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The FEE SIMPLE is published semiannually for distribution to members of the Real Property Section of the Virginia State Bar. Anyone interested in publishing an article in the FEE SIMPLE is invited to contact the Editors. Articles should be submitted by email as Microsoft Word documents. Your submission will also be your consent to the posting of the article on the Real Property Section website, http://www.vsb.org/site/sections/realproperty/newsletters. The FEE SIMPLE has the authority to edit materials submitted for publication. Authors are responsible for the accuracy of the content of their article(s) in the FEE SIMPLE and the views expressed in them are solely the views of the author(s).

The Board of Governors gratefully acknowledges the dedication and the hard work of the Assistant to the Editors, Felicia A. Burton ((757) 221-3813, (email) faburt@wm.edu), of the College of William and Mary School of Law.

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FALL SUBMISSION DEADLINE: FRIDAY, OCTOBER 7, 2016

The next meeting of the Board of Governors of the Real Property Section of the Virginia State Bar will be held on
Friday, June 17, 2016, at 11:00 am
Oceanaire Resort, 3421 Atlantic Avenue, Virginia Beach.

User name: realpropertymember
Password: Nwj5823

Visit the section web site at
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for the Real Property Section Membership form
and
http://www.vsb.org/site/sections/realproperty/newsletters
for articles from the FEE SIMPLE and a whole lot more!
CHAIR'S COLUMN

by Susan S. Walker*

WARNING – This column contains advertising material!

You receive this magazine because you are a dues-paying member of the Real Property Section of the Virginia State Bar. In addition to the Fee Simple, there are other benefits available to you as a Section member.

One monetary benefit is the small tuition discount Section members receive to attend either the Advanced Real Estate Seminar in March or the Annual Real Estate Practice Seminar in May, both offered by Virginia CLE in conjunction with the Section (Although the “present administration” cannot guarantee this subsidy will always be provided, the plan is to continue it for the foreseeable future).

Section membership also has non-monetary, practice-enhancing benefits, including positions on one of the many Section committees. If you think “committee” is synonymous with boring meetings and busy work, you will find the Section’s committees quite different. Substantive committees focus on particular practice areas-- members exchange information and practice tips with one another through quarterly conference calls. Because members work with practitioners from other parts of the Commonwealth, committee members may refer matters with confidence.

The committees also generate topics and authors for articles to be published in future editions of the Fee Simple. The Section’s substantive committees are:

a) Commercial Real Estate
b) Common Interest Communities
c) Creditors’ Rights and Bankruptcy
d) Eminent Domain
e) Ethics
f) Land Use and Environmental
g) Residential Real Estate
h) Title Insurance

In addition to substantive committees, the Section has four standing committees that are not practice area-focused, but provide support for the Section as a whole. These committees and a brief description are as follows:

a) Fee Simple – Under the leadership of Editor Steve Gregory, the Fee Simple committee formulates and reviews proposed articles and topics for inclusion in our semiannual magazine.¹

b) Programs - The Programs committee collaborates with Virginia CLE to plan the curriculum for both the Advanced and the Annual Real Estate Practice seminars.

¹ And badgers people to contribute articles. –Ed.
c) **Membership** – The Membership committee:

i) participates in the annual First Day in Practice Seminar for new bar admittees;

ii) establishes contacts within Virginia law schools to support to promote education in preparation for real estate law practice. This effort has resulted in the Section being invited to provide lecturers for a real estate practice course taught at the University of Richmond (I would note that one member of the Section’s Board of Governors, Kathryn Byler, has taught a real estate course at Regent University);

iii) offers interested second and third year law students (2 per Virginia law school) free tuition to attend the Virginia CLE Annual Real Estate Practice Seminar in May; and

iv) promotes section membership to new attorneys.

d) **Technology** – The Technology Committee seeks to keep the Section informed of changes in technology relevant to real estate practice.

Later in this Newsletter are committee reports, which provide insight into the committees’ activities. If you are drawn to one of the committees, please contact the committee chair, whose contact information is set forth in the committee rosters at the end. The committees are open to all Section members.

In addition to the Committees, the Section has area representatives, who are nominated from among the Section membership and elected by the Board of Governors. While years in practice are not a specific requirement, area representatives are elected based upon practice experience and high professional standards. Area representatives have the opportunity (and requirement) to attend, in person or by telephone, quarterly meetings of the Section’s Board of Governors. Such meetings are an opportunity for enriching in-person interaction with other real estate practitioners, many of whom are leaders in the field.

As outgoing Real Property Section chair, my involvement in the Section first as an area representative, then committee member, and later a Section officer has been personally enriching. I have been edified, and often awed, by the acumen, knowledge, character and generosity of spirit of the colleagues with whom I have served in these capacities. I know that I have gained more than I have given, which motivates me to seek to foster the same experience for new area representatives and committee members.

Thus ends the advertisement.

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2 More recent meetings have occurred, but reports were not available at the time of publication.
As this is being written the Supreme Court of Virginia is considering a challenge to § 56-49.01 of the Code:

§ 56-49.01. Natural gas companies; right of entry upon property.

A. Any firm, corporation, company, or partnership, organized for the bona fide purpose of operating as a natural gas company as defined in 15 U.S.C. § 717a, as amended, may make such examinations, tests, hand auger borings, appraisals, and surveys for its proposed line or location of its works as are necessary (i) to satisfy any regulatory requirements and (ii) for the selection of the most advantageous location or route, the improvement or straightening of its line or works, changes of location or construction, or providing additional facilities, and for such purposes, by its duly authorized officers, agents, or employees, may enter upon any property without the written permission of its owner if (a) the natural gas company has requested the owner's permission to inspect the property as provided in subsection B, (b) the owner's written permission is not received prior to the date entry is proposed, and (c) the natural gas company has given the owner notice of intent to enter as provided in subsection C. A natural gas company may use motor vehicles, self-propelled machinery, and power equipment on property only after receiving the permission of the landowner or his agent.

B. A request for permission to inspect shall (i) be sent to the owner by certified mail, (ii) set forth the date such inspection is proposed to be made, and (iii) be made not less than 15 days prior to the date of the proposed inspection.

C. Notice of intent to enter shall (i) be sent to the owner by certified mail, (ii) set forth the date of the intended entry, and (iii) be made not less than 15 days prior to the date of mailing of the notice of intent to enter.

D. Any entry authorized by this section shall not be deemed a trespass. The natural gas company shall make reimbursement for any actual damages resulting from such entry. Nothing in this section shall impair or limit any right of a natural gas company obtained by (i) the power of eminent domain, (ii) any easement granted by the landowner or his predecessor in title, or (iii) any right-of-way agreement, lease or other agreement by and between a natural gas company and a landowner or their predecessors in title or interest.

The landowners contend, in brief, that this is an unconstitutional taking of property without due process. Natural gas companies counter by saying they must have a defined route in order to obtain a FERC permit (which, among other things, entitles the companies to acquire easements, by eminent domain, over those tracts whose owners have failed to grant them). Litigation over pipelines has a long and storied history, not only in the Commonwealth, but nationally.

I believe both sides have valid and cogent points. Transportation of minerals is essential to energy independence, and concomitantly, to the health of the economy. Pipelines are the most efficient means; transport by rail or truck is prohibitively expensive (and dangerous). It would seem to be in the best interests of consumers and suppliers to facilitate the construction of these (mostly) underground mineral highways.

On the other hand, property rights in the U.S. are considered sacrosanct, even as they are being eroded regularly in courtrooms and legislatures. (c.f. *Kelo v. City of New London, Connecticut*). It’s easy to understand the powerlessness felt when a surveyor shows up to begin the process of taking part of what many may have worked a lifetime to obtain. Moreover, some landmen have been known to be abusive to
property owners in negotiations with them; there is a story (apocryphal?) of one who threatened to run the line under the house if the homeowner didn’t accede.

Because there is no way to eliminate all conflict in these situations, why not impose arbitration? The legislature and the courts are all too ready to force bickering foes to non-judicial dispute resolution for such minimal arguments as cell phone bills. Let’s send pipeline contests to a neutral panel to determine rights, location, and compensation.

Near the end of the Constitutional Convention in 1787, a lady approached Benjamin Franklin and asked, “Well Doctor, what do we have—a republic or a monarchy?” Franklin replied, “A republic—if you can keep it.”

Apparently, we couldn’t.

On March 10, after months of invective, the General Assembly elevated Court of Appeals Judge Stephen McCullough to the vacant seat on the Supreme Court. Thus endeth what may very well be the sorriest spectacle in Virginia jurisprudence.

To recap, Democratic Governor Terry McAuliffe appointed Fairfax County Circuit Court Judge Jane Marum Roush during a legislative recess to fill the seat of retired Justice LeRoy F. Millette. The GOP-controlled legislature then went into full-pout mode, claiming that Gov. McAuliffe didn’t properly consult or inform them of the appointment, and publicly vowed that they would never, under any circumstances, confirm Judge Roush. Then, when her first term as interim appointee expired, Gov. McAuliffe reappointed Judge Roush, further infuriating the GOP. They resolved even more strongly to elevate Court of Appeals Judge Rossie D. Alston, Jr., but that plan fell apart thanks to the defection of one of their own. Finally, with the end of the session rapidly approaching (which could have led to Judge Roush’s third appointment), the GOP rushed through a vote on Judge McCullough, who was confirmed with all but one Democratic legislator refusing to vote at all (citing legislative rules).

At this point, it is important to pause and note that NOT ONE SENATOR OR DELEGATE CLAIMED THAT JANE MARUM ROUSH WAS NOT QUALIFIED. NOT ONE. In fact, her qualifications were highly praised by members of both parties. No, this was a GOP thumb in the eye of the Governor; this was the GOP saying to the citizens of the Commonwealth, “you elected a buffoon, but fortunately you also elected us to protect you—even if you don’t need protecting.” This was the GOP saying to the citizens of the Commonwealth, “The Supreme Court belongs to us—not you. The Supreme Court is political, not impartial, and we will control it.”

To trace the seeds of this arrogance and intransigence would require more space than this column has remaining. Suffice it to say that the tone set by Congress in Washington has infiltrated state- and county-level elected officials as well. Why shouldn’t it? There are no consequences for the contumacy; rather, those obstinate congressmen, senators, and delegates are rewarded for it with campaign contributions from their Citizen United-empowered oligarchs. “Just say no” was supposed to keep the nation’s youth from experimenting with the scourge of illegal drugs; it was never intended to be the theme song of a governing philosophy grounded in the heady drug of power and money.

“A Republic—if you can keep it.” Indeed.

L ’envoi: Shortly after the debacle over the Supreme Court, Gov. McAuliffe vetoed a coal tax credit bill championed by a number of Republican representatives from the coal-rich Shenandoah Valley. Never mind that McAuliffe had vetoed the same bill in 2015; no, this was McAuliffe’s retribution for the

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1 Nothing in this column should be construed to imply that Judge McCullough and/or Judge Alston is not qualified to sit on the Supreme Court. On the contrary; the author has the utmost respect for all of the jurists who were appointed or considered for appointment. The author’s contempt is for the process as it played out in Richmond this year.
Supreme Court fight. This was the Governor being politically corrupt, according to GOP Senator William Carrico. This was the Governor being “a big baby,” according to GOP Senator Richard Stuart. The chutzpah is immeasurable.

As the Hindenburg burst into flames in 1937, reporter Herbert Morrison yelled into the microphone, “Oh, the humanity...” and turned away. As the (air) ship of state crashes and burns in the 21st Century, we as observers can only say, “Oh, the humanity...” Unlike Mr. Morrison, we had the ability to prevent this abuse of power, or at the very least, to prevent a repetition. Have we learned anything?

“A Republic—if you can keep it.”

From time to time, we like to try out new features that we may include regularly in this magazine. The Roundtable, with Jessica Selway as the moderator, has been popular and will be continued as often as Jessica can browbeat—um, persuade—practitioners to participate. The interview with a prominent real estate professional was less successful, and has been discontinued.

This spring, we are debuting a feature we have tentatively named “Clerk’s Corner.” Karen Day, an old friend and practitioner in Alexandria, has graciously offered to interview our Circuit Court Clerks and present their views. For this inaugural voyage, Karen sat down with Clerk Ed Semonian and Deputy Clerk John Knippenberg of the City of Alexandria. Please enjoy. We would appreciate any feedback.

Because there are 95 counties and 38 Class 1 cities in the Commonwealth, we should have enough material for the next 65 years or so. I would love to say I will be here to edit each and every one, but genetics says otherwise.

Reunions are a reminder of times gone by, simpler times, of which memory has filtered away the bad and retained the good. Recently, my high school held one such anniversary celebration; though I couldn’t attend in person, through the miracle of the internet I was able to reconnect with forgotten classmates. It brought to mind the experiences we shared in those tiled halls lined with lockers and classroom doors—doors which opened not into calculus, physics and chemistry, but into the paths we would follow for the rest of our lives. For too many of us, those paths diverged, and the goodbyes we said that summer proved to be the last, perhaps because of the horizon we tended to keep in our sights, occasionally looking left or right, but seldom back.

The Reunion brought into sharp focus the words of Bob Crewe and Kenny Nolan, through the brilliance of Frankie Valli:

Headed for city lights  
Climbed the ladder up to fortune and fame  
Worked my fingers to the bone  
Made myself a name  
Funny but I seem to find  
That no matter how the years unwind  
Still I reminisce  
About the girl I miss  
And the love I left behind...

Yes, I did that; I headed for those lights, worked my fingers to the bone, made myself a name.² By August of graduation year, we had scattered, separated by the miles with no electronic communication available back then. I lost touch with so many; youthful exuberance and determination (and perhaps some laziness) consumed me, leaving unspoken words that would express how much my friends had added to those years, to my life. Alas, at every Reunion, the list of the departed grows. One killed in a

² Although there have been other names that have been used in reference to my existence or regret thereof.
car wreck 2 years after graduation; one gone in Viet Nam. Athletes, cheerleaders, thespians; honor students and those who barely graduated. Everyone in between. Death is random.

However maudlin this may be, I hope that I have stirred something in you that will make you reach out to those who have passed through your life, those whom you may have forgotten without meaning to. Please don’t wait—tomorrow may be too late. Resolve to try to contact at least one person from your past. Remember that no one ever said on his deathbed, “I wish I’d spent more time in the office.”

[I realize that the preceding is only marginally related to real property, but it is related to the hours, days, weeks and months that fly by as we ply our trade. It’s all too easy to lose sight of what’s really important to a full life.]

Times of Your Life—Paul Anka

One day short of two years after we said goodbye to Courtland Traver, the real property world in Virginia lost another titan. Ron Critzer of Charlottesville died March 29. Ron wasn’t an attorney, but his contributions to the real property industry were no less profound. He was the founder of Court Square Title in Charlottesville and a long-time member of the Virginia Land Title Association, of which he served a term as its President. He believed in, demanded, and upheld the highest standards of service to the public, both personally and professionally, while maintaining and displaying a remarkable sense of humor.

I met Ron a few decades ago, when both of us were tossing around 25-pound deed books in the basement of the (old) Fairfax County Courthouse. He was always just a nice person, fun to be around. We reconnected years later after I left private practice and went to work for Stewart Title, for whom he was an agent; I regret (see above on reunions) having lost touch with him after Stewart and I parted ways.

Ron is survived by his wife, Betsy, their children, Leigh and Elizabeth, and other family members. He had no enemies, only friends, and he will be missed by all of us.

We close, as always, with our entreaty that this your magazine; help us make it better. Let us know what you like, what you don’t like, what you would change or improve. Consider contributing an article or an opinion.

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3 Attributed to many, but most likely to have been the Rabbi Harold Kushner.

4 “Up in the attic, away from the din, someone is playing a lone violin.” If this all sounds familiar, well, guilty as charged. Some time ago in these pages, I bemoaned the billable hours construct, having observed how young attorneys, in their drive to partner or member, sometimes sacrifice family, friends, and life experiences. As one of my ex-wives impressed upon me, life is not a dress rehearsal.

5 Those of you who are reading this in hard copy, please search on YouTube for “Times of Your Life”
On October 3, 2015, the Consumer Financial Protection Bureau’s ("CFPB") TILA-RESPA Integrated Disclosure ("TRID") rule went into effect bringing about numerous changes to closed-end real estate transactions. What observations have you made over the course of the last five months about the practical effects of the new laws on your practice and your representation of clients?

Participants:

Glenn E. Ayers, Esq., Lafayette, Ayres & Whitlock, PLC, Richmond, VA

William “Bill” Tucker, Esq., Tucker, Griffin Barnes, PC, Charlottesville, VA

Karen L. Day, Esq., Absolute Title & Escrow, LLC, Alexandria, VA

Karen: ALTA1 headline news dated March 15, 2016 featured an article by the Mortgage Bankers Association reporting on a consumer survey of 1,000 repeat home buyers conducted by ClosingCorp regarding the TRID-RESPA integrated disclosures which found: (1) new forms easier to understand (63%) and better explained (53%); but, 51% reported “unexpected costs, fees and surprises” and (2) getting a mortgage more difficult under new rules (64%) and took more time (57%).

Brian Benson, CEO of ClosingCorp.stated: “Consumers who have bought homes and gotten mortgages both the new and the old way suggests that TRID is making it easier for consumers to understand the costs and fees that they’ll face at closing. But at the same time, the new rules are adding time and anxiety to the closing process.”

Another survey conducted by the American Bankers Association found that more than 75 percent of banks say TRID compliance is delaying loan closings between one and 20 days. Reasons for delays included hiring more staff to cover the compliance (who required more training and hours), additional legal reviews, and third party audits.2 This had led to a reduction in the loan products being offered to consumers as well as increased loan costs.

On March 2, 2016, a real estate attorney and Washington Post columnist reported that lenders and title companies refusal to provide copies of the final closing disclosure to real estate agents representing home buyers is “threatening to jeopardize one of the traditional services agents perform for their clients: scrutinizing closing statements for inaccuracies that could cost them money or delay the settlement unnecessarily.” Harney reports that a recent nationwide survey by the National Association of Realtors found “54.5 percent of agents reported they had experienced difficulties obtaining the Closing Disclosure form used under the new federal rules and that half of these agents detected errors when they finally reviewed them. The errors included incorrect fee charges, commission splits, taxes and failure to include seller concessions to the purchasers.”

From my perspective as an attorney and the owner/manager of a settlement company/title agency, implementation of the new rules has been a challenge, due in largest part to issues with our settlement software, and exacerbated by general confusion as to the shifting roles of the lenders, realtors, and settlement providers in the closing process.

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1 American Land Title Association –Ed.

2 http://bostonagentmagazine.com/2016/03/08/survey-trid-impacting-75-percent-loan-closings/#sthash.dkBDjVA5.dpuf

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Administratively: in order to avoid privacy concerns and follow lender’s instructions, my office uses the ALTA settlement statement in addition to the CD (which I consider a loan document requiring seller signature without necessary signatory lines). But, using two separate forms to itemize costs and disbursements (lender’s CD and ALTA settlement statement) creates redundancy and excess paperwork in files. Because, the CD form itself contains no indication as to the time/date of its production or by whom it was produced, working files are larger than ever with endless versions of the CD sent back and forth between the lender and my office.

As recently as yesterday, I received a Reminder Notice from one of the banks we work with stating that they “will produce and deliver the Closing Disclosure (and any revisions) to our client(s) prior to and following (if necessary) the closing. Third parties, settlement agents, real estate agents, signing agents, etc., will not be permitted to produce the Closing Disclosure or deliver it to our client(s).” Yet I just closed a loan where a lender required my office produce a preliminary CD for delivery to them immediately upon contract receipt and refused information provided in any other format.

With a few exceptions, final closing instructions and loan documents are not being delivered to us any earlier. Purchasers, with expectations of final figures at lenders delivery of CD three days prior to consummation, are not pleased when cash required at closing varies in any way – often unavoidable as result of lack of necessary info due to split closings and/or changes in property assessed values, etc.

On positive note: one attorney with whom I spoke has decided to stop conducting real estate settlements in light of all the changes, upgrades and capital improvements required to continue. In process of cleaning up his closing files, he had opportunity to send CS request letters to several lenders. Much to his surprise, he learned that a national lender actually paid a statutory penalty to a borrower for having failed to file a certificate of satisfaction releasing the deed of trust within 90 days of receipt of the payoff funds. This attorney stated that in his experience, the larger national lenders have believed themselves exempt from this Virginia requirement. He credits new consumer focused rules with the lender’s payment.

Glenn: Karen, thanks for kicking off our discussion and an excellent summary of recent headlines and surveys of consumers and banking professionals from ALTA, Mortgage Bankers Association and American Bankers Association. I too, have read the statistical data being compiled primarily by the stakeholders (mortgage bankers, ALTA, National Association of Realtors) and I can only imagine how much better the new and improved TRIAD will be (TRIAD II?) after the stakeholders and their allies in Congress have congressional hearings, receive testimony and introduce and pass legislation all to further help Americans achieve the American Dream: Home Ownership. I can hardly wait.

From my vantage point, I observed that TRIAD has had the following impact on the settlement business in Richmond, VA and on the settlements I have conducted under TRIAD:

1. There are fewer individual settlement providers. Many small or solo practices no longer perform settlements.

2. Our office is involved earlier w/ the lender due to the production of the CD; there are a errors in the CD as it is revised before being presented to the consumer, so more time is being added to the closing process because the CD is being produced at the last possible time to meet the 3 day deadline before closing.

3. The 3 day deadline is a joke. One lender sent the CD after 9:00 pm on a Friday night with that Friday counting as day 1 due to missing the original deadline on the previous Wednesday.

4. With the CD, the consumer is no longer surprised at fees and costs at settlement; they are just surprised 3 days earlier. There is no time for the consumer to shop around after the CD is presented if the fees and costs are not satisfactory because there is a contract closing date that is now past, the seller wants to close and the buyer may be between homes with their possessions in the moving van.
5. The CD and the settlement/closing statement now agree.

6. Fees for closings have increased because now there is more time spent on the closing with the consumer’s lender and there is, of course, more paperwork to include all the disclosures required by the new laws.

I think that consumers and the industry would be far better served if consumers were required to have some basic education and knowledge about mortgages. Require prospective borrowers to attend a class taught objectively by an independent third party and demonstrate an understanding on the subject. With a certificate earned, then any mortgage they take out would be eligible for being insured or purchased by a NGO, VA, FHA, et al. Education is now a part of some government loan/grant programs and with reverse mortgages. Why not all mortgages?

The CFPB working with the stakeholders to provide transparency and timely information is part of the solution. I think the CFPB should also work with the borrowers on education.

Bill: Karen and Glenn’s comments on their experience with TRID and the new settlement procedures their staff and clients are experiencing are similar to ours in Central Virginia. When I began to learn about TRID, I believed there would be significant changes in the entire home buying process. Obviously the lending and closing process had to be completely overhauled with all the new forms, procedures, and software. Additionally in many seminars with our local real estate companies, we discussed the potential numerous changes for realtors and settlement attorneys involved in the process.

Now that we’ve had over five months to experience these changes, it does not appear that our local realtors have been significantly affected by TRID in their dealings with their clients. The same cannot be said for my real estate closing staff and the many lenders we deal with. Basically, even though the TRID rules and procedures are spelled out in great detail, the various lenders we work with have each interpreted the TRID procedures differently.

As a result, we are constantly surprised how one lender wants detailed CD information from us, while another says we are not allowed to change the CD even if figures are inaccurate. Also we are now not being asked by many lenders for estimated fees for the LE (with the GFE we were always quoting fees). Another example is regarding the Purchaser’s lender’s need or lack thereof for information from the Seller’s CD. The additional time spent dealing with the different lender procedures has significantly increased our total time spent on each closing.

It has not all been bad. One major position change has been the ability to tell the Purchaser how much money is needed for the closing well in advance of the actual settlement. The three day review period for the CD has greatly resolved one of the Purchasers’ most frequently asked question, “How much money do I need for my closing?” Granted, the CD can change from the initial three day CD to the actual CD at closing. However, these changes are minor and do not upset the Buyer anywhere near the HUD “dark ages” when we couldn’t tell the Purchaser how much money he needed to wire until the day of the actual closing.

I agree with Karen, that final instructions and loan document delivery have not improved at all. That was one of my predictions that turned out to be a “pipe dream”. Because the lenders had to prepare the CD three days in advance of the closing, it only seemed reasonable that lenders and their underwriters would go ahead and obtain the “clear to close” when they produced the CD. Recently a few lenders have started sending out the closing package with the CD. Maybe in the future, this trend can improve with the majority of the lenders.

Another good surprise was how easily all lenders found a way to waive the three day CD delivery requirement. Everyone was predicting with the “three-day delivery” and the “three-day review” periods that closings would be delayed unreasonably. Uniformly lenders have put in place procedures with the
borrowers so that the “three day delivery” can be acknowledged immediately upon receipt of a secured email with the CD attached.

We have also experienced with our closings, issues with the ability to disclose information to the various parties in the transaction, including obviously the realtors who want the CD financial information for their own requirements. Remember, one of the goals of the TRID regulations was to protect Purchaser and Seller financial and other non-public information. However, this goal conflicts with the lenders’ need for certain protected information to complete the CD. As a result of this need to deliver information to all the parties involved in the closing, it has been suggested that the following language be added to the standard real estate contract in the “Other Terms” paragraph:

“The parties agree to provide and consent to the disclosure of any and all information requested by any party, real estate agent, lender, settlement agent or attorney involved in this transaction to comply with applicable state or federal law or regulation relating to real estate settlement practices and reporting, including the TILA-RESPA Integrated Disclosure (TRID) rule”.

A final issue that we deal with is the Seller’s CD. Many lenders are not requiring this, but we do get some requests from the Purchaser’s lender for the Seller CD. TRID regulations place the responsibility on the settlement agent to provide the Seller with a CD no later than “the day of consummation”. You can either use a Seller only CD or a combined Buyer/Seller CD (our software now provides both forms). Also our software now incorporates a line for the Seller to sign, which was not on the initial TRID documents. Even though lenders are still not always requesting it, my staff is instructed to produce a separate Seller CD and/or a combined CD and have the Seller sign it.

Each day is a new learning experience with TRID and how each lender interprets it. As many of us have now learned, TRID is really an acronym for “The Reason I Drink”. Hopefully the future will get better as closing procedures become more uniform between lenders. In the meantime, I am always telling my staff not to get frustrated, but to just “go with the flow”. Remember, the lender has to pay if they get it wrong.
CLERK’S CORNER

CLERK’S CORNER is a new feature. On behalf of the FEE SIMPLE, Karen Day\(^1\) conducted an interview with Edward Semonian,\(^2\) Clerk of the Circuit Court for the City of Alexandria, Virginia, who was joined by John Knippenberg, Deputy Clerk of the Circuit Court.

Karen Day (KD): To begin, tell me a little about your background and how you came to be the Clerk of the Circuit Court for the City of Alexandria?

Semonian: I attended George Washington High School here in Alexandria, did my undergraduate studies at George Washington University, and also took my law degree from the George Washington University Law School. I actually began my legal career in the DC office of a west coast law firm. After spending so much time traveling for work and faced with having to relocate, I decided to set up a small solo general practice in Alexandria. Judge Backus\(^3\) asked me to consider serving as Clerk of the Court. I declined. But when the Clerk, Alvin Frinks, retired from office and Frederick Jackson, who was designated to fulfill the remainder of Frinks’ term, unexpectedly passed away from a heart attack, guess who got another phone call? I agreed to serve two terms. That was 36 years ago.

Knippenberg: I took my Masters in Public Administration from George Mason University after my undergraduate studies at West Virginia University. During school, I had an internship in the City of Alexandria sheriff’s office. I then applied and was hired as a clerk in the land records division of the Clerk’s office. I just began my 24th year with the Alexandria Clerk’s office.

KD: What is unique about the Alexandria Clerk’s office?

Semonian: Alexandria is one of the few courts that has its own case management system, known as the Alexandria Justice Information System (AJIS)

Today, the Virginia Supreme Court offers a system that its courts can use. But, prior to that being available, we had developed the AJIS to meet our specific needs. The development of our system was funded by the City of Alexandria. The AJIS began as a computer indexing system but is currently used as an imaging system as well.

KD: What are some of the changes you’ve seen over your time as clerk?

Semonian: The most exciting changes relate to the use of technology.\(^4\) When I began here, everything was done by hand – all records and receipts were manually entered. The case load was different then, and

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\(^1\) Karen L. Day graduated from Mary Washington University and received her Juris Doctor from the Columbus School of Law, The Catholic University of America. Since admission to the Virginia Bar, her practice has focused on residential and commercial real estate related issues, including contracts, title, finance, and settlements. Ms. Day owns Absolute Title & Escrow LLC, located in Alexandria, Virginia.

\(^2\) Edward Semonian has served as Alexandria's Clerk of Court since 1980. He has been a member of the Commission on Virginia Courts in the 21st Century, and as of 2011 was the only Circuit Court Clerk appointed to the Advisory Committee on Rules of Court of the Virginia Supreme Court. Mr. Semonian has participated in the Clerks of the Court Professional Certification Program, is a member of the Virginia Court Clerk's Association and the Virginia Metropolitan Court Clerk's Association.

\(^3\) Franklin P. Backus served as mayor of the City of Alexandria and was appointed to the circuit court bench in 1952 when his term as mayor ended. He helped establish the juvenile court system in Virginia, and served as a judge and senior judge until 1983. The Judicial Center in Alexandria is named in his honor. –Ed.

although not to the same extent as our neighbors in Fairfax, we have faced an increased caseload as a result of development and population growth. In addition, over time we have had to meet additional state-mandated requirements. Despite the increased business in the Clerk’s office, we have needed only a small increase in the number of staff as a direct result of the increased use of technology. I believe Alexandria has added just two positions over the past 25 years without having to sacrifice the quality of service and prompt attention to our customers, which we are proud to be able to provide.

Another significant change occurred in 1982 when the Commonwealth of Virginia began to guarantee the Circuit Court Clerk’s budgets, and the Clerk’s compensation was converted to a salary from a fee-based system. Prior to 1982, court clerks were paid based on the fees collected for the services provided by their office. Our office operations were funded through a budgeting process (in which requests for funding were approved) and a reimbursement process (in which the approved expenses were actually paid). The recession of the early 1980s made it difficult for many clerks’ offices to cover operating expenses. I was keeping the books for the City of Alexandria’s Clerk’s office and wrote all our checks by hand at that time. But due to the economic conditions and resultant decrease in fees being collected by our office, it was quite a challenge on several occasions to find sufficient funds to cover our payroll and operating expenses. I ultimately received back payments from the state, but a few months precluded my ability to cover the office operating expenses and get paid myself. So, the state’s guaranty of the Clerk’s operating funds was a beneficial and quite welcome change during my tenure.

KD: Do you see any downside to the changes over years?

Semonian: Not really. Technology has made many things somewhat easier. What used to be very laborious, still is - but less so.

KD: Do you have predictions for other changes we might see in the future?

Semonian: Electronic filing, as currently takes place in the land records division, will likely move to other sides of the business soon. Currently, we are working to create a system for electronic issuance of criminal orders.

KD: Are there changes would you like to see, either from technology or the legislature?

Semonian: I am a member of the Virginia Court Clerks’ Association (VCCA), a professional organization for all of the 120 Circuit Court Clerks throughout the state. The Code of Virginia lists over 800 responsibilities and duties for the Clerk of the Circuit Court. So, in response to this question, I will defer to the recommendations of the VCCA’s Advisory and Legislative Committees.

There has been much progress in the past 20 years through the Circuit Court Records Preservation Program (CCRP), and there is still more to be done. For articles and specific information on statewide circuit court records preservation efforts and how those records are accessible, refer to both VCCA and the Library of Virginia websites. The City of Alexandria land records are accessible online

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6 For in depth look at the budget-reimbursement system used to fund constitutional offices, see Article IV of the Joint Legislative Audit and Review Commission (JLARC) Report, Funding of Constitutional Officers, published in 1990 as House Bill 81. See also JLARC Report, State Mandates on Local Governments and Local Financial Resources, published December 1983, for informative discussion of financial circumstances of time, increased Virginia mandates and impact of local governments.

7 http://www.vaclerks.org

8 http://www.lva.virginia.gov/agencies/CCRP/
through the AJIS and Virginia’s State Records Management System (RMS) and go back to 1967. We are currently working to get additional records in the system and available for viewing through remote access.

**KD:** Have you seen changes in the relationship between clerks and real estate attorneys?

**Semonian:** The Alexandria Clerk’s Office continues to enjoy good relationships with our Judges and local bar, as well as the City government. What has changed is the way that business is done. The exchange of information has sped up with the availability of online records and services. Although there is still a small group frequently in the land records room, more of my time today is spent on the phone and addressing email communications.

In prior years, the Clerks attended an annual meeting in Charlottesville in order to review legislative and administrative changes. Of course, this required our travelling and being away from our offices. And once we returned from the conference, information we learned would need to be disseminated throughout the office and to staff. Today, updated information is provided to us through periodic Supreme Court sponsored webinars. Typically in Alexandria, the clerks will gather here in the conference room and watch the presentation together. We are able to immediately discuss whether modification to our procedures is necessary and how any change can be best accomplished.

**KD:** What is your favorite part of the job? What is the most challenging aspect of job? Has it changed over time?

**Semonian:** People. People are both my favorite part and the most challenging part of my job. That has not changed over time. I certainly enjoy being able to walk to the office each day and find public service a personally satisfying endeavor.

**Knippenberg:** I do not live close enough to walk to work but when the weather permits I have enjoyed a cross country ski into office. Besides that distinction, my response is largely the same.

**KD:** I appreciate you taking the time to meet with me. It has been an honor speaking with you and on behalf of the real estate section of the VSB, I thank you.
TRAVER SCHOLAR AWARD

[The Traver Award is given annually in March at the Advanced Real Estate Seminar. The recipient is announced and introduced by a Section member who knows the person well and can present the honoree’s accomplishments. The 2016 winner was introduced by Edward Waugaman. Hereewith are his remarks.]

An award given by Virginia Continuing Legal Education, Real Property Section, Virginia Bar Association and the Real Property Section of the Virginia State Bar. It is named for the “father” of Virginia real estate lawyers, Courtland L. Traver, who died March 30, 2014, whose outstanding legal ability and willingness to share his knowledge and experience was an inspiration to others.

The purpose is to honor men and women who embody the highest ideals and expertise in the practice of real estate law and who have made outstanding contributions to the cause of Virginia Continuing legal education.

Previous Award Recipients:

2005 Courtland L. Traver
2006 Joseph W. Richmond, Jr.
2007 C. Grice McMullan, Jr.
2008 Douglas W. Dewing
2009 Susan M. Pesner
2010 Larry J. McElwain
2011 Howard E. Gordon
2012 Lynda L. Butler
2013 Lucia Anna “Pia” Trigiani, David S. Mercer
2014 Edward R. Waugaman
2015 Paula Caplinger
2016 David C. Helscher

DAVID C. HELSCHER

Co-Managing Partner OPN LAW

COLLEGE:
Wake Forest University, B.A. (1969)
Law School Washington & Lee University, J.D. (1972)

ADMISSIONS:
1972, Virginia

MEMBERSHIPS & ASSOCIATIONS:
Roanoke Bar Association
Virginia Bar Association
Virginia State Bar (member 1972 to present)
Chair, Board of Governors, Real Property Section (1985-86)
Area Representative (1986 to present)
VBA Real Estate Council (Chairman, 2005-2006)
Community Association Institute
Attorney for Roanoke Regional Homebuilders Association (1990-Present)
PERSONAL OBSERVATIONS AT PRESENTATION:
Introduced through the Real Property Section of the VSB 1980.

Encouraged many in the pursuit of the Real Property Sections including myself to become the first corporate member of the Board of Governors, serving two terms. Later encouraged me to become the Chair of the Real Estate Council of the Real Estate Section of the Virginia Bar Association.

Loyal supporter of Both the Real Estate Sections over the years taking on various leadership positions serving as Chairperson of both and too numerous committee assignments.

Virginia State Bar (member 1972 to present); Chair, Board of Governors, Real Property Section (1985-86); Area Representative (1986 to present) VBA Real Estate Council (Chairman, 2005-2006)

Contributor to the course of the sections course of growth and development from the early years when often the section were small in members and leadership positions, traveling far a wide to contribute his unique and often humorous style of contributions to the many issues over the years.

A personal friend to all who have known him and an encourager for myself and others.

Respectfully submitted,

Edward R. Waugaman.
Why the change in names from ALTA/ACSM to ALTA/NSPS?

ACSM (the American Congress on Surveying and Mapping) was merged into the National Society of Professional Surveyors (NSPS) several years ago. The successor organization is NSPS. The committees felt that it was appropriate that the name of the new Standards reflect the organizations that developed, adopted, and are responsible for them.

The effective date of the new 2016 ALTA/NSPS Standards is Feb. 23. What about the transition period?

Because the new standards are not effective until Feb. 23, it is suggested that any land title survey being conducted pursuant to a contract that was executed before Feb. 23 be performed to the 2011 Standards. Any contract executed on Feb. 23 or after would have to be performed pursuant to the 2016 Standards. On the other hand, if the contract was executed on a date prior to Feb. 23, but it is obvious to the surveyor that the survey will not be delivered until Feb. 23 or after, it would be logical, although not required, to perform the survey pursuant to the 2016 Standards.

How do I deal with an “update” to a 2011 ALTA/ACSM Land Title Survey?

If the contract to conduct the “update” is executed after Feb. 23, it would have to be performed pursuant to the 2016 Standards. However, if the “update” is simply a follow-up on a survey related to a conveyance that had been anticipated to close before Feb. 23, but was perhaps unexpectedly delayed for a fairly short time until after Feb. 23, the surveyor could probably logically conduct the update pursuant to the 2011 Standards. This logic should not extend to “updates” unrelated to the initial conveyance or updates that take place substantially after Feb. 23.

As an aside, notwithstanding the innocuous-sounding word “update,” an update is actually a new survey. The only difference is that the surveyor happens to have surveyed the property previously, so the client may see a reduced fee or timeframe depending on a number of factors (e.g., how long has it been since the initial survey? And how many changes have affected the property since?).

I see that in Section 4 of the 2016 Standards, there is essentially an acknowledgement that the documents to be provided to the surveyor may not be forthcoming. If they are not, the surveyor need only conduct that research otherwise required by “the statutory or administrative requirements of the jurisdiction where the property being surveyed is located” (or pursuant to the contract). I am from a state that does not have any mandatory standards adopted by its regulatory Board or in its statutes. What responsibility do I have for the research if is not forthcoming?

Where there are no mandated standards, the practice of surveying would typically be defined by the standard of care exercised by competent surveyors working in the same area under similar circumstances and on similar projects. So, a surveyor should be familiar with how other surveyors in his or her area deal with research on land title and boundary surveys and do the same.

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Why is observed evidence of utilities now mandatory on a Land Title Survey pursuant to Section 5.E.iv. rather than optional as it was in Table A item 11(a) of the 2011 Standards?

This change was made to address a conundrum. Pursuant to the 2011 Standards, if a client did not request Table A item 11(a) or 11(b), the surveyor had no responsibility to locate and show evidence of utilities. But if that utility evidence could be considered evidence of an easement, the surveyor did need to locate and show it pursuant to Sections 5.E.i. through iv. The committees felt that most evidence of utilities could also be considered evidence of easements, so to eliminate future problems and questions in that regard, locating and showing observed evidence of utilities was made mandatory for 2016.

The 2016 Standards say the surveyor needs to be provided with the most recent title commitment “or other title evidence satisfactory to the title insurer.” Why not simply require a title commitment?

Title companies have other products that are sometimes requested by clients that fall short of commitments and policies, but that are acceptable to the client. In addition, in some cases, and in at least one state, abstracts are still used on a regular basis. Since the Standards were developed expressly to address title company needs, the standards—starting in 2011—required that title evidence be provided to the surveyor. But sometimes, the title company may accept or produce something less than a title commitment, so the standards need to reflect that fact.

The date of fieldwork is obvious, but what is the date of the plat or map?

That is the date that the survey will be identified by. Many surveyors date the plat or map as of the date they signed it. Others backdate it to the date of the fieldwork. The committees feel this decision is best left to the surveyor.

Former Table A item 18 (Observed evidence of site use as a solid waste dump, sump or sanitary landfill) has been removed. Why?

This item was initially developed as a Table A item prior to the ubiquitous use of Phase One Environmental Assessments in commercial transactions. This is the type of thing that a Phase One ESA was developed to identify. The committees felt that, in light of the near universal use the Phase One ESA, there was no need for the surveyor to look for this sort of evidence. Of course, whether a surveyor not trained in environmental matters would recognize such uses was questionable anyway and clients might have been placing unwarranted faith in this item. In the 2016 Standards, Table A item 8 now asks that the surveyor locate and show observed “substantial areas of refuse.”
AN INTRODUCTION TO THE 2016 MINIMUM STANDARD DETAIL REQUIREMENTS FOR
ALTA/NSPS LAND TITLE SURVEYS*

By Richard F. Bales

And

Marjorie Ramseyer Bardwell

Introduction

The ALTA/NSPS Liaison Committee (consisting of both the American Land Title Association and the National Society of Professional Surveyors) has approved modifications to the 2011 version of the Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys. The new version will be referred to as the 2016 Standards.

These standards will be effective on February 23, 2016. Why was this date chosen? In ancient Roman religion, Terminus was the god who protected boundary markers. The name “Terminus” was the Latin word for a boundary marker. On February 23rd, Roman landowners celebrated a festival called the “Terminalia” in honor of Terminus.

This article is intended to provide a broad overview of those changes to the land title survey standards that will be of the most significance to the title insurance industry and real estate practitioners.

A complete copy of the 2016 Standards can be found at:
http://www.alta.org/forms/download.cfm?formID=338&type=word

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1 Richard F. Bales is employed by Chicago Title Insurance Company as Assistant Regional Counsel and Assistant Vice President. He has worked in the title insurance industry since 1977. He graduated from Illinois College in Jacksonville in 1973. He received his juris doctorate degree from Northern Illinois University (NIU) in 1983 and is admitted to practice law in Illinois. Bales has been a long-standing member of the Real Estate Committee of the DuPage County Bar Association. As a member of the Education Committee of the Illinois Land Title Association, he has lectured throughout the state on all aspects of title insurance. He has also written numerous articles for the Chicago Bar Association, the DuPage County Bar Association, and the Illinois State Bar Association. These articles include “Land Surveyor Liability to Third Parties in Illinois,” which appeared in the March 2007 issue of the Illinois Bar Journal, the peer-reviewed journal of the Illinois State Bar Association. Some of his articles have been reprinted in the book, Land Surveys: A Guide for Lawyers and Other Professionals, which was published by the American Bar Association in 2012. Bales’ book, A Guide to Residential and Commercial Surveys in Illinois, was published by the Illinois Institute for Continuing Legal Education in 2004 and later updated and reissued in 2011. Bales has been a member of an American Land Title Association and American Congress on Surveying and Mapping liaison committee for many years. As a member of this committee, he has helped draft several versions of the national ALTA/ACSM land title survey standards, including the brand new 2016 version.

2 Marjorie Ramseyer Bardwell is Vice President and Director -Underwriting Services for the Fidelity National Title Group, Inc. which includes Chicago Title, Fidelity National Title, Alamo Title, and Commonwealth Land Title Insurance companies. A 1976 graduate of Marquette University Law School and a member of the Wisconsin State Bar, the Illinois State Bar and the American Bar Association, she has spent over 39 years in the title industry. She is currently Co-Vice Chair of the Membership Committee and past Chair of the Residential, Multi-Family and Special Use Group of the Real Property, Trust and Estates Section of the ABA, author of the ABA’s web-based training module on the 2006 ALTA Policies and a frequent speaker on title insurance and real estate related topics.

ALTA also has a “frequently asked questions” page about the 2011 Standards at:
http://www.alta.org/forms/downloadSub.cfm?formSubID=4&type=word

It is suggested that you print out a copy and follow along as the sections are discussed below:

**Section 5 Fieldwork**

Section 5 of the 2016 Standards generally concerns the fieldwork of the surveyor.

**Section 5.B.ii. Rights of Way and Access**

Section 5.B.ii. of the 2011 Standards imposed a duty on the surveyor to show the “width and location of the traveled way.” Under the 2016 Standards, this amended section now requires the land surveyor to also show “the location of each edge of the traveled way” unless there is no access from the land to said traveled way. In addition, the 2016 Standards include a reference to divided streets and highways.

The term “traveled way” is a term of art, used in many court decisions. It has been defined as “the portion of the roadway used for movement of through traffic.”

In other words, although a plat of a residential subdivision may indicate that the dedicated roads have a width of 50 feet, the distance from one edge of the surface of the asphalt to the opposite edge of the asphalt may be only 29 feet. The land surveyor will have to show both widths—the width of the dedicated road and also the width of the asphalt—on the plat of survey.

This additional information should be helpful to those trying to determine access to a particular parcel of land, including curb cuts.

Section 5.B.ii. of the 2016 Standards is as follows. The italicized words are new.

The name of any street, highway or other public or private way abutting the surveyed property, together with the width of the traveled way and the location of each edge of the traveled way including on divided streets and highways. If the documents provided to or obtained by the surveyor pursuant to Section 4 indicate no access from the surveyed property to the abutting street or highway, the width and location of the traveled way need not be located.

**Section 5.C.ii. - Improvements Located Along the Boundary Line**

The land title survey standards have traditionally required the surveyor to show the nature of the improvements on the land within five feet of each side of the boundary line of the property. Section 5.C.ii. of the 2016 Standards now includes a caveat, stating that the surveyor will show these improvements “unless physical access is restricted” by neighbors or physical impediments. Also, the drafters wanted to make it clear that generally speaking, the surveyor did not have to show trees and bushes on the plat of survey unless the vegetation represented evidence of possession, such as a tree line.

**Section 5E. - Utilities v. Easements**

Section 5.E. of the 2011 Standards imposed a duty on the surveyor to show observable evidence of utility easements. Item 11 of the optional Table A of the 2011 Standards, on the other hand, gave the surveyor the option of showing evidence of utilities on the plat of survey. This fine-line distinction resulted in at least one court proceeding where the surveyor was held liable for failing to show evidence of a utility on his plat of survey. This surveyor thought that he didn’t have to show evidence of utilities on his survey
because item 11 of Table A was not checked off, but the court felt otherwise. Section 5.E. of the 2011 Standards refers to utility *easements*, and item 11 of Table A of the 2011 Standards refers simply to *utilities*.

This distinction has been eliminated in the 2016 Standards. The surveyor should show all observable evidence of *both easements and utilities* on his plat of survey. Section 5.E. of the 2016 Standards requires this. (Table A of the 2016 Standards is discussed later.)

**Section 5.G.i. - Water Features**

Previously the Standards provided that the location of springs, ponds, lakes, streams and rivers bordering or running through the property had to be shown.

The surveyor now has the obligation to show those and, in addition, *canals, ditches, marshes and swamps* if any are “running through, or *outside*, but within five feet of the perimeter boundary of the surveyed property” [emphasis added].

**Section 6.A. - Notes**

Section 6 begins by stating that the plat or map “shall show the following information.” In Section 6.A. of the 2011 Standards, the surveyor merely had to show “the evidence and locations gathered during the field work as outlined in Section 5 above.” This concept is now greatly expanded in the 2016 Standards; Section 6.A. encourages the surveyor to include notes on the plat of survey.

The text of Section 6.A. appears below; the italicized words are new.

> The evidence and locations gathered, and the monuments and lines located during the fieldwork pursuant to Section 5 above, with accompanying notes if deemed necessary by the surveyor or as otherwise required as specified below.

**Section 6.B.ii. - A New Legal Description**

As property gets combined and re-divided, the customer often thinks it would be easier to get a new perimeter description rather than the historical descriptions. The “Section---except __, except____, except ____“ is often the best description because under most state law, if drafted correctly, it cannot cause an overlap. The title company may have difficulty insuring a new description depending upon how it has been monumented to neighboring descriptions, the historical descriptions of surrounding parcels and the state law determining requirements for the use of historical descriptions, not to mention the tax assessors or other subdivision laws.

If the surveyor prepares a new legal description that is not an original description, the surveyor under the 2016 Standards now **must** include a note stating that the new description describes the same real estate as the record description, or if it does not, then the surveyor has to explain how the new description differs from the record description. This section cautions the surveyor that the “*preparation of a new legal description should be avoided unless deemed necessary or appropriate by the surveyor and insurer.*”

**Section 6.B.vii. - Gaps and Overlaps**

This section has been amended to make it clear that the surveyor is not responsible for determining how to resolve the problem of gaps or overlaps between land parcels. See below; the italicized words are new to the 2016 Standards. The lined out words appeared in the 2011 Standards but have been omitted from the 2016 Standards.
Where gaps or overlaps are identified, the surveyor shall, prior to or upon delivery of the final plat or map, disclose this to the insurer and client for determination of a course of action concerning junior/senior rights.

Section 6.B.xi. - Restricted Access

As noted above, Section 5.C.ii. of the 2016 Standards requires the surveyor to show “the character and location of all walls, buildings, fences, and other improvements within five feet of each side of the boundary lines,” unless physical access is restricted. This concept is then carried forward to new paragraph 6.B.xi., requiring the surveyor to indicate such restricted lands on the survey.

The text of paragraph 6.B.xi. reads as follows:

A note on the face of the plat or map identifying areas, if any, on the boundaries of the surveyed property, to which physical access within five feet was restricted (See Section 5.C.ii.).

Section 6.C.ii. - A Summary of Rights of Way, Easements, and Servitudes

Section 6 of the 2016 Standards is prefaced by the words, “A plat or map of an ALTA/NSPS Land Title Survey shall show the following information.” Section 6.C.ii. has been substantially amended. Note that the section is now in a list format. See below; the italicized words are new to the 2016 Standards:

A summary of all rights of way, easements and servitudes burdening the property surveyed and identified in the title evidence provided to or obtained by the surveyor pursuant to Section 4. Such summary shall include the record information of each such right of way, easement or servitude, a statement indicating whether or not it is shown on the plat or map, and a related note if:
(a) the location cannot be determined from the record document;
(b) there was no observed evidence at the time of the fieldwork;
(c) it is a blanket easement;
(d) it is not on, or does not touch, the surveyed property;
(e) it limits access to an otherwise abutting right of way;
(f) the documents are illegible; or
(g) the surveyor has information indicating that it may have been released or otherwise terminated.
In cases where the surveyed property is composed of multiple parcels, indicate which of such parcels the various rights of way, easements, and servitudes cross or touch.

Section 6.D. - Presentation

Section 6.D. concerns the format of the plat of survey such as size and legibility. The committee added two new items to this section; these new additions encourage the surveyor to add explanatory notes or supplemental diagrams to his plat of survey:

6.D.ii. The plat or map shall include:...
(f) Supplementary or detail diagrams when necessary.
(g) Notes explaining any modifications to Table A items and the nature of any additional Table A items (e.g., 21(a), 21(b), 21(c)) that were negotiated between the surveyor and client.
Table A

Table A is the list of “Optional Survey Responsibilities and Specifications.” This is where the customer indicates what it needs the survey to include to comply with possible title insurance company underwriting for survey based coverages, including zoning. Those readers that deal with HUD or other governmental programs should familiarize themselves with any specific survey requirements of that or any other lender. Of these survey additions, Item 6 of Table A is by far the most important change that affects the title company.

**Item 6, Table A - Zoning**

Item 6 in the old 2011 Standards referred to the “current zoning classification, as provided by the insurer.” These highlighted words proved to be problematic to title companies, who, citing liability concerns, were reluctant to furnish this information.

**Item 6, Table A, 2011 Standards**

(a) Current zoning classification, as provided by the insurer.

(b) Current zoning classification and building setback requirements, height and floor space area restrictions as set forth in that classification, as provided by the insurer. If none, so state.

Accordingly, paragraph (a) has been rewritten so that the title company does not furnish the zoning information. Furthermore, the surveyor is not responsible for obtaining the information, either. Rather, the client has to furnish the surveyor the zoning information. In addition, the surveyor has the option of listing the setback requirements.

Title company reluctance and concern was an issue in both paragraph (a) and paragraph (b) of the 2011 Standards. But there was also a bigger issue that concerned paragraph (b) which required the surveyor to show the setback requirements in the zoning classification. Note that when the committee originally wrote paragraph (b), it failed to state how the building setback information should be shown on the plat of survey. Should the building setback information be shown on the plat of survey as a written statement, word for word, directly as it is written in the zoning ordinance? Or should the information be shown graphically on the plat of survey? The 2011 Standards, regretfully, offered no guidance.

In the last few years, surveyors have been getting increased pressure from lenders to show building setback information graphically on their plats of survey. Unfortunately, this information is not always easy to decipher. The information is sometimes subject to interpretation. It is easy when the surveyor only has to recite the setback information, word for word, on the plat of survey. But it can sometimes be difficult for the surveyor to take this information and graphically show it on his plat of survey. What if the surveyor makes a mistake, a mistake due solely to a misinterpretation of an ambiguous setback provision in a zoning ordinance?

The committee was faced with two directives—it had to somehow rewrite paragraph (b) so that the surveyor would be charged with graphically depicting the building setback information on the plat of survey. But it also had to protect the surveyor from the consequences of being instructed to graphically depict ambiguous information.

Paragraph (b) of Item 6 of the 2016 Standards accomplishes both objectives, as shown below. The client has to furnish the surveyor the zoning information. But in addition, Item 6 protects the surveyor. Per paragraph (b), the surveyor must graphically depict the building setback. However, the surveyor must do this, only if the setback requirements “do not require an interpretation by the surveyor.” (See the italicized words below of Item 6 of the 2016 Standards.)
Again, note that in paragraph (a) the surveyor “lists” the zoning setback requirements, but in paragraph (b) the surveyor “graphically depicts” the zoning setback requirements. This is an important distinction for the land surveyor. If the surveyor feels that he cannot graphically depict the setback requirements pursuant to paragraph (b), perhaps he can offer to list them pursuant to paragraph (a).

Item 6, Table A, 2016 Standards

(a) If set forth in a zoning report or letter provided to the surveyor by the client, list the current zoning classification, setback requirements, the height and floor space area restrictions, and parking requirements. Identify the date and source of the report or letter.

(b) If the zoning setback requirements are set forth in a zoning report or letter provided to the surveyor by the client, and if those requirements do not require an interpretation by the surveyor, graphically depict the building setback requirements. Identify the date and source of the report or letter.

Item 9, Table A- Parking Spaces

This item, concerning “parking spaces,” has been clarified. The surveyor now has two duties. One, to set forth the number and type of parking spaces “on surface parking areas, lots and in parking structures.”

And two, to set forth the striping of “clearly identifiable” parking spaces on “surface parking areas and lots.”

The complete text of Item 9 of the 2016 Standards reads as follows:

Number and type (e.g. disabled, motorcycle, regular and other marked specialized types) of clearly identifiable parking spaces on surface parking areas, lots and in parking structures. Striping of clearly identifiable parking spaces on surface parking areas and lots.

Item 11, Table A - Easements

As noted above, section 5.E. of the 2011 Standards imposed a duty on the surveyor to show observable evidence of utility easements. Item 11 of Table A of the 2011 Standards, on the other hand, required the surveyor to show evidence of utilities.

But this issue has now been clarified with the 2016 Standards. Paragraph 5.E.iv. of the 2016 Standards requires the surveyor to show “evidence on or above the surface of the surveyed property observed in the process of conducting the fieldwork, which evidence may indicate utilities located on, over or beneath the surveyed property.”

Item 11 of Table A now expands this requirement. Under Item 11, the surveyor is required to show not only observed evidence of utilities, “existing on or serving the surveyed property,” but also other evidence of utilities, as noted on utility company plans or as noted by utility locating companies that many utility companies use. Note that under Item 11, the surveyor has the obligation to call the utility locating company.

Summary of Section 5.E.iv. and Item 11 of Table A

- Section 5.E.iv. of the 2016 Standards requires the surveyor to disclose observed evidence of utilities on or above the surface of the surveyed property.
Item 11 of Table A of the 2016 Standards requires the surveyor to disclose observed evidence of utilities on the surveyed property and also observed evidence of utilities serving the surveyed property. Under Item 11 of Table A of the 2016 Standards, the surveyor also has to disclose evidence of utilities on or serving the surveyed property, as disclosed by utility company plans and a utility locating company.

Pursuant to Item 11 of Table A of the 2016 Standards, the surveyor has the duty to call the utility locating company. But the final note of Item 11 points out that if the locating company ignores the surveyor, or performs an incomplete locating job, the surveyor shall indicate on the plat of survey how this inadequate response affected the surveyor’s assessment of the location of the utilities.

Item 13, Table A - Names of Adjoining Owners

Item 13 of the 2011 Standards required the surveyor to show the “names of adjoining owners of platted lands according to current public records.”

But this would require the surveyor to either perform a title search or have a title company perform the search, and so Item 13 has been changed to the “names of adjoining owners according to current tax records.” The 2011 Standards referred to the “names of adjoining owners of platted lands.” This has been expanded in the 2016 Standards to the “names of adjoining owners” platted or otherwise.

Item 18, Table A - Wetlands

The term ‘wetlands” is a term of art. The wetlands instructions to the surveyor in the 2011 Standards were somewhat vague, and so the committee revised this item to more clearly define the role of the surveyor. For example:

- The client has to hire a qualified specialist.
- The surveyor does not have to look for cattails and bull rushes or other vegetation that he feels is suggestive of a wetland. Rather, the surveyor’s obligation is to merely locate observed “delineation markers.”
- If there are no such markers, the surveyor should state this on his plat of survey.

The text of Item 18 of the 2016 Standards reads as follows:

*If there has been a field delineation of wetlands conducted by a qualified specialist hired by the client, the surveyor shall locate any delineation markers observed in the process of conducting the fieldwork and show them on the face of the plat or map. If no markers were observed, the surveyor shall so state.*

Item 19, Table A - Off-Site Easements

The 2011 standards introduced what was then Item 20—the request of the surveyor to survey off-site easements benefiting the land.

Example: If the land being sold in 2012 was lot 1, and lot 1 had no direct access, but an access easement was created 15 years earlier over the west 10 feet of lot 2, the surveyor might have been asked in 2012 to survey lot 1 and also the west 10 feet of lot 2. The surveyor might even have been asked in 2012 to place monuments at the major corners of the easement parcel.
This item (now Item 19 in the 2016 Standards) has been refined in the following ways:

- The easement is now further defined as being “appurtenant,” or benefiting, the fee simple land being surveyed.

- The easement is to be surveyed in the same manner as the fee simple land being otherwise surveyed.

- The option to place monuments at the major corners of the easement parcel has been deleted from the 2016 Standards. This was an unfortunate addition to the 2011 Standards. This option was deleted because a surveyor who has not been hired by the fee simple owner of the servient easement parcel should not be placing monuments at the lot corners of the easement parcel.

**Item 20, Table A - Liability Insurance**

The 2011 Standards introduced a new concept—the option of the surveyor obtaining a professional liability insurance policy. This option has been carried forward as Item 20 of the 2016 Standards, but with an added statement.

Item 20, Table A, of the 2016 Standards appears below. The “added statement” that is referred to above appears in italics.

> Professional Liability Insurance policy obtained by the surveyor in the minimum amount of $____________ to be in effect throughout the contract term. Certificate of Insurance to be furnished upon request, but this item shall not be addressed on the face of the plat or map.

**Conclusion**

There are dozens of other changes and clarifications to the new *Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys*. Those changes described above should be some of the most relevant to parties to the transaction and the title insurance industry. We encourage you to review the new standards before you celebrate *Terminalia* on February 23, 2016!
Welcome to the Wild, Wild West: How Koontz Has Helped Land Developers Fight Back Against Lawlessness.

Part 2 of Series*

by Joshua M. Johnson**

Due to deferential common law standards of review for legislative action in land use cases, localities operate in a vacuum of wide discretion.

If developers feel they are being extorted, why don’t they sue?¹ This question is more complex than it appears. On the one hand, courts afford great deference to local governments when they make legislative decisions involving land-use.² If a developer sues a local legislature, the developer, in order to win, must show that the legislative action was both “arbitrary and unreasonable”³ and that it was not “fairly debatable.”⁴ This very high hurdle acts as a deterrent or even a barrier to court action.

On the other hand, the discretion vested in the local government is dependent upon the application of the developer. A developer with a “by–right” proposal is in a stronger position than one requesting a rezoning or a special use permit because rezoning requires a discretionary legislative change, and a special use requires a discretionary permit.⁵ If a local government has discretionary authority, it is likely to win any court challenge.

It is difficult to discern if a condition is within the scope of discretionary local power. Unless there are some other restrictions on a local government’s ability to impose conditions, developers will always face the choice of “pay to play” or “roll the dice.”

Regulating the Relationship Between Developers and Local Governments

In Koontz, the Court primarily relied on Nollan v. Cal. Coastal Commission⁶ and Dolan v. City of Tigard⁷ as the foundations for its decision. The Koontz majority held that the doctrine of unconstitutional conditions, as recognized in Nollan and Dolan, protected the right to just compensation for a taking under

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* Parts 2 and 3 have been combined to reflect the significant timing of Virginia Senate Bill No. 549, legislation that drastically modifies the ability of local governments to extract monetary proffers (read, “exactions”) for conditional re-zoning applications related to new residential developments.

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¹ Obviously some do, but land-use suits are much less common than in other areas of the law.

² See Euclid, 272 U.S. at 388. The same case that established the local government’s ability to zone also establishes the “fairly debatable” standard of review for legislative land-use decisions: “If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”

³ See Euclid, 272 U.S. at 395.

⁴ Id.


the Fifth Amendment. The unconstitutional conditions doctrine applies in many other legal contexts, and simply states that “the government may not deny a benefit to a person because he exercises a constitutional right.”

A brief overview of these cases will show how this principle effortlessly applies to the land-use context as a restraint on the vast discretionary powers of government.

THERE MUST BE AN ESSENTIAL NEXUS BETWEEN THE CONDITION IMPOSED AND THE PURPOSE OF THE INITIAL GOVERNMENT RESTRICTION

In Nollan, the California Coastal Commission (“Commission”) refused to grant a permit to the owners of beachfront property unless they allowed a public easement across their property. The Commission wanted to create a public right-of-way for public beach-goers to walk from one public beach across the Nollan’s property to another public beach without the need to cross the street. The Commission insisted the easement was necessary because the Nollan’s proposed construction would contribute to “a ‘wall’ of residential structures’ that would prevent the public ‘psychologically ... from realizing a stretch of coastline exists nearby that they have every right to visit.’” Further, the Commission noted that it had imposed such a condition on 43 similar developments.

Justice Scalia’s majority opinion stated Nollan was a case of first impression “because the point is so obvious.” An easement is more than a mere restriction on . . . use[,] were it not attached as a condition, it would surely be a taking. By making the easement a condition precedent to granting a land-

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8 See Koontz, 133 S. Ct. at 2594.
9 Regan v. Taxation With Representation of Wash., 461 U.S. 540, 545 (1983); see also Scott Woodward, The Remedy For A “Nollan/Dolan Unconstitutional Conditions Violation,” 38 VT. L. REV. 701 at FN 1 (2014) (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972): For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . .).
10 See id. If a governing body cannot violate an individual’s First and Fourteenth Amendment rights through a discretionary benefit condition, why would it be permissible for a local government to violate someone’s Fifth Amendment right with a similar discretionary benefit condition? See also Speiser v. Randall, 357 U.S. 513 (1958) (reversing a lower court decision demanding a “loyalty oath” prior to the receipt of tax exemptions).
12 Id. at 827. An easement is one of several appropriate instances where the government may exercise its powers of eminent domain, allowing the government or its authorized agent to take private property and put it to public use; however, the government must compensate the owners for their property. See U.S. CONST. amend. V, cl. 4.
13 Id. at 829, (stating that the Nollan’s proposed construction would “‘burden the public’s ability to traverse to and along the shorefront.’”).
14 Id. at 828-29.
15 Id. at 829 (an example of the “This is the way things work” argument).
16 Id. at 831.
17 Id. (quoting Justice Brennan in dissent).
18 Id.
use permit, the Commission attempted to circumvent the just-compensation afforded by the Takings Clause.\textsuperscript{19}

The Court held that an “essential nexus” must exist between the condition imposed and the original purpose of the restriction; otherwise the condition is “out and out extortion” and invites a takings claim.\textsuperscript{20} A government may not simply impose as a condition the grant of an easement across private property; as Justice Scalia stated, “it must pay for it.”\textsuperscript{21}

**IF THERE IS AN ESSENTIAL NEXUS BETWEEN THE CONDITION IMPOSED AND THE PURPOSE OF THE RESTRICTION THEN THE CONDITION MUST BE ROUGHLY PROPORTIONATE TO THE PROPOSED IMPACT.**

\textit{Dolan} may be considered the companion case to \textit{Nollan}.\textsuperscript{22} In this case, the property owner applied for a permit to build an expansion to her hardware business (located on a parcel with extensive undevelopable land).\textsuperscript{23} The local planning commission demanded the property owners dedicate an easement for a public pedestrian/bicycle path as a condition for approval.\textsuperscript{24} After a variance from the condition was denied, the owner appealed to the local Land Use Board of Appeals, claiming the dedication requirement was an uncompensated taking because the “requirements were not related to the proposed development.”\textsuperscript{25} After appealing and losing in the Oregon state courts, the U.S. Supreme Court granted certiorari in order to clarify the “alleged conflict between the Oregon Supreme Court’s decision and [the United States Supreme Court’s] decision in \textit{Nollan}.”\textsuperscript{26} As in Nolan, if the city had “simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred.”\textsuperscript{27}

Unlike in \textit{Nollan}, the Court held that an essential nexus \textit{did} exist between the condition and the original land use restriction.\textsuperscript{28} The Court held that the essential nexus test alone was not enough to determine the constitutionality of a condition, and created a new standard to determine the “degree of connection.”\textsuperscript{29} They enunciated a “rough proportionality” test in order to determine the scope within

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\textsuperscript{19} \textit{Id.} at 837, 41.  \\
\textsuperscript{20} \textit{Id.} at 837 (quoting J.E.D. Associates, Inc. v. Atkinson, 121 N.H. 581, 584 (1981)).  \\
\textsuperscript{21} \textit{Id.} at 842.  \\
\textsuperscript{22} \textit{See} Dolan v. City of Tigard, 512 U.S. 374, 377 (1994) (hearing the case “to resolve a question left open by our decision in \textit{Nollan v. California Coastal Comm’n}, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.”).  \\
\textsuperscript{23} \textit{Id.} at 379.  \\
\textsuperscript{24} \textit{Id.} at 379, 80.  \\
\textsuperscript{25} \textit{Id.} at 382.  \\
\textsuperscript{26} \textit{Id.} at 383. The Oregon Supreme Court interpreted the holding as an “exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve.” In a later case, \textit{Lingle v. Chevron U.S.A. Inc.}, 125 S.Ct. 2074 (2005), the U.S. Supreme Court would revisit this question and strip the “reasonably related” language from both \textit{Nollan} and \textit{Dolan}.  \\
\textsuperscript{27} \textit{Id.} at 384.  \\
\textsuperscript{28} \textit{Id.} at 387-88.  \\
\textsuperscript{29} \textit{Id.} at 388-91 (The Court looked to different state common law in order to find an appropriate intermediate degree of connection). The Nollan test was never enough to reign in any form of conditioning. Under the Nollan test, by itself, a locality might tell a landowner that in order to gain approval for a development that would impact a small protected tidal basin area (for example) the
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which the condition could legitimately be imposed. This addition to the Nollan test asks whether the imposed condition “bear[s] the required relationship to the projected impact of ... [the] proposed development.”

The Dolan decision added to the essential nexus test by creating the two-step Nollan-Dolan Test. The Nollan-Dolan Test provides a formula to determine whether a condition placed on real property is unconstitutional, essentially stating that if a condition would otherwise be a taking (such as conditioning the discretionary approval of a building permit on the owner’s grant of an easement), it must be directly related to the legitimate purpose of the initial restriction. Further, even if there is an essential nexus, the condition must be roughly proportional to the impact of the proposed land use.

The Nollan-Dolan Test was easily applicable if a physical condition was placed on real property (such as an easement), but it was not at all clear if a monetary condition could be regulated under the same scheme. This was the primary question facing the Supreme Court in Koontz.

PROTECTING PRIVATE PROPERTY RIGHTS AGAINST MONETARY CONDITIONS

Coy Koontz owned a parcel of land in Florida. In order to develop a portion of his land, Mr. Koontz applied for building permits from the St. Johns River Water Management District (“District”), a state body charged with overseeing certain protected wetlands in the state. Mr. Koontz offered to deed nearly three quarters of his property to the District as a means of mitigating the environmental impact of his development. The District refused Mr. Koontz’ terms and offered to grant the permit on the condition that he accept one of two District proposed concessions. The first option required him to reduce the size of the proposed development to 1 acre by installing expensive retaining walls and a subsurface storm water management system, and deed the remainder of the property (totaling 13.9 acres) to the District as a conservation easement. His second option was to hire contractors either to replace off-site culverts or fill in off-site ditches, which would improve around 50 acres of public wetlands located several miles away from his property. Mr. Koontz filed suit in Florida State Court, claiming that under landowner must pay to protect a tidal basin area much larger than the one impacted here. The Nollan test is incomplete—merely a test as to “type” but not “scope.”

30 Compare Pioneer Trust & Savings Bank v. Mount Prospect, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961) (“specific and uniquely attributable” test developed by the Supreme Court of Illinois; determined to be too strict by the U.S. Supreme Court), with Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964); Jenad, Inc. v. Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966) (using “very generalized statements” to determine a connection; determined to be too lenient for the Court’s purposes in the instant case). In Dolan, the Supreme Court chose a middle ground between these two decisions.

31 Id. at 388.
32 Id. at 386.
33 See e.g. Koontz, 133 S.Ct. at 2595.
34 The property was owned by Coy Koontz Sr. who also brought the initial state suit. Mr. Koontz passed away in 2000, and the property as well as the continuing litigation passed to his son, Coy Koontz Jr.
35 See Koontz, 133 S.Ct. at 2592 (The St. Johns River Water Management District was one of five water management districts authorized by Florida’s Water Resources Act of 1972.).
36 Id. at 2592-593.
37 Id. at 2593.
38 Id.
state law, the District’s actions amounted to a taking without just compensation. On the merits, both the Circuit Court and the Appellate Court ruled against the District, holding the District’s actions failed to satisfy the Nollan and Dolan requirements. The Florida Supreme Court reversed the lower court, holding that, unlike in Nollan and Dolan, (1) in this case the permit application was denied, and (2) demands for money did not warrant a takings claim. On appeal to the U.S. Supreme Court, Justice Alito, writing for the majority, reversed the decision of the Florida Supreme Court.

**UNCONSTITUTIONAL CONDITIONS AND EXTORTIONATE DEMANDS**

The Supreme Court ruled that the District placed an unconstitutional condition on Coy Koontz. The Court regarded the activity of the St. John’s Water Management District in this case as clearly parallel to the situations faced by the landowners in Nollan and Dolan:

[L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner’s deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation.

The District could have told Mr. Koontz that it was going to confiscate his lands as an exercise of its eminent domain power, but it would have had to pay fair market value for the property. By conditioning approval of Mr. Koontz land-use permit on him giving his private property to the District, the District tried to avoid paying for the property.

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39 Id. Fla. Stat. § 373.617(2) authorized “monetary damages” for uncompensated takings. There is some question about the timing of the suit.

40 Id. The Florida Circuit Court initially granted the District’s motion to dismiss, ruling Mr. Koontz had not exhausted all of his administrative remedies, but the Court of Appeals reversed the trial on the merits occurred on remand.

41 The off-site mitigation requirements had no “essential nexus” (Nollan) and was not “roughly proportional” (Dolan) to the development’s environmental impact. Koontz, 133 S.Ct. at 2593. The portion he wanted to develop was already seriously degraded due to the impact of other surrounding properties.

42 Id. at 2593-594.

43 Id. at 2603.

44 See Koontz, 133 S.Ct. at 2594. The Supreme Court provided two cases where this doctrine was applied in vastly different factual contexts: Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)(where a public college violated a professor’s freedom of speech by declining to renew his contract based on his criticism of the college administration) and Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974)(where the government burdened the right of sick people to travel through selective extension of healthcare).

45 Id. (citing Dolan, 512 U.S., at 384; and Nollan, 483 U.S., at 831).

46 See U.S. CONST. amend. V, cl. 4. (“[N]or shall private property be taken for public use, without just compensation.” The inverse implies the government may take your private property as long as it is for a public use and they pay just compensation.).

47 See id. at 2595, 598–99. This point was not controversial, and as the Court notes, it would be “untenable” if the government were allowed to withhold a benefit from someone because they were exercising a Constitutional right.
The Court explained the business principles underlying the decisions with which developers are faced when presented with “accept or sue” options:

So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government’s demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.48

“Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”49

**MONETARY EXACTIONS**

Critics of Alito’s decision focus on the application of the Nollan-Dolan Test to monetary exactions.50 The majority relied on the 2003 case *Brown v. Legal Foundation of Washington*51 to lay a foundation for monetary takings and to distinguish between monetary exactions and user fees/taxes.52 In *Brown*, the Supreme Court ruled that the Penn Central test should not be used to determine whether a statutory confiscation of money is a taking.53

Since 1980, by an Act of Congress, banks are authorized to hold their lawyer client’s trust funds in interest bearing accounts.54 The interest accrued in these accounts is withdrawn from the trust account and deposited into the accounts of charitable organization that provide indigent legal representation.55 The Washington Supreme Court established its state’s IOLTA program in 1984, and heard arguments for and against it for over two years.56 In its opinion, the Court addressed the objection that this new rule constituted an uncompensated taking, stating the IOLTA “program creates income where there had been none before.”57

The petitioners in this case were clients of a real estate professional who required them to deposit funds in an IOLTA account.58 They alleged, despite the Washington court’s opinion, that this transfer was

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48 *Id.* at 2595.
49 *Id.* at 2596.
50 See *Koontz*, 133 S.Ct. at 2598–603. This is Section III of the opinion.
54 *Id.* at 221.
55 *Id.* at 222, 23.
56 *Id.* citing IOLTA Adoption Order, 102 Wash.2d 1101. This opinion amended the Washington Rules of Professional Conduct.
57 *Id.* at 226 citing IOLTA Adoption Order, 102 Wash.2d at 1104.
58 *Id.* at 220, 28. (*IOLTA* is an acronym which stands for Interest On Lawyers’ Trust Accounts. The original action sought an injunction from Washington state officials’ requirement that Limited Practice Officers (licensed non-attorneys acting as escrowees in real estate closings) deposit trust funds into IOLTA accounts).
an unconstitutional taking. The Supreme Court cited a 9th Circuit opinion which determined that the interest in an IOLTA account is the property of the client, and the government appropriation of that interest for a public purpose is a compensable taking; however, the remedy was dependent on the circumstances. The Court noted that the requirement to deposit in an IOLTA account could be considered a regulatory taking subject to the Penn Central test, but because there was no "confiscation of any interest" in this case, there could be no taking. The Supreme Court honed in on the second aspect of the IOLTA requirement, the confiscation and public use of earned interest by the state, holding that it was more like a permanent occupation—a per se taking. Reaffirming that "the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain," the Court nevertheless held that the state use of the interest earned in an IOLTA account was not a compensable taking because the "just compensation" owed to the plaintiffs would be "nil.

Although the Supreme Court ruled the state confiscation of IOLTA account interest was a taking, it did not violate the Takings Clause of the Fifth Amendment because it was not compensable; however, this confirms the willingness of the Court to view money as property that is subject to a government taking.

The Court, in Koontz, ruled that the Nollan-Dolan test must be satisfied even if the request is for money, as long as there is a substantial link from the money to an "identifiable property interest."

CRITICS CONCERNS

Most of the publications addressing the Koontz decision have taken a very negative, and sometimes incredibly harsh, stance on its holding. There are three main arguments: (1) this decision will have a chilling effect on government/developer negotiations; (2) this holding is inconsistent with precedent; and (3) there is no appropriate remedy for a Koontz taking.

WILL THERE REALLY BE A CHILLING EFFECT?

It is hard to follow the argument that if local government cannot ask for monetary exactions that do not pass the Nollan-Dolan Test, then they will be unlikely to negotiate with developers. Local governments don’t have to be "one-trick ponies" that must extort money from developers in order to

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59 Id. at 225, 26. The opinion of the Washington Supreme Court was not a “ruling” in a case, it was an explanatory opinion issued with the amendment to the Rules of Professional Conduct.

60 Id. at 230, 31 (citing Washington Legal Foundation v. Legal Foundation of Washington, 236 F.3d 1097, 1115 (2001)).

61 Id. at 234.

62 Id. at 235; see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

63 Id. at 240. As the dissent points out, this interpretation of just compensation runs afool of the rule that just compensation equals fair market value. Id. (Scalia J. dissenting).

64 Koontz, 133 S. Ct. at 2603 (stating holding of case). This holding limits a monetary exaction taking to one that burdens an identifiable real property right.

function. This is a surprising argument coming from a group that is more likely to characterize a locality/developer negotiation as a discussion between Captain Planet and Looten Plunder, respectively. Of course this characterization is nonsense, and there are myriad instances where the localities are about as benevolent as Mr. Henry F. Potter. Unfortunately, most city/county attorneys will advise the local governments to ignore this ruling, and proceed with business as usual. One reason for this arrogance is that most local governments participate in a legal fund pool where legal costs are covered win or lose. These municipal legal pools are funded by local governments on an annual basis. Another reason local governments feel safe is that time is always on their side. Zoning ordinances and state statutes proscribe time limits for development approval. Notwithstanding the statutory deadlines, lawsuits can be incredibly time consuming and doubly expensive for a private party.

The dissent relies too heavily on an irrelevant precedent. Of the two main cases dealing with monetary takings cited in Koontz, Justice Kagan relied on the one less applicable to this case. It may seem like a digression to expound so much on the background of this case, but a detailed understanding of the facts is key to understanding why it is so out of place in the Koontz decision.

Eastern Enterprises, a coal mining company, signed agreements with labor unions in the 1940’s, 50’s, and 60’s that created benefit funds for the miners. As part of the agreements, trustees were charged with distributing funds according to the amount of money held in the funds at the time. Each of the agreements applied, individually, to the coal miners who retired during the specific years of the relevant agreement, and there were no provisions to “grandfather” in older retirees that were receiving benefits under a prior agreement. The evolving agreements created financial difficulty for several coal companies, including Eastern Enterprises, who sold their coal mining operations. Because of the continued benefits issues the multiple agreements created, Congress acted in 1992 to unify those agreements. In passing the Coal Act, Congress sought “to identify persons most responsible for [1950 and 1974 Benefit Plan] liabilities in order to stabilize plan funding and allow for the provision of health care benefits to . . . retirees.” With the authority granted by the Coal Act, the Commissioner of Social Security assigned

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67 See Captain Planet season 1, episode 13, at 2:15 and 15:00. (Looten Plunder dams an African river and installs a large hydroelectric power plant, cutting off water supplies to the villages. Gaia warns that only carefully engineered dams are beneficial. The villagers soon realize that Plunder's electricity is not a fair trade for the food and water that the river provided. With their crops dying and thirst-crazed elephants on the rampage, they enlist the help of the Planeteers to stop Plunder's scheme. The Planeteers then build a wisely placed dam to balance proper river flow with electrification of the village.) (available at https://www.youtube.com/watch?v=rvDEnH_I85M.)


69 Not only the attorney’s fees, but also the economic cost of the development delay (or economic waste).


72 Id. at 514(citing § 19142(a)(2), 106 Stat. 3037, note following 26 U.S.C. § 9701); see also 138 Cong. Rec. 34001 (1992) (Conference Report on Coal Act) (explaining that, under the Coal Act, “those companies which employed the retirees in question, and thereby benefitted from their services, will be
liability for the benefits of one thousand retirees to Eastern Enterprises. The company rejected this
assignment, claiming, among other things, this constituted an uncompensated taking contrary to the Fifth
Amendment. Eastern Enterprises based its takings argument on the Penn Central ad hoc balancing test:
“(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation
interferes with the claimant's reasonable investment-backed expectations, and (3) the nature of the
governmental action.” Due to the “utterly pointless” nature of a claim for compensation in this instance,
Eastern Enterprises demanded equitable relief. The Supreme Court articulated that “[t]he Takings Clause
of the Fifth Amendment provides: ‘Nor shall private property be taken for public use, without just
compensation.’ The aim of the Clause is to prevent the government “from forcing some people alone to
bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” 73
Although not a “classic taking” where the government appropriated real property, the Court held the Coal
Act “permanently deprived” Eastern Enterprises of the assets needed to fund the retirement benefits. 74
The plurality focused on reasonable investment backed expectations and the retroactivity of the Coal Act,
holding that “the Coal Act operates retroactively, divesting Eastern Enterprises of property long after the
company believed its liabilities . . . have been settled. And [sic] the extent of Eastern Enterprises'
retroactive liability is substantial and particularly far reaching.” 75

Justice Kennedy concurred in part, but did not sign on to the Takings argument. Instead, he wrote
that the Act was unconstitutional because it violated due process principles, calling the Takings analysis
“unwise.” 76

The activities in this case bear little or no semblance to the monetary exaction found in Koontz.
The Coal Act was a regulation that caused a transfer of money from one private party to another private
party, hence, the Penn Central claim. 77 The extraction of money from Coy Koontz Jr. was from a private
party to the government through direct negotiations—not through direct legislation. 78 That is why the
Koontz majority establishes the case as in the realm of a per se taking. 79 The Brown decision is much
more on point 80 than Eastern Enterprises, but that decision doesn’t fit the narrative the dissent and other
critics have tried to establish. Regardless, reliance on Eastern Enterprises is misplaced.

WHAT IS THE REMEDY FOR MONETARY EXACTIONS TAKINGS?

The dissent disagrees with the majority’s concern that local governments might “‘evade the
limitations’ on exaction of real property” if Nollan and Dolan did not apply to monetary exactions. 81
Labeling the majority opinion “prophylaxis in search of a problem,” 82 the dissent dismisses the majority’s

assigned responsibility for providing the health care benefits promised in their various collective
bargaining agreements”).

74 Id. (citing Calder v. Bull, 3 U.S. 386 (1798) (Chase, J.) (“It is against all reason and justice” to
 presume that the legislature has been entrusted with the power to enact “a law that takes property from A.
 and gives it to B”).
75 Id. at 534.
76 Id. at 540.
77 Id. at 522, 23.
78 See discussion supra note 81.
79 See Brown 538 U.S. at 218.
80 Id.
81 Koontz, 133 S. Ct. at 2608 (Kagan, J., dissenting) (quoting the majority at p. 2599).
82 Id.
concern by stating “No one has presented evidence that . . . local officials routinely short-circuit Nollan and Dolan to extort the surrender of real property interests having no relation to a development’s costs.”83 This is a logical fallacy—argumentum ad ignorantiam. A lack of evidence for something is not evidence of its opposite.

While the unconstitutional conditions doctrine recognizes that extortionate demands for money with an identifiable interest in property burdens a constitutional right, the Fifth Amendment mandates a particular remedy for takings—just compensation.84 In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies.85

Critics note that a problem with monetary takings is the remedy. Injunctive relief could otherwise solve this problem, but it does not comport with the traditional view of just compensation for a taking. Just compensation has been calculated several different ways, but the traditional view is that just compensation means “fair-market value.”86

*LEGISLATIVE UPDATE: STATUTORY REMEDY*

The Governor of Virginia recently signed into law a bill that essentially codifies the Nollan/Dolan/Koontz Test in the Commonwealth.87 This bill shifts the traditional presumptions in land use cases88 and requires that all proffers, either offered or accepted, must address “...an impact that is specifically attributable to a proposed new residential development or other new residential use applied for...”89 In addition, offsite proffers are required to address “...an impact to an offsite public facility...in excess of existing public facility capacity...and [the development] receives a direct and material benefit from a proffer made...”90 Unless these conditions are met, the proffer is presumed to be unreasonable. The significance of this shift should not be underestimated. Under the current proffer regime, a “school proffer,” for example, might be assessed91 by using a formulaic calculation to determine the average number of additional children a particular new residential development would introduce to the local school system.92 This money is not earmarked to the particular school district in which the development is situated, so one might legitimately question whether or not there is an “essential nexus” to the impact.93 The proposed standard seems to require that such a proffer must now be earmarked.

If such “status quo” proffering continues under the new law (effective July, 2016), a developer should have an easier time seeking a judicial remedy. Courts historically view land use decisions with

83 Id.
84 See U.S. CONST. amend. V, cl. 4. (“[N]or shall private property be taken for public use, without just compensation.”).
85 Koontz, 133 S. Ct. at 2597.
86 See Brown 538 U.S. at 235-38. The discussion in Brown is exactly what this Article is advocating here.
90 Id.
91 Yes, assessed, because although proffers are supposed to be voluntary, many cash proffer regimes are anything but...they are impact fees.
92 Interview with local official. This information is used with the promise of anonymity.
93 Id.
extreme deference afforded to local governments, but the new law serves to balance the scales between
the free use of property and proper local government growth control. According to subsection D.2, if a
local government denies a rezoning or a proffer amendment, and the applicant proves by a preponderance
of the evidence that such denial was the result of the presence of an unreasonable proffer that “was
suggested, requested, or required, formally or informally, by the locality, the court shall presume, absent
clear and convincing evidence to the contrary, that such refusal or failure was the controlling basis for the
denial.”94 Lest it be said that this is a one-sided piece of legislation, the law prevents developers from
offering unreasonable proffers as well. This legislation may offer the remedy that has often eluded the
courts.

CONCLUSION

It has been three years since the Supreme Court issued the Koontz decision, and the land-use
industry in the United States is as bustling as it has ever been. It is safe to say that Koontz has
emphatically not had a chilling effect on developer/local government relationships, but that is likely due
to ultra vires local policies and institutional developers who ignore the ruling. Virginia has taken a huge
step forward with its legislative solution, and it should be an example to other states that have similar
issues. Critics of the Koontz decision are likely to be irked by the fact that their arguments must be tested
in the real world, but, especially in the case of large and sophisticated localities, some theories don’t
capture reality. Most of these scholars will dismiss this conclusion outright, without a thought to the
actual motivations of localities or developers. Monetary exactions can be used to bypass unpopular tax
increases, and make people “feel good” about the justness of a “user-pays” system, but this is merely
smoke and mirrors to obfuscate the end result of pass through costs—ultimately, the consumer bears the
burden. A policy of cash exactions on new developments, unrelated to the specific impact, increases the
cost of a new home and benefits only mortgage companies and the political machinations of local
governments. The Koontz decision is a logically solid and well intentioned decision that attempts to
protect private property rights and curtail the ability of government to extort property owners. Even if no
pure judicial remedy may be found in this decision, Koontz has set a clear precedent for lawmakers across
the country to create their own unique remedies for one universal problem.

ETHICAL RESPONSIBILITY OF A PURCHASER’S SETTLEMENT ATTORNEY TO SEEK INFORMATION ABOUT A SELLER’S EXISTING TITLE INSURANCE

by Daniel Borsinsky* and James M. McCauley**

SCENARIO: A purchaser engages a lawyer to represent him in the purchase of a residence. The lawyer promptly contacts the realtor, lender, and the seller’s settlement adviser to announce his representation of the buyer and to supply and request relevant information so that the transaction will proceed smoothly.

The lawyer, like most lawyers who regularly represent purchasers in residential real estate settlements, owns or is financially affiliated with a title insurance agency, which in turn is licensed and appointed by a title insurance company (underwriter). The title insurance agency receives a commission from the title insurance company that is a percentage of the title insurance premium. The agency retains a percentage of the premium charged to the purchaser in an amount established by the agency contract. The size of the title premium and, therefore, the size of the title agency’s commission, may be significant, hundreds or even thousands of dollars.

The premiums charged by title insurance companies are uniform throughout Virginia. Title insurance companies’ “rate cards” allow a reduced premium, called a “reissue rate,” if the agent obtains a copy of an existing owner’s title policy that was issued to the seller within a defined timeframe, usually ten years. This “reissue rate” is normally a 30% discount off the full rate that would be charged otherwise.

In many cases, a request from the purchaser’s lawyer to the seller, the seller’s realtor, or the seller’s settlement adviser will result in the production of a copy of an owner’s title policy and enable the purchaser to obtain the discount. Another source of the existence of a money-saving owner’s title policy is the seller’s deed, which may provide this information. When these simple actions are not fruitful, other avenues to locate an existing policy may be contacting former settlement advisers, former realtors or former spouses to track down a policy. At some point, though, the time and expense required to pursue obtaining a copy of the seller’s policy may outweigh the potential benefits to be derived from the effort.

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1 Although the “split” is fixed by law in some states, in Virginia the division of premium is strictly a matter of contract between the agent and the underwriter. –Ed.

2 It is critical that the lawyer/title insurance agent know and understand the underwriter’s rules for reissue rates. Some companies may limit the discount to refinance (not sales), and some may have a sliding scale (x% up to 5 years, y% years 6 through 10, etc.) Moreover, the reissue rate will only apply up to the amount of insurance in the prior policy; insurance over that amount will be at full rate. –Ed.

3 Since 2004, §17.1-223 provides that the first page of the deed include the name of any title insurance company insuring the transaction. –Ed.
ETHICAL RESPONSIBILITY: Success in obtaining a qualified existing owner’s policy, while benefitting the purchaser, will reduce the revenue to the lawyer’s affiliated title insurance agency. Despite the financial disadvantage, the lawyer has a fiduciary responsibility to subordinate his financial interest to that of his client. Consequently, the purchaser’s lawyer is ethically required to make reasonable, good faith efforts to obtain an existing owner’s title policy, even if successful efforts to do so will result in reduced revenue to the lawyer’s affiliated title agency.

APPLICABLE RULES OF CONDUCT:
Rule 1.1 (Competence): A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 (Diligence): A lawyer shall act with reasonable diligence in representing a client.

Rule 1.4(b): A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment [5]: The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

Rule 1.7(a)(2): Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. (emphasis added).

Rule 1.8(a): A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

APPLICABLE PRIOR LEOS:

5. Full Disclosure and Client Consent. The Committee is of the Opinion, in circumstances where it would not be improper for the attorney to represent a party to a real estate transaction wherein the Attorney Agency provides title insurance or related products or services, that, prior to using such Attorney Agency, the attorney is required to make a full and adequate disclosure to the client. See DR:5-101(A) and LE Op. 886, LE Op. 939, LE Op. 1152. Furthermore, since the transaction will create a business relationship between the attorney and client, DR:5-104(A) requires that the transaction must not be unconscionable, unfair or inequitable when made. See LE Op. 603, LE Op. 712.


A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which the lawyer does not render legal services, unless:

(1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer’s involvement in it;
(2) the terms and circumstances of the transaction are fair and reasonable to the client;

(3) the client consents to the lawyer’s role in the transaction under the limitations and conditions provided in § 122\(^4\) after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.

The Committee has consistently quantified adequate disclosure as that which will enable the client to make an informed decision. Furthermore, the Committee is of the view that all doubts regarding the sufficiency of the disclosure must be resolved in favor of the client, and against the attorney, since it is the attorney who seeks to profit in advising his client to utilize the services of a business in which the attorney has a pecuniary interest. See LE Op. 187. In the circumstances under consideration, the Committee opines that a sufficient disclosure would include title insurance costs, including the title insurance premium, binder fees, title examination fees, closing fees, and any other charges which the Attorney Agency would make and a suggestion of the availability of securing title insurance and related services from alternative title insurance agencies. See LE Op. 1515. The Committee is of the further Opinion that it is advisable that the disclosure be made in writing and accepted by the client in writing. \textit{Id.}

ANALYSIS:

The lawyer has a duty to represent the client’s best interests, which includes seeking an existing owner’s policy that may result in a substantial discount to the client-purchaser in the premium to be paid for title insurance. The lawyer’s personal and business interest is the revenue derived from his agency selling title insurance at a non-discounted premium; this presents an inherent “material limitation” conflict under Rule 1.7(a)(2) as the lawyer’s personal or business interest conflicts with the purchaser/client’s best interests. This conflict may be cured with full disclosure and consent, but only if the lawyer will diligently and competently represent the client’s interests notwithstanding the conflict. If the lawyer does not seek out an existing owner’s policy, the representation of the client has been “materially limited” and any blanket consent or waiver is of no effect because the conflict has not been cured.

Further, as LEO 1564 indicates, the business transaction rule is triggered when the purchaser’s attorney proposes that the client purchase title insurance products and services from an agency the lawyer owns Rule 1.8(a). This rule requires that the lawyer’s transaction be fair and reasonable to the client, and that there be full disclosure of all necessary information for the client to give an informed consent. A sufficient disclosure would include title insurance costs, including the title insurance premium, binder fees, title examination fees, closing fees, and any other charges which the Attorney Agency would make, as well as suggesting securing title insurance and related services from alternative title insurance agencies. Finally, Rule 1.8(a) requires the lawyer to advise the purchaser to seek the advice of independent counsel before entering into the business transaction proposed by the lawyer.

\begin{footnotesize}  
\footnotesize \textbf{4} Restatement (3d) of the Law Governing Lawyers § 122 (2000):

(1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer’s representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.

(2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:

(a) the representation is prohibited by law;

(b) one client will assert a claim against the other in the same litigation; or

(c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.
\end{footnotesize}
Rule 1.8(a) is a codification of the common law rule that transactions between lawyer and client, because of the fiduciary relationship, are presumptively fraudulent, and the burden shifts to the lawyer to prove the fairness and reasonableness of the transaction; otherwise, the transaction may be challenged and set aside. Thomas v. Turner’s Adm’r, 12 S.E. 149, 153 (Va. 1890)

(“According to that rule all dealings between attorney and client for the benefit of the former, are not only regarded with jealousy and closely scrutinized, but they are presumptively invalid, on the ground of constructive fraud; and that presumption can be overcome only by the clearest and most satisfactory evidence.”; “All transactions between the parties, to be upheld in a court of equity must be uberrima fides, and the onus is on the attorney to show, not only that no undue influence was used, or advantage taken, but that he gave his client all the information and advice as against himself that was necessary to enable him to act understandingly. He must show, in other words, (1) that the transaction was perfectly fair; (2) that it was entered into by the client and (3) that it was entered into with such a full understanding of the nature and extent of his rights, as to enable the client to thoroughly comprehend the scope and effect of it.”; ultimately holding that the lawyer had not carried his burden of showing that the transaction was fair, although the client had signed the agreement after reading it, and also affirmed that she understood it).5

If not explicit in the recital of these legal authorities, there is at least an implied duty on the part of the purchaser’s lawyer to disclose to the client the possibility that an owner’s policy may exist, and the advantages to the client of seeking the discount in the title insurance premium charged to the purchaser in the real estate transaction. A conscious and deliberate non-disclosure of that information breaches duties of diligence, competence, and communication. At worst, willful withholding of that material information from the client is tantamount to fraud and a breach of fiduciary duty to the client. Further, the lawyer has a duty to represent the client competently and diligently, including determining if an existing owner’s policy exists, advising the client of that fact, and the advantages to the client of pursuing the discounted premium. A lawyer who fails to do this has materially limited the representation of the client and has violated the business transaction rule.

[Although not specifically addressed in this article, the Editor is of the opinion that the same ethical obligation obtains if the client is refinancing rather than purchasing. That is, the lawyer should inquire of the client if he has an owner’s title insurance policy, and advise of the potential discount.]

5 See also, DiLuglio v. Providence Auto Body, Inc., 755 A.2d 757, 770–71 (R.I. 2000); Tyson v. Moore, 613 So. 2d 817, 823–24 (Miss. 1992); and Security Federal Sav. & Loan Ass’n of Nashville v. Riviera, Ltd., 856 S.W.2d 709 (Tenn. Ct. App. 1992). See also Matter of Smith, 572 N.E.2d 1280, 1285 (Ind.1991), cited with approval in Liggett v. Young, 877 N.E.2d 178, 184 (Ind. 2007). This right of avoidance can be seen as an expression of the norms that a fiduciary ordinarily may not retain any of the profits that arise from a breach of fiduciary duty and that an agent may be required to deliver to the principal any benefit acquired through the misuse of the agent’s position. See Restatement (Second) of Torts § 874, cmt. b (1979); Restatement (Third) of Agency § 8.02, cmt. e (2006); and Note, Sanctions for Attorney’s Representation of Conflicting Interests, 57 COLUM. L. REV. 994, 1004–06 (1957).
I. INTRODUCTION TO SECTION 1031 TAX-DEFERRED EXCHANGES

A. Section 1031 – Tax Deferral

Section 1031 of the Internal Revenue Code provides that no gain or loss shall be recognized if property held for productive use in a trade or business or for investment is exchanged solely for property of like-kind to be held for productive use in a trade or business or for investment. Section 1031 provides an exception to the general rule of current gain recognition (taxation) on the sale or exchange of property. In a qualifying Section 1031 exchange, the gain that otherwise would be recognized (taxed) is deferred until the replacement property is transferred in a later taxable transaction. Note that the replacement property may be transferred in another qualifying exchange, continuing the deferral. Some taxpayers exchange over and over again throughout their lifetime in a series of transactions called “swap until you drop”. While this is technically deferral and not exclusion of taxable gain, the gain may be deferred for a very long time.

The exchange concept has been a part of the Internal Revenue Code since 1921 and reflects Congressional policy not to tax theoretical gains where the taxpayer has continued his or her investment in like-kind property. The Commonwealth of Virginia generally conforms to federal tax law and provides comparable deferral of state income taxes for qualifying exchanges.

B. Identification and Other Section 1031 Exchange Issues

Section 1031 is highly technical and includes numerous complex requirements, including the following:

- **Identification of replacement property** – in a non-simultaneous or delayed exchange, all replacement property must be “identified” in writing within 45 days of closing the relinquished property;

- **Multiple property identification** – three (and sometimes more) properties may be identified as potential replacement property;

- **Closing deadline** – all replacement property must be acquired by the earlier of 180 days or the due date of the taxpayer’s tax return (with extensions);

- **Replacement property debt requirement** – reduction of debt in an exchange is taxable; debt secured by the relinquished property must be offset with debt secured by the replacement property; and

- **Taxable boot** – any cash or non like-kind property received in the exchange is taxable (commonly referred to as “boot”).

These rules can be difficult to apply in the real world and may create numerous traps for the unwary.

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II. RISE OF SECTION 1031 EXCHANGE PROGRAMS
STARTING IN THE LATE 1990’S

A. Low Tax Basis Means High Taxable Gains

Many exchangers have long-term ownership of a rental house or investment property with a low tax basis; others own properties that were inherited many years ago and also have a low tax basis. For most taxpayers, low tax basis means high taxable gains (federal and state) on sale.

B. Simultaneous vs. Non-Simultaneous Exchanges

In a simultaneous exchange, the exchanger transfers the relinquished property and acquires the replacement property at the same time; both legs of the exchange occur simultaneously. In a non-simultaneous exchange, sometimes referred to as a “delayed” exchange, the exchanger transfers the relinquished property and acquires the replacement property at a later date. Section 1031 was amended in 1984 to permit non-simultaneous exchanges, which can be helpful to exchangers who need additional time to acquire replacement property. Today, almost all exchanges are non-simultaneous or delayed.

C. Typical Section 1031 Challenges

Most exchangers acquire a “whole” property (i.e., 100% of a property) as their Section 1031 replacement property. However, many exchangers are not active in the real estate business and struggle with the requirements of Section 1031; some fail to satisfy the technical requirements and, despite their best intentions, will have to pay federal and state taxes. The biggest challenges for most investors include:

- Sourcing (finding) the replacement property;
- Conducting due diligence;
- Identifying replacement property within 45 days in compliance with Section 1031; and
- Placing the required level of debt on the replacement property to satisfy Section 1031.

The starting point is the replacement property; exchangers must locate desirable replacement property to be held for productive use in a trade or business or for investment. Smaller investors frequently do not have access to a broad menu of replacement property. They can engage a realtor or real estate broker, but this is foreign territory for many.

In a non-simultaneous or delayed exchange, all of the replacement property must be “identified” in writing typically sent to the qualified intermediary (or accommodator) holding the exchange proceeds. The identification must be sent within 45 days of closing the relinquished property. Failure to properly identify will result in the entire transaction being fully taxable.

The 45-day identification clock starts ticking when the relinquished property is sold for tax purposes (not necessarily the date on the settlement statement), and there are no extensions (barring a Presidentially-declared disaster, terrorism or military action).

What if the timing is bad to identify all replacement property by the 45th day? For example, what if:

- the pricing of desirable properties is high?
- the inventory of available properties is low? or
- the exchanger is on vacation and does not have time to find replacement property?

There is no relief: the 45-day identification requirement is inflexible. Failure to properly identify will result in the entire transaction being fully taxable.

Additionally, what if the exchanger has located several prospective replacement properties and has not decided which one or more to acquire? Taxpayers can always identify three properties of any value, and sometimes more, using the so-called 200 percent rule or the 95 percent exception. However,
multi-property identification is problematic; a number of taxpayers inadvertently over identify, which results in the entire transaction being fully taxable.

Prudence dictates that exchangers conduct extensive due diligence on replacement property, including the following:

- Feasibility of the property for its intended use;
- Financial strength of tenants;
- Property condition;
- Zoning;
- Title;
- Survey; and
- Environmental.

However, customary due diligence is beyond the ability of many smaller investors; delegating the due diligence process to attorneys, CPAs and consultants can be very expensive and may be impractical on smaller properties. This creates a dilemma for less sophisticated exchangers who understand that prudence dictates extensive due diligence but who lack the skills or want to incur the cost to obtain professional help.

Taxpayers must reinvest the precise amount of net proceeds from the sale of their relinquished property. For example, a taxpayer with $192,379.99 of net proceeds from their relinquished property must reinvest that exact amount in the replacement property (note, taxpayers may “trade up” by adding cash to the exchange to acquire a larger property). However, whole replacement properties do not come in the exact size needed for a given taxpayer. Any portion of the sales proceeds not reinvested will be taxed as “boot”.

Also, taxpayers must offset debt on the relinquished property with an equal or greater amount of debt on their replacement property. For example, a taxpayer with $299,379.33 of debt secured by their relinquished property (that was repaid or assumed at closing) must acquire replacement property secured by that precise amount of debt. (Note: taxpayers may bring after-tax cash to the exchange to offset or reduce debt and qualify for Section 1031).

Many smaller exchangers struggle to reinvest the exact amount of proceeds from their relinquished property, and others do not have access to commercial real estate lenders to obtain the required amount of debt to achieve complete tax deferral under Section 1031. Many taxpayers do not want to sign notes personally or provide a guaranty to obtain a necessary real estate loan. Some desirable properties may not qualify for the required level of debt.

Still other taxpayers own actively-managed real estate, such as rental houses or business properties, but seek more passive replacement property. They may have access to other rental houses or properties but no longer want to deal with the “tenants, toilets and trash”; they desire a more passive investment.

There is good news for real estate investors--many of the exchange challenges have been overcome by real estate firms, known as “sponsors,” who have created Section 1031 exchange programs to provide turn-key replacement property that can be purchased in the exact equity amount needed, with non-recourse debt in place, and all the due diligence completed.

D. “Whole” Replacement Property; Net Leased Properties

Typically, most exchangers acquire a “whole” replacement property (that is, 100 percent of a property). But many real estate investors struggle with the requirements of Section 1031 and some will fail without professional help. Due in part to the difficulty of satisfying the requirements of Section 1031, a number of real estate firms (for example, Calkain Companies in Northern Virginia: www.calkain.com) have developed a specialty in brokering “net leased” retail properties, such as Walgreens and CVS.
pharmacies. Such properties have become commoditized in part because they are relatively easy for exchangers to find, conduct due diligence, identify within 45 days, finance, and acquire.

The net lease structure is desirable to exchangers who want a more passive investment because the tenant typically is required to make all repairs and replacements during a long lease term. Furthermore, the tenant typically pays all taxes, insurance, maintenance and repair costs (this is a classic “triple net” lease; there are many variations) putting the risk of inflation on the tenant.

Over the past ten years, net leased retail properties have become the replacement property of choice for a large number of exchangers who want a whole property in a passive structure. But there are challenges; it may be difficult to match up the exchanger’s equity and debt requirements with a given property in time to satisfy Section 1031’s timing requirements and net leased properties have been selling for record prices, which has driven down investor returns compared to other asset classes.

In conclusion, net leased assets are relatively plentiful and easy to own as replacement property due to the net lease structure. However, prudent exchangers still must conduct extensive due diligence and must satisfy the timing and debt requirements imposed by Section 1031. For many taxpayers, net leased assets are an imperfect replacement property solution.

E. Syndicators to the Rescue in the late 1990’s with TIC Programs

Beginning in the late 1990’s, a handful of real estate syndicators familiar with real estate partnerships began to syndicate fractional interests in real estate specifically structured for exchangers. These offerings became known as Tenant in Common, or TIC, offerings because the exchangers acquired an undivided Tenant in Common interest in the replacement property. Triple Net Properties, LLC, Passco Companies and Inland Private Capital Corporation were early adopters of the TIC structure.

TIC programs typically were sold as securities through independent broker-dealers across the nation. The goal was to provide a quality replacement property in a more convenient form for smaller investors who did not want to source, conduct due diligence, finance, and manage their own replacement property. Over time, TIC sponsors created a turn-key product where the due diligence was complete, the loan was in place, and the TIC interest could be acquired quickly, simply and with certainty to satisfy the strict requirements of Section 1031. Sponsors of TIC programs also provided full scope property and asset management services, creating a passive investment sought by many aging baby boomers.

The first round of TIC offerings from 1999 to early 2002 was structured based on the analysis of tax counsel who rendered legal opinions that the TIC interest “should” qualify for 1031 treatment; this was prior to specific IRS guidance issued on March 19, 2002. Attorneys at the Hirschler Fleischer law firm in Richmond, Virginia, were at the forefront of this industry in crafting TIC programs for numerous sponsors across the nation.

F. Rev. Proc. 2002-22 Validates TIC Programs

On March 19, 2002, the IRS issued unprecedented guidance commonly referred to as the “Rev. Proc.” that essentially validated the TIC structure. With the tax status finally nailed down, the sale of TIC interests sky rocketed. According to widely reported industry statistics, TIC equity grew from less than $200 million in 2001 to over $3.8 billion in 2006. Clearly, 2006 was the high-water mark (before the 2007-2011 recession), when sponsors sold over $7 billion of TIC real estate to exchangers. TIC programs became a national phenomenon, sold by hundreds of broker-dealers from coast-to-coast. Back in 2006, while waiting in a grocery store line in Southern California, the author once heard two soccer moms discuss the recent sale of their TIC property and exchange into a new TIC property. At the time, it felt as if TICs had become an overnight sensation.
III. POST-RECESSION ENTITY OF CHOICE: DELAWARE STATUTORY TRUST

Following the 2007-2011 recession, TIC lending essentially ended. Over time, lenders started making loans to a different qualifying structure known as a Delaware Statutory Trust, or DST, that may be used to accomplish the same tax-deferral as a TIC. DSTs are widely used today for virtually all fractionalized 1031 programs. TICs are no longer a viable structure for syndicated 1031 programs.

A. History of DST

DSTs were formerly known as Delaware Business Trusts and have been in use for many decades. A DST is a flexible, unincorporated entity formed under Delaware law and can be used for many purposes, including real estate ownership. DSTs were used occasionally before and after issuance of the Rev. Proc. to overcome some of the limitations of the TIC structure, but the TIC structure was predominate until after the 2007-2011 recession, when most lenders refused to make loans to TICs. From 2011 to date, almost all syndicated fractionalized 1031 programs have used the DST structure.

B. Revenue Ruling 2004-86

Like the Rev. Proc issued in 2002 for TICs, Revenue Ruling 2004-86 (the “Ruling”), provided needed guidance on DST qualification for tax deferral under Section 1031. To qualify, a DST must satisfy a number of strict requirements and avoid any of the so-called “seven deadly sins”. A detailed discussion of the Ruling is beyond the scope of this article. Bottom line – only passive real estate qualifies for Section 1031 treatment in a DST. This means that DST programs may be used to hold net leased real estate or active real estate subject to a master lease that makes the investment passive to the investors.

C. Tax Opinions

Sponsors of DST offerings provide a legal opinion from tax counsel that the DST interests should “qualify” for Section 1031 treatment. This is a positive feature of syndicated DST offerings. Coincidentally, Virginia law firms, such as Kaplan Voekler Cunningham & Frank, PLC and Hirschler Fleischer, have been instrumental in creating TIC and DST programs for sponsors across the nation.

D. Key Attributes of DST Programs

When compared to TICs, DST offerings have a number of positive attributes for investors, including:

DSTs have a simpler and less costly closing process because investors are not on title.

DSTs have a much lower minimum investment, making it possible for even small exchangers to diversify into several replacement properties.

DSTs are sold in dollar increments, which means that exchangers can invest their precise amount of net proceeds, making DST investments one size that fits the equity needs of most exchangers.

DSTs interests are more freely transferable than TICs, making DSTs preferred for family gifting and estate planning.

DST interests solve a number of problems experienced by real estate investors, especially small real estate investors who frequently struggle with the requirements of Section 1031. The biggest challenges for most investors include: sourcing replacement property, conducting customary due diligence, identifying replacement property within 45 days, and placing required debt on the replacement property. DSTs solve these challenges for many exchangers.
E. Strictly Passive Ownership Structure

The Ruling requires DST investors to be passive owners of replacement property. This excludes many categories of active real estate unless the sponsor uses a master lease structure to make the investment passive to the investors.

IV. CONCLUSIONS

A. Creativity/Evolution

The leading 1031 sponsors have been exceptionally creative in structuring fractionalized real estate offerings to qualify for Section 1031—first TIC offerings and, now, DST offerings. Future structures will evolve over time to conform to applicable tax requirements and possibly changing demographics of exchangers (for example, a number of aging baby boomers seek passive debt-free, all cash replacement property).

B. IRS Support

The IRS has consistently supported Section 1031 with guidance, including the Rev. Proc., the Ruling and a large number of private letter rulings, technical advice memoranda and the like. Back in 1991, regulations were issued on non-simultaneous or delayed exchanges that included the use of a qualified intermediary or accommodator to hold exchange proceeds. This “safe harbor” eliminated concerns about taxpayers being taxable due to actual or constructive receipt of sales proceeds. Over time, the cost of using a qualified intermediary or accommodator has declined to the point where even small transactions can be cost-effectively structured as an exchange.

As the body of favorable tax guidance grows, a greater number of taxpayers have acquired DST investments as their 1031 replacement property. The modern DST is particularly efficient in keeping transaction costs to a minimum, works well for smaller investors, and provides additional comfort of a “should” qualify tax opinion from a national law firm. To twist a famous quote, “today, even the little people DO NOT have to pay taxes” when they exchange.

Coincidentally, members of the Virginia bar are widely regarded as some of the leading innovators who helped develop both the TIC and DST structures for Section 1031, from the late 1990s to the present. Further, frequently it is members of the Virginia bar who provide “should” qualify tax opinions for DST offerings on a national basis.

C. Change is the Only Constant

From whole properties to TICs, and now from TICs to DSTs, legal structures come and go, but sponsors, with the assistance of expert legal counsel, define and redefine the optimal structure for tax deferral under Section 1031. Large and small real estate investors who struggle with the technical requirements of Section 1031 are the beneficiaries of the improvements as exchange programs evolve and improve over time.
NO ANSWERS, JUST QUESTIONS: OBERGEFELL AND STATUTORY CONSTRUCTION

by Douglass W. Dewing*

In June, 2015, the United States Supreme Court held:

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. Baker v. Nelson must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples. Obergefell, et al v. Hodges, et al, 576 U.S. ___ (# 14-556, pages 22-23, June 26, 2015)

Because many real estate concepts are based on societal norms derived from heterosexual marriage relationships, the decision creates issues not just for those who issue licenses and celebrate marriages, but for real estate practitioners as well. Perhaps these questions will be addressed by future sessions of the Virginia legislature, but they do not appear to be up for consideration in 2016.

Does the definition of “tenants by the entirety” need to be revised? Although it seems that “tenants in common” and “joint tenant relationships” need not be addressed, the inclusion of “husband” and “wife” (terms laden with a gender-based definition), in the statutory definition of tenants by the entirety cries out for clarification. In a same-gender marriage, who is the husband or the wife? Should the statute be redrafted, perhaps to read:

§ 55-20.2. Tenants by the entireties in real and personal property; certain trusts. —

A. Any husband and wife two individuals lawfully married within or without the Commonwealth, hereinafter referred to as spouses, may own real or personal property as tenants by the entireties. Personal property may be owned as tenants by the entireties whether or not the personal property represents the proceeds of the sale of real property. An intent that the part of the one dying should belong to the other shall be manifest from a designation of a husband and wife the spouses as “tenants by the entireties” or “tenants by the entirety.”

B. Notwithstanding any contrary provision of § 64.2-747, any property of a husband and wife the spouses that is held by them as tenants by the entireties and conveyed to their joint revocable or irrevocable trusts, or to their separate revocable or irrevocable trusts, and any proceeds of the sale or disposition of such property, shall have the same immunity from the claims of their separate creditors as it would if it had remained a tenancy by the entirety, so long as (i) they remain husband and wife married, (ii) it continues to be held in the trust or trusts, and (iii) it continues to be their property, including where both spouses are current beneficiaries of one trust that holds the entire property or each spouse is a current beneficiary of a separate trust and the two separate trusts together hold the entire property, whether or not other persons are also current or future beneficiaries of the trust or trusts. The immunity from the claims of separate creditors under this subsection may be waived as to any specific creditor, including any

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separate creditor of either spouse, or any specifically described property, including any former tenancy by the entireties property conveyed into trust, by the trustee acting under the express provision of a trust instrument or with the written consent of both the husband and the wife spouses. (2001, c. 718; 2006, c. 281; 2015, c. 424.)

Similarly, Intestate inheritance by a surviving spouse does not seem to be affected by the Obergefell decision, but relationships further down the statute of descent and distribution run into some of the same gender-based definitions as the tenants by entirety statute.

For example: “... children or their descendants, one or more of whom are not children or their descendants of the surviving spouse ...” If a same-sex marriage occurs after the break-up of a different-sex marriage which produced children, there should be little difference from the current practice. If, however, the same-sex couple enters into a parent-child relationship without benefit of a formal adoption process which recognizes the married couple as “parent” and the child as a child of both, will the intent of the married couple be carried out using the current statutory language? (§ 64.2-200(A)(1)

Another example: “... to the paternal kindred ... to the maternal kindred ... to the decedent’s uncles and aunts ... to the nearest lineal ancestors, and the descendants of such ancestors.” (64.2-200(A)(5). Ancestor and descendant, maternal and paternal, uncles and aunts are all general purpose biological terms that have been accepted into the legal lexicon. The relationships defined by those terms are far more ambiguous without the implicit gender based part of the definition.

Without more research than time allows to put the use into context, the following terms appear within the Code with some frequency:

“husband and wife” – 71
“husband” – 87
“wife” – 79
“uncle” – 15
“aunt” – 17
“maternal” – 13
“paternal” – 5
“father” – 74
“mother” – 82

Where those usages affect the conveyance, inheritance, and/or ownership of real estate, the law of Virginia either needs to conform to the federal ruling or explicitly distinguish property rights from personal status. Straddling the issue will result in uncertainty for the citizens of Virginia for whom the issue is directly of concern, and confusion amongst those, such as the members of the bar, who are charged with helping them direct their personal and business affairs.

[It will be interesting, in the absence of statutory modification, to see if the “on the same terms and conditions as opposite-sex couples” language of Obergefell is interpreted by the courts to include a right to hold property as tenants by the entirety. United States v. Windsor (2013) addressed the question of recognition of survivorship for tax purposes in same-sex marriage, but a court might (wrongly, in the editor’s opinion) conclude that same-sex couples can hold title as joint tenants with survivorship. However, such a holding ignores the potential tax consequences of not being able to be tenants by the entirety, not to mention the protections from creditors afforded by T/E status. Will Pennsylvania’s presumption of T/E between a husband and wife continue for same-sex marriages, and if so, are the proceeds from the sale of same-sex T/E properties similarly T/E? The Editor declines to assume what the courts will do, for fear of the “you can’t get good food in a gas station” phenomenon. –Ed.]
PROPERTY ASSIGNED CLEAN ENERGY (“PACE”) FINANCING COMES TO VIRGINIA

by William L. Nusbaum* and Abigail C. Johnson**

As many regions of the Commonwealth continue to struggle to recover from the double whammy of the Great Recession and federal budget sequestration practices, legislators and state and local government officials have created many innovative programs to boost their economies. One such program is Property Assessed Clean Energy (widely known by its acronym, “PACE”) financing, which, despite some legislative false starts over the past 7 years, is about to become a viable financing vehicle in Virginia.

PACE first appeared in Virginia in 2009 when the General Assembly enacted §15.2-958.3 of the Virginia Code, (amended in 2010).1 However, PACE financing only became viable in Virginia with the enactment of additional amendments during the 2015 General Assembly session,2 which aligned the statute with the expectations of prospective PACE loan investors and conventional lenders.

But what is PACE? In a PACE financing, a political subdivision (a locality or an authority, such as an economic development authority or redevelopment and housing authority) or a third party lender originates a loan to an owner of real estate to finance the owner’s acquisition and/or installation of renewable energy production and distribution facilities, energy usage efficiency improvements and/or water usage efficiency improvements. (Excluded are residential dwellings with fewer than five dwelling units or condominiums.) These projects are secured not by a deed of trust, but rather by the placing on the benefitted property of a special assessment equal in value to the PACE financing, of equal dignity with the locality’s real property tax lien and superior to any prior (in time) deed of trust lien (as to any current and past due special assessments), thanks to the mandatory consent of and subordination by the mortgage holder. Significantly, the PACE special assessment lien runs with the land, and in the event of the sale of the real estate or even the foreclosure of a deed of trust lien on the property, the unmatured installments of the special assessment will remain in place, undisturbed and without being accelerated. The length of the special assessment is not specified by the statute, but it is generally assumed by PACE

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** Abigail C. Johnson, LEED AP O&M is the founder and principal of Atlantic PACE, LLC, which offers a new paradigm in PACE program administration, combining extensive local and national PACE expertise with significant deal origination experience, and of Abacus Property Solutions, LLC, a real estate advisory firm. She graduated from the University of Virginia with a Bachelor of Architectural History and from L’Universita' SDA Bocconi in Milan, Italy with a Masters in International Economics and Management. She holds the LEED AP O&M designation that focuses on incorporating green building principles into existing buildings. She represented the Virginia Energy Efficiency Council (“VEEC”) on the DMME CPACE Committee, and is Vice Chair of HRACRE’s Legislative Committee.

professionals that the term of the special assessment will not exceed the useful life of the improvements funded by the PACE transaction.

After closing the PACE financing and filing the special assessment lien in the deed books of the local Circuit Court Clerk’s Office, the locality then applies the periodic payments on the special assessment to the repayment of the PACE loan (if the locality itself was the capital source) or assigns the special assessment payments to the PACE investor (if a third party lender furnished the capital). While the statute allows localities to use their own funds to finance PACE projects, it is expected that few Virginia localities will pursue that option, and instead will turn to third-party investors to provide the capital for PACE projects, at no net cost or liability to the locality. In recognition of the localities’ concerns over unfunded programs, the 2015 General Assembly also agreed to allow localities to charge a participation fee— in the form of an application fee or as a component of the interest rate on the PACE loan— or a combination of both options.

Why should a locality create a PACE financing program? PACE financed projects generate multiple beneficial effects. They create good-paying jobs as the contractors and tradesmen make the improvements and install the new facilities. They revitalize and extend the useful economic life of commercial and multi-family buildings, making income-producing properties more profitable and non-income producing properties more valuable (resulting, in both cases, in increased real property tax assessments). PACE financing can also eliminate nearly all the up-front costs for PACE-eligible capital projects, improving building condition and maintenance and thus reducing risk to existing mortgagees. In short, PACE loans strengthen the finances of the property owners and the vibrancy of a locality’s economy. And, for those localities seeking to fight sea level rise and climate change, the improvements funded with PACE financings also reduce the City’s carbon footprint.

Why would a secured lender agree to consent and subordinate its deed of trust lien to a PACE loan’s special assessment lien? The fundamental premise of PACE is that the energy and water efficiency enhancements that result from the improvements to the property will improve the financial performance of the property (or, if owner-occupied, the owner’s business) by more than the annual special assessment payment. Accordingly, if the property owner’s annual savings from the improvements exceed its annual special assessment payments, then the owner’s post-improvement financial condition should be stronger than before the PACE-funded improvements were made, and consequently, the mortgage lender’s loan should be more secure. When required, large contractors of PACE-funded improvements (often called “Energy Service Companies,” or “ESCOs”) can provide a contractual guaranty of their customers’ savings levels, which can be assigned to the PACE lender as additional security for the PACE loan. PACE lenders in Virginia should be able to monetize their loans by securitizing and reselling them in the secondary market, expressly allowed by §15.2-958.3.D.

Turning to why a property owner would employ PACE financing to fund its qualifying improvements, PACE offers several advantages compared to mortgage financing. As long as the property owner’s annual savings will materially exceed the annual special assessment payments, there is no reason why a PACE loan cannot be sized to fund 100% of a project’s cost, compared to the usual 75% to 80% ceiling on loan to value ratio in mortgage loans. Also, there should be no recordation taxes on the filing of a Notice of Special Assessment Lien, and many of the other due diligence requirements of mortgage financing (title insurance premiums, physical survey, environmental studies, etc.) may also not be required, leading to significant savings, especially in a larger financing.

Having addressed the “what” and the “why” of PACE, we turn to the “how” of PACE, for which there are two versions. The first version is “How do the ‘nuts and bolts’ of PACE work?” The schematic below succinctly summarizes the all-important flow of funds of a PACE financing:
Because PACE is new to Virginia, localities are just beginning to examine how to use it in their jurisdiction. Accordingly, if you propose a PACE financing to a locality, you will likely first have to explain how to create its PACE program (the second “how” question), by adopting an authorizing ordinance. The General Assembly, recognizing this hurdle, provided a framework for a locality’s PACE program ordinance in §15.2-958.3.A, where it set out a minimum of seven topics for the ordinance to include, but permitted additional topics to be included in the ordinance:

A. Any locality may, by ordinance, authorize contracts to provide loans for the initial acquisition and installation of clean energy improvements with free and willing property owners of both existing properties and new construction. Such an ordinance shall include but not be limited to the following:

1. The kinds of renewable energy production and distribution facilities, energy usage efficiency improvements, or water usage efficiency improvements for which loans may be offered;
2. The proposed arrangement for such loan program, including (i) a statement concerning the source of funding that will be used to pay for work performed pursuant to the contracts; (ii) the interest rate and time period during which contracting property owners would repay the loan; and (iii) the method of apportioning all or any portion of the costs incidental to financing, administration, and collection of the arrangement among the consenting property owners and the locality;
3. A minimum and maximum aggregate dollar amount which may be financed;
4. A method for setting requests from property owners for financing in priority order in the event that requests appear likely to exceed the authorization amount of the loan program. Priority shall be given to those requests from property owners who meet established income or assessed property value eligibility requirements;

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4 Some of these requirements ought not to be material to the locality if it will not be originating PACE loans with its own funds, but instead will only be providing “conduit” loans through third party lenders.

5 Here, a locality would state whether it would originate PACE loans with its own funds or limit the program to PACE loans funded by third party PACE investors.

6 If the locality is not using its own funds for the origination of PACE loans (i.e., all loans are funded by third party lenders), then there is no reason to impose an overall cap on the amount of PACE
5. Identification of a local official authorized to enter into contracts on behalf of the locality. A locality may contract with a third party for professional services to administer such loan program;

6. Identification of any fee that the locality intends to impose on the property owner requesting to participate in the loan program to offset the cost of administering the loan program. The fee may be assessed as (i) a program application fee paid by the property owner requesting to participate in the program, (ii) a component of the interest rate on the assessment in the written contract between the locality and the property owner, or (iii) a combination of (i) and (ii); and

7. A draft contract specifying the terms and conditions proposed by the locality.

As of this writing (late April), only Arlington County has issued a Request for Proposals for the hiring of a third party contractor to administer its PACE program. Similarly, very few localities have adopted resolutions or ordinances beginning the process of creating a PACE program (e.g., the City of Richmond), but more are expected to follow in short order, particularly once Arlington County’s program begins operation. A primary reason that more programs are expected to be created very soon is that the General Assembly provided for another source of guidance for the localities.

Had §15.2-958.3.A. been all the guidance the General Assembly had provided, localities would have been left to their own devices in establishing underwriting parameters for PACE loans. Recognizing what a challenge that would be for localities, and to assuage the concerns of the Virginia banking community about consistency in underwriting, the General Assembly opted to provide (indirectly) guidance to the localities in Section 2 of Chapter 427 of the 2015 Acts of Assembly:

2. That the Department of Mines, Minerals and Energy (DMME) shall develop uniform statewide financial underwriting guidelines for loans made under § 15.2-958.3. In developing the guidelines, DMME shall incorporate input from representatives of the Virginia Bankers Association, the Virginia Energy Efficiency Council, the Virginia Association of Realtors, the Virginia Municipal League, the Virginia Association of Counties, and the Virginia Association for Commercial Real Estate. The guidelines shall require an evaluation of each of the following criteria: the loan to value ratio, the voluntary special assessment to assessed value ratio, the savings to investment ratio, the requirement for energy assessments, and any provision addressing the disclosure of voluntary special assessments to a subsequent owner of the property. DMME shall finalize the uniform financial underwriting guidelines no later than December 1, 2015.

Representing VACRE and VEEC on the DMME PACE Stakeholders Committee was a true privilege (aside from the personal thrill of sitting on the “narrow side of the table” in House Room 2 in Jefferson’s Capitol – the closest your authors will ever come to being legislators!). The process was a thoughtful one and played out over several months of meetings, discussions and drafts of the proposed uniform financial underwriting guidelines. The very able DMME staff for the Committee, Program Support Manager Michael Skiffington and Policy Analyst Borna Kazerooni, excelled at incorporating suggestions from the Committee members and interested members of the public into the guidelines, and ensured that we met the General Assembly’s December 1, 2015 publication deadline. These “Final loans its program can originate in a year and, correspondingly, no reason to prioritize certain applicants’ PACE loan applications.

7 It is likely that most localities will elect to contract out the management of their PACE loan program to a third party contract program administrator, to reduce the financial and administrative burden on the locality.

8 Localities will be drawn to this fee as a means of getting reimbursed for the cost of billing, collecting and remitting to third party PACE investors the PACE special assessment installments.
Uniform Statewide Financial Underwriting Guidelines for Clean Energy Loans made by Localities under §15.2-958.3 of the Code of Virginia⁹ (the “Guidelines”), although not mandatory, will be highly influential as localities seek and establish financing parameters for their PACE programs, and, for that reason, the Guidelines are attached as Appendix A. The Guidelines provide, in comprehensive but understandable prose, an excellent introduction for localities seeking to understand PACE.

The most valuable tool in the Guidelines is the Summary of Uniform Statewide Financial Underwriting Guidelines for PACE Loans, on page (i) of the Executive Summary:

### Table 1: Summary of Uniform Statewide Financial Underwriting Guidelines for PACE Loans

<table>
<thead>
<tr>
<th>Underwriting Criteria</th>
<th>DMME CPACE Committee’s Recommended Guideline</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total Loan to Value Ratio (LTV)</strong></td>
<td>≤90% of the assessed or appraised property value (including the PACE loan). Debt-Service Coverage Ratio ≥ 1.0. Exceptions evaluated on a case-by-case basis.</td>
</tr>
<tr>
<td><strong>Special Assessment to Assessed Value Ratio</strong></td>
<td>≤20% of the assessed or appraised property value. Exceptions evaluated on a case-by-case basis.</td>
</tr>
<tr>
<td><strong>Savings to Investment Ratio (SIR)</strong></td>
<td>≥1.0. Exceptions evaluated on a case-by-case basis. Localities and administrators to determine how to characterize “savings.”</td>
</tr>
<tr>
<td><strong>Technical Assessment</strong></td>
<td>Requirements based on the size and scope of the project as well as the requirements of the lender and administrator.</td>
</tr>
<tr>
<td><strong>Disclosure to Future Owners</strong></td>
<td>Localities to record the special assessments in a way that makes them discoverable in a title search.</td>
</tr>
</tbody>
</table>

When localities consider these Guidelines as they stand up their PACE programs, they should not lose sight of the DMME CPACE Committee’s reminder that flexibility should be baked into the program, as it repeatedly called for “Exceptions [to be] evaluated on a case-by-case basis.” Some examples that justifiably call for such exceptions include:

**LTV Ratio**: Exceptions may be appropriate for affordable housing projects where the property is undervalued due to the rental restrictions, but there are guaranteed payment streams.

**Debt-Service Coverage Ratio**: Just as every lender has its own underwriting criteria, so do PACE investors, and among them may be the DSCR. If a third party PACE investor has a more liberal DSCR than 1.0, then, as a sophisticated investor, it should be able to accept that risk exposure.

**Special Assessment to Assessed Value Ratio**: The guideline that the special assessment to assessed value ratio not exceed 20% of the assessed value of the property can safely be set at a higher percentage if the property has no mortgage debt.

**Savings to Investment Ratio**: Exceptions to the recommended guideline that the SIR be greater than or equal to 1.0 may be justified when the guideline acknowledges that there can be ancillary “benefits” in addition to utility savings, with the SIR being measured for the entire project, rather than just the individual efficiency measures. Examples of other savings metrics that can speak to the value of a project include Operations and Maintenance (O&M) savings and replacement costs, both of which can be taken into account in the District of Columbia’s PACE program. In Virginia, where energy savings will be less than in other states with higher utility rates, consideration of these additional savings metrics could enable additional PACE projects to qualify. In addition, the Guidelines acknowledge that an SIR of less than 1.0 may be acceptable if the PACE investor agrees.

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The appropriate level of technical assessment of the proposed PACE project should be a function of the size of the financing, with smaller or simpler projects (e.g., less than $1 million, like-kind replacements or projects only involving a single energy conservation measure (“ECM”)) requiring less rigorous documentation. For larger or more complex projects, the contractor or ESCO should be required to submit its calculations of energy savings and project costs to the program administrator for review, to increase the likelihood that the promised SIR will be delivered.

Disclosure to Future Owners: For this guideline, requiring the recordation of the special assessment lien to provide notice to future lenders and purchasers, there should be no exceptions, especially since this requirement was a key stipulation of the Virginia Bankers Association in order to garner its neutrality when the 2015 amendment to §15.2-958.3 was working its way through the General Assembly.

In addition to the foregoing instances of flexibility, localities will need to work with their program administrators and PACE investors to establish eligibility criteria for properties and project costs, and some of these criteria may go beyond those matters listed in §15.2-958.3.A for inclusion in a locality’s authorizing ordinance. (See the second sentence of §15.2-958.3.A, “Such an ordinance shall include but not be limited to the following…”) Other matters to be ironed out include the documentation among the parties evidencing the agreement to impose the special assessment lien and collect and remit the periodic payments to the PACE investor, as well as the exact form of the recorded lien.

But, despite the modest hurdles in establishing a PACE program for a locality, PACE represents a worthwhile and much-needed new economic development tool for Virginia’s localities, almost all of which continue to struggle to return to pre-2008 levels of financial health and prosperity. It will be interesting to observe as localities, property owners and PACE investors learn how to use PACE to their mutual advantage.
APPENDIX A

Final uniform statewide financial underwriting guidelines for clean energy loans made by localities under §15.2-958.3 of the Code of Virginia

As required by Chapter 427 of the 2015 Acts of Assembly

Prepared by the Virginia Department of Mines, Minerals and Energy

December 1, 2015
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Executive Summary

During the 2015 session of the Virginia General Assembly, the legislature and governor approved legislation modifying §15.2-958.3 which among other things, directed the Virginia Department of Mines, Minerals and Energy (DMME) to develop uniform statewide financial underwriting guidelines for clean energy (property assessed clean energy or PACE) loan programs developed by localities pursuant to §15.2-958.3. In developing the guidelines, DMME elicited input from groups representing real estate, energy efficiency, banking, local governments, and other interests or industries and included in the guidelines certain specific criteria as required by law. These criteria included: savings to investment ratio, loan-to-value ratio, assessment to assessed value ratio, technical assessment requirements and disclosure to future owners. The guidelines and criteria are summarized in the table below (Table ES-1) and were developed to specifically apply to non-residential PACE financing programs pursuant to §15.2-958.3.

In developing the financial underwriting guidelines, DMME balanced the need for local government discretion with the need for uniform guidelines to support the growth of PACE programs. Because PACE loans are repaid through special property tax assessments placed on a property, local governments will have discretion in setting programmatic requirements and ensuring that underwriting guidelines reduce risk of default and support local program objectives. DMME also recognized that for some criteria such as savings to investment ratio, or loan to value ratio, the parties involved in the transaction should have the flexibility to determine whether they wish to proceed with the transaction. Ultimately, regardless of the underwriting guidelines mentioned herein, existing lienholders, PACE capital providers, borrowers, and local or third party administrators will need to agree whether to provide PACE financing.

Table ES-1: Summary of Uniform Statewide Financial Underwriting Guidelines for PACE Loans

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<tr>
<td>Disclosure to Future Owners</td>
<td>Localities to record the special assessments in a way that makes them discoverable in a title search.</td>
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The development of uniform statewide financial underwriting guidelines for PACE loans in Virginia is only one piece of establishing a functioning PACE financing program. In addition to developing financial underwriting guidelines, localities will need to develop or work with a third party administrator and lending institutions to identify eligibility criteria for property owners and eligible costs that can be included in the PACE loan. Some of these requirements are established by law while others will need to be identified in the locality’s enabling ordinance. Among other criteria, in order for PACE assessments to achieve priority tax lien status, state law requires a written subordination agreement by all existing mortgage holders and evidence that a property owner is current on property loans and tax payments and is not insolvent or in bankruptcy proceedings. Also, the title of the property cannot be in dispute.

The purpose of this guidance document is to provide localities that are interested in developing a PACE financing program enough information to start a dialogue about the underwriting process and guidelines necessary to facilitate PACE projects. PACE financing can be very attractive to commercial property owners and lenders because it offers favorable terms, enhances the property value, and from the perspective of capital providers is a relatively secure investment. Mortgagees with existing liens on properties will need to agree to subordinate their lien status to a PACE lien before a borrower can close on PACE financing. Although more details need to be developed in order to start a PACE program, these financial underwriting guidelines are designed to help localities, administrators, and capital providers determine which projects can be financed to encourage investments in energy and water efficiency improvements and mitigate risk.
Introduction

The Virginia Department of Mines, Minerals and Energy (DMME) as directed in Chapter 427 of the 2015 Virginia Acts of Assembly has established the following uniform statewide financial underwriting guidelines for loans made pursuant to §15.2-958.3 of the Code of Virginia. In developing these guidelines, DMME incorporated input from representatives of the Virginia Bankers Association, the Virginia Energy Efficiency Council, the Virginia Association of Realtors, the Virginia Municipal League, the Virginia Association of Counties, and the Virginia Association for Commercial Real Estate. DMME also received input from the Metropolitan Washington Council of Governments, several local jurisdictions, and members of the public. As directed by the legislation, the guidelines include the evaluation of the following criteria: total loan to value ratio, voluntary special assessment (PACE assessment) to assessed value ratio, savings to investment ratio, the requirement for energy assessments, and the disclosure of an assessment to future owners.

In Virginia Property Assessed Clean Energy (PACE) financing can be used to finance renewable energy, energy efficiency, and water usage efficiency improvements. The underwriting guidelines proposed by DMME are not mandatory. Localities, in consultation with their administrator and participating capital providers, may modify these underwriting guidelines in order to better fit the specific needs and goals of their jurisdiction’s PACE program.

When developing a PACE financing program, localities, PACE financing program administrators and lenders will need to set objectives to manage and minimize risk. Because PACE financing programs require local government support to function, they need to support local goals and objectives. According to §15.2-958.3, a locality’s enabling ordinance for a PACE program “shall include but not be limited to...[the] kinds of renewable energy production and distribution facilities, energy usage efficiency improvements, or water usage efficiency improvements for which [PACE] loans may be offered.” By extension localities have discretion in terms of identifying the savings associated with PACE-financed projects.

PACE financing, like any financing product, carries the risk of default. Localities, PACE administrators and capital providers need to develop policies and protocols to manage the risk of default. These guidelines are intended to be sufficiently detailed to provide guidance to localities interested in developing a PACE program but general enough to provide discretion to administrators and capital providers to meet specific program objectives while minimizing risk of default. These underwriting guidelines were developed to specifically apply to non-residential PACE financing programs.
PACE financing for commercial property owners

PACE allows for the financing of up to one hundred percent of the upfront costs of making energy improvements to a property and is repaid through a voluntary special assessment that is placed on a property’s tax bill regardless of whether the financing originates from a public or private entity. These assessments are secured in the form of a property tax lien, which is placed on the property only if there is a written subordination agreement by all existing mortgage holders. For simplicity, “PACE assessment” refers to the voluntary special tax assessment. Depending on a commercial owner’s specific lease structure, commercial property owners may benefit from PACE loans in a triple-net lease environment because the repayment obligation of the PACE assessment can be passed through to tenants. Commercial property owners may also benefit because the financing and accompanying assessment transfer to the next owner when a property is sold.

Commercial property owners are sometimes reluctant to make energy improvements to their buildings because the landlord would be responsible for the upfront capital costs while the tenant benefits from the lower utility bills that result from such improvements. This is the so-called “split incentives” problem where the landlord would not necessarily be able to benefit from the generated savings. Because many commercial leases allow for special tax assessments to be passed on to tenants, PACE assessment payments can be passed on to the tenants who benefit from the energy improvements.

Another reason property owners hesitate to make energy investments is that clean energy improvements, such as energy efficiency or renewable energy technologies, often have payback periods in excess of five or six years, which are typical terms for most commercial property loans. In addition to having longer terms (typically equal to the weighted average of the expected life of the measures financed) that can be as long as 20 or 30 years, PACE assessments transfer with the sale of the property, so the next owner would be responsible for assuming the PACE assessment payments.

PACE assessment payments can be structured in a way such that the annual cost savings exceed the annual assessment payments, resulting in a positive cash flow for a property. In addition, some of the improvements financed through PACE loans can make space that was previously unusable or uninhabitable usable and able to generate more income for the owner.

Because PACE assessment payments can be passed through to tenants, transferred to future property owners, and used to make investments that may generate positive cash flows, commercial property owners who make planning decisions for periods that are typically shorter
than the life of a particular energy conservation measure or energy improvement may benefit from the flexible financing options provided by PACE.

**PACE financing and private financial institutions**

Private financial institutions may be interested in offering PACE financing because it is a financial instrument that finances improvements that enhance and protect the collateral of banks. Because many PACE-financed projects improve comfort and desirability of a property, PACE can enhance and increase property values. Many of the improvements financed with PACE are improvements that owners and mortgagees want implemented because they improve the desirability of the building. Replacing boilers or chillers, upgrading to high-efficiency lighting, or installing photovoltaic panels or solar thermal hot water heating equipment can all increase property values while generating a positive cash flow.

PACE assessments are secured in the form of a tax lien, which means that in the event of a default and ensuing foreclosure, delinquent PACE assessments are to be repaid first after ad valorem taxes. Primary mortgagees are protected because PACE assessment liens can only achieve priority status if all existing lienholders on a property consent to subordinating their lien status to the PACE lien. Because PACE assessment liens are treated as special tax liens, they are “non-accelerating.” Typical mortgages and other types of loans contain *acceleration clauses* that require the borrower to pay off the loan immediately if certain conditions are met, such as if the borrower misses too many payments. Because PACE assessments are “non-accelerating,” if a borrower defaults and the property goes into foreclosure, the foreclosure proceeding will only pay the PACE capital provider the amount that is due in arrears (only delinquent payments). Should the property be acquired by the future owner, the future owner would assume the PACE loan payments. In this way, both the risk undertaken by the PACE capital provider and the primary mortgagee are mitigated by trying to ensure that enough value remains in the property after the tax lien has been satisfied in order to allow the primary mortgagee to recover its investment.

The law allows PACE assessment liens to effectively achieve the same priority status as property tax liens on a property only if existing lienholders consent to the PACE lien through a written subordination agreement recorded with the special assessment lien. This means that regardless of the financial underwriting guidelines in place for capital providers to provide PACE financing, the borrower still needs to secure lender consent through a written subordination agreement from any existing lenders who hold liens on the property. As a result, the underwriting
guidelines adopted by localities need to be acceptable both to a PACE capital provider and the current lienholders on a property.

The Investor Confidence Project

The Investor Confidence Project (ICP) is a project of the Environmental Defense Fund that many other states including Texas have used to develop protocols and guidelines for financing energy efficiency projects. DMME makes reference to the ICP Efficiency Project Framework when suggesting protocols for energy assessments and audits.

Virginia Uniform Statewide Financial Underwriting Guidelines

Chapter 427 directs the Virginia Department of Mines, Minerals and Energy to develop uniform statewide underwriting guidelines. In developing these guidelines, DMME solicited input from various stakeholders. The legislation stipulates that the guidelines include: total loan to value ratio, special voluntary assessment (PACE loan) to assessed value ratio, savings to investment ratio, requirements for a technical assessment, and requirements to disclose the voluntary special assessment to future owners. The phrase “voluntary special assessment” pertains to the PACE assessment and the guidelines will use the term “PACE assessment” for simplicity.

Also, it is important to note that the underwriting guidelines are voluntary. Localities may choose to adopt them in full or in part. As mentioned before, Virginia’s PACE law requires that existing mortgage holders consent through a recorded written subordination agreement prior to a voluntary special assessment for a PACE loan achieving priority tax lien status on a property to which they already have a mortgage. This means that the primary mortgagee will also have the opportunity to evaluate whether the loan can be repaid by the borrower.

Total Loan to Value Ratio (LTV)

Total loan to value ratio is the ratio of the total debt secured by a property (including the PACE financing) to the assessed or appraised property value. The purpose of setting a maximum LTV ratio is to ensure that there is sufficient collateral to secure the PACE assessment in the event of a default. The loan value should include the amount of PACE financing. The locality should exercise its discretion about whether to use assessed or appraised values. For example assessed values may vary considerably based on the vacancy rate at a property, and in this case, it may be more accurate to use appraised value as the basis for determining the value of the property. Regardless, the maximum allowable LTV should be 90% of the assessed or appraised property value.
To further mitigate risk of default, DMME recommends adding an additional measure of a borrower’s ability to pay in the form of a debt service coverage ratio (DSCR). DSCR is defined as net operating income (yearly gross revenue minus operating expenses) divided by the total debt service, including the PACE financing. A DSCR of greater than or equal to one indicates that a property generates enough revenue to cover its debt service. Requiring a DSCR greater than one can further reduce risk of delinquency and default because it shows that the property raises enough revenue to cover its debt service payments. **DMME recommends a DSCR equal to or greater than 1.**

Together setting the maximum allowable LTV at 90% coupled with a DSCR of greater than or equal to 1 should provide sufficient risk mitigation for lenders and borrowers. Localities should have the flexibility to increase the LTV limit or reduce the DSCR threshold on a case-by-case basis only if there are no existing debts on the property.

**Voluntary Special Assessment (PACE Financing) to Assessed Value Ratio**

The voluntary special assessment (PACE financing amount) to property value ratio is the PACE financing amount divided by the assessed or appraised value. Setting a maximum PACE financing amount to assessed value ratio provides additional protection by reducing the risk of default. **The PACE financing amount to property value ratio should be no more than 20%.**

Similar to LTV above, the locality should use its discretion when using assessed versus appraised value. Furthermore, a local program administrator may choose to waive the 20% threshold on a case-by-case basis if all parties agree. This may also take place if there is no current mortgage or debt obligation or other extenuating circumstance.

**Savings to Investment Ratio (SIR)**

Savings to investment ratio (SIR) refers to the ratio of overall project savings to overall project costs. An SIR greater than one indicates a project whose savings are greater than the costs. Although the SIR can help property owners evaluate the value of a PACE project, SIR is less important for financial underwriting because lenders want to ensure that borrowers will be able to repay their loans even if the costs are greater than the savings.

There are examples of projects that would be good candidates for PACE financing although their SIR is less than one. For example, a project that would include improving the health, safety, or occupancy of the building would generate revenue or produce benefits to the owner that are not included in the savings calculation. SIR for the project may be less than one, but the improvements may allow for increased cash flow to the owner and thus still preserve or even improve the owner’s ability to pay for the loan.
As a result, DMME recommends that if localities chose to use SIR in their PACE programs, the SIR should be greater than one, but allow the inclusion of ancillary benefits in addition to utility savings. The SIR should be applied to the entire project, and not just individual energy conservation measures. In addition, the administrator should be allowed to issue a waiver for projects where the SIR is less than one if the parties involved agree that it is acceptable to have such an SIR.

Requirements for a Technical Assessment

Requiring technical assessments such as an energy audit of a PACE financed project can help ensure that a project is feasible and that it delivers the expected savings. DMME recognizes that some projects, such as single-measure projects, are simpler and require a basic assessment while others are more complex and require a more sophisticated assessment. Rather than requiring a single type of assessment such as an American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) Level II or Level III audit, the technical assessment protocols should be based on the specific characteristics of the building and project. Localities may wish to use the recommendations of the Investor Confidence Project (ICP) Efficiency Project Framework to determine which protocols are suitable provided the building type and the size and scope of the project. To ensure that projects deliver savings, DMME recommends that localities require that PACE borrowers submit a technical energy assessment that is based on the size and type of the building and the size and scope of the project. Local governments and their administrators can decide whether and when to require independent third party assessments and the extent to which the costs of the assessment can be included in the PACE financing amount. For other clean energy projects such as solar photovoltaic or solar thermal water heating, the locality, administrator and lender should work together to develop an acceptable assessment methodology that considers the size and scope of the project.

The ICP Efficiency Project Framework designates standards and best practices for various stages of an energy project from baselining energy use and projecting savings to measuring and verifying savings after the project is complete. These standards are different for each building type or risk model and they designate protocols for determining an energy usage baseline; projecting energy savings; overseeing design, construction and verification of the measures; monitoring operations and maintenance; and lastly measuring and verifying savings after the project has been completed. Localities can apply the ICP Large, Standard, and Targeted protocols for baselining.
energy usage and projecting savings that are outlined in the ICP Efficiency Project Framework to individual projects based on project scope according to guidelines described in Figure 1.

**Figure 1: ICP Efficiency Project Framework specifies requirements for baselining and projecting energy savings size and scope of project.**

For example, a commercial whole building retrofit with a cost of over $1 million would submit an energy assessment that follows the ICP Large Commercial Protocol for baselining and energy savings projections, which would entail a more comprehensive assessment. On the other hand, a single measure commercial building project of less than $1 million would use the ICP Targeted Commercial Protocol whose protocols are less stringent. Requiring onerous or costly energy assessment for all projects regardless of size or measure could discourage the development.
of smaller energy projects that could result in substantial savings, and failing to require comprehensive and industry-accepted assessments for larger more complex projects could result in a project’s failure to produce savings and thus increase the risk of default on a loan. Allowing for different assessments based on size and scope of the project mitigates risk and avoids crowding out smaller projects with onerous assessment requirements.

Although the ICP has protocols for measurement and verification of savings, DMME is not recommending any specific measurement and verification protocols for energy projects at this time. DMME understands that robust measurement and verification protocols are vital to ensuring accountability and to building confidence in energy efficiency projects, and the agency encourages participants with larger projects to include measurement and verification in their projects. For smaller projects, measurement and verification activities that adhere to widely accepted protocols such as the International Performance Measurement and Verification Protocol (IPMVP) Option C can be very costly. In some cases, the costs of measurement and verification for a single project can exhaust most or all of the projected savings of a project. As a result, DMME recommends encouraging borrowers to consent to allowing the local program administrator and their utilities to share their application information (including the energy assessment) and detailed monthly energy consumption data (at the meter level for the property, without regard to any sub metering) for three years before and three years after the PACE financed project with an independent third party for evaluative purposes, assuming that this data is readily available. Third parties who use this data should be required to enter non-disclosure agreements with the utility and local administrator to ensure that detailed individual consumption data is not made publicly available. Only aggregated performance data about the entire program should be shared publicly.

Disclosure of the Voluntary Special Assessment (PACE Assessment) to Future Buyers

Because a PACE assessment “runs with the land,” a seller does not necessarily need to pay off the PACE obligation before selling their property. In the event of a sale, the PACE obligation would transfer to the new owner who would assume responsibility for making the assessment payments. If future buyers are not aware of a PACE lien on a property, they may not be aware of the financial obligation they would have to satisfy additional payments on their property tax bill. In addition, if a prospective buyer is financing their purchase with a mortgage, the mortgagee would need to consent to the existence of a PACE lien on the property. In Virginia, it is typical for a title search to occur prior to settlement in order to identify any existing liens on a property. DMME recommends that localities record PACE liens in a way that would make such liens easily discoverable in a title search.

Virginia Uniform Statewide Financial Underwriting Guidelines for PACE Loans
Other considerations and conclusion

The development of uniform statewide financial underwriting guidelines for PACE financing in Virginia is only one piece of establishing a functioning PACE financing program. In addition to developing financial underwriting guidelines, localities will need to work with their administrator and lending institutions to identify eligibility criteria for property owners and eligible costs that can be included in the PACE financing. Some of these requirements are established in §15.2-958.3 of the Code of Virginia while others will need to be identified in the locality’s enabling ordinance. Among other criteria, in order for a PACE lien to achieve priority tax lien status, state law requires a written subordination agreement by all existing mortgage holders, as well as evidence that a property owner is current on property loans and tax payments, evidence that a property owner is not insolvent or in bankruptcy proceedings and evidence that the title of the property is not in dispute.

The purpose of this guidance document is to provide localities that are interested in developing a PACE financing program enough information to start a dialogue about the underwriting process and guidelines necessary to facilitate PACE financing. PACE financing can be very attractive to commercial property owners and lenders because it offers favorable terms, enhances the property, and from the perspective of lenders is a relatively secure investment. Mortgagees with existing liens on properties will need to agree to subordinate their lien status to a PACE lien before a borrower can secure PACE financing. Although more details need to be developed in order to start a PACE program, these financial underwriting guidelines are designed to help localities, administrators, and lenders determine which projects can be financed to support PACE projects and mitigate risk.
VIRGINIA REAL ESTATE CASE LAW UPDATE
(SELECTED CASES)

by Otto Konrad and James L. Windsor*

I. VIRGINIA SUPREME COURT CASES

A. Chacey v. Garvey, 781 S.E.2d 357 (Va. 2015)

Facts: In 2008, Allan Chacey (“Chacey”) hired a company to remove timber from his property. Valerie Garvey (“Garvey”), the adjacent landowner, alleged that the company trespassed on her property and removed timber from her property without her permission. Garvey testified that she incurred more than $135,000 in legal costs, including attorneys’ fees, directly associated with the trespass.

Lower Court Proceedings: The trial court held that Garvey was entitled to $165,135.00 in “directly associated legal costs” resulting from the trespass, pursuant to Virginia Code § 55-331, et seq.

Holding: A prevailing property owner on a timber trespass claim was not entitled to attorneys’ fees, even though “legal costs” are provided for in. That section allows a property owner to recover reforestation costs, legal costs, and the costs of ascertaining the value of the timber, even if the property owner does not first establish the value of the timber taken. The trial court did not err in allowing the owner’s claims for timber trespass to go to the jury.

Discussion: The issue is whether “directly associated costs” includes attorneys’ fees. The Court found that “costs” is limited to the costs necessary for the prosecution of a suit (e.g. filing fees or charges for service of process) and not attorneys’ fees. The Code has more than 200 sections in which it states that a successful litigant is entitled to “costs and attorneys’ fees” (or some combination of the two), indicating that the General Assembly clearly views costs separate from attorneys’ fees.

B. CPM Virginia, LLC v. MGM Golf, LLC, 780 S.E.2d 282 (Va. 2015).

Facts: CPM Virginia, LLC (“Plaintiff”) contracted with a third party, Dominion Resources, Inc. to acquire fly ash for use on Plaintiff’s planned 18-hole golf course. Plaintiff then entered into an agreement with MJM Golf, LLC (“MJM”) to purchase the golf course. The parties executed the agreement in August 2006. In 2013, Plaintiff sued MJM alleging non-payment of the promissory note signed in January 2007. MJM countersued, alleging CPM violated the warranty provision by not covering all of the property with fly ash. MJM argued the expenses to repair and replace the fly ash offset any liability under the promissory note. Lower Court Proceedings: The trial court found Plaintiff breached the warranty provisions of the commercial contract. Holdings: The Supreme Court found in favor of the Plaintiff, reversed the breach of warranty finding and remanded for further proceedings.

Discussion: The Supreme Court evaluated the agreement between Plaintiff and MJM to determine what, if any, warranty governed the use of fly ash on the property. In assessing the issue, the Supreme Court looked to the agreement’s language and affiliated documents for any possible representations and warranties. The Supreme Court determined the agreement did not include an explicit or implied warranty requiring the Plaintiff cover the property with the fly ash, and therefore Plaintiff could not have breached a warranty that did not exist. The Supreme Court found the trial court erred as a matter of law.

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**Facts:** Lynore Arrington (“Arrington”) and William Plucky (“Plucky”) acquired by general warranty deed property located in Moneta, Virginia, as tenants by the entireties with the right of survivorship. Upon their divorce, Arrington conveyed her interest to Plucky by deed of gift executed on July 15, 2004, and recorded on July 29, 2004. On July 7, 2005, Plucky conveyed the property by general warranty deed to Donald L. Riemenschneider (“Riemenschneider”), recorded on July 12, 2005. On August 22, 2006, Plucky executed a deed of trust purporting to convey the property to Deutsche Bank (the “Deutsche Bank Deed of Trust”). The Deutsche Bank Deed of Trust was not recorded until May 21, 2008. On March 19, 2009, Plucky executed a deed of trust in favor of Arrington to purge a contempt order for failing to pay debts set forth in the divorce decree. On July 6, 2009, Riemenschneider executed a general warranty deed re-conveying the property to Plucky. This deed was recorded on July 17, 2009 at 1:10 pm. Arrington recorded her deed of trust on July 17, 2009 at 1:11 pm. Deutsche Bank filed a complaint in the Circuit Court of Bedford County seeking a declaratory judgment that the Deutsche Bank Deed of Trust was a valid first priority lien on the property. Deutsche Bank’s position was that when Riemenschneider conveyed the property to Plucky on July 6, 2009, Virginia Code § 55-52 cured the title defect in the Deutsche Bank Deed of Trust retroactive to August 22, 2006, and with respect to Arrington’s deed, Plucky conveyed only what he held, resulting in Arrington’s deed of trust being inferior to the Deutsche Bank Deed of Trust.

**Lower Court Proceedings:** The Circuit Court ruled that Arrington’s deed of trust had priority over the Deutsche Bank Deed of Trust because, even though the Deutsche Bank Deed of Trust was recorded before Arrington’s deed (i) Virginia Code § 55-52 does not affect the deeds of third parties or influence the relative priority of their interests, (ii) the Deutsche Bank Deed of Trust was void against Arrington as a judgment lien creditor under Virginia Code § 55-96(A), and (iii) pursuant to Virginia Code § 55-105, the Deutsche Bank Deed of Trust was not properly recorded in Arrington’s chain of title.

**Holding:** The Supreme Court affirmed the Circuit Court’s decision.

**Discussion:** Virginia Code § 55-52 provides that “when a deed purports to convey property, real or personal, describing it with reasonable certainty, which the grantor does not own at the time of the execution of deed, but subsequently acquires, such deed shall, as between the parties thereto, have the same effect as if the title which the grantor subsequently acquires were vested in him at the time of the execution of such deed and thereby conveyed.” In agreement with the Circuit Court, the Supreme Court held that Virginia Code § 55-52 governs the rights between a grantee and a grantor (here, Riemenschneider and Plucky); it does not affect the rights of third parties (here, Arrington). Under Virginia Code § 55-96(A), which addresses priority, the Deutsche Bank Deed of Trust did not impair Arrington’s priority because she was a lien creditor and the Deutsche Bank Deed of Trust was not admitted to record before Arrington qualified as a lien creditor. The Deutsche Bank Deed of Trust was recorded before Plucky acquired legal title of record; therefore, it was outside Arrington’s chain of title. Because the Deutsche Bank Deed of Trust was not properly recorded in Arrington’s chain of title, it was not “duly admitted to record” despite being recorded before Arrington’s deed. As a result, Arrington, a lien creditor, had priority over the Deutsche Bank Deed of Trust because it was recorded outside Arrington’s chain of title, and was therefore void as to her.


**Facts:** Edwin and Evelyn Ramos (“Ramos”) filed an action challenging a foreclosure sale of their residence. The subject loan was insured by the Federal Housing Administration and certain Department of Housing and Urban Development (“HUD”) Regulations were incorporated into the foreclosed deed of trust. Ramos alleged the HUD regulation requiring “face-to-face” meeting with Wells Fargo, N.A. (“Wells”) was not had or attempted following the borrowers’ default. Without such a required meeting, Ramos argued that Wells had not satisfied a precondition to foreclosure and that it lacked authority to foreclose, rendering the sale it initiated unlawful. Additionally, at the time of the action’s commencement, settlement on the property to the high bidder at the sale had not yet taken place;
accordingly, the foreclosing trustee could refund the bidder’s security deposit and release the bidder from its purchase. Based on these allegations, Ramos asked for compensatory damages and rescission of the foreclosure sale.

**Lower Court Proceedings:** The Circuit Court sustained Wells Fargo’s demurrers asserting (i) the Ramos had (i) failed to identify the injury caused by any contractual breach; (ii) failed to allege any specific damages incurred and to include an *ad damnum* clause stating the amount of damages sought, and (iii) failed to allege facts indicating that foreclosure sale was unconscionable, a product of fraud or otherwise voidable, thus negating rescission as an equitable remedy.

**Holding:** The Supreme Court affirmed the Circuit Court’s decision.

**Discussion:** The Court held that, while Ramos sufficiently pled the breach of contract, they omitted allegations of the breach causing injury or damage incurred. As to rescission, while the Court acknowledged that, at the time Ramos brought their action, the foreclosure sale to the successful bidder had not occurred, “upon foreclosure under a Virginia deed of trust ‘[t]he contract of sale [is] consummated when the auctioneer cries[s] the property out to the person making the highest and last bid. The only power remaining in the trustees, so far as the purchaser [is] concerned, [is] to collect the purchase money and execute a proper deed conveying such property and title as had been conveyed to the [the purchaser].’” (citation omitted) The Court therefore held the sale of the property to the high bidder was consummated and Ramos was not entitled to rescission. The Court implied in its holding that Ramos’ complaint did not contain allegations of fraud, collusion with the purchaser, or a sale price that shocks the consciousness such that rescission was justified.

E. **Collett v. Cordovana, 772 S.E.2d 584 (Va. 2015)**

**Facts:** The Cordovanas and 1273 West Ocean View, LLC (“1273 WOV”) own property on either side of the property owned by Gina M. Collett (“Collett”). Collett alleged that the Cordovanas and 1273 WOV were responsible for directing water run-off and pollutants onto her property, and that they had altered the topography of their property to the extent that it exacerbated the water run-off and caused her property to suffer water-related damage any time a significant rain event occurred. She alleged that the resulting pools of water caused mosquitoes and other pests to breed on her property, rendering her yard unusable. She alleged that the Cordovanas and 1273 WOV were responsible under theories of trespass, nuisance, negligence per se and ordinary negligence.

**Lower Court Proceedings:** The Circuit Court for the City of Norfolk sustained the demurrers filed by the Cordovanas and 1273 WOV, and dismissed the matter with prejudice.

**Holding:** The Supreme Court affirmed the trial court’s ruling.

**Discussion:** Under the modified common law rule in Virginia, surface water is a common enemy, and each landowner may fight it off as best he can, provided he does so reasonably and in good faith and not wantonly, unnecessarily or carelessly. Property owners may, in the reasonable development of their property, grade it and not be liable for discharging additional diffused surface water. Collett’s complaint alleged that the defendants dumped gravel and/or put down mulch; however, she failed to plead any facts from which one could conclude that the defendants acted recklessly or carelessly in modifying their properties. As a result, the Supreme Court held that Collett’s complaint failed to state valid causes of action for trespass, nuisance, and negligence by the Cordovanas or 1273 WOV when they modified their properties as permitted under Virginia’s modified common law rule regarding surface water. Further, Collett relied on two Norfolk ordinances to support her claim for negligence per se; however, neither ordinance contained a provision for a private right of action like that asserted by Collett.

Facts: A severance deed, executed in 1887, severed the mineral estate underlying land in Dickenson County, Virginia from the surface estate (the “Sutherland Surface Estate”), and conveyed “all of the coal, iron, petroleum oil and gas and other ores and mineral lying and being in, upon and under all that certain tract of land” to the Virginia Coal and Coke Company. The severance deed did not specify who would own the resulting mine void after all of the ores and minerals were removed. On May 10, 1983, Malva Bailey (“Bailey”) acquired ownership of a portion of the Sutherland Surface Estate. Bailey filed a civil complaint in the Circuit Court of the City of Richmond asking the Court for a declaratory judgment regarding the alleged taking of her real property by Conrad Spangler, the Director of the Virginia Department of Mines, Mineral and Energy. She alleged that by issuing mining permits “to conduct mine operations” in the mine void beneath her property, Spangler took her property rights for private use, purportedly pursuant to Virginia Code § 55-154.2. Spangler removed the case to the U.S. District Court for the Eastern District of Virginia and filed a motion to dismiss alleging that Bailey did not own the mine void beneath her property because Virginia Code § 55-154.2 divested her predecessors in title of ownership of the mine void before Bailey acquired the property.

Lower Court Proceedings: The U.S. District Court for the Eastern District of Virginia certified two questions for review by the Supreme Court of Virginia:

1. Does the mine void ownership created by Virginia Code § 55-154.2 in 1981 apply to deeds executed before July 1, 1981?

2. If the answer is yes, and the presumption applies to coal severance deeds executed before July 1, 1981, and assuming that a predecessor in interest executed a valid coal severance deed in 1887, then under Virginia law what, if any, ownership interest in the mine voids would a subsequent grantee surface owner take if she were deeded the land in 1983?

Holding: The Supreme Court of Virginia held that the presumption of mine void ownership created by Virginia Code § 55-154.2 does not apply to deeds executed before July 1, 1981.

Discussion: Virginia law does not favor retroactive application of a statute unless a contrary legislative intent is present. Absent express manifestation from the legislature, the Supreme Court will not infer retroactive application. Virginia Code § 55-154.2 states that “[t]he provisions of this section shall not affect contractual obligations and agreements entered into prior to July one, nineteen hundred eighty-one.” The parties disagreed on whether a deed is considered a “contractual obligation” or an “agreement”; however, the Supreme Court determined that it did not need to decipher whether a deed was considered a “contractual obligation” or an “agreement” because it did not change the fact that there was no express statement that the statute was to be applied retroactively. Given the absence of the express intent of the legislature, the Supreme Court held that Virginia Code § 55-154.2 does not apply to deeds executed before July 1, 1981. Because the first certified question was answered in the negative, the Supreme Court did not consider the second certified question.

G. Marble Tech., Inc. v. Mallon, 773 S.E.2d 115 (Va. 2015)

Facts: In 1936, a dissolving corporation distributed a large tract of land to its shareholders. The deed distributing the land stated that the parties would take the property “subject to an easement on a twenty foot road as designated on the map recorded with this deed, which easement is to run with the land and from the parties hereto to their assigns and heirs but it is expressly stated that the said twenty foot road shall not become a public road, but merely an easement for the parties, their heirs or assigns to the deed.” The phrase “Along Present Mean High Water” was written between the parallel lines depicting the road on the referenced map. Due to changes in the sand and water levels, the easement, as located on the map, is now under the Chesapeake Bay. The landowners claimed that the express easement moved with the mean high water line as the beach eroded.
Lower Court Proceedings: The Circuit Court determined that the deed and map were ambiguous and considered parol evidence to ascertain the intent of parties to the deed and map. The Circuit Court ruled that the landowners had a variable express easement that moves with the mean high water line.

Holding: The Court reversed the Circuit Court’s ruling, holding that it erred in considering parol evidence to determine the location of an easement, because the map accompanying the deed was unambiguous.

Discussion: The Court reviewed de novo the Circuit Court’s interpretation of the words in the deed. If the language in a deed is unambiguous, Courts should interpret the deed based solely on the language, should only consider parol evidence if the language of the deed is ambiguous. The Court considered the dictionary definition of “present,” defined as “now existing or in progress; begun but not ended; now being in view, being dealt with, or being under consideration; being at this time; not past or future; contemporary.” Given the definition of “present,” the easement, as depicted on the map, means the line as it existed in 1936. The Court held that this was confirmed by the fact that the map utilized metes and bounds and a stationary marker to show the easement’s location. Therefore, because the deed and map were unambiguous, there was no need for the Circuit Court to consider evidence beyond the documents, and it erred in admitting parol evidence.

H. Evans v. Evans, 772 S.E.2d 576 (Va. 2015)

Facts: In 1973, Douglas and Wanda Evans, husband and wife, obtained title to a piece of property (the “Fairway Property”) as tenants by the entirety with right of survivorship. In 1976, Douglas Evans conveyed all of his interest in the Fairway Property to Wanda Evans by a general warranty deed. The 1976 deed was not recorded in the land records until 1979, and the records of the parties did not provide direct evidence that Wanda Evans accepted physical delivery of the 1976 deed prior to its recordation. Douglas and Wanda Evans had three sons: William, Lloyd and Wayne Evans. In 1993, Wanda Evans executed a trust agreement providing Douglas Evans a life estate in the Fairway Property, with the remainder, and all other trust assets, to William Evans. The trust agreement expressly made no provision for Wayne and Lloyd Evans. At the time of execution of the trust, Wanda Evans executed a deed which purported to convey all of her interest in the Fairway Property to herself as trustee of the trust. She also executed a will that provided for any remaining property in her estate to pour over into the trust. Upon Wanda Evans’ death, William Evans asserted that the 1993 deed was ineffective to transfer any interest in the Fairway Property to the trust because neither spouse can sever an estate by the entireties nor convey or dispose of any part of it by his or her sole act. Wayne Evans entered into a mutual settlement and release agreement; however, upon Douglas Evans’ death, Wayne and Lloyd Evans asserted a claim of ownership to the Fairway Property through Douglas Evans’ estate.

Lower Court Proceedings: The Circuit Court concluded that the 1976 deed failed to show the requisite intent to jointly transfer the Fairway Property in fee simple and thus, because that deed was ineffective, the 1993 deed was likewise ineffective to transfer any interest to the trust.

Holding: The Supreme Court reversed the Circuit Court’s decision.

Discussion: The dispositive issue was whether the 1976 deed effectively terminated Douglas Evans’ tenancy by the entirety ownership in the Fairway Property, leaving Wanda as the sole owner in fee simple. It is well-established that to convey property held in a tenancy by the entirety, both spouses must consent to the transfer; however, this well-established rule had only been applied to situations involving conveyances to third parties. Douglas Evans’ unilateral execution of the 1976 clearly established his intent to divest himself of his tenancy by the entirety in favor of a fee simple ownership in Wanda Evans. Despite the fact that there was no evidence of a delivered deed, Wanda Evans’ execution of the 1993 deed, trust and will each addressed her ownership of the Fairway Property, which in turn evidenced her intent to accept the 1976 deed. The Court held that there was sufficient evidence to establish the mutual consent of Douglas and Wanda Evans to convert their tenancy by the entirety ownership of the Fairway Property into fee simple ownership in Wanda Evans.

**Facts:** In 2013, the Tvardeks filed a declaratory judgment complaint against their homeowners’ association, Powhatan Village Homeowners Association, Inc. (the “HOA”) challenging the validity of a 2008 amendment to the Powhatan Village Declaration of Protective Covenants and Restrictions (the “2008 Amendment”) on the basis that it unlawfully deprived them of the preexisting right to rent their home, which they purchased in 2006. After the Tvardeks filed an amended complaint amplifying their claim, the HOA filed a special plea in bar asserting that the case should be dismissed as untimely under the one-year statute of limitations prescribed by Code §55-515.1(E). The Tvardeks responded with a motion for partial summary judgment claiming that the statute of limitations was inapplicable because the 2008 Amendment never became “effective” under the Virginia Property Owners’ Association Act, Code § 55-509 et seq., and specifically pursuant to Code §55-515.1(F), which is a prerequisite for the running of the one-year limitations period in Code §55-515.1(E). The debate over the statute of limitations turned on a single uncontested fact: the text of a certification attached to the 2008 Amendment, recorded in the land records of the clerk of the Circuit Court. The certification stated:

**CERTIFICATION REQUIRED BY VIRGINIA CODE § 55–515.1.(F)**

The undersigned President of the Association does hereby certify that this Amendment has been approved by a vote of two-thirds of the Class A votes in the Association, as evidenced by the results of the meeting at which the vote was taken, such evidence on file with the Association, as required by Section 9.2 of the Declaration.

EXECUTED on the date first written above by the duly authorized officer of the Association.

POWHATAN VILLAGE HOMEOWNERS ASSOCIATION, INC., a Virginia Nonstock Corporation

By: /s/Barbara G. Moody

Barbara Moody, President

The one-year statute of limitations prescribed by Code § 55–515.1(E) only bars actions challenging the validity of amendments when the action is “brought more than one year after the amendment is effective.” The next subsection of the statute defines the events that make an amendment effective under the Act:

**Agreement of the required majority of lot owners to any amendment of the declaration shall be evidenced by their execution of the amendment, or ratifications thereof and the same shall become effective when a copy of the amendment is recorded together with a certification, signed by the principal officer of the association or by such other officer or officers as the declaration may specify, that the requisite majority of the lot owners signed the amendment or ratifications thereof.**

Virginia Code § 55–515.1(F) (emphasis added).

**Lower Court Proceedings:** Without taking evidence, the Circuit Court reviewed the pleadings, heard arguments of counsel, and entered an order granting the special pleas in bar asserting the statute of limitations defense. The Court later entered an order granting “prevailing party” attorney fees, in the amount of $12,237.50, to the HOA. (Citing Va. Code Ann. §55-515(A)).

**Holding:** The Court reversed the Circuit Court’s order granting the plea in bar and the award of the prevailing party attorney fees.

**Discussion:** The Court began its analysis by observing the English common law (which Virginia courts have consistently applied) on the principle of strict construction of restrictive covenants. It then observed
that the Virginia Property Owners’ Association Act expands the concept of privity beyond common law limits, but statute prescribed procedures governing adoption of an amendment to existing restrictive covenants must be followed exactly. The Court noted the certification states only that the amendment was approved by a vote of two-thirds of the eligible members, rather than the statutory requirement that the eligible members signed the amendment. The Court held the certification did not meet the statutory requirements and the one year limitations period under § 55-515.1(F) was not triggered. The Court also held that the certification’s reference of unspecified evidence on file did not stand in lieu of, and satisfy, the requirement that the certification recite that the requisite majority of eligible members signed the amendment. The HOA attempted, as a “last stand”, to argue for the application of the “anti-absurdity principle,” arguing that any interpretation requiring that certification must strictly comply with § 55-515.1(F) leads to absurd results, including placing a burden on the HOA to maintain records forever to refute a possible challenge. Stating that the Court’s fidelity to the statutory text does not permit them to weigh policy arguments for and against legislation, the Court rejected the application of the so-called “anti-absurdity” principle.

II. VIRGINIA CIRCUIT COURT CASES


Facts: This action involved a gravel road known as Tarzan Road located on land owned by Defendants and of which Plaintiffs claim they have acquired a right to use by prescriptive easement. Plaintiffs owned tracts of land, either individually or jointly with one or more of the other Plaintiffs that abutted Tarzan Road. Ownership of the land in question and the fact that Tarzan Road was situated on part of Defendants’ land was not contested; the only facts in dispute were: (1) whether the Defendants granted the Plaintiffs permission to use Tarzan Road; and (2) whether such use was under a claim of right.

Holding: The Circuit Court of the County of Buchanan granted Plaintiffs a prescriptive easement on Tarzan Road for commercial and residential purposes and entered a permanent injunction preventing the parties from altering or interfering with either Plaintiffs’ or Defendants’ use of the road, including altering its size or hindering ingress and egress by use of a gate, fence, signage, or other such device or impediment. The Court further ordered that the land immediately parallel to the main highway remain in its current state and that the parties may not alter or interfere with use of such area for entering and exiting Tarzan Road.

Discussion: To prove a prescriptive easement, Virginia law requires a showing of “use that is adverse, under a claim of right, exclusive, continuous and uninterrupted, and with the knowledge and acquiescence of the owner of the land over which it passes.” Virginia law imposes a twenty (20) year statutory period during which such use must continue. Where there has been open, visible, continuous, and uninterrupted use of a road across another’s land for at least the requisite twenty years, the burdened owner must rebut the presumption of a prescriptive easement, which generally consists of evidence of permission to use the land and that such use was not under a claim of right. Here, in addition to one Defendant’s testimony at a previous hearing that Plaintiffs’ use of Tarzan Road was without permission, Plaintiffs presented evidence showing that they maintained the road by trimming back weeds and that their use was continuous and open to the public since they have lived on Tarzan Road. In making its ruling, the Court declined to consider Defendants’ proposed evidence of an alternate road for use by Plaintiffs on the ground that Plaintiffs did not allege an easement by necessity.

B. City of Chesapeake v. KH HR Two Great Bridge, LLC and Parcel 138, Civil No. CL12-1779, 2015, Va. Cir. LEXIS 129 (Chesapeake Cir. Ct. June 9, 2015)

Facts: The City of Chesapeake (the “City”) filed a petition for condemnation against KH HR Two Great Bridge, LLC and Parcel 138 (collectively, the “Landowner”) regarding a franchise and public utility easement containing 2,153 square feet. During the jury trial, the City filed a motion for leave to amend the certificate of take pursuant to Virginia Code § 25.1-312 and a motion to amend the petition for
condemnation pursuant to Virginia Code § 25.1-216 seeking to reduce the value of the rights taken by eliminating any impact to the Landowners’ parking, thereby reducing the City’s payment to the Landowner. Landowner moved to dismiss the petition arguing that the City sought more property than necessary. The Court orally granted the City’s motion and denied the Landowner’s motion to dismiss, ruling that the City would be responsible for reimbursement of the Landowner’s costs and expenses resulting from preparing for the amended petition. The City subsequently withdrew its motion for leave to amend on the basis that it did not want to pay the Landowner’s costs and expenses, and the Landowner moved to invalidate the certificate of take and dismiss the matter.

**Holding:** The Court granted Landowner’s motion to dismiss without prejudice and allowed the recovery of fees and costs pursuant to Virginia Code § 25.1-419.

**Discussion:** According to the due process clause of the Constitution of Virginia, no more private property may be taken than necessary to achieve the stated public use. The central issue is whether the City’s petition seeks to take more property than is necessary to achieve its stated public use as a utility easement. The initial certificate sought a franchise and public utility easement for the relocation of certain Dominion Virginia Power and Verizon Virginia, Inc. facilities. In the motion for leave, the City sought to amend the certificate to reserve certain parking rights in the Landowner. By filing the motion to amend, the City effectively admitted that the initial petition sought more property than was necessary to achieve the stated public purpose.


**Facts:** Philippe and Tania Steinschneider ("Owners") own certain property that they rented to Steve and Laura Reid ("Tenants"). Sommer Barry ("Barry") owns the adjacent property, which is separated from the first property by a common wall. Tenants added fill material to Owners’ backyard, which elevated the grading of the land to twelve inches above the Barry property, and “altered and extended” a rainwater downspout which was used to carry water away from the Barry property. The downspout is now buried and sends surface water onto the Barry property, flooding the interior of the townhouse located thereon. Barry filed an action for trespass, negligence and nuisance, seeking relief for severe flood damage, mold infestation and costs of obtaining temporary alternative housing. Owners filed a demurrer.

**Holding:** The Court sustained Owners’ demurrer and granted Barry leave to amend the complaint, holding that Barry did not plead sufficient facts.

**Discussion:** The Court found that Barry did not plead sufficient facts to allege the three counts of trespass, nuisance, and negligence. On the count of trespass, Barry failed to plead that the Owners have done anything beyond exercise their legal right to improve their property in the “usual and customary way.” The Court found that Barry failed to allege that the artificial downspout was directed toward the Barry property. On the count of negligence, Barry failed to plead that the Owners owed a duty to Barry, which is a fundamental element of a negligence claim.


**Facts:** Appeal from the General District Court. Richardson’s predecessors in title granted an easement and right of way to Virginia Electric and Power Company ("VEPCO") to construct, operate and maintain one line of poles for the purpose of transmitting electric power. VEPCO sought the right to apportion its easement to T-Mobile for T-Mobile’s use. VEPCO had filed a demurrer against Richardson in the previous case.

**Lower Court Proceedings:** The Circuit Court heard the case *de novo* as the general district Court is not a Court of record.
Holding: An easement granted for the transmission of electric power cannot be expanded by the grantee unilaterally. The grantor has the right to prohibit any use of the easement that is outside of the use authorized by the manner and nature of the easement’s creation.

Discussion: The Court evaluated two questions: (1) is VEPCO’s easement apportionable? and (2) if so, can it be apportioned for the use T-Mobile is now making of it? Here, the deed that created the easement was determined to be ambiguous, so the Court sought to infer, based on the language, the extent of VEPCO’s easement. It noted the deed’s language specifically references the facilities as the one line of poles, equipment and accessories necessary to transmit power. Courts historically have refused to re-write agreements between parties and infer additional uses when not stated or implied in the original contract. The Court did not address whether VEPCO could apportion its easement, instead focusing on the proposed use by the assignee. Ultimately, the Court determined that even if VEPCO’s easement was apportionable, VEPCO could not apportion the easement for a use it did not receive from the grantor.

E. Winesett v. Edwards-Soblotne, 90 Va. Cir. 269 (Norfolk, 2015)

Facts: Appeal from the General District Court. Winesett purchased a single family residence and asserted that the seller’s real estate agent failed to disclose to her known material adverse facts relating to the property’s physical condition in violation of Virginia Code § 54.1-2132(A)(6) and § 54.1-2132(B). The Defendants argued the statute does not provide for any private right of action for its violation.

Lower Court Proceedings: The Circuit Court heard the case de novo as the general district Court is not a Court of record.

Holding: The Real Estate Brokers Act provides for a private cause of action for its violation.

Discussion: The Act’s “Liability for false information” provision states, “A licensee shall not be liable for providing false information if the information was (i) provided to the licensee by the licensee’s client; (ii) obtained from a governmental entity; (iii) obtained from a nongovernmental person or entity that obtained the information from a governmental entity; or (iv) obtained from a person licensed, certified, or registered to provide professional services in the Commonwealth, upon which the license relies, and the licensee did not (a) have actual knowledge that the information was false; or (b) act in reckless disregard of the truth. This includes any regulatory action brought under the chapter and any civil action filed.”

The General Assembly enumerated the various instances in which a real estate agent would not be liable for providing false information, signifying its intent that the statute provide a basis of liability in other circumstances. Evaluating Plaintiff’s case in the light most favorable to her, the Court found Claims I and II stated a cause of action and overruled the demurrers on those claims.

F. Reed v. Smith, 90 Va. Cir. 220 (Roanoke 2015)

Facts: On or around August 1, 2013, Reed (“Landlord”) and Smith (“Tenant”) entered into a lease agreement, which by its terms was to expire on August 31, 2014. On July 27, 2014, Tenant indicated to Landlord that she would be vacating the premises and terminating her tenancy prior to the expiration of the lease. Tenant vacated the lease on August 3, 2014; Landlord inspected the property and found considerable disrepair, including evidence of unpermitted dogs on the premises. Landlord filed suit for damages and unpaid rent.

Lower Court Proceedings: The General District Court entered judgment in favor of Landlord.

Holding: The General District Court overruled Tenant’s Motion to Strike, finding that Tenant violated the lease upon the early termination and refusal to pay August rent, and found Tenant liable to Landlord in the amount of $2,922.63.

1 §54.1-2142.1 --Ed.
Discussion: On appeal, Tenant again filed a Motion to Strike arguing that Landlord failed to comply with portions of the Virginia Residential Landlord and Tenant Act (the “VRLTA”), Va. Code Ann. § 55-248.15:1, by not providing Tenant with notice of Landlord’s withholding of Tenant’s security deposit or an itemization of damages. Tenant also maintained she was not liable for August rent because she vacated the premises in early August. The VRLTA requires the Court to order the return of a tenant’s security deposit if the landlord willfully fails to return the deposit in accordance with the VRLTA. The Court found that Landlord’s failure to provide formal notice of the withholding of the deposit or itemization of damages was at most negligently noncompliant with the VRLTA, but not willfully noncompliant. Further, the Court found that pursuant to the VRLTA, the security deposit should be credited against the unpaid rent due to Landlord and pursuant to the lease agreement between the parties, Tenant would be liable to Landlord for all damages, unpaid rent, costs and attorneys’ fees.


Facts: In 1890, Norfolk Southern Railway’s (the “Railroad”) predecessor condemned the right of way on which the Railroad now operates; between 1890 and 1900, it constructed the rail line and began operations. The line has been in active use since, and operations on the rail line predate the development of the neighborhood in which Richard and Barbara Shilling’s (“Shillings”) properties are located. Appalachian Power Company (“APCO”) owned a strip of property adjacent to the rail line, and cleared the strip of trees. As a result of the clearing, the Shillings experienced noise, vibration and various discharges, and asserted that the operation of the rail line now constituted a nuisance. The damages to their properties were pursuant to a public use (operating the rail line), and that before taking or damaging the Shillings’ properties, Railroad should have pursued a condemnation proceeding under the Virginia State Constitution.

Holding: The Court grants Railroad’s plea in bar holding that the Shillings’ claims are preempted by federal law.

Discussion: The Court finds preemption under 49 U.S.C. § 10501(b) reaching its conclusion by being guided by the purpose of and intent of § 10501(b) that the development and continuation of a sound rail transportation system be ensured.

H.  *Richmond Mort., Inc. v. Preferred Trust Co.*, Case No. CL15-2155 (Portsmouth Oct. 16, 2015)

Facts: By deed dated September 10, 2012, Johnson conveyed certain real property to Property Solution Specialists, Inc. (“PSS”). On the same date as the Johnson to PSS deed, PSS executed two deeds of trust – a purchase money deed of trust and a second deed of trust. The Circuit Court Clerk appears to have rejected the vesting deed and the purchase money deed of trust for recording, and there was a delay in returning the rejected documents to the party attempting to record them. The vesting deed and the purchase money deed of trust were later recorded, but by then a second deed of trust that was intended to be in second lien position had been recorded prior to both of them. Richmond Mortgage held a refinance deed of trust that paid off the purchase money deed of trust. It filed suit seeking to establish that the rejected vesting deed and purchase money deed of trust for recording, and there was a delay in returning the rejected documents to the party attempting to record them. The vesting deed and the purchase money deed of trust were later recorded, but by then a second deed of trust that was intended to be in second lien position had been recorded prior to both of them. Richmond Mortgage held a refinance deed of trust that paid off the purchase money deed of trust. It filed suit seeking to establish that the rejected vesting deed and purchase money deed of trust were deemed to have been recorded prior to the second deed of trust; the purchase money deed of trust was deemed to have priority over the second deed of trust, despite the order of recording; and the refinance deed of trust was equitably subrogated to the lien position of the purchase money deed of trust it paid off, to the extent of the amount of the payoff.

Holding: The court held that, pursuant to the doctrine of simultaneous seisin, the purchase money deed of trust was deemed to have been recorded with the vesting deed, as part of one transaction. The court further held that the vesting deed and the purchase money deed of trust were intended to have been recorded prior to the second deed of trust. In addition, Richmond Mortgage was equitably subrogated to the lien position of the purchase money deed of trust, to the extent of the funds used to pay it off. This restored the refinance deed of trust to its intended first-lien position.
Discussion: Although Virginia Code § 55-52, which codifies the doctrine of after-acquired title, addresses circumstances such as this, it specifically states that it only applies “as between the parties thereto.” Plaintiffs were not parties to the purchase money deed of trust or the deed into PSS; therefore, § 55-52 could not operate to prejudice the rights of Richmond Mortgage and its trustee. However, Virginia Code § 8.01-184 specifically gives courts the power to issue declaratory judgments in “[c]ontroversies involving the interpretation of deeds, wills, and other instruments of writing . . .” When the second deed of trust was recorded prior to both the vesting deed and the purchase money deed of trust, PSS did not yet have title to the property. The deed into PSS and the purchase money deed of trust were intended to be recorded back-to-back, prior to the second deed of trust. Virginia law deems that the vesting deed and the purchase money deed of trust were simultaneously recorded as part of one transaction, pursuant to the doctrine of simultaneous seisin. The court declared that the vesting deed and the purchase money deed of trust were intended to have been recorded prior to the second deed of trust. Because the refinance deed of trust paid off the purchase money deed of trust, it equitably subrogated the second deed of trust and retained first lien position.


Facts: Defendants acquired title to real property by virtue of a deed dated April 28, 1989. By deed dated October 13, 1995, Defendants intended to convey an undivided one-half interest in the property to the parents as tenants by the entirety, and an undivided one-half interest in the property to Rauf and her brother as joint tenants. However, there was an error in the lot number of the legal description. In August 2006, the parties executed a deed of trust against the property. This deed of trust contained the same error in its legal description but did reference the correct street address and parcel identification number.

In November 2007, a deed of correction was recorded in the clerk’s office correcting the lot number in the legal description of the deed. It also attempted to remove Rauf as a grantee of an interest in the property. However, Rauf did not sign the deed of correction. On the same day in November 2007, the parents and the brother executed a refinance deed of trust to replace the August 2006 deed of trust. Rauf was not named as a grantor and did not sign this refinance deed of trust. A factual investigation revealed that it was the intention of the parties to remove Rauf as an owner of the property, (the reason that Rauf did not sign the refinance deed of trust).

Plaintiffs filed suit to reform the deed of correction, which incorrectly omitted Rauf as a grantor, and asked the court to declare, pursuant to Virginia Code § 8.01-184, that the refinance deed of trust was a valid conveyance of the interests of all of the owners of the property, and that it was a valid and existing lien against the property.

Holding: The court reformed the deed of correction to add Rauf as a grantor and issued a declaration that the refinance deed of trust was a valid lien against the interests of all the owners of the property.

Discussion: This case illustrates a set of facts that appear to lead to one conclusion, when a different conclusion was correct. Initially, the case appeared to involve a missing interest on a deed of trust, when in actuality it involved a missing interest on the deed of correction.

J. Wells Fargo Bank, N.A. v. Williams, Case No. CL15-2462 (Henrico Cty. Feb. 12, 2016)

Facts: The legal description of a deed of trust failed to account for the effect of a prior deed of exchange. The legal description of the deed of trust was therefore over-inclusive in some respects and under-inclusive in other respects. The grantor of the deed of trust died intestate, leaving six heirs. Plaintiffs filed suit to reform the deed of trust to correct the legal description, effective as of the date of its execution.

Holding: The court reformed the legal description to include appropriate references to the deed of exchange.
Discussion: This case illustrates the importance of being able to obtain reformation of instruments, effective as of the dates of their execution.


Facts: By deed dated 1991, the Wischhusens acquired title to certain real property as tenants by the entirety. In 2005, the Wischhusens executed a refinance deed of trust. Although the husband signed the refinance deed of trust and his signature was notarized, he was not listed as a grantor in the granting clause of the refinance deed of trust and, accordingly, the refinance deed of trust was not indexed in his name but was indexed solely in the name of the wife. The couple later filed a bankruptcy petition, and the trustee attempted to avoid the lien of the refinance deed of trust for this reason. The lender settled with the bankruptcy trustee, obtained relief from the stay, and proceeded in circuit court seeking a declaratory judgment, pursuant to Virginia Code § 8.01-184, to state that the refinance deed of trust conveyed the interest of both the husband and wife as of the date of execution of the deed of trust, and was a valid and enforceable lien against the property.

Holding: The court entered a declaratory judgment that the refinance deed of trust conveyed the interest of both the husband and the wife as of the date of its execution, and was a valid and enforceable lien against the property.

Discussion: At the time of the execution of the refinance deed of trust, the Wischhusens owned the property as tenants by the entirety. The fact that both of them signed the refinance deed of trust is consistent with this form of ownership, and consistent with their intention to grant a valid lien against the property. In addition, because both Mr. and Mrs. Wischhusen signed the refinance deed of trust and their signatures were acknowledged by a notary, the lien of the refinance deed of trust attached to the property on the date of its execution.

III. U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT CASES

A. Jones Lang Lasalle Americas, Inc. v. Hoffman Family, LLC, 606 F. App’x 706 (4th Cir. 2015)

Facts: In August 2007, Hoffman Family, LLC and Hoffman Buildings, L.P. (jointly, “Hoffman”) retained real estate firm Jones Lang Lasalle Americas, Inc. (“JLL”) to serve as its exclusive leasing agent with respect to multiple properties that Hoffman owned in Virginia. The parties entered into an agreement (the “Agreement”) whereby JLL agreed to assist Hoffman in identifying, pursuing, negotiating and securing leasing opportunities with the U.S. federal government. In return, if JLL’s efforts resulted in a federal lease of any of the subject properties, the Agreement provided that JLL would receive a commission equal to 2% of the base rent. After formation of the Agreement, JLL hired a former U.S. General Services Administration (“GSA”) employee to advise JLL on federal government leasing and the procurement process.

In 2011, with the assistance of JLL, Hoffman was awarded a federal government lease for one of its Virginia properties, for a total base rent of more than $330,000,000 over the 15-year term. Shortly after the lease was signed, Hoffman and JLL began to disagree over the amount of commission due to JLL; when the parties were unable to resolve the dispute, JLL filed an action against Hoffman for breach of contract, claiming over $6,000,000 in commission payments. During discovery, Hoffman learned that the former GSA employee hired by JLL did not possess a Virginia real estate salesperson license when he joined JLL, and never obtained such a license at any time during his employment with JLL. Both parties moved for summary judgment, with Hoffman arguing that, as a matter of public policy, JLL was not entitled to recover any commission payable under the Agreement because the unlicensed broker’s involvement in JLL’s leasing efforts on behalf of Hoffman rendered the Agreement unenforceable.

Lower Court Proceeding: The U.S. District Court for the Eastern District of Virginia entered summary judgment in favor of Hoffman, concluding that Virginia law required that the JLL employee have a valid real estate license.
Holding: The Fourth Circuit reversed and remanded the case for further proceedings.

Discussion: Virginia law is contradictory: on one hand, a contract made in violation of the real estate licensing statutory framework is illegal and unenforceable; but on the other, Virginia courts are generally opposed to holding contracts unenforceable on public policy grounds unless their illegality is clear and certain. When the Fourth Circuit handed down this ruling, the Supreme Court of Virginia had yet to address the enforceability of validly formed contracts for real estate commissions performed in contravention of Virginia’s real estate licensing scheme and whether such a contract can later become invalid through unlawful performance of a party’s contractual obligations. Furthermore, although the District Court imposed a complete forfeiture of JLL’s commission payments, no explicit statute nor case law was identified that would require “a total prohibition” of JLL’s commission under Virginia law. Thus, the Fourth Circuit declined to hold the Agreement unenforceable as a matter of law on public policy grounds in the absence of clear Virginia law.

B. Poindexter v. Mercedes-Benz Credit Corp., 792 F.3d 406, (4th Cir. 2015)

Facts: In 2001, Poindexter purchased a car from HBL, Inc., an automobile dealer located in Virginia (“HBL”). She originally entered into a retail installment contract with HBL, but after HBL assigned the contract to Mercedes-Benz Credit Corporation (“MBCC”), Poindexter voluntarily agreed to participate in the Home Owner’s Choice program that MBCC offered to her. Under that program, Poindexter agreed to grant MBCC a lien against her residence in Loudoun County by a deed of trust as security for the outstanding loan (effectively converting it into a mortgage loan). The deed of trust in favor of MBCC, which was properly recorded in the Loudoun County land records, contained a covenant in which MBCC promised to release the lien on Poindexter’s property upon complete payment of the underlying debt obligation. In 2004, when Poindexter traded in her car to lease another vehicle from HBL, any obligations to make further payments on the first car terminated. MBCC, however, failed to record a certificate of satisfaction releasing the deed of trust on Poindexter’s residence, which she discovered in 2013 in connection with an unrelated attempt to refinance her existing home mortgage. Although Poindexter immediately contacted MBCC to demand that it record a certificate of satisfaction to release the lien, MBCC failed to timely do so. Around this same time, the lender Poindexter had approached about refinancing her home mortgage denied her application.

Poindexter filed a complaint against MBCC in the U.S. District Court for the Eastern District of Virginia, alleging six causes of action, including breach of contract. MBCC, after recording the requisite certificate of satisfaction within several weeks after Poindexter initiated the suit, then moved for summary judgment on all counts, asserting that all claims were time-barred. Poindexter argued that MBCC should be equitably estopped from pleading that the ordinary limitation period applies to bar her claims on the grounds that she should not be held accountable for MBCC’s failure to fulfill its contractual obligations under the deed of trust.

Lower Court Proceeding: The District Court granted summary judgment to MBCC as to all of Poindexter’s claims arising from MBCC’s failure to timely file a certificate of satisfaction to release the lien on her property upon satisfaction of the underlying debt.

Holding: The Fourth Circuit Court of Appeals affirmed.

Discussion: The District Court noted that Poindexter’s claim for breach of contract accrued under Virginia Code § 8.01-230 in 2004, when the debt was satisfied. Her action, filed nine (9) years later in 2013, was untimely under any of the applicable limitations periods, absent a finding that the principles of equitable estoppel applied to extend or toll such limitations periods. Under Virginia law, a party seeking to invoke equitable estoppel must prove by “clear, precise, and unequivocal evidence” that: (1) a material fact was falsely represented or concealed; (2) the representation or concealment was made with knowledge of the facts; (3) the party to whom the representation was made was ignorant of the trust of the matter; (4) the representation was made with the intention that the other party act upon it; (5) the other party was induced to act upon it; and (6) the party claiming estoppel was misled to his detriment.
Moreover, Virginia law makes clear that to permit the application of equitable estoppel, the party claiming to have been influenced by the conduct or declarations of another to his injury must not only have been ignorant of the true state of the facts but also have no “convenient and available means” of obtaining such information.

Here, the Fourth Circuit rejected all arguments that Poindexter raised in support of her attempt to invoke the doctrine of equitable estoppel. Poindexter had a convenient and available means to check whether MBCC indeed had filed the certificate of satisfaction by inspecting the Loudoun County land records. With respect to Poindexter’s contention that she was entitled to assume that MBCC filed the certificate of satisfaction based on the parties’ prior dealings and communications, the Court found that she failed to demonstrate any false representation or concealment of any material fact from her reliance on letters from MBCC concerning the return of her purchased car in exchange for the new, leased vehicle.

IV. U.S. DISTRICT COURT CASES

A. Appalachian Power Co. v. Nissen, Case No. 7:14-cv-000535 (W.D. Va.)

Facts Applicable to All Three Cases: Appalachian Power Company (“APCO”) operates the Smith Mountain Hydroelectric Project (the “Project”) pursuant to a license granted by the Federal Energy Regulatory Commission (“FERC”) under authority granted to FERC under the Federal Power Act, 16 U.S.C. § 791a et seq. (the “FPA”). The FERC license was originally granted in 1960, and was renewed in 2009 for another ten years. When FERC granted APCO the Project license in 1960, it required APCO to acquire all property rights necessary to enforce the requirements of the FERC license, a directive with which APCO complied. APCO also developed a Shoreline Management Plan (the “SMP”), incorporated into the Project license, providing detailed guidance for managing development within the Project’s boundaries. William and Lora J. Nissen (the “Nissens”) own real property at Smith Mountain Lake, a portion of which falls within the Project. With respect to the portion of the land falling within the Project, APCO obtained a Flowage Right and Easement Deed (the “Easement”) from the Nissens’ predecessor-in-title, providing APCO:

[T]he further right to enter upon said premises at any time and from time to time and, at [APCO’s] discretion, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises [falling within the Project].

The Nissens, without obtaining APCO’s consent, constructed a dock, removed vegetation, and constructed a road on the portion of their property falling within the Project, none of which comply with the FERC license or integrated SMP. APCO thereafter filed a complaint seeking a declaratory judgment regarding its rights to regulate Project lands and injunctive relief requiring the Nissens to repair damage already done and to cease continuing to violate the provisions of the Easement. The Nissens filed a counterclaim seeking their own declaratory relief.

1. 2015 U.S. Dist. LEXIS 45030 (Apr. 6, 2015)

Matter Under Consideration: In a previous decision, the Court denied the Nissens’ motion to dismiss for lack of subject matter jurisdiction. The Nissens filed a Rule 52(b) Motion to Reconsider, based on the Nissens’ belief that the Court failed to consider what they believed to be pertinent case law, Jeffrey Lake Dev., Inc. v. Cent. Neb. Pub. Power & Irrigation Dist., No. 4:11-cv-003112, 2011 U.S. Dist. LEXIS 152637, 2011 WL 7122188 (D. Neb. Nov. 23, 2011).

Holding: The Court denied the motion for reconsideration.

Discussion: The Jeffrey Lake Court found that federal question jurisdiction was inappropriate in a factual scenario which the Nissens’ argued was sufficiently similar to the instant matter to warrant dismissal, but
the Court found the facts distinguishable. Important to the Court was that the Jeffrey Lake Court focused heavily on the fact the complaint focused exclusively on interpretation of a lease under state law. In contrast, in the instant matter, APCO included several pleadings in its complaint specifically referencing the FERC licenses and the SMP incorporated therein (e.g., by claiming the dock being constructed by the Nissens exceeded what APCO would be permitted to allow under the FERC licenses and SMP, citing specific provisions thereof violated by the Nissens). Further, APCO’s prayer for relief asks for a declaration of its rights under the FPA, the FERC licenses and the SMP. Thus, a substantial question arose under federal law, and the Court’s exercise of subject matter jurisdiction was appropriate.


Matter Under Consideration: APCO filed a motion to dismiss the Nissens’ counterclaims. The Nissens’ counterclaims included five requests for declaratory relief, but three of those were conceded at a hearing. Thus, The holding below addressed only the following requests for declaratory relief: (i) a declaration that the Easement does not grant APCO sufficient property rights to compel the Nissens to cease construction of the dock, undertake re-vegetation of the area, or remove the road and related fill; and (ii) a declaration that a taking has occurred violative of the Fifth Amendment to the U.S. Constitution, in the event the Court holds that the FERC licenses or the SMP superseded or extinguish property rights retained by the Nissens under the Easement.

Holding: The Court granted APCO’s motion in part and denied it in part.

Discussion: With respect to matter (i) above, the Court found that the Easement gave APCO sufficient property rights to compel the Nissens to cease construction of the dock and to remove related fill, but found that, at the motion to dismiss stage, it was not clear that the road qualified as a “structure or improvement” such that its construction violated the Easement and that APCO had no apparent right to require the Nissens to take affirmative action to re-vegetate.

With respect to matter (ii), the Court found that the FERC licenses and SMP serve simply to define requirements for use of the Project lands which APCO may enforce only to the extent of its property rights in such lands (in this case, pursuant to the Easement), and that therefore no taking had occurred.


Matter Under Consideration: APCO filed a motion for summary judgment on its pleas for declaratory judgment and injunctive relief.

Holding: The Court granted all of APCO’s requests for declaratory and injunctive relief except to the extent they would require the Nissens to take affirmative action.

Discussion: The Court initially noted that the grant of rights in the Easement is facially unfettered, but Virginia law imposes a reasonableness inquiry based on the original purpose of the Project (i.e., to run a hydroelectric plant). The Nissens argued that the original 1960 license grant should be used to determine the original purpose of the grant, but the Court disagreed, finding that modifications to the license grant were contemplated in the 1960 grant, and that the updated 2009 grant and 2014 integrated SMP best reflect what is necessary to accomplish the original purpose of the Project.

From there, the Court had little trouble making the following declaratory judgements on summary judgement: (1) APCO has authority to regulate the use and occupancies of Project lands under the Easement as limited by the FPA, the FERC license and the SMP; (2) the Nissens’ deck construction was in violation of APCO’s rights; (3) the Nissens’ removal of vegetation was in violation of APCO’s rights; (4) the Nissens’ construction of a road was in violation of APCO’s rights; and (5) fill activity undertaken by the Nissens was in violation of APCO’s rights. The Court granted a permanent injunction prohibiting the Nissens from further violating APCO’s rights under the Easement.
The Court declined to require the Nissens to make any repairs for damage already done, finding that the Easement contains only a negative covenant not to engage in such activity, and not an affirmative covenant to repair damage done. Instead, APCO could make repairs and seek damages from the Nissens (although the Court in this case gave the Nissens an opportunity to make repairs if it so chose).


Facts: Sixty-two individuals brought individual and class claims against the Law Office of Shapiro, Brown & Alt, LLP (“SBA”) and Professional Foreclosure Corporation of Virginia (“PFC” and, together with SBA, the “Defendants”) alleging that Defendants violated both common law duties and various Fair Debt Collection Practices Act (“FDCPA”) provisions when foreclosing on Plaintiffs’ homes. Plaintiffs allege that Defendants breached their fiduciary duty to Plaintiffs by proceeding with foreclosure without satisfying all conditions precedent to the foreclosure. Additionally, Plaintiffs allege that Defendants violated both their common law fiduciary duty and the FDCPA by charging excessive title examination fees related to those foreclosures.

For FHA-insured deeds of trust in Virginia, foreclosure proceedings and loan acceleration may not occur if prohibited by HUD regulations. One such regulation requires a face-to-face meeting with the mortgagor or a reasonable attempt to arrange such a face-to-face meeting before foreclosure proceedings may occur. FHA Plaintiffs’ servicers or note-holders did not arrange for face-to-face meetings before proceeding with the foreclosures.

As part of the foreclosure process, Defendants ran title searches on Plaintiffs’ properties. Plaintiff Shelagh Payne received two correspondences that included foreclosure costs, including title costs in the amount of $375 and $325. According to Plaintiffs’ counsel’s research, the reasonable and customary fee for title searches is no more than $100.

Issue: Whether Defendants breached their fiduciary duty by (i) foreclosing before the face-to-face meeting condition precedent had been met and (ii) charging exorbitant title examination fees.

Holding: Defendants’ Motion to Dismiss was granted in part and denied in part.

(i) The Court found that Plaintiffs failed to state a claim for breach of fiduciary duty related to the face-to-face meeting requirement. (ii) With all inferences in favor of Plaintiffs, the Court agreed that Plaintiffs had stated a claim for breach of fiduciary duty with respect to the title examination fees.

Discussion: To recover for a breach of fiduciary duty claim in Virginia, a plaintiff must show that a duty exists, that the duty was breached, and that the breach caused damages. In Virginia, courts construe a deed of trust as a contract. A trustee’s power and duties are limited and defined by the instrument under which the trustee acts. Relying on a contract interpretation of the deed of trust, Defendants argue that Plaintiffs fail to state a claim for breach of fiduciary duty, because none exists within the deed of trust itself. Plaintiffs contend, however, that the trustees owe fiduciary duties outside of the deed of trust, particularly impartiality. Plaintiffs rely on case law indicating that trustees are fiduciaries to debtors and creditors alike and that trustees owe the duty of impartiality. The Court will not incorporate all of the common law duties of a traditional fiduciary, but rather only those that Virginia common law has specifically recognized in the deed of trust context. The only duty that the Virginia Supreme Court has imposed upon a trustee is that of impartiality.

According to Plaintiff, Defendants breached their fiduciary duty of impartiality by proceeding with the foreclosures when not authorized to do so by conducting foreclosures due to pricing incentives and forced compliance with unreasonable timelines. The claim rests upon the assertion that Defendants did not satisfy conditions precedent to foreclosure that the deeds of trust specifically enumerated. Plaintiffs claim on this point sounds in contract, not tort.
Plaintiffs allege that Defendants violated the FDCPA and breached their fiduciary duty to Plaintiffs by falsely and deceptively charging amounts for title examination fees beyond the customary rate and/or for inflating costs actually paid, and/or by falsely and deceptively representing different amounts were incurred when providing consumers with reinstatement and payoff statements. Virginia law recognizes that a trustee owes a duty of impartiality to a debtor. Plaintiffs plausibly pleaded that Defendants breached the fiduciary duty by exploiting their position as trustee and charging over three times the market rate for title examination fees. The Plaintiffs also plausibly pleaded resulting damages by alleging that the excessive fees were then passed on to Plaintiffs.


**Facts:** The defendant, K-VA-T Food Stores, Inc. (“K-VA-T”), leased space within the shopping center owned by the plaintiff, Euclid Center, L.P. The lease was subject to a provision entitled “Exclusive Supermarket” that states, “During the term of this lease or any renewals thereof, neither Landlord, its successors, assigns, representatives, nor heirs, will lease, rent or occupy or permit to be occupied, any premises owned or controlled by Landlord which are within 1 mile of herein leased premises, to be used primarily for the sale of grocery…Rental and other considerations are negotiated based upon Landlord’s representations to Tenant that there will be only one supermarket in this shopping center or extensions thereof.” During the term of the lease, K-VA-T closed its supermarket in the shopping center and opened a new supermarket directly across the street on its own property.

**Issue:** Whether a restrictive covenant contained in the lease agreement prohibits the operation of a supermarket by a tenant other than K-VA-T.

**Holding:** A factual dispute existed regarding the parties’ intent as represented by the lease agreement regarding the ongoing viability of the restrictive covenant. The Plaintiff’s motion for judgment on the pleadings was denied.

**Discussion:** The meaning of the restrictive covenant was at the core of the litigation. K-VA-T asserted that, after it closed its supermarket, it retained rights under the Lease to exclude competing entities offering for sale grocery-type items through the remaining Lease extension periods, except to the extent that it consented. Euclid disputed this position and sought a declaratory judgment that the restrictive covenant was now unenforceable, and it intended to lease space within the shopping center to another supermarket operator.

An ambiguity exists because the lease agreement may reasonably be interpreted in two ways. K-VA-T asserted that the radius limitation extended to the property located within the shopping center based on the “within 1 mile of the herein leased premises” language. However, the restriction also indicated the parties’ intent that there will be “only one supermarket in this shopping center or extensions thereof.” The existence of a supermarket within the shopping center may be analogous to a condition precedent regarding the radius limitation. The Court was unable to determine how the ambiguity should be resolved, and it must be left to trial.


**Facts:** Franklin and Mary Radford (the “Radfords”) conveyed certain real property to J. Jeffrey and Mitzi G. Tinaglia (the “Tinaglias”) pursuant to a general warranty deed (the “Tinaglia Deed”), which contained language purporting to create an access easement (the “Easement”). Fidelity National Title Insurance Company (“Fidelity”) issued a title insurance policy in connection with the transaction. For various reasons, the Easement was invalid, and Fidelity was required to compensate the Tinaglias under the title insurance policy.
Fidelity, as the Tinaglias’ subrogee, filed a complaint against the Radfords alleging breach of warranty and unjust enrichment. Fidelity sought damages of $106,282.86, which was the amount Fidelity “expended . . . in order to resolve the Claim,” with the “Claim” defined as follows: “In 2012, the Tinaglias demanded coverage under the Policy, claiming that the Easement was not actually conveyed to the Tinaglias under the Tinaglia Deed, as the Easement did not exist.”

In response, the Radfords filed a Rule 12(e) motion for a more definite statement, asserting that the complaint failed to explain how the damages were calculated, failed to identify the causal connection between the alleged defects in the Tinaglia Deed and the requested damages, and failed to attach the underlying real estate contract.

**Holding:** The Court denied the motion for a more definite statement.

**Discussion:** The Court noted that courts “tend to disfavor motions for a more definite statement,” and that they should only be granted if a defendant cannot reasonably be expected to prepare a response.

With respect to the damages calculation (which implicated the Court’s subject matter jurisdiction as the matter was brought under the Court’s diversity jurisdiction), the Court noted that the sum claimed by the plaintiff controls unless it is apparent “to a legal certainty” such amount cannot be recovered.

With respect to the causal connection, the Court noted that, to the extent the Radfords wished for an itemized list of damages so it could evaluate each claim separately, such a request would be more appropriate in discovery, and that Rule 12(e) motions should not serve as discovery substitutes.

Finally, with respect to failure to attach the underlying real estate contract, the Court again believed that the contract could be obtained through discovery, and that the contract simply was not necessary for the Radfords to file an answer.


**Facts:** In 2005, the Cooks refinanced through First National Bank (“FNB”) and obtained a loan in the amount of $214,400.00. At closing, the new FNB Deed of Trust was recorded and later assigned to Wells Fargo. Star City issued FNB and its successors and assigns a title insurance policy, which insured against the priority of any lien or encumbrance over the lien of FNB.

In its role as settlement agent at closing, Star City wired Macquarie Mortgages USA (“Macquarie”) the pay-off amount of the existing Macquarie credit line deed of trust. Virginia Code provides that, after full or partial payment or satisfaction has been made of a debt secured by a deed of trust…the lien creditor shall issue a certificate of satisfaction in form sufficient for recordation reflecting such payment and release of lien. This requirement shall apply to a credit line deed of trust only when the obligor or settlement agent has paid the debt in full and requested that the instrument be released. Star City maintained that it also sent Macquarie a written request by the Cooks to close the Macquarie credit line; however, Macquarie claimed never to have received it. Thus, Macquarie never closed the credit line it extended to the Cooks and never released the Macquarie Credit Line Deed of Trust, which remained the first lien on the Cooks’ property, paramount to the FNB Deed of Trust. The Cooks continued to make draws on the still-open Macquarie credit line and accumulated $276,000 in debt on it. The Cooks later defaulted on that debt, and lost the property in a foreclosure sale under the Macquarie Credit Line Deed of Trust. The property sold at auction for less than the amount owed to Macquarie thereby eliminating the FNB Deed of Trust.

First American paid the face amount of its title insurance policy to Wells Fargo. First American then filed an action for breach of contract as subrogee to the rights and claims of Wells Fargo, an
aggrieved person under Star City’s CRESPA² Bond (a surety bond under which Star City was the named Principal and NBM Insurance served as surety), seeking $100,000 from Star City and NGM Insurance, jointly and severally, as the penalty amount of the CRESPA Bond in force on the date of the transaction at issue.

**Issue:** Whether First American’s cause of action against the CRESPA Bond as Wells Fargo’s subrogee was barred because any claim Wells Fargo may have had against the bond was barred by the statute of limitations.

**Holding:** Defendants’ motions to dismiss was granted and this matter was dismissed with prejudice. The Court found that the injury to FNB/Wells Fargo occurred no later than October 14, 2005 when the FNB Deed of Trust was recorded behind the Macquarie Credit Line Deed of Trust. FNB agreed to extend the Cooks a refinancing loan based upon the bank’s mistaken belief that the Macquarie credit line would be paid in full, Macquarie Credit Line Deed of Trust released, and the FNB Deed of Trust recorded as first priority lien. Settlement agent Star City failed to comply with its statutory duty of care and recorded the FNB Deed of Trust behind the Macquarie Credit Line Deed of Trust. At that point, FNB/ Wells Fargo was injured and the five year statute of limitations began to run. First American, standing in the shoes of Wells Fargo, did not file this action until July 2014. It was now time-barred.

**Discussion:** The parties agreed that the CRESPA Bond was to be construed as a contract, and the applicable limitations period for breach of a written contract is five years. The parties disagree when the breach occurred. Defendants maintain that the breach occurred when Star City recorded the FNB Deed of Trust in a second position after the Macquarie Credit Line Deed of Trust. However, Wells Fargo's injuries did not become fixed until the January 2013 foreclosure sale. In Virginia, the general rule is that the applicable period of limitation begins to run from the moment the cause of action arises rather than from the time of discovery of injury or damage.


**Facts:** Livia Properties, II, LLC (“Livia”) leased property to Chelsea Communications, LLC, doing business as Adelphia Cable Communications (“Adelphia”). Comcast acquired the assets of Adelphia and assumed its rights and obligations under the Lease Agreements. Comcast retained Jones Lang LaSalle Americas, Inc. (“JLLA”) to act as its agent in negotiating and securing leases and/or renewals for its operations in the region. Paula Thompson, an employee and/or agent of JLLA, began acting as Comcast’s agent. According to Livia, until January 9, 2014, Livia had every reasonable expectation that Comcast intended to renew the Lease Agreement; however, on that day, Thompson contacted counsel for Livia and stated that Livia would be responsible for paying any commission due to JLLA. Livia responded the same day that it would not agree to pay any such commission or fee to JLLA. Comcast thereupon decided not to renew the Lease Agreement with Livia and secured property elsewhere.

**Issue:** Whether JLLA’s actions constituted tortious interference with business expectancy and/or prospective economic advantage or a statutory business conspiracy

**Holding:** The motions to dismiss were granted.

**Discussion:** Livia contended that Comcast’s refusal to renew the leases with Livia was due to a conspiracy on the part of JLLA and Comcast aimed at punishing Livia for refusing to pay Thompson and JLLA a commission. Livia’s claim against JLLA failed because a person cannot intentionally interfere with his own contract, and therefore an agent acting within the scope of its agency cannot interfere with the contract of its principal. JLLA’s actions were taken in furtherance of its work on Comcast’s behalf, ² Consumer Real Estate Protection Act, superseded by Chapter 27.3 of Title 55 of the Code of Virginia. –Ed.
and therefore, the claim for tortious interference failed. With respect to the business conspiracy claim, Livia failed to plead concerted action on the part of Comcast and JLLA in anything other than conclusory terms and failed to allege any facts that indicated Comcast acted with legal malice.


Facts: Appalachian Power Company (“APCO”) operates the Smith Mountain Hydroelectric Project (the “Project”) pursuant to a license granted by the Federal Energy Regulatory Commission (“FERC”) under authority granted to FERC under the Federal Power Act, 16 U.S. C. § 791a et seq. (the “FPA”). The FERC license was originally granted in 1960, and was renewed in 2009 for another ten years. When FERC granted APCO the Project license in 1960, it required APCO to acquire all property rights necessary to enforce the requirements of the FERC license, a directive with which APCO complied. APCO also developed a Shoreline Management Plan, incorporated into the Project license, providing detailed guidance for managing development within the Project’s boundaries.

Richard and Theresa Pressl (“Plaintiffs”) owned land on Smith Mountain Lake, a portion of which falls within the boundaries of the Project. Plaintiffs’ predecessor-in-title granted to APCO a Flowage Right and Easement Deed (the “Easement”), providing APCO with:

[T]he right to enter upon said premises at any time and from time to time and, at [APCO’s] discretion, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located [within the Project].

Plaintiffs desired to build on a portion of their property located within the Project. APCO, citing its authority under the Project license and the Easement, sought to impose on Plaintiffs a requirement that Plaintiffs obtain from APCO an Occupancy and Use Permit, revocable by APCO for violation of any conditions imposed by APCO. In response, Plaintiffs filed a declaratory action asking the Court to hold that APCO had no authority to impose such a condition. APCO filed a Rule 12(b)(6) motion to dismiss for failure to state a claim.

Holding: The Court granted APCO’s motion to dismiss, finding that APCO had a legal right to impose on Plaintiffs an obligation to obtain an Occupancy and Use Permit from APCO.

Discussion: The Court noted that, in Virginia, interpretation of easements granted by deed are the same as those governing the construction of other documents, and that, accordingly, the terms are to be construed by giving the words their natural and ordinary meaning and against the grantor and in favor of the grantee.

The Court found that the Easement grant was a broad one, giving APCO the ability to remove any structures located within the Project at any time for any reason (also noting that Virginia law imposes a reasonableness requirement, to be evaluated based on the original purpose of the grant). The Court further held that, though the Easement did not specifically provide APCO the right to require a usage permit, its right to demolish any structure at its discretion would logically include the right to determine the necessary steps to be taken to build such a structure in the first instance.


Facts: As part of an internal reorganization for tax and operational efficiencies, a subsidiary of a Sunoco affiliate transferred title to a group of fee and leasehold properties located in Planning District 8 (localities constituting Northern Virginia) to a wholly owned subsidiary pursuant to a written purchase agreement (the “APA”) with an effective date June 1, 2014. The APA provided that to the extent local law permitted, the agreement would be deemed a deed of conveyance. The APA further provided that
confirmatory deeds and lease assignments would be recorded for each of the subject sites, which such instruments were drafted, executed and, in the case of the deeds, recorded in the applicable local land records on or about October 1, 2014. Subsequent to the effective date of the APA, newly enacted Virginia Code § 59.1-21.15:2 (the “ROFR Provision”) became effective on July 1, 2014. The ROFR Provision provided that refiners who owned or leased convenience stores in Planning District 8, that in turn were leased to retailers, were required to extend a right of first offer or first refusal for each such site to its applicable retailer prior to transferring title to such fee or leasehold sites to another person. Plaintiffs asserted that Sunoco’s transfer of its sites to its wholly owned subsidiary pursuant to the October deeds and lease assignments was in violation of the ROFR Provision.

Holding: The Court held that, as between the two Sunoco affiliates, the APA constituted the operative deed and lease assignment and the transfers were effective prior to the July 1, 2014 effective date of the ROFR Provision. Accordingly, the plaintiffs were not entitled to any rights of first offer or purchase.

Discussion: Citing multiple Virginia Supreme Court opinions, the Court held that, as between parties to a contract, if the intent to transfer title is clearly expressed in the contract, the agreement can be effective as an instrument of transfer. Such intent to transfer title effective June 1, 2014 was clearly expressed in the APA. With respect to the leasehold sites, plaintiffs argued the assignment of such leasehold interests were not effective as the leases contained provisions making assignment of the tenant’s interest null and void. The Court also held that, as between the two Sunoco affiliates to the APA, the lease assignment is effective notwithstanding the landlords’ restrictions on alienation.


Facts: In August 2008, defendant debtor Laburnum Hotel Partners, LLC (“Laburnum”) executed a promissory note (the “Note”) in favor of the Bank of the Commonwealth (“Commonwealth”) in the original principal amount of $18,300,000. The Note was secured by a deed of trust executed in favor of Commonwealth (the “Deed of Trust”), which encumbered both real and personal property owned by Laburnum. More specifically, the Deed of Trust created a security interest in favor of Commonwealth in the hotel owned and operated by Laburnum and in “all equipment, fixtures, and other articles of personal property now or hereafter owned by Laburnum or affixed or attached to the real property.” In addition, the Deed of Trust provided that upon default, any sale of the personal property may be made in conjunction with any sale of the real property. Laburnum and Commonwealth also executed a UCC Article 9 security agreement (the “Security Agreement”) to secure the Note and future advances, which granted Commonwealth a security interest in Laburnum’s “personal property” as that term was broadly defined in the Security Agreement. Twenty-five individuals executed guaranty agreements as further security for the Note, each guarantying Laburnum’s payment and satisfaction of its indebtedness and performance of its obligations under the Note up to a certain fixed share as set forth in each guaranty (collectively, the “Guaranties”).

In 2011, plaintiff Southern Bank & Trust Company (“Southern”) purchased the Note, the guaranties, and the other loan documents from Commonwealth. After Laburnum defaulted on the Note in August 2012, Southern made demand for payment in full under the Note as well as under the Guaranties. Despite such demands, Laburnum made its last voluntary payment under the Note in October 2012, and none of the Guarantors made any payments under the Guaranties. In April 2013, the Trustee gave notice to Laburnum and the Guarantors expressly stating that it would foreclose on “the property described in [the] Deed of Trust” by public auction. At the foreclosure sale the following month, Southern purchased the collateral that secured the Note. The memorandum of sale that Southern executed (the “Memorandum of Sale”) explicitly recited that the Trustee sold “the real estate with all improvements thereon described . . . in the aforementioned Deed of Trust and further described in the Notice of Trustee’s Sale.”

3 Right of First Refusal. –Ed.
thereafter, Southern assigned all of its right, title, and interest in and to the Memorandum of Sale to Oak, LLC (“Oak”). The settlement statement that Oak and the Trustee executed at the subsequent closing listed the “Property” as the parcel of land on which the hotel was located.

A dispute among Southern, Laburnum, and the Guarantors then arose as to whether the Trustee sold or disposed of any collateral other than that covered by the Deed of Trust. Laburnum contended that the Trustee sold only the real property and improvements defined by the Deed of Trust, while the Guarantors argued that Southern disposed of all of the personal property collateral, further suggesting that certain personal property was transferred to Oak without proper notice from the Trustee. Southern asserted that the Trustee sold all the real and personal property pledged as collateral under both the Deed of Trust and the Security Agreement because the personal property covered by each agreement is the same. Southern moved for summary judgment against Laburnum on the Note and against the Guarantors on the Guaranties for a deficiency amount, including, but not limited to, the outstanding principal, past interest, late fees, and attorney’s fees, that it claimed remained after the Trustee’s sale of the collateral.

**Lower Court Proceeding:** The Report and Recommendation of the Magistrate Judge for the U.S. District Court for the Eastern District of Virginia recommended denying Southern’s motions for summary judgment and directing an evidentiary hearing to resolve the following factual disputes:

1. Was any collateral not covered by the Deed of Trust disposed of by the Trustee’s sale?
2. If so, was the disposition of such collateral made in a commercially reasonable manner?
3. If not, what amount of proceeds would have been realized had the Trustee disposed of the collateral in a commercially reasonable manner?

**Holding:** The district court adopted the Report and Recommendation of the Magistrate Judge, denying Southern’s motions for summary judgment.

**Discussion:** Under Virginia law, if a security agreement covers both real and personal property, a secured party may proceed: (1) under UCC Article 9, Section 6 as to the personal property without prejudicing any rights with respect to the real property; or (2) as to both the personal and real property in accordance with the rights with respect to the real property, in which case the other provisions of UCC Article 9, Section 6 do not apply. Moreover, the decision regarding which rights and remedies to pursue lies with the secured party. Thus, upon Laburnum’s default under the Note, Virginia Code § 8.9A-604 provided Southern with two primary options as to how it could proceed with respect to the collateral covered by the Deed of Trust: (1) dispose of the real property and personal property collateral separately, under real property law and the Virginia UCC, respectively; or (2) dispose of both in the same proceeding under real property law.

When a security agreement covers both real and personal property collateral (as the Deed of Trust did here), and the secured party elects to dispose of both in the same proceeding, that disposition need only be conducted in accordance with the rights with respect to the real property, and the other provisions of the UCC Article 9 do not apply. If, however, the Trustee is found to have disposed of only the collateral covered by the Deed of Trust, then all aspects of the sale, including notice, advertisements, and descriptions of the property, must comply with the requirements set forth in Virginia Code § 55-59.3. Notably, Virginia law only requires “substantial compliance” with the § 55-59.3 requirements so long as the rights of the parties are not affected in any material way. If the Trustee failed to substantially comply with such requirements, Laburnum still must show that such failure by the Trustee materially prejudiced it, in which event rescission of the foreclosure sale provides the typical remedy. Lastly, where a security agreement covers only personal property (as the Security Agreement did here), Part 6 of the UCC Article 9 governs, and every aspect of the disposition of the personal property collateral must be commercially reasonable. Ultimately, the Magistrate Judge’s recommendation, as adopted by the district court, found that Southern failed to meet its burden to show that the fact finder could arrive at no reasonable conclusion other than that all the real and personal property defined by the Deed of Trust, and no other collateral, was sold at the Trustee’s sale, thus necessitating further evidentiary hearings on the remaining factual issues in dispute.
V. BANKRUPTCY COURT CASES


Facts: William H. Reese, Jr. and Virginia Reese, the parents of Bambi Lynne Tederick (“Plaintiff”), owned property as tenants by the entirety. They borrowed $140,000 from US Bank National Association’s (“Bank”) predecessor in interest in 1990, using their property as security for the loan. The loan had a maturity date of 2000. William Reese, the Plaintiff’s father, filed a Chapter 12 petition in February 1992, which was dismissed in April 1992. He then filed a Chapter 11 petition in 1993 and the Chapter 11 plan was confirmed in 1994. One provision in his Chapter 11 plan stated he would make monthly payments for the next 30 years to pay off the $140,000 loan. The confirmed plan continued the deed of trust and the lien securing the bank’s predecessor in interest in the intended 30-year period, which would end in 2026, however, no documentation of the extension of the maturity of the note or lien of the deed of trust was recorded in the land records. The Plaintiff’s mother passed away in 1998. The Plaintiff’s father, William Reese, the surviving tenant by the entirety, died on April 8, 2008, and the Plaintiff inherited the property at that time. The Plaintiff filed a Chapter 13 bankruptcy petition in March 2014. The Bank filed a proof of claim in the Plaintiff’s Chapter 13 bankruptcy and sought to enforce its $140,000 deed of trust.

Holding: A certificate must be recorded prior to the expiration of the statute of limitations in order to extend the statute of limitations.

Discussion: The case’s central issue dealt with the applicability of the Virginia statute of limitations to the enforcement of a deed to trust. First, the Court evaluated the question of whether or not the statute of limitations was tolled in light of William Reese’s bankruptcies and the Plaintiff’s parents’ deaths. The Court found the bankruptcies did not toll the statute of limitations because the statute of limitations did not begin to run until the original obligation had become due and payable according to its terms and “without regard to any provision for the acceleration of such date.” Therefore, the Court determined the statute of limitations started after the two bankruptcy cases were closed. Second, the Court addressed the applicability of Virginia Code §8.01-241(C), which permits a secured lender to file a certificate to extend the enforceability of its deed of trust for a period of 10 years. In this case, the lender failed to file the certificate before the limitation period’s expiration. The Court ruled the Bank was no longer eligible to file the certificate permitting the extension and the enforcement of the deed of trust was barred under the statute of limitations.


Facts: From 2009 to 2011, Starlight Group, LLC (“Starlight”) purchased residential real estate at short sales with the intention to later resell the various properties. Holmes worked as the real estate agent in the initial purchase and later sale of each property. While working with Holmes, Starlight obtained private loans and purchased distressed properties at below-market prices. In 2011, Starlight began to collapse and it was unable to close on a property and pay off a private note simultaneously. Holmes decided Starlight should close on the property and leave the note unpaid, along with other Starlight debts. The creditors sought payment and collection of the Starlight debts.

Holding: The unsecured creditors’ claims have priority over the claims of the creditor in control of the debtor because of the unsecured creditors’ equitable liens, or in the alternative, equitable subordination.

Discussion: The Court evaluated the priority of the various unsecured claims from the alleged creditors to determine if any creditors with unsecured claims had priority over the unsecured claims of a creditor who

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4 Similar to a Chapter 13, but available for family farms and fishermen. –Ed.
was not the owner of the debtor but had control over the debtor and knew the security agreements were ineffective to grant liens on the debtor’s property. The Court found the security agreements created liens on Starlight’s personal property in favor of the creditors and the liens were effective between Starlight and its creditors. The Court also determined the security interests in the property were binding on Holmes. Holmes was the decision maker for Starlight and had ultimate say on Starlight’s real estate purchases, sales, and entering into the loans. Ultimately, the Court found the unsecured creditors’ claims had priority over the claims of the creditor in control of the debtor by virtue of the unsecured creditors’ equitable liens, or alternatively, equitable subordination.
Due to time constraints, we are unable to include a summary of the legislation of the following bills. We hope to be able to have it available for the Fall issue.

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<th>Bill Number</th>
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<td>Mortgage lenders and mortgage brokers; licenses; reports</td>
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<td>HB 125</td>
<td>Mortgage loan originators; inactive licenses.</td>
<td>Delegate Daniel W. Marshall, III</td>
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<td>HB 874</td>
<td>Credit unions; voluntary mergers.</td>
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<td>HB 968</td>
<td>Mortgage lenders and mortgage brokers; posting license.</td>
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<td>HB 1224</td>
<td>Bank franchise tax.</td>
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<tr>
<td>HB 1227</td>
<td>Securities Act; registration exemptions.</td>
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</table>

* David S. Mercer and Lucia Anna (Pia) Trigiani are partners in the firm of MercerTrigiani in Alexandria, Virginia. The focus of their practice is on the representation of common interest community associations. Mr. Mercer and Ms. Trigiani are and have been involved in the development and advocacy of legislation affecting common interest community associations.

They have presented the legislative update segment of Virginia CLE's Annual Real Estate Seminar for the more than 12 years. This bill list is compiled for that presentation and the Recent Developments in the Law Seminar, also presented by Virginia CLE. Mr. Mercer and Ms. Trigiani were recognized for their contributions to the education of real estate lawyers with the Court Traver Scholarship Award at the Annual Advanced Real Estate Law Seminar in 2013.

Mr. Mercer is a member of the Board and past President of Lawyers Helping Lawyers. He serves on the Board of Governors of the Virginia Bar Association and is President elect. He will serve as President in 2017. He is a Virginia Law Foundation Fellow and is a charter member of, and served as, Dean of the College of Community Association Lawyers. He also serves on the committee that is advisory to Virginia CLE.

Miss Trigiani is past president of the Virginia Bar Association and served as Chair of the Virginia Bar Association Real Estate Section Council. She is an Area Representative of the Real Property Section of the Virginia State Bar. Ms. Trigiani is also a charter member of the College of Community Association Lawyers and a Fellow of the Virginia Law Foundation. She serves on the boards of the Virginia Law Foundation, Virginia Free and Lead Virginia. She is president elect of the Virginia Law Foundation. She will serve as President in 2017. She is chair of the Virginia Common Interest Community Board and a member of the Board of Visitors of Longwood University.
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<td>Financial institutions; references to federal law.</td>
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<td>SB 582</td>
<td>Credit unions; voluntary mergers. <strong>Identical to HB 874.</strong></td>
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<td>SB 670</td>
<td>Bank franchise tax. <strong>Identical to HB 1224.</strong></td>
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**BUSINESS ETHICS**

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<td>Corporate action without board meeting.</td>
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<td>HB 918</td>
<td>Limited liability companies; access to records.</td>
<td>Delegate T. Montgomery “Monty” Mason.</td>
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<td>Limited liability companies; entity conversions.</td>
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<td>Securities Act; registration exemptions.</td>
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<td>Limited liability companies; registered agent.</td>
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**CHARITABLE, CIVIC AND VOLUNTEER ORGANIZATIONS**

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<td>HB 63</td>
<td>Sales and use tax; exemption for certain nonprofit entities.</td>
<td>Delegate L. Scott Lingamfelter</td>
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**CIVIL REMEDIES AND PROCEDURE**

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<td>HB 232</td>
<td>Authenticity and reasonableness of medical bills; presumption; who may identify and provide testimony.</td>
<td>Delegate James A. “Jay” Leftwich</td>
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<td>HB 437</td>
<td>Security for appeal.</td>
<td>Delegate G. Manoli Loupassi</td>
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<td>HB 441</td>
<td>Nonsuits; tolling of limitations; contractual limitation periods. <strong>Identical to SB 170.</strong></td>
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<td>HB 496</td>
<td>Attorney-issued summons; proof of payment to clerk’s office.</td>
<td>Delegate Jeffrey L. Campbell</td>
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<td>Medical malpractice actions; limitations period.</td>
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<td>HB 641</td>
<td>Jurisdiction of general district court; arbitration.</td>
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<td>Administrative Process Act; judicial review of certain regulations.</td>
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<tr>
<td>HB 1117</td>
<td>Immunity of persons at public hearing; attorney fees and costs. <strong>Incorporates HB 690.</strong></td>
<td>Delegate G. Manoli Loupassi.</td>
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<tr>
<td>HB 1128</td>
<td>Spouse’s liability for medical care; exemption for principal residence.</td>
<td>Delegate Gregory B. Habeeb</td>
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<td>HB 1257</td>
<td>Personal injury and wrongful death actions; disclosure of physical address of insured person. <strong>Identical to SB 128.</strong></td>
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<td>SB 27</td>
<td>Servicemembers Civil Relief Act; appointment of counsel to represent servicemember.</td>
<td>Senator Bryce E. Reeves</td>
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<td>SB 90</td>
<td>Discovery rule; statute of limitations.</td>
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<td>SB 125</td>
<td>Punitive damages for persons injured by intoxicated drivers.</td>
<td>Senator William M. Stanley, Jr.</td>
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<tr>
<td>SB 128</td>
<td>Personal injury and wrongful death actions; disclosure of physical address of insured person. <strong>Identical to HB 1257.</strong></td>
<td>Senator John S. Edwards</td>
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<tr>
<td>SB 170</td>
<td>Nonsuits; tolling of limitations; contractual limitation periods.</td>
<td>Senator Scott A. Surovell</td>
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<td>SB 240</td>
<td>Virginia Tort Claims Act; notice of claim; electronic filing when notice filed with Department of Transportation.</td>
<td>Senator John S. Edwards</td>
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<td>SB 241</td>
<td>Service of process on domestic corporations.</td>
<td>Senator J. Chapman Petersen</td>
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<td>SB 392</td>
<td>Release of lien against real property.</td>
<td>Senator Scott A. Surovell</td>
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<td>SB 611</td>
<td>Notice of tort claim against the Commonwealth, transportation district, or locality; statute of limitations.</td>
<td>Senator William M. Stanley, Jr.</td>
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<td>Punitive damages; injury by intoxicated drivers; admission of evidence.</td>
<td>Senator Ryan T. McDougle</td>
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<td>SB 746</td>
<td>Recovery of costs and attorney fees from agency; actions brought in violation of law or for an improper purpose.</td>
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**COMMUNITY ASSOCIATIONS**

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<td>HB 1101</td>
<td>Automatic notification of registration of sex offenders; common interest communities.</td>
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<tr>
<td>HB 1146</td>
<td>Permitting or licensure; locality shall not require consent of homeowners’ association. <strong>Identical to SB 389</strong></td>
<td>Delegate Patrick A. Hope</td>
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<tr>
<td>SB 389</td>
<td>Permitting or licensure; locality shall not require consent of homeowners’ association. <strong>Identical to HB 1146.</strong></td>
<td>Senator Scott A. Surovell</td>
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**CONDEMNATION AND EMINENT DOMAIN**

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<td>Commissioners in eminent domain proceedings.</td>
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<td>HB 478</td>
<td>Eminent domain; reimbursement of costs.</td>
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<td>HB 543</td>
<td>Inverse condemnation proceeding; reimbursement of owner’s costs.</td>
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**CONSERVATION AND ENVIRONMENT**

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<td>Establishing fee schedule for state parks.</td>
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<td>HB 315</td>
<td>Conservation police officers; retirement.</td>
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<td>HB 647</td>
<td>Tree conservation ordinance. <strong>Identical to SB 361.</strong></td>
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<td>HB 1066</td>
<td>Disbursement of funds for Confederate gravesites.</td>
<td>Delegate S. Chris Jones <em>(by request)</em></td>
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<td>HB 1127</td>
<td>Forest fire protection compacts; codification.</td>
<td>Delegate Gregory D. Habeeb</td>
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<td>HB 1290</td>
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<td>Delegate Gregory D. Habeeb</td>
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<td>SB 361</td>
<td>Tree conservation ordinance. <strong>Identical to HB 647.</strong></td>
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<td>SB 687</td>
<td>Timber cutting; determination of damages; attorney fees. <strong>Identical to HB 1290.</strong></td>
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**DEEDS AND DEEDS OF TRUST**

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<td>Housing; removal of obsolete provisions; correction of citation.</td>
<td>Delegate James M. LeMunyon <em>(by request)</em></td>
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<td>HB 675</td>
<td>Auxiliary grants; supportive housing.</td>
<td>Delegate Christopher K. Peace</td>
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<td>HB 31</td>
<td>Automobile, commercial liability, and homeowners insurance policies; notices.</td>
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<tr>
<td>SB 192</td>
<td>Automobile, commercial liability, and homeowners insurance policies; notices.</td>
<td>Senator Richard H. Stuart</td>
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<td>Bedford; references to the former City of Bedford.</td>
<td>Delegate Terry L. Austin</td>
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<td>When circuit courts open; Judicial Council. <strong>Identical to SB 590.</strong></td>
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<td>Clerk of Circuit Court; Local fees and fines.</td>
<td>Delegate J. Randall Minchew</td>
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<td>HB 624</td>
<td>Retention of court records; violent felonies and acts of violence.</td>
<td>Delegate Robert B. Bell</td>
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<td>SB 87</td>
<td>Circuit court clerks; disaster recovery plan for electronic land records.</td>
<td>Senator Thomas A. Garrett</td>
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<td>SB 590</td>
<td>When circuit courts open; Judicial Council. <strong>Identical to HB 442.</strong></td>
<td>Senator Mark D. Obenshain</td>
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<td>SB 769</td>
<td>Bedford; references to the former City of Bedford.</td>
<td>Senator David R. Suetterlein</td>
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<td>Establishment of damages for unlawful entry or unlawful detainer; exclusion of</td>
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<td>Landlord and tenant laws.</td>
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<td>Rental inspection programs; exemptions.</td>
<td>Delegate James P. “Jimmie” Massie, III</td>
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<td>Landlord and tenant laws; tenant’s assertions; forms of relief.</td>
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<td>Landlord and tenant laws; tenant’s assertions; forms of relief. <strong>Identical to</strong></td>
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<tr>
<td>SB 377</td>
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<td>Senator Jill Holtzman Vogel</td>
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**MECHANICS’ AND OTHER LIENS**

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<td>Delegate Tony O. Wilt</td>
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**MISCELLANEOUS**

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<td>Urban county executive form of government; animal protection police officer.</td>
<td>Delegate David B. Albo</td>
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<td>HB 136</td>
<td>Damaged duck blinds in Virginia Beach.</td>
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<td>HB 137</td>
<td>Killing feral hogs.</td>
<td>Delegate Barry D. Knight</td>
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<td>Official emblems and designations; Eastern Garter Snake.</td>
<td>Delegate Brenda L. Pogge</td>
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<td>Legal age for marriage; 18 years of age. <strong>Identical to SB 415.</strong></td>
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<td>Fantasy Contests Act; registration required; conditions of registration; civil</td>
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<td>penalty. <strong>Identical to SB 646.</strong></td>
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<tr>
<td>HB 789</td>
<td>Exhumations; notice to next of kin.</td>
<td>Delegate Les R. Adams</td>
</tr>
<tr>
<td>HB 812</td>
<td>Limited Residential Lodging Act; penalty. <strong>Identical to SB 416.</strong></td>
<td>Delegate Christopher K. Peace</td>
</tr>
<tr>
<td>HB 818</td>
<td>Virginia Freedom of Information Act (FOIA); designation of FOIA officer; posting</td>
<td>Delegate James M. LeMunyon</td>
</tr>
<tr>
<td></td>
<td>of FOIA rights and responsibilities.</td>
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</tr>
<tr>
<td>HB 832</td>
<td>Vacancies in constitutional offices; special elections. <strong>Identical to SB 308.</strong></td>
<td>Delegate R. Steven Landes</td>
</tr>
<tr>
<td>HB 1060</td>
<td>Localities towing fees.</td>
<td>Delegate Timothy D. Hugo</td>
</tr>
<tr>
<td>HB 1231</td>
<td>Dogs injuring, chasing, or killing livestock or poultry.</td>
<td>Delegate Christopher E. Collins</td>
</tr>
<tr>
<td>HB 1245</td>
<td>Judicial Retirement System; mandatory judicial retirement.</td>
<td>Delegate Barry D. Knight</td>
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<tr>
<td>SB 210</td>
<td>Automobile clubs.</td>
<td></td>
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<tr>
<td>Bill Number</td>
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</tr>
<tr>
<td>SB 308</td>
<td>Vacancies in constitutional offices; special elections. <strong>Identical to HB 832.</strong></td>
<td>Senator Emmett W. Hanger, Jr.</td>
</tr>
<tr>
<td>SB 352</td>
<td>Official emblems and designations.</td>
<td>Senator R. Creigh Deeds</td>
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<tr>
<td>SB 388</td>
<td>Virginia Consumer Protection Act; failure to make required statement.</td>
<td>Senator Scott A. Surovell</td>
</tr>
<tr>
<td>SB 415</td>
<td>Legal age for marriage; 18 years of age. <strong>Identical to HB 703.</strong></td>
<td>Senator Jill Holtzman Vogel</td>
</tr>
<tr>
<td>SB 416</td>
<td>Limited Residential Lodging Act; penalty. <strong>Identical to HB 812.</strong></td>
<td>Senator Jill Holtzman Vogel</td>
</tr>
<tr>
<td>SB 646</td>
<td>Fantasy Contests Act; registration required; conditions of registration; civil penalty.</td>
<td>Senator Ryan T. McDougle</td>
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**PROFESSIONS AND OCCUPATIONS**

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<tr>
<td>HB 304</td>
<td>Home service contract providers.</td>
<td>Delegate Terry G. Kilgore</td>
</tr>
<tr>
<td>HB 393</td>
<td>Insurance agencies; designated licensed producers.</td>
<td>Delegate R. Lee Ware</td>
</tr>
<tr>
<td>HB 405</td>
<td>Professional and occupational licenses; temporary licenses for spouses of military service members.</td>
<td>Delegate David E. Yancey</td>
</tr>
<tr>
<td>HB 567</td>
<td>Real Estate Board; duties of real estate licensees; residential real estate transactions.</td>
<td>Delegate Jackson H. Miller</td>
</tr>
<tr>
<td>HB 741</td>
<td>Virginia Board for Asbestos, Lead, and Home Inspectors; licensing of home inspectors. <strong>Identical to SB 453.</strong></td>
<td>Delegate Jackson H. Miller</td>
</tr>
<tr>
<td>HB 844</td>
<td>Insurance agents; continuing education program.</td>
<td>Delegate Jackson H. Miller</td>
</tr>
<tr>
<td>Senate Bill 453</td>
<td>Virginia Board for Asbestos, Lead, and Home Inspectors; licensing of home inspectors. <strong>Identical to HB 741.</strong></td>
<td>Delegate John J. Bell</td>
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**REAL ESTATE SALES AND SETTLEMENTS**

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<tbody>
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<td>HB 339</td>
<td>Recordation tax; exemption.</td>
<td>Delegate Brenda L. Pogge</td>
</tr>
<tr>
<td>HB 577</td>
<td>Interpleader; earnest money deposits.</td>
<td>Delegate Roxann L. Robinson</td>
</tr>
<tr>
<td>HB 596</td>
<td>Recordation tax; exemption.</td>
<td>Delegate Marcus B. Simon</td>
</tr>
<tr>
<td>HB 746</td>
<td>Virginia Residential Property Disclosure Act; required disclosures; zoning and permitted uses of adjacent parcels.</td>
<td>Delegate John J. Bell</td>
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<tr>
<td>Bill Number</td>
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<tr>
<td>HB 1264</td>
<td>Virginia Residential Property Disclosure Act; representations related to covenants and restrictions affecting the property.</td>
<td>Delegate Roxann L. Robinson</td>
</tr>
<tr>
<td>SB 204</td>
<td>Real estate settlement agents.</td>
<td>Senator Richard H. Stuart</td>
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**TAXATION**

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<td>HB 15</td>
<td>Personal property tax; classifications.</td>
<td>Delegate R. Lee Ware</td>
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<tr>
<td>HB 80</td>
<td>Property certified as tax exempt; effective date of tax exemption.</td>
<td>Delegate Kathy J. Byron</td>
</tr>
<tr>
<td>HB 95</td>
<td>Corporate income tax; addback for Captive REIT dividends.</td>
<td>Delegate R. Lee Ware</td>
</tr>
<tr>
<td>HB 127</td>
<td>Real property tax exemption; spouse of military service member killed in action.</td>
<td>Delegate Barry D. Knight</td>
</tr>
<tr>
<td>HB 148</td>
<td>Real property tax assessment; date to fix tax rate.</td>
<td>Delegate Hyland F. “Buddy” Fowler, Jr.</td>
</tr>
<tr>
<td>HB 182</td>
<td>Transient occupancy tax; Frederick County.</td>
<td>Delegate J. Randall Minchew</td>
</tr>
<tr>
<td>HB 328</td>
<td>Transient occupancy tax; Botetourt County. Permits Botetourt County to impose an additional transient occupancy tax at a rate not to exceed two percent.</td>
<td>Delegate Terry L. Austin <em>(by request)</em></td>
</tr>
<tr>
<td>HB 398</td>
<td>Sales and use tax; refunds.</td>
<td>Delegate Richard C. “Rip” Sullivan, Jr.</td>
</tr>
<tr>
<td>HB 402</td>
<td>Commonwealth’s tax code; conformity with federal law; emergency.</td>
<td>Delegate R. Lee Ware</td>
</tr>
<tr>
<td>HB 421</td>
<td>Real property tax exemptions; military members and their surviving spouses.</td>
<td>Delegate Gordon C. Helsel, Jr.</td>
</tr>
<tr>
<td>HB 526</td>
<td>Living shorelines; tax exemption.</td>
<td>Delegate M. Keith Hodges</td>
</tr>
<tr>
<td>HB 590</td>
<td>Research and development expenses tax credit; reporting requirement.</td>
<td>Delegate Charles D. Poindexter</td>
</tr>
<tr>
<td>HB 643</td>
<td>Department of Taxation; limitations on collecting taxes.</td>
<td>Delegate James A. “Jay” Leftwich</td>
</tr>
<tr>
<td>HB 742</td>
<td>Neighborhood Assistance Program tax credits; eligibility.</td>
<td>Delegate David J. Toscano</td>
</tr>
<tr>
<td>HB 859</td>
<td>Sales and use tax exemption; beer-making equipment.</td>
<td>Delegate R. Steven Landes</td>
</tr>
<tr>
<td>Bill Number</td>
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</tr>
<tr>
<td>HB 865</td>
<td>Constitutional amendment (voter referendum); property tax exemption for surviving spouse of certain emergency services providers.</td>
<td>Delegate Timothy D. Hugo</td>
</tr>
<tr>
<td>HB 872</td>
<td>Sales and use tax exemption; certain data centers. <strong>Identical to SB 64.</strong></td>
<td>Delegate Timothy D. Hugo</td>
</tr>
<tr>
<td>HB 910</td>
<td>Appeal of local tax assessments; confidentiality. <strong>Identical to SB 597.</strong></td>
<td>Delegate J. Randall Minchew</td>
</tr>
<tr>
<td>HB 1093</td>
<td>Income tax credit; food crop donations to a food bank. <strong>Identical to SB 580.</strong></td>
<td>Delegate Benjamin L. Cline.</td>
</tr>
<tr>
<td>HB 1147</td>
<td>Transient occupancy tax; Arlington County. <strong>Identical to SB 160.</strong></td>
<td>Delegate Patrick A. Hope</td>
</tr>
<tr>
<td>HB 1152</td>
<td>Local gas road improvement and Virginia Coalfield Economic Development Authority tax; use of revenues. <strong>Identical to SB 182.</strong></td>
<td>Delegate James W. Morefield</td>
</tr>
<tr>
<td>HB 1170</td>
<td>Real property tax; boards of equalization.</td>
<td>Delegate Hyland F. “Buddy” Fowler, Jr.</td>
</tr>
<tr>
<td>HB 1194</td>
<td>Transient occupancy tax; Bedford County.</td>
<td>Delegate Terry L. Austin <em>(by request)</em></td>
</tr>
<tr>
<td>HB 1203</td>
<td>Real property tax exemption; disabled veterans and the spouse of a service member killed in action. <strong>Identical to SB 366.</strong></td>
<td>Delegate Joseph R. Yost</td>
</tr>
<tr>
<td>HB 1305</td>
<td>Sales and use tax exemption and real and personal property tax exemption; solar and wind energy equipment, facilities, and devices.</td>
<td>Delegate Jackson H. Miller</td>
</tr>
<tr>
<td>HJR 123</td>
<td>Constitutional amendment (second resolution); real property tax exemption.</td>
<td>Delegate Timothy D. Hugo</td>
</tr>
<tr>
<td>SB 64</td>
<td>Sales and use tax exemption; certain data centers. <strong>Identical to HB 872.</strong></td>
<td>Senator Frank M. Ruff, Jr.</td>
</tr>
<tr>
<td>SB 99</td>
<td>Real property tax exemption; spouse of military service member killed in action. <strong>Identical to HB 127.</strong></td>
<td>Senator John A. Cosgrove, Jr.</td>
</tr>
<tr>
<td>SB 160</td>
<td>Transient occupancy tax; Arlington County. <strong>Identical to HB 1147.</strong></td>
<td>Senator - Janet D. Howell</td>
</tr>
<tr>
<td>SB 182</td>
<td>Local gas road improvement and Virginia Coalfield Economic Development Authority tax; use of revenues. <strong>Identical to HB 1152.</strong></td>
<td>Senator A. Benton “Ben” Chafin</td>
</tr>
<tr>
<td>Bill Number</td>
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<tr>
<td>SB 366</td>
<td>Real property tax exemption; disabled veterans and the spouse of a service member killed in action. <strong>Identical to HB 1203.</strong></td>
<td>SB A. Benton “Ben” Chafin</td>
</tr>
<tr>
<td>SB 414</td>
<td>Land Bank Entities Act. <strong>Identical to HB 268.</strong></td>
<td>SB George L. Barker</td>
</tr>
<tr>
<td>SB 444</td>
<td>Sales and use tax; refunds. <strong>Identical to HB 39.</strong></td>
<td>Senator Emmett W. Hanger, Jr</td>
</tr>
<tr>
<td>SB 445</td>
<td>Real property tax assessment; date to fix tax rate. <strong>Identical to HB 148.</strong></td>
<td>Senator Ryan T. McDougle</td>
</tr>
<tr>
<td>SB 545</td>
<td>Commonwealth’s tax code; conformity with federal law; emergency. <strong>Identical to HB 402.</strong></td>
<td>Senator Emmett W. Hanger, Jr</td>
</tr>
<tr>
<td>SB 563</td>
<td>Sales and use tax exemption; materials and equipment used to drill natural gas and oil.</td>
<td>Senator Thomas K. Norment, Jr.</td>
</tr>
<tr>
<td>SB 580</td>
<td>Income tax credit; food crop donations to a food bank. <strong>Identical to HB 1093.</strong></td>
<td>Senator R. Creigh Deeds</td>
</tr>
<tr>
<td>SB 597</td>
<td>Appeal of local tax assessments; confidentiality. <strong>Identical to HB 910.</strong></td>
<td>Senator John A. Cosgrove, Jr.</td>
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**TRUSTS AND ESTATES**

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<tr>
<th>Bill Number</th>
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<tbody>
<tr>
<td>HB 230</td>
<td>Judicial creation of trusts.</td>
</tr>
<tr>
<td>HB 231</td>
<td>Augmented estate; elective share of surviving spouse. <strong>Identical to SB 181.</strong></td>
</tr>
<tr>
<td>HB 342</td>
<td>Guardianship; communication between incapacitated person and others. <strong>Identical to SB 466.</strong></td>
</tr>
<tr>
<td>HB 1020</td>
<td>Unclaimed property; payment of property of deceased owner. <strong>Identical to SB 408.</strong></td>
</tr>
<tr>
<td>HB 1266</td>
<td>Guardianship appointments, modifications, and terminations; notice to the Department of Medical Assistance Services.</td>
</tr>
<tr>
<td>HB 1267</td>
<td>Petitions for guardianship or conservatorship; orders prior to the respondent’s eighteenth birthday.</td>
</tr>
<tr>
<td>SB 181</td>
<td>Augmented estate; elective share of surviving spouse. <strong>Identical to HB 231.</strong></td>
</tr>
<tr>
<td>Bill Number</td>
<td>Bill Description</td>
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<tr>
<td>SB 408</td>
<td>Unclaimed property; payment of property of deceased owner. <strong>Identical to HB 1020.</strong></td>
</tr>
<tr>
<td>SB 466</td>
<td>Guardianship; communication between incapacitated person and others. <strong>Incorporates SB 632 and is identical to HB 342.</strong></td>
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**WATER, SEWER AND STORMWATER**

<table>
<thead>
<tr>
<th>Bill Number</th>
<th>Bill Description</th>
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<tbody>
<tr>
<td>HB 440</td>
<td>Impaired waters clean-up plan; progress report; annual submission.</td>
<td>Delegate L. Scott Lingamfelter</td>
</tr>
<tr>
<td>HB 448</td>
<td>Acquisition of nutrient offset credits. <strong>Identical to SB 314.</strong></td>
<td>Delegate M. Kirkland Cox</td>
</tr>
<tr>
<td>HB 558</td>
<td>Onsite sewage systems and private wells; evaluation and design.</td>
<td>Delegate Robert D. Orrock, Sr.</td>
</tr>
<tr>
<td>HB 611</td>
<td>Regulation of water and sewer utilities. <strong>Identical to SB 85.</strong></td>
<td>Delegate Robert B. Bell</td>
</tr>
<tr>
<td>HB 648</td>
<td>State Health Commissioner; State Board of Health; approved sewage system or nonconforming system.</td>
<td>Delegate Barry D. Knight</td>
</tr>
<tr>
<td>HB 919</td>
<td>Water and sewer service provided by locality; canceling service for nonpayment of charges.</td>
<td>Delegate T. Montgomery “Monty” Mason</td>
</tr>
<tr>
<td>HB 1250</td>
<td>Virginia Erosion and Stormwater Management Act; consolidation of programs; opt-out for certain localities; penalties.</td>
<td>Delegate Tony O. Wilt</td>
</tr>
<tr>
<td>HJR 120</td>
<td>Study; JLARC to study biosolids and industrial residuals; report.</td>
<td>Delegate R. Steven Landes.</td>
</tr>
<tr>
<td>SB 85</td>
<td>Regulation of water and sewer utilities. <strong>Identical to HB 611.</strong></td>
<td>Senator Thomas A. Garrett</td>
</tr>
<tr>
<td>SB 314</td>
<td>Acquisition of nutrient offset credits. <strong>Identical to HB 448.</strong></td>
<td>Senator Rosalyn R. Dance</td>
</tr>
<tr>
<td>SB 408</td>
<td>Onsite sewage systems; civil penalties.</td>
<td>Senator Jennifer T. Wexton</td>
</tr>
<tr>
<td>SB 468</td>
<td>Local stormwater utility; public-private partnership.</td>
<td>Senator Frank W. Wagner</td>
</tr>
<tr>
<td>SB 542</td>
<td>Delinquent sewer charges; lien; unlimited time.</td>
<td>Senator Mark D. Obenshain</td>
</tr>
<tr>
<td>SB 598</td>
<td>Erosion and sediment control; stormwater management program.</td>
<td>Senator Bill R. DeSteph, Jr.</td>
</tr>
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</table>
### Bill Number | Bill Description                                                                 | Patron                          
---|---|---
SB 673 | Virginia Erosion and Stormwater Management Act; consolidation of programs; opt-out for certain localities; penalties. | Senator Emmett W. Hanger, Jr.  

### ZONING AND LAND USE

| Bill Number | Bill Description | Patron                          
---|---|---
HB 367       | Nonconforming uses. | Delegate Glenn R. Davis         
HB 883       | Comprehensive plan; telecommunications towers. | Delegate Gregory D. Habeeb      
HB 945       | Annexation. **Identical to SB 309.** | Delegate Tony O. Wilt           
SB 309       | Annexation. **Identical to HB 945.** | Senator Emmett W. Hanger, Jr.   
SB 549       | Conditional zoning. | Senator Mark D. Obenshain.       


REPORT OF THE COMMERCIAL REAL ESTATE COMMITTEE

REPORT AND MINUTES OF A MEETING OF THE COMMERCIAL REAL ESTATE COMMITTEE OF THE VIRGINIA STATE BAR REAL PROPERTY SECTION

HELD BY CONFERENCE CALL ON JANUARY 14, 2016 AT 3:00 P.M.

By Richard Bruce Chess, Chair

Pursuant to e-mailed notice to members of the Commercial Real Estate Committee, a conference call meeting was convened by the Chair, Richard Bruce Chess (Chess Law Firm, PLC) on January 14, 2016, at 3:00 p.m. Also participating in the call were Grice McMullan (Thompson McMullan), Ben Leigh (Atwill, Troxell & Leigh), Alyson Harter (LeClair Ryan), Bill Nusbaum (Williams Mullen), David Helscher (OPN Law), and Mark Graybeal (Keegan, DeVol & Clarke).

The meeting opened with a discussion of potential articles for the Spring 2016 FEE SIMPLE.

1. Bill Nusbaum will author an article on PACE (Property Assessed Clean Energy) financing. PACE financing allows for a special assessment to be paid over 15 - 20 years, not to exceed the useful life of the improvement, for energy efficiency improvements to private property.

2. Doug Dewing has submitted an article, written by two of his Fidelity colleagues, on the new ALTA/NSPS Land Title Survey standards, which become effective February 23, 2016.

Grice McMullan, with assistance from Ben Leigh, has developed a case study titled LAND DEVELOPMENT CHALLENGES AND OPPORTUNITIES FROM THE STANDPOINT OF A SELLER OF REAL ESTATE. Their CLE presentation will open the two day 20th Annual Advanced Real Estate Seminar March 4 - 5, 2016, at the Williamsburg Lodge.

The following ideas were discussed:

1. Is there a benefit to attendees to have the CLE presentations AFTER a case study built upon what was discussed in the case study?

2. How best to deliver to Section members “hot” news (e.g., the new title survey standards covered in the article above) prior to publication of the FEE SIMPLE;

3. Would it enhance readership of the FEE SIMPLE if a one-page “teaser” listing the topics in the publication were distributed to Section members prior to distribution of the publication?

The next meeting of the Board of Governors and Area Representatives will be in Williamsburg, on January 22 at 1 p.m. at the Williamsburg Lodge. The next meeting of this Committee will be held on a date to be determined by the Chair and approximately two weeks prior to the next Board of Governors of the Real Estate Section. There being no other business to come before the Committee, the meeting was adjourned.
REPORT OF THE COMMON INTEREST COMMUNITY COMMITTEE

by Jeremy R. Moss, Chair

The Common Interest Community Committee of the Real Property Section for the Virginia State Bar held its quarterly meeting by telephone on January 13, 2016. Present at the meeting were: Jeremy R. Moss (Chair) from MercerTrigiani LLP, David C. Helscher from OPN Law, Jeanne S. Lauer from Inman & Strickler PLC, and John C. Cowherd of Cowherd PLC.

The Committee remains committed to its mission – to provide a forum for exchange of information between common interest community law practitioners across the Commonwealth of Virginia through quarterly telephone conference calls and electronic mail exchanges. The Committee is committed to refining its mission and intends to expand Committee membership in 2016.

The Committee focused on the following substantive issues:

Office of the Common Interest Community Ombudsman Report to the House Committee on General Laws, Senate Committee on General Laws and Technology, and the Housing Committee Annual Report 2014-2015

In 2008, the Virginia General Assembly created the Office of the Common Interest Community Ombudsman (“Ombudsman”) and the Virginia Common Interest Community Board. Statutory provisions require the Ombudsman, a licensed Virginia lawyer, to report on the Ombudsman each year.

During the period between November 26, 2014, and November 25, 2015, the Ombudsman received a total of 182 complaints in the following areas:

- 45% related to property owners’ associations;
- 25% related to condominium unit owners’ associations; and,
- 30% related to time-shares.

No complaints related to residential real estate cooperatives were received.

Ombudsman determinations pertained to the following subject areas:

- Access to books and records (13%);
- Meeting notice (13%)
- Communication methods (5%);
- Executive sessions (meetings) (5%);
- Pesticide application (4%);
- annual meetings (4%); and,
- Due process (rule enforcement) (2%).

The published Ombudsman determinations are listed by association name and subject matter area at http://www.dpor.virginia.gov/CIC-Ombudsman/Determinations/.

Attorney General Opinion (April 14, 2015)

Attorney General Mark Herring issued Opinion Number 14-057 (“Opinion”) in response to a request by Delegate Joseph R. Yost.1 In the opinion, the Attorney General provided that under Va. Code §67-701, a property owners’ association may prohibit solar panels on private property in a recorded declaration, but not through the adoption of rules and regulations. If prohibitions against solar panels do not exist in a recorded declaration, property owners’ associations retain the authority under Va. Code §67-

1 The Opinion may be found at http://ag.virginia.gov/files/Opinions/2015/14-057_Yost.pdf
701 to establish reasonable restrictions concerning the size, location, and manner of placement of solar panels on private property.

The Opinion provides an interesting, in-depth discussion about whether the retrospective application of Va. Code §67-701 is constitutionally barred by Article I, Section 11 of the Constitution of Virginia. Because property owners’ associations may still prohibit solar panels through the recorded declaration (or amendment to those declarations), Va. Code §67-701 does not violate the constitutional prohibition against legislation impairing the obligations of contract.

If, however, Va. Code §67-701 attempted to retrospectively abrogate restrictive covenants provided in a recorded declaration, the Section would not likely have passed constitutional review or scrutiny.

2015 Case Law Update

The Committee discussed recent case law, including *McCarthy v. Fennessy*, 87 Va. Cir. 143 (Norfolk 2013), in which a condominium resident filed suit against a condominium association and its president, alleging he (or she) was injured when the president’s dogs attacked his/her dogs. The court held the Association had a duty to protect lot owners and residents from the foreseeable negligence of third parties because (a) it had a special relationship with lot owners and residents, (b) the Association has exclusive control over the Common Area, and (c) has a duty either to exercise ordinary care to provide safe premises or to warn lot owners or residents of known hazards.

2016 Virginia General Assembly Update and Forecast

Three members of the Committee (Jeremy R. Moss, Sue Tarley and Jeanne Lauer) also serve on the Virginia Legislative Action Committee of the Community Associations Institute (“VALAC”), a national not-for-profit educational and resource organization dedicated to fostering vibrant, competent, and harmonious community associations. Through its website (http://www.cai-valac.org/), VALAC provides periodic updates on legislation affecting common interest communities.

Jeremy Moss, Chair of the Committee and Vice Chair of VALAC, maintains a Legislative Resources Page related to common interest communities (http://mercertrigiani.com/page/16762~393794/2016-Virginia-Legislative-Resources) and reported on the status of the following bills being considered by the General Assembly in 2016:

- HB 234 introduced by Delegate Sullivan related to - Corporations; action without board of directors meeting.
- HB 269 introduced by Delegate Cole related to - Invasion of privacy; civil action, damages, attorney fees and costs.
- HB 270 introduced by Delegate Cole related to - Persons with disabilities; rights in public places, fraudulent representation of service dog.
- HB 300 introduced by Delegate Simon related to - Fair Housing Law; unlawful discriminatory housing practices, sexual orientation, etc.
- HB 385 introduced by Delegate Marshall, R.G. related to - Discrimination; ordinances or regulations prohibiting.
- HB 397 introduced by Delegate LaRock related to - Discrimination; specification of certain terms relating to sex or gender.
- HB 512 introduced by Delegate Bulova related to - Subdivision ordinance; provisions.
- HB 548 introduced by Delegate Watts related to - Property Owners' Association Act; conforms maximum fees for disclosure packets.
- HB 650 introduced by Delegate Marshall, R.G. related to - Local government; mandatory provisions of a subdivision ordinance, notice to homeowner associations.
- HB 684 introduced by Delegate Peace related to - Condominium and Property Owners' Association Acts; rental of units and lots; disclosure packets.
• HB 710 introduced by Delegate Watts related to - Property Owners' Association Act; conforms maximum fees for disclosure packets.
• HB 812 introduced by Delegate Peace related to - Limited Residential Lodging Act; established, penalty.
• HB 946 introduced by Delegate Keam related to - Tow truck drivers and towing and recovery operators; regulation of towing.
• HB 1034 introduced by Delegate Sickles related to - Personal property tax; transmittal of certain information to commissioner of the revenue.
• HB 1101 introduced by Delegate Villanueva related to - Automatic notification of registration of sex offenders; common interest communities.
• HB 1146 introduced by Delegate Hope related to - Local permitting or licensure; requiring consent of homeowners’ association prohibited.
• SB 67 introduced by Senator Wexton related to - Virginia Fair Housing Law; unlawful discriminatory housing practices, sexual orientation, etc.
• SB 76 introduced by Senator Wexton related to - Service of process; common interest communities.
• SB 237 introduced by Senator Petersen related to - Virginia Property Owners' Association Act; condemnation of common area, valuation.
• SB 238 introduced by Senator Petersen related to - Virginia Property Owners' Association Act; home-based businesses.
• SB 389 introduced by Senator Surovell related to - Permitting or licensure; locality shall not require consent of homeowners' association.

Full text of all legislation is available through the Virginia Legislative Information System website (https://lis.virginia.gov/).

The next quarterly meeting of the Common Interest Community Committee of the Real Property Section for the Virginia State Bar is scheduled April 20, 2015 at 4:00 PM. Please contact Jeremy Moss for membership or meeting information:

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REPORT OF THE CREDITOR’S RIGHTS AND BANKRUPTCY COMMITTEE

by F. Lewis Biggs, Chair

The Creditors’ Rights and Bankruptcy Committee of the Virginia State Bar Real Property Section held a telephonic meeting on January 19, 2016, at 11:00 A.M. In attendance were F. Lewis Biggs, chair; J. Philip Hart; Richard C. Maxwell; and Lynn L. Tavenner.

The Chair notified the Committee that the winter meeting of the Section will be held on Friday, January 22, 2016, in Williamsburg. The Chair announced that the Section, with several other sections, is organizing and sponsoring the Showcase Seminar to be presented at this coming summer’s Annual Meeting. The seminar is entitled, “Cybersecurity for Lawyers: Ethically Protecting Your Confidential Data,” and will be held from 1:30 to 3:30 P.M. on Friday, June 17, 2016, at the Hilton Oceanfront Hotel in Virginia Beach. The Chair urged members to attend the Annual Meeting and this seminar.

The Chair advised the Committee that the Advanced Real Estate Seminar will be held on March 4 and 5, 2016, in Williamsburg. He went through the topics to be presented and highlighted one that may be of interest to bankruptcy and creditor’s rights attorneys. The Committee discussed the Annual Real Estate Practice Seminar to be held in May. Committee members were unaware if subjects had been selected, but discussed topic ideas. Mr. Maxwell suggested an overview of mechanics’ lien law. Mr. Hart suggested that the Annual Practice seminar periodically include a survey and summary of foreclosure practice.

The Committee revisited the addition of one or more new committee members. Ms. Tavenner reported that Peter G. Zemanian is interested in joining our Committee. The Chair asked Ms. Tavenner to formerly extend an invitation to Mr. Zamanian. Mr. Maxwell will reach out to another colleague to see if he is interested in serving on the Committee.

The Committee discussed topic ideas for the Spring edition of The Fee Simple. Mr. Maxwell will ask Judge Mitchell if he would be willing to update his article on lien stripping1 in light of a recent U.S. Supreme Court case on point. Mr. Biggs discussed last summer’s Virginia Supreme Court case, Deutsche Bank v. Arrington, Record No. 140978 (2015), and stated that he is considering preparing an article on after-acquired property under Virginia law.

The Chair thanked the Committee members and for attending the meeting, which adjourned at about 11:35 P.M.

Respectfully submitted,

F. Lewis Biggs

Committee Members:

F. Lewis Biggs, chair  Paula S. Beran
J. Philip Hart  James E. Clarke
Richard C. Maxwell  Christopher A. Jones
Lynn L. Tavenner  John H. Maddock, III

1 Fall 2013. –Ed.
REPORT OF THE ETHICS COMMITTEE

by Paul H. Melnick, Chair

The Ethics Committee met via teleconference on January 20, 2016, at 11:00 a.m. In attendance were Paul Melnick, Eric Zimmerman, Christina Meier, Jim McCauley, Ed Waugaman, and Susan Pesner.

There was a general discussion about HB 1091 (introduced by Marcus B. Simon) entitled Settlement Statements: definition, certain disclosures required. The link to view this bill is http://lis.virginia.gov/cgi-bin/legp604.exe?ses=161&typ=bil&val=hb1091. Jim McCauley said that the Virginia State Bar is not going to take a position on this bill. Members who wish to comment should contact the Virginia Bar Association; the bill is likely to be discussed at the VBA meeting this Friday [January 22—Ed.]. Ed Waugaman stated that he will attend the VBA meeting and report to us on the discussion.

Jim McCauley led a discussion on recent developments in the Virginia Rules of Professional Conduct:

1. The Supreme Court of Virginia approved changes to Rule 1.1 (Competence), and Rule 1.6 (Confidentiality of Information). The changes to the Rules are effective March 1, 2016.

The members of the section are urged to visit the Virginia State Bar website and review these changes and proposed changes to the Rules. Jim McCauley, of the VSB Future of Law Practice Study Committee, stated that a Special Committee on Law and Technology is developing seminars addressing technology issues, so that attorneys can better protect client confidential information and be informed about relevant technology.

Susan Pesner noted that it has come to her attention that real estate agents are upset about privacy rules which allow buyers to prevent real estate agents from seeing the Closing Disclosure. Christina Meier stated that if a buyer allows his agent to see the Closing Disclosure, some lenders are not allowing the loan to be sold on the secondary market. Ed Waugaman suggested that we get a representative from a lender with this position to speak at a seminar to discuss why there is this problem with loan sales on the secondary market.

Ms. Pesner also reported hearing about sellers of real property using “nanny cams” to listen to conversations of people viewing their home. There is a question as to whether this would have to be disclosed by the seller or whether there should be a statement by the seller that such devices have been turned off.

Finally, Ms. Pesner related FIRPTA issues involving parties not wanting to disclose their Social Security Numbers.

There was a general discussion about CFPB rules and the possibility of a webinar concerning them. Alternatively or in addition, an article could be written for the Fee Simple on that subject. Susan Pesner will make inquiries about possible speakers and/or authors.

The meeting was adjourned at 11:40 a.m.

Respectfully submitted,

Paul H. Melnick, Chair
VSB Real Property Section, Ethics Committee
REPORT OF THE FEE SIMPLE COMMITTEE

by Stephen C. Gregory, Chair

The Fee Simple Committee met by telephone on January 13, 2016, at 10:00 AM. Participating were committee members Doug Dewing, Jessica Selway, and Karen Day, and chair Steve Gregory.

The focus was on the upcoming Spring, 2016 issue of the magazine.

The implementation of the TRID rules was discussed, particularly issues and problems. Ms. Selway will feature the topic for the Round Table.

Ms. Selway mentioned that someone had suggested “Land Use for Dummies” as a Round Table topic. The Committee decided that Land Use would be a better topic for an article, and Ms. Selway agreed to attempt to find an author.

As a follow-up to a prior discussion, Mr. Dewing stated that the VBA did not have Obergefell v. Hodges related issues on their (real estate) legislative agenda for 2016.

The Committee revisited the idea suggested by Pia Trigiani of a continuing feature called “Clerk’s Corner,” to be authored by circuit court clerks concerning issues they experience in real estate. The chair was unable to enlist John Frey of Fairfax due to his reelection campaign. Ms. Day contacted Ed Semonian of the City of Alexandria for his participation.

New survey standards are scheduled to take effect in February. Mr. Dewing obtained consent from Marjorie Bardwell and Richard Bales to publish an article they had authored for Fidelity National Title. The chair related a conversation he had with Rick Chess on the same topic.

Ms. Trigiani was unavailable to participate. The chair will contact her regarding the annual legislative update.

The chair reminded everyone to send contact information for prospective authors so they could be provided an information letter.

Deadline for the fall issue is April 1. The meeting adjourned at 10:54 AM.

Respectfully submitted,

Stephen C. Gregory, Chair.
REPORT OF THE LAND USE AND ENVIRONMENTAL COMMITTEE

by Stephen R. Romine, Chair

VSB Real Estate Section

Land Use and Environmental Committee

The Committee met by conference call on January 15, 2016. After a brief introduction, a roundtable discussion centered on current topics of interest occurred. It was noted that the recent Fee Simple magazine had several articles related to the focus of the Committee. Additional installments on the Koontz case analysis by Josh Johnson will be published in upcoming issues of the Fee Simple.

A. Prospective matters of interest discussed included:

1. Marijuana legislation and the impact on zoning laws.

2. Stormwater regulations related to recurrent flooding and resiliency initiatives. The 2016 General Assembly has several proposals for consideration.

3. Evolving aspects of due diligence standards relative to Phase 1 investigations.

B. Several recent cases of interest for the Committee included:

1. Sansotta v. Town of Nags Head, 97 F. Supp. 3d 713 (E.D.N.C. 2014);

2. Tommy Davis Constr., Inc v. Cape Fear Pub Util. Auth., 807 F.3rd 62 (4th Cir 2015); and


C. Potential project: Analyze the various immediate appeal rights an applicant has upon an adverse land use decision in various Virginia localities. The local ordinances vary widely, from reconsideration rights to prohibitions or restrictions on refiling the denied application.

The Committee will continue to monitor land use and environmental laws in Virginia and look for opportunities to publish in the Fee Simple magazine. It will also schedule conference calls, as needed, to facilitate Committee work.

Respectfully submitted,

Stephen R. Romine, Chair
REPORT OF THE MEMBERSHIP COMMITTEE

by Philip Hart, Chair

Virginia State Bar

Real Property Section

Membership Committee Report

January 15, 2016

The Membership Committee of the Real Property Section of the Virginia State Bar met by telephone on January 14, 2016, starting at 11:30 a.m. The Committee members in attendance were Philip Hart (Chair), Lewis Biggs and Susan Siegfried. Ron Wiley attended as a guest.

Following a welcome, Philip Hart led a review and discussion of the Committee’s planned activities for 2015-16, as follows:

1. Participation in the VSB’s annual “First Day of Practice” CLE seminar. Philip reported that the Committee coordinated the Section’s participation in the seminar on December 10. Larry McElwain and Philip Hart spoke about residential and commercial real estate practice, respectively, and Beth Godwin-Jones spoke on landlord-tenant practice. Ed Waugaman staffed a desk and disseminated Section membership information to attendees. Kay Creasman assisted with the preparation of the seminar materials.

2. Waiver of dues for the first year of Section membership. In place and on-going.

3. Section CLE seminar discounts for Section members. In place and on-going. There was discussion that the Committee should coordinate with the Programs Committee to make sure Section membership information is given to attendees.

4. Coordination of recruit efforts with the law school liaison committee. There was discussion of the need to better coordinate with the law school liaison committee.

5. Law student vouchers to attend the Section’s Real Estate Practice Seminar in May 2016. Philip summarized the results of last year’s efforts: four law schools were contacted, two students accepted the offer to attend the seminar and one student actually attended. The decision was made to try again this year and to re-double efforts to contact all of the law schools in the state. Susan said she may know a person to contact at UVA Law School. Philip said he would ask at the Board of Governors and Area Representatives meeting next week if people have good contacts at the law schools which they can recommend.

6. Reaching out by letter to former Section members and asking them to re-join the Section. Philip will contact Dolly Shaffner at the VSB for assistance in identifying persons to target with such a letter invitation, which would be sent in spring, 2016.

On January 15, 2016, the 2015-2016 edition of the Section’s handbook was distributed to the Board of Governors and the Area Representatives.

Respectfully Submitted,

Philip Hart, Chair
REPORT OF THE PROGRAMS COMMITTEE

by Paula Caplinger and Blake Hegeman, Co-Chairs

The Programs Committee met after the Board of Governors and Area Representatives meeting on September 18, 2015.

The focus of the meeting was soliciting feedback from participants regarding speakers and topics for the 20th Annual Advanced Real Estate Seminar and the 34th Annual Real Estate Practice Seminar. Committee Members and a number of attendees from the earlier meeting had an excellent discussion and generated a number of suggestions.

As a result of the meeting, the Advanced Seminar schedule is complete and registration is open. The Committee is now actively working to finalize the Annual Real Estate Practice Seminar. The program dates are May 11 in Williamsburg, May 17 in Lexington and May 18 in Fairfax.1 We look forward to sharing the program outline in the near future and always welcome suggestions for topics or speakers for future programs.

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1 These are the live dates and locations. Video Replays will be available; check www.vacle.org for those dates and locations.
REPORT OF THE RESIDENTIAL COMMITTEE

by Susan S. Walker and Christina E. Meier, Co-Chairs

The Residential Committee met by teleconference on January 14, 2015, at 11:00 a.m. Participating in the call were Todd E. Condron, Kay M. Creasman, Mark W. Graybeal, Barbara Wright Goshorn, Alan C. Tanner, Jr., Eric V. Zimmerman, Susan S. Walker and Christina E. Meier.

Topics of discussion were as follows:

a) Issues related to Implementation of CFPB Closing Disclosure: We discussed our experiences with the new Closing Disclosures.

Experiences vary from lender to lender. In some cases, the new disclosures result in final numbers and loan documents being delivered well in advance of closing; in others, unfortunately, the experience continues to involve last minute changes (with or without resulting delays for re-disclosure) and last minute loan packages.

There was discussion on what triggers a re-disclosure and a new three-day waiting period, and we were reminded that changes which do not negatively affect the APR by at least .0125% do not require re-disclosure.

During the course of the meeting, it became apparent that there are statewide concerns about disclosures to sellers and settlement statements disclosing how the settlement agent is disbursing funds, consistent with the requirements of Va. Code Sec. 55-525.24. Todd Condron made us aware that the General Assembly is considering a proposal to amend the definition of settlement statement and to require certain information be included and/or to mandate a state specific settlement statement. It is unclear how this would integrate with the closing disclosures mandated by the CFBP or the options currently being used statewide, which include the ALTA Settlement Statement, the old version of a HUD-1, and closing statements customized by the Settlement Agent (particularly in Charlottesville.)

Kay Creasman suggested that the ALTA article, found at https://www.alta.org/advocacy/news.cfm?newsID=30153, was worthwhile reading for identifying “10 Reasons Why the Secondary Market is Rejecting Purchase of TRID Loans.”

b) Encryption: The discussion moved into the requirements under TRID for encrypting correspondence. Again, experiences vary widely. We have lenders sending all correspondence encrypted, most (but not all) sending encrypted CDs, and a few that do not even send loan documents encrypted. Kay Creasman suggested that attorneys are not subject to the provisions of the Gramm-Leach-Bliley Act, and may not be required to encrypt in the same manner as lenders, but Susan Walker countered by pointing out our greater ethical obligations. It was also discussed that lender agreements and instructions may require us to abide by the lender guidelines under fiduciary obligations. The Committee is attempting to locate an attorney familiar with the new rules to write an article to further educate us on this topic. It was also noted that some parties—for example short sale lenders, and even some primary lenders—are resistant to encrypted emails because of the unknown nature of the content. The use of faxes as an alternative was briefly discussed, but for those of us who use programs through our computers for sending and receiving faxes, this may not provide any security.

c) Lender Agreements: Several of us have found that we are being increasingly asked to sign closing specific and/or blanket lender agreements, sometimes with objectionable language. It was suggested that we take the time to read to what we are agreeing, and consider adding language to limit our compliance to be consistent with Virginia law, our ethical obligations, and the terms of our insured closing letters.

d) Lender Ratings: Ms. Creasman made the Committee aware that a lender rating system for settlement agents may exist. The Committee will attempt to get further information on this rating system. In the
meantime, interested members are referred to an ALTA article on this topic at http://www.alta.org/advocacy/news.cfm?newsID=18916.

e) Termite and Moisture Reports: We discussed the printed language on many termite and moisture report forms to the effect that the seller has disclosed everything seller ever knew about the history of the property as it relates to those issues. As a practice pointer, some of us routinely strike this language, others add verbiage to clarify that no warranty is given, and all of us verify with any sellers that we represent that the statements are accurate, before allowing them to sign without modifying.

f) Power of Attorney to Lender: Many lenders include forms in their closing packages which create powers of attorney from the borrowers to the lender. It was recommended that those powers of attorney be limited to allow only correction of typographical or clerical errors, and that as attorneys we should consider modifying those that are overly broad, after consultation with our clients and the lender.

g) New Certification on the Deed Regarding Tax Status: Alan Tanner advised us of pending legislation which will allow local jurisdictions to enact ordinances requiring clerks not to accept any deed for recordation, unless the locality has certified that taxes are current. In lieu of clerk certification, it would be incumbent on the attorney submitting the deed to certify that taxes are or were being paid current. (It’s not clear how a non-attorney lay settlement agent would make the certification.) See http://leg1.state.va.us/cgi-bin/legp504.exe?161+ful+HB636.

The meeting concluded at Noon.

Respectfully submitted,

Susan S. Walker
Christina E. Meier
REPORT OF THE TITLE INSURANCE COMMITTEE

by Kay M. Creasman, Chair

Title Insurance Committee
Virginia State Bar
Real Property Section

January 11, 2016 Committee Report

The Title Insurance Committee held a meeting by conference call at 10 a.m., January 11, 2016, with the following members attending: Paula Caplinger, Kay M. Creasman, Stephen C. Gregory, and Jessica Selway.

1. The Committee discussed the proposed changes in administrative procedure promulgated by the Virginia Bureau of Insurance. Although the changes apply only to lay settlement service providers, many attorneys are affected because they function in conjunction with lay settlement services.

   a. The comment period is open until February 16, 2016.
   b. Comments can be found at http://www.scc.virginia.gov/case/e-notice/ni150170.pdf
   c. Members of the Virginia Land Title Association met with the BOI to resolve some questions. See VLTA comments at http://www.vlta.org/assets/docs/Legislative/vlta%20guide%20to%20bois%20proposed%20resa%20regulation.pdf
   d. Issues of concern that were discussed:
      (i) Need for a W-2 vs. 1099 employee of a title and settlement company
      (ii) Whether an employee can work from home.
   e. Members are encouraged to read the order and comment about concerns prior to February 16, 2016, if this matter impacts their business.

2. The Virginia Bar Association is sponsoring legislation to clean up certain matters in the Code, but we currently do not have a list of their proposals.

3. Topics and speakers for the Advanced and Annual Seminars were discussed.

4. Topics for the Fee Simple were discussed. Jim Windsor has agreed to write a short article for the Fall/Winter issue regarding the effectiveness of the scrivener’s error statute and how it functions from a practical point of view.

5. Jessica brought up how well TRID\textsuperscript{1} is or is not working. We all agree we need more time to determine how it is functioning. Of particular interest to Jessica were privacy issues and how to protect email.

\textsuperscript{1} TILA-RESPA Integrated Disclosure. –Ed.
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