VSB RPS

the FEE SIMPLE

The Journal of the
Virginia State Bar
Real Property Section

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

Vol. XLVI, No. 1 SPRING 2025

SARAH LOUPPE PETCHER

2025 TRAVER SCHOLAR

TABLE OF CONTENTS

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 2025 SUBMISSION DEADLINE: October 3

MEETINGS

Dates and Locations to be announced.

Visit the section website

at

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

and
for the Real Property Section *Fee Simple Journal*

https://vsb.org/RP/groups/RP/rp-newsletters.aspx

MESSAGE FROM THE CHAIR

I am writing this message while I attend the 43rd Annual Real Estate Practice Seminar for 2025 in Roanoke, Virginia. As I listen to David Mercer and Pia Trigiani inform me about the annual recent legislative changes for what may be the 25th time, I see Steve Gregory across the room, who has served this section admirably and faithfully as editor and co-editor of this Fee Simple for . . . well, a long time.

As current chair of the section, I decided to attend all three installments of our annual seminar to promote the Real Property Section and the many benefits of section membership. Fairfax on Tuesday, Roanoke today, Richmond next week. One of my objectives as section chair was to reconnect with our brethren in the western region of the state in this post-covid era. My motivation for this aspiration is not only professional (the western regions of our state encompass a vibrant segment of the legal community that provides valuable, diverse perspectives arising from their own traditions and geography), but also nostalgic. One of our speakers today is George I. Vogel, III, whose father formed a law practice in Roanoke in the early 1970s with my father, Bob Hawthorne, now the senior partner in my firm, as well as my best friend and invaluable mentor. I mention this because I remember, as a young law student, the obvious enjoyment Dad derived both socially and professionally from his association with this section as he served on the board of governors, including service in this same chair. Following in his footsteps, I am emphatically enjoying the same experience.

I consider myself the embodiment of the average attorney, but I have derived from my involvement with this phenomenal section exponentially more than I have contributed and am the better for it. I am confident that those who have served the section before me found the reward to well exceed the effort, and I am equally as confident that any who come forward to serve the interest of real property through this Virginia State Bar section will soon agree. Most of all, I have enjoyed immensely working as an officer of the board with Karen Cohen, Sarah Louppe Petcher, Rick Chess, and Cynthia Nahorney. I also offer special thanks to my section mentors of many years, Susan Pesner and Kay Creasman, and in more recent years, Jim Windsor, all of whose accomplishments, abilities, and body of service far exceed mine, but all of whom have treated me as a peer nonetheless.

I hope to continue my involvement with the section for the rest of my career. I know there are many out there throughout the Commonwealth who can enhance the practice of real estate law by affiliation and active participation in the Real Property Section of the Virginia State Bar, and to those who do, I offer my immense gratitude. We are all the better for it.

Sincerely,

Robert E. Hawthorne, Jr.

2024-2025 Chair, Real Property Section

A MESSAGE FROM THE INCOMING CHAIR OF THE REAL PROPERTY SECTION

To all the Board Members and Area Representatives, thank you for your service to the Real Property Section ("RPS"), and by extension, real estate practice in Virginia

Each Chair of the Section adds something for the good of the section.

Robert Hawthorne strongly pushed to return the mission of the section to serve ALL of Virginia. The Advanced Real Estate seminar ("Advance") was held in Charlottesville. I hope we can, on a three-year cycle, rotate the Advanced to the west (e.g., Roanoke), north (e.g., Prince William), and central (e.g., Williamsburg). (According to VA CLE, anything up north makes a huge profit, central is (at least) break even, and out west loses money.) With rotation, the VA CLE breaks even (in a three-year cycle) and, since about half of the attendees are online, hosting an event "out west" does not require a huge attendance for success.

With four board meetings annually of the RPS, I propose we find ways to hold one in each of Virginia Beach (as part of the VSB annual meeting), wherever the Advanced is held, and the other two find us in the markets not otherwise covered (e.g., west, north, central).

My focus as Chair of the RPS for 2025 – 2026 is to regain "touch" with our section members and the communities they serve. Covid forced the section to adopt virtual meetings. We now need to develop means to regain the "touch" we had when we all met together (which is why the RPS has been a very important part of my career).

- With virtual board meetings, we can have breakout sessions to discuss topics (before or after the board meeting).
- The Virginia Realtors hold a virtual webinar every week with over 1000 members attending. We have had multi discussions with Virginia Realtors to insert section members (generally those involved in a committee or the board) onto some of these webinars AND to support live events around the Commonwealth.
- Our publications can become a more effective tool for carrying out message. There will be a Publication Task Force formed to coordinate how we best connect with section members, those attorneys in other sections, and with the public.
- The Better Business Bureau of Central Virginia has discussed how our members might engage with their members at monthly events held in Richmond and around the state. I have attended one session with 45 BBB members. Their members need our help!
- I have asked the soon-to-be Vice Chair, Cynthia Nahorney, to challenge what we now do considering how technology is changing how we do our practice and live our life. I expect Cynthia to be pushing the board to move smarter and faster. The Virginia State Bar is now not only an advocate of use of Artificial Intelligence ("AI") , but they have also sponsored two presentations this year where the Bar states that it is a disservice to your clients NOT to effectively integrate AI into our practice! It is a brave new world we face.

- The Carolinas Virginia Business Broker Association (I am the immediate Past President) is seeking help from real property attorneys for their members when one of their clients is selling a business. Typically, the business is a tenant, and obtained landlord approval of the new owner as tenant generally is a battle.
- We have committees which are dead and attempts to get them going have failed for several years. Your ideas are appreciated.
- Where else might we help our section members to improve their practice of real property law in Virginia?

Regaining "touch" will require changes in how we do what we do, and in some cases, who is leading the various committees.

Please guide me on how best you wish to serve the section

Rick Chess

2025 RECIPIENT OF THE TRAVER AWARD

SARAH LOUPPE PETCHER

Sarah Louppe Petcher is the **2025 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.

Sarah is a past chair of the Real Property Section of the Virginia State Bar (2023-2024), and is currently an Area Representative and co-chair of the Education Committee. In this role, she has assisted the Section and VaCLE in putting together CLEs targeted towards real estate practitioners. She is a speaker for VaCLE on real estate brokerage issues as well as other matters. Sarah teaches extensively around Virginia and the country to real estate agents and brokers covering diverse topics such as ethics, code of ethics enforcement process, real estate transactions, fair housing and 1031 exchanges.

Previously she was active with the Young Lawyers' Conference of the Virginia State Bar receiving the R. Edwin Burnette Jr. Young Lawyer of the Year Award in 2007. In 2006 she was awarded the Significant Service Award by Virginia State Bar for creating an award winning statewide pro-bono program to increase access to legal representation for undocumented juvenile immigrants by training attorneys, judges, and social workers.

Born and raised in Paris, France Sarah received her Bachelor of Science and Bachelor of Arts degrees from Northwestern University, and her J.D. from The George Mason University School of Law. After a stint as a family law attorney in Fairfax, Sarah became General Counsel of the Northern Virginia Association of Realtors where she fell in love with real estate. During her tenure at NVAR, she learned not only about running a real estate association but came to understand the full picture of the real estate industry in Virginia and around the country. With this unique perspective, she partnered up with Toula Dreifuss to form S&T Law Group and the 1031 Exchange Group with the goal to provide services to Realtor associations, real estate brokerages, real estate agents, and members of the public involved in real estate transactions. Sarah lives in Falls Church, VA with her husband, two daughters, and several furry family members, and she travels home to France as often as she can.

CELEBRATING THE CAREER OF DOLLY SHAFFNER: A HEARTFELT FAREWELL FROM THE REAL PROPERTY SECTION

By Hayden-Anne Breedlove
Counsel, Old Republic Title, Co-Editor of the *Fee Simple*

After more than three decades of dedicated service to the Virginia State Bar, Dolly Shaffner is preparing to retire, leaving behind a legacy marked by warmth, connection, and tireless support for the Real Property Section and the overall legal community. Her journey has touched countless attorneys, volunteers, and colleagues, especially those in the Real Property Section, a section she has supported with genuine enthusiasm and care.

A Radford University graduate with a degree in political science, Dolly began her career in Richmond in 1988 and first worked at the AAA corporate office. There, she sold tickets and enjoyed the unique perk of visiting amusement parks, a fun prelude to what would become a long and meaningful career in service.

Dolly began her tenure at the Virginia State Bar in 1992 as an administrative assistant. From the start, she thrived on working with a great staff and loved being downtown. Her talent, warmth, and work ethic quickly earned her a promotion to meetings coordinator, where she became instrumental in planning the annual meeting and supporting key legal areas.

Over the years, Dolly has worked under three executive directors and four deputy directors. She became a critical liaison to numerous sections and committees, always bringing professionalism and a personal touch to everything she has done. In particular, her support of the Real Property Section stands out.

"The volunteers are just great," Dolly says, speaking of the section. She fondly recalls attending section meetings, where she could put faces to names of the members and engage with the people behind the work. Her favorite memories include traveling to Williamsburg for meetings, exploring new venues and hotels, and building connections with both new and longtime section members. From CLEs at annual meetings to seeing the community grow, Dolly was always at the heart of it.

As she looks ahead to retirement, Dolly plans to take a well-deserved break for a month or two before diving into home projects and learning how to digitize family photos. She will continue with her Tai Chi classes and is considering volunteering at Lewis Ginter Botanical Garden, where she was married 33 years ago, bringing her journey full circle.

Dolly Shaffner's presence at the Virginia State Bar has been more than just professional. It has been deeply personal, filled with kindness, reliability, and genuine joy in connecting with others. The Real Property Section and the broader bar community are better for having had her as part of their story.

From all of us in the Real Property Section: thank you, Dolly. You will be greatly missed, and your legacy will continue to inspire.

REAL PROPERTY PUBLICATIONS

In a constant desire to have information available and useful for Section Members and for the public in general the Title Insurance Committee of the Real Property Section has published the beginnings of a series of articles to briefly explain legal concepts to the public. The goal is to have uniform information available to provide basic information upon which you can build in private discussions with your client. These documents also help prevent the unauthorized practice of law by lay settlement service providers. All of the documents can be found on the Bar's website by searching for "Real Property Publications."

We welcome your suggestions for future topics that would help streamline your practice or address recurring challenges. Don't hesitate to share your ideas. Also consider becoming involved in the Section either as an Area Representative or as the author of an article to add to this collection or as an author of a Fee Simple article. We look forward to hearing from you. Contact Rick Chess, Vice Chair, Rick@ChessLawFirm.com

Available now:

Common Types of Fraud in Real Estate Transactions

May 2025

Fraud in real estate and title insurance is a growing concern, impacting both professionals and the public. As technology evolves, so do the tactics employed by fraudsters. This article aims to shed light on the most common types of fraud occurring today and provide guidance on how to protect against these threats.

Before You Buy: HOA Legal Issues

Updated May 2017

This information from the Real Property Section Common Interest Community Committee is offered as a public service to answer certain basic questions about resale disclosure in Virginia common interest community associations and provide general guidance about important portions of a resale disclosure document that should be given careful attention.

The Most Common Tenancy Options in Virginia

May 2025

The way to own real estate is called "tenancy," and this publication highlights the most common tenancies in Virginia. What is selected depends on how many people are buying the property.

Powers of Attorney in Virginia: A Brief Overview

May 2025

A power of attorney (POA) is a legal document that authorizes a person or persons (the agent or attorney-in-fact) to act on behalf of another person or entity (the principal).

A Title Insurance Guide For The Homebuyer

Updated February 2024

An owner's title insurance policy could save you money and time if a title defect is discovered after you purchase your home. Read more about this type of policy in A Title Insurance Guide for the Homebuyer.

The Basics of Virginia Transfer on Death Deeds

May 2025

Most people who have a retirement account and/or a bank account are aware of the forms they completed that direct who gets the money on their death. Completing the form is a simple process and allows the assets to be paid directly to the designated person without involving the probate court, saving time and money. A transfer-on-death deed (TOD deed) serves that function for real estate.

What Happens to My Real Property When I Die?

May 2025

Upon death while owning real property in Virginia, the real property passes according to the laws of Virginia. Real property in Virginia is said to "drop like a stone"—title is immediately vested at time of death in the heirs at law or devisees. But those heirs or devisees need to establish their ownership of record in the land records of the circuit court in which the real property lies.

THE FUNDAMENTAL RIGHT OF PRIVATE PROPERTY IN VIRGINIA

By Jacob R. French

Jacob French is a current law student at the University of Richmond where he will earn his J.D in May of 2025. He graduated from James Madison University in 2022 with a B.A in History and a Minor in General Business. Jacob has interned in the United States House of Representatives, the Office of the Virginia Attorney General, and in the Virginia House of Delegates. Jacob currently works within the Virginia Senate as a Legislative Assistant. He also serves as President of the Rural Law Society at the University of Richmond. Upon completing his studies and passing the Bar, Jacob intends to return to his hometown and practice independently.

Introduction

After the United States Supreme Court decided Kelo v. City of New London[1], the Takings Clause of the Federal Constitution wielded a broader power within the realm of eminent domain. As a result, states restricted their own power by narrowing the scope of their takings language within their state constitutions. Virginia amended its state Constitution in 2012, intending to establish a more limited state authority concerning takings. In an attempt to narrow the power of the Takings Clause in Virginia, the Commonwealth added distinct language that creates stronger protections for property rights. The new Virginia Takings Clause requires a reflection and a rethinking of what it is and what it can be.

This article intends to demonstrate that any forfeiture, seizure, or taking of property in the Commonwealth of Virginia by the government that is not for a public use is unconstitutional. It will analyze the Federal Takings Clause review the Kelo decision, compare the new language of the Virginia Takings Clause to the prior language analyze the current application in Virginia courts, and then assess how the distinct and novel language should be applied--all while using the required form of statutory interpretation. The article will also review the suspected counter arguments opposed to the new limitations.

In summation, this article will explore an area of law in Virginia that is uncharted and proffer evidence that the Virginia Takings Clause provides an absolute fundamental right to private property.

I.) The Federal Takings Clause

The Takings Clause of the United States Constitution allows the Federal Government to condemn and confiscate property, so long as that property qualifies as a public use and the owner is compensated. The Fifth Amendment of the US Constitution states, "...nor shall private property be taken for public use, without just compensation". This taking of property does not violate constitutional boundaries and is neces-sary to build roads, provide public utilities, etc., and ultimately benefit society.

The idea that the government can confiscate property for a public use is firmly established in the United States through legal precedents and has been practiced globally for centuries. The US Supreme Court has affirmed this right of eminent domain but has noted that the Federal Takings

1 Kelo v. City of New London, 545 U.S. 469 (2005)

Clause is a limitation on the power of it rather than the authority for it. In Boom Co. v. Patterson[2], the Supreme Court held that the right of emi-nent domain belongs to every independent government, requiring no constitutional recognition. The Supreme Court explained that the Takings Clause in both the Federal Constitution and the constitutions of the states, which require just compensation for property taken, is a mere limitation upon the exercise of eminent domain.[3]

In other words, the Takings Clause does not prevent property from being taken but instead creates standards for how private property can be taken to satisfy a public use. The Federal Constitution language is so broad that it allows for other forms of forfeiture to exist constitutionally.

A.) Federal Civil Forfeitures and the Federal Takings Clause:

Civil forfeiture allows the government to seize and then keep or sell any property that is allegedly involved in a crime or illegal activity, without having to compensate the owner.[4] The legal authority creating civil forfeiture is not granted within the Constitution; rather, the statutory authority is found within U.S. Code § 981. The Code defines what property is subject to forfeiture and what criminal activity justifies the forfeiture. For the purposes of this article, the law of what is eligible to be forfeited is not relevant. What is relevant, however, is how the Federal Constitution allows forfeiture of private property other than by eminent domain.

The United States Supreme Court has held that civil forfeiture does not violate the Takings Clause of the US Constitution as long as the forfeiture proceeding did not violate the Due Process Clause of the Fourteenth Amendment. This is because the proceeding transferred the owners interest in the property to the state. As a result of that transfer, the government is not required to compensate an owner for property which it has already lawfully acquired without relying upon eminent domain.[5] If the government can justify its taking or seizure under a different constitutional power, then no violation of the Takings Clause has been committed. When the government exercises its takings power without using the Takings Clause, no compensation is owed to the owner of the property; the language of the Takings Clause does not forbid takings, and it only creates a requirement of compensation within the realm of eminent domain.

This standard was established within the Bennis v. Michigan decision. In that case, a husband was charged with gross indecency after being caught while engaged in a sexual act with a prostitute within a parked car.[6] The car was jointly owned by the husband and his wife but, the wife had no in-volvement in the illegal act. The trial court ordered the forfeiture of the automobile. The wife appealed, contending that she was an innocent party and her property interest cannot be destroyed without violating the US Constitution.[7] The US Supreme Court disagreed with the wife and upheld the trial court's seizure of the car,stating that the taking did not offend the Due Process Clause because precedent has held that an owner's interest in property may be forfeited based upon use even if the owner did not know that it was being put to such use.[8] The Court further held that the Takings Clause of the Fifth Amendment did not prevent the taking because the forfeiture pro-

2 Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).

3 *Id.*

4 Civil forfeiture, CIVIL FORFEITURE, https://www.law.cornell.edu/wex/civil_forfeiture:~:text=Civil%20forfeiture%20allows%20the%20government,away%20permanently%20by%20the%20government.

5 Bennis v. Michigan, 516 U.S. 442 (1996).

6 Bennis at 443.

7 *Id.*

8 *Id.*

ceeding did not violate the Fourteenth Amendment.[9] The Court found that the wife's interest in the vehicle was transferred from her to the state by virtue of a court proceeding, hence the government may not be required to compensate the owner when the property was seized according to other governmental power that does not offend the Takings Clause.[10] This holding has precedent in United States v. Fuller[11], which stated that the government as condemnor may not be required to compensate a condemnee for elements of value that the government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain.

Ultimately, the Supreme Court is affirming that the Federal Takings Clause is a condition upon a certain type of government taking and that the condition only exists within the realm of eminent domain because of how the wording of the clause. This allows for civil forfeiture legislation because the taking is not classified as a public use, thus compensation is not owed. The Federal Takings Clause does not forbid other forms of government takings.

The United States Constitution, when applicable to the states, provides a floor of protection with respect to individual rights and civil liberties.[12] States may not deny individuals the minimum level of protection mandated by the Federal Constitution. However, states possess authority to grant broader protections under their own constitutions than those granted by the Federal Constitu tion.[13] More state courts are increasingly relying on their constitutions when examining personal rights and liberties.[14] Oftentimes these constitutions provide further protections than the Federal Government because there is no prohibition against granting broader protections.[15]

Consequently, the Takings Clause can be strengthened by granting broader protections within state constitutions than those afforded in the Federal Constitution. These protections will only apply to state actions because the Federal Government can only be governed by Federal Law.[16] Although the Federal Takings Clause allows government takings without compensation through other constitutional provisions, a state can pass a stronger and broader Takings Clause that expressly eliminates the ability to seize or take property for any reason that the state wishes. For a state to manage this difficult change, an event must happen that ignites a need to redraft the state's tak-ings language. The Kelo decision did just that.

II.) The Infamous Case: *Kelo v. City of New London*

In Kelo v. City of New London, the definition of a public use was expanded not only to include benefits provided by the government and benefited equally by society, but also to include private

9 *Id.*

10 *Id.*

11 United States v. Fuller, 409 U.S. 488, 492 (1973).

12 Stickley v. City of Winchester, 110 Va. Cir. 300, 317 (Cir. Ct. 2022). States can still establish protections for civil liberties through state statutes or state constitutional amendments. However, due to the Fourteenth Amendment and the Doctrine of Incorporation, when federal principles conflict with a state statute or state constitution, the federal fundamental rights encapsulated in the incorporated Amendment apply. Essentially, with those federal Bill of Rights incorporated under the Fourteenth Amendment, a bare minimum or "floor" is established as to the level of protection of civil liberties. While a state's civil liberty protections can exceed those incorporated under the Fourteenth Amendment, those protections cannot provide fewer rights than those afforded under the incorporated Amendments of the federal Bill of Rights.

13 *Id.*

14 Arnold v. City of Cleveland, 67 Ohio St. 3d 35, 42 (1993). A common thread found in the state court decisions which have relied exclusively on the state's constitution is that states may not deny individuals or groups the minimum level of protections mandated by the federal Constitution. However, there is no prohibition against granting individuals or groups greater or broader protections.

15 *Id.*

16 Stickley at 317.

economic benefits had by corporations. The facts of the case are important in understanding the Court's reasoning.

The City of New London is located in Connecticut. In 1990, the state designated the locality a distressed municipality; then in 1996, the Federal Government closed the Naval Undersea Warfare Center, which employed over 1,500 people. The Naval Undersea Warfare Center was located within Fort Trumbull; Fort Trumbull is situated on a peninsula that juts into the Thames River.[17] In 1997, Susette Kelo purchased her dream home, a bright pink structure located within Fort Trumbull. Susette spent the next few years remodeling and enhancing the home but always keeping it bright pink. By 1998, the New London's unemployment rate was nearly double that of the State and the City's population was at its lowest since 1920.[18] As a result of the struggling economy, the City partnered with a private organization, the New London Development Corporation (NLDC), to create an economic revitalization plan to change its economic course.[19]). In January of 1998, the State authorized a $5,350.000.00 bond to support the NLDC's planning activities.[20] In February of 1998, the pharmaceutical company Pfizer Inc. announced that it would build a $300,000.000.00 research facility on a site immediately adjacent to Fort Trumbull.[21] Upon obtaining state-level ap proval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area consisting of approximately 115 privately owned properties as well as the 32 acres of land formerly occupied by the naval facility.Suzette Kelo's pink home was one of those 115 houses.[22] The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to build momentum for the revitalization of downtown New London, the plan was also de-signed to make the City more attractive and create leisure and recreational opportunities on the waterfront.[23] Within those 58 acres of privately owned property (90 acres minus the 32 acres of the Federal Property), the NLDC intended to have a waterfront conference hotel at the center of a small urban village that would include restaurants and shopping areas, marinas both for rec-reational and commercial uses, a pedestrian walkway, 80 new residences, a new U. S. Coast Guard Museum, 90,000 square feet of research and development office space for Pfizer Inc., parking and retail services for visitors of the marinas, and land for commercial parking.[24] To accomplish all this would require the demolition of the existing homes on the 58 acres of private property. In the year 2000, the city approved the development project and authorized the NLDC to purchase property or to acquire property by exercising eminent domain under the City's name.

The NLDC was unable to negotiate the purchase of every privately owned property within the 58 acres.[25] The Pink Home, along with 14 other houses (10 of which were the primary residence of the owners), did not want to be sold. As a result, the NLDC exercised the power of eminent domain granted to them by the City of New London, available to the City under the Takings Clause of the U.S Constitution, and seized the properties. (It is worth noting that none of these properties were ever argued to be blighted or otherwise in poor condition. They were condemned only because

17 Kelo v. City of New London, 545 U.S. 469, 472 (2005).

18 Kelo at 473.

19 *Id.*

20 *Id.*

21 Kelo at 474.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

they happen to be located in the development area.)[26] The property owners sued. arguing that the taking of their properties violated the "public use" restriction in the Fifth Amendment.[27]

The Supreme Court in a 5-4 decision disagreed and further broadened the taking capabilities of the Federal Government. The Court held that a taking of private property and selling it to a private developer qualified as a "public use" within the Takings Clause of the US Constitution. Because the City was not exercising its authority solely to benefit the developers, but took the property in accordance with their economic plan.[28] The Supreme Court decision created a legal precedent by which land seized can be deemed as government property even if it is not directly beneficial to the public and the courts have little authority to review the decision.[29] In 2009, Pfizer Inc. left New London and terminated the 1,400 jobs that they created.[30] 19 years after the Kelo decision, there exists nothing on the decimated land that was condemned and seized by the government solely based on economic prospects.

III.) The Commonwealth of Virginia and Kelo

The Kelo decision shocked and frightened voters across the United States. In response to the decision, Virginia and 43 other states passed legislation in an attempt to place restrictions upon the state government's right to seize property.[31] In 2012, the Virginia legislature sent a re-vised version of the Virginia Constitution to the voters of the Commonwealth; it was approved with 74% of the voting population supporting the measure.[32] This change was a direct result of the Kelo decision. According to an opinion from the Office of the Attorney General at the time, "The present efforts to amend Virginia's Constitution have been strongly influenced by the decision of the United States Supreme Court in the case of Kelo v. New London"[33] The Commonwealth of Virginia purposely amended its state constitution to differentiate it from the Federal Constitution and to increase rights granted to property owners. It is important to note and compare the prior language of the Virginia Constitution to the updated language:

- Prior Article 1 Section 11 of the Virginia Constitution (Takings Language in Bold):

  That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, **nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly**; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

26 Kelo at 472.

27 *Id.*

28 *Id.*

29 Author, G. (2023) *Why Kelo v. New London is one of the worst Supreme Court decisions, James Madison Institute*. Available at: https://jamesmadison.org/why-kelo-v-new-london-is-one-of-the-worst-supreme-court-decisions/?gad_source=1

30 Mcgeehan, P. (2009) *Pfizer to leave city that won land-use case, The New York Times*. Available at: https://www.nytimes.com/2009/11/13/nyregion/13pfizer.html

31 *50 state report card - institute for justice (2007) Institute for Justice.* Available at: https://ij.org/report/50-state-report-card/.

32 *Virginia eminent domain amendment, question 1 (2012) Ballotpedia*. Available at: https://ballotpedia.org/Virginia_Eminent_Domain_Amendment,_Question_1_(2012)

33 2012 Va. AG LEXIS 3, *8, 2012 Va. AG LEXIS 3

- Current Article 1 Section 11 of the Virginia Constitution (New Language Bolded, Prior Bolded Language Removed):

  That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

  That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

  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. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms "lost profits" and "lost access" are to be defined by the General Assembly. A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property. The condemnor bears the burden of proving that the use is public, without a presumption that it is.[34]

Prior to the amended language, the Virginia Constitution was similar to that of the US Constitution. There were a total of 28 words that allowed government takings and only required compensation if the taking was for a public purpose. Reading the text of the prior Takings Clause, the restriction was that the General Assembly could not pass any law that denied compensation for a taking that quali-fied as a public use. This prior Takings Clause allowed the same overreach as the Federal Con-stitution. A taking could only be considered a "taking" in the context of eminent domain and the government could confiscate property using other constitutional powers without compensating the owner or violating the Constitution.[35] However, the new Taking's Clause expressly prohibits any government action that takes property unless it is 1.) For a public use as defined in the amendment, 2.) The owner is compensated no less than the value of the property taken, and 3.) No more property is taken than necessary for the stated public use. This new language, specifically the word ing "shall pass no law"**,** eliminates the ability to confiscate property through other constitutional powers or the Code of Virginia. It does this by enhancing the Takings Clause to abolish any possibility of circumventing its authority. This was the goal of the amendment:to distinguish the Federal Constitution and create strong property rights within the Commonwealth.

When comparing the prior and revised language, it is important to understand that when interpreting a Virginia law, the Virginia Supreme Court has stated that a court must assume that the legislature chose with carethe words it used when it enacted the relevant statute.[36] In construing statu-

34 Va. Const. Art. I, § 11

35 Bennis v. Michigan held that the government is not required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.

36 *McMillion v. Commonweal*th, 81 Va. App. 344, 346, 903 S.E.2d 578, 579 (2024).

tory language, the court is bound by the plain meaning of clear and unambiguous language. Where the General Assembly has expressed its intent in clear and unequivocal terms, the court cannot add words to the statute or alter its plain meaning.[37] Subsequently, when the language states that the General Assembly "shall pass no law" whereby private property shall be damaged or taken except for public use, it must be interpreted to mean exactly that. Thus, Virginia has chosen to exercise its power and step further than the Federal Government within its state Takings Clause - A power that was granted to the Commonwealth by the US Supreme Court.[38]

A.) Virginia's Takings Clause Compared to Other States:

Virginia's Takings Clause is distinguishable from other states' takings language. Virginia has by far the most strongly worded amendment and does not restrict it to eminent domain whatsoever within its Constitution. Of the 47 states that have constitutional takings language, 11 states con-strain taking power specifically to eminent domain and 34 have language identical or nearly identical to the Federal Constitution.[39] West Virginia, the Commonwealth's neighbor, has the fol-lowing language in its Constitution:

> Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner as may be prescribed by general law: Provided, That when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.[40]

This language is nearly identical to the Federal Constitution, except to extend the requirement of compensation to private corporations which exercise eminent domain. It also guarantees a jury trial for these types of cases; however it still begins the same as the US Constitution and allows for civil forfeitures because of its language.

Maryland, the Commonwealth's neighbor to the north, has the following language in its Constitution:

> The General Assembly shall enact no Law authorizing private property to be taken for public use without just compensation, as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation.[41]

Again. this language is similar to the Federal Constitution, with more details added. The concept does not change nor do its protections. It offers the same standard of protection as the Federal Government. Maryland and West Virginia are among the 34 states that have takings language that is consubstantial to the Federal Government's Takings Clause. They change small details but the goal and the impact are identical. In those 34 states, private property can be taken for a public use, so long as compensation is paid but the state can seize property under separate powers without compensating the owner.

37 *McMillion* At 579.

38 *Stickley* held that the United States Constitution provides a floor of protection with respect to individual rights and civil liberties. States may not deny individuals the minimum level of protection mandated by the federal constitution. However, states possess authority to grant broader protections under their own constitutions than those granted by the federal constitution.

39 List of Takings Language organized by state. https://drive.google.com/file/d/1lRQy3j8Hq3JmHjfvOSQuxv89ONGRl3pH/view?usp=drive_link

40 W. Va. Const. Art. III, § 9

41 Md. Const. Art. III, § 40

The other 11 are not so different from the other 34, they simply mention eminent domain expressly in their constitutional language. New Hampshire has the following language:

> No part of a person's property shall be taken by eminent domain and transferred, di rectly or indirectly, to another person if the taking is for the purpose of private devel opment or other private use of the property.[42]

This language is different from the Federal Constitution, but it's specific to eminent domain. Ala bama also has a Takings Clause that falls within this category. The language of Alabama's Takings Clause is:

> That the exercise of the right of eminent domain shall never be abridged nor so con strued as to prevent the legislature from taking the property and franchises of incor porated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association.[43]

The remaining 9 are similar to this; they expressly limit the taking of property, but only in instances of eminent domain. This still allows the ability to take property through other powers. If Virginia was simply attempting to limit the powers of eminent domain, they could have done so by following New Hampshire or Alabama's guidance. However, Virginia chose not to restrict their amendment solely to eminent domain, and the Virginia courts have followed suit.

No state has language concurrent with the Commonwealth of Virginia. This provides the basis for the argument that Virginia's Takings Clause is distinct and advanced. Borrowing Federal Court precedent, novel language cannot be applied in the same way as traditional language.[44] The re vised amendment must be applied in a new and stronger way than the old language, otherwise the actions of the legislature would be null and void. Virginia may not have intended to pass such unique and unambiguous language, but the courts must presume that it did.

IV.) The Potential Impact of the Revised Amendment

The initial impression of the Virginia Takings Clause is that it is only intended to protect against tak ings of land where the public use is questionable or not necessary. This is viewing the language in the traditional and narrower sense. There is no contention that the purpose behind the change was to protect against Kelo-style takings. It does this by making a taking harder, ensuring com

42 N.H. Const. Pt. FIRST, Art. 12-a

43 Alabama Const. Art. I, Sec. 23

44 The L. W. Eaton, 15 F. Cas. 1119, 1123 (S.D.N.Y. 1878). Where the language of any section of the Revised Statutes, is so clearly different from the language of any prior provision referred to in the marginal note to such section, as to make it impossible to give to the new language the same meaning and interpretation which were given to the former language, the new language must receive a different meaning and interpretation.

pensation when it happens, and attempting to narrowly define what a public use is. However, that train of thought is not distinctive to real property. Article 1 Section 11 applies equally to personal property as it does to real property.[45] Considering that the language protects personal property and factoring in the concept of it being a novel idea, under the revised amendment, any taking or seizure of property without a permitted public use and just compensation is unconstitutional in the Commonwealth of Virginia, no matter if permitted by statute. This is because where there is incon sistency between the statute and the Constitution, the Constitution must prevail, and the statute, to the extent of the inconsistency, must be declared invalid.[46]

Returning to the concept of forfeitures discussed earlier, prior to the revision of the Takings Clause, Virginia and the Federal Government shared the same takings language. This identical language allowed Virginia to pass seizure statutes and enforce them under the same constitutional protec tions afforded the Federal Government. Before the revision, Virginia could possess forfeited prop-erty so long as due process was granted when the property was taken. However, after the revision of the Takings Clause within the Virginia Constitution, this power no longer exists. This means that Virginia Code § 18.2-46.3:2, which authorizes civil forfeitures, may be declared unconstitutional and invalid.

Reading Article 1 Section 11 using the required plain meaning interpretation clearly establishes the following; 1.) Property is a fundamental right in Virginia, 2.) The only circumstance that Virginia may take property is when there is a permitted public use relying on the taking, 3.) The taking of prop erty must be followed by compensation no less than the value of the property taken, and 4.) No more property than necessary may be taken to accomplish the public use. Virginia Code § 18.2-46.3:2 would seem to violate Article 1 Section 11 because the statute permits all property substantially connected to violations of specific sections of the Virginia Code to be subject to civil forfeiture. Statutes that permit seizures and forfeitures appear to be contrary to Virginia's Takings Clause be-cause they do not specify that the forfeiture is a public use; even if they did, the forfeiture does not result in the value of the property being paid to the owner. The laws that allow it were passed be fore the Takings Clause changedl now with the change these laws may be challenged as being invalid because of their confliction with the Virginia Constitution.

Keep in mind that this revision to Virginia's Takings Clause is fairly recent in terms of case prec edent. There is a very limited application in the local courts, but that does not mean that the argu ment is faulty, only that it is unexplored. The argument has been attempted in only a single case thus far, but the decision was based not on the Constitution, but solely on the gun statute at issue. The Court seemed to hint that if the gun would have been lost permanently, the unconstitutional as-pect of the argument would have survived and been reviewed.

In Baird v. Baird, the respondent in the case was placed under a protective order; a condition of this order was that the respondent be required to surrender his firearm until the order expired.[47] Respondent argued that the statute allowing a protective order results in private property being taken for a non-public use, and thus violated his state constitutional right under Article 1 Section 11.[48] (The respondent did not explain what property was allegedly taken; the Court assumed he

45 AGCS Marine Ins. Co. v. Arlington Cty., 293 Va. 469, 489. Affirmed that "private property" under Article I, Section 11 of the Constitution of Virginia applies to personal property.

46 Fid. Ins., Tr. & Safe-Deposit Co. v. Shenandoah V. R. Co., 86 Va. 1, 5, 9 (1889). Where the repugnancy between the statute and the constitution is too clear to admit of reasonable doubt, the constitution must prevail, and the statute, to the extent of the repugnancy, must be declared invalid, be the consequences what they may.

47 Baird v. Baird, 99 Va. Cir. 432, 437 (Cir. Ct. 2018).

48 Baird at 437.

meant the firearm[49]). The Court agreed that a taking is a direct government appropriation or physi-cal invasion of private property.[50] The Court also conceded that a government regulatory action may give rise to a taking if the government requires an owner to suffer a permanent physical invasion of his property, no matter how minor, or if the regulations completely deprive an owner of all economically beneficial use of the property.[51] The Court held that the statute does not meet the definition of a taking because the law allowed such a person to continue to possess a firearm for a period of 24 hours after being served with the protective order. The Respondent is permitted to sell or transfer the firearm to another person, thus allowing them an economic benefit.[52] The Court relied on the fact that the provision does not require the sale of the firearm or otherwise to permanently give up an ownership interest in the firearm, but instead gives the Respondent the opportunity to remove the firearm from his possession in whatever lawful manner he sees fit.[53] It does not cause the Respondent to suffer a permanent physical invasion because the law only re-quires a temporary dispossession of the firearm.[54] Thus. although direct ownership is pro hibited for a limited period of time, the ownership is not fully extinguished. A statute that allows an owner's property to be taken indefinitely (without a public use or compensation), would likely be prohibited under the plain meaning of Virginia's Takings Clause.

Virginia Code Section 3.2 - 6569 is an animal abuse statute; a violation of this law can result in a seizure of the property. Section 3.2-6569 allows a seizure of any animal that has been cruelly treat ed, abandoned, or suffering.[55] The statute defining animal abuse is broad on what constitutes the abuse of an animal. Cases have involved loose uninjured dogs and owners not taking their animals to the veterinarian.[56] Although animals have attempted to be classified as something higher than property, the courts cannot and should not ignore the language of the Con stitution. Animals, no matter how beloved, are personal property under the law in Virginia.[57] Under Section 3.2 - 6569, if the property owner is found to have violated the statute regarding animal cruelty, then the court shall order that the seized property be sold by a local governing body or disposed of.[58] A conviction of this statute can also carry the punishment of the prohibition of owning animals in the future.[59] Along with the loss of their property and their property rights, the owner is also obligated under the act to pay all reasonable expenses incurred in caring for and providing for such property from the time it was seized until it is disposed of.[60] If a sale of the property occurs, the proceeds shall first be applied to the costs of the seizure, then next to the unreimbursed expenses for the care of the property, and the remaining proceeds, if any, shall be paid over to the prior owner of the animal.[61]

---

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 Va Code Section 3.2 - 6569

56 Mosca v. Commonwealth, No. 1084-11-4, 2012 Va. App. LEXIS 379, at *5-6 (Ct. App. Nov. 27, 2012); Baker v. Commonwealth, 2016 Va. Unpub. LEXIS 24, *1; Sullivan v. Commonwealth, 280 Va. 672, 676 (2010); Pelloni v. Commonwealth, 65 Va. App. 733, 737 (2016).

57 Kondaurov v. Kerdasha, 271 Va. 646, 657 (2006). All dogs and cats shall be deemed personal property.

58 Va Code Section 3.2 - 6569

59 Va Code Section 3.2 - 6569

60 Va Code Section 3.2 - 6569

61 Va Code Section 3.2 - 6569

Following the same framework that was applied in the Baird case, the first question that must be asked is if the Takings Clause applies to animals. Because the language applies to both real and personal property, animals are personal property under the law and therefore the Takings Clause of the Virginia Constitution should apply to animals. Continuing to follow the Baird framework, the court must then ask whether the statute prohibiting possession of an animal by the owner is a taking.[62] To establish this the analysis can still rely upon either a categorical or a regulatory taking.[63] A categorical taking is a deprivation of all economic use of property.[64] A regulatory taking places limitations on property that render an economic effect on the owner and interfere with reasonable investment-backed expectations.[65] Although the old analysis can still be applied, it must be applied more broadly on what constitutes either a categorical taking or a regulatory taking. The seizure of animals is likely not a regulatory taking, but it is a categorical taking. The owner of the animal is deprived of all economic use of his property since it is seized from him and the owner is not paid the value of the animal nor having the capability of selling the animal--unlike the Re-spondent in the Baird case.

Since the act of seizing the animal is a taking, the taking would be constitutionally allowed if the action is done for a public use. Prior case precedent has already established that the confiscation of animals has no public use. In the 1998 case Green v. Commonwealth, the Court of Appeals upheld a condemnation of an individual's right to possess animals through the police powers of the Constitution. The Court fur ther held that Virginia's statutory scheme provides very clearly that proceedings pursuant to the code sections at issue are for the protection of animals; they do not constitute a taking of animals for public use.[66] Now, though, the police power justification is no longer applicable under the updated Takings Clause because the new clause eliminates the state's ability to circumvent it us-ing other constitutional powers. Assuming that Green is overturned in the future, if the owner of the property is not compensated for the value of their animal, it still makes it unconstitutional even if taken for a public use. The policy defending this is simple--in Virginia property is a fundamental right.

Virginia Code Section 3.2 - 6569 is just one example of how a current forfeiture law can have facts that easily contradict the Virginia Constitution. The new Takings Clause nullifies any law that seizes property from individuals without a stated and approved public purpose. Where there are acceptable public purposes to justify the forfeiture laws, the seizure of that property still requires just compensation to be paid to the individual who suffers. Under the new Takings Clause, just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking.[67]

This plain meaning interpretation of the Virginia Takings Clause is not solely limited to animal sei zures. There exist many instances within the Virginia Code that allow for forfeitures or seizures of property when found guilty of specific [criminal] violations. Under Va Code § 18.2-246.5, a bar owner can lose his liquor license for a drug conviction; perhaps this is now an unconstitutional

62 Baird at 432.

63 Bd. of Supervisors v. Greengael, L.L.C., 271 Va. 266, 287 (2006). To establish an unconstitutional taking, a landowner must suffer either a categorical or a regulatory taking. A categorical taking is a deprivation of all economic use of property. A regulatory taking "places limitations on land that fall short of eliminating all economically beneficial use [but render an] economic effect on the landowner [and] interfere [] with reasonable investment-backed expectations," among other harms.

64 Greengael, L.L.C. at 287.

65 *Id.*

66 Green v. Commonwealth, 1998 Va. App. LEXIS 601, *10. "If the trial court's prohibition was a taking, we reject appellant's argument because the taking was not for public use. Virginia's statutory scheme provides very clearly that proceedings pursuant to the code sections at issue are for the protection of animals; they do not constitute a taking of animals for public use"

67 Va. Const. Art. I, § 11

taking. Under Va Code § 18.2-270 (C)(4), a convicted drunk driver can have his vehicle forfeited; perhaps now the state will have to compensate the driver the actual value of his 2024 BMW. Under Va Code § 18.2-46.3 any asset used for the recruitment of criminal street gangs is subject to forfeiture;, perhaps now the police will have to pay the gang member for his illegal 9mm. These may seem like ridiculous comparisons, but civil forfeitures are not limited to harmless violations; if it is unconstitutional for one, it must be unconstitutional for all. The legislature purposely chose the unambiguous language of Article 1 Section 11; the courts are bound by its language according to the Virginia Supreme Court. Courts are not permitted to rewrite statutes-- that is solely a legislative function.[68] The intent of the legislature clearly expressed by its language must be applied.[69] The courts cannot depart from the legislative language when the intention is clear.[70] Thus, if there is to be any change in the power of Virginia's Takings Clause, it must start at the General Assembly.

V.) Opposition to the Virginia Takings Clause

Opponents of this paper may still rely upon other powers of the Constitution as a way to allow for feitures and seizures, notwithstanding the Takings Clause. An example of a different power provided by the Virginia Constitution is the Due Process Clause, which states, "that no person shall be deprived of his life, liberty, or property without due process of law".[71] Opponents may argue that the Due Process Clause allows the government to seize property so long as the owner is found guilty in a court of law and is afforded due process. However, the argument can be made that even though the Virginia Constitution includes the Due Process Clause, the Takings Clause is not affected; rather, the Due Process Clause is *restricted* by the Takings Clause.

Under the prior language that required compensation for takings that constituted a public use, the government was not able to sidestep this provision by taking the property under the Due Process Clause instead of eminent domain. Now, though, the government cannot sidestep the new Takings Clause. The Due Process Clause establishes the right for a government to seize property using the court system; the Takings Clause is a restriction upon that right. Virginia has chosen to restrict itself from taking property unless that property is for a public use, and if so, has also chosen to compensate and protect those owners. The Due Process Clause cannot override those restrictions, just as the Federal Government cannot take private property for a public use unless it compensates the owner-- no matter if the taking occurs after affording the owner Due Process. No mat ter what, with the current language of the Takings Clause, the state government cannot confiscate property unless it satisfies the new requirements of the Virginia Takings Clause. This argument applies to any power that the Constitution may provide. The Commonwealth has placed an incredibly effective protection against takings, seizures, and forfeitures, a protection that cannot be circumvented through other constitutional powers.

VI.) The Current Application of the Amendment In Virginia Courts

The current application of the Virginia Takings Clause has been applied somewhat incon sistently in cases across Virginia, but it has not been limited to eminent domain cases. It is impor tant to understand the current application to better understand the full potential of the Clause. The following cases illustrate the expansive nature of the Takings Clause, while also addressing its limita-tions. Most importantly the different applications provide evidence of inconsistency among lawyers and

68 Anderson v. Commonwealth, 182 Va. 560, 566 (1944). Courts are not permitted to rewrite statutes. This is a legislative function. The manifest intention of the legislature, clearly disclosed by its language, must be applied. There can be no departure from the words used where the intention is clear.

69 *Id.*

70 *Id.*

71 Va. Const. Art. I, § 11

judges on how to apply the new Takings Clause, strengthening the argument that a stricter Takings Clause is legally possible and probable. At the very least, these cases provide evidence that the courts are still expanding upon its understanding of the Takings Clause and its relevance within Virginia law. There is plenty of room and basis for a stronger interretation that prohibits civil forfeitures in Virginia.

A. *McKeithen v. City of Richmond:*

In McKeithen v. City of Richmond, the City of Richmond (City) obtained a judicial sale of a parcel of property subject to a statutory lien for delinquent taxes. Although the sale proceeds satisfied the City's tax lien, the City claimed that Virginia Code § 58.1-3967 required the Court to award the surplus proceeds to the City rather than an unsatisfied junior lien holder.[72] The petitioner, a junior lien holder, contended that this statute is unconstitutional based upon Virginia's Takings Clause. The petitioner argued that the City was taking property not for a public use. The Virginia Supreme Court agreed with the petitioner. This case involves a fully satisfied lien holder (The City), an abandoned and thus forfeited lien holder (Lien Holder A), and a valid but not fully satisfied inferior lien holder (Lien Holder B).

The facts of the case are that the decedent owned property within the City;, the payment of property taxes ceased upon decedent's death in 2006. In 2017, the City sought a judicial sale for satisfac tion of the unpaid taxes. Two other liens had been placed upon the property, but the unpaid taxes had priority under Virginia law. The City property sold for $50,050.00 dollars; the City was owed $28,878.90 dollars for the outstanding taxes, interest, and legal fees.[73] This left $21,171.10 dollars in surplus, which the Court placed in the court's registry in the event that the other two lien holders made timely claims.[74] Lien Holder B came forward to submit a claim for the money, and received $7,171.10 dollars, but Lien Holder B had a lien in excess of $100,000 dollars. Lien Holder A did not file a timely claim, which caused their claim to be forfeited. The Circuit Court continued to hold the remaining 14,000 dollars in the Courts registry. Lien Holder B argued that because Lien Holder A had forfeited its interest by failing to file a timely claim and because the City had been made whole, they should be entitled to the remaining 14,000 dollars because their lien had not been satisfied.[75]

The City opposed this claim arguing that Virginia Code § 58.1-3967 directs payment of the unclaimed surplus to the locality in which the judicial sale took place, in this case, the City of Richmond.[76] The City argued that Lien Holder B had already been awarded its bounty of the proceeds; the remainder is unclaimed by Lien Holder A, and therefore the proceeds must go to the City according to Virginia law.

The Circuit Court ruled in favor of the City based on the Virginia statute. Lien Holder B appealed to the Virginia Supreme Court, arguing that Virginia Code § 58.1-3967 violates the Takings Clause of the Virginia Constitution. Upon review, the Virginia Supreme Court asks whether the alleged taking involves a "property interest" recognized by Virginia law; the Court found that a judgment lien does constitute a "vested property right".[77] The Supreme Court then addressed whether the statute at issue authorizes an unconstitutional taking of private property in violation of Virginia's Takings

72 McKeithen v. City of Richmond, 302 Va. 422, 428 (2023).

73 *Id.*

74 *Id.*

75 *Id.*

76 McKeithen at 430.

77 *Id.*

Clause.[78] In reviewing the Takings Clause, the Court found that the language states that the ancient right of private property is a "fundamental" right in the Commonwealth.[79] The Court further found that no enacted law can authorize the government to damage or take private property "except for public use" and even when such damage or taking has a "public use" justifica-tion, the government must pay "just compensation" to the owner.[80]

With that understanding, the Court held that the fully compensated City had no property inter est whatsoever in the unclaimed surplus. As applied to this particular scenario, Code § 58.1-3967 unconstitutionally authorized the City to take these proceeds from Lien Holder B, without a public use.[81] This case is incredibly important because it invalidates a law relying upon the interpretation that the Takings Clause prohibits legislation that confiscates property for anything other than a public use. The Virginia Supreme Court did not allow any circumvention of the Takings Clause and went further by reaffirming that property in Virginia is a fundamental right.

McKeithen offers concrete evidence that the Virginia Supreme Court interprets the language of the Takings Clause in a way similar to this paper. The Supreme Court held that the statute in this case attempted to circumvent the Takings Clause, which the new language expressly pro hibited. The case did not apply to real property, nor was it relevant to eminent domain. The Court found that there was a direct conflict between the Virginia Code and the Virginia Constitution, and the Court upheld the Constitution.

In the next case the Court applied the Takings Clause not to a taking of a typical aspect of personal property but instead to a right of an owner to have reasonable access to his business, being a protected right under the Takings Clause. PM Lube illustrates the fluidity of the concept of property within the Clause. Fluidity strengthens the argument that there is a broader view in the application of the Clause, which helps justify its power over civil forfeitures.

B. *PM Lube, LLC v. City of Loudoun:*

In PM Lube, LLC v. County of Loudoun. the case arose from a complaint filed by the plaintiff regarding the County of Loudoun's ("County") inaction in timely fixing a sinkhole in front of its leased commercial property. The plaintiff sought monetary relief through inverse condemnation, based on the argu-ment that the County's inaction in fixing the road constituted a taking under the Takings Clause and thus required compensation. An inverse condemnation is a remedy for property owners when a government takes or damages property for public use without having brought an eminent domain proceeding.[82]

The plaintiff leased property where they provided oil changes and other vehicle maintenance services.[83] In January of 2015, a large sinkhole caused by a failure of the County's stormwater management system damaged the service road and cut off access to plaintiff's business.[84] The County took no ac-tion in fixing the road and repairs were not completed until the end of 2015.[85] Plaintiff claimed that as a result of the limited access to its business, it lost significant income while the sink-

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 Inverse condemnation, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/inverse_condemnation

83 PM Lube, LLC v. Cty. of Loudoun, 100 Va. Cir. 395, 396 (Cir. Ct. 2018).

84 PM Lube, LLC at 395.

85 *Id.*

hole existed and during the repair process. The loss occurred despite the business being open longer hours and using new marketing strategies.[86] PM Lube estimated its losses at $258,404.21.[87] and asked the Court to declare that an inverse condemnation had occurred as a result of the County's inaction. PM Lube argued that it was not paid just compensation after it suffered a taking for public use, which violated the Takings Clause. The County refuted this and asked the Court to dismiss the case.

The Court chose not to dismiss plaintiff's action and found that according to the Takings Clause of the Virginia Constitution, when such damage occurs in the context of an inverse condemnation, ei-ther to the property itself or to the rights of the landowner, the compensation for that damage shall be no less than the lost profits caused by the taking.[88] The Court held that to take or damage prop erty in the constitutional sense does not require that the sovereign actually invade or disturb the property nor does it require a purposeful action by the government. The Court held that the Takings Clause language applies to purposeful acts as well as purposeful inaction.[89]

The opinion stated that taking property under the Takings Clause means that the government ac tion adversely affected the landowner's ability to exercise a right connected to that property.[90] The Court found that the Takings Clause makes no categorical distinction between personal and real property rights or even between an actual owner or a tenant. If an inverse condemnation claim meets all of the necessary requirements to recover for a taking of private property, then it is no de fense that the property right taken was a personal property right rather than a real property right.[91] This case displayed just how broad the Takings Clause can reach even in its current application.

Neither McKeithen nor PM Lube can be considered Kelo takings, yet an amendment that was created as a result of Kelo upheld property rights in both cases. These cases do not involve eminent domain in the traditional sense. The Takings Clause protected a unique property right that likely would not have been protected under the prior lan guage.

In the next case, the Court applied a totally different interpretation.

C.) *Allen v. City of Virginia Beach*:

In Allen v. City of Virginia Beach, the petitioner in this case was a property owner within the City of Virginia Beach ("City"). The City was conducting upgrades to the public roads and a portion of the petitioner's property was to be affected.[92] The problem arose when, upon further examination, the City asserted that the entirety of petitioner's property was needed for the completion of the road project.[93] The City corrected its plans and resurveyed the property, then made its offer to the petitioner to purchase the remaining land; Petitioner declined the City's offer. The City thereupon deposited $700,000.00 dollars into the petitioner's bank account and recorded a take of petitioner's property on February 1. 2018.[94] Both parties conceded that Virginia Code § 33.2-1007 grants the Commissioner of Highways the right to acquire by purchase, gift, or the power of eminent domain

86 *Id.*

87 *Id.*

88 PM Lube, LLC at 395.

89 PM Lube, LLC at 403.

90 *Id.*

91 *Id.*

92 Allen v. City of Va. Beach, 100 Va. Cir. 299, 299 (Cir. Ct. 2018).

93 Allen at 299.

94 *Id.*

an entire tract of land or any part thereof whenever conditions of the statute are met.[95] Petitioner contended that Virginia Code § 33.2-1007 is unconstitutional based on Virginia's updated Takings Clause.

Applying the current understanding of the Takings Clause, this seems to be exactly the circumstance for which the clause was intended. A property owner feels that more property than necessary is being taken to satisfy the public use, yet there is a state law that allows this taking. As a result, the property owner argued that this statute is unconstitutional because it conflicted with the Takings Clause,. However, the Court in this case does not follow this same rationale.

In deciding this case, the Court relied upon precedent from the Virginia Supreme Court that when the constitutionality of a statute is challenged, a court's determination of legislative intent is guided by the recognition that all actions of the General Assembly are presumed to be constitu tional.[96] Affording this presumption to the Virginia Code, the Court stated that a peti-tioner who challenges a statute's constitutionality has a heavy burden of proof.[97] (This rationale was not adopted by the Virginia Supreme Court five years later in the McKeithen case.) Following prec edent advocated by Allen ignores the last part of the Takings Clause, that the condem-nor bears the burden of proving that the use is public, without a presumption that it is. To require that the petitioner bear a heavy burden to prove that the law violates the Constitution nullifies the entire purpose of the Clause. Hypothetically, if a Virginia law took property that obviously was not for a public use, would the property owner have to overcome this heavy burden of proof to argue the law is unconstitutional, as court precedent dictates? Or would the government have to justify the law's application for public use, as the Clause dictates? Applying the Clause correctly in this case would have allowed the petitioner a stronger argument, that the Commissioner of Highwaysis taking more land than necessary to accomplish the public use (in violation of the amendment), and inasmuch as the statute allows the Commissioner this right, the statute must be declared unconstitutional. Despite that, the Court held that since the statute narrowly applied to public highways and because the land being taken was very minimal, the petitioner did not overcome his burden of proof to establish the unconstitutionality of the statute. The Court *did* state that, "At best, the statute casts a slight doubt or confusion in light of the 2012 constitutional amendment. Accordingly, the Court opines that a statutory interpretation leads to conclude the legislative intent in enacting the statute was not to frustrate the purpose of the takings clause but to work and be read in conjunction with the clause".[98] Property in this case was not viewed as a fundamental right and was taken with the Takings Clause in place without affording the property owner the benefits of the clause.

In the author's opinion, Allen is a prime example of how mistakes in the application of the law can happen when courts attempt to legislate or change the plain meaning of the statues. Again, courts are not the legislature and cannot act as lawmakers. It is bad policy to allow courts to purposefully ignore clear text in the interest of tradition. When courts adopt this role inconsistent precedent is created, as is clearly seen in the Allen decision.

These cases prove that the language is viewed differently among courts, but it seems concurrent that the Takings Clause has potential to be an expansive right. It seems clear that the Virginia Supreme Court and lower courts notice a stricter restriction against the government within this revised section of the Constitution. Although it is not yet applied consistently, it does lay the founda-

95 Va. Code Ann. § 33.2-1007

96 Allen at 300.

97 *Id.*

98 Allen at 302.

tion for the argument that the Virginia Takings Clause prohibits nonpublic use takings and requires compensation for all takings that satisfy the public use prong of the Clause.

VII.) Conclusion

After the Kelo decision, states across the country began reviewing their own taking power and began granting more protections in the realm of private property rights. Virginia endowed property owners more pow er than any other state. The Commonwealth regards property rights as a fundamental right within its Constitution. In Virginia's crusade to offer more protections, the Commonwealth has rightfully limited the taking of property to situations that constitute a public use. Although this creates a conflict between current Virginia law and the Virginia Constitution, the purpose behind the revised Takings Clause is significant.

The Virginia Takings Clause has unambiguous language that clearly states that the taking of property is strictly limited to instances of public need no longer allowing for the same Federally-sanctioned seizure and forfeiture of property outside the realm of eminent do-main. Due to its explicit wording, Virginia courts must apply the Clause in a way that ensures that property is protected in all circumstances.

The Virginia Takings Clause is unique from both the Federal Takings Clause and from all other state takings language. Although Virginia could have avoided Kelo style takings by adopting language similar to that of other states, Virginia went a step further and created novel language to offer protections that ensure that property is only taken for a public use.

The Virginia Supreme Court agrees that the Virginia Takings Clause provides these protections. In the McKeithen case, the Supreme Court voided a law that took money from a lien holder and gave it to the government in a case that did not involve eminent domain. The Supreme Court correctly upheld the legislature's intent and protected the fundamental right to property in the Common wealth.

It is clear that the Virginia Takings Clause is incredibly powerful, just as it was meant to be. It places limitations that rightfully should be placed upon the government. However, it also exposes ma jor legal questions and concerns regarding certain activities. The Virginia Takings Clause desperately needs legislative input regarding those limitations, but Virginia should strive to place property rights above all else. Otherwise, any property owned by an individual is shared with the Local, State, and Federal Governments and the idea of "Private Property" ceases to exist. It has long been recognized that property rights are basic civil rights, and that a government's failure to protect private property rights puts every other civil right in doubt.[99] The Virginia Takings Clause should be read to encompass the full potential and protections that the words clearly and defini tively provide. Until the legislature and the voters decide to change those words, the courts must allow the Commonwealth of Virginia to be a haven for property owners, just as the Takings Clause declares. Property is and should always be a fundamental right in Virginia.

99 *Id.*

VIRGINIA MINERAL RIGHTS OVERVIEW

By Jon W. Brodegard, Counsel[1]

At its broadest, ownership of or title to land means the right to use or develop, to exclude others from, and to otherwise control everything within the cubic space located above and below a defined area located on the surface of the earth.[2] Except for condominiums, the upper and lower bounds of such cubic space are not generally defined but may be limited by law.[3]

Someone who owns the entirety of the three-dimensional space described above not only owns and, therefore, may use or develop any resource contained in such space, but also may convey title to a specific cubic space located within the larger space or rights to specific resources located at any altitude or depth.[4] Once title to vertical interests is severed from the surface estate, conflicts may arise as easily between vertical neighbors as between horizontal neighbors. This article will explore some of the sources and nature of such conflicts, especially related to minerals exploration and development, and identify some of the Virginia statutes and judicial decisions that mediate them.

I. Geographic scope of historical minerals development in Virginia

It is easy to think of mineral rights issues as geographically centered in, if not limited to, southwestern Virginia. But, both historically and in the present day, minerals have been found, claimed, and produced throughout the Commonwealth. Virginia's history of minerals exploration and development spans centuries.[5]

Iron was discovered near Jamestown before 1611.[6] Production flourished after the American Revolution and during the Civil War "in belts of rich iron ore along the flanks of the Blue Ridge mountains, and in the sandstones of the Valley and Ridge Province" through 1942.[7] Likewise, "Virginia lead deposits played important roles in both the Revolutionary and Civil wars."[8]

---

1 Jon Brodegard is currently employed as Counsel for Old Republic National Title Insurance Company. The information provided in this article is intended solely for educational and informational purposes only and does not constitute legal advice. Readers should not act upon any information contained herein without seeking professional counsel. The opinions expressed are those of the author and do not reflect the views or positions of the author's employer or any affiliated organizations.

2 *See* Ho v. Rahman, 79 Va. App. 677 (2024) at 832-3 (background principles) *and* Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 105 Va. 574 (1906) at 592 (introducing a presumption that *the owner of the surface owns all beneath and above the surface*).

3 *See, e.g.,* Va. Code § 55.1-1900 (def. of *Land*) *and* United Masonry, Inc. v. Jefferson Mews, Inc. 218 Va. 360 (1977) at 361-63 (history of condominiums).

4 *See* Ho, *supra* note 2, at 833 ([O]*wnership interests may be split among various owners and conveyed independently of each other*), Va. Coal & Iron Co. v. Richmond, 128 Va. 258 (1920) at 278 (*One indisputable right of an owner in fee is to dispose of any portion of the fee, the timber, the mineral, or the water rights therein*), Interstate Coal & Iron Co., *supra* note 2, at 591 (minerals ownership may be severed from the surface estate); *and* Va. Coal & Iron Co. v. Kelly, 93 Va. 332 (1896) at 338: *The [party who acquired title] to the minerals and timber, and [the party who acquired title] to the surface . . . became the owner of estates in fee in distinct and separate parts of the land . . . The division was as complete as if it had been made by lines on the surface[.]*

5 *See* Va. Dept. of Energy, *Historic Mining and* Charlie Grymes, *Virginia Places: Minerals of Virginia* for general information regarding historic mining in Virginia.

6 *See* Christopher Geist, *The Works at Falling Creek*, 29 Colonial Williamsburg Journal 78, 78-83 (2007).

7 *See* Va. Dept. of Energy, *Iron and Civil War Minerals*.

8 *See* Va. Dept. of Energy, *Lead*.

Both lead and zinc were produced in Virginia from the 1700s through 1981.[9] Copper was "widely mined in the Piedmont and Blue Ridge provinces, and locally in the Valley and Ridge Province" from the mid- to late-1700s through 1947.[10] "Gold was mined extensively in Virginia," from Fairfax County to Buckingham County, prior to the 1849 California gold rush, including Spotsylvania County as early as 1804 and Fauquier County as early as 1818.[11] Even after 1849, "[c]ommercial gold mining continued on a smaller scale" through 1947.[12] Manganese was mined as early as 1834 in Frederick County and as recently as 1959 in Augusta County.[13]

Coal was discovered 14 miles west of Richmond in 1699.[14] It was produced from the Richmond Basin Coalfield for the better part of two centuries and from coal beds located in Montgomery and Pulaski Counties through the 1950s.[15]

In 2005, the Virginia Department of Mines, Minerals, and Energy reported that, between 1999 and 2003, "[o]ver ninety percent of Virginia's counties produce[d] some sort of mineral or fossil fuel commodity."[16] Natural gas leases appear to have proliferated in the coastal plain region at least through the 2010s.[17] Fourteen rare earth elements, deemed "critical minerals" by the United States Department of the Interior, not only have been located in Virginia, but also, "are considered to have high potential for economic commercial development."[18] In 2023, aggregate (crushed stone, construction sand, and gravel) was produced from 227 mines located in 49 counties, primarily in the coastal plain region.[19] And, of course, coal and natural gas continue to be produced in southwest Virginia.[20]

II. The basic problem

In Virginia,

> *[O]wnership of coal or other underlying mineral may be separated from the surface by a deed of record . . . thereafter there will be two estates in the same land . . . where such separation has taken place the owner of the surface of the land and the owner of the minerals under it are neither joint tenants nor tenants in common. They are not the owners of undivided interests in the same subject, but are the owners of distinct subjects of entirely different natures.*[21]

---

9 *See* Va. Dept. of Energy, *Lead and Zinc*.

10 Va. Dept. of Energy, *Copper*.

11 *See* Va. Dept. of Energy, *Gold*, Charlie Grimes, *Virginia Places: Gold in Virginia*, *and* PALMER C. SWEET, GOLD IN VIRGINIA 4 (Va. Dept. of Conservation and Econ. Dev., Div. of Mineral Resources 2003) (1980).

12 Va. Dept. of Energy, *Gold*.

13 *See* Va. Dept. of Energy, *Manganese*.

14 WALTER R. HIBBARD, JR., VIRGINIA COAL: AN ABRIDGED HISTORY 17 (Theodore J. Clutter, ed., Virginia Center for Coal & Energy Research, Virginia Polytechnic Institute & State University 1990).!

15 Id. at 1-2 and Va. Dept. of Mines, Minerals and Energy, Div. of Mined Land Reclamation, Abandoned Mine Land Program, *Richmond Coalfield Abandoned Mine Land Program*

16 Va. Dept. of Mines, Minerals, and Energy, Div. of Mineral Resources, *Mineral and Fossil Fuel Production in Virginia (1999-2003)*, Open File Report 05-04, 1 (2005)

17 *See* Va. Dept. of Energy, *Natural Gas and Hydraulic Fracturing in Virginia*, Steve Szkotak, Associated Press, *Virginia to review natural gas hydraulic fracturing case*, The Daily Jeff, Jun 2, 2014, *and* Leslie Middleton, *VA Tidewater Communities Educating Themselves on Fracking Issues*, Bay Journal, Dec 5, 2013, updated Jun 15, 2020.

18 Va. Dept. of Energy, *Critical Minerals*.

19 Va. Dept. of Energy, *Sand and Gravel*.

20 Va. Dept. of Energy, *Coal* and *Natural Gas*.

21 Interstate Coal & Iron Co. ,*supra* note 2, at 592, citing Va. Coal & Iron Co. v. Kelly, *supra* note 4, at 338, *approved in* Ventro v.

Title to minerals may be severed from title to the surface estate by deed or by lease.[22] Generally, a lease will be limited to a term of years and require that royalties be paid during the term of the lease.[23]

Frequently, deeds that convey title to the surface estate, but not title to minerals, will use phrases such as "less and except title to minerals or less and except minerals previously severed" or a more specific designation such as "less and except rights reserved (or conveyed!) in the instrument recorded in Deed Book ABC at page 123" to reflect and reveal that minerals interests have been severed from ownership of the surface estate. However, the failure of a deed made after severance to acknowledge the severance does not invalidate the severance. The Virginia Supreme Court has held that possession of the surface, even under a deed which did not acknowledge a prior minerals severance, "did not constitute possession of the mineral estate which had been severed from the surface."[24]

As time goes on, an omitted reference to a severance can become a challenge to title abstractors and examiners, title insurance agents, and attorneys. While, "it is . . . well settled that there may be a severance of the mineral estate from the surface estate, it is also elementary that a conveyance of land without reservation or exception embraces the underlying minerals[.]"[25] If the severance instrument was recorded outside of the search period, and no deed to the surface estate within the search period indicates that mineral interests were severed, then the false conclusion could be reached that the legal description found in the most recent deed comprises title to both surface and subsurface rights. While "[a] grantor must be considered to have intended to convey all that the language he has employed is capable of passing to his grantee," no grantor can convey more than he owns.[26]

Some instruments that convey either mineral or surface estates may do so ambiguously.[27] If the bounds of property conveyed in a deed cannot be determined from the language of the deed itself, then prior deeds in the chain of title, other parol evidence, and various rules of construction may be used to resolve the ambiguity.[28] One such rule is: "There is a conclusive presumption that all property not embraced within the description of a deed is excluded from it".[29] This particular rule points to two other interesting conclusions: Not only may rights or title to separate surface or subsurface materials, or to resources located at different depths, be conveyed to different grantees, but also any unconveyed mineral rights remain the property of the owner of the surface estate.[30]

Clinchfield Coal Corporation, 199 VA 943 (1958) at 951.

22 *See* Shenandoah Land & Anthracite Coal Co. v. Hise, 92 Va. 238 (1895) (incorporating a duty to begin mining operations into a lease that would, otherwise, have stated no consideration), Hairston v. Hill, 118 Va. 339 (1916) (distinguishing between lease and license), Graham v. Smith, 170 Va. 246 (1938) (interest of a life tenant in leases), and Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44 (2008) (confirming a minerals lease is a contract).

23 Levisa Coal Co. at 57.

24 Mountain Mission School, Inc. v. Buchanan Realty Corp., 207 Va. 518 (1966) at 523.

25 Bostic v. Bostic, 199 Va. 348 (1957), at 351, citing 13 Mich. Jur., Mines and Minerals, § 5, pp. 9, 10, and Steinman v. Vicars, 99 Va. 595 (1901) at 601.

26 *See* CNX Gas Company, LLC v. Rasnake, 287 Va. 163 (2014) at 167-8, citing Hamlin v. Pandapas, 197 Va. 659 (1956) at 664.

27 Ambiguity over whether minerals or rights to other substances were, in fact, severed is the fundamental dispute presented in the following cases: Beury v. Shelton, 151 Va. 28 (1928) (as to Limestone); Shores v. Shaffer, 206 Va. 775 (1966) (as to sand and gravel); Phipps v. Leftwich, 216 Va. 706 (1976) (as to strip mining); Dye v. CNX Gas Co., LLC, 291 Va. 319 (2016) (as to natural gas and coal bed methane).

28 CNX Gas Company, LLC, *supra* note 26, at 166-8.

29 Conner v. Hendrix, 194 Va. 17 (1952), at 26.

30 *See* Swords Creek Land P'ship v. Belcher, 288 Va. 206 (2014), Harrison–Wyatt, LLC v. Ratliff, 267 Va. 549 (2004), *and* Yukon Pocahontas Coal Co. v. Ratliff, 181 Va. 195 (1943).

Unfortunately, as noted above, disputes may arise just as easily between vertical neighbors as between horizontal neighbors. Mineral interests and surface interests may literally sit beside or on top of, or be intermingled with, each other.[31] When disputes arise between competing owners, generally, "there is no Virginia statute giving priority to any of the competing interests."[32]

Thomas v. Carmeuse Lime & Stone, Inc., 642 Fed. Appx. 253 (4th Cir., 2016), which is an unpublished decision, provides a good example of how even relatively old conveyances may impact current uses. In Thomas, "stone . . . rock . . . and particularly limestone" were severed from the surface estate in 1849, a year that is well outside most title search periods.[33] While that deed authorized development of the severed materials, it also prohibited development "within the enclosure of the yard attached to the said . . . present dwelling house."[34] The exact structure identified as the "present dwelling house" and the scope of its surrounding enclosure, what techniques could be used to get at the minerals, and the geographic limits of the grant were at issue in the 2016 appeal.[35] Thomas demonstrates that minerals severances made over a century ago can still be enforced, and that disputes may involve not only ownership of minerals, but also how the surface may be used or disturbed for their development. It also illustrates that mineral estates may not align with surface boundaries, may cover a range of materials beyond fossil fuels or metals, and that resolving such issues can be complex and expensive.

Va. Code §§ 45.2-400 and 45.2-401 provide a procedure by which unknown or abandoned title to minerals located east of the Blue Ridge Mountains may be consolidated with title to the surface estate.

III. More problems

When production ends, orphaned mines not only present physical and environmental hazards, but also physically illustrate that severed mineral rights do not disappear.[36]

Because unconveyed mineral rights remain the property of the owner of the surface estate, surface owners may dispute title to mineral rights or other subsurface substances or spaces even if they know or suspect that some, but not all, subsurface rights have been severed.[37] Disputes may focus not only on whether a severance exists, but also as to the full scope of the severed interest.[38]

In 2014, the Virginia Supreme Court held that a conveyance of *all of the coal* did not include title to coal bed methane.[39] But, in 2016, the Court held that a conveyance of, "all the coal and minerals" did include title to coal bed methane.[40] In both cases, the Court affirmed that, as an initial matter,

---

31 Va. Code § 45.2-1619(D) acknowledges this reality by requiring developers of coal bed natural gas to coordinate their operations with the owners of underground coal mines.

32 2014 Op. Va. Att'y Gen. No. 14-012 (Dec 19, 2014).

33 *See* Thomas at 256-7.

34 Id. at 257.

35 Id. at 257-9.

36 *See* Va. Dept. of Energy, *Abandoned Mineral Mined Lands* regarding hazards related to orphaned mines. Mountain Mission School, Inc., *supra* note 24, and Thomas, *supra* note 33, are two of the many decisions noted in these materials that interpret deed severances made decades before litigation started.

37 This assertion follows from the material connected to note 30.

38 Beury v. Shelton, *supra* note 27, Swords Creek Land P'ship, *supra* note 30, and Dye, *supra* note 27 are three of the many of the decisions cited in these materials which address the scope of severed interests.

39 *See* Swords Creek Land P'ship, *supra* note 30.

40 *See* Dye, *supra* note 27. But note current Va. Code § 45.2-1621 (*No conveyance, reservation, or exception of coal shall be deemed to include coalbed methane gas.*)

it had to determine if the disputed language was, "ambiguous," meaning, "[capable] of being understood in more than one way."[41] In an older case, *Beury v. Shelton*, 151 Va. 28 (1928), the Court determined that the term ***minerals*** did not include ***limestone*** in a deed that reserved, "all the metals and minerals of every kind and character."[42] In reaching this latter conclusion, the Court explained:

> *[I]t is rare, if ever, that mineral is intended in [the scientific or geological sense] in the ordinary trading transaction about which deeds and contracts are made. . . . [W]hat the courts attempt to do is to ascertain what the parties intended, determining this from the language employed in the instrument, if that may be done with certainty, and if doubtful, then to call to their aid the facts and circumstances surrounding the transaction . . . [I]n doubtful cases, the meaning of the word 'minerals' will be restricted to that given it by the custom of the country in which the contract is to operate.*[43]

While reserving the ability to consider outside sources to construe ambiguous language, the Court has insisted that unambiguous terms, including unambiguous grants or reservations of mineral rights, must be interpreted based only on language found within the ***four corners*** of the document at issue.[44]

Even when surface owners are aware that they do not own the minerals beneath their land, they may still be surprised the extent to which minerals owners may disturb the surface to access what lies beneath. "The express grant of all the minerals or mineral rights in a tract of land is, by necessary implication, the grant also of the right to work them."[45] So, for example, the developer of a duly granted mineral estate has been held not liable to the surface owner for interfering with springs fed by percolating water, or even polluting surface water through "mining in the usual and ordinary way."[46] Likewise, while the owner of subsurface rights may not "deprive . . . the owner of the surface[ ] of an important right upon which the enjoyment of his property depends," the surface owner's right to subjacent support may be found not to be violated if "appreciable damage to the surface estate or diminution in its use" cannot be demonstrated.[47] "[U]ntil a surface landowner establishes damage to his property, he has no cause of action."[48] But the right to support may be waived by "clear and unequivocal language" in the deed.[49] For example, Gilly v. Bondurant, 148 Va. 522 (1927) discusses a deed in which "the grantee was given the fullest mining rights, including the right . . . to disturb the surface in the proper exercise of his mining rights."[50] In 1991, however, the

---

41 *Compare Id.* at 323 *with* Sword's Creek Land P'ship, *supra* note 30, at 212. *See also* CNX Gas Company, LLC, *supra* note 26 at 167.

42 Beury at 31.

43 *Id.* at 37-39.

44 *See* Id. at 36-44, Dye, *supra* note 27, at 323, CNX Gas Company, LLC, *supra* note 26, at 167, Harrison-Wyatt, *supra* note 30, at 553 and 556, *and* Warren v. Clinchfield Coal Corp., 166 Va. 524 (1936) at 526.

45 Williams v. Gibson, 84 Ala. 228 (1888) at 231-2. Williams is cited approvingly in Yukon Pocahontas Coal Co., *supra* note 30, Oakwood Smokeless Coal Corp. v. Meadows, 184 Va. 168 (1945), and Phipps, *supra* note 27. *See also* Clayborn v. Camilla Red Ash Coal Co., 128 Va. 383 (1920) at 390: *[T]he conveyance [of minerals (in this case, coal)] . . . carries the right to sink a shaft or drive an opening when necessary upon and through the surface to reach and remove the coal.*

46 *See* Oakwood Smokeless Coal Corp. at 172 and 177-78, Clinchfield Coal Corp. v. Compton, 148 Va. 437 (1927) at 454, *and* Couch v. Clinchfield Coal Corp. 148 Va. 455 (1927) at 462-66. But compare Kerr v. Clinchfield Coal Corp., 169 Va. 149 (1937) (liability for loss of spring resulting from removal of subjacent support.)

47 Stonegap Colliery Co. V. Hamilton, 119 Va. 271 (1916) at 293 *and* Large v. Clinchfield Coal Co., 239 Va. 144 (1990) at 148.

48 Large at 148.

49 Ball v. Island Creek Coal Co., 722 F. Supp. 1370 (W.D. Va., 1989) at 1372.

50 Gilly, at 526.

United States Fourth Circuit Court of Appeals declined to award damages to a homeowner whose house was damaged by intentionally collapsed mineworks.[51]

In Yukon Pocahontas Coal Co. v. Ratliff, 181 Va. 195 (1943) and, again, in Ellis v. Comm'r of Dept. of Mental Hygiene and Hospitals, 206 Va. 194 (1965), the Virginia Supreme Court held that the mineral owner's right to use the surface, and even to erect mine-related structures on the surface did not permit the minerals owner to erect structures that do not pertain strictly to mining operations. But note that at least one prior case construed a grant to build mine related structures much more broadly.[52]

In Shores v. Shaffer, 206 Va. 775 (1966), the Virginia Supreme Court held that a grant of "an undescribed mineral interest" did not include sand. Thus, the surface could not be removed by or on behalf of the subsurface owner because the "deed made no reference to sand and did not provide in any way for separating it from the adversely held surface." In Phipps v. Leftwich, 216 Va. 706 (1976), the Court declined to construe a grant of rights to use the surface "[in] any manner that may [be] deemed necessary or convenient for mining . . . without liability for injury to the surface" to include the right to strip mine. In Phipps, the Court explained:

> *[The mineral owner] may, of course, take advantage of developments in the operation of underground mines which modern technology may make available. Improvements in mining machinery, power, lighting, ventilation, transportation, and safety facilities may be utilized. A change, however, from underground mining, which leaves the surface substantially usable by the owner of the freehold, to surface mining, which destroys what was reserved by the grantor, is not permissible.*[53]

But ownership of the surface, or even of the surface and what lies below, may not be sufficient to prevent underground resources from being developed. In those areas where natural gas may be produced, except as to coalbed natural gas, only 25% of the owners of the gas found in a given pool must agree before production may start.[54]

In Clayborn v. Camilla Red Ash Coal Co., 128 Va. 383 (1920), the Virginia Supreme Court "held that a surface estate owner retains ownership of a mine void if the severance deed does not expressly convey the mine void to the mineral estate owner."[55] But, in 1981, the Virginia Assembly adopted what is now codified at Va. Code § 45.2-402, which states: "[T]he owner of minerals shall be presumed to be the owner of the shell, container chamber, passage, and space opened underground for the removal of the minerals." Litigation ensued regarding the retroactive effect of the 1981 statute and its successors.[56] Cases have also been brought when the mine void has been used to house waste from other operations.[57]

IV. Future development

Minerals and mining are not only part of Virginia's past, but also part of Virginia's future. Today, crushed stone and aggregate production takes place throughout Virginia, but especially eastern

51 Vandyke v. Island Creek Coal Co., 948 F.2d 1284 (4th Cir. 1991) (affirming *Ball, supra*, note 49.)

52 *See* Stonegap Colliery Co. v. Kelly & Vicars, 115 Va. 390 (1913).

53 Phipps, supra note 27, at 714.

54 Va. Code § 45.2-1620(C)(3). *See also* 2009 Op. Va. Att'y Gen. Nos. 09-018 *and* 09-23 (both dated June 10, 2009).

55 Bailey v. Spangler, 289 Va. 353 (2015) at 357.

56 Id.

57 Levisa Coal Co., *Supra* note 22, Oryn Treadway Sheffield, Jr., Trust v. Consolidation Coal Co., 819 F.Supp.2d 625 (W.D. Va. 2011); Powers v. Consolid'n Coal Co. Case No. 1:12CV00039 (not reported in F. Supp. 2d) (W.D. Va. 2013).

Virginia.[58] Mining, especially for coal, remains an essential part of the economy of southwestern Virginia.[59] A Canadian enterprise has expressed interest in mining for gold in the Commonwealth.[60] In 2024, the Governor announced that mineworks for rare earth minerals would be reopened in Dinwiddie County.[61]

Natural gas has been located throughout the Commonwealth, but, using conventional production techniques, is not commercially viable outside of western Virginia.[62] To reach unconventional subsurface reservoirs, "hydraulic fracturing is often combined with the relatively new technique of horizontal drilling."[63] While hydraulic fracturing for natural gas is banned in much of eastern Virginia, a natural gas reserve called the Taylorsville Basin lies below parts of northern and central Virginia.[64] Likewise, while uranium mining is, currently, effectively banned in Virginia, "[t]he largest unmined uranium deposit in the United States is Coles Hill, in Pittsylvania County."[65]

The fact that production of these resources is currently constrained by statute should not justify ignoring the potential of their future development. Although not Virginia precedent, the following conclusion from the Supreme Court of Ohio regarding modern gas production technology is worth noting:

> *[O]wnership rights in today's world are not so clear-cut as they were before the advent of airplanes and injection wells . . . Just as a property owner must accept some limitations on the ownership rights extending above the surface of the property . . . there are also limitations on property owners' subsurface rights*.[66]

In 2018, the federal District Court for the Northern District of Ohio concluded that, under this Ohio rule, "one has no right to exclude a subsurface "invader" from portions of the subsurface that one does not use."[67]

V. How title insurance may apply

Most purchasers or other parties who wish to understand their interests (or potential interests) in real property will not be seeking to obtain title to subterranean interests. Title insurance insures title as it exists and may, in some instances, address mineral rights. However, as a matter of practice, title insurance does not insure severed mineral interests. Title examiners must account for both active and historical mineral claims and should note any severance of mineral rights from the surface estate–particularly in areas of a history of mineral development or exploration. Alert title insurance agents will take exception to noted severances. In some instances, searches may need to reach back to sovereignty or to the beginning of local minerals exploration to properly assess

58 *See* Va. Dept. of Energy, *Mineral Mining: About Us*, *Crushed Stone*, *and Sand and Gravel*, Guidelsky Group, *Chantilly Crushed Stone, Inc.*, and https://www.bonneybrightsand.com/.

59 Va. Dept. of Energy, *Coal*.

60 Brian Carlton, *Are Buckingham Gold Deposits Worth Mining? It's Questionable*, The Farmville Herald, Mar 31, 2023. *See also* Aston Bay, *Virginia Overview*.

61 Office of the Governor of Virginia, *Critical Minerals Producer to Reactivate Operations in Virginia* (Mar 11, 2024).

62 Va. Dept of Energy, *Hydraulic Fracturing in Virginia*.

63 *Id.*

64 *See* Va. Code Title 45.2, Ch. 16, Art. 4, Va. Code § 45.2-2116, Va. Dept of Energy, *Hydraulic Fracturing in Virginia* and *Uranium*. *See also* Charlie Grymes, *Virginia Places: Natural Gas Resources in Virginia*, *and* Leslie Middleton, *Potomac Watershed Roundtable Considers Fracking in the Taylorsville Basin*, Bay Journal, Apr 8, 2014.

65 *See* Va. Code § 45.2-2116 *and* Va. Dept. of Energy, *Uranium*.

66 Chance v. BP Chemicals, Inc., 77 Ohio St.3d 17 (1996) at 26.

67 Baatz v. Columbia Gas Transmission, LLC, 295 F.Supp.3d 776 (N.D. Ohio, 2018) at 785.

the risk. If such a search is not commercially reasonable, then it may make sense to include a general mineral rights exception, especially if local history of minerals exploration and possible severance extends beyond a typical 40- or 60-year title search. Discussing exceptions — especially unusual exceptions — with the proposed insured in a timely manner enables both residential and commercial consumers to make informed decisions.

[Ed. Note: when oil and gas companies discovered the rich deposits that could be extracted from subsurface shale formations by horizontal drilling and hydraulic fracturing, leasing the minerals led to a boom in title search demands. The three chains—surface, minerals, and leasehold—often resulted in 5- and even 6-figure title reports because of the necessity of taking title to the three chains back at least to the mid-19th Century (Drake's well in Pennyslvania, e.g.) and in some cases back to the patents.]

2025 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).

2025 Session By The Numbers

The 2025 Session of the Virginia General Assembly lasted for 45 days, convening on January 8, 2025, and adjourning *sine die* on Saturday, February 22, 2025. (Since this was an odd-numbered year, the legislature convened for 45 calendar days; In even-numbered years, the legislature convenes for 60 calendar days.) The reconvene session, also referred to as the "veto session," was held on April 2, 2025. The budget was approved minus 8 last-minute line item vetoes by the Governor.

In all, 3107 bills and resolutions were introduced during the 2025 session and 1989 bills passed the House and the Senate. Governor Youngkin signed 727 bills, while vetoing 196. Additionally, eighteen bills were referred to the Virginia Housing Commission for additional study over the summer.

2025 Session At A Glance

The General Assembly continued to focus on larger issues this year such as gambling, marijuana, reproductive rights, gun control and artificial intelligence. The majority democratic legislature remained interested in the declining housing supply and increased housing costs. Data centers and their effects on surrounding communities and utility costs were a recurring theme. The continued politics of a split-party government were obvious, and together with the upcoming Fall election season, influenced what bills made it to the Governor's desk this year.

2025 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 https://lis.virginia.gov/. 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, 2025. 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

A memorandum of lis pendens can now be filed if the action on which the lis pendens is based seeks (i) to sell real property to enforce a lien for delinquent taxes pursuant to the provisions of

§ 58.1-3965 et seq. or a docketed judgment lien, or (ii) the partition of real property pursuant to § 8.01-81 et seq. The new language clarifies that any party or entity with an interest in the subject real estate, including a lienor, a person with a claim of title, or the beneficiary and trustees under a deed of trust, must be named as party defendants in a proceeding for the sale of such real estate. The process by which notice by publication is given for a proceeding to enforce a lien for delinquent real estate taxes is now consistent with other actions where notice by publication is authorized. This bill was recommended by the Boyd-Graves Conference. (*House Bill 2362 – Candi Mundon King*).

The General Assembly increased the assessment thresholds at which a local treasurer or other officer responsible for collecting taxes may sell real property with more than three years of delinquent taxes at public auction. The threshold is raised to $15,000 or less or if the property is assessed at more than 15,000, but less than $30,000 and certain other criteria are met. The assessment threshold for the nonjudicial sale of real property with more than three years of delinquent taxes when such property is (i) unimproved, (ii) one-half acre or less in size, and (iii) located within a designated urban redevelopment or revitalization zone is increased to properties assessed at more than $30,000 but no more than $40,000. (*House Bill 1792 – Robert D. Orrock, Sr.*).

Indigent defendants are exempt from having to post an appeal bond in unlawful detainer actions brought by a public housing authority. A public housing authority landlord cannot require tenants to pay any fees for the maintenance or repair of a dwelling unit unless the need for such repair is caused by the tenant's action. If a public housing authority issues a notice of nonpayment of rent to a ten-ant, it must be printed on pink or orange paper and provide certain information specified in the law. (*House Bill 2415 – Rae Cousins; Senate Bill 1221 – Lashrecse Aird*).

Commission, Boards, and Institutions

The Virginia Real Estate Board (VREB) of the Department of Professional and Occupational Regulation (DPOR) can now only charge a transfer fee to a licensee who is transferring from one primary place of business to another. The charging of transfer fees for a transfer within a primary place of business (e.g. from the primary to a branch office, or one branch office to another) is prohibited. (*House Bill 1653 – Joshua E. Thomas; Senate Bill 785 – David R. Suetterlein*).

The individual limit of claims against the Virginia Contractor Transaction Recovery Fund is increased from $20,000 to $30,000 and the aggregate claim limit against a single licensed contractor is increased from $40,000 to $100,000 in a two-year period. The thresholds for the value of

single contracts or projects and the total value of all construction, removal, repair, or improvements undertaken by a contractor in a 12-month period that govern each class of contractor's licenses are also increased. (*House Bill 1707 – David L. Bulova; Senate Bill 1059 - T. Travis Hackworth*).

The General Assembly directed all regulatory boards within DPOR to promulgate regulations to provide for reciprocal licensure or certification for individuals with equivalent qualifications from another country. Such applicants will be subject to the same exam requirements. (*House Bill 1940 – Rodney T. Willett; Senate Bill 1188 – Stella G. Pekarsky*).

The General Assembly directed the Department of Housing and Community Development (DHCD) to consolidate all reports required under the Code into one annual report due to the Governor and the General Assembly on October 1. DHCD will now have to include in that report: (i) an annual report on the outcomes associated with closed projects that received a grant from the Virginia Growth and Opportunity Fund and (ii) a comprehensive annual report on the state's homeless programs. This law has a delayed effective date of January 1, 2026. (*House Bill 2203 – Terry G. Kilgore; Senate Bill 787 – Ryan T. McDougle*).

The qualifications for a licensee to serve on the VREB were changed. Licensees must now have seven consecutive years of experience actively engaged as a licensed real estate salesperson or broker. Such members of the Board must also have acknowledged ability in the profession as evidenced by at least one of the following qualifications: (a) experience in real estate credentialing or certification; (b) certification by the Board as a real estate instructor; or (c) training or experience in the adjudication of other real estate licensees. Additionally, at least one member of the VREB must have proficiency and experience in residential property management. (*House Bill 2210 – Terry G. Kilgore; Senate Bill 866 – Bryce E. Reeves*).

The Virginia Department of Health (VDH) must develop guidance directing local health districts and health departments to evaluate and recommend solutions to problems with a valid onsite sewage system or private well permit prior to issuing a revocation. (*House Bill 2309 – M. Keith Hodges*).

Virginia Housing Development Authority, together with DHCD, will convene a technical advisory group to (i) evaluate the prevalence of deed fraud, including notary fraud, seller impersonation, owner impersonation, and fraudulent lien filing; (ii) develop recommendations for the prevention of deed fraud; and (iii) develop measures to enhance protections for property owners from such crimes. The group will also consider specific policy proposals. All findings and recommendations must be submitted no later than November 1, 2025. (*House Bill 2396 – Marcus B. Simon; Senate Bill 1270 – T. Travis Hackworth*).

Only individuals who hold a valid onsite sewage system operator, onsite sewage system installer, or onsite soil evaluator license with DPOR are authorized to perform a septic system inspection in connection with any real estate transaction, including refinancings. The General Assembly defined the minimum requirements for such a septic inspection. First, there must be a contract between the client and the inspector that permits the inspector to access the property and indicates that a complete inspection requires pumping of the septic tank. (A client is allowed to decline pumping.) The inspector shall inspect all readily accessible and openable components of the system, although the inspector does not have to move vegetation, structures, furniture, equipment, debris, or anything that obstructs access to visibility of the system. Other criteria for the inspec-tion and certain exceptions are provided. A written report must be provided to the client within ten business days. (*House Bill 2671 – Eric Phillips*).

Regulatory boards will be prohibited from using vague or arbitrary terms, including "good moral character" or "moral turpitude" to refuse a license. This will require updates to regulations, which

we will see in the upcoming months. An individual with a criminal record can now request a predetermination from any regulatory board as to whether his criminal history record would disqualify him from obtaining a license or other authority to engage in a particular trade, occupation, or profes-sion in the Commonwealth. In response to such a request, the licensing authority must provide a written determination. If a license application is denied due to a criminal history record the applicant must be notified in writing of the specific offense that contributed to the denial, how that criminal history relates to the occupation, and how the regulatory board weighed rehabilitation factors into their decision. (*Senate Bill 826 – Mamie E. Locke*).

Common Interest Communities

The General Assembly only made one change to the resale certificate in § 55.1-2310 this year. Section 14 of the resale certificate, pertaining to insurance coverage by the association, will now include a statement that the governing documents may make an owner responsible for payment of all or part of the deductible when making a claim against the association's insurance. (*House Bill 1704 – David L. Bulova; Senate Bill 808 – Christie New Craig*).

When ordering the resale certificate, an association can no longer require the seller or seller's agent to provide the purchaser's name prior to preparing the resale certificate. (*House Bill 2110 – Marcus B. Simon*).

The General Assembly clarified that when a management contract with an automatic renewal provision is terminated pursuant to §§ 55.1-1837 or 55.1-1940.1 it is done so without penalty. If such a contract is terminated, the common interest community manager shall transfer and release all funds and close bank accounts maintained on behalf of an association within a reasonable time after termination without additional cost to the association. (*House Bill 2750 – Delores Oates*).

The requirement has been removed from § 55.1-2245 of the Virginia Real Estate Time-Share Act that, if contact information was obtained by a reseller of a time-share from any source, the reseller and the lead dealer of that timeshare had to maintain a copy of the current government-issued photographic identification of the lead dealer who provided the contact information.. (*Senate Bill 807 – Christie New Craig*).

Conservation / Environmental

As is often the case, many of the conservation and environmental bills this session also have an impact on real estate development.

Localities may create a Foundation and Soil Management Fund by ordinance to grant money to owners of private property or a common interest community for foundation management and soil settlement repairs on previously developed lands. The funds can only be used for: (i) the construction, improvement, or repair of a foundation; (ii) soil settlement and compaction control; (iii) foundation failure and soil compaction mitigation and protection measures that are a part of a locality's comprehensive plan to address foundation failure and soil compaction mitigation and protection; or (iv) joint foundation repair and soil compaction mitigation projects. (*House Bill 1659 – Rozia A. Henson, Jr.*).

Various provisions of the Dam Safety Act were amended to streamline the Department of Conservation and Recreation's (DCR) enforcement powers for impounding structures under the Act and clarify DCR's powers and duties during an active dam failure. A dam owner's responsibilities were also amended to include (i) obtaining a general permit for a low hazard impounding structure; (ii) ensuring that an impounding structure that presents an imminent danger has a safety inspec-

tion performed; and (iii) allowing a dam owner to identify the dam break inundation zone of his impounding structure by providing the limits of the dam break inundation zone in lieu of filing a map. Certain criteria for applicants to receive funds from the Dam Safety, Flood Prevention and Protection Assistance Fund were also changed. (*House Bill 2000 – Amy J. Laufer; Senate Bill 857 – Timmy F. French*).

The Virginia Erosion and Stormwater Management act was amended to allow a locality serving as an operator of a regulated municipal separate storm sewer system or any duly authorized agent thereof, to at reasonable times and under reasonable circumstances, enter any establishment or upon any property, public or private, for the purpose of obtaining information or conducting surveys or investigations necessary in the enforcement of the provisions of the Act. The restriction on localities that operate regulated municipal separate storm sewer systems from entering only those properties from which a discharge enters their system was removed. (*House Bill 2008 – Marty Martinez; Senate Bill 1093 – Russet Perry*).

The General Assembly directed the Secretary of Natural and Historic Resources to establish a policy task force to develop (i) strategies to protect existing tidal and nontidal wetlands and restore, create, and plan for the persistence of such wetlands in the Commonwealth and (ii) mechanisms to incorporate such strategies into appropriate plans, including the Virginia Flood Protection Master Plan and the Virginia Coastal Resilience Master Plan, to address losses and adverse impacts from human activities and climate change. *(House Bill 2034 – Shelly A. Simonds*).

The type of eligible recipients for loans and grants from the Virginia Community Flood Preparedness Fund was expanded to include federally recognized tribes and Virginia recognized tribes. Under current law, only localities are eligible to receive these loans or grants. (*House Bill 2077 – Paul E. Krizek; Senate Bill 1335 – David W. Marsden*).

Consumer Protection

In 2024, the General Assembly passed a bill that made it 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. This year the General Assembly clarified that the mold remediation certification can come from a nationally or internationally recognized certifying body for mold remediation. It is also now a violation of the Consumer Protection Act (Va. Code Ann. § 59.1-200 et seq.) for such a remediator not to comply with (i) the U.S. Environmental Protection Agency›s publication on Mold Remediation in Schools and Commercial Buildings, as revised; (ii) the ANSI/IICRC S520 Standard for Professional Mold Remediation, as revised; or (iii) any other equivalent ANSI-accredited mold remediation standard, when conducting or offering to conduct mold remediation in the Commonwealth. Those changes had an emergency clause and were effective immediately. DPOR, VDH, and mold industry professionals will also come together to study the current state of the mold inspection and remediation workforce in the Commonwealth and determine whether the licensure or certification of mold inspectors and mold remediators would benefit the public health, safety, or welfare. The study report is due by January 1, 2026. (*House Bill 2195 – Delores L. McQuinn*).

A supplier, in connection with a consumer transaction, is prohibited from advertising or displaying a price for goods or services without clearly and conspicuously displaying the total price, which shall include all mandatory fees or surcharges, as defined in the bill. The bill exempts (i) fees charged by electric utilities, natural gas utilities, and telecommunications service providers and (ii) certain costs associated with real estate settlement services. (*House Bill 2515 – Adele Y. McClure; Senate Bill 1212 – Stella G. Pekarsky*).

Counties, Cities, and Towns

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

Several changes were made to the Commercial Property Assessed Clean Energy (C-PACE) financing program. The definition of an "eligible property" for a C-PACE loan now includes multifamily properties with five or more units and commercial condominiums. A definition of "property owner" was added to the code and includes a fee simple owner and lessee under a long-term ground lease so long as certain criteria are met. The law also (i) changes from two years to three years from a locality's issuance of a certificate of occupancy the time period within which a local C-PACE ordinance may allow submittal of a loan application and (ii) provides that a locality agrees to execute a locality agreement within 30 days of the adoption of the ordinance that opts them into the statewide C-PACE loan program. (*House Bill 1819 – David A. Reid*).

The second public hearing notice that a planning commission publishes for certain planning and zoning actions now must be published no less than five days before the date of the meeting. Previously it was required to be published no less than seven days before the date of the meeting. (*House Bill 1996 – Elizabeth B. Bennett-Parker*).

The charter for the City of Roanoke was amended to allow for the appointment by city council of the City's direc-tor of real estate valuation. Previously, the director of real estate valuation was appointed by the city manager. (*House Bill 2005 – Joseph P. McNamara; Senate Bill 1176 – David R. Suetterlein*).

The General Assembly expanded the authority of localities to impose civil penalties on the owners of certain derelict buildings. Previously this authority was limited to residential property, but now that authority includes non-residential property. (*House Bill 2128 – Wendell S. Walker*).

The City of Falls Church was added to the list of localities with authority to provide for an affordable dwelling unit program pursuant to § 15.2-2304. (*House Bill 2137 – Marcus B. Simon; Senate Bill 1011 – Saddam Azlan Salim*).

Localities may adopt a variety of strategies intended to encourage and facilitate the development of affordable housing on property owned by property tax-exempt nonprofit organizations. To stimulate development of such property, localities may provide, by ordinance, the alteration or waiver of requirements for certain zoning permits and the creation of site plan application incentives. If a locality adopts such an ordinance, such ordinance shall ensure that the organization agrees to preserve the property as affordable housing for at least 40 years. DHCD will develop and publish a document describing the strategies a locality may consider on the Department's website no later than December 1, 2025. (*House Bill 2153 – Betsy B. Carr*).

Code provisions related to enterprise zone real property investment grants were changed to (i) create an elevated grant tier on and after July 1, 2025, for major qualified zone investors, defined in the bill, and cap grants for such major qualified zone investors at $300,000 within any five-year period and (ii) include child day care centers in the definition of qualified real property investments for purposes of enterprise zone real property investment grants. DHCD and the Virginia Economic Development Partnership Authority will convene a work group to review the utilization of currently designated enterprise zones, make recommendations on renewals or termination of such zones, and report its findings by November 1, 2025. (*House Bill 2163 – Betsy B. Carr*).

One notice sent by first-class mail to the last known address of certain property owners impacted by a proposed change in the zoning map classification of 25 or fewer parcels of land shall be

deemed adequate notice. A representative of the local planning commission shall make affidavit that such mailings have been made and file such affidavit with the papers in the case. (*House Bill 2330 – M. Keith Hodges*).

The comprehensive plan prepared by a local planning commission and adopted by a local governing body may include the use of tiny homes and accessory dwelling units, defined in the bill, as part of any residential development and use designated within such plan. (*House Bill 2533 – Briana D. Sewell*).

Localities may, by ordinance, establish a tree canopy fund to collect, maintain, and distribute fees collected from developers that cannot provide for full tree canopy requirements where the development project is situated. The ordinance must establish cost units that are based on average costs of two-inch caliper nursery stock trees. A locality may use money from the fund to (i) plant and maintain trees on public or private property or (ii) make disbursements to a community-based organization that is exempt from income tax pursuant to § 501(c)(3) of the Internal Revenue Code and is operated for tree planting, stewardship, or community-beautification missions that benefit the community at large. Any funds collected by localities must be spent within five years of the collection date. (*House Bill 2630 – Rodney T. Willett*).

The General Assembly shortened the timeframes for various local government approvals of subdivision plats and site plans. The Virginia Code Commission will convene a work group to review existing provisions related to the submission, review, and approval of subdivision plats and site plans. The work group shall develop recommendations to (i) organize procedural steps in a clear, logical, and sequential order to enhance ease of reference; (ii) clarify the processes, requirements, and timelines applicable to each type of plat or plan; (iii) standardize terminology to ensure consistency, reduce ambiguity, and minimize misinterpretation; and (iv) identify and eliminate redundant or duplicative provisions to streamline the Code and improve its usability. (*House Bill 2660 – Marcus B. Simon*).

The General Assembly removed planning commission and governing body approval authority for the administrative review process for plats and plans and gave the authority solely to a designated agent, defined in the bill. However, a local planning commission may serve as the designated agent of any locality with a population of 5,000 or less. The timeframes for forwarding plats and plans to state agencies for review in §§ 15.2-2259 and 2260 were also shortened. (*Senate Bill 974 – Schuyler T. VanValkenburg*).

A locality may now provide for the full or partial reimbursement of water and sewer connection fees, capital recovery charges, and availability fees paid by an applicant in connection with any new residential development. (*Senate Bill 1263 – Lamont Bagby*).

Localities will be allowed to have enhanced civil penalties for zoning violations involving property that is zoned or used for multifamily residential purposes. For any violation involving property that is zoned or used for multifamily residential purposes, a person who admits liability shall abate or remedy the violation within a period of time specified by the locality that is no less than 30 daysbut no more than 24 months from the date of admission of liability. (*Senate Bill 1267 – Lashrecse D. Aird*).

A locality with property that (i) has been vacant for at least five years; (ii) has been declared blighted or derelict property; and (iii) is delinquent on taxes may petition the circuit court to appoint a special commissioner to execute the necessary deed or deeds to convey such real estate, in lieu of a sale at public auction, to the locality, to the locality's land bank entity, or to an existing nonprofit entity

designated by the locality to carry out the functions of a land bank. The locality shall require any purchaser to (i) begin repair or renovation of the property within six months of purchase and (ii) complete all repairs or renovations necessary to bring the property into compliance with the local building code within a period not to exceed two years from the purchase date. (*Senate Bill 1476 – Todd E. Pillion*).

Housing

The General Assembly amended the furlough law, § 44-209, that passed several years ago. It removed from the definition of "closure of the United States government" the requirement that the closure be for a period of 14 consecutive days or longer. The stay of a foreclosure proceed-ing for any (i) homeowner who defaults on a note that is secured by a one- to four-family residential property or (ii) owner who rents a one-family to four-family residential dwelling unit who defaults on a note that is secured by such property after the commencement of a closure of the United States government is extended from 30 days to 60 days. The 60-day stay on unlawful de-tainer proceedings stays the same. However, the provisions of the law will not apply where a sepa-rate, signed legal agreement exists between a landlord and tenant or homeowner and mortgage holder to stay legal action or defer the filing of proceedings for a term of 60 days or more. This law became effective on May 24, 2025. (*Senate Bill 1430 – Aaron R. Rouse*).

Landlord/Tenant

The General Assembly ended the eviction diversion pilot program in § 55.1-1260 and made it a permissive program open to all district courts throughout the Commonwealth. (*House Bill 1623 – Adele Y. McClure; Senate Bill 830 – Mamie E. Locke*).

§ 55.1-1204 was amended to require landlords who own more than 4 rental units or more than 10% interest in more than 4 rental units in the Commonwealth to provide written notice of nonrenewal to any tenant who has the option to renew a rental agreement or has an automatic renewal clause no later than 60 days prior to the end of the rental agreement term. (*House Bill 1867 – Adele Y. McClure; Senate Bill 1043 – Adam P. Ebbin*).

A tenant cannot be charged a fee for the collection or processing of any payment of rent, security deposit, or any other fees unless the landlord offers an alternative method of payment that does not include additional fees. The law states that a landlord with four or fewer rental dwelling units, or up to a 10 percent interest in four or fewer rental dwelling units in the Commonwealth shall not be required to accept payment of periodic rent and any security deposit by debit or credit card. This last change was an amendment sent down by the Governor and was not debated in committee. [It is unclear if the change is meant to imply that landlords outside the criteria would be required to accept payments by debit or credit card.] (*House Bill 2218 – Kathy K.L. Tran; Senate Bill 1356 - Kannan Srinivasin*).

Last year, the law changed to require landlords 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. A disclosure statement above that section was also required. This year, the General Assembly clarified that a landlord must provide an itemization of all charges to the tenant that comprise (i) the security deposit, (ii) the amount of rent due per payment period pursuant to the lease period, and (iii) any additional one-time charges due prior to the commencement date of the rental agreement or that will be included in the first rental payment. The required disclosure was also updated with the new language. This new law only applies to rental agreements that are entered into, extended, or renewed after July 1, 2025. (*House Bill 2430 – Marcus B. Simon*).

The General Assembly again amended the code provision for early termination of a rental agreement by victims of sexual abuse or criminal sexual assault. § 55.1-1236 now covers victims of stalking and human trafficking and includes preliminary protective orders. A tenant may also provide the landlord with a copy of a warrant, summons, information, or indictment. Such evidence must have been issued during the term of an active and current rental agreement. The written notice of termination will now be effective 28 days after the notice of termination is served on the landlord. (*Senate Bill 884 – Russet Perry*).

Property and Conveyances

A condemnor must provide a report showing all matters that affect the current ownership, existing liens, encumbrances, and other matters affecting title as of the date of the title report to a landowner in a condemnation action. (*House Bill 1690 – Kelly K. Convirs-Fowler*).

The residential property disclosure statement required by § 55.1-703 was amended to include a statement that the owner makes no representations or warranties with respect to the property's proximity to a public use airport nor any noise from aircraft due to the proximity of the property to flight operations. Purchasers are provided with several options to complete their due diligence including contacting (i) the locality or public use airport and reviewing any available maps depicting public use airport aircraft noise zones or (ii) the Department of Aviation or visiting the Department of Aviation's website, where any such maps, if made available by localities or public use airports, shall be accessible to the public. (*House Bill 1706 – David L. Bulova; Senate Bill 1210 – Stella G. Pekarsky*).

An *inter vivos* deed is effective to revoke a recorded transfer on death deed if such inter vivos deed conveys real property to another so the transferor is no longer the owner at the time of the transferor's death. This bill contained an emergency clause and became effective on May 18, 2025. (*House Bill 1871 – Marcus B. Simon*).

The General Assembly amended the definition of a community land trust to remove the requirement that a community housing development organization under such definition must have a corporate membership open to any adult resident or organization of a particular geographic area specified in the bylaws of the organization and that the organization's board of directors must include a majority of members who are elected by the corporate membership. (*House Bill 2151 – Betsy B. Carr*).

Various changes were made to the Code provisions governing eminent domain. In a condemnation proceeding initiated by an authorized condemnor or the Commissioner of Highways, a certificate transferring a defeasible title shall now include certain information describing the property and any rights to the property being taken or damaged. The requirement that the court refer a matter initiating a condemnation proceeding to a dispute resolution orientation was repealed. (*Senate Bill 1158 – Mark D. Obenshain*).

Real Estate Licensing

The General Assembly amended Chapter 21 of Title 54.1 to require real estate licensees working with buyers and tenants to have a written agreement with that person before showing them property. This does not apply to listing agents or property managers who are contacted by an unrepresented buyer for a showing; it is only for agents working with the buyer or tenant. The law also defines "showing property" and "brokerage services." (*House Bill 1684 – Briana D. Sewell; Senate Bill 1309 – Jeremy S. McPike*).

The exemption from licensing provision in § 54.1-2103 for persons employed by a licensed real estate broker for and on behalf of the owner of any real estate that the licensed broker has contracted to manage for the owner was amended to include additional allowable actions. Such employees can also (i) accept and sign broker-approved rental agreements, state or federal required disclosures, and any documents required for compliance with Virginia Fair Housing Law related to such rental transaction and (ii) accept security deposits, periodic rent, and other payments contracted for in the rental agreement. Identifying a violation of such an unlicensed person negotiating rental agreement terms in the broker self-audit will not absolve the broker from the violation. (*House Bill 2557 – Adele Y. McClure; Senate Bill 993 – Angelia Williams Graves*).

Taxation

The real property tax exemption currently available to the surviving spouse of any member of the armed forces of the United States who died in the line of duty with a Line of Duty determination from the U.S. Department of Defense will now include the death of any such member that was the result of suicide. (*House Bill 1868 – Michael B. Feggans*).

Properties that are exempt from taxation by classification pursuant to § 58.1-3606 shall now include the real and personal property of a single member limited liability company whose sole member is an organization. (*House Bill 1896 – Rodney T. Willett*).

The local real property tax exemption and deferral program for elderly and disabled individuals was amended to allow a locality to require that an individual (i) pay all delinquent taxes, penalties, and interest assessed by the locality and incurred prior to becoming eligible for an exemption or deferral; (ii) enter into an installment agreement with the locality for the payment of all such delinquent amounts in installments over a period that is reasonable under the circumstances, but that in no event shall exceed 72 months; (iii) submit and obtain the treasurer's agreement to an offer in compromise with respect to all amounts of delinquent taxes, penalties, and interest; or (iv) carry out a combination thereof. Notice of the terms and conditions of the exemption and deferral program may be included in any notice of change in assessment and the treasurer must post the information on the locality's website. A locality will also now be able to provide a prorated exemption or deferral for the portion of the taxable year during which the taxpayer would have qualified for such exemption or deferral but has not yet filed an application. (*House Bill 2029 – Phil M. Hernandez; Senate Bill 816 - Aaron R. Rouse*).

The real estate assessor charged with determining the fair market value of affordable rental housing must use the income approach when such housing generates income unless certain information is not provided by the property owner. This new law is effective for assessments beginning on or after January 1, 2026. The Department of Taxation, together with a stakeholder group, will develop a uniform income and expense reporting form no later than September 1, 2025 and provide training to assessing officials and contracted assessors on the assessment of affordable rental housing. (*House Bill 2245 – Katrina Callsen*).

The property tax exemption for property used for religious worship in § 58.1-3606.A.2. shall include property on which a church or other building for religious worship is being replaced or rebuilt. The property owner must demonstrate his intent to use such structure exclusively for religious worship or for the residence of the minister of any church or religious body, as well as certain other requirements provided in the bill. The new law applies to tax years on and after January 1, 2023. (*House Bill 2302 – Mark D. Sickles*).

An accommodations provider will not be required to transmit a transient occupancy tax return to a locality if (i) all retail sales of accommodations owned by the accommodations provider are fa-

cilitated by an accommodations intermediary and (ii) the accommodations provider attests to the locality that all such sales were facilitated by an accommodations intermediary. An attestation is effective for 12 months. An accommodations provider will be required to transmit returns for the retail sale of any accommodations not facilitated by an accommodations intermediary. The information provided by an accommodations intermediary to a local commissioner of the revenue, treasurer, or any other local tax or revenue officer or employee of a county, city, or town for transient occupancy tax purposes shall be confidential and shall not be divulged to any other department or official of the locality or any other political subdivision of the Commonwealth. The information may be used by such officials only for the purpose of levying and collecting retail sales and use tax, transient occupancy tax, and any other taxes imposed on the sale of accommodations. (*House Bill 2383 – Candi Mundon King; Senate Bill 1402 – Scott A. Surovell*).

Miscellaneous

For the purposes of notarial acts being performed outside the Commonwealth for use in the Commonwealth, a "notarial act" means an act, whether performed with respect to a tangible or electronic document, that a notary public commissioned in the Commonwealth may perform under the laws and regulations of the Commonwealth. *(House Bill 1889 – Marcus B. Simon*).

It will be a Class 5 felony for any person to maliciously threaten eviction, loss of housing, property damage, or any financial loss with the intent to cause the complaining witness to engage in various sexual acts and then engaging in those acts. It will be an unclassified felony punishable by not less than one nor more than 20 years and a fine of not more than $100,000 for any adult who violates the provisions of the bill with a person younger than 15 years of age. (*House Bill 1998 – Wendell S. Walker*).

The General Assembly removed the requirement for a license for certain outdoor advertising in the sight of public highways. (*House Bill 2254 – H. Otto Wachsmann, Jr.*).

The Virginia Telephone Privacy Protection Act was amended to permit an individual receiving a telephone solicitation via text message to request not to receive telephone solicitations from a telephone solicitor by replying to such text message with the word "UNSUBSCRIBE" or "STOP." A telephone solicitor in receipt of such request is required to honor it for at least 10 years. This law will not become effective until January 1, 2026. (*Senate Bill 1339 – David W. Marsden*).

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. Legislators may also refer a bill idea to the Commission for study. 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. Further information on VHC business, workgroups, and upcoming meetings is available at https://vhc.virginia.gov/.

Delegate Debra D. Gardner proposed legislation that would have established an Access to Housing Task Force for the purpose of evaluating short-term and long-term access to housing in the

Commonwealth. The House General Laws subcommittee on Housing and Consumer Protection referred the bill to the VHC for further study. (*House Bill 1708 – Debra D. Gardner*).

Delegate Debra D. Gardner proposed legislation that would have prohibited landlords from including in their lease a provision stating that the tenant would forgo the right to select his own service provider of cable television service, cable modem service, satellite master antenna television service, direct broadcast satellite television service, subscription television service, broadband service, or any other related television or Internet service. or opt out of procuring such services from a service provider. In cases where the landlord was the service provider, the landlord would have to conspicuously disclose in the rental agreement a statement that the tenant is free to either select his own service provider or opt out of procuring services from any service provider and is in no way obligated to procure such services from the landlord as a condition of tenancy. The landlord would also have to disclose any fees or charges imposed for the provision of services as well as the name and telephone number of at least one other service provider with access to deliver such services to the premises for which tenancy is sought. The House General Laws subcommittee on Housing and Consumer Protection referred the bill to the VHC for further study. (*House Bill 1709 – Debra D. Gardner*).

Delegate Robert D. Orrock, Sr. proposed legislation that would have allowed a locality, within the residential district classifications of its zoning ordinance, to include districts specifically designated for affordable housing. The House Committee on Counties, Cities, and Towns referred the bill to the VHC for further study. (*House Bill 1790 – Robert d. Orrock, Sr.*).

Delegate Bonita G. Anthony proposed legislation that would have required DHCD to conduct an annual geographic equity assessment (GEIA) to identify distressed localities that have historically received less investment for housing and economic development. It would have also required that, of the 80 percent of moneys from the Virginia Housing Trust used to provide flexible financing for low-interest loans, no more than 20 percent could be allocated to a single locality unless such locality has been identified as underserved in the most recent GEIA. The Senate Finance and Appropriations committee referred the bill to the VHC for further study. (*House Bill 2048 – Bonita G. Anthony*).

Delegate Marty Martinez proposed legislation that would have allowed a locality with a population of at least 75 people per square mile or a locality located within the Chesapeake Bay watershed, when assessing the adequacy of existing trees identified by the developer during the development process to be preserved or in assessing the overall impact of the development on existing trees, to require, by ordinance, the developer to (i) submit a survey or map detailing the location of critical root zones on the subject property, including any roots from mature trees that have grown over the subject property line to the abutting property or property adjacent to the subject property, or

(ii) provide other information reasonably calculated to assist the locality to determine if such trees are sufficient to meet all or part of the tree canopy requirements. The Senate Committee on Agriculture, Conservation, and Natural Resources referred the bill to the VHC for further study. (*House Bill 2238 – Marty Martinez*).

Delegate Holly M. Seibold proposed legislation that would have prohibited certain common interest community associations from prohibiting the installation of an amateur radio antenna on the roof of the unit owned by the unit owner or on a roof appurtenant to the unit owned by the unit owner or, in the case of a property owners' association, a lot owner's property. The House General Laws subcommittee for Housing and Consumer Protection referred the bill to the VHC for further study. (*House Bill 2542 – Holly M. Seibold*).

Delegate Joshua G. Cole proposed legislation that attempted to prohibit a locality from adopting or enforcing any ordinance that created criminal penalties for sleeping or seeking temporary shelter in a legally parked vehicle and from detaining such a person solely for that reason. A locality would also have been prohibited from detaining any person who was public camping, as defined in the bill, solely for such reason unless the locality is able to immediately provide other temporary shelter to such person or the person is deemed to pose an immediate threat to the public. Finally, the bill would have required a locality to make a reasonable effort to provide temporary shelter for individuals without housing and gave authority to use government-owned property for such purpose. The third subcommittee of House Counties, Cities, and Towns referred the bill to the VHC for further study. (*House Bill 2602 – Joshua G. Cole*).

Senator Glen H. Sturtevant, Jr. proposed legislation to establish the Virginia Workforce Housing Assistance Program to provide grants to eligible employers that set up housing down payment assistance programs for employees in amounts equal to the lesser of 15 percent of housing down payment assistance expenses incurred by an eligible employer during the fiscal year or $50,000. The Senate Committee on General Laws and Technology referred the bill to the VHC for further study. (*Senate Bill 1139 – Glen H. Sturtevant, Jr.*).

Senator Emily Jordan proposed legislation that would have required DHCD to use at least 65 percent of the moneys from the Virginia Housing Trust Fund to provide flexible financing for low-interest loans through eligible organizations and up to 35 percent of the moneys from the Fund to provide grants through eligible organizations for targeted efforts to reduce homelessness. The Senate Committee on General Laws and Technology referred the bill to the VHC for further study. (*Senate Bill 1344 – Emily M. Jordan*).

Senator Glen H. Sturtevant, Jr. proposed legislation that would have prohibited the holder of the obligation secured by a mortgage or deed of trust on certain residential real estate from imposing, agreeing to, or enforcing a legal restriction on conveyance or restriction on the assumption of a residential mortgage or deed of trust. The Senate General Laws and Technology Committee referred the bill to the VHC for further study. (*Senate Bill 1452 – Glen H. Sturtevant, Jr.*).

Senator Adam P. Ebbin has requested by letter that the VHC study the related costs to tenants when opting out of required damage insurance provided by landlords and obtaining separate insurance from the landlord's chosen provider.

Senator Scott A. Surovell has requested by letter that the VHC study three housing-related issues. First, he requested the VHC look at the idea of a mandatory disclosure for home sales subject to Chesapeake Bay Preservation Act. Second, he has asked to study prohibiting home inspectors from disclaiming civil liability below insurance requirements and how that might work in a caveat emptor state. Finally, Senator Surovell asked the VHC to study prohibiting the acquisition of residential land by large corporations.

Senator William M. Stanley, Jr. requested, by letter, that the VHC evaluate the idea of a right of first refusal.

Delegate Michelle Lopes Maldonado has asked the VHC to evaluate the feasibility of establishing manufactured home subdivisions/zoning ordinances in Virginia.

Senator Bill DeSteph has asked the VHC to study declarant control of residential developments and the process for transitioning control to the lot owners.

Conclusion

While gambling, marijuana, reproductive and contraception rights, and gun control continued to dominate the conversation at the General Assembly, there was a notable increase this year in debate about the housing supply crisis in the Commonwealth. The continued acrimony between the Democratic legislature and the Republican administration led to the expected flurry of amendments and vetoes. I hope these summaries were helpful to your practice and ultimately your clients.

2024-2025 VIRGINIA REAL ESTATE CASE LAW UPDATE (SELECTED CASES)

By Michael E. Derdeyn and John E. Rinaldi

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.

John E. Rinaldi has been with Walsh, Colucci, Lubeley and Walsh since 1993. He is a native of Northern Virginia with a family background in the construction and development industries. John's practice primarily focuses on litigation in real estate, construction, and development, including mechanic's liens, real property title issues, title insurance, and general business law. The remainder of John's practice includes real estate transactions and larger general business issues.

A. FEDERAL CASES

1. *William T. McDonald v. Wells Fargo, et al.,* 2024 U.S. Dist. LEXIS 176068; 2024 WL 4336606 (E.D. Va. 2024)

Facts: In an attempt to avoid foreclosure, pro se plaintiff alleged that he entered into a loan agreement and promissory note with Primelending, the original lender, to finance Plaintiff's purchase of real property. Plaintiff further alleged that Defendants failed to lend Plaintiff "lawful consideration of any kind, in exchange for the Note." Plaintiff "tendered full payment of the alleged debt to alleged noteholder" in June of 2022 by attempting to assign the debt to the United States Treasury.

Plaintiff brought a suit in the Loudoun County Circuit Court containing eight claims against Defendants Wells Fargo and Primelending, for: (1) fraudulent misrepresentation; (2) breach of contract; (3) fraud in the concealment; (4) civil theft for stolen promissory note; (5) defamation; (6) unjust enrichment; (7) intentional infliction of emotional distress; and (8) violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq., and four criminal statutes (18 U.S.C. §§ 514, 892, 894, 1341).

Plaintiff did not serve Primelending with the Complaint.

Holding: Wells Fargo's Motion to Dismiss was granted as to Counts 4, 5, 7, and 8 with prejudice The remaining counts (1, 2, 3, and 6) were dismissed without prejudice. The Court further ordered that the Plaintiff show cause within 14 days as to why Primelending was not served with process.

Discussion: The opinion in this case has a very good overview as to the standard of review for pro se Complaints and also as to the elements of each cause of action.

The U.S. District Court subsequently dismissed the remainder of the case with prejudice, *sua sponte*, for failure to serve Primelending.

B. VIRGINIA SUPREME COURT CASES

1. *Dorcon Group, LLC v. Westrick,* 303 Va. 204 (Va. 2024)

Facts: Subdivision was created by deed that imposed restrictive covenants on lots with the exception of 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.

Dorcon then filed suit seeking a declaratory judgment that the amendment violated the express language of the deed and that the deed did not permit the lot owners to create a new restriction.

Trial Court Ruling: After a bench trial, the circuit court ruled in favor of the lot owners finding that the term "modify" in the deed was unambiguous and permitted the lot owners to do what they did.

Court of Appeals: The Court of Appeals reversed. The Court of Appeals 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 while the term modify may permit enlarging or reducing the scope of an existing restriction, it did not permit the addition of a new restriction. The court found that the amendment was not a simple modification but instead was a new restrictive covenant.

Supreme Court: Affirmed. In addition to agreeing with the Court of Appeals' analysis regarding the term "modify" the Supreme Court also focused on the fact that while the amendment provision permitted the "restrictions to be excepted, modified, or vacated in whole or in part," that provision did not address the modifications to "exceptions" from the restrictions. Lot 5 was expressly excepted from the restriction against commercial activities and the attempt to modify *the exception* is not permitted under the amendment provision in the underlying deed of subdivision.

C. VIRGINIA COURT OF APPEALS CASES

1. *5800 HVB, LLC v. Harbour View Commerce Ass'n, Inc.*, 2024 Va. App. LEXIS 359, 2024 WL 3107581

Facts: Plaintiff purchased commercially zoned property in commercial development and proposed to build a convenience store/gas station. The ARB for the commercial development rejected Plaintiff's plans and the Plaintiff filed suit seeking a declaratory judgment that the ARB did not have the power to reject Plaintiff's development plans.

The Declaration for the development permitted the creation of the ARB and gave the ARB the power to promulgate development guidelines, which provided that the building sites were to be used for offices, display rooms, general administration, lodging, light manufacturing and warehousing and "for such other uses as the Declarant shall determine in its sole discretion to be in harmony with the general character and purposes" of the development.

Plaintiff purchased a parcel in the development which was zoned B-2 under the City of Suffolk's Zoning Ordinance, which permitted gas stations and convenience stores. Plaintiff applied to the ARB to construct a 7-Eleven gas station and convenience store and a National Tire & Battery service station. The ARB denied the application due to lack of conformity with the external design to neighboring lots and the uses of those lots. Plaintiff filed suit asserting that the ARB exceeded its authority by excluding uses that were permitted by right under the zoning ordinance.

Trial Court Ruling: After a bench trial, the circuit court ruled in favor of the development, finding that the declaration authorized the ARB to regulate property uses in the development, to promulgate guidelines to promote harmony within the development, and to deny applications that are contrary to those guidelines.

Court of Appeals: The Court of Appeals affirmed, finding that the ARB had the power under the Declaration and the Guidelines to determine whether a proposed use is appropriate for the development based on the provision in the Declaration providing that the Declaration was intended to promote "orderly and attractive development" in a "harmonious manner, to preserve and protect property values." The Declaration also provided that where conflicts occur between the Declaration and the zoning ordinance, "the more restrictive requirement shall prevail."

The Guidelines, in turn, required submission of plans regarding "the proposed use of the Lot" and that, in making its determination whether the approve the plans, the ARB would consider "harmony of external designs with neighboring Lots and types of operations and uses thereof . . ."

Based on these provisions, the Court determined that the ARB had the power to regulate the uses of land. The Court also determined that the ARB exercised that power properly in denying approval, recognizing that although the use was permitted under the zoning code, the declaration allowed for further limitations on the use of property within the development, as evidenced by a provision in the declaration noting that even if a use is permitted under the zoning code, such use would not be permitted if the use would create "objectionable noise, smoke, odors, or which in any other way, in the opinion of the [ARB] will constitute a nuisance or degrade the value of the development."

2. *Agnew v. 1309 Taylors Point Road,* 2024 Va. App. LEXIS 434, 2024 WL 3571821

Facts: Following extensive litigation in the City of Richmond Circuit Court over ownership of the property at issue, the ultimate owner of the property filed an unlawful detainer action in the General District Court for the City of Virginia Beach, where the property was located. At the GDC hearing on the unlawful detainer the plaintiff entered several documents into evidence, including a copy of the final decree from the Richmond Circuit Court, which confirmed the judicial sale of the Property. The defendants raised two affirmative defenses in the GDC: (a) that plaintiff was not entitled to possess the Property and thus lacked standing; and (b) that plaintiff's claims were barred by its fraud, "and unclean hands." The GDC granted immediate possession of the property as well as $40,000 in damages. Appellants appealed to the circuit court.

During the circuit court proceedings plaintiff entered into evidence the same documents presented to the GDC. The defendants then attempted to admit a series of documents related to the prior proceedings in Richmond, but the circuit court deemed them irrelevant to the issue of possession in the unlawful detainer action. The circuit court was, nevertheless, aware of the extensive procedural history regarding the Property, including the then-pending appeal from the Richmond Circuit Court in which appellants directly challenged the validity of title to the Property. In ruling on the unlawful detainer claim, the circuit court expressly avoided making any findings on the issue of title, stating only that it was "not in a position to determine that the final decree from the Richmond Circuit Court was void.

Holding: in an extensive review of *Parrish v. Fannie Mae*, 292 Va. 44, 49, 787 S.E.2d 116 (2016) the Court of Appeals held that the trial court did not err granting appellee's motion for summary judgment and awarding appellee possession of the property and unpaid rent in an unlawful detainer action; appellee established a prima facie case of its right to possession; as appellant's allegations of invalid title were insufficient, trial court did not err limiting its ruling to the issue of possession. The Circuit Court derives its jurisdiction from that of the GDC. In failing to establish dispute of title, allegations of fraud have no proper place in an unlawful detainer action

3. *Anne P. Everett v. George Lee Parson, et al.,* 2024 Va. App. LEXIS 395, 2024 WL 3416953

Facts: In 1941, George Lee Parson ("Senior") acquired a 74-acre farm consisting of 3 parcels in Sussex County. In 1973, George Lee Parson, Jr. ("Junior") acquired the 2 of the parcels (the "Everett Farm") under Senior's will. Anne P. Everett is Junior's daughter.

Between 1989 and 1990, Junior entered into 13 mining leases that were ultimately assigned to Iluka Resources Inc. ("Iluka"). Ten of the leases authorized extraction from land that Junior wholly owned, including the Everette Farm that he inherited from Senior. The remaining leases authorized extraction from three parcels that Junior jointly owned with his four sisters.

From August of 1990, Junior's sisters were aware that the Parsons had executed the mining leases and that Junior considered himself the sole owner of the Everette Farm. Beginning in August 1990, Everett's husband began conducting farming operations on the Everette Farm with Junior's consent. His farming operations were clearly visible from the public roads. On December 12, 1994, Junior conveyed the Everette Farm to Everett. With Everett's consent, her husband continued to conduct farming operations on the Everette Farm until spring 2007.

On October 6, 2006, Junior assigned the rights and obligations under the leases to Everett. With Everett's consent, Iluka took possession of the Everett Farm and began mining operations in spring 2007. Iluka's operations on the Everette Farm were visible, exclusive, and continuous until at least the end of 2010.

Around June 25, 2012, Senior's other heirs or their estates (the "Relatives") filed an amended complaint against Iluka, claiming damages for trespass, waste, and breach of contract. The Relatives alleged that Senior's will did not convey the entire Everett Farm to Junior. Instead, the Relatives alleged that a triangular part of the Everett Farm (the "Triangle") had passed to Senior's wife, Virgie F. Parson ("Virgie"), under the residuary clause of Senior's will. The Relatives further asserted that Virgie devised the Triangle to her five children through the residuary clause of her will. As Virgie's descendants, the Relatives claimed joint ownership of the Triangle and alleged that Iluka mined the Triangle without the consent of all its owners.

Everett filed a complaint to quiet title against the Relatives. Everett's complaint, as amended, claimed that she acquired title to the Everett Farm, including the Triangle, by adverse possession through Junior's actions and her own actions. The Relatives filed a demurrer arguing that Everett's complaint failed to state a claim for adverse possession because it demonstrated that she took possession of the Triangle under the mistaken belief that the 1994 Deed conveyed the Triangle to her. The Relatives further asserted that, contrary to Everett's claim of adverse possession, they owned the Triangle with Everett as co-tenants and had constructive possession of the Triangle.

The circuit court held a hearing on the Relatives' demurrer on February 27, 2023.3 Following the hearing, the circuit court held that Everett's amended complaint failed to state a claim for adverse possession because her possession of the Triangle "under the mistaken belief that it was conveyed" to her by the 1994 Deed "cannot result in adverse possession as a matter of law." The circuit court further found that Everett's amended complaint established that Everett "is a co-tenant in privity with the Relatives and not a stranger," and thus failed to state a claim for adverse possession because it failed to "allege with specificity the conduct of Everett . . . which would be necessary to oust the Relatives to support adverse possession." The circuit court entered an order, sustaining the Relatives' demurrer to Everett's claim for adverse possession and granting Everett leave to further amend her complaint. Everett appealed from that order.

Holding: Trial court erred sustaining appellees' demurrer and ruling appellant's mistaken belief property conveyed to her precluded claim for adverse possession; mistaken belief of ownership does not defeat hostile element for adverse possession; amended complaint sufficiently alleges other elements of adverse possession; judgment reversed and matter remanded for further proceedings.

The Court of Appeals distinguished this case from both *Chaney v. Haynes*, 250 Va. 155, 159, 458 S.E.2d 451 (1995), in which the adverse possession was under the mistaken belief of ownership based on a description in a deed and therefore not "hostile". The court held that the case was more analogous to *Hollander v. World Mission Church*, 255 Va. 440, 443, 498 S.E.2d 419 (1998) in which claimants "based their claim not only on the deed descriptions, but also on their belief as to where the property line lay."

The Court of Appeals also held that that Everett had not alleged a co-tenancy with the Relatives. If she had alleged a co-tenancy, noting that when parties acquire property as co-tenants, one co-tenant may not rely on adverse possession to obtain title unless notice, actual

or constructive, is given to the other of the intent to oust, making the occupying co-tenant's possession hostile. There is a presumption against any occupancy of a co-tenant being in hostile possession as to other co-tenants with whom he is in privity. Citing *Harkleroad v. Linkous*, 281 Va. 12 (2011)

4. *Ashburn Village Community Ass'n v. Waltonwood Ashburn, LLC,* 2024 Va. App. LEXIS 428, 2024 WL 3498727

Facts: Plaintiff community association brought action to collect unpaid assessments and for violation of declaration by rezoning property without approval as required by declaration.

The Association is a homeowners' association that oversees both commercial and residential lots. The declaration defines a "commercial lot" as one used for non-residential purposes. A "residential lot" is defined to include multifamily uses, including "elderly congregate care facilities. The commercial declaration imposes an obligation to pay assessments on owners of commercial lots. The declaration prohibits an owner from rezoning a lot without Association approval. The declaration also provides that when a property is rezoned, the Association has the power to withdraw the property from the commercial declaration and subject it to the residential declaration.

In 2013, prior to the purchase of the subject property by defendant Waltonwood, the property was rezoned from "Planned Development – Industrial Park" to "Planned Development – Active-Adult Age-Restricted." This rezoning permitted the development of a congregate care facility for elderly adults. Two-months later, Waltonwood purchased the property and constructed a congregate care facility on the property. Waltonwood never paid any assessments to the Association.

The Association filed suit and in its third amended complaint sought to recover for breach of contract for failure to pay commercial assessments, in the alternative to recover for failure to pay residential assessments, and for failing to obtain approval for rezoning to operate a congregate care facility.

Trial Court Ruling: The trial court sustained the demurrer to the third-amended complaint.

Court of Appeals: The Court of Appeals affirmed. With respect to the first count for recovery of commercial assessments, the Association argued that Waltonwood was in breach by rezoning the property without approval and therefore could not excuse itself from paying of commercial assessments. The Court of Appeals rejected this argument, ruling that Waltonwood did not breach the provisions of the declaration because it was not the owner of the property at the time of the rezoning. The Court also ruled that Waltonwood was not obligated to pay assessments under the declaration because it was not an "owner" of a commercial lot as defined by the declaration.

The Court ruled that Waltonwood did not owe assessments under the residential declaration because, although the property at issue met the definition of a residential lot, the Association did not follow the procedure set forth in the Declaration to withdraw rezoned property from the commercial declaration and subject it to the residential declaration.

The Court also rejected the Association's claim for injunctive relief to prohibit the use of the property as a congregate care facility based on the failure to obtain Association approval for the rezoning, noting once again that Waltonwood did not breach the covenant, the prior owner did.

5. *Avonlea LLC v. Moritz,* 81 Va. App. 729, 2024 Va. App. LEXIS 514, 2024 WL 4017354

Facts: Plaintiff obtained a variance from the City of Alexandria BZA from a requirement in the Alexandria Zoning Ordinance that required that "access to all parking [within the Old and Historic Alexandria District] shall be provided from an alley or an interior court." The BZA granted a variance from this requirement because it prevented the reasonable use of the property at issue because it could not be accessed from an alley or an interior court. Plaintiff instead proposed to construct a landscaped parking area behind a gated fence to allow parking for two cars. The BZA granted the variance and the City Council and the Director of Planning and Zoning, Karl Moritz, petitioned the Circuit Court for a writ to review the decision.

Trial Court Ruling: The trial court overturned the BZA's grant of a variance, concluding that the BZA lacked statutory authority to grant a variance and that, even if the BZA had authority, the requirements for a variance were not met.

Court of Appeals: The Court of Appeals affirmed. The Court recognized that the BZA is a creature of statute that only has the powers granted to it by the General Assembly, which cannot be expanded by the locality. A variance is defined as a "reasonable deviation from those provisions [in a zoning ordinance] regulating the shape, size, or area of a lot or parcel, or the size, height, area, bulk or location of a building or structure." Plaintiff sought a variance from the requirement that access to parking in the historic district must be provided from an alley or interior court – which does not relate to the "shape, size or area of a lot . . . or the size, height, area, bulk or location of a building or structure."

Plaintiff argued that parking requirement regulated the "area and location of any potential parking structure" and therefore should be subject to a variance. The Court rejected this argument, noting that the BZA has authority to grant a variance only "from the literal terms" of an ordinance and the literal terms of the provision at issue regulated only "access to . . . parking" – not whether a parking structure may be built. The Court noted that nothing in the ordinance prevented construction or a parking area. The ordinance just prevents access to that parking area from the street.

The Court also noted that the ordinance at issue provided that the parking requirements in the ordinance can be waived by the planning commission or by the director as part of the site plan review process if access from an alley or interior court is not feasible.

6. *Axios Partners v. Northampton County Board of Supervisors,* 2024 Va. App. LEXIS 445, 2024 WL 3571783

Facts: Axios applied for a special use permit for its 48 acre property in Northampton County. The application proposed the development of a single-family residence and an additional 12 "tourist cottages" in an A/RB zoning district. Axios proposed constructing 13 structures, with a density of 1 per 3.7 acres, in a zoning district that typically allowed a density of only 1 dwelling unit per 20 acres.

County staff members evaluated the application and issued a report recommending denial, finding that the proposed use did not comply with density standards applicable to land zoned A/RB and other significant issues. Finally, County staff members recommended removing the "tourist cottage" land use from the zoning ordinance, due to its overlap with the definition of "short-term rental unit."

In its letter of justification required by the zoning ordinance, Axios acknowledged that its proposed use exceeded the "1 unit per 20 acres" density requirement. Axios argued that the zoning ordinance allows up to 12 tourist cottage units on agricultural property with a special use permit" and therefore reflected "an exception to the density requirements."

The Planning Commission conducted two public hearings. It suspended consideration of the application at the first hearing "because of missing information and confusion as to the application of performance standards." The Planning Commission reconsidered Axios's application at the second public hearing and recommended that the Board deny it.

The Board reviewed the application at a public hearing. It received 3 written comments supporting the application, a "letter of concern" regarding protections for a gravesite, and at least 28 comments in opposition. The Board also received a petition in opposition to the application, signed by 573 residents of the County.

At the beginning of the public hearing, Axios modified its request from 12 tourist cottages to 6 tourist cottages. Axios further argued to the Board that the density regulations did not apply.

After considering the application, the County staff report, and public comments, the Board voted unanimously not to approve the project. The Board also voted unanimously to refer a zoning text amendment to the Planning Commission to remove "tourist cottages" as a defined use in the zoning ordinance. See NCZO § 154.2.043 (providing the process for zoning text amendments). At a subsequent meeting in May 2022, the Board formally approved a zoning text amendment removing "tourist cottages" from the zoning ordinance.

Axios appealed the decision of the Board of Supervisors to the circuit court on the grounds that the Board's decision was arbitrary and capricious and other constitutional grounds.

The circuit court ruled that because "[t]he issue in this matter was fairly debatable," it was "not going to disturb the decision of the Board of Supervisors." Finally, the court found that the Board "did not act in an arbitrary and capricious manner, nor [did it] violate anyone's constitutional rights."

Axios appealed to the Court of Appeals.

Holding: Trial court dd not err affirming the denial of a Special Use Permit by County Board of Supervisors; no error finding tourist cottage was a dwelling and consideration of density appropriate; no error finding actions of the board were not arbitrary and capricious and not a violation of constitutional rights; trial court properly applied the fairly debatable standard.

7. *Barr v. Garten Development, LLC,* 2024 Va. App. LEXIS 534, 2024 WL 4205402

Facts: The Barrs, the servient estate holders, filed a declaratory judgment action seeking to limit Garten Development's ability to improve a right of way across the Barr's property to facilitate logging the dominant tract. The Barrs claimed that a floating easement of unspecified width granted to the dominant estate in 1914 was released or extinguished in 1979 when a specific right of way across the road at issue was granted.

Common ownership of the properties at issue was severed in 1914. The 1914 deed conveyed to the Barrs predecessor in title only surface rights to that parcel, reserving all mineral rights and all necessary rights of way for development of the mineral rights, including retention of an area of not less than 25 acres for a furnace site or other purposes incident to development

of the minerals on the servient tract. That deed also reserved "rights of way" across the servient tract for (i) railroad tracts to any mine (ii) necessary wagon roads, "it being the intent . . . to reserve all necessary rights of way . . . as may be necessary for the development of the mineral [rights] and more particularly for the proper ingress and egress [to the dominant estate]."

In 1979, the Barrs' predecessor in title granted to Garten's predecessor in title certain water rights, including a right to lay a water line across the servient tract and provided to the dominant tract a right of way "over the established road." The Garten's predecessor in title, in turn, released "all restrictions, easements, and mineral rights." That deed noted that "a portion of the rights, easements, and restrictions being herein released are set forth in [the 1914 deed]."

The Barrs took the position that the 1979 transaction released all rights created by the 1914 deed and that Garten was limited to the use of the existing road, with its location and width being fixed as of the 1979 conveyance.

Garten claimed that the 1979 deed was only a partial release of rights, noting that the 1914 deed and subsequent conveyances differentiated between the term "easements" associated with the extraction of mineral rights and "rights of way" for ingress and egress. Because the 1979 deed did not release "rights of way," Garten retained rights of way "necessary for . . . proper ingress and egress" which included ingress and egress for logging.

Trial Court Ruling: The trial court ruled in favor of Garten, finding that it had the right to improve and expand the existing road to facilitate logging the dominant tract.

Court of Appeals: The Court of Appeals affirmed, finding that the 1979 deed did not release or extinguish all of the rights created by the 1914 deed because it did not mention "rights of way for ingress and egress." That transaction released all mineral rights and associated easements with respect to the servient tract, but not rights across the servient tract for ingress and egress to the dominant tract. The conveyance of a right of way over the existing road, according to the Court of Appeals, was intended to specify that rights of way for ingress and egress were not being released and in fact extended to the existing road, the physical location of which had not yet appeared in the chain of title for the servient tract.

The Court of Appeals therefore concluded that the 1979 conveyance of an easement across the existing road did not create a new right but merely ratified that the rights under the 1914 deed extended to the now existing road. Accordingly, the rights of way under the 1914 deed are still viable and apply to the existing road.

Because the 1914 deed did not specify a width, and because that deed was creating a new right of way, the dimensions of the right of way must be "reasonably sufficient for the accomplish" the object for which the right of way was granted. Here, the object of the rights of way were for mining and industrial endeavors and that removing and transporting timber are included within those contemplated uses. Accordingly, the dimensions of the right of way must be sufficient for transportation of timber and Garten is permitted to improve the road for that purpose.

8. *Becker Building Company, LLC, et al. v. Scott W. Keller, et al.,* 2025 Va. App. LEXIS 184

Facts: In 1976, property owners subdivided their parcel and sold the southernmost ten acres to someone else. Because the newly created parcel did not have road frontage, the owners

granted an express easement of 50 feet for ingress and egress over their remaining parcel to Route 50. The easement was described in the deed conveying the parcel and was depicted on a plat incorporated into and recorded with the deed.

In 1982, the owners subdivided their remaining parcel, conveying a 10-acre portion to their son and daughter-in-law and granting them an express 50-foot easement over the same easement area for access to Route 50.

In 2004, the owner on the other side of the easement acquired the remaining portion of the original parcel fronting on Route 50. The two parcels subdivided out of the parent tract retained access to Route 50 via

In 2007, the owner of the other side of the easement created a small subdivision, forming two new parcels taken from the original parcel along the eastern side of the ingress and egress easement. In compliance with local zoning ordinances, the owner recorded separate subdivision plats for each new parcel and granted Fauquier County an express "private street easement" for "public emergency and maintenance." The subdivision plats depict the private street as running across the coincided with the 50'.

Between July 2016 and August 2017, Easton & Porter Group, LLC ("Easton & Porter") acquired all of the properties served by the easement except for the parcel at the end of the easement that was originally subdivided out in 1976. Becker then purchased three of the lots along the easement from Easton and Porter. Keller then acquired the lot with frontage on Route 50 from Easton and Porter.

The Kellers brought a declaratory judgment action against Becker, asserting that any easement was extinguished by merger when Easton & Porter held title to all three properties. Becker filed a counterclaim, and both parties filed cross motions for partial summary judgment.

The trial court held that the easement was extinguished by merger. Becker appealed.

Held: Trial court erred granting summary judgment finding right to use private road extinguished under doctrine of merger; durable private easement of passage created by duly recorded plats and doctrine of merger does not apply; reversed and remanded for further proceedings.

Citing *Ryder v. Petrea*, 243 Va. 421 (1992) and related cases, the Court of Appeals held that a "private easement" is not subject to the doctrine of merger. "When lands are laid off into lots, streets[,] and alleys," and a plat showing them is recorded, "all lots sold and conveyed by reference thereto, without reservation, carry with them, as appurtenant thereto, the right to the use of the easement in such streets . . . necessary to the enjoyment and value of said lots." Citing *Lindsay v. James*, 188 Va. 646 (1949), the court determined that merger does not apply to private easement depicted on a plat.

9. *Biller v. Morrow,* 2025 Va. App. LEXIS 141, 2025 WL 678051

Cooper's Hawk Lane is a private roadway in Rockingham County that borders the Billers' property. The Morrows also access their respective properties via Cooper's Hawk Lane. In 1964, Miller and Marie Coffman conveyed property, including Cooper's Hawk Lane, to Leonora Morrow by a deed describing it as "a field, timber, and right of way one pole wide.". The

deed included a plat and metes and bounds description encompassing Cooper's Hawk Lane. he Billers initially claimed ownership of Cooper's Hawk Lane and later argued that John Coffman, as heir to Miller Coffman's estate, owned the lane.

The circuit court found that the language "field, timber, and right of way one pole wide" was descriptive of the land conveyed in fee simple, which was confirmed by both the plat and the metes and bounds description. Because of this, the circuit court held that David Morrow is the current owner of Cooper's Hawk Lane. Biller Appealed.

Holding: Trial court did not err granting summary judgment and finding deed intended to convey a fee simple interest in property including portion described as right of way; right of way language is descriptive of a part of land conveyed and inclusion supported by metes and bounds description

The Court of Appeals considered the plain language of the deed, including the phrase "consisting of", the metes and bounds description that included Cooper's Lane, and the accompanying plat. The court concluded that the term "right of way" was descriptive of a part of the property, rather than limiting the conveyance to an easement. The court also considered the contemporaneous sale agreement, which suggested the Coffmans intended to reserve a right of way for their own use rather than convey only a right of way.

10. *Boyer v. Frederick County Board of Supervisors,* 2024 Va. App. LEXIS 313, 2024 WL 2819631

Facts: The Frederick County Board of Supervisors denied Plaintiff's application for a conditional use permit to provide dog kennel boarding and training services in her home. Boyer appealed to the circuit court.

The Planning Commission recommended approval of the CUP, with conditions limiting the number of dogs, requiring that all dogs be indoors by 9 pm, and prohibiting Boyer from hiring employees.

One of the supervisors – Graber - owned a neighboring property and when that supervisor and others sought to arrange an inspection of Boyer's house, Boyer served the supervisor with a no trespassing notice. A number of neighbors submitted written comments opposing the application due to noise and traffic.

At the public hearing, Boyer and Graber discussed a number of events and interactions between them, some unrelated to the application. Boyer claimed Graber had a conflict of interest, which Graber denied. After a public hearing, the Board denied the application by a 4-2 vote, with one supervisor noting that he denied the application "only because no good" could come of it due to the interactions between Graber and Boyer.

Boyer appealed, arguing that the decision was arbitrary and capricious and was influenced by Graber's conflict of interest and personal bias. The Board filed a motion craving oyer, which was granted, incorporating the legislative record.

Trial Court Ruling: The trial court sustained the Board's demurrer with prejudice.

Court of Appeals: The Court of Appeals affirmed, finding that the legislative record incorporated by the Motion Craving Oyer produced significant evidence from Boyer and from ad-

jacent landowners, which included support for and disapproval of the CUP application – and such evidence was "sufficiently probative to make a fairly debatable issue of the decision to deny" the CUP.

11. *Brookfield Washington v. County of Fairfax,* 2025 Va. App. LEXIS 65, 2025 WL 450050

Facts: Brookfield, a developer, sought approval from the Fairfax County Land Development Services to develop an 11-lot subdivision, which proposed creating a new road connecting existing Sunset Hills Road and Hunting Crest Way. The County denied the subdivision plan, finding that the proposed new road was prohibited under the Fairfax County Comprehensive Plan. However, the Comprehensive Plan envisioned a realignment of Sunset Hills Road that had not yet taken place.

Brookfield did not seek a determination from the Fairfax County Planning Commission that the proposed new road was "substantially in accord" with the Comprehensive Plan under Code § 15.2-2232(A). Rather, Brookfield filed suit in the circuit court seeking (1) a writ of mandamus ordering the approval of the subdivision plan; (2) an order declaring that the subdivision plan conforms to all applicable laws and ordinances and that the subdivision plan be approved; and (3) damages for inverse condemnation. The County demurred to all three claims. The circuit court sustained the demurrer as to the writ of mandamus and inverse condemnation claims but overruled as to the declaratory judgment action. The circuit court then heard evidence and argument on whether the County correctly disapproved Brookfield's proposed subdivision. The circuit court then ruled in favor of the County. Brookfield appealed.

Holding: Judgment affirmed as trial court did not err finding Department of Land Development Services correctly disapproved proposed subdivision plan; plan did not meet requirements of Code § 15.2-2232 for new road proposed in subdivision plan and did not comply with county's comprehensive plan; finding not arbitrary or capricious; other claim waived, Rule 5A:18.

The Court of Appeals reasoned that Brookfield failed to satisfy the requirements of Code § 15.2-2232 for the proposed new road. Because the proposed road was not already shown on the Comprehensive Plan, Brookfield was required to petition the County's Planning Commission under Code § 15.2-2232(A) to obtain a decision that the proposed road was "substantially in accord" with the Comprehensive Plan. However, Brookfield did not seek such a decision from the planning commission. Additionally, the court rejected Brookfield's argument that Code § 15.2-2232(D) required the County to deem the proposed road as "already shown" on the Comprehensive Plan. The court noted that Code § 15.2-2232(D) is permissive, not mandatory, and gives the locality discretion to deem certain features consistent with the Comprehensive Plan. In this case, the County did not deem Brookfield's proposed new road as "already shown" on the Comprehensive Plan

12. *Catoctin Ridge Homeowners Ass'n v. Biller,* 2025 Va. App. LEXIS 178

Facts: Homeowners association sued neighboring property owner seeking a declaratory judgment that a 1995 deed failed to convey an easement to defendant's predecessor in title and seeking to prohibit defendant from using the easement.

In 1995, the developer of the subdivision executed a deed of subdivision subdividing land into lots and parcels for a residential subdivision. South of the subdivision were four lots,

including one owned by defendant's predecessor in title (his mother). The owners of those lots accessed their property along a private road running along the southern boundary of the subdivision and lying within the subdivision.

The 1995 deed created a 50 foot access easement for three of those lots noting that the grantors:

> do hereby create and establish easements for ingress and egress . . . as shown on the Plat, designated as . . . 50' private access easement for the exclusive use of adjoining lots 4, 7 and 8, for the use and benefit of the lots served thereby.

In 2021, after defendant acquired the property, the association learned that some trees had been cut and, when investigating the matter with counsel, determined that the easement to defendant's lot – Lot 8 – was not valid.

The association filed a declaratory judgment actions seeking a determination that the easement was not valid under the stranger to the deed rule, which provides that "a reservation or exception in favor of a stranger to the instrument does not create in the stranger any right or interest in the property being conveyed." *Shirley v. Shirley*, 259 Va. 515 (2000).

Trial Court Ruling: The trial court ruled that the stranger rule did not apply because the deed very clearly describes the easement and identified the grantees by lot number. In the alternative, the trial court found that defendant had acquired a prescriptive easement and that the association was estopped from denying the existence of an easement.

Court of Appeals: The Court of Appeals affirmed, finding that the deed contained an express grant of an easement – not an exception or reservation. A reservation creates a new right or interest by or for the grantor in the real property being conveyed. An exception withdraws or excludes a pre-existing right from the property conveyed that would otherwise pass to the grantee.

In *Shirley*, for example, the grantor "reserved a life estate to her daughter" instead of making her daughter a party to the deed and expressly granting her a life estate. That purported conveyance was invalid under the stranger rule.

The Court recognized that easements may be granted by express grant or reservation and whether a deed grants an express easement "presents a pure question of law." Although provisions in instruments claiming to grant easements are to be strictly construed, with any doubt being resolved against the establishment of an easement, a grantor does not need to employ any particular words so long as the "intention to grant" is clear.

Here, although the deed at issue did not use the word "grant" the language in the deed – that the grantors "do hereby grant and establish easements for ingress and egress" – signified the intent to grant an express easement.

The Court also rejected the association's argument that no easement was created because it did not identify the owner of Lot 8 by name. The instrument need only "sufficiently describe" a grantee so as to distinguish the grantee from others. Identifying the lots that the easement benefitted was sufficient to create an easement for the owners of those lots.

13. *Cook v. Greene,* 2024 Va. App. LEXIS 233, 2024 WL 1723431

Facts: Leon Greene filed a suit against his two siblings seeking a partition in kind of 106 in Augusta County inherited by the three siblings from their mother. The two siblings filed a counterclaim requesting an allotment. The trial court awarded the partition in kind instead of an allotment. Leon appealed.

Held: Judgment affirmed as trial court did not abuse its discretion awarding partition in kind of real property; evidence sufficient to show division in kind possible; no abuse to qualify appellee's appraiser as an expert witness; claim of error for failure to order additional appraisal not preserved, Rule 5A:18; matter remanded for proceedings consistent with trial court's ruling

14. *Green v. Green,* 2024 Va. App. LEXIS 224, 2024 WL 1723963

Facts: Linda Green and Jimmy Green signed a deed of gift conveying property to Jimmy's daughter, Bri'Anne Green. The deed's granting clause included two separate parcels, Y-1 and X-1. Parcel X-1 was Linda and Jimmy's home. After Jimmy's death, Linda asserted that parcel X-1 should not have been included in the deed of gift and requested that Bri'Anne correct the deed. When Bri'Anne refused, Linda sued for reformation. Bri'Anne moved for summary judgment, arguing the deed is unambiguous and, therefore, parol evidence is inadmissible to prove Linda's intent in making the conveyance. The circuit court agreed with Bri'Anne.

Linda appealed, contending the circuit court erred by entering summary judgment in Bri'Anne's favor. She argued that the circuit court erred in finding no material facts in dispute, as the deed of gift's description of the conveyed property is ambiguous.

Holding: Trial court erred finding no material facts in dispute, entering summary judgment in appellee's favor, and dismissing appellant's complaint seeking reformation of the deed of gift; deed of gift's description of conveyed property is ambiguous; judgment reversed and matter remanded for further proceedings

15. *Historic Fredericksburg Found., Inc. v. City of Fredericksburg City Council,* 2024 Va. App. LEXIS 710, 2024 WL 5049061

Facts: HFFI appealed circuit court's ruling upholding City Council's determination that HFFI lacked standing to pursue a legislative appeal from a decision of the ARB pursuant to Fredericksburg's historic preservation ordinance.

The ARB approved a certificate of appropriateness to demolish a historic structure located 46 feet away from a building owned by HFFI. HFFI appealed the ARB's decision to the City Council pursuant to the City's ordinance and its enabling statute, Virginia Code § 15.2-2306. City Council denied the appeal on the ground that HFFI was not an "aggrieved person" within the meaning of the ordinance.

The City ordinance and the enabling statute limits judicial review of a governing body's decision under a historic preservation ordinance to whether that decision is "arbitrary and constitutes an abuse of discretion," or "is contrary to law."

HFFI filed suit seeking (i) a declaratory judgment that the historic preservation ordinance violated Dillon's Rule and was void ab initio because it adopted a judicial standard for standing, (ii)

a declaratory judgment the decision was arbitrary and capricious as a matter of law because it applied a judicial standard, and (iii) that the decision was arbitrary and capricious and contrary to law.

Trial Court Ruling: The trial court sustained the City's demurrer. The trial court dismissed the declaratory judgment counts on the ground that they were untimely and moot because they asked for a declaratory judgment to rule that the very ordinance under which they sought relief was void. The trial court cited *Norton v. City of Danville*, 268 Va. 402 (2004) for the proposition that a party challenging a locality's decision under an ordinance cannot simultaneously challenge the validity of the ordinance itself. The trial court also ruled that (i) the ordinance did not violate Dillon's Rule because the "aggrieved person" standing was fairly implied by the enabling statute, (ii) that the decision on standing was a legislative standard that did not require judicial standards of proof, and (iii) that HFFI failed to show that the action was arbitrary and capricious or contrary to the law.

Court of Appeals: The Court of Appeals affirmed. With respect to the declaratory judgment claims, the Court affirmed the determination that those claims were untimely because HFFI had already suffered and its rights under the statute had fully matured. In other words, HFFI was seeking the determination of a disputed issue rather than an adjudication of rights and therefore the claims had fully matured and were not appropriate for summary judgment. The Court also agreed with the trial court's reliance on *Norton*, in which the Supreme Court held that a challenge to an underlying ordinance as ultra vires and violative of Dillon's Rule is barred from judicial review of a locality's action with respect to a certificate of appropriateness.

With respect to standing, the Court ruled that, although questions of whether factual allegations are sufficient to establish standing are typically reviewed de novo because it presents a question of law, in this context the standard set forth in the ordinance and the enabling statute governs, i.e. "the court may reverse or modify the decision of City Council . . . if it finds . . . that the decision of the City Council is contrary to the law or is arbitrary and capricious and constitutes an abuse of discretion."

The Court also held – relying again on *Norton* – that the determination of standing under the ordinance was legislative action that was governed by a fairly debatable standard and thus presumptively correct. Because reasonable and objective persons could have reached different conclusions as to whether HFFI would suffer particularized harm, the Court of Appeals upheld the ruling. The Court noted that the structure to be demolished was in a dangerous state of disrepair, was at most an accessory structure built 200 years later than the other buildings at issue, and was not listed in any database as historically significant.

16. *Hurt v. Caton,* 83 Va. App. 745, 911 S.E.2d 871 (2025)

Facts: Douglas Caton and the South Pantops II Land Trust entered into an option agreement, giving Caton an option to rent and then purchase the Trust's 13.12-acre parcel of land. During the option period, an adjacent landowner claimed adverse possession over a small portion of the Trust's property. Caton ultimately declined to exercise the option, purported to terminate the agreement, and demanded damages from the Trust. The Trust refused to pay damages, as Caton had not exercised the option, which was a condition precedent to trigger the Trust's obligations under the agreement.

Holding: The Court of Appeals affirmed the circuit court's ruling that Caton was required to exercise the option to trigger the Trust's obligations, but reversed the circuit court's grant of

summary judgment to Caton on the basis of the futility exception. The case was remanded for further proceedings on the issue of futility.

The court reasoned that the agreement's plain language required Caton to exercise the option for the Trust's obligations to provide the land free of material encumbrances to be triggered. Since Caton did not exercise the option, the Trust's obligations never became due, and Caton could not claim damages for breach of contract. The court distinguished the present case from Waller v. Welch, where the futility exception was applied, as the Trust did not repudiate the agreement or refuse to perform, and the record did not establish that it would have been futile or useless for the Trust to attempt to cure the adverse possession dispute within the 30-day period after the option was exercised. The futility exception to exercising the option did not apply as a matter of law, as the Trust did not repudiate the agreement or refuse to perform, and the record did not establish that it would have been futile or useless to give the Trust an opportunity to cure the adverse possession dispute over a small portion of the land.

17. *Kozikowski v Monroe RE LLC,* 2025 Va. App. LEXIS 52, 2025 WL 375770

Facts: Neighboring property owners brought two separate actions challenging the operation of a group home, which were consolidated on appeal. The first action challenged a zoning administrator's letter advising the potential purchaser of three adjacent parcels of land that group homes could be operated on the properties if certain conditions were met. A group of nearby neighbors appealled that determination to the BZA, which determined that the letter was merely advisory and not appealable.

The second action appealed the issuance of a zoning permit to operate a group home on one of the parcels. The neighbors appealed this determination to the BZA as well, which upheld the issuance of the permit.

The neighbors appealed both BZA determinations to the circuit court.

Trial Court Ruling: The trial court agreed that the zoning administrator's determination was not appealable and that the issuance of the zoning permit was appropriate.

Court of Appeals: The Court of Appeals affirmed. With respect to the zoning administrator's decision, the court agreed that the determination was merely advisory and therefore not appealable. Among other things, the letter involved an interpretation of state and county law with no pending application and the letter used conditional language, indicating that future events would need to occur to obtain a permit. Further, the zoning letter does not confer the right to do anything, stating that both a zoning permit and state licensure would be necessary for the property to qualify as a group home.

With respect to the zoning permit, the Court determined that the circuit court did not err in determining that the applicant was entitled to a zoning permit under Va. Code § 15.2-2291 and the Loudoun County zoning ordinance. The Court noted that, in an appeal from a circuit court decision revieing a decision by the BZA, the circuit court's factual findings are presumed to be correct, while its legal conclusions are reviewed de novo.

18. *Linda Heath v. The Estate of Louise T. Heath, Deceased,* 2024 Va. App. LEXIS 221, 2024 WL 1724007

Facts: Louise Heath died in 1988. Her last will and testament left her property to be divided among all of her children. Her daughter, Linda, had lived in Louise's home and cared for Louise

at the end of Louise's life. After Louise died, Linda remained in the home. Linda's six brothers were not happy about that.

After her brothers attempted to evict her using self-help in 2011, Linda sent them a "no trespass" letter claiming that she had "lifetime rights" to the home. In 2012 Linda unsuccessfully attempted to probate a holographic will that purported to leave Linda a life estate in the home. Despite that set back, Linda nonetheless continued to live in the home.

In 2022, Linda filed a Complaint seeking declaratory judgment that she now owned the home through adverse possession. Louise's estate (the brothers) demurred, stating that she could not adversely possess the home because she had occupied it under the mistaken belief that she had the right to do so, thereby defeating the "hostile" element of an adverse possession claim.

The circuit court agreed and Linda appealed.

Held: The trial court erred sustaining appellee's demurrer to appellant's claim for adverse possession; court erred determining appellant's letter was unambiguous and finding allegations in her complaint were insufficient to state a cause of action; judgment reversed and matter remanded for further proceedings

19. *Primis Bank v. Mahaley,* 2025 Va. App. LEXIS 126, 2025 WL 676728

Facts: In February 2019, the Metters conveyed their property to Mahaley. Proceeds from the $1.67 million purchase price were used to satisfy two liens against the property, a $860,449.58 balance due on a Bank of America loan and a $336,324.98 balance due on a Wells Fargo loan. A third lien securing a Primis Bank revolving line of credit issued to the Metters, was not discovered in the title search and was not addressed at closing. As a result the Deed of Trust securing that line of credit was not satisfied or released.

In February of 2021 Mahaley learned of the Primis Deed of Trust and brought suit against the Metters (for, among other things, breach of the warranty of title, a constructive trust, and fraud) and against Primis asserting among other things that the Primis Deed of Trust should be released as satisfied. Specifically, Mahaley contended that the Primis Deed of Trust had been satisfied prior to an attempted modification of that deed of trust in 2012.

The underlying facts relating to that argument are as follows: in 2008 Primis issued two loans to Metters Industries, Inc. The first loan was a $2 million term loan secured by a deed of trust on the property. The second loan was a $2.5 million revolving line of credit secured by Metters Industries assets, which loan was later increased to $5 million.

On May 9, 2012, the Metters modified their loan and executed a modification to the deed of trust, which was executed by Primis on May 10. Pursuant to that modification, the Metters drew on the credit line to pay off the first loan secured by the property. The deed of trust on the property was then amended to secure up to $2 million of the line of credit under the second loan. The second loan was also modified to increase the line of credit to $5.5 million. The modification was recorded on May 22, 2012. The modification included a waiver stating "[n]othing in this Modification shall constitute a satisfaction of the promissory note or other credit agreement secured by the Deed of Trust."

Thus, on May 10, 2012 (i) the first loan was paid off and (ii) the deed of trust was modified to secure the line of credit. On May 22, 2012, the modification was recorded.

Trial Court Ruling: After a bench trial, the trial court held for Mahaley concluding that the modification of the deed of trust was void ab initio because (i) it could not be modified after the underlying instrument it secured had been paid in full, (ii) Primis fraudulently misrepresented a material fact to the clerk when recording the modification, and (iii) the Metters had not waived their statutory right to a certificate of satisfaction when the first loan was paid in full. The trial court also dismissed the Mahaney's claim against Metters on a motion to strike.

Court of Appeals: The Court of Appeals reversed, finding that the modification of the deed of trust was valid and that Primis was entitled to the conclusive presumption under § 55.1-602 that the modification was valid as to form.

First, the trial court erred in finding that the deed of trust was not effective between the parties until recordation. The trial court held that the modification was not effective until it was recorded, which was after the first loan was satisfied and therefore was void. The Court of Appeals noted that the recording statute relates to validity as to subsequent purchasers and lien creditors – recordation does not affect validity between the parties to the instrument. As a result the modification was valid on May 10, the same date the loan was paid off. There was no evidence that the loan was paid off prior to modification. Accordingly, the modification was valid.

The Court also reversed the finding of fraud by Primis in an effort to avoid paying recording taxes. Mahaley did not plead fraud and fraud was not proven in any event.

The Court also determined that Primis was not required to issue a certificate of satisfaction with respect to the first loan because at the time it was paid off on May 10, it was no longer secured by the property due to the modification of the deed of trust to secure the letter of credit. Because the trial court thought that the modification was not valid until it was recorded on May 22, it makes sense that it thought a certificate of satisfaction was required.

Finally, the Court determined that the trial court erred by not applying the conclusive presumption under § 55.1-602 that a recorded document, unless procured by fraud, is conclusively presumed to be in proper form after having been recorded for three years.

The only defect in the modification was that it did not state THIS IS A CREDIT LINE DEED OF TRUST as required by § 55.1-318(B) – which is intended to warn others that the debt secured by the property is not fixed, as in a term loan. Because this is a defect relating to the form of the document and did not affect the substance of the transaction, Primis was entitled to the conclusive presumption of validity.

With respect to the Mettters, the Court determined that, since the modification of the deed of trust was valid, then the claims against the Metters should proceed.

The Court reversed the ruling against Primis, finding that the modification was valid, reversed the ruling striking the claims against Metters, and remanded the case for the trial court to dismiss the claims against Primus and reconsider the dismissal of the claims against Metters.

20. *Rebh v. County Board of Arlington County,* 80 Va. App. 754 (2024)

Facts: Residents filed suit against the County Board seeking a declaratory judgment that amendments to the zoning ordinance that increased height and density limits for certain zoning districts Pentagon City were void. The rezoning was prompted by Amazon's 2018 decision to establish an east coast headquarters in Arlington County.

The Pentagon City Phased Development Site Plan (the "PDSP") has governed growth in Pentagon City since 1976 and the area has been zoned C-0-2.5 Mixed-Use. RiverHouse is an apartment complex zoned RA6-15 located just outside the PDSP area. The amendments expanded the PDSP area – and redesignated the area as the Pentagon City Coordinated Redevelopment District ("PCCRD") – to include the RiverHouse property and provided that properties within the PCCRD with a RA6-15 zoning designation such as RiverHouse could be developed up to 150 dwelling units per acre and up to 350 feet in height. Properties located in the district and zoned C-0-2.5 could be developed up to a 9.0 Floor Area Ratio and up to 350 feet in height. These constituted significant increases in height and density limits for properties location in the district – which would not apply to the properties with the same zoning designations in other areas of the County.

The Residents, who lived next to RiverHouse and enjoyed views of Washington D.C. that would be obstructed if that property were redeveloped under its new zoning, filed suit seeking to declare the amendments void because (i) the amendments were adopted without a certification and resolution from the Planning Commission, as required by § 15.2-2225 and 2226, (ii) the Board provided insufficient public notice in violation of § 15.2-2204(A), and (iii) the amendments violated the uniformity requirements of § 15.2-2282.

Trial Court Ruling: The trial court dismissed all claims on demurrer.

Court of Appeals: The Court of Appeals reversed and entered final judgement for the residents with respect to inadequate notice.

With respect to the first basis for the residents claim, the Court determined that the Planning Commission's actions at its meeting combined with its subsequent letter to the Board satisfied the statutory requirements for a resolution and a certification. Passing the motion recommending adoption of the amendments to Board constituted a resolution because by passing the motion, the Commission formally expressed its will as a deliberative body. The Commission's subsequent February 9 letter recommended that the Board adopt the amendments was "an official document . . . attesting to the merit of the [attached amendments] thus constituting a 'certification' of the amendments by the Commission." The Court noted that the statutes do not specifically require the use of the words "resolution" or "certification" and that the residents were elevating form over substance in arguing that the use of such words was required.

With respect to the second basis, the Court reversed the trial court, finding that under the version of § 15.2-2204(A) in effect at the time the amendments were advertised, the County failed to satisfy the "descriptive summary" requirement because it did not state that the expanded district boundary would include RiverHouse or that there would be an increase in height and density limits within the district. That statute was amended effective July 1, 2023 to remove the descriptive summary requirement.

With respect to the third basis, the Court agreed that there was no violation of the uniformity requirement in § 15.2-2282, which requires that "zoning regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts." The residents argued that treating properties zoned RA6-15 and C-0-2.5 differently in the Pentagon City district than they are treated elsewhere in the County constituted a violation of the uniformity requirement. Here, because the properties within the Pentagon City district have their own unique uses tied to the goals and purposes of the plan for that district, there was no uniformity violation.

21. *Sarah K. Lehmann, Administrator of the Estate of Emile Lehmann, III, et al. v. WFV Holdings, LLC, et al.*, 80 Va. App. 802 (2024)

Facts: Helen Lehmann died intestate in 2012. Her brother, Arthur Lehmann, filed an affidavit declaring that he was her sole surviving heir. In fact, Helen had other heirs. Arthur conveyed his interest in the property to WFV Holdings, LLC ("WFV") in December of 2017.

On April 9, 2020, WFV filed a complaint for partition. Two other heirs filed their own complaint for partition of three of the same parcels the next day. Their complaint asked the circuit court to partition the properties and order any defendant who had received "rents and profits" from the properties "without paying the plaintiffs their ratable share of the same" to pay them "their portions of the rents and profits thus obtained."

WFV amended their complaint twice, the second amended complaint asked for partition of the three parcels that were the subject of the other heirs' complaint. The second amended complaint asked the circuit court to determine boundary lines, identify and determine the percentage interests of any co-tenants, and partition the properties. The second amended complaint did not include a request for reimbursement of any costs, including attorney fees.

The circuit court consolidated the two cases for trial. After a hearing, the circuit court found that the parties were tenants in common, WFV owned a 50% interest, the two heirs each owned a 12.5% interest, and another heir owned the remaining 25% interest. By order of October 5, 2021, the circuit court appointed a special commissioner to sell the property.

The special commissioner obtained purchase offers totaling $6.16 million and the circuit court approved the sales. WFV then moved the circuit court to distribute the proceeds of the sales and for reimbursement from its co-tenants of various costs incurred in connection with the properties. WFV also sought reimbursement of attorney fees for the special commissioner before his appointment, determining the identity of heirs, and establishing title.

The heirs opposed WFV's motion. They emphasized that WFV's second amended complaint was "limited strictly" to "determining boundary lines," "determining who the co-tenants were and their percentage ownership," and "partitioning the property." They asserted that WFV had "not include[d] . . . a request" for reimbursement of any costs. They further argued that Virginia law was clear that WFV was not entitled to any reimbursement that had not been requested in the complaint. WFV replied, denying that a "complaint for partition must include a request for reimbursement" but moving for leave to amend its complaint to include a request for reimbursement if "such a request is required." WFV did not include a proposed amended complaint with its motion, and the circuit court did not rule on the motion.

The circuit court conducted an evidentiary hearings on WFV's motion for reimbursement and after considering the evidence and argument of the parties, found that the heirs should contribute to the costs but disallowed the claim for attorney's fees. The circuit court ordered that the heirs each were obligated to pay 12.5%, of the reimbursable expenses. The circuit court ordered the clerk to deduct that amount from the sales proceeds due to each party. Lehmann and Crumpler appealed.

Holdings: The Court of Appeals held that: (1) Plaintiff's complaint for partition informed the opposing parties that it wanted partition but did not place them on notice that it also wanted compensation for enhancement, and plaintiff did not identify in its complaints any efforts or expenditures it had made related to the property, or any enhancement of the property's value

created by its efforts or expenditures; (2) Plaintiff was required to include in its complaint, or other pleading filed before the partition, its request for compensation but did not do so and therefore was not entitled to compensation; (3) Defendants had conceded that they should reimburse plaintiff and relied on those erroneous findings in ordering the deduction of the reimbursement from their share of the sale proceeds despite the failure of plaintiff to request reimbursement in its complaint.

22. *Stafford County Board of Zoning Appeals v. Grove,* 81 Va. App. 687 (2024)

Facts: The Groves applied for a special exception to operate a commercial kennel on their property. The BZA denied the application and the Groves appealed to the Circuit Court pursuant to § 15.2-2314, naming both the BZA and the Board of Supervisors as parties defendant, who filed a demurrer to the Petition.

Trial Court Ruling: The trial court overruled the demurrer, finding that responsive pleadings may not be filed in cases under § 15.2-2314. The Circuit Court, on motion of the respondents, certified its ruling for an interlocutory appeal under § 8.01-675.5(A) and the Court of Appeals granted the petition for appeal.

Court of Appeals: The Court of Appeals reversed and remanded, finding that a § 8.01-273 and the Rules of Court apply to actions under § 15.2-2314 and, therefore, a demurrer is an appropriate responsive pleading and should have been entertained by the trial court.

The Court noted that the BZA was not a proper party to the action because § 15.2-2314 provides that the petition is not an action against the BZA and the BZA "shall not be a party to the proceedings; however the [BZA] shall participate in the proceedings to the extent required by this section." That code section also provides that the BZA must "file a response" once the "writ of certiorari is served." The Board of Supervisors is a "necessary party."

Regarding the filing of responsive pleadings at the petition stage (as opposed to after the issuance and service of the writ), § 15.2-2314 is silent – neither expressly providing nor prohibiting responsive pleadings. The Court of Appeals noted that § 8.01-273 allows filing of a demurrer in any "action at law" and the Rules of Court apply to "all civil actions . . . unless otherwise provided by law." No exceptions to these rules are provided in § 15.2-2314. Accordingly, a governing body has the right to file a demurrer to a petition appealing a decision of the BZA.

23. *Thibault Enterprises v. Yost.* 2025 Va. App. LEXIS 20, 2025 WL 84877

Facts: The Yost Living Trust owns a 1.08-acre parcel of land in Dinwiddie County, Virginia, with a 50-foot wide ingress and egress easement over an outlet road granted by a 1971 deed. Thibault Enterprises owns adjacent property that is subject to the easement. Thibault placed hay bales, grapevines, and other objects within the bounds of the 50-foot easement, although not on the outlet road itself. The Trust sought an injunction to require Thibault to remove the objects from the easement area.

At the circuit court trial, the court admitted stipulated exhibits from the parties consisting of deeds, surveys, and photographs of the easement, and then heard argument from the parties. Thibault conceded that some hay bales and fencing containing grapevines belonging to Thibault were located within the 50-foot easement. In addition, photographs and a survey admitted into evidence also showed the location of the hay bales and grapevines within the

easement, specifically at the side of, but not on, the outlet road. A survey also reflected that there were hay bales and grapevines located inside the easement, near the edge of the road. The parties did not dispute that the outlet road was "usable," despite the presence of the hay bales and grapevines.

Thibault argued that the standard for whether the objects in the easement should be removed was one of "reasonableness" and that the objects did not create "an unreasonable ingress and egress issue." The Trust contended that Thibault was not permitted to place anything in the easement that "narrows the width of the easement." The parties also disagreed as to the size of the easement. Based on the language of the one of the deeds, Thibault argued that the easement stopped at the southwest boundary of the Trust property, while the Trust asserted that the easement extended onto the western boundary of the property, as reflected on the plat.

In a letter opinion, the circuit court first addressed the issue of the objects placed in the easement, noting that it was "undisputed that [Thibault] have placed grapevines and bales of hay in the easement." The court then stated that "it is true that the grapevines and hay bales do not interfere with [the Trust's] current use of the easement. Nevertheless, . . . it is improper for [Thibault] to place objects in the easement." The court accordingly ordered Thibault to remove the hay bales and grapevines from the easement. Concerning the issue of the location of the easement, the court ruled that "[w]hile the language in the deed is not so clear as it could have been, and the use of the term 'corner' is a bit vague, . . . the intent was for [the Trust] to receive the entire easement area as shown on the plat and not for the easement to stop at [the] southern boundary line of [the Trust's] property." Thus, the court found that the easement runs "from River Road (Route 608) and terminates along the southwest property line of [the Trust's] property as depicted" on the plat attached to the Gill deed. The circuit court memorialized its rulings in a final order, to which Thibault listed objections. This appeal followed.

Held: The Court of Appeals reasoned that Thibault's placement of hay bales and grapevines within the defined 50-foot easement narrowed the width of the easement, constituting a material encroachment under Virginia case law, even though the objects did not interfere with the current use of the outlet road. Regarding the location of the easement, the court held that the incorporated plat showing the easement extending to the midwestern boundary of the Trust's property should control over any ambiguous language in the deed. The court cited Virginia common law regarding easements, as established in cases such as *Pizzarelle v. Dempsey*, *Snead v. C&S Props. Holding Co.,* and *Piney Meeting House Invests., Inc. v. Hart*, as well as Virginia Code § 55.1-305, governing the use and interference with easements.

The owner of a servient estate may not effectively narrow the defined width of an ingress and egress easement by placing obstructions amounting to a material encroachment on the dominant owner's rights, even when the encroachment does not interfere with ingress and egress at that time. An encroachment that narrows the width of an easement is a material encroachment. However, an encroachment that does not narrow the width or unreasonably interfere with the use is not a material encroachment.

Importantly, the court ruled that where a deed incorporates a plat by reference, that plat is considered part of the deed itself to establish the location and boundaries of the property and easements being conveyed.

24. *Town of Iron Gate v. Simpson,* 82 Va. App. 38 (2024)

Facts: Town of Iron Gate allowed a stormwater drainage pipe to flood Simpson's property. Simpson brought an action for inverse condemnation.

Trial Court Ruling: The trial found that the Town was liable for inverse condemnation and affirmed a jury award for $37,586 and ordered reimbursement of attorney's fees in the amount of $205,785.74 pursuant to § 25.1-420.

Court of Appeals: Affirmed and remanded to circuit court for a determination of the amount of fees incurred on appeal to be awarded to Simpson.

The primary issues on appeal were whether the trial court erred in overruling the Town's demurrer to the inverse condemnation claim and whether the trial court property awarded fees and costs under § 25.1-420, which requires "reimbursement" of fees and costs. Simpson had not actually paid any fees and therefore, the Town argued, was not entitled to reimbursement.

The Court of Appeals determined that the Demurrer was properly overruled. The Town argued that Simpson failed to allege that the Town damaged her property for public use and contended that she merely alleged a negligent failure to repair the stormwater pipe. The Court noted Simpson had plead all the elements of a claim for inverse condemnation – (i) she is the owner of private property, (ii) the property has been damaged or taken without condemnation authority, (iii) the taking or damaging was for public use, and (iv) the governmental body failed to pay just compensation.

The Town disputed the third element, claiming that although the stormwater facilities were for public use, the petition merely alleged ineffective repair and that, under *Kitchen v. City of Newport News*, 275 Va. 378, 386 (2008), "tortious or wrongful conduct by a governmental official, acting outside his or her lawful authority, can never be a sufficient ground, in itself, for an inverse condemnation award."

The Court determined that the Petition did not allege mere negligence and alleged sufficient facts that the Town purposefully used her property as a makeshift storage site for the Town's stormwater system.

Regarding attorney's fees, § 25.1-420 provides that a court "shall determine and award" to a successful plaintiff in an inverse condemnation claim "such sum as will, in the opinion of the court . . . *reimburse* such plaintiff for his reasonable costs . . . including reasonable attorney . . . fees . . . *actually incurred* because of such proceeding." The Town argued that, because Simpson had not actually paid any fees and costs, there were no fees to reimburse.

The Court engaged in a fairly lengthy discussion of the meaning of "actually incurred" and determined that the phrase did not require actual out of pocket expenditure but was intended to ensure that the fees were linked directly to the inverse condemnation action. Therefore, even though Simpson had not paid any fees, she "actually incurred" them.

The Court also determined that "reimburse" does not require that the plaintiff actually pay her attorney's fees before recovering them because of the liberal construction given to remedial statutes such as this one. Here, the term "reimburse," which is defined as both "repayment" and "indemnification," means indemnification.

The Court also awarded Simpson her fees incurred on appeal and remanded the matter to the circuit court for a determination of the amount of those fees.

25. *Tuscarora Marketplace Partners, LLC v. First National Bank,* 82 Va. App. 261; 906 S.E.2d 171

Facts: Tuscarora Farms owned Parcels A1, A, and C. A related entity, Franklin Farms, owned Parcel B. VB&T wanted to buy Parcel A1, but as a condition of that purchase, requested that a restriction be placed on Parcels A, B, and C prohibiting the use of those parcels as a banking facility. The parties agreed and recorded a Declaration of Restrictions as a part of the closing of the sale in 1998, which was incorporated into the contract of sale, signed by both Tuscarora Farms and Franklin Farms. In 2017, Franklin Farms conveyed Parcel B to Tuscarora Market Place. In 2020, Tuscarora Market Place entered into a lease with URW Federal Credit Union to operate a bank on Parcel B.

First National Bank, as successor to VB&T filed suit to enforce the Declaration of Restrictions. Tuscarora Market Place responded, taking the position that the Declaration of Restrictions was not enforceable because (a) there was no Horizontal privity (no common grantor) and (b) the Declaration of restrictions did not "touch and concern" the land. On summary judgment, the circuit court ruled in favor of FNB and held that the Declaration of Restrictions was enforceable. Tuscarora Market Place appealed.

Held: Trial court did not err granting summary judgment, declaring restrictive covenants remained valid and enforceable, and enjoining appellant from violating the restrictive covenants; no error finding horizontal privity existed between original parties although not all parties conveyed an estate in land; restrictions not collateral to land but touch and concern its use.

The Court of Appeals did a thorough analysis of the concepts of both horizontal privity and what it means to "touch and concern" the land. As to horizontal privity, the court ruled that a common grantor was not absolutely necessary to establish horizontal privity. In this case, horizontal privity existed because Franklin Farms executed the Declaration of Restrictions as a part of the same transaction as the sale of Parcel A1 to VB&T. The court also did a thorough analysis of the "touch and concern" element of covenants running with the land as opposed to a restriction being merely collateral to its use.

26. *Willson Family, LLC, et al. v. Board of Supervisors of Hanover County,* 2025 Va. App. LEXIS 188

Facts: The Hanover County Board of Supervisors denied a rezoning request, even though the request was generally consistent with the comprehensive plan for the area. The Planning Commission had recommended denial.

The property owner filed a complaint in the circuit court seeking a declaratory judgment that the Board's denial was arbitrary and capricious. Appellants also asked the circuit court to order that the Board approve the zoning application. The Board filed a motion craving oyer, seeking inclusion of the legislative record from the hearings before the Board. The parties consented, and the motion was granted; the additional documents became part of the record. The Board then demurred, arguing that the legislative record established that its decision was "fairly debatable" and therefore properly within its discretion. After a hearing, the circuit court agreed with the Board, sustained the demurrer, and dismissed appellants' suit. The property owner appealed to the Court of Appeals.

Held: Trial court did not err granting demurrer; no error finding Board's decision to deny rezoning application fairly debatable and not arbitrary and capricious; no error dismissing case before an evidentiary hearing as court able to consider Board's significant legislative record.

27. *Winfred P. Hudgins, DDS v. JP Morgan Chase Bank, N.A.,* 2025 Va. App. LEXIS 173

Facts: Hudgins had a first trust with d MGC Mortgage, Inc. ("MGC") and a second with JP Morgan Chase Bank ("Chase). He defaulted on both. Chase had scheduled a foreclosure sale but canceled it after Hudgins entered its loss mitigation process. However, he had no agreement with MGC to stave off foreclosure. MGC initiated foreclosure proceedings and held a foreclosure sale, at which Chase purchased the property to protect its subordinate interest.

Chase filed a summons for unlawful detainer in general district court. Hudgins moved to dismiss for lack of subject matter jurisdiction, alleging the existence of a bona fide dispute over title to the property under *Parrish v. Fed. Nat'l Mortg. Ass'n*, 292 Va. 44, 787 S.E.2d 116 (2016). The general district court granted that motion. In Chase's de novo appeal to circuit court, both parties declared their intent to renew and rely on their pleadings filed in general district court.

Hudgins alleged that representatives of both MGC and Chase told him his home was not subject to foreclosure while his loan modification applications were pending with each bank. Chase moved for summary judgment in the circuit court. The circuit court found that Hudgins had not raised a bona fide question of title and concluded that it had jurisdiction to hear the case. The court further found that Chase said would not foreclose on its loan and Chase did not foreclose on its loan and that there was nothing to suggest that Chase was anything but a good faith purchaser for value.

Held: The Court of Appeals held that the trial court did not err granting summary judgment; appellant's equitable claims did not sufficiently raise a bona fide question of title to divest trial court of jurisdiction over unlawful detainer appeal from general district court.

D. VIRGINIA CIRCUIT COURT CASES

1. *Baber v. Conlon,* 2024 Va. Cir. LEXIS 172 (Augusta County)

Facts: Plaintiff sought to establish a prescriptive easement across Wild Turkey Lane ("WTL") in Augusta County, which is an old Civilian Conservation Corps road that leads to the Shenandoah National Park and crosses Conlon's property. The National Park Service installed in the early 1990s a trail marker at WTL's intersection with Black Bear Lane directing the public to use WTL to access the Rip Rap Trailhead. The NPS removed the trail markers in 2021. Conlon then erected a gate to discourage the public from using the access.

Trial Court Ruling: The trial found that Baber established a prescriptive easement. Of note in the Court's ruling is the analysis of the public use of WTL and the impact of that use on Baber's claim. Conlon argued that Baber's use was under the mistaken belief that WTL was public and, therefore, could not establish a prescriptive easement. The Court noted that the Babers had used the road as if it were their own and periodically maintained the road, which is inconsistent with a belief that the road was public.

The Court also allowed the gate, which was erected in 2020, to remain. Because the cabin owned by the Babers was not regularly occupied, it does not constitute a residential property and the gate was therefore permitted under § 33.2-110(C), which allows the owner of forest or timberland to erect a gate or other impediment to obstruct a private road leading into such forest or timberlands where such a road is subject to an easement for the benefit of lands not regularly and continuously occupied.

2. *Beaudoin v. Saunders,* 2025 Va. Cir. LEXIS 24 (County of Culpeper)

Facts: The sole issue before the court was the applicability of Va. Code § 8.01-81.1(C) regarding the appointment of an appraiser in a partition suit. The property at issue had been under contract for sale for $550,000 as of September 2022, but one party later revoked consent. The property was marketed as commercial, and rezoning efforts had commenced before consent was revoked. A 2021 report showed comparable sales with lower median/average prices than the contract price. No evidence was presented that the current contract was an arm's length transaction.

Held: Code § 8.01-81.1(C) allows a court to determine fair market value without ordering an appraisal if the evidentiary value of an appraisal is outweighed by its cost. Fair market value in Virginia is generally the price a willing buyer would pay a willing seller, considering all factors affecting value. A recent arm's length sale of the property is entitled to substantial weight in determining fair market value, but is not conclusive.

The court found that the evidence presented by the plaintiff, including the contract price, comparable sales report, and rezoning efforts, did not outweigh the cost of ordering an appraisal to determine fair market value. The court would have to speculate whether the contract was an arm's length transaction, and the comparable sales were from 2020. The court ordered an appraisal to be conducted pursuant to Virginia Code § 8.01-81.1(D) and set a trial date to address the appraisal.

3. *Dressel v. Bolridge,* 113 Va. Cir. 481; 2024 Va. Cir. LEXIS 94 (County of Culpeper)

Facts: The court considered extensive testimony regarding Mr. Bolridge's condition. The court found clear and convincing evidence demonstrated that he was incapacitated and appointed his sister and brother as co-guardians and conservators based on his significant cognitive disabilities, living within his 92 year old mother, and was someone who did not deal well with change. However, the court refused to invalidate the 2018 power of attorney and advanced medical directive that he executed in 2018 because that relief was not requested in plaintiff's pleadings.

4. *Gwin v. Beatty, et al.* 2024 Va. Cir. LEXIS 137 (County of Fairfax),

Facts: As the part of the purchase of residential real property in Fairfax County, buyer had a home inspection performed on the property. That inspection revealed a number of deficiencies and made recommendations for repairs. At the walk-through, the seller presented a copy of the inspection report with hand-written check marks next to a number of the items on the inspection report. The buyer considered those check marks to be acknowledgements by the seller that the recommended work had been completed. They had not been completed. At trial, the seller relied on the doctrine of *caveat emptor*, claiming that it should have been open and obvious to the buyer at the walk through that the work had not been done.

Held: The court performed a thorough analysis of the caveat emptor doctrine as it stands today. Plaintiff was awarded damages because defendant's checkmarks and statements were fraudulent misrepresentations that diverted the buyers from investigating defects, thus triggering an exception to caveat emptor. Defendant made representations that he had resolved the issues in the Pillar to Post Report identified by checkmarks and the resulting difference in value between the fair market value of the property if had been as presented at sale ($1.3M) and the fair market value of the property in its actual condition on the date of sale ($725K).

5. ***Meredith Investment Partners LP v. Noureddine Houssni and Naima Ghislat,* 113 Va. Cir. 266, 2024 Va. Cir. LEXIS 35 (City of Norfolk)**

Facts: Tenant rented industrial property consisting of three garage bays from landlord in 2022. Tenant opened an auto garage utilizing all three garage bays. Parking issues became the subject of complaints to the City of Norfolk. Upon further investigation, City officials discovered that the property was the subject of an Ordinance from 1992 requiring one of the garage bays to remain "sealed". Because the amount of rent was based on the ability to operate three garage bays, the tenant could not continue to pay rent at the rate originally agreed upon and stopped paying rent altogether. The Landlord successfully pursued an unlawful detainer in general district court. The tenant then appealed to circuit court.

Holdings: [1]-A city ordinance—and, specifically, its requirement to close one of the leased garage bays—provided grounds to rescind the lease between the parties, as neither party was aware of the ordinance before executing the lease of a three-bay auto-repair shop; [2]-Because defendants benefitted from the use of the premises during the time period between June and September, when there were only two garage bays available, the court held that defendants were liable to plaintiff for the fair market rental value of the premises during that time; [3]-The court found that the monthly rent amount stated in the lease—$3,000—was the monthly fair rental value of the premises if all three garage bays were available; [4]-The court found that defendants were liable for unpaid utility costs, as they benefitted from those services.

6. ***Pretty Lake 5757 LLC v. City of Norfolk,* 114 Va. Cir. 325, 2024 Va. Cir. LEXIS 186 (City of Norfolk)**

Facts: Pretty Lake filed suit to eject the City from property owned by Pretty Lake – which the City had maintained as a public park since at least 1990, including constructing three gazebos on the property, a large concrete pier, a kayak ramp, and a paved walkway for access to thereto, among other things. Part of the property has been subject to the City's right of way associated with an unbuilt section of Pretty Lake Avenue. Pretty Lake claimed that the City has abandoned the right of way. The City counterclaimed asserting that it had acquired portions of Pretty Lake's property – both along the right of way and outside the right of way, by adverse possession. The City also claimed that a 25 foot wide strip of land it owns along Little Creek is measured landward – not seaward – from the high water mark at high tide. The City also sought in the alternative compensation for the value of improvements it made to Pretty Lake's property.

The City and the prior owner of the property previously litigated a dispute over the location of the pier and ownership of the 25 foot strip. That case was resolved with the Court finding that the City owned the 25 foot strip, which was to be measured "from the high-water mark visible to the naked eye at high tide."

Trial Court Ruling: The trial court ruled that (i) the City has not abandoned its right of way, (ii) the City has not acquired property by adverse possession, (iii) the 25 foot strip is measured landward from the high water mark, and (iv) the City did not prove damages with reasonable certainty so is not entitled to recover the value of improvements.

Regarding the right of way, the court recognized that this constituted a "paper street" that was originally created in 1906 and was designed to connect Pretty Lake Avenue to other streets. The City did not abandon the right of way because, among other things, it has maintained it for public use since at least 1990 and any non-use prior to that time did not constitute abandonment.

The Court agreed with Pretty Lake's claim that the City does not have the right to build and operate infrastructure in the right of way that is unrelated to public transportation. In other words, the City can use the right of way for access – whether pedestrian or vehicular – but cannot construct gazebos, benches and grills in the right of way.

The Court rejected the City's claim that these "adverse" uses constituted adverse possession because, although they exceeded the City's rights under the right of way, they did not result in a claim to the underlying fee.

Regarding improvements, the Court determined that the City owned the pier because its terminus is located on the 25 foot strip owned by the City and that the construction of the walkway improvements are consistent with the easement rights over the right of way. The other improvements became Pretty Lake's property upon its acquisition of title. Although the City has the right under § 8.01-160 to seek compensation for the value of these improvements, the City did not prove with reasonable certainty the depreciated value of those improvements. The only evidence presented was lay opinion regarding what the current cost of constructing those improvements would be.

7. *Putnam v. Covington,* 2024 Va. Cir. LEXIS 129 (Rappahannock County)

Facts: Plaintiff brought suit for partition of real property inherited from Oliver Putnam (the "testator") naming the testator's ex-wife as the party defendant. The former marital residence is the subject of the suit, which is located on separate but adjoining parcels of land held as tenants in common, along with a third parcel separately owned by the testator.

The divorce decree incorporated a property settlement agreement that granted the testator the right to live on the property for as long as the divorced couple's dog Jack lived. Upon Jack's death, the testator was to sell property and the proceeds were to be distributed pro rata (56% to the testator and 44% to the ex-wife). The PSA provided that if the testator predeceased Jack, then the ex-wife could "immediately choose to sell the subject property, live there herself, and/or rent it and sell it later . . ." Jack since died.

The testator's heirs seek to partition the property to recover the testator's pro rata interests. The ex-wife opposed the partition and sought to enforce the PSA's provisions granting her interim rights in the property after the testator's death.

The ex-wife filed a plea in bar claiming that the PSA bars any suit for partition.

Trial Court Ruling: The trial court overruled the plea in bar. The Court rejected the ex-wife's claim that the PSA created a restrictive covenant that barred a suit for partition because there was insufficient evidence of an intent that their agreement was intended to run with the land

or that it touched and concerned the land. Rather, the obligations in the PSA were personal and the PSA does not expressly bar or exclude a suit for partition. The Court also rejected the alternative claim that the PSA created an equitable servitude.

The Court also rejected the argument that partition was irreconcilable with the terms of the PSA. Here, only one sentence governed the parties' rights in this circumstance – and there were no deadlines, time limitations, valuation methods, or other explanations as to how ex-wife's continued use of the property was to be reconciled with a clause regarding allocation of the carrying costs of the property.

The Court also rejected the ex-wife's arguments that the partition claim was barred by res judicata or equitable estoppel.

8. *Quivonn Bowman v. Essence L. Samuel*, 113 Va. Cir. 374; 2024 Va. Cir. LEXIS 95 (City of Norfolk)

Facts: Plaintiff originally sought to invalidate a deed claiming that his signature on a deed was a forgery. Plaintiff then brought a motion for summary judgment claiming that the deed was void for failure to conform with the requirements of Va. Code Ann. § 17.1-223(B), which provides:

> The attorney or party who prepares the writing for recordation shall ensure that...a deed conveying residential property containing not more than four residential dwelling units states on the first page of the document that it was prepared by the owner of the real property or by an attorney licensed to practice law in the Commonwealth...

Holding: A deed's failure to conform to the requirements of did not render the deed void.

9. *Stockton v. Batchelor,* 113 Va. 556, 2024 Va. Cir. LEXIS 114 (Henry County)

Facts: Plaintiff Richard Stockton sought to reform a deed due to a mutual mistake and sought to quiet title based on that reformation or, in the alternative, for adverse possession or a prescriptive easement. Defendant Zaneta Batchelor filed a plea in bar claiming that laches bared the claims for relief and a demurrer. The allegations of the complaint were as follows:

- Beatrice Stockton recorded a plat dividing her property into 5 parcels A-E with the intent of conveying the parcels to her children and grandchildren. The plant contained a "Unity Note" stating that parcel E could not be used for any buildings other than accessory structures and would be considered "in unity" with the adjoining parcel A – which is owned by the plaintiff Richard Stockton.
- In 2002, an attorney prepared a deed conveying parcel D to the defendant. Parcel E was mistakenly included in that conveyance due to a scrivener's error. Ms. Stockton intended parcel E to be conveyed to plaintiff.
- The plaintiff has maintained parcel E since 1971 and in 1987 he constructed a garage on parcel E.
- 21 years passed from the recordation of the deed to the defendant and the filing of the lawsuit and Beatrice Stockton is now deceased.

The plea in bar was heard on the pleadings, with no evidence being taken. The unexplained delay in waiting twenty-one years to file suit, coupled with prejudice to the defendant from the intervening death of Ms. Stockton, justified dismissal of the reformation claim based on laches.

BOARD OF GOVERNORS
REAL PROPERTY SECTION
VIRGINIA STATE BAR

Please note: the editors are aware there may be corrections needed to contact information, and the full roster as amended will be published in the fall issue.

Full Name	Position	Address of Record
Robert Hawthorne, Jr.	Chair	Hawthorne & Hawthorne, P.C. 1805 Main Street, PO Box 931 Victoria, VA 23974
Richard B. Chess	Vice Chair	Chess Law Firm, PLC 3821 Darby Drive Midlothian, VA 23113
Cynthia A. Nahorney	Secretary	Fidelity National Title Insurance Co. 4525 Main Street, Ste 810 Virginia Beach, VA 23464
Sarah Louppe Petcher	Immediate Past Chair	S&T Law Group 6641 Locust St Falls Church, VA 22046
Shane M. Murphy	Ex-Officio	Miles & Stockbridge, P.C. 1751 Pinnacle Drive, Ste 1500 Tysons, VA 22102
Jordan Harris	Liaison	Virginia State Bar 1111 E Main St Ste 700 Richmond, VA 23219-0026

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