VSB RPS

the FEE SIMPLE

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Real Property Section

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TABLE OF CONTENTS

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MEETINGS

Dates and Locations to be announced.

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MESSAGE(S) FROM THE CHAIR

[Editor's Note: The following has been compiled from Mr. Chess' communications to the Section]

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

Robert Hawthorne strongly pushed to return to 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 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).

1. With virtual board meetings, we can have breakout sessions to discuss topics (before or after the board meeting).

2. 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.

3. 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.

4. 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 attended one session with 45 BBB members. Their members need our help!

5. I have asked 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.

6. 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.

7. We have committees which are dead and attempts to get them going have failed for several years. Your ideas are appreciated.

8. Where else might we help our section members to improve their practice of real property law in Virginia?

Dear Section Members,

I hope you enjoyed the three free online real property CLE programs our section provided members on October 4.

The leadership of the Virginia Mountain Valley Lawyer Alliance (VMVLA) was pleased with the positive response from their members to our presentation and has requested that we provide additional real property CLE programming in the future.

A special thank you to Helen Spence and Robert Hawthorne for their outstanding presentations.

Other section updates:

- Vice Chair Cynthia Nahorney is working with the VSB Trusts and Estate Section on a proposed CLE presentation for the 2026 VSB Annual Meeting.

- The VSB Antitrust Section has invited the Commercial Property Committee of the RPS to partner with them on a full-day Data-Center Symposium in Northern Virginia in Spring 2026.

- Secretary Jim Windsor and former Chair Sarah Louppe Petcher have made HUGE progress on the Advanced Real Estate conference and the Annual Seminar. More details coming soon.

- The Better Business Bureau of Central Virginia will sponsor five presentations before the end of the year in conjunction with the Carolinas Virginia Business Broker Association (CVBBA) and the section.

    - The 90-minute sessions will cover how to "Improve, Grow, & Transfer" a business owned and located in these five markets: Charlottesville, Farmville, Colonial Beach, Kilmarnock, and Fauquier County.

    - The dates are November 19 and 20, and December 2, 9, and 10.

Assuming these events go as anticipated, we hope to expand our geographic reach across the Commonwealth in 2026.

Your help is appreciated. Please share your ideas or let me know if you'd like to get involved by emailing me at rick@chesslawfirm.com

Together, we are rebuilding the cross-member support we enjoyed within the section for decades before Covid (and the advent of virtual meetings).

Thank you for this opportunity to serve.

Beginning in November, we're kicking off a new series highlighting the incredible work of each of the section's committees.

Each month, you'll hear directly from our committee chairs about their current projects, upcoming activities, and how section members like you can get involved.

We are excited to showcase the energy and collaboration driving our section forward.

In the meantime, meet the committees and chairs leading the way:

Standing Committees:

- Membership—Aubrey Cross
- Programs—Sarah Louppe Petcher/Jim Windsor
- Publications—Kevin Pagoda

Substantive Committees:

- Land Use and Environmental—Karen L. Cohen/Lori H. Schweller
- Title Insurance—Helen Spence
- Residential—Benjamin Winn/Rachel Hinson
- Eminent Domain—Chuck Lollar
- Commercial Real Estate—John Rinaldi/Jeremy Root
- Living Library—Vanessa Carter/Nana Yeboah
- Fee Simple—Stephen Gregory/Hayden-Anne Breedlove

ASSESSING 'MISSING MIDDLE' HOUSING POLICIES: PROCEDURAL PITFALLS AND POLICY IMPLICATIONS IN VIRGINIA AND BEYOND

By Joseph L. Stiles and Nicole E. Bemberis,
Whiteford, Taylor & Preston LLP

Mr. Stiles is an experienced advisor on commercial real estate, business and corporate matters. He regularly advises on real estate strategies, financing and construction for clients ranging from small businesses to multinational corporations. He has, in addition, significant experience with general corporate legal matters including corporate formation and structuring, corporate finance, project financing, mergers and acquisitions, and investor relations, as well as a background as in-house counsel. Mr. Stiles advises owners, developers, utilities, energy and renewables companies, and contractors on all stages of construction and development. He helps marshal complex multiparty development projects through financing, acquisition, planning and zoning, development, tax strategy, final sale and leasing. His experience extends to risk audits and risk management monitoring programs for multi-industry clients under various regulatory schemes, and he has done a significant amount of real estate work for major and regional airports. He often works closely with state and local organizations and authorities to help make zoning and development processes more efficient and equitable.

Ms. Bemberis is an associate in the firm's corporate practice. She advises corporate clients on a wide array of matters related to entity ownership governance. She drafts essential organizational documents for various operating entities, ensuring that clients' corporate structures are compliant with relevant laws. In addition to her corporate governance work, she provides valuable advice to clients on real estate matters, leveraging her extensive knowledge to navigate complex transactions and regulatory requirements. Her experience includes serving as a Judicial Intern to the Honorable Hannah M. Lauck of the U.S. District Court for the Eastern District of Virginia, as a Legal Extern at various law firms in Virginia, and as a staff member of the William and Mary Business Law Review.

Introduction: Defining EHO/Missing Middle Policy

Recent judicial decisions and legislative critiques surrounding "Missing Middle" housing policies have spotlighted significant procedural challenges and community implications inherent in zoning reforms intended to alleviate housing shortages. "Missing Middle" housing policies are zoning reforms designed to allow for a broader range of housing types—duplexes, triplexes, townhouses, and other small-scale multi-family units—in areas previously limited to single-family homes.1 The primary objective is to diversify the housing stock, address affordability challenges, and increase supply near transit corridors and urban centers, supporting broader sustainability and inclusivity goals.2 This article examines recent developments in Virginia, with a particular focus on the Virginia Court of Appeals' September 5, 2025 decision reversing and remanding the Arlington County

1 National Housing Trust, "'Missing Middle' Zoning Reform is Just a Start in Solving the Affordable Housing Crisis", (May 01 2023), https://nationalhousingtrust.org/news/missing-middle-zoning-reform-just-start-solving-affordable-housing-crisis.

2 *Id.; See Arlington County Government, Housing Arlington: Missing Middle Housing, https://www.arlingtonva.us/Government/Programs/Housing/Housing-Arlington/Tools/Missing-Middle/Documents.*

Circuit Court's order that had invalidated Arlington's Expanded Housing Option (EHO) policy.3 The appellate decision held that developer Wilsons Ventures LLC should have been allowed to intervene and that its appeal was timely, but did not reach the merits of the EHO's legality.4 The article also addresses related remands affecting Albemarle County and provides comparative insights from similar policy implementations in the U.S. and internationally.[5]

Arlington and Albemarle – Background and Procedural Missteps

The creation of Missing Middle policies is driven by escalating housing affordability crises, demographic changes, and the need for a wider array of housing options to serve diverse household sizes and income levels.[6] Localities like Arlington and Albemarle have pursued these reforms to provide more attainable housing, foster economic diversity, and promote sustainable urban growth.[7] These policies also respond to increased demand for walkable, transit-accessible neighborhoods and the recognition that traditional single-family zoning can perpetuate exclusion and limit housing opportunities.[8]

Arlington: In 2023, Arlington adopted its EHO amendment to permit multi-unit housing in areas previously zoned for single-family residences.[9] Residents sued within 30 days under Code § 15.2-2285(F), and after a July 2024 bench trial, the circuit court declared the EHO void and enjoined the County from issuing permits under it.[10] By then, 45 permits had issued.[11] The court partially stayed its order for those permits, requiring permit holders to record land-record notices warning prospective purchasers of the pending appeal and directing the County to ensure those notices were recorded before issuing additional permits; the court expanded that stay on November 13, 2024.[12] Wilsons Ventures, holder of two EHO permits, moved to intervene after the court's oral ruling but before entry of the written final order; the circuit court denied intervention the same day it entered the final order (October 25, 2024).[13] The County noticed its appeal November 22, 2024; Wilsons Ventures noticed its appeal December 13, 2024. A panel initially reversed the circuit court in June 2025; after granting rehearing in July, the same panel again reversed on September 5, reinstating its core conclusions.[14] The panel held that the circuit court abused its discretion by denying developer Wilsons Ventures LLC's motion to intervene, because the residents' complaint included developer-specific allegations and requested relief tied to EHO projects, making Wilsons Ventures' defenses directly relevant ("germane") under Rule 3:14.[15] The court also held that Wil-

3 *Cnty. Bd. of Arlington v. Arlington Cir. Ct.*, No. CL23001776-00 (Va. Cir. Ct. Sept. 27, 2024), No. CL23001513-00 (Va. Ct. App. Sept. 05, 2025).

4 *Id.*

5 *See Edward G. White, et al. v. Charlottesville City Council*, Case No. CL24-25 (Va. Cir. Ct.).

6 Eliza Terziev, "Missing Middle Housing Policies Balance Interests Whole Addressing the Affordable Housing Crisis", Reason Foundation (Nov. 04, 2024), https://reason.org/commentary/missing-middle-housing-policies-balance-interests-while-addressing-the-affordable-housing-crisis/.

7 *See Edward G. White, et al. v. Charlottesville City Council*, Case No. CL24-25 (Va. Cir. Ct.); *Cnty. Bd. of Arlington v. Arlington Cir. Ct.,* No. CL23001776-00 (Va. Cir. Ct. Sept. 27, 2024).

8 *Cnty. Bd. of Arlington v. Arlington Cir. Ct.,* No. CL23001776-00 (Va. Cir. Ct. Sept. 27, 2024), No. CL23001513-00 (Va. Ct. App. Sept. 05, 2025).

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Cnty. Bd. of Arlington v. Arlington Cir. Ct.,* No. CL23001776-00 (Va. Cir. Ct. Sept. 27, 2024), No. CL23001513-00 (Va. Ct. App. Sept. 05, 2025).

15 *Id.*

sons Ventures' appeal was timely, as the circuit court's amended partial stay modified the final order and reset the 30-day appeal clock.[16] The panel clarified that Code § 15.2-2285(F)'s 30-day window applies to challengers' suits, not to intervention, and that courts may add parties "at any time" as justice requires under Code § 8.01-5(A).[17] The appellate decision did not address or decide the legality of the EHO itself; instead, it vacated the circuit court's order voiding the EHO and its related injunction, and remanded the case for further proceedings with Wilsons Ventures joined as a party.[18] We continue to follow closely any updates on this case.

What does the ruling mean on the ground?

The circuit court's judgment voiding the EHO and its injunction are reversed. The case returns to Arlington Circuit Court with instructions to join Wilsons Ventures and proceed. The appeals court did not validate or invalidate the EHO. The merits will be back before the circuit court, now with a developer-defendant at the table to respond to developer-specific allegations and potential remedies affecting project approvals and occupancy. The panel's timeliness ruling clarifies that when a trial court meaningfully modifies a final order via a stay with additional terms that direct conduct, the modification can reset the deadline to notice an appeal.

What the court decided:

Timeliness of appeal: The court held Wilsons Ventures' notice of appeal was timely because the circuit court's November 13, 2024, amended partial stay modified the earlier final order and reset the 30-day clock for filing.[19] The court denied appellees' motion to dismiss Wilsons Ventures' appeal as untimely.[20] The court ruled that the circuit court abused its discretion by denying Wilsons Ventures' motion to intervene.[21]

The panel found: Wilsons Ventures' defenses are "germane" (i.e., directly pertinent) to the suit because the residents' complaint includes allegations and requested relief tied to EHO permit holders and their projects—claims that developers like Wilsons Ventures are best positioned to address.[22]

No 30-day limit bars intervention. The trial court misapplied the 30-day filing window in Code § 15.2-2285(F), which governs when challengers must file zoning suits, not when nonparties may move to intervene. By statute, courts may add new parties "at any time as the ends of justice may require" (Code § 8.01-5(A)).[23]

Narrow grounds: The panel emphasized it was deciding only the Rule 3:14 intervention issue.[24] It did not decide whether Wilsons Ventures is a necessary/indispensable party under the separate Friends of Clark Mountain framework and did not reach the merits of the EHO's validity.[25]

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Cnty. Bd. of Arlington v. Arlington Cir. Ct.,* No. CL23001776-00 (Va. Cir. Ct. Sept. 27, 2024), No. CL23001513-00 (Va. Ct. App. Sept. 05, 2025).

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

Albemarle: Related "Missing Middle" challenges in Albemarle County (Charlottesville area) have likewise seen procedural recalibration.[26] In *Edward G. White, et al. v. Charlottesville City Council*, the court granted the City's Motion to Reconsider its June 30, 2025 ruling on plaintiffs' Motion for Entry of Default Judgment and granted the City's Motion for Relief from Default and for Leave to File a Late Answer.[27] The court denied plaintiffs' Motion for Entry of Default Judgment and deemed the City's Answer (submitted as Exhibit A to the City's motion) filed as of September 2, 2025.[28] Pursuant to Rule 3:19(b), the court ordered the City to reimburse plaintiffs $20,000 for fees incurred in connection with: (i) the default-judgment motion; (ii) the City's motion for relief from default/leave to file late answer; (iii) the City's motion to reconsider and written submission of substantial defenses; and (iv) appearances at the June 30 and August 13 hearings.[29] The matter is continued on the court's docket.[30] This action underscores the appellate courts' insistence on proper party participation and strict adherence to procedural rules before reaching the merits of local zoning reforms aimed at increasing housing options.

Both the Arlington and Charlottesville area cases illuminate the strict procedural standards required in modifying or creating new zoning law – a principle repeatedly emphasized by Virginia's appellate courts.[31] Judge Schell notably emphasized compliance with "procedural requirements... to provide adequate notice and protection to its citizens when a local governing body determines to change zoning".[32] For the most part, the 'procedural requirements' exist for the purposes of providing notice and an opportunity to be heard to any groups or individuals whose interests may be affected by the reforms.[33] In both foregoing examples, failures to adhere to procedural requirements - regardless of the underlying policy - proved to create delays and confusion that disrupted active and planned development projects.[34] Given the breadth of affected parties and scale of potential effects of reforms to ordinances governing or affecting residential building allowances and population density, communities, developers, and local legislators and administrators alike should stay vigilant to observe and comply with procedural requirements to better ensure, where warranted, timely and unobstructed reform of zoning ordinances.[35] Adherence to an established procedure also provides a level of predictability enabling stakeholders to better prepare for (or hedge against) changes in law that might be detrimental or terminal to ongoing and planned building projects. The recent remands signal that proper party alignment and procedure will be, as they should, scrutinized before any rulings are provided on the merits.

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26 *See Edward G. White, et al. v. Charlottesville City Council*, Case No. CL24-25 (Va. Cir. Ct.).

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *See Edward G. White, et al. v. Charlottesville City Council*, Case No. CL24-25 (Va. Cir. Ct.); *Cnty. Bd. of Arlington v. Arlington Cir. Ct.,* No. CL23001776-00 (Va. Cir. Ct. Sept. 27, 2024), No. CL23001513-00 (Va. Ct. App. Sept. 05, 2025).

32 *See id.*

33 *See id.*

34 *See id.*

35 *See id.*

Policy Successes and Failures

Successes:

- Arlington's EHO policy initially enabled the approval of 45 projects that would have been prohibited under previous zoning, demonstrating the potential for incremental increases in housing supply and diversity.[36]

- These policies can offer more housing choices, particularly in high-demand areas near jobs and transit, and can support local economic vitality.[37]

Failures:

- Prior to the September 2025 appellate ruling, the circuit court's voiding of Arlington's EHO and injunction illustrated the vulnerability of reforms to procedural and party-alignment challenges. However, the appeals court has now reversed and remanded, vacating the circuit court's judgment and restoring the EHO's status pending further proceedings with all necessary parties joined.[38]

- In Austin, Texas, and Spokane, Washington, similar reforms produced only modest increases in housing production—newly enabled developments accounted for roughly 5 percent of Austin's total housing output in the year following reform.[39]

- Internationally, in Australia, the lack of accompanying infrastructure investment and affordable housing requirements has limited the effectiveness and community benefits of such policies.[40]

Impediments to Success and Causes of Failure/Discord

- **Procedural Compliance:** The active parties in both Arlington's and Charlottesville's cases encountered legal setbacks due to failures in adhering to statutory procedures, such as providing adequate notice and properly considering infrastructure impacts.[41] As Arlington and Albemarle County show, errors in party participation, intervention, or timeliness can upend or delay reforms irrespective of their policy merits.[42] The flip-side of this coin being that interested parties who may not have been involved in the process of drafting and amending the zoning ordinance will be granted a voice should they decide to participate in the litigation of issues regarding the ordinance's application.

- **Infrastructure Planning:** A consistent critique is the absence of parallel investment in infrastructure—schools, transportation, utilities—to support increased density, which can undermine the success and public acceptance of these policies.[43]

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36 *See id.;* Expanded Housing Option Development, Arlington VA Government Programs, Arlington Zoning Ordinance § 10.4, (AZO), Expanded Housing Option (EHO) Development – Official Website of Arlington County Virginia Government.

37 *See id.*

38 *See Edward G. White, et al. v. Charlottesville City Council*, Case No. CL24-25 (Va. Cir. Ct.); *Cnty. Bd. of Arlington v. Arlington Cir. Ct.,* No. CL23001776-00 (Va. Cir. Ct. Sept. 27, 2024), No. CL23001513-00 (Va. Ct. App. Sept. 05, 2025).

39 *See* Christian Britschgi, What "Missing Middle" Housing Reforms Can Do for Supply, Choice, and Affordability, Reason (Jan. 28, 2025), What 'missing middle' housing reforms can do for supply, choice, and affordability.

40 *See* "New 'Missing Middle' Housing Policy a Missed Opportunity", Local Gov't NSW Media Release (Feb. 21, 2025), New 'missing middle' housing policy a missed opportunity | LGNSW.

41 *See Edward G. White, et al. v. Charlottesville City Council*, Case No. CL24-25 (Va. Cir. Ct.); *Cnty. Bd. of Arlington v. Arlington Cir. Ct.,* No. CL23001776-00 (Va. Cir. Ct. Sept. 27, 2024), No. CL23001513-00 (Va. Ct. App. Sept. 05, 2025).

42 *See id.*

43 *See* "New 'Missing Middle' Housing Policy a Missed Opportunity", Local Gov't NSW Media Release (Feb. 21, 2025), New 'missing middle' housing policy a missed opportunity | LGNSW; Eliza Terziev, "Missing Middle Housing Policies Balance Interests Whole Addressing the Affordable Housing Crisis", Reason Foundation (Nov. 04, 2024), https://reason.org/commentary/missing-

- **Affordability Mandates:** Without explicit requirements for affordable housing, increased density may not translate into greater affordability for lower- and middle-income residents, limiting the reach of the intended benefits.[44]

- **Community Opposition:** Concerns about neighborhood character, property values, and potential strain on local services often generate resistance, complicating implementation and threatening the sustainability of reforms.[45]

Key Opposing Views

- **Supporters** argue that Missing Middle policies are essential for addressing housing shortages, promoting inclusivity, and supporting economic growth by enabling a broader range of housing options.[46] Currently, 75% of residential land in U.S. cities is zoned exclusively for single-family detached homes.[47]

- **Opponents** maintain that such reforms can erode neighborhood character, overburden existing infrastructure, and fail to guarantee affordability without additional mandates or safeguards.[48] Organized homeowners who treat homes as investments rather than depreciable consumption goods vote in favor of policies that maintain the value of their investment under the assumption that multifamily development entering their community will diminish it.[49]

Effects and Objective Evaluation

The intended effects of Missing Middle policies are to increase housing supply and affordability.[50] However, evidence from Arlington, Albemarle County, and other jurisdictions indicates that zoning changes alone yield only modest results unless paired with robust infrastructure investment, affordability measures and procedural transparency.[51] National and international experiences reinforce the lesson that procedural rigor, community engagement, and comprehensive planning are critical to achieving meaningful outcomes.[52]

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middle-housing-policies-balance-interests-while-addressing-the-affordable-housing-crisis/.

44 *See id.*

45 *See* Christian Britschgi, What "Missing Middle" Housing Reforms Can Do for Supply, Choice, and Affordability, Reason (Jan. 28, 2025), What 'missing middle' housing reforms can do for supply, choice, and affordability.

46 *See Cnty. Bd. of Arlington v. Arlington Cir. Ct.,* No. CL23001776-00 (Va. Cir. Ct. Sept. 27, 2024), No. CL23001513-00 (Va. Ct. App. Sept. 05, 2025).

47 Emily Badger & Quoctrung Bui, "Cities Start to Question an American Ideal: A House With a Yard on Every Lot," New York Times (June 18, 2019), https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html.

48 *See Cnty. Bd. of Arlington v. Arlington Cir. Ct.,* No. CL23001776-00 (Va. Cir. Ct. Sept. 27, 2024), No. CL23001513-00 (Va. Ct. App. Sept. 05, 2025); Eliza Terziev, "Missing Middle Housing Policies Balance Interests Whole Addressing the Affordable Housing Crisis", Reason Foundation (Nov. 04, 2024), https://reason.org/commentary/missing-middle-housing-policies-balance-interests-while-addressing-the-affordable-housing-crisis/.

49 *Id.*

50 Eliza Terziev, "Missing Middle Housing Policies Balance Interests Whole Addressing the Affordable Housing Crisis", Reason Foundation (Nov. 04, 2024), https://reason.org/commentary/missing-middle-housing-policies-balance-interests-while-addressing-the-affordable-housing-crisis/.

51 *See Edward G. White, et al. v. Charlottesville City Council*, Case No. CL24-25 (Va. Cir. Ct.); *Cnty. Bd. of Arlington v. Arlington Cir. Ct.,* No. CL23001776-00 (Va. Cir. Ct. Sept. 27, 2024).

52 *See* Christian Britschgi, What "Missing Middle" Housing Reforms Can Do for Supply, Choice, and Affordability, Reason (Jan. 28, 2025), What 'missing middle' housing reforms can do for supply, choice, and affordability.

Nugget of Wisdom

Zoning reform is not a cure-all; its effectiveness depends on procedural integrity, transparent communication, and the integration of infrastructure and affordability considerations from the outset.[53] Sustainable, community-supported growth requires iterative governance and a willingness to adapt policies in response to local needs and challenges.[54]

Conclusion

Recent appellate rulings make clear that for Missing Middle housing policies to achieve their intended goals, localities must balance the desire for increased density with strict procedural compliance, infrastructure investment, and meaningful community engagement. In Arlington, the Court of Appeals' reversal and remand restore the matter to the circuit court with a developer-defendant at the table and clarify key timeliness and intervention principles.[55] Albemarle likewise returned to its circuit court for further proceedings, with the merits of their zoning reform yet to be decided.[56] For Virginia localities and others contemplating Missing Middle policies, the path forward is to couple thoughtful policy design with procedural rigor, proactive infrastructure planning, and targeted affordability strategies—so that the benefits of increased housing choice and affordability are realized and durable. Developers and community stakeholders should pay close attention, not only to the drafting and enactment of these zoning reforms, but also to the progress of subsequent cases applying any "untested" Missing Middle ordinances.

53 Alexandra Staub, "Why Zoning Reform Won't Solve the Housing Crisis", Penn State University (Feb. 23, 2025), Why zoning reform won't solve the housing crisis – Ethics in the Built Environment.

54 *See id.*

55 *See Cnty. Bd. of Arlington v. Arlington Cir. Ct.*, No. CL23001513-00 (Va. Ct. App. Sept. 05, 2025).

56 *See Edward G. White, et al. v. Charlottesville City Council*, Case No. CL24-25 (Va. Cir. Ct.).

CONDEMNATION CLAUSES IN LEASES: THREE FREQUENTLY ASKED QUESTIONS FROM REAL ESTATE PRACTITIONERS

By: Theodora Stringham, Esq., Kramer Elias, PLLC

Theodora Stringham is a Partner with Kramer Elias, PLLC, a boutique Real Estate and Commercial Litigation firm in Fairfax, Virginia. She regularly litigates complex land use disputes, including but not limited to, eminent domain/condemnation matters, boundary line disputes, easement, zoning, and access concerns. Ms. Stringham also provides counseling and litigation support for employment concerns, including, but not limited to, discipline/termination, discrimination, and wage and hour issues. She currently serves on the Fairfax Bar Association Board of Directors as Secretary and is dedicated to serving the legal profession via pro bono representation and CLE presentations. She has been recognized by her contributions as a "Pro Bono Attorney of the Year" by Legal Services of Northern Virginia and an "Influential Woman of the Law" by Virginia Lawyers Weekly, among other honors.

The power of eminent domain – also known as condemnation – is necessary for the construction of roads, schools, railroads, sidewalks, and a variety of other public functions. Article I, Section 11 of the Constitution of Virginia and the Fifth Amendment of the United States Constitution provide the government with the power to exercise eminent domain for public use – so long as property owners are provided with just compensation. Uniquely, Virginia Code § 25.1-100 defines property as "Land and personal property, and any right title, interest, estate or claim to such property." Therefore, tenants potentially also have rights in condemnation actions.

The following Frequently Asked Questions (FAQ) provide context for attorneys with clients seeking to understand how to best navigate condemnation provisions in their leases or to address an impending or ongoing condemnation of their property.

1. What tenants might qualify for compensation when an eminent domain action is initiated?

Not all tenants qualify for just compensation under eminent domain. The terms of a lease are instructive (and can be dispositive as to tenants' interest). Va. Code § 25.1-234 specifies that eligibility for participating in a condemnation proceeding requires a lease of 12 months or more as well as an asserted interest in offering admissible evidence. That being said, language in a lease clearly awarding condemnation proceeds to a landlord usurps a tenant's potential interest in the proceedings *Norfolk So. Ry. Co. v. Am. Oil Co.*, 214 Va. 194, 197 (1973). Therefore, the terms of the lease are very instructive and determinative in terms of the applicability of an award. *Id.*

2. What if a condemnation provision is less than clear as to whether the tenant has the right to an award?

Many leases reference partial taking or damaging and include formulas to identify whether a tenant might have an interest. If a tenant's interest is left unclear by their lease terms, then they arguably have a right to the compensation award given the presumption that a tenant is entitled to a portion of the award. *See Foodtown, Inc. v. State Highway Comm'r,* 213 Va. 760 (1973). Known ten-

ants have the right to notice of the condemnation proceedings pursuant to Va. Code § 25.1-209. In addition, tenants have the right to intervene in the condemnation proceedings up to ten (10) days before trial. Va. Code § 25.1-234.

Ultimately, the Virginia Code dictates that any ambiguities regarding the landlord and tenant's interests should be resolved via a hearing. Va. Code § 25.1-241. This process – separate from the determination of just compensation -- makes a final determination on how the condemnation proceeds should be distributed.

3. What role do tenants have in the determination of the ultimate condemnation award?

Virginia law follows the "Unit Rule" -- meaning that the property in condemnation proceedings is valued without consideration for individual interests. *See e.g. Lamar Corp. v. City of Richmond*, 241 Va. 346, 350 (1991). This means that tenants participating in the determination of the underlying just compensation trial can introduce evidence about the overall value – but not their specific interest. Litigation surrounding just compensation is resource-intensive, and therefore, any affected tenant may be well-served to balance its potential recovery/share of the condemnation award with overall participation in the proceedings.

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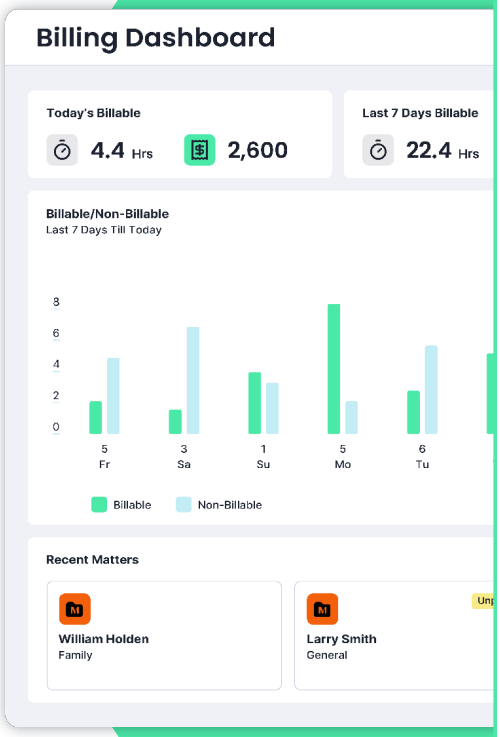

ADVERSE POSSESSION UNDER VIRGINIA LAW: A PRIMER

By James L. Windsor

Jim has over 40 years of experience in a broad range of counseling, negotiation, mediation, and civil litigation focused on real estate, title insurance, mechanic's liens/ construction, local government, legal malpractice defense, and creditor's rights. Jim is an AV® Preeminent rated lawyer by Martindale-Hubbell and is the Chairman of the firm's Real Estate Claims & Title Insurance Solutions Group. He has been recognized by Best Lawyers in America from 2018-2026 in the area of Real Estate and in Litigation – Construction from 2022-2026. In 2015, Jim received the Distinguished Service Award from the Virginia Land Title Association, and in 2024, he received the Traver Scholar Award from the Real Property Section of the Virginia State Bar. Jim is a member of the Boyd-Graves Conference, and was recently named by Best Lawyers in America® as the 2026 Norfolk Real Estate Law "Lawyer of the Year" in the Norfolk metropolitan area which includes the cities of Chesapeake, Hampton, Newport News, Norfolk, Portsmouth, Smithfield, Suffolk, Virginia Beach, Williamsburg, and Yorktown.

A. In Virginia, a party claiming adverse possession "must prove actual, hostile, exclusive, visible, and continuous possession, under a claim of right [or color of title], for the statutory period of 15 years." Grappo v. Blanks, 241 Va. 58, 61 (1991); Heath v. Est. of Heath, No. 1276-22-2, 2024 Va. App. LEXIS 221 (Va. Ct. App. Apr. 23, 2024); Fort Lewis Mt. Co., LLC v. W. Va. Water Auth., No. CL22-1345, 2024 Va. Cir. LEXIS 96 (Roanoke Cnty. July 3, 2024); Fianna Invs., LLC v. Two Fat Witches, LLC, No. CL233840, 2025 Va. Cir. LEXIS 112 (Loudoun Cnty. Jan. 27, 2025); Everett v. Parson, No. 0995232, 2024 Va. App. LEXIS 395 (Va. Ct. App. July 16, 2024); Pretty Lake 5757 LLC v. City of Norfolk, 114 Va. Cir. 325 (Norfolk Cty. 2024). "A claimant has the burden of proving all the elements of adverse possession by clear and convincing evidence." Grappo, 241 Va. at 62; Pretty Lake 5757 LLC, 114 Va. at 332. "The doctrine of adverse possession in Virginia has a long history," and "[m] any cases are factspecific" such that "their resolution may turn on only one or two of the elements of adverse possession." Quatannens v. Tyrrell, 268 Va. 360, 365 (2004).

B. **Actual Possession**

1. Actual possession is satisfied by showing that the claimant used and occupied the property, by actions such as fencing it. Helms v. Manspile, 277 Va. 1, 78 (2009). Possession is hostile if the claimant is possessing the property under a claim of right and adverse to the rights of the true owner. Furthermore, permission by the owner negates hostility. Horn v. Webb, 302 Va. 70, 79 (2023). Possession is exclusive when it is not in common with others. Helms, 277 Va. at 78. Visible possession is demonstrated by showing that possession was "so obvious that the true owner may be presumed to know about it." Id. at 7. Continuous possession is met if the possession continues without interruption for the statutory period. Id.; Fort Lewis Mt. Co., LLC, 2024 Va. Cir. LEXIS 96.

2. Actual possession must be an entry that amounts to ouster of true owner. Nowlin v Reynolds, 66 Va. (25 Gratt.) 137 (1874).

3. Constructive possession alone does not suffice. Woody v. Abrams, 160 Va. 683 (1933).

4. What constitutes actual possession

a) Most commonly, occupancy, involving use or enjoyment, residence, cultivation, enclosure and improvement;

b) Enclosure by fence, cultivation, clearing or any other plainly visible and notorious manifestation of sole, exclusive possession, *bona fide* claim of title against that of all other persons. Roller v. Armentrout, 118 Va. 173 (1915) (dweller living in house on enclosed tract of land, having and using outbuildings, fruit trees, and a garden, cultivating part of the tract, and grazing entire tract had adverse possession of entire tract);

c) Temporary and sporadic cutting of timber does not suffice. Lennig's Ex'r v. White, 1 Va. Dec. 873, 20 S.E. 831 (1894); but see Taylor's Devisees v. Burnsides, 42 Va. 165, 192 (1844) ("Take, for example, the case of a town resident, who, claiming title to a lot or tract of woodland in the vicinity, openly, notoriously and habitually cuts and hauls from it his necessary supplies of fuel; or in like manner makes it a source of revenue, by sales of firewood or timber. . . . There cannot be stronger instances of actual possession than these, and other like cases which might be stated: but they can serve only for the purpose of illustration.");

d) Neither does occasional grazing of cattle. Whealton & Wisherd v. Doughty, 112 Va. 649 (1911);

e) Blakey v. The Unknown Heirs, Devisees, Assigns, and Successors in Title of Ada Rebecca Price, Whose Names and Last Known Addresses are Unknown, Who are Made Parties Defendant by the General Description of Parties Unknown, Case No. CL23001257-00 (Judge William H. Shaw, III) (**Gloucester Cnty. Cir. Ct.**[1] Jan. 5, 2024) ("Since 2003, Blakey has used and maintained roadways, cut down trees, mowed and landscaped, improved, used and possessed the Subject Property as his principal residence in an open, notorious, exclusive, non-permissive way under a color of title or claim of right, and he has paid real estate taxes and insured the Subject Property" . . . . "Pursuant to Count One of the Complaint, Blakey acquired the Subject Property from the Parties Unknown, if any there should be, by adverse possession, and the Parties Unknown have been ousted from title as a result, and they have lost any interest they may have held in and to the Subject Property as heirs at law of Ada Rebecca Price . . . ."

5. Possession of Part Can Be Possession of Whole

a) Actual possession of part of a tract of land under a *bona fide* claim and color of title to the whole tract equals possession of the whole tract. Baldwin v. Mothena, 171 Va. 94 (1938);

b) Maynard v. Hibble, 244 Va. 94 (1992) (under color of title describing entire parcel, possession of field being portion of parcel was possession of whole parcel)

1 The county or city of the court in which the unpublished cases were decided are bolded for ease of reference for the reader to easily identify cases which are "local" to the reader or otherwise of interest.

6. Wild and Uncultivated Land

a) The evidence needed to establish adverse possession by claim of right depends on the character of the land in dispute. Craig-Giles Iron Co. v. Wickline, 126 Va. 223 (1919). "In a settled and cultivated region an actual occupancy and pernancy of the profits may be requisite; whilst in the wilderness a possession less definite might suffice . . ." . Id. at 236 (emphasis added).

b) In order for a claimant to establish a claim of adverse possession to wild and uncultivated land, it is only necessary for the claimant to change the condition of a relatively small portion of such land. Graves v. Grandstaff, 9 Va. Cir. 513 (Shenandoah Cnty. 1982). In Graves, the plaintiffs claimed title by adverse possession to two tracts of mountain land in Shenandoah County, Virginia, consisting of approximately 110 acres in total. Id. at 513. The court acknowledged that because the property was wild and uncultivated land, it was "inadvisable" and "virtually impossible" for the claimant to have changed the character of the entire property, and decided the issue on whether it found that the property as a whole was "under the essential control" of the claimant. Id. at 517. Ultimately, the Court held that "[w]hile in a settled and cultivated area, a greater degree of possession might be necessary," id. at 516, the facts and circumstances established by the plaintiffs proved that they "made a sufficient change in condition of the land appropriate to this kind of land to clearly and unequivocally give notice to the world that they held both tracts adversely to all parties, including the true owners," regardless of the fact that "they did not change the condition of a large portion of either of these tracts." Id. at 517.

c) In NTS/Virginia Development Company v. Goodwin Brothers, No. CL0722 (**Spotsylvania Cnty.** 2009), the Honorable Judge David H. Beck ruled that where the plaintiff developer was developing the platted 2,657acre Fawn Lake subdivision in phases but had done little or nothing on a 48-acre area in the rear of the subdivision, NTS acquired title to a 48acre area by adverse possession based on Graves and other authorities.

C. **Exclusive Possession**

1. Even when there are multiple users of an easement, a claimant's use may still be exclusive "when each user independently asserts his right to enjoy the roadway for himself, that use may be exclusive, even though other persons assert similar rights for themselves." Ward v. Harper, 234 Va. 68, 71 (1987); see Burks Bros. of Va. v. Jones, 232 Va. 238, 246 (1986); Pettus v. Keeling, 232 Va. 483, 486 (1987).

2. Providence Forge Fishing & Hunting Club v. Miller Mfg. Co., 117 Va. 129 (1915) (fishing and hunting on pond, renting boats to others to fish and hunt on pond, and instructing agent not to permit others to boat or fish on pond without permission *not* sufficient to vest title by adverse possession against adjacent owner who also used pond for boating and fishing)

3. See Nowlin v. Reynolds, 66 Va. at 144 (whether deed purporting to convey title to property recorded or not immaterial to validity as deed between parties, exclusive possession under such title adverse not only against grantor of deed, but against all others.)

D. **Open and Notorious Possession**

1. Because title by adverse possession is based in part on the laches of the true owner, possession must be visible and of sufficient notoriety that the true owner may be presumed to know about it. Grappo v. Blanks, 241 Va. 58 (requirement is satisfied when possession is so obvious that true owner may be presumed to know about it)

2. However, proof of actual knowledge on the part of the true owner is not generally required. Boggs v. Bright, 222 F. 714 (E.D. Va. 1915), *rev'd on other grounds*, sub nom, Higgenbotham v. Briggs, 234 F.253 (4th Cir. 1916).

E. **Hostile Possession**

1. Hostile possession is defined "as possession 'under a claim of right and adverse to the right of the true owner.'" Quatannens v. Tyrrell, 268 Va. at 372 (quoting Grappo v. Blanks, 241 Va. at 62; Tidwell v. Goldsmith, 85 Va. App. 152, 168 (2025). "When used in the context of adverse possession, the term[] *claim of right* . . . mean[s] a possessor's intention to appropriate and use the land as his own to the exclusion of all others." Grappo, 241 Va. at 62. To establish hostile possession, the possessor must profess, through words or actions, a belief that [s]he is entitled to use the land and prevent others from using it in a manner that precludes the legal owner from exercising his rights over the property. If possession is hostile, the legal owner and the possessor cannot simultaneously exercise control over the land. Thus, permission negates hostile possession. Quatannens, 268 Va. at 372; Everett, 2024 Va. App. LEXIS 395, at *5.

2. Field v. Pellegrino, CL22000753-00 (**Goochland Cnty. Cir. Ct.** Apr. 25, 2023) (Judge Timothy K. Sanner) (The Court declared that the plaintiffs acquired the property by adverse possession and were the sole owners of the property, and that the defendants were clearly and undeniably barred by Virginia Code § 8.01-236 from making a claim to the subject property.)

F. **Claim of Right**

1. In Grappo v. Blanks, 241 Va. 58, 62 (1991), the Supreme Court of Virginia explained the term "claim of right": "When used in the context of adverse possession, the terms *claim of right, claim of title, and claim of ownership* are synonymous. They mean a possessor's intention to appropriate and use the land as his own to the exclusion of all others. That intention need not be expressed but may be implied by a claimant's conduct. Actual occupation, use, and improvement of the property by the claimant, as if he were in fact the owner, is conduct that can prove a claim of right" (citation omitted); Heath, 224 Va. App. LEXIS 221, at *7; Helms, 277 Va. at 78. In other words, a possessor takes under a claim of right that which he "occupies, cultivates, encloses, or from which he otherwise excludes the owner." Walton v. Rosson, 216 Va. 732, 736 (1976). Conduct, that is unequivocal and inconsistent with any other reasonable inference may show a claim of right. Kim v. Douval Corp., 259 Va. 752, 758 (2000). For instance, occupation or property improvement by the possessor as though he were the owner may show a claim of right. Id. The existence of a personal item on someone else's private property, and periodic access for use of the item does not establish a hostile intent to take the private property under a claim of right. Sims v. Copper, 278, 133 Va. 278, 28788 (1922) (determining that there was no adverse possession where the possessor's actions were equally consistent with a claim of ownership under a recoverable license, and there was

only a claim to the buildings but not the land; further, ownership of improvements is evidence of the absence of a claim of right.) Fort Lewis Mt. Co., 2024 Va. Cir. LEXIS 96.

2. In Grappo, 241 Va. at 62, the Supreme Court provided some explanation for the term "claim of right": "When used in the context of adverse possession, the terms claim of right, claim of title, and claim of ownership are synonymous. They mean a possessor's intention to appropriate and use the land as his own to the exclusion of all others. . . . That intention need not be expressed but may be implied by a claimant's conduct. Actual occupation, use, and improvement of the property by the claimant, as if he were in fact the owner, is conduct that can prove a claim of right." See also Douval Corp., 259 Va. at 757 ("It is well-established that a claimant's possession is 'hostile' if it is under 'a claim of right and adverse to the right of the true owner.'")

3. Quatannens, 268 Va. at 364 ("... occupation, use and improvement of the property can prove a *claim of right*. Occupation, use and improvement may also prove *actual possession*. Similarly, occupation, use, and improvement may also be used to establish *exclusivity and visibility*") (emphasis added) (citations omitted).

4. "To establish claim of right as a requisite element of adverse possession [by a party in possession against the record owner] it is not necessary that the party in possession should have expressly declared his intention to hold the property as his own, nor need his claim thereto be a rightful or well-founded one. That his acts and conduct clearly indicate a claim of ownership is enough, and it may be sufficient even though the disseisor has knowledge of a better title." Marion Inv. Co., 171 Va. at 182. The actual occupation, use, and improvement of the premises by the claimant, as if he were in fact the owner thereof, without payment of rent, or recognition of title in another, or disavowal of title in himself, will be sufficient to raise a presumption of his entry and holding as absolute owner, and, unless rebutted, will establish the fact of a claim of right." Id.

5. "A mere naked possession without claim of right, that is the intention to use the land as his own to the exclusion of all others, can never ripen into a good title." Radford Veneer Corp. v. Jones, 143 Va. 124, 128 (1925).)

6. An adverse possession claimant is entitled to a presumption of an adverse claim of right.

- **a)** This is useful when seeking a default judgment
- **b)** Burden of proof of adversity may be carried by presumption

7. Similarly, possession that begins as permissive never ripens into adverse possession

8. Nevertheless, the claim of right need not be expressed. A claim of right can be inferred from unequivocal conduct that is inconsistent with any other reasonable inference. Douval Corp., 259 Va. 756-57.

G. **Color of Title**

1. Defined as something that has the appearance of title, but is in fact not title

a) Any written instrument that purports to convey title to land, that defines the extent of the claim to the land, but is defective or invalid, is color of title. See Sharp v. Shenandoah Furnace Co., 100 Va. 27 (1901)

b) The significance is that under color of title, the limit of the parcel claimed is determined by the description contained in the title document.

2. Adverse possession under color of title for the statutory period will ripen into valid title. Marion Inv. Co., 171 Va. 170.

3. Requirements for color of title

a) Must identify the land with sufficient certainty that the boundaries of the parcel may be determined by application of rules governing construction of deeds. Blacksburg Mining & Mfg. Co. v. Bell, 125 Va. 565 (1919)

4. Sample cases

a) Deed void for defects apparent on its face. W.M. Ritter Lumber Co. v. Edwards, 171 Va. 185 (1938)

b) Invalid and void tax deed. Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612 (1908)

H. **Continuous Use and Possession**

1. Any break in possession, however slight, restores the seisen of the true owner

2. Once an adverse claimant vacates the premises, the true owner, by reason of his legal title, is regarded as in constructive possession, and the adverse period of the claimant ends. United States v. Tobias, 899 F.2d 1375 (4th Cir. 1990)

3. Possession is continuous only if it exists without interruption for the statutory period. Grappo, 241 Va. at 62.

4. Tacking

a) To prove the requisite adverse period, Virginia recognizes the doctrine of tacking. Scott v. Burwell's Bay Improvement Ass'n, 281 Va. 704, 71213 (2011). The doctrine of tacking allows claimants to combine successive occupations or use by adverse claimants to establish the requisite fifteen years. Id. For example, the sale of property during the fifteen year possessory period does not restart the fifteen year adverse possession period provided that "the land remains sufficiently invaded by the possessor and the invaded ownership interest continuously has a person (or succession of persons) properly situated to defend it for the entire possessory period." Ho v. Rahman, 79 Va. App. 677, 69496 (2024). However, the party asserting tacking must prove by clear and convincing evidence when all of the elements of adverse possession were first established, including hostility. Claimants may not include predecessors' actions that were by right,

permission or agreement. Furthermore, tacking is not permitted simply because the prior occupants carried on activities similar to the activities of the claimant. Rather, to successfully assert tacking, the claimant must show that the prior occupants were asserting the same claims to possession. Scott, 281 Va. at 71213; Fort Lewis Mt. Co., 2024 Va. Cir. LEXIS 96.

b) The possession of trees may not be tacked to the possession of the surface of the land. Yellow Poplar Lumber Co., 108 Va. at 624.

I. 15-Year Statute of Limitations

The doctrine of adverse possession is predicated upon the statute of limitations. The acquisition of title by adverse possession and the statute of limitations for ejectment are inextricably linked. The 15year period necessary to hold property for adverse possession is equal to the 15year statute of limitations barring suits for recovery of real property. The 15year statutory period for adverse possession does not begin to run against the owner until there is a necessity cast upon him to protect his property. In an adverse possession claim where the claimant's possession was originally in privity with the owner, a clear, positive, and continued disclaimer and disavowal of title and assertion of an adverse right brought home to the owner is indispensable before any foundation can be laid for the operation of the statute of limitations. Fianna Invs., LLC v. Two Fat Witches, LLC, No. CL233840, 2025 Va. Cir. LEXIS 120, at *2 (Loudoun Cnty. Mar. 3, 2025).

1. The purpose of the fifteen year period of adverse possession is to quiet titles to land. Ho, 79 Va. App. at 69293. The period of adverse possession begins to run when "the adverse possessor sufficiently invades the true owner's property interest," such that the owner can protect his title by "appropriate proceedings." Id.; Fort Lewis Mt. Co., 2024 Va. Cir. LEXIS 96, at *6. In other words, the possessory period begins to run when the owner has the right to eject the adverse possessor.

2. Virginia Code § 8.01-230 (*an "accrual" statute*) provides, in pertinent part, "[i]n every action for which a limitation period is prescribed, *the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run* from the date the injury is sustained in the case of injury to the person or damage to property, . . . *and not when the resulting damage is discovered* . . ." (emphasis added); See also Caperton v. Gregory, 52 Va. (11 Gratt.) 505 (1854) (son's taking and holding of land of his father, claiming title to it under lost will, was adverse to other heirs, and statute of limitation began to run at time of taking possession.). Specifically, Virginia Code § 8.01236 (*a "time limitations" statute*) provides, in relevant part, that "[n]o person shall make an entry on, or bring an action to recover, any land unless within fifteen years next after the time at which the right to make such entry or bring such action shall have *first accrued* to such person or to some other person through whom he claims . . ." (emphasis added).

3. Va. Code § 8.01235 governs when a party must raise a statute of limitations defense. It states, in pertinent part, that "[an] [o]bjection that an action is not commenced within the limitation period prescribed by law can only be raised as an affirmative defense specifically set forth in a responsive pleading." Va. Code § 8.01235; Pretty Lake 5757 LLC, 114 Va. at 340.

4. In Ho v. Rahman, 79 Va. App. 677, 691 (2024) the Court of Appeals reasoned as follows:

"The doctrine of adverse possession is predicated upon the statutes of limitations . . . which, in effect, provide that an uninterrupted occupancy of lands by a person who has in fact no title thereto, for a certain number of years, shall operate to extinguish the title of the true owner thereto, and vest a right to the premises absolutely in the occupier." Ferguson v. Stokes, 287 Va. 446, 451 (2014) (quoting McClanahan's Adm'r v. Norfolk & W. Ry. Co., 122 Va. 705, 714-15 (1918)). "The effect of adverse occupancy is the vesting in an adverse occupant . . . a new, independent and indefeasible title – one paramount to and good against that of all other persons . . . ." Id. (quoting McClanahan's Adm'r, 122 Va. at 715); see also McClanahan's Adm'r, 122 Va. at 738 ("a title acquired by adverse possession is a perfect title and good against all the world").

5. In Kennedy Coal Corp. v. Buckhorn Coal Corp., 140 Va. 37, 60 (1924), upholding the dismissal of plaintiff's quiet title action where defendants had possessed the land in question for the statutory period under a color of title, the Court observed that "[a]nd all this time, this complainant and those under whom it seeks to claim title to the property stand silently by without a word of protest against these things and never once make any claim that their rights were being violated." "The possessory period will not begin to run until the interest has been sufficiently invaded and possessed to satisfy all the elements of adverse possession." Ho, 79 Va. App. at 693-94.

6. Parker v. Griffin, 55 Va. Cir. 191, 192 (Shenandoah Cnty. 2001) (acknowledging that 15-year limitations period under Section 8.01-236 "establishes a fifteen-year limitations period for actions to recover any land" and noting the limitations period "applies to actions for ejectment and suits to quiet title by adverse possession"); see also Devers v. Chateau, 748 F.2d 902, 905-06 (4th Cir. 1984) (discussing the "15year statute of limitations" that governs Virginia ejectment actions).

7. L-Wood, Inc., Southern Pine Specialists v. Kel-Wood Timber Prod. Co., Case Number CL 23000375-00 (**New Kent Cnty. 2023**) (Court held the Defendant and/or their predecessors-in-title, successors-in-title, or privies, were barred by the 15-year statute of limitations set forth in Virginia Code § 8.01-236, in addition to and separate and distinct from the claim of adverse possession in Count 1, based on the Defendants, or any one or more of them, having failed to make any known claim or file an action to recover any interest (e.g. ejectment), if any, in Parcel E within the 15-year period to re-enter the Property or bring an action to recover the Property).

8. Field v. Pellegrino, Case Number CL 22000753-00 (**Goochland Cnty. 2023**) (Court declared that the Defendants are clearly and undeniably barred by the 15year statute of limitations, based on, *inter alia*, the silence and inaction of the Defendants and their predecessors in title, having failed to make any known claim or file an action to recover any interest, if any, in the Property pursuant to Virginia Code § 8.01-236).

9. Riverview Prop. Mgmt., LLC, v. Bowens, Case No. CL23-1417 (**Portsmouth Cty. 2023**) (Pursuant to Count III of the Complaint, in addition to, and separate and distinct from, the claim of adverse possession in Count I and Count II, the Defendants and/or their predecessors-in-title, successors-in-title, or privies, are barred by the 15-year statute of limitations set forth in Virginia Code § 8.01-236 based on the Defendants, or any one or more of them, having failed to make any known claim or file an action to recover any interest (*e.g., ejectment*), if any, in the Property within the 15-year period to re-enter the Property or bring an action to recover the Property. See Va. Code § 8.01-236).

10. See also Wells v. Edwards, Case Number CL23-74 (**Mathews Cnty. 2023**).

11. Larry D. Wilson, sole Trustee of the Raymond L. Wilson Trust dated January 28, 2010 v. Kenner, Case No. CL23-277 (**Lancaster Cnty. 2023**).

12. The statute of limitations is of particular importance in the context of property questions, because of the important public interest in ensuring that the title record is clear and free from unnecessary disputes. McClanahan's Adm'r, 122 Va. at 717. "The object of [statutes of limitations] is to quiet titles to land, and prevent that confusion relative thereto which would necessarily exist if no period was limited within which an entry upon lands could be made." Ferguson v. Stokes, 287 Va. 446, 451 (2014). In this context, "a successful plea of the statute of limitations not only defeats an ejectment action, *but also clears the way for title to be divested and conferred upon the adverse occupant*." Id. (emphasis added).

13. In Martin v. Mershon, Case Number CL 01009523-00 (James City Cnty. 2002), Judge J. Warren Stephens, sitting by designation, sustained a plea in bar of the 15year statute of limitations under Virginia Code § 8.01-236.

J. **Permissive Possession is a Bar**

1. To obtain title by adverse possession, as a general rule, the possession must be adverse in its inception. Thompson v. Camper, 106 Va. 315 (1906)

2. Accordingly, permissive possession will *not* ripen into adverse possession. Fleming v. Lockhart, 171 Va. 127, 130 (1938) (For example, a tenant cannot dispute the owner's title during the tenancy.)

3. Where the original entry on another person's land was by agreement or permission, in the absence of an explicit disclaimer, possession, regardless of its duration, *presumptively continues as it began*. This presumption may be overcome by evidence of an adverse holding with notice to the true owner. Matthews v. W.T. Freeman Co., Inc., 191 Va. 385 (1950); see also Alford v. Alford, 236 Va. 194 (1988)

4. In a conveyance, the grantor reserved the right to occupy the land for a period of three years. During the period of three years for which she had reserved the right of occupancy, she married the claimant. Her husband moved into the house with her and claimed title to it by adverse possession. The claimant's occupancy began during the time when his wife under the reservation in her deed had the right to occupy the property. No notice was given that the husband was claiming adverse to his wife's tenancy or to the grantees' rights or title. Without such notice, the occupancy was permissive and the husband could not establish title to the land by adverse possession. Hall v. Clinchfield Coal Corp., 161 Va. 177 (1933)

K. **Possession by Mistake May Ripen into Title by Adverse Possession**

1. In "narrow circumstances" mistake can negate hostility. Quatannens, 268 Va. at 37274. Distinguishing between two types of mistakes the Quatannens Court said that mistake negates hostility when the mistake is due to a mistake in location of a boundary line described in a deed, and there has been no proof of the claimant's intention to occupy the land "up to a particular and definite line on the ground." Id. When a claimant's possession is based *solely* on a mistaken belief that the land in question was the land described in the deed, the possession is not hostile. Chaney v. Haynes, 250 Va. 155, 159 (1995) ("The essence of an adverse use is the inten-

tional assertion of a claim hostile to the ownership right of another . . . . Use of property, under the mistaken belief of a recorded right, cannot be adverse as long as such mistake continues."); Fort Lewis Mt. Co., 2024 Va. Cir. LEXIS 96; Pretty Lake 5757 LLC, 114 Va. Cir. at 334.

2. On the other hand, the hostility requirement is generally satisfied when the claimant mistakenly believes that a particular "line on the ground" represents the extent of his own land, and treats the land within the line on the ground in a manner that satisfies the other adverse possession requirements. Quatannens, 268 Va. at 37274. When possession occurs by mistake, to determine whether the possession was hostile the practical test is "whether the positive and definite intention to claim as one's own the land up to a particular line on the ground existed. . ." . Christian v. Bulbeck, 120 Va. 74, 111 (1916).

3. See also Stuart v. Meade, 119 Va. 753 (1916) (A mere "general" mistake, resulting in the occupation and possession of the land of another, without the intention to claim beyond the true boundaries of the parcel, will not ripen into title under a theory of adverse possession.)

4. Hollander v. World Mission Church, 255 Va. 440 (1998)

a) A neighbor and her predecessors in title had used a disputed strip of land under the mistaken belief that it was their property. The trial court found that the possession was not adverse because there was no intent to oust the true owner of the property. The Supreme Court of Virginia reversed, holding that because the adverse claim was based not only on the deed descriptions, but also on the belief that the property line ran to a line of woods, the possession was accompanied by the required adverse or hostile intent

5. Quatannens v. Tyrrell, 268 Va. 360 (2004)

a) A dispute arose over a narrow strip of land between adjoining landowners. The Quatannens were mistaken about the boundary of their land, and the disputed strip of land contained a small portion of a room of their house, part of a brick walkway, part of a paved parking area, and one side of a brick archway at the front of the house. All of these existed when the Quatannens purchased the house. The Quatannens asserted a quiet title claim based on a theory of adverse possession in the trial court. The trial court ruled that the Quatannens failed to establish ownership of the disputed land by adverse possession, apparently because it concluded that the element of hostile intent was not met. The Supreme Court discussed Hollander v. World Mission Church at some length, ruled that mistake did not preclude a finding of hostile intent, and reversed and remanded the case for entry of judgment in favor of the Quatannens. "[T]he possessor must profess, through words or actions, a belief that he is entitled to use the land and prevent others from using it in a manner that precludes the legal owner from exercising his rights over the property." Id. at 372.

L. **Title acquired by adverse possession is "a new, independent, unencumbered, and indefeasible title."**

1. Importantly, title acquired by adverse possession is "a new, independent, unencumbered, and indefeasible title," title vested anew in the claimant and/or their predecessors-in-title. Porter v. Wilson, 244 Va. 366, 370 (1992) (Noblett acquired

title to the property by adverse possession, which conferred upon him a new, independent, unencumbered, and indefeasible title.) (citing McClanahan's Adm'r, 122 Va. at 715); Turner Ashby Camp No. 1567 v. Cnty. of Clarke, No. 0683224 2023 Va. App. LEXIS 271 *; Va. Ct. App. May 2, 2023) ("However, Turner Ashby Camp misunderstands the legal status of an adverse possessor. Satisfaction of the elements of adverse possession, for a period of 15 years "operate[s] to extinguish the title of the true owner thereto, and vest[s] a right to the premises absolutely in the occupier.") (quoting McClanahan's Adm'r, 122 Va. at 715. At the same time title vested anew in the claimant, conversely, the record owner, and/or his or her predecessors-in-title were necessarily divested of any such interest in the disputed property. See McClanahan's Adm'r, 122 Va. at 718 ("divested by . . . a subsequent disseisin for the statutory limitation period").

2. In McClanahan's Adm'r, the Court further reasoned as follows:

"The adverse occupant who has held for the statutory period does not stand in the position of a grantee from the former true owner, but his occupancy has, by authority of the State speaking through the statute, extinguished all other titles, and has vested in him an absolute and exclusive right to the possession. His title is not in any sense in privity with that of the former owner, and cannot be questioned either by such former owner or by any one claiming through him.

* * *

To summarize our conclusions, at the risk of some repetition, which we think is justified by the importance of the question, we are of opinion that the better reason and the clear and unmistakable result of the authorities is to the effect that a true adverse possession for the statutory period confers upon the occupant a new, independent, unin-cumbered, indefeasible title, a weapon of defense and offense, good alike at law and in equity in all proceedings which call in question its validity or endanger its security. In short, such a title, though not derived from the former owner, is as good as it would be possible to acquire by deed from a former owner of a perfect title, or by a grant from the Commonwealth."

Id. at 714-15. (emphasis added.)

3. "[L]iens against the true owner were dependent on his title, that adverse possession conferred, not a derivative, but an independent paramount, title, and that therefore, when the paramount title matured by adverse possession, the former title was lost, and with it fell the lien, which was dependent upon it." Va. & W. Va. Coal Co. v. Charles, 254 F. 379, 391 (4th Cir. 1918) (emphasis added).

4. Accordingly, since any lien on the record owner's title to the property is dependent on the record owner's title, a lender's deed of trust lien, for example, can rise no higher than the record owner's title and fails with such record owner's title divestment of the property.

M. **Adverse Use and Occupation Sufficient to Raise Legal Presumption of Ownership That, Unless Rebutted, Will Establish a Claim of Right and Satisfy *Prima Facie* Case.**

1. "To establish claim of right as a requisite element of adverse possession it is not necessary that the party in possession should have expressly declared his intention to hold the property as his own, nor need his claim thereto be a rightful or well-founded one. That his acts and conduct clearly indicate a claim of ownership

is enough, and it may be sufficient even though the disseisor has knowledge of a better title. The actual occupation, use, and improvement of the premises by the claimant, as if he were in fact the owner thereof, without payment of rent, or recognition of title in another, or disavowal of title in himself, *will be sufficient to raise a presumption of his entry and holding as absolute owner, and, unless rebutted, will establish the fact of a claim of right."* Marion Inv. Co., 171 Va. at 182 (emphasis added).

2. "In Virginia, proof of an expressed intention to claim title is not necessary." Christian v. Bulbeck, 120 Va. 74, 107 (1916); Haney v. Breeden, 100 Va. 781, 783 (1902).

3. In Maynard v. Hibble, 244 Va. 94, 97-98 (1992), the Court held that Hibble had adversely possessed nine acres under a color of title theory because (a) Hibble's possession of a part of that tract was possession of the whole tract described in his deed and (b) because Hibble's other activities, including

a) paying taxes and homeowners association fees,

b) posting the property,

c) granting permission to hunt, and

d) selling timber, were sufficient to establish the other required adverse possession elements.

Id. at 97-98.

4. Zesinger v. Ford, Trustee, CL23001628-00 (**Williamsburg/James City Cnty. Cir. Ct.** Nov. 9, 2023) (Judge Holly B. Smith) (The Court (1) declared that the subject property was vested solely and exclusively in the plaintiffs in possession, (2) declared that the plaintiffs were the sole and exclusive owners of the property by adverse possession, and (3) declared that the defendants are barred from making a claim to the property pursuant to Virginia Code § 8.01-236.)

5. In Walton v. Rosson, 216 Va. 732, 735 (1976), "actual occupation, use and improvement of the premises, without payment of rent, . . . of another's title or disavowal of [its] own title" raises an important legal evidentiary presumption that they have held the Property under a claim of right.

N. Adverse Possession Against Cotenants

1. A co-tenancy is "[a] tenancy with two or more coowners who have unity of possession." Cotenancy, Black's Law Dictionary (11th ed. 2019). "[W]hen two parties acquire property as co-tenants, one co-tenant may not rely on adverse possession to obtain exclusive fee simple title to the property unless notice, actual or constructive, is given to the other co-tenant of the intent to oust, thus making the occupying co-tenant's possession hostile." Harkleroad v. Linkous, 281 Va. 12, 18 (2011). "Indeed, there is a presumption against any occupancy of a co-tenant being [in] hostile possession as to the other co-tenants with whom he is in privity." Id.

2. In general, the possession of one cotenant is the possession of all cotenants. The possession of one cotenant, therefore, can never be adverse until there is an actual ouster of the cotenants, or some equivalent act. See Rutledge v. Rutledge, 204 Va. 522 (1963). However, when two parties acquire property as co-tenants, one co-

tenant may only rely on adverse possession to obtain exclusive fee simple title to the property if notice, actual or constructive, is given to the other co-tenant of the intent to oust, thus making the occupying cotenant's possession hostile. See Leake v. Richardson, 199 Va. 967, 979 (1958).

3. Harkleroad v. Linkous, 281 Va. 12 (2011)

a) This case provides an exception to the general rule stated above, or at least a variance, where the claimant is a stranger in title to the original cotenancy

b) Linkous and his wife bought real property at a federal tax sale in 1991. Linkous made renovations, and rented the house until sometime in 2007, when their ownership interest was questioned by prospective purchasers of the property. Linkous and his wife were unaware that Harkleroad and related parties claimed a one-half tenant in common interest in the property until 2007

c) The Linkouses had improved and maintained the property, paid the property taxes, and leased the property to tenants who had openly occupied it, for a period in excess of the statutory requirement of 15 years

d) Linkous filed a quiet title action in the trial court, and Harkleroad counterclaimed

e) Although Harkleroad argued in the trial court that one cotenant may not assert a hostile possession of the property unless the other cotenants are ousted from the property by an affirmative notice of the intent to exclude them, the trial court ruled in the Linkouses' favor, vesting title to the entire property in them by adverse possession

f) The Supreme Court of Virginia affirmed. Key to the decision was that the Linkouses were strangers to the original co-tenancy and had taken possession of the property through a conveyance that on its face purported to give them the right to possess the whole property. Therefore, the act of the Linkouses in taking possession of the entire property was itself an ouster of the other cotenants, and no further notice was required

O. **Hostile Possession for Adverse Possession Purposes Among Co-Tenants**

1. The element of hostile possession is an issue where one co-tenant or joint tenant asserts title over another tenant's share by adverse possession. See Harkleroad v. Linkous, 281 Va. at 19 (quoting Helms, 277 Va. at 7). This gives rise to a rebuttable presumption "against any occupancy of a co-tenant being hostile possession as to other cotenants with whom he is in privity." Harkleroad, 281 Va. at 18. However, significantly, "this [rebuttable] presumption does not apply when a . . . stranger [in title] to the original co-tenancy takes possession of the [subject] property. . . ." Harkleroad, 281 Va. at 19 (citing Shenandoah Nat'l Bank v. Burner, 166 Va. 590, 593 (1936)); Estep v. Presnell, Case No. CL21000549-00 (Buchanan Cnty. 2021).

2. In Baber v. Baber, 121 Va. 740, 759 (1917) the Supreme Court of Virginia held that a co-tenant had constructive notice of co-tenant's ouster *by lapse of time* in the face of open possession even though he lived out of state. See 121 Va. at 761-63 ("But in view of the facility of communication in modern times, . . . the presumption

seems reasonable that James K. Baber within a reasonable time after the death of his father, William Baber, Sr., made inquiry in Virginia with regard to said land and that by the year 1878, or 1879 at least, was informed of what the numerous other members of the family interested with him must be taken to have known, of the notorious disclaimer and adverse claim of title of the said John H. Baber accompanying his actual possession of the land aforesaid. Hence, under the circumstances of the cause before us, our conclusion is that the said James K. Baber must be taken to have had the constructive notice and knowledge aforesaid from 1878 or 1879 until his death in 1910.").

3. In Shenandoah National Bank v. Burner, the Supreme Court of Virginia likewise held that exclusive occupation of the property, payment of taxes, making improvements, and encumbering the property with a deed of trust was sufficient to establish title by adverse possession in the co-tenant. See 166 Va. at 595 ("Charles Burner paid the taxes, made improvements upon his land, and encumbered it as his own; he has continued in the exclusive possession from the time of his father's death in 1919 down to the institution of this suit in 1934; a period of more than fifteen years without action or ouster."). In that case, the court held that the will devising the property to the co-tenant "constituted notice to Clinton Burner that Charles Burner was not holding this land as his cotenant; he knew that he was holding it as his own in severalty, and that he did not admit any right of Clinton in the land." Id. No formal communication to the ousted tenant is required. See id. Rather "intention to claim the land to the exclusion of the co-tenant may be shown by the acts of the claimant." Id. at 594.

4. This is "because the stranger to the original co-tenancy is not in privity with the other co-tenants and when he enters into the exclusive possession of the land, and claiming title to the whole, it is an ouster of the other co-tenants." Id.; see also Preston v. Va. Mining Co., 107 Va. 245, 248 (1907); Johnston v. Va. Coal & Iron Co., 96 Va. 158, 163 (1898);

5. In Shalom v. Clark, 79 Va. Cir. 202, 203 (Alexandria 2009), arising out of a divorce, the court held that changing the locks to a house constituted an ouster sufficient to deny a right to claim contributions for a mortgage from the other cotenant.

I hope this primer on adverse possession has been helpful and informative. If you have a "quick question" or comment, please do not hesitate to contact me. We are all in this together, and I am always delighted to assist a colleague in the bar.

—JLW

PROCEDURAL ISSUES IN THE CONDEMNATION OF A PRIVATE WATER AND SEWER SYSTEM

By Paul Terpak and Scott Helsel

Paul B. Terpak is a shareholder at Blankingship & Keith, P.C. in Fairfax. He is the editor of "Eminent Domain Law in Virginia" (2018) and has been selected five times (most recently in 2024) by Best Lawyers as "Eminent Domain and Condemnation Law Lawyer of the Year" in the DC metro area. Mr. Terpak has lectured and written about eminent domain on numerous occasions and served on the Virginia Code Commission Advisory Committee on the recodification of eminent domain law. In 2024, he was Chair of the VSB Real Estate Section subcommittee to recommend new Eminent Domain Jury Instructions to the Virginia Model Jury Instructions Committee of the Virginia Supreme Court. In 2024, he was named to the Virginia Lawyer Hall of Fame. He is a graduate of the University of Virginia and its School of Law and is a past president of the Fairfax Bar Association and past chair of the Virginia State Bar Committee on Lawyer Discipline.

Scott D. Helsel is a principal at Walton & Adams, P.C. in Reston and represents both government and private clients in real estate litigation, including in the fields of eminent domain and inverse condemnation. He is a co-author of a chapter on pretrial practice and procedure in "Eminent Domain Law in Virginia" (2018). He has a special interest in appellate work in Virginia's appellate court. He has been recognized by Virginia Business in that field and began his legal career as a law clerk to the Honorable Henry H. Whiting on the Supreme Court of Virginia. He is a graduate of William & Mary Law School and Elizabethtown College.

The authors have just completed the case of Board of Supervisors of Rockingham County and Board of the Massanutten Water and Sewer Authority v. Massanutten Public Service Corporation ("MPSC"), CL 23001337-00, which involved the condemnation of a private water and sewer system. While a number of generally applicable condemnation requirements must be followed when condemning a private water and sewer system—such as making a *bona fide* offer (Va. Code § 25.1-204), and (when a locality exercises its power of eminent domain), holding a public hearing and adopting an authorizing resolution before initiating condemnation (Va. Code § 15.2-1903)—the authors learned several procedural matters unique to the condemnation of a private water and sewer system. Title 15.2 sets out several provisions relevant to water system condemnation:

I. An Authority does not need SCC authorization to condemn a private water and sewer system in its entirety.

Ordinarily, an Authority must obtain State Corporation Commission ("SCC") authorization when exercising the power of eminent domain regarding property owned by an entity which also has the power of eminent domain. Va. Code § 15.2-5114(6). That code section states that Virginia Code § 25.1-102 "shall apply" to the exercise of eminent domain by an authority. And § 25.1-102 states that no authority "shall file a petition to take by condemnation…any property belonging to any other corporation possessing the power of eminent domain, unless…the State Corporation Commission" has certified that a "public necessity" exists.

Nevertheless, there is an express exception for the condemnation of a private water and sewer system in its entirety. That exception is reiterated in multiple Code sections. The provision endowing an authority with the power of eminent domain states that it "shall follow the same procedure provided in §§ 15.2-1906 and 15.2-2146." Va. Code § 15.2-5114(6). Those two sections both contain identical language stating that the "provisions of § 25.1-102 shall not apply in the condemnation of an existing water or sewage disposal system in its entirety." (Emphasis added.) As if that was not clear enough, § 25.1-102 itself states that it does not apply "as provided in §§ 15.2-1906 and 15.2-2146…"

Moreover, the Supreme Court of Virginia decided, under predecessor statutes, that an Authority does *not* need to obtain SCC approval. *Virginia-American Water Co. v. Prince William County Service Authority*, 246 Va. 509, 516-18 (1993). The Court explained the history of this issue. Prior to 1970, an authority *did* need to obtain SCC approval. However, a statutory change at that time granted authorities "the same power of eminent domain" as provided for a locality and stated it "shall follow the same procedure." This indicated that the General Assembly "intended to grant authorities…the same freedom to proceed without Commission approval, as was already accorded to those cities and counties." *Id.* at 517. The same analysis applicable to those predecessor statutes would, and should, apply with equal force now.

II. The property taken may be described in general terms if the entire system is taken.

In most condemnations, the exact property to be taken must be described in the petition for condemnation. Va. Code § 25.1-206(2)(f). Due to the complex nature of the real estate and other property owned as part of a water system, the rules are different.

Va. Code § 15.2-1906 provides that in a petition for condemnation of a private water and sewer system in its entirety, the petitioner need not file a "minute inventory and description of the property sought to be condemned, provided the property is described therein generally and with reasonable particularity and in such a manner as to disclose the intention of the petitioner that such existing water or sewage system be condemned in its entirety."

Va. Code § 15.2-1906 goes on to state:

> The court having jurisdiction of the condemnation proceedings shall, as the occasion arises and prior to the filing of the report of the commissioners appointed to determine a just compensation for the property sought to be condemned in its entirety, take such steps as may be necessary and proper to cause to be included in an inventory of the property sought to be condemned full descriptions of any and all such property whenever the exigencies of the case or the ends of justice will be promoted thereby. Such inventory shall be made a part of the record in the proceedings and referred to the (condemnation) commissioners.

(Emphasis added.)

Thus, pursuant to the emphasized language in the statute, the Court has the power to cause an inventory to be prepared that contains "full descriptions" of all the property that the condemnor seeks to condemn.

To the authors' knowledge, Va. Code § 15.2-1906 is unique in Virginia eminent domain law, and the condemnation of a water system is the only situation that provides for such an inventory. In Massanutten this resulted in the equivalent of the purchase of the assets of a corporation, rather than

the entity itself, which would come with corporate liabilities and other obligations. Obviously, the condemnor should be cautious and not condemn items it does not desire.

III. A Commissioner may be appointed to conduct the Inventory.

Water and sewer systems are complex. The system at Massanutten involved over a dozen parcels of real estate, numerous water tanks, pumps, and meters, over 200 miles of pipeline, and a large sewage treatment plant.

Va. Code § 15.2-1906 does not require the Court to prepare this inventory itself but instead authorizes the Court to "take such steps as may be necessary and proper" to cause the inventory to be prepared. Thus, the statute implicitly permits the Court to appoint a commissioner pursuant to its "necessary and proper" clause. The authors did not discover any pre-existing case law interpreting this statute, but the Court in Massanutten agreed that "exigencies of the case or the ends of justice," as well as economic use of a Court's limited resources, were promoted by the appointment of a commissioner to conduct the inventory in that case.

Appointment of a commissioner is governed by Va. Code § 8.01-607 et seq. Whether to appoint a commissioner is clearly within the sound discretion of the Court. *Raiford v. Raiford*, 193 Va. 221,226 (1952). The authorization to appoint a commissioner in § 8.01-607 does not limit or restrict the Court as to the class of case that it may refer to a commissioner. *Id.*

Specific items that need to be addressed in the inventory include:

- Title. The title company hired by the Board in Massanutten had a very difficult time finding records to match the reported assets in the System. Assets reported or observed on the ground did not match the documented location. Numerous parcels and easements which MPSC claimed to own were not recorded at all in the land records.

- Engineering Issues. Available public information including land records, tax assessment and filings with the State Corporation Commissioner as well as information from the system's private owner left much unknown. Many components of the system were not described in public records, including pipe length and size, and locations and numbers of manholes, hydrants, valves and meters. Specifics regarding customers usage were missing. Items required to calculate depreciation were not provided. Spare parts, machinery equipment and vehicle records were also not provided.

- Appraisal Issues. Real estate information publicly available and provided by the system's private owner lacked detail regarding the width, size and location of all easements in the system. In addition, information was confusing and contradictory regarding a number of tanks, boosters, and lift stations. The actual size of some parcels owned by the landowner was either unknown or conflicting. Some of the system's underground pipe network was on land or express easements owned by the system's private owner, but other parts had no recorded legal right to be in its location at all and, if legally located, exist only by virtue of implied or prescriptive easements.

Fortunately, in Massanutten, all of these issues were resolved without use of formal discovery tools or motions practice after extensive consultation and cooperation between the parties and their counsel, which enabled the parties to jointly present a proposed inventory for the Commissioner's and, ultimately, the Court's approval.

IV. Weight given to Commissioner's Report.

Pursuant to Va. Code § 8.01-610, "The report of the Commissioner shall not have the weight given to the verdict of the jury on conflicting evidence, but the Court shall confirm or reject such report, in whole or in part, according to the view which it entertains of the law and evidence." The Court did not surrender its control over legal issues, and "indeed [the Court] must exercise its own conclusions over pure conclusions of law." *Friedburg v. Hague Park Apts*., 61 Va. Cir. 589 (Norfolk 2001) (regarding a partner's fiduciary duties). Whether any issue should be resolved by the Court or reserved for the jury at trial can be addressed if and when necessary. After the resolution by the Court of any issues which the Commissioner cannot resolve, pursuant to Va. Code § 15.2-1906, the inventory is made «a part of the record in the proceedings and referred to the (condemnation) commissioners» or jury in this case. This is critical because the inventory will become the description of the property conveyed in the Final Order in the case.

V. New Parties may be revealed by the Inventory.

In Massanutten, presumably as with other older systems, older easements may be unrecorded, or difficult to locate. This may require the addition of new parties who may have a claim to real estate encumbered by a component of the system. In Massanutten this required the addition of eight additional parties, including several entities owned by a corporation which runs the mountain resort, and two homeowners' associations which owned the roads over long existing pipelines.

As part of the settlement in Massanutten, the Board required the system's private owner to convey all claims of adverse possession, easements appurtenant, easements in gross, equitable servitudes, easements by grant, easements by express reservation, easements by implied reservation, easements by implication, easements implied from prior use, easements implied from a reference to a plat, easements by necessity, easements by prescription, easement by estoppel, easements by operation of law, and easements by dedication. (Thanks to David Gogal of Blankingship & Keith for this comprehensive list). Interestingly, under Va. Code § 15.2-2109.1, the time required to create a prescriptive easement for the provision of water and sewer services by a political subdivision is only 10 years.

VI. Valuation.

Valuation issues were never addressed in Massanutten and are beyond the scope of this article. Pursuant to Va. Code § 15.2-2146, when a locality condemns the property of a public service corporation operating a waterworks system, such property

> shall include its lands, plants, works, buildings, machinery, pipes, mains, wells, basins, reservoirs and all appurtenances thereto and its contracts, easements, rights and franchises, including its franchise to be a corporation, whether such property, or any part thereof, is essential to the purposes of the corporation or not.

Virginia law provides little to no specific guidance on how to value the more ambiguous categories of property identified in this statute.

INTERVIEW WITH CLERK OF THE FAIRFAX CIRCUIT COURT

By John W. "Jay" Steele

For forty years, Jay has represented clients in all aspects of the acquisition, development, leasing, financing, operation, and sale of real estate, most notably office, shopping center and retail-oriented projects. His typical clients include developers, landlords, tenants, borrowers, investors, private equity funds, and lenders. Bringing an understanding of the real estate business on local, regional, and national levels, he strives to take a pragmatic approach in negotiations. With a focus on getting deals done and closed quickly without compromising client interests, his method involves not only identifying key issues and concerns but also partnering with clients to develop and implement creative legal and business solutions that facilitate, rather than hinder, the goal of closing. In 1991, Jay founded Hirschler's Fredericksburg office and has engineered its growth and development to its current location at 725 Jackson Street.

This quarter, the Fee Simple interviewed the Honorable Christopher Falcon, Clerk of the Fairfax Circuit Court. Falcon is a lifelong Fairfax County resident, growing up in the area and currently residing with his family in the County. He is a graduate of James Madison University and Widener University Commonwealth Law School. Formerly a practicing attorney with his own law firm and Legal Counsel and Supervisor in the Arlington County Circuit Court Clerk's office. Falcon ran for the Fairfax County's Clerk's office in 2023 following the retirement of long time Clerk John T. Frey and won election. He is concluding the second year of an eight-year term.

John W. "Jay" Steele (Jay): I know you grew up in Fairfax. Tell us a little more about yourself and your prior experiences with the Fairfax Clerk's office:

Falcon: That's right. Except for brief periods away during college and law school I've lived in Fairfax County most of my life. I went to James Madison University and then to Widener University Commonwealth Law School. My wife Jackie is a schoolteacher in Fairfax County and my children are students in Fairfax County Schools. As a practicing attorney before being elected, I was a regular visitor here to this Courthouse. I've tried jury trials here and recorded deeds. In my first year in practice (Newly Admitted Attorneys) CLE, my predecessor John Frey was there and introduced us all to the resources available at the Fairfax Circuit Court. So, it was very special to have him here handing me the keys when I started my term here as Clerk in 2024.

Jay: Why did you decide to run for the office of Clerk?

Falcon: I went to work for the Arlington Circuit Court about 11 years ago and then became legal counsel. I enjoyed that work because of my experience working with people, many of whom are dealing with very difficult situations. I saw it as an opportunity to help my neighbor – to help everyday people dealing with serious issues. While I couldn't give legal advice, I could assist them with procedural guidance, locating resources and directing them to legal aid clinics. I found that to be very fulfilling work. When Mr. Frey decided to retire, I saw an opportunity to step in and continue providing that same level of service and to help my community.

Jay: Can you talk about the differences you are seeing in operation of the Clerk's Office since you were elected? What differences do you see in the Fairfax Clerk's office vs other Clerk's offices?

Falcon: On Day One, the morning that I started, I brought the entire staff into our jury assembly room to meet them. We bought everyone breakfast, and I addressed my team for the very first time. I told them that I had heard that they are the best and I meant that. They are the best at what they do. We have people that have been here 20, 25, 30, 35 years or more, and that's for a reason. They love the work they do, and they are so good at it. They have caused me to have to raise my game.

Jay: What is your view of the mission of the Clerk's Office? Is there a main focus ?

Falcon: Absolutely. First and foremost, our mission is to provide equitable access to justice and court services and to protect and maintain court records. During my campaign for Clerk, I ran on leveraging technology to increase access and save people time and money. That is my North Star. We always look back and ask ourselves "is there a smarter way to do this?" "Is there a way that we can implement or integrate technology to do this in a way that can save our constituents a little bit of time and hopefully save them a trip to the Clerk's office." We are very intentional in focusing on customer service. I've always believed that every single person that walks into this building should be treated with dignity and respect, and I remind staff of that all the time.

Jay: How do you foresee integrating AI into your operations and services?

Falcon: We formed an AI work group at the beginning of the year, and our team has spent a few months creating a policy. I think it's dangerous when courts immediately jump into an AI integration without first looking at the different applications and rules for new technology like AI. Currently, we are looking at a pilot where will be automating one of our internal manuals. There are ways to input the manuals into an AI chatbot so you can just ask it "how do I do this thing?", and then the bot can quickly search through hundreds of pages quicker than we can. I also believe that we're not too far off from being able to land on the website and have a chatbot assist you with requesting a copy of a deed. There's no reason we shouldn't be able to come into the office in the morning and have a records request waiting that came in overnight ready for our staff to fulfill, or even better eventually have it already fulfilled by connecting with our database.

Jay: What other technological innovations do you foresee?

Falcon: We have integrated AI speech to text technology in all 15 of our courtrooms using a program called "For the Record". When we have a court hearing the program is working in the background creating an unofficial transcript. This is of great importance to many who find themselves in our court system; especially in civil matters, where unrepresented litigants often do not have the ability to pay for court reporters and can be left without a record. We have worked with a vendor to use AI to create an unofficial record which can serve as a statement of facts if there is agreement from all parties and the court. I believe this is a great way in which we have identified an equity gap and found technology to fill that need here in Fairfax County.

Jay: What's the biggest challenge for you in terms of maintenance and operation of the land records system?

Falcon: Right now, one of the biggest problems we're seeing is property and deed fraud. I was alerted by my team that we are receiving multiple calls per week from Fairfax County residents who have either heard about deed fraud or have found their property listed online for sale. We formed a deed fraud work group and began looking at ways we could address that. One result of that is we have been working with our Department of Tax Administration ("DTA") to find ways to make our citizens aware of possible instances of fraud. I am happy to say we have developed a property alert system for Fairfax County property owners, and we are now working to deliver that in 2026, to our citizens completely for free.

In addition, our Land Records team have formed a partnership with the FBI's property fraud unit and have provided them on-site training.

Jay: Do you see a need for legislative action in any area that affects Clerk's services or operations or to better improve or safeguard the recording system?

Falcon: I think we should be looking at some of the states that have stiffer penalties for deed fraud. I know New York just successfully prosecuted a fraudster and came down with heavy penalties on that person. It would also be great to require a little bit more in terms of verifying identity during closings. It's going to have to be a team effort between all of us, from the attorneys, title industry, legislators, the public, to make a difference in safeguarding property and the validity of recordings.

Jay: Tell me about the Clerk's office experience with e filings. IS this something that's working well?

Falcon: Yes. In fiscal year 2024 we had 82,149 filings in our Land Records Division. This past fiscal year that went up to 91,050 recordings. Out of those, 92.9 percent were e-filed. That was a significant increase in the number of e-filed recordings over the prior fiscal year where we only had 88 percent. I'm happy to see that increase. We are going to do everything we can to continue to make it easier for people to e-file recordings in our land records division. I'm going to come back to saving people time and money. That's what we are about and if we can use technology to get back to the things that really matter, why wouldn't we be looking at that? We have our own e-filing system and then we also use all the big ones: CSC, Simplifile, EPN. We kept those (services) in place, and in fact, we went a step further and now list phone numbers for all the e-filing vendors on our website so that people can reach out directly to them if they have an issue during a recording.

Jay: Are there any inherent problems or issues in keeping up with the you know with the updates and getting things on in time?

Falcon: We still need to take some paper filings and then do calculations on our end but other than that we really want to see everything e-recorded if possible. If there are issues that are keeping people from e-recording then I want to hear about those and I welcome your readers to reach out to us.

Jay: What do you see coming next technologically after e-filing and AI?

Falcon: With AI assisting we are going to be digitizing more of our records. Right now, believe it or not, not all our (court) records are digitized in Fairfax County from the forming of the county in 1742 to present. We have initiated a project to digitize more of our records so that people will be able to request a record, have it identified in the system and receive a fully digital response. I plan to automate the process and allow people to request and pay for documents via credit card over the website. That's one of the issues I ran on and we are currently starting a pilot program in another section of the circuit court to do that very thing. We are evaluating how it works and my hope is that we'll be able to bring that over to the land records soon.

Jay: Are there things that you or your staff wish that lawyers did differently in our use of the Clerk's office and its resources?

Falcon: We love the bar! The attorneys we work with know their stuff and are courteous. I do recognize that occasionally there are instances where issues arise during a recording. We have a dedicated management team in our land records operation so a manager should always be available to help resolve a recording issue.

Jay: Thank you so much for your time and for sharing this information with our readers!

MEET JORDAN HARRIS: THE REAL PROPERTY SECTION'S NEW MEETINGS COORDINATOR OF BAR PROGRAMS AND ENGAGEMENT

By Hayden-Anne Breedlove

The Real Property Section is excited to welcome VSB Meetings Coordinator Jordan Harris as its new liaison with the VSB Bar Programs and Engagement Department. With a diverse background in higher education, marketing, and corporate programming, Jordan brings both professional expertise and a passion for community-building to this role as she succeeds Dolly Shaffner, who retired last Spring.

A Career Rooted in Connection

A native Virginian who grew up in Chesapeake, Jordan's path to her current role with the Virginia State Bar has been shaped by her love for people and programming. She earned her bachelor's degree in Media Arts and Design with a focus in corporate communications, marketing, and advertising from James Madison University, followed by a master's degree in College Student Personnel Administration.

Her career began in student activities and leadership programming at American University in Washington, D.C., where she supported student organizations, leadership development, and graduate student programming. Jordan was promoted to Assistant Director, expanding her skills in planning, mentoring, and community engagement. Later, she pivoted into the tech industry, joining a data analytics company as a recruiter and program coordinator for early-career talent, managing internship programs, and building experiences that connected participants not just to work, but to one another.

Excitement for the Real Property Section

Jordan recently planned her first quarterly board meeting and looks forward to expanding her role with the section. She is particularly enthusiastic about building opportunities for engagement, not only among board members and area representatives, but across the entire section.

"What excites me most," she shared, "is finding ways to create authentic connections. We can dive deeper than just the business level. I want people to feel connected to the section as a community." She mentioned current chair Rick Chess' initiatives to bring the section closer together and is enthusiastic about whatever she can do to help implement the vision.

She also sees an opportunity to leverage technology to streamline operations and improve member engagement. Tools such as Microsoft Forms, for example, can simplify RSVPs and data collection, freeing time for more meaningful interactions.

An Eye Toward Member Needs

Jordan believes that communication and responsiveness will be the key to her success in this role. She encourages members to share feedback, offer ideas, and let her know what would motivate them to participate more actively in section events.

"We want to reach areas we haven't historically focused on and create new opportunities to connect," she said. "If we keep showing up and listening to what our members want, we can make involvement in the section both meaningful and rewarding."

A Creative Spirit Beyond Work

Outside of her professional life, Jordan is a self-proclaimed movie buff who still fondly remembers her very first job - working at a movie theater. She describes herself as a creative and visual person, and she enjoys channeling that creativity into both her work and personal pursuits.

With her mix of organizational experience, creative vision, and dedication to building community, Jordan Harris is poised to make a strong impact on the Real Property Section. Members can look forward to more connected, engaging, and well-supported events under her leadership.

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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.

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(2025-2026)

The list of Area Representatives is being updated and revised.

Please send additions and/or corrections to Susan Pesner, susan@spesnerlaw.com

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

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

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