



## The FEE TAIL

The Real Property Section's  
email supplement to  
*The FEE SIMPLE*

The Real Property Section is pleased to provide its members with ***The Fee Tail***, a newsletter with timely cases and statutes of interest to the practice of real estate law in the Commonwealth. We welcome all of our members to submit ideas for future *Fee Tail* issues to Heather Steele at [hsteele@pesner.com](mailto:hsteele@pesner.com). We prefer to draw these cases from our members, so if you have recently litigated (or are aware of) a current real estate case, either at the trial court or appeals level or a recent statute of interest to the section, please contact us.

Below are a few recent cases of interest, new statutes, and rulings of note, with links to decisions.

### Cases of Interest

**Reyes v. United States** (Fourth Circuit) — January 23, 2024

Fourth Circuit panel unanimously decided to rescind a RV park's summary judgment win in a housing discrimination suit challenging the park's policy requiring residents to show proof of their legal status. The court determined that the anti-harboring statute did not plausibly put the Park at risk for prosecution simply for leasing to families with undocumented immigrants. Furthermore, the court found that the Park's policy did not serve a valid interest in any realistic way to avoid liability under the anti-harboring statute. Therefore, the Park did not meet its burden at the second step of the three-step burden-shifting framework established for disparate-impact claims.

**Boxley v. Crouse, et al.** (Court of Appeals of Virginia, published) — December 28, 2023

The Court of Appeals affirmed the removal of a gate across a right of way and addressed key requirements to prove or rebut the existence of an easement by prescription. “The Supreme Court has held that servient landowners may only erect gates across rights of way if the gate has fences that extend to each side of the right of way. The gate erected by Corbett, and maintained by Boxley, is a freestanding gate that is not connected at any side by a fence.”

**Jackson Sr. v. Virginia Dep’t of Conservation and Recreation** (Court of Appeals of Virginia, unpublished) — December 19, 2023

The Court of Appeals reversed trial court’s dismissal of case regarding easement by necessity. “A reasonable fact finder could view the 1934 survey as evidence that the implied easement existed. The fact that the survey was created 22 years after the severance of the original property does not foreclose the possibility that an easement by necessity was created.”

**Parrish v. Callahan** (Court of Appeals of Virginia) — October 23, 2023

Where appellant claimed his home was sold at a foreclosure sale without adequate notice, the relevant statute precludes him from obtaining rescission of the sale.

**GW Acquisition Co., LLC v. Pageland LLC** (U.S. District Court, Eastern District of Virginia) — October 6, 2023

The Court held the parties entered into valid land sale contracts which required Defendants to approve the proffers integral to Plaintiff’s rezoning applications, and without such approval, Digital Gateway Project was likely not to be approved, which would cause significant losses to Plaintiff. Court granted motion for preliminary injunction requiring sellers to sign proffers.

**Mountain Valley Pipeline LLC v. 9.89 Acres of Land and 0.33 Acres of Land, Owned by Elizabeth Lee Terry** (U.S. District Court, Western District of Virginia) — September 29, 2023

Because of exclusion of proposed expert testimony and because of exclusion of landowner’s testimony by agreement, land owner had no admissible evidence to prove diminution of value resulting from the pipeline. Therefore, there are no issues of material fact, and Plaintiff is entitled to summary judgment as to the amount of just compensation to the landowner.

**Cumberland v. Board of Supervisors of Middlesex Co.** (Court of Appeals of Virginia) — September 19, 2023

The trial court correctly ruled that appellant lacked standing to challenge a board of zoning appeals, or BZA, decision because he did not “plead sufficient facts establishing a particularized harm resulting from the BZA’s decision.”

**James Wenzel Forbes, et al. v. Jason W. Cantwell** (Court of Appeals of Virginia) — September 12, 2023

Judgment reversed in part as trial court erred in admitting parol evidence to describe the size of the easement, finding the deed contained a negative easement on Lot 7's land, and failing to enjoin appellee from erecting fences within the 40-foot easement; there was no error in admitting parol evidence about scope of fencing and landscape easement or other rulings on fencing and gates.

**Mountain Valley Pipeline LLC v. 2.20 Acres of Land By Frank H. Terry, Jr.** (U.S. District Court, Western District of Virginia) — September 1, 2023

Where two of the landowners' experts in a condemnation damages suit provided opinions that were unreliable, and a third expert failed to provide a required report, they were excluded from the trial.

**Willems v. Batcheller** (Court of Appeals of Virginia) — August 8, 2023

The Court of Appeals held that the lower court lacked jurisdiction to declare a new boundary line between the parties' properties because this relief was not requested as a cross-claim in this nuisance and trespass case.

## Rulings of Note

**IRS and Transferrable Development Rights** — September 1, 2023

The Internal Revenue Service has recently issued a private letter ruling holding that Transferrable Development Rights under a city's zoning code will be considered like-kind property for purposes of a 1031 tax-free exchange with real estate that has been held for productive use in a trade or business or for investment.



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