions that exempt a larger percentage of the assessment on low-value homes and produce a more progressive distribution of tax obligations
- Ensuring that heirs who reside in the home are eligible for the same relief, if qualified, as any owner-occupant including by allowing alternative proof of ownership such as an affidavit
- Reducing burdensome barriers to accessing tax exemptions, such as annual or in-person renewal requirements

Require Market-Driven Tax Foreclosure Processes for Owner-Occupied/Involved Residential Properties if There is a Tax Sale

Establish appropriate pre- and post-sale processes that maximize sale proceeds.

- Attempt to sell the property using a real estate agent before conducting a public auction
- If the property does not sell on the open market, conduct a high bid public auction with a minimum bid amount based on a percentage of the property's appraised value
- Require recent appraisals to establish fair market value of the property being sold
- Return any excess sale proceeds to the former owner, including heirs if the former owner is deceased, and create a simple process for claiming the excess proceeds
- In the case of multiple heirs, create a presumption that heirs who have resided in the property as their primary residence for more than a year at the time of the sale have authority to receive the excess proceeds on behalf of all heirs, in the absence of a written agreement between heirs or objection by a non-resident heir
- If no owner or heir claims the excess proceeds, transfer the funds to the state's unclaimed property program (instead of to the municipality) to allow the owner/heir significant additional time to access the funds

For more information, please contact: Elizabeth Blosser, American Land Title Association, at eblosser@alta.org; Françoise Cleveland, AARP, at fcleveland@aarp.org, or Andrea Bopp Stark, National Consumer Law Center, at astark@nclc.org.

2024 VIRGINIA GENERAL ASSEMBLY REPORT:

REAL ESTATE LEGISLATION

By Erin Kormann

Erin graduated from the University of Mary Washington with bachelor's degrees in Psychology and Sociology. She went on to attend Brooklyn Law School where she graduated cum laude. After clerking in both the Second Circuit and the Fourth Circuit, Erin took some time off to start a real estate business and sold real estate for seven years. She then took a position with the Virginia REALTORS® Association first in the legal department as deputy general counsel and then the Government Affairs department where she currently serves as Legislative Counsel.

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, landlord-tenant, taxation, and disclosure), to more tangentially-related fields (e.g., conservation and local government) to evolving areas of real estate practice (e.g., data centers and supportive housing).

2024 Session By The Numbers

The 2024 Session of the Virginia General Assembly lasted for 60 days, convening on January 10, 2024, and adjourning *sine die* on Saturday, March 9, 2024. Since this was an even-numbered year, the legislature convened for sixty calendar days. In odd-numbered years, the legislature only convenes for thirty calendar days, with an option to extend the session for an additional thirty days. The reconvene session, also referred to as the "veto session," was held on April 17, 2024. A budget was not approved and the Governor scheduled a special budget session for May 13-May 15, 2024.

In all, 3,594 bills and resolutions were introduced during the 2024 session and 2,281 bills passed the House and the Senate. As of the reconvene session, Governor Youngkin had signed only 777 bills, vetoing 153. The Governor sent back amendments on 116 bills. Additionally, eighteen bills were referred to the Virginia Housing Commission for additional study over the summer. At the time this is being written, there are still 12 bills of interest that have not been acted on by the Governor. These bills had suggested amendments made by the Governor that were rejected by the Senate or House during the reconvene session. Once rejected, those bills are sent back to the Governor and he has the option to veto the bill or sign it in its original form. The deadline for this action is midnight on May 17, 2024. Since that deadline is after the printing of this article, those bills will be flagged in a separate section for you to reference on the General Assembly website after May 17, 2024, to confirm whether they were signed into law or not.

2024 Session at A Glance

The General Assembly continued to focus on larger issues this year such as casinos, marijuana, minimum wage, reproductive rights, gun control and sports arenas. The majority democratic legislature with its 51 new members also took an interest in housing supply, tenants' rights, and

alternative types of housing in the Commonwealth. Unlike last year, there were a large number of landlord-tenant bills with a strong focus on tenants' rights, junk fees, and affordability.

2024 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, and the fact that it is often not updated to reflect amendments to the bill, individual pieces of legislation should be reviewed carefully to gain a complete understanding of the legislation's potential impact and implications.

Unless otherwise noted, measures that passed the General Assembly will become effective July 1, 2024. Legislation could 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 is organized first by topic area, then chronologically, then separated by House, then Senate, within each topic area.

Civil Remedies and Procedure

In an effort to streamline existing law which allows tenants to petition to have dismissed unlawful detainer actions expunged, courts must now automatically expunge unlawful detainers that have been dismissed after the 30-day period has passed or voluntarily nonsuited after the 6-month period has passed. No further petition or court hearing is necessary. Automatic expungement will not apply when judgment has been entered in favor of the defendant, but the defendant can file a petition to have the record expunged. For unlawful detainer actions filed prior to July 1, 2024, the defendant must still file a petition for expungement and once the court determines all the timing criteria have been met the records will be expunged without further hearing. (*House Bill 73 – Patrick A. Hope*).

The General Assembly attempted to clean up the existing unlawful detainer law, while clarifying how and when a landlord or their attorney could amend the amounts due from the tenant. Although the changes to the law look substantial, much of it was actually moving language around to make the statute flow better and eliminating some of the legalese. The new language clarifies that a request to amend the amount due must be made on the original summons. There is also a process for amendment set forth when the request is not made on the original summons. Finally, if the request to amend is made on the summons, or the judge grants a request to amend, the plaintiff cannot file subsequent unlawful detainers or warrants in debt for amounts that could have been included in the amendment. (*House Bill 86 – Patrick A. Hope*).

An electronic signature or a digital image of a signature will now satisfy the requirement in current law that every pleading, motion, or other paper of a party be signed by at least one attorney of record. *(House Bill 171 – Karen Keys-Gamarra).*

When a foreclosure sale is initiated due to a default in payment of a subordinate security instrument, the subordinate mortgage lienholder must submit to the trustee an affidavit affirming whether monthly statements were sent to the property owner for each period of assessed interest, fees, or other charges. Any purchaser at a foreclosure sale must pay off any priority security instrument no later than 90 days from the date that the trustee's deed conveying the property is recorded in the land records. *(House Bill 184 – Marcus B. Simon).*

The General Assembly extended the expiration of the eviction diversion pilot program to July 1, 2025. *(House Bill 477 – Carrie E. Coyner; Senate Bill 50 – Mamie E. Locke).*

The amount that a householder may claim under the homestead exemption for real or personal property that is used as a principal residence increased from $25,000 to $50,000. This amount shall be adjusted by the department of Planning and Budget at three-year intervals, beginning on April 1, 2027, to reflect changes in the Consumer Price Index. (*House Bill 1339 – Marcus Simon*).

In response to growing media reports about squatters taking over properties and making claims of fake leases, the General Assembly created a process to allow for an emergency hearing on a summons for an unlawful detainer. If the summons is filed by an owner of a residential single family dwelling unit and the court finds based upon the evidence that (1) no rental agreement exists or has ever existed between the owner and the occupant; (2) the occupant occupies such dwelling unit without permission of such owner; and (3) the owner has given such occupant a written notice to vacate such dwelling unit at least 72-hours prior to the date of filing, an emergency hearing on such summons shall occur as soon as practicable, but not more than 14 days from the date of filing. If the case cannot be heard within 14 days from the date of filing, the emergency hearing shall be held as soon as practicable, but in no event later than 30 days after the date of the filing. (*House Bill 1482 – James A. "Jay" Leftwich*).

Any name change made in relation to a person's marriage or divorce is entitled to be recorded. It is no longer limited to name changes for women. *(Senate Bill 598 – Adam P. Ebbin).*

Commission, Boards, and Institutions

Any board of the Department of Professional and Occupational Regulation (DPOR) or the Department of Health Professions that issues a suspension upon any regulant of such board for having submitted a check, money draft, or similar instrument for payment of a fee required by law that is not honored by the bank or financial institution named is prohibited from considering or describing such suspension as a disciplinary action. *(House Bill 120 – Richard C. "Rip" Sullivan, Jr.).*

The Commissioner of Behavioral Health and Developmental Services must work with stakeholders to develop a plan to ensure that people with disabilities across the Commonwealth, including individuals affected by the settlement agreement entered into on August 23, 2012, pursuant to U.S. of America v. Commonwealth of Virginia, No. 3:12cv059-JAG have an opportunity to access affordable and inclusive housing. The Commissioner must make recommendations on various issues listed in the bill and present the plan to the Chairs of the House Committee on Health and Human Services and the Senate Committee on Education and Health by November 1, 2025. *(House Bill 327 – Michael B. Feggans).*

The quorum requirement for the Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects was lowered to at least one engineer, one architect, and one land surveyor. Licenses will no longer need to be signed by at least four members of the Board. These changes will sunset as of July 1, 2026. *(House Bill 350 – David Owen).*

The Department of Housing and Community Development (DHCD) must convene a stakeholder advisory group to evaluate and recommend revisions to the Uniform Statewide Building Code (USBC) Va. Code Ann. § 36-97 et seq. to permit Group R-2 occupancies to be served by a single exit, provided that the building has not more than six stories above grade plane.

The advisory group must submit its findings and recommendations to DHCD and to the Chairs of the House Committee on General Laws and the Senate Committee on General Laws and Technology no later than December 1, 2024*. (House Bill 368 – Adele Y. McClure; Senate Bill 195 – Schuyler T. VanValkenburg*).

The General Assembly amended how continuing education credits for real estate licensees are allocated. Licensees will now need 11 mandatory credit hours including two hours each in agency, contracts, and legal updates. The amount of elective credit hours required is reduced to five. There is no overall increase in the total credit hours required. The Virginia Real Estate Board must adopt regulations to allow implementation of the bill against current licensees beginning in the licensee's next full renewal cycle following July 1, 2024. *(House Bill 383 – Atoosa R. Reaser; Senate Bill 330 – Emily M. Jordan).*

The General Assembly made both technical and substantive amendments to Chapter 21 of Title 54.1 of the Virginia Code. Sections 54.1-2101 and 54.1-2107 are now repealed. The definition of a real estate salesperson was streamlined and moved to the overall definitions section under Va Code Ann. § 54.1-2100 and citations throughout the code were updated as such. Substantively, the definitions of a real estate broker and a real estate salesperson were amended. A real estate license will now be required to sell or offer to sell, buy or offer to buy, negotiate, or otherwise be in the business of buying and selling real estate contracts, including assignable contracts, on two or more occasions in any 12-month period. *(House Bill 917 – Irene Shin; Senate Bill 358 – Schuyler T. VanValkenburg).*

The General Assembly amended the duties of the Virginia Board for Asbestos, Lead, and Home Inspectors removing their responsibility to promulgate regulations concerning dust sampling technicians, renovators, and accredited renovation training programs. This was an effort to avoid confusion in setting up a state program when a federal program already exists. (*House Bill 1005 – David Owen; Senate Bill 560 – T. Travis Hackworth*).

For the purposes of real estate licensing, definitions for both a "place of business" and "branch office" were added to the Code of Virginia. The new law also specifies situations when a branch office license is not required to be obtained through the Real Estate Board. Any nonresident real estate broker residing in a state that mandates resident real estate brokers of the Commonwealth to maintain a place of business in such mandating state shall be required to maintain a place of business in the Commonwealth. *(House Bill 1237 – Rodney T. Willett; Senate Bill 437 – David R. Suetterlein).*

The Department of Health is now required to approve treatment units for alternative onsite sewage systems if they meet certain NSF/ANSI standards or certain testing requirements. *(House Bill 1431 – M. Keith Hodges)*.

DHCD must translate all forms and documents that it is mandated to create and provide on its website for use by residential landlords and tenants into the five non-English languages most commonly spoken in Virginia according to the most recent American Community Survey data published by the United States Census Bureau. DHCD may also accept materials translated by volunteers but must first verify the accuracy of such translations prior to making the translated materials available on its website *(House Bill 1487 – Kathy K.L. Tran).*

DHCD must convene a work group to assess the feasibility of and options for establishing a Virginia residential development infrastructure fund. The bill directs the work group to submit a report of its assessment to the General Assembly no later than the first day of the 2025 Regular Session. *(Senate Bill 489 – Jennifer D. Carroll Foy).*

In a further effort to make the Commonwealth an easy place to move to and work, the Real Estate Appraiser Board, the Real Estate Board, the Board for Waste Management Facility Operators, and the Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals will now, upon receiving an application, have to recognize current and valid licenses or certificates issued by a neighboring state as fulfillment of qualifications for licensure in the Commonwealth if there are no pending investigations or complaints, no disqualifying criminal records, and no discipline imposed by another state. (*Senate Bill 554 – Emily M. Jordan*).

Common Interest Communities

The General Assembly passed three bills in an effort to do some technical clean up to the new Resale Disclosure Act (Va Code Ann. § 55.1-2307 et seq.) that became law on July 1, 2023. The new law clarifies that failure to deliver a resale certificate within 14 days will deem the certificate unavailable. The 3-to-7 day language for termination was removed since it no longer applies in the new law, but if parties to a contract leave the termination period blank in the contract, the termination period will default to 3 days. Clarification on to whom the resale certificate can be delivered and how payment for a financial update should be made was included. The new law clarifies that a buyer cannot waive his right to receive a resale certificate from the seller. Additional technical changes were made. (*House Bill 105 – Atoosa R. Reaser; House Bill 876 – David L. Bulova; Senate Bill 526 – Angelia Williams Graves*).

Section 55.1-1816 of the Property Owners' Association (POA) Act (§ 55.1-1800 et seq.) governs the conduct of meetings of the board of directors without regard to whether the property owners› association is incorporated or unincorporated. The new law clarifies that such provisions shall not be interpreted to supersede corporate authorities otherwise established by law or governing documents. *(House Bill 723 – Michael J. Webert).*

No bill to enforce a lien shall be entertained if the real estate is the judgment debtor's primary residence and the amount of the judgment exclusive of interest and costs does not exceed $25,000. If the judgment is for assessments levied by a common interest community association pursuant to Code sections outlined in the law, no bill to enforce the lien shall be entertained if the total amount of the judgment does not exceed $5,000. Common interest community associations must now maintain individual assessment account records. (*House Bill 880 – David L. Bulova; Senate Bill 341 – Scott A. Surovell*).

Provisions of the POA Act (§ 55.1-1800 et seq.) and the Virginia Condominium (Condo) Act (§ 55.1-1900 et seq.) that authorize associations to rescind or reduce certain assessments necessary for the maintenance and upkeep of the common area or other association responsibilities, including maintenance, repair, and replacement of capital components were removed. Associations are now authorized to borrow money for certain purposes and assign all revenues to be received by such association to its creditors. Finally, the bill defines the term "reserve study". *(House Bill 1209 – David L. Bulova).*

The partial termination of a time-share project by a developer or an association is now allowed and the procedures to do so are included in the new law. There is a one-year statute of limitations on any legal challenge or action for damages or equitable relief arising out of any termination of a time-share project in accordance with the provisions of the Virginia Real Estate Time-Share Act, Va. Code Ann. § 55.1-220 et seq. The law included an enactment clause making it retroactive in accordance with Va. Code Ann. § 55.1-2201. *(House Bill 1241 – Tony O. Wilt; Senate Bill 600 – Mark D. Obenshain).*

In response to a recent court case, the General Assembly clarified that neither the POA Act (§ 55.1-1800 et seq.) or the Condo Act (§ 55.1-1900 et seq.) shall be construed to prevent such association from levying or using assessments, charges, or fees to pay the association›s contractual or other legal obligations in the exercise of the association›s duties and responsibilities. The bill also restricts such associations from imposing charges against one or more but less than all unit owners unless otherwise specifically authorized by the POA or Condo Acts. *(Senate Bill 672 – Adam P. Ebbin).*

Conservation

As is often the case, many of the bills this session that focused on environmental conservation also have a direct impact on real estate development.

The deadline to bring the CSO outfall that discharges into the Chesapeake Bay Watershed not under a state order or decree related to the CSO as of January 1, 2017, into compliance is extended for an additional year to July 1, 2026. *(House Bill 71 – David L. Bulova; Senate Bill 372 – Adam P. Ebbin).*

An interested party who seeks judicial review for the final decision of the Department of Environmental Quality (DEQ) must file such action in the Circuit Court of the City of Richmond within 30 days of the decision. The court is directed to hear and decide such action as soon as practicable after the date of filing. *(House Bill 122 – Richard C. "Rip" Sullivan, Jr.; Senate Bill 580 – R. Creigh Deeds).*

A person is prohibited from engaging in any land-disturbing activity until he has submitted to the Virginia Erosion and Sediment Control Program (VESCP) authority (1) an erosion and sediment control plan for the land-disturbing activity; and (2) the plan has been reviewed and approved. Where Virginia Pollutant Discharge Elimination System permit coverage is required, the VESCP authority will be required to obtain evidence of such permit coverage from the Department's online reporting system prior to approving the erosion and sediment control plan issuing its land-disturbance approval. *(House Bill 656 – Bill Wiley; Senate Bill 365 – Bill DeSteph).*

Money from the Forest Sustainability Fund must be allocated proportionally among localities that forgo tax revenues as a result of the use value assessment and taxation for real estate devoted for forest use. No locality shall receive an allocation of more than four percent or less than one-half of one percent of available funds from the Fund. *(House Bill 944 – Alfonso H. Lopez Senate Bill 129 – Frank M. Ruff).*

The State Water Control Board must waive the expiration of any ground water withdrawal permit for a well that (1) serves exclusively residential users; (2) is located in the Eastern Virginia Groundwater Management Area north of the Occoquan River; and (3) is located within five miles of any commercial or industrial permitted ground water withdrawal. Such waiver shall continue in force until the commercial or industrial permitted ground water withdrawals have been halted for five years. DEQ must then assess whether the termination of the commercial or industrial permitted ground water withdrawals has substantially mitigated the stress upon the aquifer and redetermine whether the permit for the residential well should be renewed. *(Senate Bill 337 – Richard H. Stuart).*

DEQ is authorized to utilize and incorporate comprehensive groundwater, surface water, and aquifer data in its decision-making processes related to the issuance and renewal of groundwater withdrawal permits and surface water withdrawal permits. Such data may include information relating to water levels, flow rates, and water quality. *(Senate Bill 581 – Richard H. Stuart).*

Consumer Protection

A supplier making automatic renewal or continuous service offers that automatically renew after more than 30 days and extend the automatic renewal or continuous service offer for a period of more than 12 months is required to notify the consumer of the option to cancel no less than 30 days and no more than 60 days before the cancellation deadline or the end of the current contract term. Such notice must contain information listed in the law. A violation of this law is prohibited by the Consumer Protection Act (Va Code Ann. § 59.1-200). *(House Bill 744 – Michelle Lopes Maldonado).*

A public utility, as defined in the bill, is prohibited from disconnecting service to a residential customer for nonpayment of bills or fees: (1) for 30 days after a state of emergency is declared by the Governor in response to a communicable disease of public health threat; (2) when the forecasted temperature low is at or below 32 degrees Fahrenheit within the 24 hours following the scheduled disconnection; (3) when the forecasted temperature high is at or above 92 degrees Fahrenheit within the 24 hours following the scheduled disconnection; (4) on Fridays, weekends, state holidays, and the day immediately preceding a state holiday; or (5) if the account is not at least 45 days in arrears. Each utility must notify its residential customers of such utility's disconnection for nonpayment policy and deliver notice of nonpayment of bills or fees to such customers prior to disconnection. *(House Bill 906 – Irene Shin; Senate Bill 480 – Lashrecse D. Aird).*

The Unfair Real Estate Service Agreement Act prohibits a real estate service agreement, as defined in the law, that is effective and binding for more than one year, from (1) purporting to run with the land or binding future owners of interests in the residential real property; (2) allowing the service provider to assign or transfer the right to provide services under the service agreement without notice to and written agreement of all parties to the service agreement; or (3) purporting to create a lien, encumbrance, or other real property security interest on the residential real property identified in the service agreement. Offering such an agreement to a consumer or submitting it for recordation is a violation of the Consumer Protection Act (Va. Code Ann. § 59.1-200). For those recorded agreements already in existence, the law prevents the transfer or assignment of an existing recorded unfair service agreement without the written consent of all parties. *(House Bill 1243 – Michelle Lopes Maldonado; Senate Bill 576 – Adam P. Ebbin).*

It will be a violation of the Consumer Protection Act (Va. Code Ann. § 59.1-200) to sell or offer for sale services as a professional mold remediator to be performed upon any residential dwelling without holding a mold remediation certification from the Institute of Inspection, Cleaning and Restoration Certification. *(House Bill 1270 – Delores L. McQuinn).*

[Although this bill will show up on the list of passed bills, it is definitely not what it seems.] The bill language consists of two parts. First, it would prohibit a landlord from charging a tenant any transaction or processing fee or similar surcharge for the use of an electronic fund transfer for the payment of a security deposit, rent, or any other amounts payable. Second, the bill would have made charging any transaction or processing fee or similar surcharge to a consumer for the use of an electronic fund transfer for payment for the purchase of a good or service a violation of the Consumer Protection Act (Va. Code Ann. § 59.1-200). Withdrawal of funds from an automated teller machine or fees charged in cases where the service is to expedite an electronic fund transfer were exempted. This bill passed the General Assembly over stakeholder opposition. The Governor amended the bill to add a reenactment clause requiring the bill to pass again in 2025 to become law. He also directed the State Corporation Commission to assess the proposed bill language and report its findings to the Chairmen of the House Com-

mittee on General Laws and the Senate Committee on General Laws and Technology no later than December 1, 2024 The House accepted the amendments which means that **although the bill is listed as passed and enrolled, it will not actually become law unless it passes again in 2025.** *(House Bill 1519 – Kannan Srinivasan).*

Counties, Cities, and Towns

As always, there were a large number of bills focusing on the power of local governments and the residential development process.

The Governor can now renew zones designated on or after July 1, 2005, for up to four five-year renewal periods and zones designated prior to July 1, 2005, can be renewed for up to two five-year renewal period periods. *(House Bill 61 – Thomas C. Wright, Jr.).*

The Department of Energy is now required, upon request, to provide technical assistance to localities, subject to available budgetary resources, as localities implement mandates related to onsite renewable energy generation, energy storage, and resilience standards for construction or renovation of certain public buildings. *(House Bill 151 – Dan I. Helmer; Senate Bill 245 – Jeremy S. McPike).*

Where any ordinance, resolution, notice, or advertisement is required by law to be published in a newspaper, it may instead be published in an online-only news publication subject to certain specified requirements. There is a process by which an online-only news publication must petition the circuit court to publish such ordinances, resolutions, notices, or advertisements. The Court is authorized to grant such publication for a period of one year. *(House Bill 264 – Patrick A. Hope; Senate Bill 157 – Jennifer B. Boysko).*

Although there were the usual variety of what are affectionately known as the "tree bills" brought before the General Assembly this year, only one passed. Under this new law, localities within planning district 8 can now use their tree canopy fund to maintain trees on both public and private property. Local ordinances allowed under this bill may now also provide two times the canopy credits if a site developer provides a stand assessment before development plans are created, for review by the local jurisdiction, and protects identified trees for conservation on the submitted site plans. *(House Bill 459 – Richard C. "Rip" Sullivan; Senate Bill 121 – Suhas Subramanyam).*

All localities are prohibited from establishing or enforcing a mandatory disclosure requirement on any real estate licensee, any party to a contract for the sale or listing of residential real property, or any authorized agent of such party. *(House Bill 467 – Marcus B. Simon; Senate Bill 354 – Mamie E. Locke).*

The current law allowing for the establishment of a community revitalization fund for the purpose of preventing neighborhood deterioration was expanded to apply to all localities. *(House Bill 478 – Carrie E. Coyner; Senate Bill 49 – Mamie E. Locke).*

Any locality may establish, by ordinance, one or more military centered community zones. The locality can offer unique benefits to businesses looking to locate within a military centered community zone for the purpose of serving the needs of military personnel such as reduction of permit fees, reduction of gross receipts tax, and payment of incentive grants. The ordinance may also give the locality regulatory flexibility with respect to zoning and permits. *(House Bill 619 – Marcia S. "Cia" Price; Senate Bill 343 – Aaron R. Rouse).*

Localities are prohibited from enacting or enforcing an ordinance that would prohibit renting a residential dwelling unit for a lease term of thirty consecutive days or longer. Any local re-

strictions on such rentals must be reasonable and not exceed the requirements for an owner-occupied residential property or a residential property rented for a lease term of 12 months or longer in the same zoning district. As is customary with these types of bills, this new law does not supersede contracts or common interest community documents. *(House Bill 634 – Marcus B. Simon; Senate Bill 308 – Jeremy S. McPike).*

The conditions of a special exception or special use permit may now include a period of validity. In the case of a special exception or special use permit for residential and electrical generation projects, the period of validity shall be no fewer than three years. The initial approval of a special exception, special use permit, or conditional use permit for a solar photovoltaic or energy storage project will give the landowner or developer a minimum of three years to commence the project and no change or amendment to any local ordinance, map, resolution, rule, regulation, policy, or plan adopted after the date of approval of the permit will adversely affect the right of the developer to commence and complete an approved development in accordance with the lawful terms of the permit with limited exceptions. *(House Bill 650 – Carrie E. Coyner).*

Localities are allowed, by ordinance, to charge enhanced civil penalties for certain local property violations on property that is zoned or utilized for industrial or commercial purposes. *(House Bill 755 – Wendell S. Walker).*

In response to Berry v. Bd. Of Supervisors of Fairfax County, 884 S.E.2d 515 (Va. 2023), the General Assembly passed a law providing that the provisions for conducting a meeting by electronic means due to a state of emergency stated in the Virginia Freedom of Information Act (FOIA) (Va. Code Ann. § 2.2-3700 et seq.) are declarative of existing law since March 20, 2020, with respect to the Governor's declared state of emergency due to COVID-19. Therefore, any meeting by a public body using electronic communication means occurring from that date until July 1, 2021, and any otherwise lawful action taken at such a meeting is validated with respect to FOIA so long as existing FOIA provisions regarding electronic and closed meetings were met. *(House Bill 816 – Mike A. Cherry; Senate Bill 244 – Jeremy S. McPike).*

A locality that establishes a local historic district pursuant to Va. Code Ann. § 15.2-2306 may provide tax incentives for the conservation and renovation of historic structures in such district, including tax rebates to the extent allowed by the Constitution of Virginia. *(House Bill 914 – Irene Shin).*

Any individual or company that has contracted with a landlord for the provision of parking enforcement who seeks to remove a resident's vehicle from a parking lot of a multifamily dwelling unit that is owned and maintained by a landlord, for an expired registration or inspection sticker must first post written notice on the vehicle providing at least 48 hours' notice to the resident prior to removing the vehicle and provide a copy of the notice to the landlord. The vehicle cannot be removed until 48 hours have passed from the posting of the notice. Any local towing ordinance must accommodate this requirement. *(House Bill 925 – Irene Shin).*

The threshold for petitioning a city or town for establishment of a tax assessment district is changed from not less than three-fourths of the landowners affected to now the owners of not less than three-fourths of the parcels affected. *(House Bill 1211 – C.E. Cliff Hayes, Jr.).*

The filing of a building permit or demolition application will stay a locality from issuing any permit to raze or demolish a historic landmark, building, or structure until 30 days after the rendering of the final decision of the governing body of the locality pursuant to a historic preservation ordinance. *(House Bill 1395 – Patrick A. Hope).*

Any locality may adopt an ordinance establishing a civil penalty for the razing, demolition, or moving of a building or structure that is located in a historic district or that has been designat-

ed by a governing body as a historic structure or landmark in violation of an ordinance adopted pursuant to Va. Code Ann. § 15.2-2306. The penalty cannot exceed twice the market value of the subject property. The process to enforce the ordinance is laid out in the bill. *(House Bill 1415 – Delores L. McQuinn).*

A local ordinance cannot prohibit an operator from offering a property as a short-term rental solely on the basis that such operator is a lessee or sublessee, so long as the property owner has given their permission. However, localities may enact an ordinance that limits a lessee or sublessee to one short-term rental within the applicable locality. *(House Bill 1461 – Candi Mundon King).*

Any county, city, or town can now, by ordinance, require the owner of any building that has been vacant for at least 12 months to register such building annually if it is a building (i) that meets the definition of "derelict building" in relevant law, (ii) that meets the definition of "criminal blight" in relevant law, or (iii) in which a locality has determined a person is living without the authority of the owner. *(House Bill 1486 – Joshua E. Thomas; Senate Bill 48 – Mamie E. Locke).*

The General Assembly standardized the frequency with which and length of time in which notices of certain meetings, hearings, and other intended actions of localities must be published. It also standardized the descriptive information in those notices. Notice provisions are organized into three groups: (i) publication required at least seven days before the meeting, hearing, or intended action; (ii) publication required twice, with the first notice appearing no more than 28 days before and the second notice appearing no less than seven days before the meeting, hearing, or intended action; and (iii) publication required three times, with the first notice appearing no more than 35 days before and the third notice appearing no less than seven days before the meeting, hearing, or intended action. *(House Bill 1488 – Rozia A. Henson, Jr.; Senate Bill 413 – Christopher T. Head).*

Orange County is now added to the list of localities that are authorized to establish a department of real estate assessment and to enter into an agreement with a contiguous county or city to establish a joint department of real estate assessment. *(Senate Bill 9 – Bryce E. Reeves).*

Local planning commissions are required to use the same approval process for residential development projects as is currently required for commercial development projects. *(Senate Bill 296 – Schuyler T. VanValkenburg).*

No local ordinance enacted after December 31, 2023, or any subsequent amendment, shall require that a special exception, special use, or conditional use permit be obtained for the use of a residential dwelling as a short-term rental where the dwelling unit is also legally occupied by the property owner as his primary residence. *(Senate Bill 544 – Lamont Bagby.*

If a locality has issued a building permit, despite nonconformance with the zoning ordinance, and a property owner, relying in good faith on the issuance of the building permit, incurs extensive obligations or substantial expenses in diligent pursuit of a building project that is in conformance with the building permit and the USBC (Va. Code Ann. § 36-97 et seq.), the locality cannot treat such building as an illegal use but rather as a legal nonconforming use. This adds additional protection to the current law which only requires that such project be completed and a certificate of occupancy issued or the owner has paid taxes on the structure for more than the previous 15 years. *(Senate Bill 701 – Timmy F. French).*

Housing

Under the Manufactured Home Lot Rental Act, Va. Code Ann. § 55.1-1300 et seq., when a rental agreement with a term of one year or more expires, it shall automatically renew with the same

duration and terms unless either party provides written notice of an intent not to renew at least 60 days prior to the expiration date. If the landlord provides written notice of any change in the terms, the tenant can notify the landlord within 30 days of receiving the notice that they choose not to renew unless the terms remain the same. Additionally, the landlord cannot charge a tenant for late payment of rent unless the charge is included in the rental agreement. Any such late charge cannot exceed the lesser of 10 percent of the periodic rent or 10 percent of the remaining balance due. Other clean up and clarifications were made. *(House Bill 572 – Karrie K. Delaney; Senate Bill 232 – Ghazala F. Hashmi).*

The General Assembly increased from $2,500 to $5,000 the minimum amount and from $5,000 to $10,000 the maximum amount that any person, firm, or corporation shall be fined when convicted of a third or subsequent offense of violating the provisions of the USBC (Va. Code Ann. § 36-97 et seq.) committed within 10 years of another such offense after having been at least twice previously convicted of such an offense. Additionally, violations of any provision of the USBC (Va. Code Ann. § 36-97 et seq.) at a dwelling unit of a multifamily property that the local governing body has declared blighted and where the local governing body has taken official action to enforce such provisions, shall be deemed a misdemeanor and punished by a fine of not more than $10,000. There are also penalties for subsequent offenses. *(House Bill 578 – Delores L. McQuinn; Senate Bill 538 – Lamont Bagby).*

Rules promulgated by the State Corporation Commission related to billing requirements and all other rules related to submetering or energy allocation equipment use by tenants of an apartment house, office building, shopping center, or campground shall apply to residential and nonresidential unit owners*. (House Bill 1376 – David A. Reid).*

In the Manufactured Home Lot Rental Act (Va. Code Ann. § 55.1-1300 et seq.), language regarding the sale of a manufactured home park to a developer was changed. Now, if the termination of a rental agreement is due to the sale of a manufactured home park to a buyer who is going to redevelop the park and change its use, each homeowner must be given $5000 in relocation expenses. *(House Bill 1397 – Paul E. Krizek).*

Landlord/Tenant

The General Assembly amended the language in Virginia Landlord Tenant Act (VRLTA), Va. Code Ann. § 55.1-1235, providing for early termination of rental agreement by military personnel to match the language in the Federal Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501 et seq. Specifically, language referring to a 35-mile radius was removed, and language referring to stop movement orders was added. This change resolves any conflicts between state and federal law. Notably this bill included an emergency clause which means the law became effective upon the governor's signature and is already law. *(House Bill 352 – Jackie H. Glass; Senate Bill 213 – Russet Perry).*

One of the few landlord-tenant bills that passed this General Assembly without amendment by the governor added an "end-date" to routine maintenance performed by the landlord. Under current law, the landlord must give at least 72-hours' notice of routine maintenance to be performed in the tenant's unit. The new law specifies that the routine maintenance must be completed within 14 days of delivery of the notice and the notice must state the last day on which the routine maintenance could be performed. *(House Bill 701 – Michael B. Feggans).*

After several failed attempts, this year the General Assembly amended the VRLTA provision for early termination of rental agreement by victims of sexual abuse or criminal sexual assault. Section 55.1-1236 of the Code of Virginia now covers victims who have obtained a permanent protective order pursuant to Va. Code Ann. § 19.2-152.10. The written notice of termination

provided for in this law is now effective thirty days after the notice of termination is served on the landlord. *(House Bill 764 – Karrie K. Delaney).*

After an amendment by the Governor, if a tenant gives notice to the landlord during the tenancy that his dwelling unit was in violation of an applicable building code, such violation posed a substantial risk to the health, safety, or welfare of a tenant, and such violation resulted in the tenant being excluded from his dwelling unit due to such unit being condemned, the landlord will be liable to the tenant for actual damages unless the condemnation was caused by the deliberate or negligent act or omission of the tenant, an authorized occupant, or guest or invitee of the tenant or an act of god or the lease was properly terminated pursuant to Va. Code Ann. § 55.1-1240. *(House Bill 957 – Alfonso H. Lopez).*

A landlord must provide, beginning on the first page of the written rental agreement, a description of any rent and fees to be charged to the tenant in addition to the periodic rent. Immediately above the list of fees, the written rental agreement must state: No fee shall be collected unless it is listed below or incorporated into this agreement by way of a separate addendum after execution of this rental agreement. *(House Bill 967 – Alfonso H. Lopez; Senate Bill 405 – Jennifer B. Boysko).*

Landlords must provide a copy of the signed rental agreement and the statement of tenants' rights and responsibilities to the tenant within 10 business days. A landlord must also provide the tenant with an additional hard copy once per year upon request or maintain such rental agreement in an electronic format that can easily accessed or shared with the tenant upon request. Any additional electronic copies must be provided at no charge to the tenant. *(House Bill 1272 – Katrina Callsen).*

Property and Conveyances

To correct a technical error from the 2019 recodification of Title 55 of the Code of Virginia, the General Assembly relocated certain provisions of Title 55.1 related to assignments of rent, from a chapter related to nonresidential tenancies to the chapter related leases. *(House Bill 312 – Debra D. Gardner; Senate Bill 589 – William M. Stanley, Jr.).*

The period for which a nonvested property interest held in trust may vest or terminate, or for which a power of appointment over property or property interests may be exercised is extended from 90 years to 1,000 years. Such extension applies only to such interests or powers that were created on or after July 1, 2024, and does not apply to real property held in trust or a power of appointment over real property granted under a trust. The current law that allows the terms of a trust instrument to provide an exception to the Uniform Statutory Rule Against Perpetuities shall apply only to a nonvested interest in or power of appointment over personal property held in trust, or a power of appointment over personal property granted under a trust, if such interest or power was created between July 1, 2000, and June 30, 2024, but shall not apply to such interests or powers created on or after July 1, 2024. *(House Bill 836 – Rae Cousins; Senate Bill 470 – Mark D. Obenshain).*

The General Assembly established a process whereby a manufactured home owner who is not listed as the owner of such manufactured home on its title may detitle such manufactured home to convert the home to real property. *(House Bill 1538 – Terry G. Kilgore).*

Taxation

A treasurer or other duly authorized official responsible for collecting taxes may sell, at public auction, any parcel of real property that is assessed at more than $25,000 but no more than

$40,000 so long as the taxes are delinquent for three years, the parcel is not subject to a recorded mortgage or deed of trust lien, it is located within a designated urban redevelopment or revitalization zone, it is unimproved, and measures no more than .5 acres. *(House Bill 258 – Shelly A. Simonds).*

The General Assembly approved a referendum in the November 5, 2024 election to approve or reject an amendment to the Constitution of Virginia that would expand the real property tax exemption that is currently available to the surviving spouses of soldiers killed in action to the surviving spouses of soldiers who died in the line of duty. *(House Bill 558 – Phil M. Hernandez; Senate Bill 4 – Jeremy S. McPike).*

For the purposes of recordation taxes, the value of a property interest conveyed shall be the most recent property tax assessment for such property at the time the property is conveyed. *(House Bill 574 – Joshua E. Thomas).*

In a locality where the total assessed value of real property would result in an increase of one percent or more in the total real property tax levied, the notice of assessment changes shall state the tax rate that would levy the same amount of real estate tax as the previous year when multiplied by the new total assessed value of real estate. *(House Bill 639 – Richard C. "Rip" Sullivan; Senate Bill 677 – Tara A. Durant).*

The historic rehabilitation tax credit maximum is increased from $5 million to $7.5 million beginning in taxable year 2025. *(House Bill 960 – Alfonso H. Lopez; Senate Bill 556 – Angelia Williams Graves).*

For taxable years beginning on or after January 1, 2024, but before January 1, 2026, a participating landlord renting a qualified housing unit in an eligible non-metropolitan census tract shall be eligible for a credit against the tax levied, as defined in the law, in amount equal to 10 percent of the fair market value of the rent for the unit, computed for that portion of the taxable year in which the unit was rented by such landlord to a tenant participating in a housing choice voucher program. DHCD shall administer and issue the tax credit. The new law sets maximum tax credit amounts for fiscal years beginning after July 1, 2024, depending on the type of tax credit being claimed. If the amount of the qualified requests for tax credits for such participating landlords in the fiscal year exceeds $500,000, DHCD will prorate the tax credits among the qualified applicants. *(House Bill 1203 – Rodney T. Willett).*

The General Assembly allowed for a constitutional amendment to be presented during the November 2024 general election that would expand the real property tax exemption that is currently available to the surviving spouses of soldiers killed in action to the surviving spouses of soldiers who died in the line of duty with a Line of Duty determination from the U.S. Department of Defense. *(Senate Bill 240 – Jeremy S. McPike).*

Bills Waiting for Governor Action – May 17, 2024

The bills reviewed in this section are still awaiting action by the Governor. The Governor proposed amendments to these bills during the reconvene session that were rejected by the Senate and/or the House. He has until midnight on May 17, 2024 to decide whether to veto the bill or sign it in its original posture as passed by the legislature. **If these bills are of interest to you, please review them after the deadline at http://leg1.state.va.us/lis.htm to see if they were signed into law.**

The General Assembly passed a bill that would have established a presumption that any resident of a common interest community association who provides bookkeeping, billing, or re-

cordkeeping services for such community for compensation is an independent contractor. The bill also exempted common interest community associations from the definition of "employer" where a resident provides such services. The Governor amended the bill to include a reenactment clause which would require the bill to pass again in 2025 to become law. This amendment was rejected and the bill is now awaiting the Governor's response. *(House Bill 214 – Vivian E. Watts).*

The Board of Contractors would be required to adopt regulations requiring all Class A, B, and C residential contractors to use legible written contracts including specific terms and conditions as laid out in the bill. In transactions involving door-to-door solicitations *or* any residential rooftop solar installation, the Board must require that a statement of protections be provided by the contractor to the homeowner, consumer, or buyer. The Governor requested an amendment that would have instead required DPOR to convene a work group of relevant stakeholders to develop recommendations for any additional consumer protections regarding the sale, lease, or installation of a solar energy facility with a generating capacity of 25 kilowatts or less. DPOR would be required to submit a written report of recommendations by November 30, 2024. That amendment was rejected by both the House and the Senate and the bill is now awaiting the Governor's response. *(House Bill 576 – Jackie H. Glass; Senate Bill 313 – Schuyler T. VanValkenburg).*

This bill would have increased the required notice of the landlord's intention to terminate the rental agreement for a dwelling unit that has been damaged or destroyed by fire or casualty to 21 days' notice. Additionally, prior to giving such notice, the landlord would have to (1) make a reasonable effort to meet with the tenant to discuss reasonable alternatives and to offer the tenant a substantially similar unit, if one is available; or (2) determine that the damage was caused by the tenant's failure to maintain the dwelling unit in accordance with certain provisions. Within seven days of receiving such notice a tenant would be allowed to make a written request to have the landlord reevaluate the damage to and habitability of the rental unit. The Governor amended the bill to include a reenactment clause which would require the bill to pass again in 2025 to become law. The Governor also included an amendment requiring DHCD to review all amendments made to the VRLTA (Va. Code Ann. § 55.1-1200 et seq.) within the past five years and the effects of such amendments on the cost, accessibility, and availability of rental dwelling units in the Commonwealth. DHCD must also analyze whether such amendments have facilitated or hindered the Commonwealth›s efforts to address statewide housing needs. These amendments were suggested by the Governor on many landlord-tenant bills instead of an outright veto. The House rejected these amendments and the bill is now awaiting the Governor's response. *(House Bill 588 – Adele Y. McClure).*

The General Assembly passed this bill for the second year in the row, only to run into problems with the Governor again. The bill provided that if a condition exists in a rental dwelling unit that constitutes a material noncompliance by the landlord with the rental agreement or with any provision of law that, if not promptly corrected, constitutes a fire hazard or serious threat to the life, health, or safety of tenants or occupants of the premises, a locality may institute an action for injunction and damages to enforce the landlord's duty to maintain the rental dwelling unit in a fit and habitable condition, provided that (i) the property where the violation occurred is within the jurisdictional boundaries of the locality and (ii) the locality has notified the landlord who owns the property, either directly or through the managing agent, of the nature of the violation and the landlord has failed to remedy the violation to the satisfaction of the locality within a reasonable time after receiving such notice. Despite support from most stakeholder groups, last year the bill was vetoed. This year, the Governor amended the bill with his standard landlord-tenant amendments. First, a reenactment clause requiring the bill to pass again in 2025. Second, a requirement that DHCD review all amendments made to the VRLTA (Va. Code

Ann. § 55.1-1200 et seq.) within the past five years and the effects of such amendments on the cost, accessibility, and availability of rental dwelling units in the Commonwealth. DHCD must also analyze whether such amendments have facilitated or hindered the Commonwealth›s efforts to address statewide housing needs. Both the House and the Senate rejected these amendments and the bill is now awaiting the Governor's response. *(House Bill 597 – Marcia S. "Cia" Price; Senate Bill 479 – Lashrecse D. Aird).*

Delegate Rae Cousins proposed legislation that would have prevented a court from bifurcating an unlawful detainer case if the defendant contested the amount of rent and damages alleged to be due and owing to the plaintiff at the initial hearing. The Governor amended the bill to make this permissive, allowing a court to choose to deny a request for bifurcation. The House rejected this amendment stating that it gutted the premise of the bill. The bill is now awaiting the governor's response. *(House Bill 740 – Rae Cousins).*

In its final form, this bill would have prohibited the Governor or DHCD from modifying any regulation in the USBC (Va. Code Ann. § 36-97 et seq.) prior to the conclusion of the Commonwealth›s next triennial code development process. The Governor recommended an amendment that would instead set forth a process whereby when any legislative bill requiring the Board of Housing and Community Development (Board) to amend the USBC is filed during any session of the General Assembly, the Chairman of the committee to which the bill is referred shall request that the Board prepare an evaluation of the legislation to determine its necessity and impact on public health, safety, and welfare. Once such a request is received, the Board shall prepare an evaluation and forward it to the Governor and to the Clerk of the House of Delegates for House Bills and the Clerk of the Senate for Senate bills no later than November 1 of that year for distribution to the Chairman of each committee of the General Assembly. The House rejected the Governor's amendments and the bill is now awaiting his response. *(House Bill 950 – Alfonso H. Lopez).*

A landlord would be required to provide an applicant, upon request, a summary page that outlines key rental agreement provisions, including the duration of the lease, the amount of rent and the date upon which such rent shall be due, an explanation of any deposits and late fees that may be charged, and any termination provisions. A landlord who owns or manages more than four rental dwelling units or more than a 10 percent interest in more than four rental dwelling units, whether individually or through a business entity, in any locality in the Commonwealth that regularly provides official government communications in languages other than English would be required, upon request of the prospective tenant, to provide the summary page in any of such languages. DHCD was directed to develop and maintain a sample summary page with blanks or space for landlords to fill in, as applicable, for the required information. The sample summary shall be in at least 14-point type and shall be available in English and any language for which any locality in the Commonwealth regularly provides official government communications. The Governor amended the bill with language from another bill that already passed, House Bill 967, adding a fee disclosure statement to the lease that would require a landlord to provide, beginning on the first page of the written rental agreement, a description of any rent and fees to be charged to the tenant in addition to the periodic rent. Immediately above the list of fees, the written rental agreement shall state: No fee shall be collected unless it is listed below or incorporated into this agreement by way of a separate addendum after execution of this rental agreement. The House rejected the Governor's proposed amendments and the bill is now awaiting his response. *(House Bill 955 - Alfonso H. Lopez).*

Landlords would be prohibited from requiring a tenant to (i) pay any fee for the maintenance or repair of any unit subject to such rental agreement unless necessitated by the tenant's violation of a requirement of the Act or (ii) pay any fee to submit periodic rent payments or other

amounts due, unless the landlord offers an alternative method of payment that does not include additional fees. The Governor amended the bill to remove the prohibition on charging a tenant any fees for maintenance or repair. The House and the Senate rejected the Governor's amendments and the bill is now awaiting his response. *(House Bill 993 – Kathy K.L. Tran; Senate Bill 422 - Adam P. Ebbin).*

Prior to collecting any monies or information from an applicant, landlords governed by either the VRLTA (Va. Code Ann. § 55.1-1200 et seq.) or Manufactured Home Lot Rental Act (Va. Code Ann. § 55.1-1300 et seq.) would be required to notify applicants or post in a conspicuous manner (1) the amount and purpose of fees to be charged to such applicant; (2) information that may be used to assess such applicant›s eligibility for tenancy; and (3) any criteria that may result in automatic denial of an application. Landlords would be required to review applications in the order they are received. If after reviewing an application a landlord took an adverse action, the landlord would have to send notice in accordance with the Fair Credit Reporting Act, including a statement of the reasons for such adverse action. Finally, the bill required such landlords to refund any funds received in excess of the landlord›s actual expenses and damages within 14 days after the landlord›s rejection of an application or an applicant›s failure to rent a unit upon being notified of his eligibility for tenancy. The bill stated that any application not reviewed within 14 days constituted a rejection. The Governor amended the bill to remove items (2) and (3) above from the applicant notification. The Governor also removed all language requiring the landlord to issue a statement of reasons for the adverse action. Finally, the Governor removed the language stating that any application not reviewed within 14 days constituted a rejection. The House rejected all of the Governor's suggested amendments and the bill is now awaiting the Governor's response. *(House Bill 996 – Bonita G. Anthony).*

Bills Referred to the Virginia Housing Commission

The Virginia Housing Commission (VHC) is a standing Commission comprised of legislative members as well as Governor Appointees that exists to study and provide legislative solutions to ensure the availability of safe, sound and affordable housing in Virginia. The Commission also studies and makes recommendations concerning real property, community development, land-use, and other housing-related issues. Proposed bills, or even parts of proposed bills are often referred to the VHC during the General Assembly session for the commission to study over the summer. This study often results in proposed legislation being written, amended, and then presented in the following year's General Assembly. This year the General Assembly referred 18 bills for further study by the VHC. The VHC meeting schedule is available online. None of these bills were passed into law, unless otherwise stated below.

Senator Paul E. Krizek proposed legislation that would have prevented a common interest community association from prohibiting an owner from installing managed conservation landscaping, as defined in the bill, upon such owner's property unless such prohibition was recorded in the declaration for the association. An association would have been allowed to establish reasonable restrictions concerning the management, design, and aesthetic guidelines for managed conservation landscaping features. The House Committee on General Laws referred the bill to the VHC for further study. *(House Bill 528 – Paul E. Krizek).*

Delegate Carrie E. Coyner proposed legislation that would have required that a locality's zoning ordinances for all purposes shall consider a certified recovery residence in which individuals with substance use disorder reside as residential occupancy by a single family. The bill specifies that no conditions more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption shall be imposed on such a residence. The House Committee on Counties Cities and Towns referred the bill to the VHC for further study. *(House Bill 646 – Carrie E. Coyner).*

The House General Laws committee referred to the VHC a bill that would have established a mandatory flood disclosure for both real estate and rental transactions. *(House Bill 863 – Phil M. Hernandez).*

Senator Bulova proposed legislation that would have permitted any local government to purchase development rights or accept the donation of development rights in an effort to preserve and provide affordable housing. Although the bill passed in the House, the Senate referred the bill to the VHC. *(House Bill 878 – David L. Bulova).*

A controversial bill that has been proposed before would have sought to require a locality to include in its zoning ordinances for single-family residential zoning districts accessory dwelling units (ADUs), as defined in the bill, as a permitted accessory use. The bill set forth a process for issuing permits for an ADU and would have prohibited a locality from requiring (i) dedicated parking for the ADU; (ii) lot sizes or setbacks for the ADU greater than that of the primary dwelling; (iii) consanguinity or affinity between the occupants of the ADU and the primary dwelling; and (iv) redundant water, sewer, or septic capacity for the ADU. The legislation passed in the Senate, but the House Committee on Counties Cities and Towns referred it to the VHC for further study. *(House Bill 900 – Kannan Srinivasan; Senate Bill 304 – Saddam Azlan Salim).*

These bills proposed to establish the Faith in Housing for the Commonwealth Act. They Act would have permitted a religious organization, as defined in the bill, to construct affordable housing on real estate owned by such religious organization (i) on or before January 1, 2024, or for a period of not less than five years, and (ii) for which the religious organization retains a majority ownership interest. Both bills were referred to the VHC for study prior to the 2025 General Assembly session. *(House Bill 1124 – Betsy B. Carr; Senate Bill 233 – Ghazala F. Hashmi).*

This legislation would have made several changes to local government land use approval processes, including (i) prohibiting use of the comprehensive plan as the basis, in whole or in part, for the disapproval of a site plan that is otherwise in conformity with duly adopted standards, ordinances, and statutes and (ii) allowing automatic approval of certain land use applications rather than a right to petition the circuit court, as provided under current law, if a locality does not approve or disapprove the application within the required timeframe. The bill also would have reduced from 12 months to four months the time within which a locality must initially act upon certain proposed zoning ordinance amendments and required a locality to act on all such proposed amendments to the zoning ordinance or map that it has previously disapproved within 45 days after an amended proposal has been resubmitted for approval. Committees in both the House and Senate referred the legislation to the VHC for further study. *(House Bill 1236 – Daniel W. Marshall, III; Senate Bill 721 – Tammy Brankley Mulchi).*

This legislation would have required the real estate assessor of a locality to appraise affordable rental housing in accordance with the income approach. If the real estate assessor failed to follow generally accepted appraisal practices, the assessment would not be entitled to a presumption of correctness, and if the owner then successfully appealed such assessment, the locality would have to reimburse the owner for attorney fees and costs incurred. The legislation was referred by the House Finance Committee to the VHC for further study. *(House Bill 1446 – Carrie E. Coyner).*

Proposed legislation that the General Assembly reviewed in both 2023 and 2024 sought to allow an owner or lessee of real property who sought to improve, repair, or maintain his property to petition the circuit court for a license to enter adjoining property for the purpose of

performing the improvements, repairs, or maintenance when the property is so situated that it is impossible to perform the improvements, repairs, or maintenance without entering such adjoining property and permission to enter such adjoining property had been denied. This legislation failed in 2023 and was referred to this VHC for further study after this session. *(Senate Bill 123 – Schuyler T. VanValkenburg).*

Senator Mamie E. Locke's bill prohibiting localities from establishing mandatory real estate disclosures did pass the General Assembly and will become law on July 1, 2024. However, during testimony the issue of localities wanting to establish mandatory airport noise disclosures by ordinance was raised, specifically with respect to Dulles Airport. This separate issue was referred to the VHC for additional study. *(Senate Bill 354 – Mamie E. Locke).*

This bill sought to create a nonrefundable income tax credit in taxable years 2024 through 2028 for eligible expenses incurred in converting office buildings to residential uses. No single taxpayer could claim more than $2.5 million in credits in any single taxable year and the credit would have been subject to an aggregate annual cap of $30 million. The Senate Finance and Appropriations Committee referred the bill to the VHC for further study. *(Senate Bill 512 – Angelia Williams Graves).*

Senator Angelia Williams Graves proposed creating a tax credit for taxable years 2024 through 2028 for homeowners who sell their primary residence in the Commonwealth to a first-time homebuyer. The credit would be equal to two percent of the sales price of the property, not to exceed $5,000. The bill was amended to instead apply the tax credit when a homeowner sold their primary residence to an owner-occupant as disclosed on the standard purchase agreement. Senate Finance and Appropriations referred the bill to the VHC for further study. *(Senate Bill 555 – Angelia Williams Graves).*

This bill sought to restrict any partnership, corporation, or real estate investment trust that managed funds pooled from investors, is a fiduciary to such investors, and has $50 million or more in net value or assets under management from acquiring any interest in residential land in the Commonwealth. Any existing landowners in this category would have been required to register with the Secretary of the Commonwealth on or after July 1, 2024. The Senate Committee for Courts of Justice referred this bill to the VHC for further study. *(Senate Bill 693 – Glen H. Sturtevant, Jr.).*

Conclusion

While casinos, marijuana, minimum wage, reproductive rights, gun control and sports arenas continued to dominate the conversation at the General Assembly, there was a notable increase this year in landlord-tenant bills this year targeting tenant rights, disclosures, and junk fees. The acrimony between the legislature and the Governor's office led to amendments, vetoes, and lingering confusion on bills that actually passed and what they will actually do. I hope these summaries were helpful to your practice and ultimately your clients.

VIRGINIA REAL ESTATE CASE LAW UPDATE (SELECTED CASES)

By Michael E. Derdeyn and Christy L. Murphy

Michael E. Derdeyn is a partner at the law firm of Flora Pettit PC. Mike's practice focuses on the areas of commercial and real estate litigation; his real estate litigation practice focuses primarily on real estate contracts, title disputes, and access issues, including representing developers in establishing access necessary for their projects. Mike is a regular presenter for the Virginia CLE on topics including title disputes, real estate contracts, and water law.

Christy L. Murphy is a partner at the law firm of Bischoff Martingayle, PC. Christy represents clients in all types of real estate litigation including, but not limited to, forgery/fraud, easements, title issues, land-use issues, unlawful detainers and possession of real property, and partition. Christy represents clients in the state courts and in the Eastern District of Virginia. Christy represents clients in appeals in the Virginia Court of Appeals, the Virginia Supreme Court, and the Fourth Circuit Court of Appeals.

A. FEDERAL COURT OF APPEALS

1. SAS Associates 1, LLC v. City Council for the City of Chesapeake, 91 F.4th 715 (Ct. App. 2024)

Facts: Plaintiff developers filed suit against the City Council for the City of Chesapeake alleging the City's denial of the Developers' rezoning application violated their equal protection rights. Developers sought to rezone a ninety-acre assemblage of property from agricultural, general business, and single family residential to a mixed-use development containing multi-family units and commercial space. Developers filed two rezoning applications, one in 2016 and one in 2018, both of which were recommended by the Planning Commission as satisfying level-of-service requirements regarding infrastructure and as being consistent with the comprehensive plan. City Council denied both applications after public hearings that involved a number of objections by neighboring property owners. Developers then filed their complaint alleging equal protection violations, claiming that City Council had approved ten "similarly situated" developments and that the denial of the Developers' applications were based on discriminatory animus.

Lower Court Ruling: Chesapeake filed a motion to dismiss pursuant to Rule 12(b)(6) which was granted without leave to amend. The Developers appealed that ruling.

Holding: Affirmed.

Discussion: After expressing a general reluctance for federal courts to become involved in local legislative decisions, the Court identified the elements of a claim for an equal protection application – a plaintiff must plead sufficient facts "to demonstrate plausibly that they were treated differently from others who were similarly situated and that the unequal treatment was the result of discriminatory animus." The Court held that the Developers failed to allege facts to support either element.

With respect to discriminatory animus, a plaintiff has to allege some basis to support the claim, i.e. evidence of a pattern of historical discrimination, statements in the record reflecting a discriminatory animus, or facts to establish that a decision maker harbored ill will toward an applicant or a class of which she was a member. In this case, the Developers attempted to allege discriminatory intent based on statements by a council member regarding traffic congestion, drainage concerns, and school capacity. The Court found that those statements related to precisely the kind of concerns that local governments routinely consider and do not reflect any discriminatory animus.

The Developers also failed to identify a similarly situated property. Because discretionary zoning decisions are not generally governed by "a clear standard against which departures, even for a single plaintiff, can be readily assessed," a person complaining of a zoning violation must "show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." The Developers could not satisfy this burden with the ten allegedly similar developments. Of those developments, nine were constructed between 1960 and 2009, before recent demographic changes. The only development within the same time frame was located 1.3 miles away, on a different road and in a different part of the City. In addition, none of the comparators included commercial components and none requested the same combination of zoning classifications.

B. FEDERAL CASES

1. *Carner v. Clements* 2023 WL 2764762 (W.D. Va. 2023)

Facts: Carner and her ex-husband obtained a loan secured by a deed of trust on their marital home. Plaintiff claimed she was unaware that her ex-husband fell behind on the payments. The deed of trust was to the benefit of MERS and in February 2014, MERS assigned the deed of trust to HSBC Bank USA on behalf of a securities trust. In April 2015, HSBC assigned it to Barclays Bank, PLC who then assigned it to Wilmington Savings Fund Society, FSB, for a trust. In July 2016, the Vice-President of Carrington Mortgage Services, LLC as attorney-in-fact for Wilmington executed an appointment of substitute trustee appointing Clements as the substitute trustee.

Clements took steps to foreclose and on September 14, 2016, conducted a foreclosure sale of the property. The plaintiff filed suits which ultimately resulted in this case for alleged failure to provide proper notice, breach of contract pertaining to the appointment of substitute trustee, and failure to obtain the highest possible price at the sale. The defendants filed a motion to dismiss and attached a notice letter and a federal tax lien for the property to the motion. The district court converted the motion to dismiss to a motion for summary judgment and gave the parties time to complete discovery before a ruling was made.

The plaintiff failed to cooperate in any discovery plan and was non-responsive to the attempts to plan for discovery. The defendants filed a motion for clarification asking for the court to rule on the motion for summary judgment in their favor.

Holding: The district court granted the motion for clarification and awarded summary judgment to the defendants.

Discussion: The trustee produced notices of foreclosure properly addressed, one with proof

of certified mail that was unclaimed and one sent by regular mail. Plaintiff claimed she did not get notice. The court held that "the law does not require proof that the homeowner actually received the notice, only that notice be given, and the terms of mailing are laid out by statute and deemed sufficient compliance with the notice requirement." The court also found no breach of contract that arose out of the appointment of substitute trustee. Lastly, the court held that there was no breach due to the sales price because considering the price and the tax lien, was not "so grossly inadequate as to shock the conscience."

2. *Landfall Trust LLC v. Fidelity National Title Insurance Company,* 2023 WL 6406400 (E.D. Va. 2023)

Facts: In 2002 developers recorded a Declaration of Covenants, Conditions, and Restrictions for the Henry's Island subdivision in Lancaster County. The Declaration included a subdivision plat for a 10-lot subdivision and provided for a variety of easements for roads and utilities. The Declaration also included a Drainfield Easement Plat depicting two different sets of drain fields, the "Primary Drainfield" and the "Reserve Drainfield" for use for the lots in the subdivision. The Declarant reserved the right to grant the surface use of those areas to the owners of lots 7 and 8.

In 2018, Landfall purchased Lots 9 and 10 and Fidelity issued a title insurance policy. The title policy insured title in lots 9 and 10, together with access easements for ingress and egress. The title policy made no reference to the drain fields.

In 2021, Landfall entered into a contract to sell Lots 9 and 10 to Crotty for 1.55M. Crotty sought a title insurance policy through Fidelity, which issued a binder identifying title as being vested in Landfall with respect to Lots 9 and 10 and in the HOA with respect to any drain field easement. Fidelity required that the HOA join in the deed to convey the drain field easement.

Crotty terminated the contract and Landfall requested Fidelity to provide coverage. Fidelity then issued Landfall a check in the amount of $90,000 to represent the diminution in value of the because of the lack of clear access easements.

In April of 2022, Landfall filed suit against Fidelity for breach of contract seeking $285,000 in damages, representing the remaining amount of coverage under the policy. Landfall moved for summary judgment on the ground that Fidelity refused to recognize Landfall's ownership of the drain field easements. The Court denied the motion for summary judgment because the "ownership" of the drainage easements was not sufficiently developed in the record to enable the court to grant summary judgment.

Subsequently, Fidelity filed motions for summary judgment, including on the following bases: (i) that issues concerning the drainage easements cannot be the subject of a breach of contract claim because the property description in Exhibit A to the insurance policy makes no reference to those interests, and (ii) that Fidelity has no liability pursuant to the cooperation clause in the insurance policy, which excuses the insurer from any loss or damage assumed by the insured in settling a claim without the insurer's consent.

Holding: The Court denied the motions for summary judgment on these bases because (i) the parties had not yet adequately briefed this issue of contract interpretation and "plans on ordering re-briefing" and (ii) the settlement with Crotty involved an issue as to which Fidelity had disclaimed coverage prior to settlement. The Court found that Virginia case law was clear that when an insurer denies liability under a policy before a settlement is reached, the

insurance company cannot rely on the cooperation clause to deny coverage. It is worth noting that in this case the insured notified Fidelity on February 1, 2023 that it planned to conduct a mediation with Crotty before the end of that month, that Fidelity denied coverage by letter dated February 23, and the mediation was conducted and the settlement was reached on February 28.

3. *Thomas Jefferson Crossings Homeowners' Association, Inc. v. Etemadipour,* 2023 WL 6644583 (W.D. Va 2023)

Facts: The defendants purchased three lots in the subdivision. The lots were subject to covenants and restrictions contained in the bylaws of the association. One such restriction was a requirement that the architectural review board evaluate any construction on the lots before it commenced. However, it was undisputed that the architectural review board did not exist at the time the defendants were building their homes.

The plaintiff contended that there were deficiencies with the buildings constructed by the defendant. The plaintiff filed suit for breach of contract and the court was considering the defendant's motion for summary judgment.

Holding: The district court granted the defendant's motion for summary judgment on the issue of whether demolition was an appropriate remedy for any breach of contract and denied the remainder of the summary judgment motion finding material facts in dispute.

Discussion: The district court found disputed material facts on the issue of whether the defendants breached the contract. This was based on an analysis of the prevention doctrine that can be used offensively or defensively. Generally, in every contract there is an implied condition that one party will not prevent the other from performing. The defense asked the court to grant summary judgment by using the doctrine defensively, asserting that the association prevented them from performing under the contract due to its failure to form the review board.

The district court, having observed that there may have been an alternate review method provided, found there was a material fact in dispute about whether the association prevented the defendant from performing under the contract. Regardless, the district court granted summary judgment finding that tearing down the homes was not an appropriate remedy for the alleged breaches of contract. The court found that the demolition was "grossly out of proportion with the relief sought." In finding that real covenants must be strictly construed, the district court held that such a remedy for something like a slab construction v. a crawl space construction would be "oppressive or otherwise inequitable."

C. VIRGINIA SUPREME COURT CASES

1. *McKeithen, Trustee v. City of Richmond,* 893 S.E.2d 369 (Va. 2023)

Facts: This dispute arose from Richmond's processing of the sales proceeds from a real estate tax sale of real property located in the City. Prior to the sale, there were two prior liens: a deed of trust recorded in 2001 and a judgment lien from 2012 in favor of a trust in the amount of over $100,000. The city took appropriate steps to conduct and did conduct the sale. From the proceeds of the sale, the city paid the tax lien and expenses of sale and then paid the remainder to the court. The court held $14,000 in the event that the first lienholder deed of

trust made a claim and $7,171.10 for the trust in the event that the trust appeared and timely made a claim.

About a year later, a representative for the trust filed with the court for payment of money from the account to satisfy its lien. The money was paid to the representative in the amount of $7,171.10. The dispute arose over the remainder of the money as no one from the deed of trust appeared or made a claim to the money. The city took the position that under § 58.1-3967, the remainder of the money should escheat to the city. The trust representative claimed the money as further payment for the $100,000+ owed to it.

Lower Court Ruling: The circuit court agreed with the city and held that § 58.1-3967 did not violate the Virginia or United States Constitution takings clause.

Holding: The Virginia Supreme Court reversed the circuit court and remanded the case.

Discussion: The Virginia Supreme Court, in discussion about creditor's bills, found that the judicial sale converts the lien "into a dollar-for-dollar" equitable claim on the sale proceeds." The court interestingly observed that the trust had a better argument from an equitable perspective, but the city had a better argument from a textual perspective. Nonetheless, the court found, narrowly, that the payment of proceeds of the sale where surplus was paid to the city was an unconstitutional taking. The court held that the city was fully compensated and had "no property interest whatsoever in the unclaimed surplus." In that fact scenario, the operation of § 58.1-3967 constituted an unconstitutional taking.

2. *Oreze Healthcare LLC v. Eastern Shore Community Services Board*, 886 S.E.2d 504 (Va. 2023)

Facts: Plaintiff Oreze operated an assisted living facility comprised of four buildings. In 2016, Oreze's license to operate the facility was suspended and Oreze entered into a lease with the Eastern Shore Community Services Board to provide interim care while Oreze tried to resolve its licensing issues. The lease was for a three-month term that would automatically renew every three months until ESCSB provided notice of termination. ESCSB agreed as part of the lease to maintain the four buildings in "tenantable condition" and to "suffer no waste or injury" to the buildings. ESCSB leased the property from May 1, 2017 until July 31, 2018 when it terminated the lease.

During the term, three of the four buildings were unoccupied. In late December 2017, the sprinkler systems in two of the unoccupied buildings froze and burst, causing water damage to the buildings. In February 2018 the third unoccupied building suffered water damage when a water filter froze and burst. ESCSB did not repair any of the damage.

Oreze then filed suit against ESCSB for breach of the lease to recover damages relating to the water damage in the buildings. While that suit was pending, Oreze sold the building to a third-party by general warranty deed, conveying to that third party the property along with "all rights, building, privileges and appurtenances thereunto belonging or in anywise appertaining."

ESCSB moved for summary judgment claiming that Oreze could no longer pursue the property damage claims because the deed conveyed those claims to the third party.

Circuit Court Ruling: The City of Portsmouth Circuit Court granted the motion for summary judgment, holding that Oreze failed to reserve its claims in the deed and that the deed con-

veyed all of Oreze's rights in connection with the property, including its rights to maintain the breach of contract action.

Holding: Reversed and remanded. The Supreme Court ruled that the deed did not extinguish or transfer Oreze's right to sue ESCSB for breach of the lease. Citing to Friedman on Leases, the Court noted that "the right to recover upon a broken covenant does not follow the land; rather it remains a chose in action." The Court further noted that the contractual right to recover for breach is a chose in action, which is considered intangible personal property and therefore does not run with the land. As a result, that chose of action did not transfer with the property by virtue of the deed.

D. VIRGINIA COURT OF APPEALS CASES

1. *Boxley v. Crouse*, 79 Va. App. 350 (Ct. App. 2023)

Facts: The Crouses sued Boxley to establish a prescriptive easement across Boxley's property and to order the removal of a gate across the right of way. The Crouses and Boxley own adjacent parcels in Highland County and the Crouses cross Boxley's property to access their property. Access to the Crouses parcel across the Boxley parcel began in 1976 and continued through 1989 when the Crouses purchased the property. In 1995, Boxley's predecessor in title erected a gate across the way and mailed the Crouses a key to the gate. There was no note accompanying the key, no discussion with Crouses about the key, and there was no evidence that the gate was ever locked. The Crouses continued to use the way until 2020 when Boxley installed a lock on the gate and did not provide the Crouses with a key.

Circuit Court Ruling: The Circuit entered judgment for the Crouses and ordered Boxley to remove the gate pursuant to Virginia Code § 33.2-110(A).

Holding: Affirmed. The primary issue on appeal related to whether the Crouses use was hostile. Boxley argued that the use was permissive because her predecessor in title gave the Crouses a key to the gate in 1995. The Court noted that, when a claimant establishes open, visible and continues use for the prescriptive period, the claimant is entitled to a presumption that the use arose adversely and under a claim for right. Once the presumption is established, the burden shifts to the servient estate owner to show that the use was permissive.

Significantly, the Court noted that the Supreme Court has held in Casey v. Lanigan, 208 Va. 587, 593 (1968) and again in Horn v. Webb, 882 S.E.2d 894 (2023), that the owner of the servient estate cannot rebut the presumption based only on circumstantial evidence. In other words, there must be some direct evidence – or "a positive showing that an agreement existed" to rebut the presumption. In this case, the Crouses presented evidence entitling them to the benefit of the presumption and Boxley produced only circumstantial evidence – the provision of a key to the gate – which was insufficient to rebut the presumption.

Virginia Code § 33.2-110(A) permits a servient estate holder to erect a gate across a way "at all points at which fences extend to such road on each side thereof." Boxley argued that this statute is merely permissive and should not be construed to prohibit a gate across a way where there are no adjacent fence lines. The Court rejected this argument, noting that the Supreme Court has interpreted this statute as "excluding any other gate across a right of way."

2. *Chacko v. Ford*, 2024 WL 558056 (unpublished opinion).

Facts: Chacko sued Ford, the president of the HOA in their neighborhood, for trespass and nuisance for entering his lot without permission. In 2020 the HOA noticed that Chacko had made unapproved improvements on his property, including construction of a pergola that could only be partially viewed from the street. The HOA sent a violation letter and Chacko responded by refusing to cooperate or engage in any approval process and advising Ford by email that he was not to "enter my property without my permission unless you want to face serious consequences."

The HOA then began the process of levying a restoration assessment under its Declaration – which would allow the HOA to restore the lot at Ford's cost. Before levying the assessment, the HOA was to provide notice and an opportunity for the owner to be heard at hearing.

Prior to levying the assessment, Ford entered Chacko's property so that he could photograph the improvements to assist in making a determination of what it would cost to restore the property, i.e. the amount of the restoration assessment. By entering the property, Ford could observe the entire pergola, including its foundation.

The HOA then sent another violation letter that informed Chacko of the initiation of the restoration assessment process. Ultimately the HOA filed a complaint for injunctive relief requiring the removal of the pergola and removal of all other unapproved alterations, which was awarded by the trial court.

While that case was pending, Chacko filed his complaint against Ford for trespass, nuisance, and intentional infliction of emotional distress. The intentional infliction of emotional distress claim was dismissed on demurrer.

Ford filed a plea in bar to the trespass and nuisance claims, asserting that he was acting on behalf of the HOA and his acts were authorized by the Declaration.

Lower Court Ruling: The trial court sustained the pleas in bar, finding that Ford had the right to enter the property for purposes related to restoration assessments, including determining whether an assessment is necessary and the amount thereof.

Holding: Affirmed. The issue on appeal was whether the Declaration authorized entry for this purpose. The Declaration only expressly authorized entry in three circumstances: to mow if the homeowner is not mowing, in emergencies, and *after* a restoration assessment has been levied and only for the purpose of restoring the lot. Ford argued that there was an implied right of entry for purposes of determining the extent of the violation and the amount of the assessment.

The Court – citing to Sainani v. Belmont Glen HOA, 297 Va. 714 (2019) – recognized that restrictive covenants "are not favored" and the burden is on the party seeking to enforce to establish "that the activity objected to is within their terms." Covenants are "construed strictly" and "substantial doubt or ambiguity is to be resolved in favor of the free use of property and against the restrictions."

The Court also recognized that restrictions are enforced where "the intention of the parties is clear and the restrictions are reasonable" and "if it is apparent from a reading of the whole instrument that the restrictions carry a certain meaning by definite and necessary implication."

Applying this case law, the Court determined that entry on the property for purposes of a restoration assessment was authorized by the Declaration.

3. *Cumberland v. Board of Supervisors of Middlesex County,* 2023 WL 666063 (unpublished opinion)

Facts: Middlesex County approved two applications of landowners to expand and improve their property in a CBPA-protected zone (Chesapeake Bay Preservation Act). The landowners sought approval for and were given approval for the work on their property finding that they had properly applied for and supplied the information required by the local zoning ordinance. That ordinance had specific setback requirements and exceptions could be provided if five requirements were met. One such requirement was reasonable and appropriate conditions be placed to prevent degradation of water quality. One step the landowners proposed to satisfy this requirement was the planting of 26 trees and 39 shrubs in the affected area. A neighbor objected to this plan and the exceptions because he alleged the trees and shrubs would interfere with his enjoyment of his property. He anticipated that one day the tree limbs would hang over onto his property.

The BZA approved the applications and the neighbor appealed to the circuit court. The board and the landowners filed a motion to dismiss based on the neighbor's lack of standing.

Lower Court Ruling: The circuit court granted the motion to dismiss, finding the neighbor did not have standing.

Holding: The Court of Appeals affirmed.

Discussion: In order to have standing under § 15.1-2314 to file a writ of certiorari with the circuit court following a BZA decision, a party must be "aggrieved." A two-prong test is used to determine whether a party is aggrieved. First, a petitioner must plead sufficient facts to show he owns or occupies real property in close proximity. Here, this element was met. Second, a petitioner must allege facts "demonstrating a particularized harm to some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally." The court noted that the petitioner does not have to establish that the particularized harm has already occurred.

The court found that the crucial component in the analysis was the likelihood and immediacy of the alleged harm and a causal connection between the BZA decision and the harm. The court held that the neighbor did not satisfy either. First, the neighbor did not and could not establish that the trees and shrubs had already been planted (they had not). Second, the neighbor could not plead or establish a causal connection between the BZA decision and the alleged harm. After all, the landowners could plant the trees and shrubs whether or not the landowners received a variance. The court found that the alleged harm was too speculative.

There was a dissenting opinion.

4. *Dorcon Group, LLC v. Westrick,* 2023 WL 4872484 (unpublished opinion)

Facts: The subdivision was created by deed that imposed restrictive covenants, with an exception for 4 particular lots. The deed provided that the four excepted lots could be used for "such non-residential purposes as approved by the Loudoun county Zoning and Subdivision ordinances . . . . The deed permitted that the restrictions could be "excepted, modified, or vacated in whole or in part at any time upon the affirmative vote of the owners of 23 lots on

said subdivision." Dorcon purchased one of the excepted lots to open a bed and breakfast and to host special events. The other lot owners then voted to amend the deed to prohibit commercial activities on any lot and specifically to prevent bed and breakfasts under certain circumstances. Essentially, enough lot owners voted to prevent Dorcon from doing anything it planned to do on the lot it purchased.

Dorcon then filed suit seeking a declaratory judgment and injunctive relief that: the 25 voting lot owners failed to comply with the Property Owners Association Act; the amendment violated the express language of the deed; the deed did not permit the lot owners to create a new restriction; the amendment impacted lot owners inequitably; and the lot owners in doing what they did engaged in a statutory business conspiracy.

Lower Court Ruling: The first and fifth count were dismissed on demurrer and plea in bar. After a bench trial, the circuit court dismissed the remaining counts finding that the term "modify" in the deed was unambiguous and permitted the lot owners to do what they did.

Holding: The Court of Appeals reversed.

Discussion: The Court of Appeals disagreed that the deed was ambiguous but found that the amendment was unenforceable because the term modify did not permit the landowners to add a new restrictive covenant. The court found that the term "modify" may permit the enlarging or reducing the scope of an existing restrictions, but it did not permit the addition of a restriction. The court found that the amendment was not a simple modification but instead was a new restrictive covenant.

5. *Forbes, et al. v. Cantwell,* 78 Va. App. 454 (Ct. App. 2023)

Facts: Forbes owns lot 6 and Cantwell owns the adjoining lot 7 in the Stoneview Circle subdivision in Lexington. Forbes' predecessor in title previously owned both lots and conveyed Lot 7 subject to a reservation of "a 40 foot easement along the westerly boundary of Lot 7, for the purpose of providing ingress and egress over existing driveway, fencing, and landscape buffer for the benefit of Lot 6." There was a reference to a plat depicting the easement, but no plat was attached to the deed.

Forbes filed a declaratory judgment action seeking to interpret the terms of the easement and asking for injunctive relief for Cantwell to remove fencing and gates within the easement area. The Court admitted parol evidence in the form of testimony of the predecessor in title to determine the size of the easement and to explain what was meant by the reference to "fencing, and landscape buffer for the benefit of Lot 6."

Lower Court Ruling: The trial court identified the exact location of the easement, found that the landscape and fencing components of the easement constituted negative easements which prohibited Cantwell from interfering with the landscape buffer or fencing, and that Cantwell had to remove his gate.

Holding: The Court of Appeals affirmed in part, reversed in part, and remanded. The Court determined that the trial court erred in admitting parol evidence as to the size of the easement because the plain language of the deed identified the easement as 40 feet wide. The Court determined that the trial court properly admitted parol evidence as to the scope of the fencing and landscape easement.

The trial court also erred in finding that the fencing and landscape easements constituted

negative easements. The Court noted that negative easements "do not bestow upon the owner of the dominant tract the right to travel physically upon the servient tract . . . but only the legal right to object to the use of the servient tract by its owner inconsistent with the terms of the easement." Affirmative easements, in contrast, permit the dominant estate the use of the land as provided in the easement. In this case, the trial court erred in identifying the landscape and fencing rights as negative easements and further erred by failing to establish the scope of those rights. The Court remanded the case to establish the scope of the fencing and landscaping buffer.

Finally, the Court reviewed the law regarding the right to construct fencing and install gates in easement areas. Fences are prohibited within easements but a line fence, along the boundary of the easement, is permissible. Gates are permissible pursuant to Virginia Code § 33.2-110 at points where fences extend to the right of way on each side – but the gate must remain unlocked.

Based on the above, the Court affirmed the trial court's ruling requiring Cantwell to remove fencing that he installed within the easement area and ordered Cantwell to remove the gate he erected because it did not fall within the statute.

6. *Hartley, et al. v. Board of Supervisors of Brunswick County,* 80 Va. App. 1 (Ct. App. 2024)

Facts: Plaintiff filed suit seeking to reverse the decision of the Brunswick County Board of Supervisors rezoning a neighboring property from A-1 to B-1 to accommodate a Dollar General store.

Lower Court Ruling: The Circuit Court partially sustained a demurrer finding that Hartley's allegations on several grounds could not support a claim that the upzoning was arbitrary and capricious. The Circuit Court granted summary judgment for the County on the remaining claims that the upzoning was arbitrary and capricious because the decision failed to align with the comprehensive plan and that the Board failed to consider the factors set forth in Code §§ 15.2-2283 and 2284.

Holding: Affirmed. The Court of Appeals in affirming the trial court's ruling reviewed the case law regarding the presumption of reasonableness that attaches to legislative action by a locality, identifying the following burden-shifting framework: where the plaintiff challenges the presumption of reasonableness with probative evidence of unreasonableness, the burden shifts to the locality to show sufficient evidence of reasonableness to make the question "fairly debatable." Under the fairly debatable standard, "the question is whether there is *any evidence in the record sufficiently probative* to make a fairly debatable issue of the boards decision." The Court also noted that legislative action taken "in violation of an existing ordinance or other binding source of law is by definition arbitrary and capricious and may not be sustained by a court."

With respect to alignment with the comprehensive plan, the Court noted that rezoning of a parcel does not need to be in exact alignment with the comprehensive plan because that plan is general in nature. Moreover, alignment with the comprehensive plan is one of many factors a legislative body must consider in amending its zoning ordinance, i.e. it is not a determinative one. Accordingly, failure to align perfectly with the comprehensive plan does not render a decision arbitrary and capricious as a matter of law. Rather, a reviewing court must apply the burden shifting framework noted above.

With respect to the weighing of the statutory factors, the Court determined that the failure to consider each of the statutory factors on the record does not render a legislative decision arbitrary and capricious as a matter of law. Rather the reviewing court is to evaluate whether the Board's decision was "fairly debatable" in the context of the required statutory factors.

The Court then addressed the issues under the fairly debatable standard and determined that, even assuming Hartley presented evidence of unreasonableness, the Board met its burden of putting forward some evidence of reasonableness in response, rendering the matter fairly debatable.

Finally, on review of the trial court's ruling on demurrer, the Court determined that the demurrer was properly sustained with respect to Hartley's claims that the rezoning was arbitrary and capricious as a matter of law for failure to follow certain VDOT Guidelines regarding the timing for traffic counts and failing to follow the County's own subdivision and zoning ordinances. Regarding VDOT, the Court clarified that an agency's guidelines – as opposed to its regulations – do not have the "force of law" and therefore failure to follow those guidelines does not render the ordinance arbitrary and capricious. The Court also determined that there were no provisions in the subdivision ordinance or the zoning ordinance prohibiting their actions.

7. *Ho v. Rahman,* 79 Va. App. 677 (Ct. App. 2024)

Facts: Rahman purchased property in 2005 where the plat showed a boundary line and fence on another lot. Ho purchased his property in 2010 and was aware of the fence. He made no entry onto the part of his property on the other side of the fence until 2021. In 2021, he tore the fence down and removed trees. This was the first time an owner disturbed the fence since its construction. In September 2021, Rahman filed suit to quiet title in the land between the boundary line and the fence claiming she had acquired it by adverse possession. Ho filed a plea in bar claiming that he had not owned the land for the requisite 15 years so Rahman could not obtain title through adverse possession.

Lower Court Ruling: The circuit court granted the plea in bar and found that the 15-year possessory period requirement had not been met.

Holding: The court of appeals reversed.

Discussion: After a thorough analysis of the law on adverse possession in Virginia, the court found that "adverse possession primarily focuses on the possessor's occupation of the invaded interest and the nature of such occupation, rather than the rights of the owner whose interests have been invaded. The court held that it is clear that the statue of limitations starts to run when the possessory interest is "*sufficiently* and continuously invaded, thus allowing the owner to defend the interest." (Emphasis in original). As a result, it did not matter how long Ho had owned the property – it mattered how long Rahman had adversely possessed it. Since she started as early as 2005, the 15-year possessory period was met.

The court noted that this is in line with our usual understanding of tacking in adverse possession cases. Tacking is where the period for adverse possession can be added together through successive ownership of those in privity to get to 15 years of adverse possession. Ho also tried to claim *bona fide* purchaser status, but the court noted that *bona fide* purchaser status applies only to defects in the chain of title. An adverse possession claim is not a defect in the chain of title.

8. *Jackson v. Department of Conservation and Recreation,* 2023 WL 8721822 (unpublished opinion)

Facts: Jackson filed declaratory judgment action against DCR to establish an implied easement across property owned by the DCR. Jackson traced title to the two adjacent parcels to a common grantor and alleged that the severance of that property in 1912 gave rise to an easement by necessity benefitting his parcel that had been in use since that time and had been located in a recorded plat in 1924. Jackson acquired his property in 2001. The DCR acquired its property in 2006.

Jackson filed a separate action asserting a claim of adverse possession of the roadway.

The DCR filed a demurrer to both actions which were heard together on two grounds (i) no adverse possession claim lies against the Commonwealth and (ii) res judicata barred the actions because the DCR had previously prevailed in an ejectment action against Jackson.

Lower Court Ruling: The trial court sustained the demurrer, concluding that "the Commonwealth has the right to say you cannot make any claim of any sort, whether it's the easement or the adverse possession claim." The trial court declined to rule on the res judicata claim.

Holding: Reversed and remanded. The Court of Appeals determined that Jackson had alleged facts to support all of the elements of a claim for an easement by necessity: (i) that the dominant and servient estates derived from a common grantor, (ii) severance of title of those estates resulted in the need for access at the time of the severance (iii) the roadway was in existence at the time of the severance, and (iv) the easement is reasonably necessary to the enjoyment of his property.

The Court rejected the DCR's arguments. The DCR argued that there was no recorded easement at the time of the severance which the Court found to be irrelevant to a claim for an implied easement. The DCR also argued there were insufficient factual allegations as to necessity and as to whether the road was in existence at the time of severance. The Court of Appeals found that these were issues for the trier of fact. Finally, the Court of Appeals found no error in the trial court declining to rule on the issue of res judicata because that is an affirmative defense that can be raised by plea in bar but not demurrer.

9. *Jones v. South Bay Shore LLC,* 2024 WL 432574 (unpublished opinion)

Facts: Prior in time Lot 35A was given a visual easement over a portion of the adjacent lot 34A. The easement permitted the holder to prevent the owner of Lot 34A from placing structures in the area covered by the easement. In 2020, South Bay Shore bought the burdened lot and installed a pier into the creek. Jones filed suit claiming that the pier unreasonably interfered with their enjoyment of the easement.

Lower Court Ruling: The circuit court found that the language creating the easement was ambiguous and permitted parol evidence. It held that Jones had failed to prove that the pier interfered with the easement. It granted a motion to strike and ruled in South Bay Shore's favor permitting the pier to remain.

Holding: Concluding that the easement "unambiguously establishes metes and bounds of the easement" and that the trial court did not err in concluding the Jones' failed to prove the pier unreasonably interfered with the easement, the court of appeals affirmed.

Discussion: The court did a good analysis of the history of the law on these topics, stating that restrictions on the free use of land "are not favored and must be strictly construed." If the deed language is unambiguous, then the easement should be interpreted based on the language of the deed. The court analyzed the deed language and concluded that it intended only to prevent structures on land. It considered the fact that the deed did not reference any water-based structures or wharfs. The court held that the "default rule, therefore, is that the appellee's purchase of land adjacent to Little Neck Creek included the right to build a pier out to navigable water." The appellee owned subaqueous bottomland that rests above the mean low-water mark and had riparian rights not affected by the easement. The deed had no language that rebutted the default grant of the riparian rights and there was nothing indicating that any structures were prevented except on land.

10. *Kooiman v. Ornoff,* 2024 WL 330506 (unpublished opinion)

Facts: The parties own adjoining lots in Isle of Wight that are encumbered by 8 deed restrictions. Among them is that each lot may be used only for residential purposes, shall be constructed only of frame or masonry materials, no exterior side can be cinder block, asbestos shingle, or a combination asphalt siding material, and that no trailer, basement, tent, shack, garage, barn, or boathouse can be used as a residence.

The neighbors sued each other for violations of the restrictions. The Ornoffs alleged that the Kooimans violated by renting the basement out for short-term rentals as an AirBNB and on VRBO. The Ornoffs sought injunctive relief to prevent the Kooimans from using the basement as a residence. The Kooimans allege that the Ornoffs violated by using cinder blocks in construction that are visible.

Lower Court Ruling: The circuit court granted the Ornoffs injunctive relief finding that the Kooimans could not rent or allow people to stay in their basement. Before the order was entered, Ornoff wrote to the court and indicated that the Kooimans were planning to live in their basement and rent out the main house as a work-around the court's orders. The judge wrote an order for the court that barred the Kooimans from using the basement as a separate residence while renting out the house. The circuit court denied injunctive relief to the Kooimans finding the barely visible cinder blocks were not a violation.

Holding: The court of appeals affirmed.

Discussion: In consideration of a prior ruling of the Virginia Supreme Court in *Scott v. Walker*, 645 S.E.2d 278 (2007), the court of appeals held that the case was not decisive as the Virginia Supreme Court did not hold that short-term rentals are always a permitted residential purpose. The term "residential purposes" was ambiguous and did not prohibit such use. However, here, there was an additional restriction that expressly stated the basement could not be used as a residence. The court found that reading the restrictions together, it was clear the concern was not duration of stay or status of residents. Its purpose was to prevent two separate living spaces from being utilized on one property. The trial court also did not err when it ordered that the Kooimans could not reside in the basement while renting out the main house. The court of appeals found that it did not matter who resided there as no one was permitted by the restrictions to reside in the basement.

11. *Board of Supervisors for County of Louisa v. Vallerie Holdings of Virginia, LLC,* 80 Va. App. 335 (Ct. App. 2024)

Facts: VHOV purchased the property from the prior owner in 2015. The prior owner had begun construction on the property but did not finish due to financial restraints. The property was for commercial use on the first floor and had a 400 square foot living space on the second floor. When VHOV purchased the property, the staircase that was in place to go from the first floor to the second floor had been removed in construction and the outside door to the second floor had been moved in its location.

In 2016, without obtaining a permit, VHOV constructed stairs outside from the first floor to the second floor in the same place as the prior stairs. It connected the stairs to a "bridge" that encroached a 5-foot setback requirement. VHOV contacted the County to alert it that it needed to repair the stairs which evolved into a rebuild and that they would immediately apply for a permit. The county reviewed the plan and noted that the 5-foot setback line had been encroached and a variance was needed.

For more than 3 years, VHOV tried to get a variance. In the last attempt, members of the BZA disagreed on the variance. One thought that VHOV caused its own problems and had other alternatives to the encroachment. Another thought that the problems had not been created by VHOV but were due to location and prior work. While recognizing that granting the variance would "alleviate the hardship of lacking access," the BZA denied the variance "hanging its hat" on the belief that VHOV had "other options" for accessing the second floor.

Lower Court Ruling: The circuit court reversed the BZA and granted the variance.

Holding: The court of appeals affirmed.

Discussion: First, the court had to decide as a case of first impression how to reconcile two presumptions that arise when the BZA and the circuit court disagree. First is a presumption of correctness afforded to a BZA decision to deny a variance. Second is a presumption that the circuit court's factual findings are correct. The court of appeals reconciled the presumptions by finding that "so long as the circuit court applies the presumption as required by Code § 15.1-2314, the presumption in favor of the BZA's decision does not directly apply to review by this Court. Therefore, we apply the ordinary presumption on appeal from a circuit court, and the circuit court's findings 'shall not be set aside unless it appears from the evidence that [they are] plainly wrong or without evidence to support [them].'"

After a historical analysis of the amendments to the statutes, the court of appeals found that it was clear that the legislature "intended to expand the availability of variances." As a result, it need only be shown that the zoning ordinance "unreasonably restrict the utilization of the property, or cause hardship due to a physical condition relating to the property or improvements thereon." The court cautioned the use of prior cases under prior statutes.

Considering the quantity and reality of the evidence presented by the property owner, the court of appeals found that the circuit court did not err in granting the variance. It would require a lot of construction at a high cost. Further, the court of appeals held that the property owner did not create its own hardship, so that could not be a basis to deny the variance. "Merely purchasing property that will require a variance is not enough to qualify as a self-inflicted hardship."

12. *Morris v. Parker,* 2024 WL 236553 (unpublished opinion)

Facts: The Morrises sought an implied easement over a right of way abutting their property.

In 1998, the Morrises bought property in Chesapeake, which was shown on the plat as being bordered by a right of way named "Flurry Road" aka "Fluridy Road" on the east side. The Morrises never used Flurry Road to access their property, choosing instead to access their property through public roads adjacent to the southern and western borders of their property. The Parkers own property on the other side of "Flurry Road" and access their property along a gravel road which the Morrises claim is Flurry Road.

In 2017, the Morrises subdivided their property creating a parcel bordering on the gravel road used by the Parkers and sought to install a driveway connecting to that gravel road. The Parkers objected and the Morrises filed a declaratory judgment action seeking to establish access to their newly subdivided parcel.

At trial, the Morrises presented expert testimony from a title examiner establishing that the parcels were once owned by a common grantor and that the deeds in the chains of title to both properties consistently describe the properties with reference to a 1909 plat that shows both the Morris Property and the Parker property abutting Flurry Road. The title examiner also testified that Flurry Road as platted in the 1909 plat was not located on either the Parkers' or the Morrises' property but between them. The expert did not testify as to actual the physical location of Flurry Road as platted, noting that she did not know whether that road was "developed or not, whether its gravel or dirt" and "there is no way to really tell exactly where it is."

Lower Court Ruling: The circuit court ruled that the Morrisses failed to establish an easement by necessity finding that, although the evidence demonstrated that there was a common grantor, there was no evidence that either the use of the road was in existence at the time of the severance of the unity of title or that the use had been reasonably necessary for the enjoyment of the dominant tract.

Holding: Affirmed. On appeal, the Morrises argued that they were not required to establish the elements of an easement by necessity because they were entitled to an implied easement under *Lindsay v. James*, 188 Va. 646 (1949, which provides that "[w]hen land is subdivided into lots, streets, and alleys, and lots are sold and conveyed by reference to the plat . . . , the conveyances carry with them the right to the use of such streets and alleys as may be necessary to the enjoyment and value of said lots.

The Court of Appeals determined that because the Morrises failed to establish the physical location of Flurry Road, i.e. their claimed easement, they could not prevail on any theory. The Morrises sued to establish an easement over the gravel road used by the Parkers claiming that it was the road depicted in the 1909 plat as "Flurry Road." The Morrises failed to present any testimony that that was the case. Meanwhile, the Parkers claimed that the gravel road was located entirely on their property and therefore could not be "Flurry Road."

Under the "right result, wrong reason" principle, the Court of Appeals affirmed the trial court's ruling that the Morrises failed to establish an implied easement.

13. *Norfolk District Associates, LLC v. City of Norfolk,* 2024 WL 780724 (unpublished opinion)

Facts: In 2013, Norfolk District Associates and the City of Norfolk and NHRA entered a lease for the space known as Waterside and owned by NHRA. In the lease, NDA claimed that it had the right to turn Waterside into a casino if Virginia law changed and permitted casinos. The

lease provided that the use did not currently include the operation of a casino. It also provided that if the law changed in the Commonwealth of Virginia that permitted developing and operating a casino, then the parties would enter an amendment. The terms of the amendment were not defined.

In December 2018, the City of Norfolk began working with the Pamunkey Tribe both in the city and through the Virginia legislature so that the laws could be changed, and the Tribe could open a casino in Norfolk. The law changed to permit casinos in Virginia in 2020.

NDA filed suit claiming a breach of the lease as well as many other claims like tortious interference with contract and conspiracy. All three of the defendants filed demurrers to the complaint.

Lower Court Ruling: The circuit court sustained the demurrers.

Holding: The court of appeals affirmed.

Discussion: The court of appeals found that all the claims turned on the premise that the City and NHRA breached enforceable contract provisions owed under the lease to NDA. First, the court of appeals found that applicable lease section to be unenforceable. "Agreements to agree in the future are too vague and indefinite to be enforced." All NDA had was an agreement to agree in the future. Further, the terms of any future deal were undefined. As a result, any potential obligation to permit NDA to lease Waterside for a casino was an unenforceable contract.

Second, the court of appeals found that a casino was not a permitted use under the lease. The lease specifically defined what the permitted uses were, and a casino was not listed. Further, it was not a breach of the lease for the city to permit the Tribe to develop and run a casino because that would be a different operation than the one NDA ran at Waterside.

14. *Sainani v. Belmont Glen Homeowners Association,* 2024 WL 157551 (unpublished opinion)

Facts: Belmont Glen originally sued Sainani in the Loudoun County General District Court seeking to collect $885.64 in fines for violating the HOA's seasonal outdoor holiday lighting guidelines. The Sainanis appealed the GDC's judgment in the HOA's favor to the Circuit Court and filed a counterclaim seeking an injunction to prevent enforcement of the seasonal guidelines as well as damages for breach of the underlying Declaration and violation of the Property Owners' Association Act.

The circuit court found in favor of the HOA, determining that the seasonal guidelines were reasonable and enforceable and entered judgment in favor of the HOA for $884.17, plus $39,148.25 in attorney's fees.

The Sainanis appealed to the Supreme Court, which held that the seasonal guidelines exceeded the scope of the HOA's authority and were not reasonably related to any restrictive covenant. *Sainani v. Belmont Glen Homeowners Ass'n*, 297 Va. 714 (2019). The Supreme Court reversed the circuit court's judgment and remanded the case.

Lower Court Ruling: On remand, the circuit court entered judgment for Sainani for $200 on its breach of contract claim, ordered the HOA to release any liens against the Sainanis, and to vacate any notices of violation. The trial court refused to award the Sainanis a permanent

injunction against the HOA.

Pursuant to Va. Code § 55.1-1828, the Sainanis sought recovery of just over $285,000 in attorney's fees and costs and the circuit court awarded $106,699 in fees and $19,521,98 in costs. In reducing the amount of fees awarded to the Sainanis, the trial court rejected any award of post-appeal fees, determining that they were not the prevailing party due to the refusal to award an injunction. Both parties appealed.

Holding: The Court of Appeals found that the trial court erred in determining that the Sainanis were not the prevailing party post appeal. The Court recognized that the prevailing party is "the party in whose favor . . . judgment is entered, and in determining this question the general result should be considered, and inquiry made as to who has, in the view of the law, succeeded in the action." The Court relied on federal case law – the United States Supreme Court decision in *Hensley v. Eckerhart*, 461 U.S. 425 (1983) for the proposition that when a party brings multiple claims that involve a common core of facts or related legal theories, "the statutorily-authorized attorney fee should not be reduced simply because the party prevailed on some claims and not others." A person is a prevailing party when he/she succeeds "on any significant issue in litigation which achieves some of the benefit [he] sought in bringing the suit." Further, even when a party fails to prevail on every issue raised in the litigation, the fee award should not be reduced." That said, the Court also recognized that if a plaintiff achieves "only partial or limited success" awarding a fee based on all of the hours expended in the case may be excessive.

Although an award of fees is in the discretion of the trial court, the circuit court should "provide a concise but clear explanation of its reasons for the fee award" and if the basis of the adjustment is due to "the exceptional or limited nature of the relief obtained by the plaintiff, the court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained."

The Court remanded the matter to the trial court "to provide a concise but clear explanation of its reasons for the fee award" taking into consideration the ruling in *Hensley*, *461 U.S. at 435."* The Court also remanded to consider evidence of certain appellate fees that it denied, which related to an initial appeal that was dismissed by the Supreme Court because the underlying ruling was not a final order. The Court emphasized that a court cannot award a fee that is "so low that it fails to reimburse the prevailing party for the costs necessary to effectively litigate the claim that – after all – it prevailed on."

The Court also rejected the HOA's appeal claiming that the trial court erred in granting judgment to the Sainanis on their breach of contract claim.

15. *Salunkhe v. Christopher Customs, LLC,* 78 Va. App. 312 (Ct. App. 2023)

Facts: Owners of lot 29 in the Brentwood Subdivision brought claims against owners of two other lots (Lots 28 and 30) seeking to establish, among other things, that public easements existed for a 24' access easement and for a 35' turnaround easement based on notations on the recorded subdivision plat. Lots 28 and 29 both include 12-foot adjacent pipestems providing access to a subdivision road. The pipestems total 24 feet in width and are partially paved. By agreement among the predecessors in title, the parties agreed to permit each other to use the paved portion of the pipestems to access the public road.

The Owners of Lot 29 believed based on the notes on the subdivision plat that they had the

right to make improvements and therefore pave the entire 24 pipestem area, as well as the 35 foot pipestem area.

The Owners of Lot 29 filed a complaint seeking a declaration of the existence of public easements, as well as seeking some ancillary relief.

Lower Court Ruling: On cross-motions for partial summary judgment, the trial court ruled in favor of the defendants finding that the notations on the subdivision plat failed to create a public easement pursuant to Code § 15.2-2265 because the plat did not "indicate that the claimed easements [were] for public usage." The circuit court further held that § 15.2-2265 "does not operate to create public easements; it merely effectuates the transfers of easements which are identified on the plat as being created for public use." Plaintiffs non-suited their remaining claims and appealed the ruling.

Holding: Affirmed. Code § 15.2-2265 provide for two different types of transfers to a locality when an approved subdivision plat is recorded: (i) the transfer of areas set apart for "streets, alleys or other public use" and (ii) "any easement indicated on the plat to create a public right of passage over land."

The Court ruled that in this case, which concerned the second type of transfer, that merely noting "Ingress-Egress Esm't" on a subdivision plat does not create a public easement under the statute. The Court based its ruling on the plain language of the statute – which requires some indication of an intent "to create a public right of passage" which is absent in the subdivision plat at issue. In addition, Virginia case law provides that a dedication to the public is not complete until an easement is "accepted by the competent public authority." Although the Couty approved the plat, nothing on the plat signaled to the locality that it was being offered a public easement.

Based on the above, the Court ruled that a public easement can only be transferred pursuant to **§ 15.2-2265 where there is an explicit notation on the plat reflecting that it is for a public purpose.**

16. *Veldhuis as Trustee v. Abboushi,* 77 Va. App. 599 (Ct. App. 2023)

Facts: When the appellees purchased their property, they had a discussion with the appellant's prior owner about the boundary line. The prior owner was mistaken about the boundary line, but the appellees accepted it and used the disputed portion of land, exclusively, for more than 15 years. This use included all maintenance, a privacy screen, and all costs associated with maintaining the disputed portion of land. The prior owner went to the appellees and asked them to agree for him to install a pipe so that rain can flow away from his property. The appellees gave permission, and the pipe was installed. The appellees filed suit to obtain ownership of the disputed portion of land through adverse possession. The appellant counterclaimed for trespass.

The appellant inherited the property from her father, the prior owner, and at trial and on appeal took the position that the appellees use was not exclusive because of the pipe. She claimed that her father and she also used the disputed portion of land with the pipe and as a result, the appellees could not obtain ownership of the disputed land by adverse possession as the use was not exclusive.

Lower Court Ruling: The trial court ruled in favor of the appellees and ordered them to have

ownership of the disputed land by adverse possession.

Holding: The court of appeals affirmed.

Discussion: The only issue raised by the appellant on appeal was the trial court's finding that the use by the appellees was exclusive. Use is exclusive when it is not in common with others. The court of appeals found that the appellant's position "misunderstands the ethos of an adverse possession claim." As is clear from the history of cases on adverse possession in Virginia, the possession must be "under a claim of right and adverse to the right of the true owner." A claim of right is "a possessor's intention to appropriate and use the land as his own to the exclusion of all others."

The court of appeals examined and decided that the fact that the prior owner sought permission from the appellees to install the pipe and that the appellees gave the permission illustrated the claim of right. The court stated that the "operable question here is whether [prior owner] used the land *as the rightful* owner; as his use *as a licensee or invitee* would not affect the Abboushis' exclusive possession." Here, there was an abundance of evidence that established the appellees ownership by adverse possession and permissive installation and use of a pipe for water did not change that.

17. *Watan Holdings, LLC v. Blankenship,* 2023 WL 7359891 (unpublished opinion)

Facts: Watan purchased commercial property from the Blankenships. At some point after the closing, Watan learned that parts of the property conveyed to it by the Blankenships was not owned by them. Watan learned this through a zoning application and process when the city told it that it did not own all the property. Watan learned that two other entities owned portions of what it purchased from the Blankenships.

Watan filed suit for breach of general warranty alleging both an actual eviction and constructive eviction. The Blankenships filed a demurrer alleging that Watan had not properly stated a claim for either type of eviction.

Lower Court Ruling: The trial court sustained the demurrers and dismissed the complaint.

Holding: The court of appeals affirmed.

Discussion: Ultimately, Watan failed to state a claim for breach of warranty because it failed to plead that a third party had asserted paramount title to the property, or that there was an ouster, or that Watan was forced to pay money to acquire superior title to the property. It undisputed that neither of the third-party owners asserted ownership over any of the property. It was undisputed that Watan, once it learned of the true ownership, voluntarily did not enter the property due to fear of a trespass claim. The court was not even aware of whether the third parties knew of the title issues.

"In an action for breach of a covenant of warranty, a claimant must plead that an actual or constructive eviction has occurred." An actual eviction requires an ouster or dispossession. "A constructive eviction occurs when 'the premises are in the actual possession of a third party' under 'an adverse assertion of paramount title' at the time of the conveyance." It can also occur when there is no change of possession, but a party is compelled to purchase the property to receive proper title. None of these were plead in the complaint.

The court of appeals held that Watan's treatment of the property after it learned of the title issues was voluntary. "Merely because Watan treated the title defect as an eviction does not make it so . . . ."

18. *Willems v. Batcheller,* 78 Va. App. 199 (Ct. App. 2023)

Facts: Plaintiffs sued for trespass and nuisance due to encroachment of Defendants' bamboo into Plaintiffs' property. 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. At that time, Plaintiffs repaired the roof of a utility shed adjacent to the fence. The eave of the reconstructed roof of the shed overhangs the fence.

In 2020, Plaintiffs filed suit alleging that (i) Defendants fence encroached on Plaintiffs' property and (ii) the bamboo created a nuisance and encroached on Plaintiffs' property. Plaintiffs sought to enjoin both encroachments. Defendants asserted various defenses, including the defense of "adverse possession" to the fence encroachment and laches and statute of limitations.

Lower Court Ruling: The court held that (i) the spread of bamboo into Plaintiffs' property was both a nuisance and a trespass and (ii) the statute of limitations did not apply because the relief sought was only equitable and laches did not bar the continuing trespasses and nuisances. The Court also held that the split rail fence installed by Defendants in 2003 – which fence encroached onto Plaintiffs' property in several areas, established the boundary line between the properties by virtue of adverse possession.

On motion for reconsideration, Plaintiffs argued that their shed roof eave, which hung over parts of the split rail fence, interrupted the exclusivity or continuity of the fence installed by Defendants to defeat their adverse possession claim. The court rejected that argument, finding that Plaintiffs would have had to take action to interfere with how Defendants used the land to disrupt the adverse possession claim. Because of the location and height of the shed eave, it did not disturb or restricted Defendants' normal use of the disputed ground.

Holding: Affirmed in part, reversed in part, and remanded. The Court reversed and remanded with respect to the trial court's ruling on adverse possession with respect to the fence on the ground that the defendants sought no affirmative relief in their pleadings. Defendants merely alleged "adverse possession" as a defense and nothing more. Although the Court determined that adverse possession can be couched as a defense and need not be alleged as a counterclaim to obtain relief, the pleading must include an affirmative request for relief to enable the trial court to grant any relief. Because no relief was requested, the trial court lacked jurisdiction to declare a new boundary line.

The Court ruled that the trial court did not err in concluding that the bamboo constituted both a nuisance and a trespass, and further rejected Defendants' claim that, under *Fancher v. Fagella*, 274 Va. 549 (2007), only self-help is available as a remedy for encroaching trees and plants. In *Fancher*, the Supreme Court adopted the "Hawaii" rule, which provides that encroaching trees and plants are not nuisances unless they cause actual harm or pose an imminent danger of harm to adjoining property. If actual harm is caused, then the owner can

be held liable for the damage and can be required to cut back the encroachments. In the absence of any actual harm or imminent danger of harm, the adjoining landowner has the right to engage in self-help to cut away encroaching vegetation at the property line – regardless of whether the encroaching vegetation constitutes a nuisance.

In this case, the Plaintiffs testified that the bamboo damaged the shingles on their shed, so the encroachment caused actual harm, justifying the trial court's finding of a nuisance and its order for Defendants to abate that nuisance.

Finally, the Court held that the trial court did not err in denying Defendants' defense of statute of limitations and laches. With respect to statute of limitations, which is five years for damage to property, Virginia Code § 8.01-230 provides that rights of action are deemed to accrue – and the applicable limitations period begins to run – when the injury is sustained . . . *except when the relief sought is solely equitable*. Here, because Plaintiffs sought only equitable relief, the statute of limitations was inapplicable. Laches also did not apply because Defendants established no prejudice from the delay.

E. VIRGINIA CIRCUIT COURT CASES

1. *Carniol v. Nayak,* (County of Fairfax 2023)

Facts: The Carniols and the Nayaks owned neighboring lots in a subdivision in Vienna, Virginia. Six mature white pine trees were located entirely on the Carniols lot and ran along the boundary line between the properties. The trees provided a sight barrier between the parties' houses and also mitigated noise coming from Route 7.

While the Carniols were on vacation, the Nayaks hired contractors to trim the branches on the pine trees. Rather than just trimming branches as they crossed the property line, which is permitted under *Fancher v. Fagella*, the Nayaks trimmed branches around the entire circumference of the trees. According to the Court the trees were "lollipopped" – meaning that the trees now looked like giant lollipops with only the trunk extending upward with branches only at the very top. According to the Court, "the distorted appearance of the trees was hideous" and the "trees looked stupid."

The Carniols filed suit for trespass and the Nayaks counterclaimed for trespass and nuisance.

Holding: The Court ruled the Nayaks trespassed when trimming the branches and that the trespass was not justified under the Restatement (Second) of Torts § 201, which allows entry on a neighboring property to abate a nuisance if the owner fails to do so after demand. Here, the Nayaks never made demand. The Court noted that *Fancher* allows an adjoining landowner to cut vegetation at the property line "whether or not the encroaching vegetation constitutes a nuisance or is otherwise causing harm." The only right the Nayaks had was to trim vegetation at the property line and by crossing the boundary line, the Nayaks trespassed.

The Court then turned to assessing damages for the trespass, finding that the correct measure of damages for nonmerchantable trees is the "diminution in the market value of the property" – not the stumpage value or the replacement value.

The Carniols testified that the trees had an aesthetic value as a sight and sound barrier. The Court also found that in this instance the stumpage value – estimated at $45,800 – was too high an award to justify, particularly when the trees were never going to be timbered and therefore were not merchantable.

The Court then reviewed several circuit court cases that have attempted to determine the proper measure of damage for injury to aesthetic or ornamental trees. Those courts have concluded that Virginia does not allow replacement costs as measure of damage, but that the replacement costs could be incorporated into the testimony of a real estate appraiser with respect to the diminution in value.

The Carniols' real estate appraiser determined that the diminution in value of the property was $25,000 and awarded those damages, as well as an additional award for damage to a pool fence and some other pool related items.

With respect to the Nayaks counterclaim for trespass and nuisance, the court found in favor of the Nayaks on their trespass claim – that the Carniols trespassed on their property repeatedly over the years to cut down tree branches – and awarded $1.00 in damages. The Court also found in their favor on their nuisance claim – that the encroaching branches and damages to their deck and other property constituted a nuisance – and awarded another $1.00 in damages.

2. *Patterson v. Garder,* (City of Norfolk 2023)

Facts: The parties owned property in a condominium in Ocean View. The dispute arose because one owner desired to build a fence. Patterson asked the court to find that the fence would constitute a private nuisance and asked for an injunction preventing the Gardners from building the fence. Patterson claimed that the fence would cause the loss of her view and diminish her access to the dock. Patterson claimed the fence would greatly lower the value of her property. The Gardner's filed a demurrer to the complaint.

Holding: The court sustained the demurrer and dismissed the count.

Discussion: The court provided a very thorough analysis of old English law on nuisance.[1] In this analysis, the court noted that the law of nuisance does not protect a landowner's view. Further, the discomfort and annoyance caused by the alleged nuisance must be significant and of a kind that would be suffered by a normal person in the community. On the issue of blocking her view, the court found that the fence would not be a private nuisance due to any impact on the view. Fences and walls are common and serve the same purpose whether built in England or Virginia! On the access to the dock, the plaintiff pleaded that the City of Norfolk owned a paper street that gave her access to the dock. She did not plead that she took any steps to have the city abandon or convey the paper street to anyone. As the condominium did not own the paper street that provided access to the dock, it could not grant an easement over it. As a result, Patterson had no claim against Gardner pertaining to access to the dock.

1. The editors urge our subscribers to read Judge Martin's opinion. Not since *Hunter v. New York, Ontario & Western Railway Company* has a judge written quite so eloquently. For example:

In *Aldred's Case*, 9 Co. Re[/ 57b, 77 Eng. Rep. 816 (K.B. 1610), the defendant erected a hot sty near the plaintiff's house, and the plaintiff sued for nuisance. The defendant argued "one ought not to have so delicate a nose that he cannot bear the smell of hogs," 77 Eng. Rep. at 817, but the Court held the hog sty was a nuisance.

The full text of the opinion will follow this article. –Ed.

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR

FALL MEETING OF THE BOARD OF GOVERNORS AND AREA REPRESENTATIVES

Virginia State Bar Offices, 3rd Floor Conference Room

September 8, 2023 – 11 a.m.

MEETING MINUTES

Welcome and meeting called to order by Sarah Louppe Petcher, Section Chair, at 11 am

1. **WELCOME AND ATTENDANCE.** Please see the attached list. Please contact the Section Secretary at the time of the meetings, Rick Chess, at the following email address with any corrections, additions, or amendments to the attendance record: rick@chesslawfirm.com.

   Sarah Louppe Petcher reviewed the ground rules for participating live or via remote access.

2. **MINUTES ADOPTION.** The board adopted the minutes from June 16, 2023, meeting without amendment.

3. **FINANCIAL REPORT.** Report presented by Rick Chess. Renew of section membership is running behind last year, which has a negative impact our allocated budget from the VSB. The VSB has requested that the RPS move their annual reception and dinner to the Thursday before the annual VSB gala to potentially increase the attendance for the VSB event. Chess questioned the effectiveness of the Thirty-Six Hundred ($3600) spent by the RPS for the Steinhilbers events, as many attendees are no longer active in the leadership of the section. After several comments by attendees, the Chair agreed to take the issue under advisement.

4. **STANDING COMMITTEES**

   a. Membership – Rick Chess – Written report distributed. Nana Yeboah of the "living library" team announced they anticipate releasing a video every other month (starting September 13, 2023) through November 2024.

   b. Fee Simple – Steve Gregory & Hayden Anne Breedlove – Written report distributed. Steve noted that publication of FEE SIMPLE is anticipated by late October 2023. Committee Chairs are requested to develop articles for publication. Additional members for this committee were solicited.

   c. Programs – Heather Steele & Jim Windsor – Jim summarized the draft agenda for the Advanced Real Estate event to be held March 1st and 2nd at the Kingsmill Resort in Williamsburg. He also discussed the preliminary agenda for the Real Estate Seminar to be held May 14th in Fairfax and May 21st in Richmond.

5. **SUBSTANTIVE COMMITTEES**

   Commercial Real Estate – John Hawthorne – Professor Carol Brown noted that the committee met, and the members anticipate to continue to so do.

a. Common Interest Community – William Sleeth, III – No oral or written report.

b. Creditor's Rights and Bankruptcy – Lewis Biggs – Mr. Biggs requested new members for this committee. Louis can be reached at flbiggs@kbtrvalaw.com.

c. Eminent Domain – Chuck Lollar – Justice McCullough has requested study of Chapter 46. The committee has met and anticipates providing an update at our next section board meeting.

d. Ethics Co-Chairs – Ed Waugaman & Blake Hegeman – No oral or written report; have not met since last Board meeting.

e. Land Use and Environmental Co-Chairs – Karen Cohen & Lori Schweller – Committee is focused on the issue of enforcement of public notice requirements with continued adoptions.

f. Residential Real Estate – Ben Winn & Rachel Hinson – Report Attached Committee is focused on fraud protection and finds that many closing agents moving away from wires to returning to the issuance of checks.

g. Title Insurance – Cynthia Nahorney – Committee has developed an article for FEE SIMPLE on how members got into title insurance practice. The committee is promoting the need to recruit title examiners in presentations at high schools.

6. **VBA UPDATE** – Shane Murphy reported on legislative and administrative issues being worked on by the VBA.

7. **NEW BUSINESS**

a. Area Representative Roster – The Chair appointed three members of the Board – George Hawkins, Kevin Pagoda, John Rinaldi – to provide support to the Secretary to update the Area Representative Roster.

b. Committee Leadership – Ethics – Blake Hegeman is planning retirement and requests a replacement as Chair of Ethics. He will remain on the committee through 2024 to help in the transition to a new Chair of the committee. It was suggested the RPS approach Ms. Emily Hedrick with the VSB for consideration for this role.

8. **ANNOUNCEMENTS**

a. Pam Faber reported on a fake letter being received by closing agents announcing that a bank has been taken over by the FDIC, requiring a redirection of funds. Suggestion was made to always confirm with the FDIC website on receipt of similar communications. She noted that most FDIC take overs of banks tend to occur after business hours on a Friday.

b. Janna Wolff was announced as a new member of PESNER ALTMILLER MELNICK DeMERS & STEELE PLC.

c. Dolly Shaffner announced that the annual meeting of the Virginia State Bar will be held May 29th through June 1 in Virginia Beach.

9. **NEXT MEETING** - Spring Meeting will be held January 19. 2024 in Williamsburg starting at 1 pm in the East Lounge of the Williamsburg Inn (in conjunction with the VBA Meeting)

10. **ADJOURNMENT** – Meeting was adjourned at 1:23 pm

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR

WINTER MEETING OF THE BOARD OF GOVERNORS AND AREA REPRESENTATIVES

Williamsburg Inn, Williamsburg, Virginia

January 19, 2024 – 1 pm

MEETING MINUTES

Welcome and meeting called to order by Sarah Louppe Petcher, Section Chair, at 1 pm.

1. **WELCOME AND ATTENDANCE.** Please see the attached list. Please contact the Section Secretary at the time of the meetings, Rick Chess, at the following email address with any corrections, additions, or amendments to the attendance record: rick@chesslawfirm.com.

   Sarah Louppe Petcher reviewed the ground rules for participating live or via remote access.

2. **MINUTES ADOPTION.** The board adopted the minutes, from the meeting on September 8, 2023, without amendment.

3. **FINANCIAL REPORT.** Report presented by Rick Chess. Dolly Shaffner explained that the new VSB website is not yet able to process payments by check. The section has 1632 paid members (vs approximately 1700 at this time last year). The Chair announced that Section will continue the annual dinner at Steinhilbers.

4. **STANDING COMMITTEES**

   a. **Membership** – Rick Chess – No written report. Vanessa Carter of the "living library" team presented the topics for future videos and requested additional members for the team. Rick Chess noted that the Area Representative outreach team – Kevin Pagoda, George Hawkins, and John Rinaldi – met on January 5, 2024, and will divide the list of ARs and contact each to confirm they are active, inquire about their onboarding as an AR, and gather their ideas on how to strengthen the involvement of ARs in the Section.

   b. **Fee Simple** – Steve Gregory & Hayden Anne Breedlove –Written report submitted - Steve noted the need for additional members for the FEE SIMPLE beyond the current three. Committee Chairs are requested to develop articles for publication.

   c. **Programs** – Heather Steele & Jim Windsor – The Real Property Section is working on joint CLE presentations with other sections – Tax and Family Law, and Business Law. The dinner has been brought back to the Advanced Real Estate on Friday, March 1, 2024.

5. **SUBSTANTIVE COMMITTEES**

   Commercial Real Estate – John Hawthorne – No written report. Meeting to be held in mid-February 2024.

   a. Common Interest Community – William Sleeth, III – No oral or written report.

b. Creditor's Rights and Bankruptcy – Lewis Biggs – Mr. Biggs noted an increase in bankruptcy activity.

c. Eminent Domain – Christina Lollar – Written report submitted. Model jury instructions were submitted by the committee in October. The board voted to approval said instructions.

d. Ethics Co-Chairs – Ed Waugaman & Blake Hegeman – No oral or written report. Blake has requested he be replaced as a Co-Chair of this committee.

e. Land Use and Environmental Co-Chairs – Karen Cohen & Lori Schweller – Written report submitted. Committee is seeking balance by recruiting members who are not representing developers.

f. Residential Real Estate – Ben Winn – Written report submitted - Rachel Hinson, co-chair, has joined Marriott and relocated to Denver. Will remain active with the committee. The committee is working with the VLTA to put in writing a proposed draft what is permissible by lay closing agents.

g. Title Insurance – Cynthia Nahorney – Written report submitted - Committee has developed a "Title Insurance Guide for Homebuyers" which will be submitted to the VSB for approval.

6. **VBA UPDATE** – Shane Murphy reported that over 1500 bills have been filed in the House and over 700 in Senate, with several days before "cut off" for submitting bills.

7. **NEW BUSINESS**

a. Jeremy Root and Amanda Sams were unanimously elected Area Representatives.

8. **ANNOUNCEMENTS**

a. Pam Faber noted a recent split between two circuit court judges (in Virginia Beach and in Suffolk) regarding valuation in a condemnation under code section 204(d). At issue is whether the title search must be completed for a full 60 years. Legislation may need be developed for the 2025 session of the General Assembly to resolve the conflicting interpretation.

9. **NEXT MEETING -** Spring Meeting – 11:00 a.m. March 1, 2024, at Doubletree by Hilton Hotel, Williamsburg

10. **ADJOURNMENT** – Meeting was adjourned at 1:54 pm

BOARD OF GOVERNORS
REAL PROPERTY SECTION
VIRGINIA STATE BAR
(2023-2024)

Full Name	Position	Address of Record	Term Start	Term End
Sarah Louppe Petcher	Chair	S&T Law Group 6641 Locust St Falls Church, VA 22046	7/1/2019	6/30/2025
Robert Hawthorne, Jr.	Vice Chair	Hawthorne & Hawthorne, P.C. 1805 Main Street, PO Box 931 Victoria, VA 23974	7/1/2018	6/30/2024
Richard B. Chess	Secretary	Chess Law Firm, PLC 3821 Darby Drive Midlothian, VA 23113	7/1/2017	6/30/2026
Karen L. Cohen	Immediate Past Chair	Gentry Locke Attorneys PO Box 780 Richmond, VA 23218-0780	7/1/2023	6/30/2024
Shane M. Murphy	Ex-Officio	Miles & Stockbridge, P.C. 1751 Pinnacle Drive, Ste 1500 Tysons, VA 22102	1/23/2023	6/30/2024
Cynthia A. Boretsky	Board of Governors	Fidelity National Title Insurance Co. 4525 Main Street, Ste 810 Virginia Beach, VA 23464	7/1/2023	6/30/2026
Vanessa S. Carter	Board of Governors	716 Dissdale Lane Chesapeake, VA 23320	7/1/2023	6/30/2026
George Hawkins	Board of Governors	Dunlap Bennett & Ludwig, PLLC 8300 Boone Boulevard, #550 Vienna, VA 22182	7/1/2022	6/30/2025
Blake Hegeman	Board of Governors	12101 Robson Street Henrico, VA 23233-1735	7/1/2021	6/30/2024
Kevin Pogoda	Board of Governors	Old Republic National Title Insurance Co 7960 Donegan Drive, Ste 247 Manassas, VA 20109	7/1/2022	6/30/2025
John E. Rinaldi	Board of Governors	Walsh, Colucci, Lubeley & Walsh, P.C. Glen Park I, Suite 300 4310 Prince William Parkway Prince William, VA 22192	7/1/2022	6/30/2025
Heather Steele	Board of Governors	Pesner Altmiller Melnick DeMers & Steele 8000 Westpark Drive, Ste 600 Tysons, VA 22102	7/1/2021	6/30/2024
Benjamin C. Winn Jr.	Board of Governors	Benjamin c. Winn Jr., Esquire, PLC 42485 Cochran Mill Road Leesburg, VA 20175	7/1/2023	6/30/2026
Dolly C. Shaffner	Liaison	Virginia State Bar 1111 E Main St Ste 700 Richmond, VA 23219-0026	7/1/2023	6/30/2024
Kim Villio	Liaison	105 Whitewood Drive Charlottesville, VA 22901-1613	7/1/2023	6/30/2024

This list and additional information about the Board of Governors can be found at:
https://vsb.org/RP/groups/RP/rp-board.aspx

REAL PROPERTY SECTION
VIRGINIA STATE BAR
AREA REPRESENTATIVES
(2023-2024)

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

AREA REPRESENTATIVES

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

Central Region

Ross Allen
Owen & Owens
15521 Midlothian Turnpike #300
Midlothian, VA 23113
(804) 594-1911
email: rallen@owenowens.com

Brooke S. Barden
Smith, Barden & Wells, P.C.
1330 Alverser Plaza
Midlothian, VA 23113
(804) 794-8070
email: bsbarden@smithbardenwells.com

F. Lewis Biggs* (2016-2017)
Kepley, Broscious & Biggs, P.L.C.
2211 Pump Road
Richmond, VA 23233
(804) 741-0400
email: FLBiggs@kbbplc.com

Steven W. Blaine
WoodsRogers
123 East Main Street, 5th Floor
Charlottesville, Va. 22902
(434) 220-6831
email: Sblaine@woodsrogers.com

Tara R. Boyd
Boyd & Sipe, PLC
105 N 1st Street, Suite 202 / POB 237
Charlottesville, VA 22902
(804) 248-8713
email: tara@boydandsipe.com

Hayden-Anne Breedlove
Old Republic Title
Old Republic Insurance Group
7960 Donegan Drive, Suite 247
Manassas, VA 20109
(804) 332-1907
email: hbreedlove@oldrepublictitle.com

Kay M. Creasman
Old Republic Title
Old Republic Insurance Group
10105 Newby Bridge Rd.
Chesterfield, VA 23832
(804) 475-1765
Email: kcreasman@oldrepublictitle.com

D. Scott Foster, Jr.
Gentry Locke
P.O. BOX 780
Richmond, VA 23218
(804) 297-3709
Email: sfoster@gentrylocke.com

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

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

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

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

William G. Homiller
Troutman Pepper Hamilton Sanders LLP
1001 Haxall Point, 15th Floor
Richmond, VA 23219
(804) 697-1288
email: will.homiller@troutman.com

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

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

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

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

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

Larry J. McElwain*† (2004-2005)
Larry J. McElwain, PLLC
941 Glenwood Station Lane, Suite 103
Charlottesville, VA 22901
(434) 284-8020
email: Lmcelwain@larrylawva.com

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

Justin A. Ritter
Ritter Law PLLC
600 E. Water Street, Suite F
Charlottesville, VA 22902
(434) 218-1172
email: jr@ritterlawpllc.com

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

Susan H. Siegfried* (1999-2000)
5701 Sandstone Ridge Terrace
Midlothian, VA 23112
(804) 818-5940
email: shs5701@comcast.net

John W. Steele
Hirschler Fleischer
The Edgeworth Building
2100 East Cary Street
Richmond, VA 23223
or
P. O. Box 500
Richmond, VA 23218-0500
(804) 771-9565
email: jsteele@hf-law.com

Brian Thornton Wesley
Thornton Wesley, PLLC
P.O. Box 27963
Richmond, VA 23261
(804) 874-3008
email: bwesley@thorntonwesley.com

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

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

Stephen Bryce Wood
The Wood Law Firm, P.L.C.
6720 Patterson Avenue, Suite D
Richmond, VA 23226
(804) 873-0088
email: Steve.wood@woodlawrva.com

Northern Region

Dianne Boyle Senior Vice President and Commercial Counsel Chicago Title Insurance Company | National Commercial Services Fidelity National Title Insurance Company 1901 Pennsylvania Avenue, Suite 201 Washington, DC 20006 direct: (202) 263-4745; cell: (703) 472-7674 email: boyled@ctt.com	Sandra (Sandy) Buchko Asmar, Schor & McKenna 5335 Wisconsin Avenue, N.W., Suite 400 Washington, DC 20015 (202) 244-4264 email: SBuchko@asm-law.com
Todd E. Condron Ekko Title 410 Pine Street, S.E., Suite 220 Vienna, VA 22180 (703) 537-0800 email: tcondron@ekkotitle.com	Michael Coughlin Walsh Colucci 4310 Prince William Parkway, Suite 300 Prince William, VA 22192 (703) 680-4664 ext. 5113 email: mcoughlin@thelandlawyers.com
Matson Coxe Wilson Elser Moskowitz Edelman & Dicker LLP 8444 Westpark Drive, Suite 510 McLean, VA 22102-5102 (703) 852-7787 email: matson.coxe@wilsonelser.com	Lawrence A. Daughtrey Kelly & Daughtrey 10605 Judicial Drive, Suite A-3 Fairfax, VA 22030 (703) 273-1950 email: ldaught@aol.com

David C. Hannah Hirschler 8270 Greensboro Drive, Suite 700 Tysons, VA 22102 (703) 584-8900 email: DHannah@hirschlerlaw.com	Jack C. Hanssen Moyes & Associates, P.L.L.C. 21 North King Street Leesburg, VA 20176-2819 (703) 777-6800 email: jack@moyeslaw.com
George A. Hawkins Dunlap, Bennett & Ludwig 8300 Boone Boulevard, #550 Vienna, VA 22182 main: (703) 777-7319; direct: (571) 252-8521 email: ghawkins@dbllawyers.com	John H. Hawthorne SVP, Legal/Associate General Counsel Comstock Companies 1886 Metro Center Drive Fourth Floor Reston, VA 20190 (703) 230-1985 email: jhawthorne@comstockcompanies.com
Tracy Bryan Horstkamp The Law Office of Tracy Bryan Horstkamp 1184 Hawling Place, SW Leesburg, VA 20175 (703) 669-4935 email: tbh@horstkamplaw.com	Ralph E. Kipp The Law Offices of Ralph E. Kipp, P.L.C. 10615 Judicial Drive, Suite 501 Fairfax, VA 22030 (703) 352-8080 email: rkipp@kipp-law.com
Benjamin D. Leigh† Atwill, Troxell & Leigh, P.C. 50 Catoctin Circle, N.E., Suite 303 Leesburg, VA 20176 (703) 777-4000 email: bleigh@atandlpc.com	Paul H. Melnick* (2011-2012) Pesner, Altmiller, Melnick & DeMers, PLC 8000 Westpark Drive, Suite 600 Tysons, VA 22102 (703) 506-9440 email: pmelnick@pesner.com
Regina Petruzzi Neumann Regina Petruzzi Neumann Attorney at Law, PLLC 19415 Deerfield Avenue, #316 Suite A Leesburg, VA 20176 (703) 777-7371 email: regina@rpnlawfirm.com	Andrew A. Painter Walsh, Colucci, Lubeley & Walsh, P.C. One East Market Street, Suite 300 Leesburg, VA 20176-3014 (703) 737-3633 ext. 5775 email: apainter@thelandlawyers.com
Susan M. Pesner*† (1996-1997) Pesner Altmiller Melnick & DeMers PLC 8000 Westpark Drive, Suite 600 Tysons, VA 22102 (703) 506-9440 email: spesner@pesner.com	Michelle A. Rosati Holland & Knight 1650 Tysons Boulevard, Suite 1700 Tysons, VA 22102 (703) 720-8079 email: michelle.rosati@hklaw.com

Amanda Hayes Rudolph Redmon, Peyton & Braswell, LLP 510 King Street, Suite 301 Alexandria, VA 22314 (703) 684-2000 email: arudolph@rpb-law.com	Jordan M. Samuel Asmar, Schor & McKenna, P.L.L.C. 5335 Wisconsin Avenue, N.W., Suite 400 Washington, D.C. 20015 (202) 244-4264 email: jsamuel@asm-law.com
Lawrence M. Schonberger* (2001-2002) Sevila, Saunders, Huddleston & White, PC 30 North King Street Leesburg, VA 20176 (703) 777-5700 email: LSchonberger@sshw.com	Theodora Stringham Offit Kurman, P.A. 8000 Towers Crescent Drive, Suite 1500 Tysons Corner, VA 22182 (703) 745-1849 email: tstringham@offitkurman.com
David W. Stroh 2204 Golf Course Drive Reston, VA 20191 (703) 716-4573 email: davidwstroh@gmail.com	Lucia Anna Trigiani† MercerTrigiani 112 South Alfred Street Alexandria, VA 22314 (703) 837-5000; direct: (703) 837-5008 email: Pia.Trigiani@MercerTrigiani.com
Benjamin C. Winn, Jr. Benjamin C. Winn, Jr, Esquire P.L.C. 3701 Pender Drive, Suite 300 Fairfax, VA 22030 (703) 652-9719 email: bwinn@nvrinc.com	Eric V. Zimmerman Rogan Miller Zimmerman, P.L.L.C. 50 Catoctin Circle, N.E., Suite 300 Leesburg, VA 20176 (703) 777-8850 email: ezimmerman@rmzlawfirm.com

Southside Region

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

Tidewater Region

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

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

Jon W. Brodegard
Old Republic Title
Old Republic Insurance Group
7960 Donegan Drive, Suite 247
Manassas, VA 20109
(757) 577-2606
email: jbrodegard@oldrepublictitle.com

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

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

Vanessa S. Carter
Vandeventer Black LLP
101 West Main Street
500 World Trade Center
Norfolk, VA 23510
(757) 446-8505
email: vcarter@vanblacklaw.com

Brian O. Dolan
DolanReid PLLC
12610 Patrick Henry Drive, Suite C
Newport News, VA 23602
(757) 320-0257
email: bdolan@dolanreid.com

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

Pamela J. Faber
BridgeTrust Title Group
One Columbus Center, Suite 200
Virginia Beach, VA 23462
office: (757) 605-2015; cell: (757) 469-6990
email: pfaber@bridgetrusttitle.com

Thomas Gladin
Flora Pettit, P.C.
90 North Main Street, Suite 201
Harrisonburg, VA 22803
(540) 437-3109
email: tbg@fplegal.com

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

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

Joshua M. Johnson
Managing Attorney
Property Law Group, P.L.L.C.
(757) 206-2945
email: jmjohnson@propertylawgroupllc.com

Kristen R. Jurjevich
Pender & Coward, P.C.
222 Central Park Avenue, Suite 400
Virginia Beach, VA 23462
(757) 490-6261
email: krj@pendercoward.com

Naveed Kalantar
Garriott Maurer, PLLC
5041 Corporate Woods Drive, Suite G180
Virginia Beach, VA 23462
(757) 530-9593
email: Nkalantar@garriottmaurer.com

Ray W. King
Vandeventer Black LLP
101 W. Main Street
500 World Trade Center
Norfolk, VA 23510
direct: (757) 446-8527
email: rking@vanblacklaw.com

Charles M. Lollar* (1992-1993)
Lollar Law, PLLC
109 E. Main Street, Suite 501
Norfolk, VA 23510
office: (757) 644-4657; cell: (757) 735-0777
email: chuck@lollarlaw.com

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

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

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

A. Garrett Kelly
Williams Mullen
222 Central Park Avenue, Ste 1700
Virginia Beach, VA 23462
(757) 687-7538
Email: gkelly@williamsmullen.com

Charles (Chip) E. Land* (1997-1998)
Kaufman & Canoles, P.C.
150 W. Main Street, Suite 2100
P.O. Box 3037
Norfolk, VA 23510-1665
(757) 624-3131
email: celand@kaufcan.com

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

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

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

Tyler J. Rosá
Williams Mullen
222 Central Park Avenue, Suite 1700
Virginia Beach, VA 23462
(757) 282-5052
email: trosa@williamsmullen.com

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

Susan B. Tarley
Tarley Robinson, P.L.C.
4801 Courthouse Street, Suite 122
Williamsburg, VA 23188
(757) 229-4281
email: starley@tarleyrobinson.com

Andrae J. Via
Associate General Counsel
Ferguson Enterprises, LLC
751 Lakefront Commons
Newport News, VA 23606
(757) 969-4170
email: andrae.via@ferguson.com

Edward R. Waugaman†
1114 Patrick Lane
Newport News, VA 23608
(757) 897-6581
email: EdWaugamanJD@gmail.com

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

Benjamin P. Titter
Richmond Redevelopment and Housing Authority
901 Chamberlayne Parkway
Richmond, VA 23220
(804) 489-7256
email: ben.titter@rrha.com

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

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

Valley Region

K. Wayne Glass
Poindexter Hill, P.C.
P.O. Box 353
Staunton, VA 24402-0353
(540) 943-1118
email: kwg24402@gmail.com

Whitney Jackson Levin* (2017-2018)
Miller Levin, P.C.
128 West Beverley Street
Staunton, VA 24401
(540) 885-8146
email: whitney@millerlevin.com

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

Mark N. Reed
President/CEO
Pioneer Bank
P.O. Box 10
Stanley, VA 22851
(540) 778-6301
email: mnreed@pioneerbks.com

Western Region

Stephen C. Gregory 1334 Morningside Drive Charleston, WV 25314 cell: (703) 850-1945 email: 75cavalier@gmail.com	David C. Helscher*† (1986-1987) OPN Law 3140 Chaparral Drive, Suite 200 C Roanoke, VA 24018 (540) 725-8182 email: dhelscher@opnlaw.com
Jean D. Mumm* (2007-2008) Gentry Locke 10 Franklin Road SE, Suite 900 Roanoke, VA 24011 540-983-9323 Email: Mumm@gentrylocke.com	Maxwell H. Wiegard Gentry Locke SunTrust Plaza 10 Franklin Road, S.E., Suite 900 Roanoke, VA 24011 (540) 983-9350 email: mwiegard@gentrylocke.com
C. Cooper Youell, IV* (2014-2015) Whitlow & Youell, P.L.C. 28A Kirk Avenue, SW Roanoke, VA 24011 (540) 904-7836 email: cyouell@whitlowyouell.com	

Honorary Area Representatives (Inactive)

Joseph M. Cochran* (2009-2010) 177 Oak Hill Circle Sewanee, TN 37375	Robert E. Hawthorne* (1993-1994) Hawthorne & Hawthorne P.O. Box 603 Kenbridge, VA 23944 Kenbridge Office: (434) 676-3275 Victoria Office: (434) 696-2139 email: rehawthorne@hawthorne-hawthorne.com
Edward B. Kidd* (1988-1989) Troutman Sanders Building 1001 Haxall Point Richmond, VA 23219 (804) 697-1445 email: ed.kidd@troutmansanders.com	Michael M. Mannix* (1994-1995) Holland & Knight, L.L.P. 1600 Tysons Boulevard, Suite 700 McLean, VA 22102 (703) 720-8024 email: michael.mannix@hklaw.com
R. Hunter Manson* R. Hunter Manson, P.L.C. P.O. Box 539 Reedville, VA 22539 (804) 453-5600	G. Michael Pace, Jr.* (1991-1992) General Counsel Roanoke College Office of the President 221 College Lane Salem, VA 24153 (540) 375-2047 email: gpace@roanoke.edu
Joseph W. Richmond, Jr.*† (1985-1986) McCallum & Kudravetz, P.C. 250 East High Street Charlottesville, VA 22902 main: (434) 293-8191 direct: (434) 220-5999 email: jwr@mkpc.com	Michael K. Smeltzer* (1998-1999) Woods, Rogers & Hazlegrove, L.C. P.O. Box 14125 Roanoke, VA 24038 (540) 983-7652 email: smeltzer@woodsrogers.com

COMMITTEE CHAIRPERSONS AND OTHER SECTION CONTACTS

Standing Committees

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

Hayden-Anne Breedlove
Old Republic Title
Old Republic Insurance Group
7960 Donegan Drive, Suite 247
Manassas, VA 20109
(804) 332-1907
email: hbreedlove@oldrepublictitle.com

Publication Committee members: Michelle A. Rosati
Shafeek Seddiq
Benjamin P. Titter

Membership
Chair
Richard B. "Rick" Chess
Chess Law Firm, P.L.C.
9211 Forest Hills Avenue, Suite 201
Richmond, VA 23235
cell: (804) 241-9999
email: rick@chesslawfirm.com

Committee members: F. Lewis Biggs*
Kay M. Creasman*†
Pamela J. Faber
J. Philip Hart*
Randy C. Howard*
Larry J. McElwain*†
Harry R. Purkey, Jr.
Susan H. Siegfried*

Programs
Chair
Sarah Louppe Petcher
S&T Law Group P.L.L.C.
8116 Arlington Boulevard, Suite 249
Falls Church, VA 22042
(703) 665-3584
email: sarah@SandTlawgroup.com

Committee members: Kathryn N. Byler†
Kay M. Creasman*†
Howard E. Gordon*†
Neil S. Kessler*
Jean D. Mumm*
Susan M. Pesner*†
Michele Rosati
Edward R. Waugaman

Technology
Chair
Matson Coxe
Wilson Elser Moskowitz Edelman & Dicker LLP
8444 Westpark Drive, Suite 510
McLean, VA 22102-5102
(703) 852-7787
email: matson.coxe@wilsonelser.com

Committee members: F. Lewis Biggs*
Kay M. Creasman*†
Christopher A. Glaser
Garland Gray
Joshua M. Johnson

Substantive Committees

Commercial Real Estate
Chair
John H. Hawthorne
SVP, Legal/Associate General Counsel
Comstock Companies
1886 Metro Center Drive
Fourth Floor
Reston, VA 20190
(703) 230-1985
email: jhawthorne@comstockcompanies.com

Committee members: Michael E. Barney*
F. Lewis Biggs*
Dianne Boyle
Richard B. "Rick" Chess
Connor J. Childress
Robert Deal
Mazin Elias
K. Wayne Glass
David C. Hannah
Alyson Harter
Will Homiller
Randy C. Howard*
James L. Johnson
Kristen R. Jurjevich
Ralph E. Kipp
Benjamin D. Leigh†
Whitney Jackson Levin*
James B. Lonergan*
Rick Melnick
David Miller
Jean D. Mumm*
William L. Nusbaum*
Stephen R. Romine*
Shafeek Seddiq
Olaun Simmons
Theodora Stringham
J. Page Williams
C. Cooper Youell, IV*

Common Interest Community
Chair
William W. Sleeth, III
Partner
Gordon Rees Scully Mansukhani
5425 Discovery Park Blvd.
Suite 200
Williamsburg, Virginia 23188
(757) 903-0869
email: wsleeth@grsm.com

Committee members: Deborah M. Casey
John C. Cowherd
David C. Helscher*†
Brett Herbert
William A. Marr, Jr
Susan Bradford Tarley
Andrew Terrell
Lucia Anna Trigiana
Jerry M. Wright, Jr.

Creditors' Rights and Bankruptcy
Chair
F. Lewis Biggs* (2016-2017)
Kepley, Broscious & Biggs, P.L.C.
2211 Pump Road
Richmond, VA 23233
(804) 741-0400
email: FLBiggs@kbbplc.com

Committee members: Paul K. Campsen
Vanessa S. Carter
Brian O. Dolan
J. Philip Hart*
Hannah W. Hutman
John H. Maddock, III
Richard C. Maxwell
Christy Murphy
Lynn L. Tavenner
Stephen B. Wood
Peter G. Zemanian

Eminent Domain
Chair
Charles M. Lollar* (1992-1993)
Lollar Law, PLLC
109 E. Main Street, Suite 501
Norfolk, VA 23510
office: (757) 644-4657; cell: (757) 735-0777
email: chuck@lollarlaw.com

Committee members:

Nancy C. Auth
Josh E. Baker
James E. Barnett
Robert J. Beagan
Lynda L. Butler
Michael S. J. Chernau
Francis A. Cherry, Jr.
Stephen J. Clarke
Charles R. Cranwell
Joseph M. DuRant
Matthew D. Fender
Gifford R. Hampshire
Henry E. Howell
Thomas M. Jackson, Jr.
James W. Jones
James J. Knicely
Brian G. Kunze
Sharon E. Pandak
Rebecca B. Randolph
Kelly L. Daniels Sheeran
Mark A. Short
Olaun Simmons
Bruce R. Smith
Theodora Stringham
Paul B. Terpak
Joseph T. Waldo

Ethics
Co-Chairs
Edward R. Waugaman
1114 Patrick Lane
Newport News, VA 23608
(757) 897-6581
email: EdWaugamanJD@gmail.com

Blake Hegeman
Long & Foster Real Estate, Inc.
8411 Patterson Avenue
Richmond, VA 23229
Tel: 804-349-3228
email: blake.hegeman@longandfoster.com

Committee members: David B. Bullington
Richard B. Campbell
Todd E. Condron
Kay M. Creasman*†
Lawrence A. Daughtrey
James M. McCauley
Susan M. Pesner*†
Lawrence M. Schonberger*
Benjamin P. Titter
J. Page Williams
Eric V. Zimmerman

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

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

Committee members:

Brooke Barden
David B. Bullington
Todd E. Condron
Henry Matson Coxe, IV
Kay M. Creasman*†
Mazin Elias
Pamela B. Fairchild
Michele R. Freemyers
K. Wayne Glass
Barbara Wright Goshorn
Mark W. Graybeal
George A. Hawkins
Blake B. Hegeman
David C. Helscher*†
Tracy Bryan Horstkamp
Jack Kendall
Michael P. Lafayette
Thomson Lipscomb
Paul H. Melnick*
Sarah Louppe Petcher
Harry R. Purkey
Karen W. Ramey
Mark N. Reed
Trevor B. Reid
Collison F. Royer
Jordon M. Samuel
Shafeek Seddiq
Allen C. Tanner, Jr.
Benjamin P. Titter
Eric V. Zimmerman

Land Use and Environmental
Co-Chairs
Karen L. Cohen
Gentry Locke
P.O. Box 780
Richmond, VA 23218-0780
(804) 956-2065; cell: (804) 205-4926
email: Cohen@gentrylocke.com

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

Committee members: D. Scott Foster
Preston Lloyd
Valerie Long
Lindsey Rhoten
Stephen R. Romine*
Tyler Rosa
Olaun Simmons
Maxwell H. Wiegard

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

Committee members:

Addison Barnhardt
Hayden-Anne Breedlove
Jon W. Brodegard
Paula S. Caplinger*†
Kay M. Creasman*†
Pamela J. Faber
Stephen C. Gregory
Cynthia Nahorney
Helen Spence
Edward R. Waugaman
Benjamin C. Winn, Jr.

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

l $35.00 enclosed

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4. Print and return this application with dues to

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