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SPRING SUBMISSION DEADLINE: APRIL 9, 2010

The next meeting of the Board of Governors of the Real Property Section of the Virginia State Bar will be held on Friday, January 22, 2010 at 1:00 p.m. at the Williamsburg Inn in Williamsburg, VA.

Visit the section web site at

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for the Real Property Section Membership form

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for articles from the Fee Simple and a whole lot more!

CHAIRPERSON'S MESSAGE

by Joseph M. Cochran*

I have recently had the misfortune of losing my paralegal of many years to another job opportunity she felt she could not pass up. In the interim, I have been performing many of the tasks she handled as a real estate paralegal working on residential transactions. I can hear her saying with somewhat of a wicked smile "welcome to my world." I am impressed once again with the constant attention to detail that is required, the ever changing documents and figures, the minor changes required at the last minute to final documents, the constant interaction with out of office vendors, attorneys, surveyors, title company folks, etc., and the sense of satisfaction having completed a file, going the extra mile to make it all run smoothly and seeing your client smile in appreciation for a job well done.

I also think about the television interviews I have watched during the past year of folks who got in over their heads in the real estate boom and are now wishing they had a lawyer advising them when they signed documents that ultimately got them into trouble. I wonder about all of the disclosures required by federal law, enough to choke a horse, and I find it hard to believe how anyone could get into such trouble with all of the disclosures required in your run of the mill house purchase or refi. Then my thoughts go back to a law school professor who told me 80% of successful law practice is servicing the client. Clients want a live person to talk to, to call them back, to respond in a timely manner to their emails, to advise them, to ask questions of, in short, to represent them. They don't want disclosure forms, they don't want to go it alone, they want someone who is knowledgeable about their transaction, who can answer their questions and can provide a reasonable level of protection. Bottom line is nothing can take the place of a knowledgeable real estate lawyer, representing his or her client and reviewing the closing documents, with the client's best interests at heart.

Ah but here's the rub: in the residential arena they don't want to pay us! Everyone is looking to stretch a buck, especially in this difficult economy, and I can't blame them. But it is clear, in general, over the past two decades, the residential closing industry has cultivated a 'penny wise pound foolish' attitude toward attorneys involved in the closing process. And although the industry may be reaping the 'benefits' of this way of operating, I think on the whole, the public has not been well served. I hope realtors, lenders, government regulators and other industry players see this. I am not holding my breath though. Somehow we need to help them open their eyes. There are a number of things we can do as a Section. We can revise deed and contract forms and disseminate them, we can update the Homebuyers Manual, we can develop pamphlets and brochures on real estate topics of interest and help to the average person, we can create a state wide speakers bureau, we can use the bully pulpit of the Section to promote the role of the lawyer in real property matters. Over the years, we have done a very good job helping practitioners develop in their work through seminars, the FEE SIMPLE, email exchanges and other activities. Members of the public might be better served if we took time to consider how the Section might engage them directly. Ultimately, the more lawyers are involved in real estate transactions at all levels, the smoother things will run in Virginia's real estate industry.

A quarter of my year as Section Chair is now gone. My main initiative has been to focus on revitalizing the Area Rep corps. I hope some of my ideas and efforts are helping in this endeavor. In the work I have done thus far this year, I continue to be impressed with the quality of folks in this Section and their commitment to seeing the Section thrive. We have over 2,000 in our Section membership. There are a whole lot of very talented dedicated individuals out there who can contribute mightily to the work of the Section. If you are not engaged in Section activities, you are missed. I invite you to volunteer to

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assist the Section in its current programs and activities, and I welcome your ideas on how we can better engage the public to promote the value of the real estate lawyer.

BE A LEEDER IN REAL ESTATE: AN INTRODUCTION TO THE LEED RATING SYSTEM AND THE "GREENING" OF REAL ESTATE DOCUMENTS

by Jennifer Mullen,[*] Andrae J. Via,[**] Mary Katherine McGetrick,[***] and Michael Nicholson[****]

Stimulus money, increased awareness of work and living environments, and new building practices have quickly moved green building to the forefront of the real estate market. A variety of methods exists for increasing energy efficiency, improving air quality and decreasing building emissions with or without certification. However, standards and rating systems provide a verifiable mechanism to determine the commitment to sustainability and the opportunity to showcase that commitment for marketing and financial incentives. The U.S. Green Building Council ("USGBC") developed the Leadership in Energy and Environmental Design ("LEED") rating system, a well-known, consensus-based approach to green building with third-party verification through the USGBC.[1]

Certification for commercial buildings is available under LEED for New Construction, LEED for Existing Buildings, LEED for Commercial Interiors, LEED for Retail, LEED for School and LEED Core & Shell.[2] All certifications are forward-looking based on design, except LEED for Existing Buildings, which is performance based. LEED ratings are available at four levels: Certified, achieving 40-49 points; Silver, achieving 50-59 points; Gold, achieving 60-79 points; and Platinum, achieving 80+ points.[3] In order to achieve a certain level of LEED certification, a project applicant must gain "credits" for sustainable design in six specific areas: Sustainable Sites, Water Efficiency, Energy and Atmosphere, Materials and Resources, Indoor Environmental Air Quality and Innovation in Design.[4] Innovation in Design includes bonus points for team member expertise in sustainable building and design features not accounted for in the other five categories.[5] Certain individual credits may have prerequisites which must

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[1] U.S. Green Building Council, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1988 (last visited Oct. 14, 2009).

[2] U.S. Green Building Council, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=222 (last visited Oct. 14, 2009).

[3] U.S. Green Building Council, http://www.usgbc.org/ShowFile.aspx?DocumentID=3330 (last visited Oct. 14, 2009).

[4] *Id.*

[5] *Id.*

be achieved as a baseline to earn corresponding point(s).[6] Each credit is assigned a certain number of points and bonus points, which can then be totaled to achieve LEED certification. LEED certification does not mandate the areas in which credits must be obtained, but rather offers the flexibility for the team members to pick credits which earn points under the LEED rating system for which the project is registered.

The first step toward certification is registration of the project and, ideally, identification of the team members. The USGBC offers an online registration process and paper registration for those seeking building certification.[7] Integrated design is a key component to LEED certification; therefore, it is beneficial to register early in the design process.[8] Early coordination and collaboration from team members may help reduce the costs of the construction or renovation of the building. Once registered, the project is easily tracked and managed through the online system, known as LEED Online.[9] The applicant may, for a fee, request an interpretation from USGBC on the likelihood that a credit will be received and points awarded. LEED Online provides free access to team members for previous interpretation requests and interpretation rulings for all projects.[10]

Certification fees vary depending on the project, but if the project achieves Platinum certification, the certification fees are refunded.[11] Through LEED Online, project team members upload supporting documentation for certification. Preliminary review is available by the USGBC, which will indicate what credits are anticipated, need clarification or will be denied for particular reasons. This provides the team members the opportunity to revise the project where possible to achieve the maximum number of points. Upon substantial completion, the project is submitted for formal review by the USGBC, which also has an established appeal process for denied credits.[12]

The LEED certification process, as well as other rating systems, can play an important role in drafting and negotiating "green" real estate documents, including leases and construction agreements. Depending on the stage of certification, and the type of real estate transaction, there are green building concepts which may affect each party's negotiating position and bottom line. LEED certification can create real value for a project, and the following overview of applicable law and documentation will assist the project owner in leveraging that value.

DILLON RULE SERVES AS OBSTACLE TO GREEN BUILDING IN VIRGINIA

In Virginia, the nineteenth-century legal precedent known as the Dillon Rule provides that local governments possess no authority, except those powers expressly granted by the General Assembly, those powers necessarily or fairly implied from expressly-granted powers, and those that are essential and indispensable.[13] If a local ordinance exceeds the scope of the locality's authority, then the ordinance,

[6] Green Building Certification Institute, https://www.gbci.org/DisplayPage.aspx?CMSPageID=130 (last visited Oct. 14, 2009).

[7] Green Building Certification Institute, https://www.gbci.org/DisplayPage.aspx?CMSPageID=137 (last visited Oct. 14, 2009).

[8] *See* http://www.usgbc.org/DisplayPage.aspx?CMSPageID=64 (last visited Oct. 14, 2009).

[9] *See id.*

[10] *Id.*

[11] Green Building Certification Institute, https://www.gbci.org/DisplayPage.aspx?CMSPageID=127 (last visited Oct. 14, 2009).

[12] Green Building Certification Institute, https://www.gbci.org/DisplayPage.aspx?CMSPageID=211(last visited Oct. 14, 2009).

[13] *Logan v. City Council of the City of Roanoke*, 275 Va. 483, 494 (2008).

upon challenge, should be deemed invalid.[14] For example, Virginia localities are prohibited from inserting green building standards into local building codes because Virginia statutory law provides that the ability to adopt and promulgate a Uniform Statewide Building Code must remain at the state level.[15] If there is any reasonable doubt to a locality's power or authority, the presumption is that the locality does not have the power in question.[16]

The Dillon Rule requires that localities obtain express authority from the Commonwealth before enacting certain types of legislation. With the emphasis and focus on green building still being relatively new, the Commonwealth, through the General Assembly, has not granted localities the authority to enact mandates for green building, although at the state executive level, the Commonwealth appears poised to make green building one of its highest priorities. Governor Kaine has signed several Executive Orders that require state buildings to conform to LEED Silver or Green Globe standards, and that encourage the private sector to adopt energy-efficient building standards, by giving preference to facilities meeting LEED or Energy Star standards when leasing such facilities for state use. Without enabling legislation from the General Assembly,[17] localities lack any express authority to enact green building standards through local ordinances. Localities thus may be reluctant to enact such standards until the state's legislature provides express authority.

With the Dillon Rule firmly in place, many Virginia localities have elected to use incentives, such as fast-tracking of permits and property tax credits, instead of legislative mandates to increase green building in the private sector. Some localities are heavily emphasizing green building, while still operating within the legal framework of the Dillon Rule. Arlington County, for example, allows developers designing LEED-certified projects to develop their sites at a higher density than conventional projects. The density bonus increases with each higher level of LEED certification attained.[18] Other localities, including Alexandria, Chesapeake, Henrico, Fairfax, and Richmond, have focused on setting requirements for LEED certification for their municipal buildings until the state legislature provides the express authority to mandate green building at the private sector level. Localities throughout the nation, however, have been able to proceed in requiring green building by the private sector, because their localities are not limited by the Dillon Rule. In our own backyard, Washington D.C., the DC Green Building Act of 2006 requires all privately-owned projects to be LEED certified beginning in 2012.

BUILDING GREEN CONSTRUCTION DOCUMENTS

Southern Builders, Inc. v. Shaw Development[19] is widely regarded as the first case involving green building issues. In this case, the contractor sued the developer on a mechanics' lien claim, but the developer countersued for the contractor's failure to construct the project pursuant to LEED standards and failure to complete construction by the deadline imposed by the State of Maryland for the project to receive state tax credits which were tied to the project attaining at least a LEED Silver rating.[20] This case

[14] *City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243, 246 (1997).

[15] *See* VA. CODE ANN. § 36-98 (2009).

[16] *See Board of Supervisors v. Reed's Landing Corp.*, 250 Va. 397, 400 (1995).

[17] For an example of such enabling legislation, see VA. CODE ANN. §§ 58.1-3221.2, 58.1-3661 (2009), which allow localities to exempt or partially exempt energy-efficient buildings and solar energy equipment, respectively, from local property taxes.

[18] *See* Arlington, Virginia, Green Building Incentive Program, http://www.arlingtonva.us/departments/EnvironmentalServices/epo/EnvironmentalServicesEpoIncentiveProgram.aspx (last visited Oct. 14, 2009).

[19] No. 19-C-07-011405 (filed in Cir. Ct. Somerset County, Md.).

[20] *See* Mary Jane Augustine, *Project Owner Strategies for "Greening" Design and Construction Contracts*, at 131, http://www.pli.edu/pli/48140/18490_Chapter08_Green_Real_Estate_Summit_2009.htm (last visited Oct. 14, 2009).

was settled out of court, so it does not offer any precedent, but it highlights the need for explicit language in any construction or design agreement describing the obligation to design and build in accordance with green principles (usually following LEED or certain other green rating systems).[21]

There are important risk allocation issues for each party to consider before signing a contract to construct, design or develop a green building, especially if the goal of the project is to attain some level of LEED certification. The American Institute of Architects ("AIA") standard form of agreement between owner and architect has a provision that states "the Architect shall consider environmentally responsible design alternatives, such as material choices and building orientation," but there is no enforcement mechanism.[22] There is also a separate addendum agreement B214-2007, which provides that the architect will take the lead in the LEED certification process. Green building principles are not addressed in either the AIA Standard Form of Agreement between the Owner and Contractor, A101-2007, or A201-2007, General Conditions of the Contract for Construction.[23]

The issue for architects and contractors is that the LEED certification process involves many different parties, and the success of the project depends on each party complying with LEED guidelines and working toward a common goal of attaining a certain level of LEED certification. An owner may be depending on an architect or contractor to perform to a certain standard, while both the architect and contractor must depend on each other and certain other parties, an independent LEED consultant, for example, to perform their job, so the entire project is successful. A contractor's or architect's liability under a services agreement is usually linked to a professional negligence standard that, absent contract language to the contrary, is a common law standard of care similar to other professionals in similar geographic communities.[24] Construction and design professionals will typically agree to perform to the professional negligence standards as set forth in the AIA standard agreements. An owner, on the other hand, should try to include as many details as possible about the expertise of the design professional in green building principles and an obligation for the architect or contractor to perform to that higher standard of care.[25] However, most professional liability insurance policies will contain an exclusion for assumptions of liability that go beyond what is imposed by law,[26] which is why a design professional should carefully examine the standard of care set forth in its contract.

There is also concern that incorporating a specific LEED certification level or other standard in a construction or design contract will be viewed as a "guarantee" or "warranty" by the design professional to the developer.[27] Again, most professional liability policies also exclude coverage for claims arising out of a breach of warranty or guarantee.[28] However, many owners and developers are seeking exactly that, a

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[21] *See id.*

[22] AIA Document B101-2007, Standard Form of Agreement between Owner and Architect, §3.2.5.1.

[23] *See* Augustine, *supra* note 20, at 129-30.

[24] Stephen Del Percio, *Considering Standard of Care Provisions in Green Construction Contracts*, GREEN REAL ESTATE LAW JOURNAL (May 15, 2009), http://www.greenrealestatelaw .com/2009/05/considering-standard-of-care-provisions-in-green-construction-contracts/ (last visited Oct. 14, 2009).

[25] Augustine, *supra* note 20, at 141.

[26] Del Percio, *supra* note 24.

[27] *Id.*

[28] Del Percio, *Reactions to Green Building Industry's First LEED Certification "Guarantee:" Implications for Insurance Coverage & Limitation of Liability Provision*, GREEN REAL ESTATE LAW JOURNAL (Aug. 27, 2009), *available at* http://www.greenrealestatelaw.com/2009/08/reactions-to-first-leed-certification-guarantee/ (last visited Oct. 14, 2009) (discussing Atlanta-based Energy Ace, Inc.'s

guarantee that their project will be awarded a certain certification. How insurance companies treat claims that arise out of these heightened standards of care and "guarantees" will ultimately determine how these contracts are written.

Design professionals and owners will continue to struggle over how to phrase the obligations in a green construction contract, while the various issues discussed above play out on the insurance front. However, an owner who is seeking a particular green certification would be wise to pay close attention to the remedies and measure of damages sections of its design and construction agreements. Many owners have certain financial incentives tied to LEED certification, and will suffer significant damages if the certification is not attained in a timely manner, or at all. Design professionals should be obligated to correct any situations caused by them which threaten the desired "green" result of the project, at no additional cost to the owner.[29] However, even if an architect or contractor can go back and fix something that has placed the certification in jeopardy, important deadlines may have expired, as in the *Shaw Development* case. The owner will want a liquidated damages provision in the contract if LEED certification or other certification is not attained after a date certain. Of course, the architect or contractor will try to limit these damages to the extent the failure to attain certification was caused by another party performing professional services.[30] It is important that the owner be protected in both contracts with its architect and contractor.

In summary, green building is a largely collaborative process which requires all parties to work together and, consequently, share the risks involved. The professional liability insurance industry will have a great effect on how specific architects and contractors can be in their performance up to "green" standards. Architects and contractors will want to limit their respective liability for performance to a certain standard of care and to refrain from offering any guarantee as to their ability to attain certain levels of LEED certification. A savvy developer will protect itself by specifically describing the certification and financial incentives sought by the project, each party's liability for its own "green" performance and the exact amount of damages to be paid by any party which fails to meet its obligations.

GREEN LEASING: CONSIDERATIONS FOR TENANTS AND LANDLORDS

Incorporating "green" concepts into commercial leases is becoming a topic of increasing importance as the number of new green buildings being constructed, and existing buildings seeking "green" certification, in this country increases annually. By knowing and understanding the various issues that buildings with a structured sustainability plan present to landlords and tenants, attorneys who draft and negotiate commercial leases will be in a better position to effectively advocate for a client that is looking to go green.

Two well-known real estate groups, the Building Owners and Managers Association (BOMA) and the Real Property Association of Canada (REALpac) have developed forms for green leases.[31] Despite their structural differences, the BOMA Lease, which incorporates green language directly into the applicable provisions of the lease, and the REALpac Lease, which uses an "Environmental Management Plan" exhibit to the lease containing green and sustainability concepts, can each serve as guides for

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announcement that it will offer industry's first LEED certification guarantee, which, however, is limited to the amount of the LEED consultant's fee).

[29] Augustine, *supra* note 20, at 143.

[30] *Id.* at 145.

[31] Steven A. Teitelbaum, Lease Guide – Guide to Writing a Commercial Real Estate Lease – Including Green Lease Language (Jones Day ed. 2008) [hereinafter BOMA Lease]; REALpac National Standard Green Office Lease for Single-Building Projects – 1.02 – 2009 (Mar. 30, 2009).

attorneys who are looking to "green" a lease for their client. Below is a discussion of a few green leasing issues related to certain lease provisions that are likely to be affected when parties go green.[32]

Submission of Buildings for Certification: For buildings where the landlord intends to seek a specific green certification (i.e. LEED, Green Globes, ENERGY STAR, etc.) subsequent to lease execution, the landlord should include a provision in the lease stating that the tenant consents to the landlord's future submission of the building for certification under the landlord's desired green standard. If possible, tenants should be required to cooperate with the landlord, agency or entity responsible for overseeing the particular standard and should agree to provide any consents and documents that are reasonably required for the landlord to obtain the desired certification.

From a tenant's perspective, having a building certified to a specific green standard may be a welcome benefit. The tenant, however, should include language in the lease stating that the tenant's cooperation with the landlord's certification process shall not unreasonably disrupt the tenant's business operations in the building or place any undue burdens on the tenant.

Building Operations: Regardless of whether a building has been certified to a particular green standard, a landlord may incorporate certain requirements into a lease in order to bolster the building's overall sustainability goals. For instance, as identified in Sections 6.3 and 6.4 of the BOMA Lease, a landlord can include provisions in a lease requiring the tenant to (i) employ specific construction and maintenance methods (including disposal of construction waste) which comply with the building's sustainability plan or applicable green certification standard, (ii) use proven energy and carbon reduction methods (for example the use of energy efficient light bulbs, timed or motion detection lighting controls, closing shades on the south side of a building to avoid excessive heating caused by afternoon sunlight, and purchasing ENERGY STAR equipment), and (iii) comply with the landlord's recycling program, as well as all applicable recycling laws and regulations established by applicable governing authorities. Section 15.1 of the BOMA Lease and Section 7.4(a) of the REALpac Lease also address the energy saving concept of janitorial services being performed during daylight hours in order to prevent lights being turned on in the evening by the janitorial staff. If a tenant balks at janitorial services being performed during normal business hours, the landlord may want to consider charging the tenant a higher fee for janitorial services which are performed in the evening.[33]

Tenants should expect that, to some degree, leases containing certain green or sustainability concepts will present restrictions or burdens not commonly found in traditional leases. That is not to imply, however, that tenants should be burdened with unreasonable requirements with respect to normal services like electricity use, water consumption, recycling, cleaning schedules or trash disposal. The landlord's requirements related to sustainable building operations should be reasonable and should not interfere with the tenant's normal business operations.

Operating Expenses: Section 4.2 of the BOMA Lease identifies certain operating expenses incurred by landlords that are unique to a green lease, including (i) insurance endorsements necessary for repairing, replacing and re-commissioning a building for re-certification to a specific green standard, and (ii) all costs of maintaining, managing, reporting, commissioning, and re-commissioning a building that is designed and/or built to be sustainable and conform to a specific green certification standard. These operating expenses are broadly defined and could include any number of expenses incurred to support the building's sustainability features, which gives the landlord flexibility in the items it can include in

[32] The issues addressed in this article are not intended to serve as an exhaustive list of issues facing landlords and tenants in green leases, nor are the highlighted lease provisions the only provisions that could be affected in a green lease.

[33] *See* BOMA Lease, *supra* note 31, § 15.1(b).

operating expenses.[34] Notably, a number of operating expenses that could be grouped in the broad definition might be considered capital expenditures — for instance, energy saving and water conservation systems. In a net lease, landlords will want to pass these costs on to tenants as operating expenses.

From a tenant's perspective, operating expenses should not be defined in such a broad manner, nor should a landlord be permitted to pass through capital improvements costs related to sustainability features unless those features *actually* lower utility bills or reduce operating expenses in general, and then only to the extent of the actual reduction achieved.[35] Also, tenants can assert that they should only be responsible for paying the amortized cost for those capital improvements, as the tenant will not realize the full value for such costs over the course of their initial lease term. [36]

Insurance: If a building that has been certified to a specific green standard is destroyed or damaged, the landlord needs to determine the level of insurance coverage needed to restore and re-certify the building to its former green standard. Certain insurance providers now offer custom insurance policies or endorsements to cover potential losses in green certified buildings. If landlords are passing their insurance costs through to tenants as part of building operating expenses, they should be sure to include the costs of any insurance endorsements related to restoring and re-certifying buildings to their previous green certification.

If your client is a green building tenant who selected the building because of its certification or sustainable building characteristics, then your client will want to require the landlord to carry insurance which covers the costs for rebuilding and re-certifying a green building. [37] Tenants also need to consider their own insurance policies for tenant improvements and personal property. Tenants should avoid being required by the terms of the lease to rebuild tenant improvements in accordance with certain green building certifications. If the tenant is committed to being green, it should carry insurance on its improvements that covers restoration costs for sustainable features.

Casualty: When addressing casualty provisions in a green lease, landlords need to consider whether or not they will be obligated to rebuild a building in accordance with a specific green certification standard. Such standards will be subject to change over time, meaning the requirements for obtaining the building's original certification may become considerably more difficult to achieve in the future, following a casualty event. In addition, there are no guaranties that a building, once rebuilt, will ultimately receive the green certification that the landlord intended or promised to deliver in the casualty provisions of the lease. In order to avoid being required to rebuild to a certain green certification standard, the landlord should insert language indicating that landlord will use its commercially reasonable efforts to restore the building to its original green certification standard.

From a tenant's perspective, leasing space in a green building could prove to be an integral part of a tenant's identity. A tenant may have its own sustainability plan which aims to increase employee productivity while decreasing the tenant's overall carbon footprint. These reasons may provide motivation for the tenant to require the landlord to rebuild a building to its previous green certification. If the landlord fails to meet its obligation, the tenant should attempt to include remedies in the lease, such as rent abatement or lease termination.[38]

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[34] Ronald B. Grais & Kristen M. Boike, *Jenner & Block: Evolving Model Leases – A Comparison of the BOMA and REALpac Green Leases*, EMERGING ISSUES COMMENTARY, Oct. 2008, at 2-4 (LexisNexis 2008).

[35] *Id*. at 4.

[36] Curt Hazlett, *Low-Emission Leasing*, SHOPPING CENTERS TODAY, Oct. 2009, at 38.

[37] Grais & Boike, *supra* note 34, at 5.

[38] *Id.* at 6.

Default: From a landlord's standpoint, a tenant breach of any green provisions in a lease should be treated as an event of default. Because such a default may jeopardize a building's certification to a certain green standard, the landlord should consider making a green breach an automatic default, with no applicable notice and/or cure provisions in the lease. In addition, in order to protect the green standard established for a certain building, the landlord should seek to insert self-help rights in order to cure the tenant's green breach. If any green breach results in a loss of certification under any standard, interferes with the landlord's efforts to obtain certification under a standard, or precludes or prohibits certification under a standard, the tenant should be liable for any and all losses or damages suffered by the landlord as a result of the green breach, including but not limited to reimbursement of any and all costs expended by the landlord in obtaining or seeking certification under a certain standard. The landlord should be entitled, in its sole discretion, to receive reimbursement for such costs either upon demand or through an increase in base rent, the amount of which shall be determined in the landlord's reasonable discretion. Tenants also need remedies in the case of a landlord's breach of a lease's green provisions. Such remedies may include self-help rights to cure such breaches, abatement of rent or lease termination.

Regardless of the drafting approach used, it is essential for landlords and tenants to identify the various provisions in a lease that may be impacted when they decide to enter into a green lease or modify an existing lease in order to incorporate sustainability concepts. Attorneys and their clients must also remember that incorporating green concepts into a lease can bestow long-lasting benefits on landlords and tenants, especially when the parties cooperate and proceed with a mutual understanding of one another's sustainability interests.[39]

CONCLUSION

Today's real estate transactions are already feeling the impact of a "greening economy" – and sustainability is expected to be an issue of increasing importance in most commercial real estate transactions. Opportunity is a driver of transactions – and standards and rating systems such as LEED create transactional opportunities by allowing clients to quantify a commitment to sustainable design and development. Such commitment levels will only increase with increased demand for sustainable products, the continued development of the various rating systems and governmental incentives.

[39] Hazlett, *supra* note 36, at 37-38.

LANDMARK HHH V. PARK, 277 VA. 50 (2009) - RAIN, RAIN GO AWAY OR ELSE THE LANDLORD WILL PAY

by Robert G. Boyle, Jr.[*]

In a recent commercial leasing decision, *Landmark HHH v. Park*, 277 Va. 50 (2009), the Virginia Supreme Court highlighted the need for landlords to carefully draft exculpation clauses in their leases, while simultaneously ignoring a carefully drafted maintenance provision and holding a landlord strictly liable for maintenance of areas within its sole control.

Maintenance Standard in Lease Unlikely to be Enforced for Areas within Landlord's Sole Control

As has been stated in numerous Virginia Supreme Court cases over the years, commercial landlords were under no obligation at common law, in the absence of express covenants to the contrary, to keep leased space in good repair.[1] Most well-drafted commercial leases now contain express provisions imposing maintenance standards for the leased premises as well as detailing which party is to perform such maintenance. Unfortunately for Virginia commercial landlords, the Virginia Supreme Court signaled in *Landmark HHH* that it will ignore the maintenance standard set forth in a lease and instead impose strict liability with respect to maintenance of areas within their sole control.

In the *Landmark HHH* case, the landlord (Landmark HHH, LLC) was solely responsible for maintenance of the shopping center's roof, with the maintenance standard being described in the lease as follows: "Landlord shall *endeavor* to keep the foundation, roof, and the outer walls . . . of the Premises *in good repair* and make such repairs to the foundation, roof and outer walls as are necessary following Landlord's knowledge of the necessity of said repairs."[2] The Virginia Supreme Court correctly construed this language as imposing on the *Landmark HHH* landlord two separate obligations: the obligation to keep the roof in good repair and the obligation to make repairs when landlord becomes aware of the need for the same. The *Landmark HHH* landlord tried to combine these two obligations into a single duty to make repairs after having received notice of the need for the same, but the Virginia Supreme Court disagreed, concluding the "duty to keep the roof in good repair would be effectively negated if necessary repairs to the roof were only required when [landlord] was notified by a tenant of defects in the roof."[3]

Citing no authority for its conclusion, the Virginia Supreme Court held that the *Landmark HHH* landlord was obligated to provide a "serviceable, leak-free roof" and then affirmed the lower court's finding that the failure of the roof was a breach of such obligation.[4] In so doing, the Virginia Supreme Court completely ignored the word "endeavor" in the aforementioned lease language, though its inclusion in the lease was assumedly not accidental. Instead, insertion of the word "endeavor" suggests an intention by the *Landmark HHH* landlord not to be held strictly liable for the condition of the roof, by signaling to

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[1] *See, e.g.*, *Adams Grain & Provision Co. v. Chesapeake & O. Ry. Co.*, 118 Va. 500, 502 (1916). Landlords in residential leases have been prescribed statutory duties with respect to maintenance and repair. *See* Virginia Residential Landlord and Tenant Act, VA. CODE ANN. § 55-248.2 *et seq*. Section 55-225.3 of the VIRGINIA CODE also imposes maintenance obligations on landlords and may apply to commercial leases as well as residential leases. The section is entitled "Landlord to maintain dwelling unit," but there is nothing in this statute limiting its applicability solely to residential leases.

[2] *Landmark HHH*, 277 Va. at 52 (emphasis added).

[3] *Id.* at 56.

[4] *Id.* at 56 n.1.

the tenant that it would "attempt by exertion of effort" (standard dictionary definition of "endeavor") to keep the roof in good repair.

The *Landmark HHH* landlord possessed a strong argument that it had fulfilled its contractual duty in attempting by the exertion of effort to keep the roof in good repair. After the tenant (and other building tenants) complained numerous times over the course of several years about intermittent leaks in the shopping center's roof, the *Landmark HHH* landlord, working with a roof design consultant and a roofing contractor, replaced the entire roof between September 2005 and February 2006.[5] Upon completion of the roof replacement, the tenant complained anew about leaks, at which point the landlord's roofing contractor took corrective measures by connecting a drain and repairing improperly installed flashing materials.[6] Intermittent leaks continued to occur until the incident at issue, which occurred after a night of record rainfall on June 25, 2006.[7]

Proof of Landlord Negligence Not Required in Breach of Lease Cases

Based on prior Virginia Supreme Court decisions, the *Landmark HHH* landlord asserted that its replacement of the roof should have absolved it of liability unless and until it had been given notice that the new roof was defective.[8] In a line of cases, the Virginia Supreme Court had previously held a tenant must show that repairs performed in its leased space were performed in a negligent manner before its landlord could be found liable; the mere fact that a defect remained after the repairs had been undertaken was not sufficient proof of negligence.[9]

The Virginia Supreme Court, in *Landmark HHH*, distinguished that line of cases by asserting that different standards apply when a tort claim is at issue. The Court explained that where breach of contract is the underlying basis for the tenant's claim, as was the case in *Landmark HHH*, the negligence standard cited in its line of cases did not apply.[10] Thus, the tenant was not required to establish negligence on the part of the landlord in a breach of lease action. [11]

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[5] *Id.* at 53-54.

[6] *Id.* at 53-54. In its brief, the *Landmark HHH* landlord noted that the tenant's manager testified to registering a single complaint subsequent to the roof replacement and prior to the damage at issue in the case. Landlord also noted that no leaks were reported after completion of the repairs. Brief of Appellant at 6-7, *Landmark HHH* (2008 WL 5794377).

[7] *Landmark HHH*, 277 Va. at 54. The next morning the tenant discovered that its entire store had been flooded, ceiling tiles had fallen in and the store's inventory suffered substantial water damage. *Id.*

[8] *Id*. at 56. This is a more nuanced argument than stated previously with respect to notice of defects. In essence, landlord argued that it had taken all necessary steps to cause the roof to be in good repair and as such it was entitled to notice and opportunity to cure before it could be held in breach of such repair obligation. *Id*.

[9] *See, e.g., Kesler v. Allen*, 233 Va. 130, 133 (1987); *Oden v. S. Norfolk Redevel. & Hous. Auth.*, 203 Va. 638, 640 (1962). In *Kesler*, the Virginia Supreme Court reaffirmed the general rule that owners are not liable for damages caused by the negligence of their independent contractors and that such landlords, in the absence of one of the exceptions to such general rule, have no vicarious liability to tenants for negligence of independent contractors in making repairs. *Kesler*, 233 Va. at 134.

[10] *Landmark HHH*, 277 Va. at 56 n.1. The Virginia Supreme Court's proclamation that commercial landlords do not have tort liability for personal injuries resulting from a contractual breach presumably remains unchanged by *Landmark HHH*. *See, e.g., Paytan v. Rowland*, 208 Va. 24, 27 (1967).

[11] There was no finding by the lower court or the Virginia Supreme Court of negligence by the *Landmark HHH* landlord in the installation of the new roof. *Id*. Instead, the Court held that "the failure of the roof, whether by reason of its negligent installation or some other cause, was a breach of [the landlord's] lease obligation to maintain the roof." *Landmark HHH*, 277 Va. at 56 n.1.

Unclear If Notice and Right to Cure Required in Breach of Lease Cases

In a prior breach of lease case, *Business Bank v. F. W. Woolworth Co.*, the Virginia Supreme Court concluded a landlord could not be held liable for an alleged failure to make repairs without having been given prior notice and an opportunity to cure.[12] The *Business Bank* case is readily distinguishable on its facts from *Landmark HHH*. In *Business Bank* the tenant was seeking reimbursement for its replacement of an air conditioning system where the landlord claimed it had not been given prior notice of the defect and the lease did not contain specific language defining the landlord's maintenance obligations with respect to the air conditioning system.[13] In addition, since the tenant in *Landmark HHH* gave notice to its landlord of leaks in the roof after its replacement, the tenant arguably satisfied the notice and cure requirements imposed in the *Business Bank* case.[14] However, it is unclear after *Landmark HHH* whether a tenant has to give its landlord notice and an opportunity to cure prior to asserting a breach of contract claim relating to its landlord's failure to make required repairs to areas within the landlord's sole control.

Landlord Strictly Liable for Areas Under its Sole Control

The *Landmark HHH* case echoes back to a 1916 Virginia Supreme Court decision, *Adams Grain & Provision Co. v. Chesapeake & O. Ry. Co.*, in which a tenant was permitted to proceed with a claim against its landlord for damages resulting from a broken water pipe located in the tenant's leased premises.[15] The lease in *Adams Grain* did not expressly require the landlord to maintain the water pipe at issue, yet the Virginia Supreme Court implied an obligation on the landlord's part to do so because the landlord had exclusive control over the maintenance of the pipe and the same did not serve the tenant's leased premises in any manner.[16]

The difference between *Business Bank* and *Adams Grain*, on the one hand, and *Landmark HHH*, on the other, is that *Landmark HHH* involved a lease where the landlord had incorporated language specifying the applicable maintenance standard. In its brief to the Virginia Supreme Court, the *Landmark HHH* landlord asserted that it had fulfilled its obligations under the lease in accordance with the maintenance standard contained therein at the point the rain started to fall on June 25, 2006:

> At this point, the landlord had no reason to believe that any further repairs were needed to [the tenant's] premises; a new roof had been installed and the drain had been corrected. Until the extraordinary rainfall in June [25-26], 2006, [the tenant] had no other issues

[12] *See Business Bank v. F. W. Woolworth Co.*, 244 Va. 333, 336 (1992).

[13] *Id*. at 335-336. Perhaps because the *Business Bank* case is easily distinguishable on its facts, it was not cited in the landlord's brief in *Landmark HHH*.

[14] *Landmark HHH*, 277 Va. at 54.

[15] *See Adams Grain & Provision Co. v. Chesapeake & O. Ry. Co.*, 118 Va. 500, 504 (1916). While it is not clear from the opinion, the assumption is that the tenant in *Adams Grain* asserted a breach of contract claim for its damaged personal property.

[16] *Id.* at 502-03 (citing with approval the following quotation: "The landlord is responsible for the condition of the pipes designed for the use of all tenants of a building and which are under his control, and is liable for injuries occasioned by permitting them to get out of order."). Interestingly, the Virginia Supreme Court noted that the "inquiry concerning [landlord's] negligence" should have been submitted to a jury as a mixed question of fact and law, yet the opinion contains no discussion of the landlord's negligence and the case was not remanded to the lower court but instead judgment was entered in favor of tenant for the damages provisionally assessed by the jury in the lower court proceeding. *Id*. at 504.

> with its new roof. Under these facts, the landlord was certainly justified in believing that the [tenant's] roof was in good repair.[17]

An objective analysis of the facts reveals the *Landmark HHH* landlord had arguably satisfied its contractual duty by endeavoring to keep the roof in good repair. In response to complaints, the landlord completely replaced the roof and subsequently had repairs performed when the tenant complained anew of leaks. Hindsight revealed specific defects in the design of those parts of the roof located directly over the tenant's leased space, but there was no finding by the Virginia Supreme Court that the *Landmark HHH* landlord had knowledge of such defects prior to June 25, 2006. Additionally, there was no finding that the *Landmark HHH* landlord had been negligent in its actions with respect to the roof. While a position could be taken that in order for a roof to be "in good repair," it must not leak at all, the *Landmark HHH* lease did not expressly require a leak-free roof. Because the Court ignored the word "endeavor" in the lease,[18] the inescapable conclusion is that the Virginia Supreme Court has imposed a strict liability standard on commercial landlords for maintenance of roofs and other areas under their sole control, regardless of the maintenance standard imposed by the lease.

Enforcement of Exculpatory Clauses Limited to Express Language Used in Lease

Despite having been found to have breached its contractual duty when the roof leaked, the *Landmark HHH* landlord had a reasonable belief that it could avoid having to pay for the tenant's damages because of the insurance and exculpation provisions set forth in the lease. As is frequently the case in commercial leases, the *Landmark HHH* lease required the tenant to maintain insurance on its inventory and other contents in the leased premises.[19] However, unlike some leases, the *Landmark HHH* lease did not require the tenant to maintain full replacement cost coverage for its inventory, which resulted in an unfavorable outcome for the landlord.[20] Had the *Landmark HHH* tenant been required to maintain full replacement cost coverage for its inventory, then the ultimate judgment obtained assumedly would have been reduced by 94%.[21]

Since the *Landmark HHH* tenant had fulfilled its contractual obligation to maintain insurance on its property, the Virginia Supreme Court held the insurance requirement did not prevent either party from bringing suit for violations of the lease. Even though the Virginia Supreme Court dismissed the aforementioned argument, the *Landmark HHH* landlord had an additional argument that the lease's exculpation language prevented tenant's recovery of damages. Like many commercial leases, the *Landmark HHH* lease contained the following mutual release of liability or responsibility:

> from any loss or damage to property caused by fire or other perils insured under policies of insurance covering such property (but only to the extent of the insurance proceeds

[17] Brief of Appellant at 6-7, *Landmark HHH* (2008 WL 5794377).

[18] Ironically, in its discussion of the exculpatory clauses in the *Landmark HHH* lease, the Court stated that "when interpreting a contract, we construe it as written." *Landmark HHH*, 277 Va. at 57.

[19] *Id.* at 57.

[20] The *Landmark HHH* landlord argued in its brief that although the lease did not explicitly require the tenant to maintain full replacement cost coverage for its inventory, a practical construction of the lease in its entirety mandated that the tenant was required to do so. Brief of Appellant at 9, *Landmark HHH* (2008 WL 5794377). There is no discussion of this issue in the *Landmark HHH* decision, other than to say that the landlord had not challenged the amount of the judgment on appeal. *Landmark HHH* , 277 Va. at 57.

[21] The *Landmark HHH* tenant obtained a judgment in the amount of $298,762.56 consisting of $282,618.00 for two-thirds (2/3) of the value of the tenant's damaged inventory, $11,014.50 for incidental damages incurred in attempting to mitigate its damages, and $5,130.06 as a return of its security deposit. *Id.* at 55.

> payable under such policies), even if such loss or damage is attributable to the fault or negligence of the other party, or anyone for whom such party may be responsible.[22]

The Virginia Supreme Court interpreted this language to merely prevent the tenant from a double recovery on its loss, noting that the *Landmark HHH* landlord could have obtained a full exemption from liability by including language to such effect in the lease.[23] This statement by the Virginia Supreme Court may provide some solace to Virginia commercial landlords in evidencing a willingness to enforce absolute exculpation clauses in leases.[24]

Conclusion

In summary, the following are the important lessons to be learned from the Virginia Supreme Court's recent decision in *Landmark HHH v. Park*:

- Strict liability will be imposed on landlords for areas under their control, regardless of whether the lease establishes a lower maintenance standard.
- The Virginia Supreme Court continues to distinguish between tort and breach of lease claims and does not require proof of negligence to establish the landlord's liability in breach of lease actions.
- It is unclear after *Landmark HHH* whether notice to the landlord and the opportunity to cure are still required in breach of lease actions, especially those involving damages relating to areas under the landlord's sole control.
- Commercial landlords should obtain indemnification from contractors performing work on areas maintained by landlord against tenant damage claims.
- Commercial landlords should require their tenants to obtain full personal property replacement coverage and should not allow exculpation clauses to be limited by the amount of insurance proceeds recovered by their tenants.

[22] *Id.* at 52.

[23] *Id.* at 57. *See also Blue Cross v. McDevitt & Street Co.*, 234 Va. 191, 196-97 (1987) (holding that insurance and waiver provisions in the contract, when read together, showed agreement by the parties to shift risk of loss from themselves to commercial insurer by acquiring policies insuring their own interests).

[24] In prior decisions, the Virginia Supreme Court has found ways to avoid enforcing complete exculpation clauses in residential leases. *See, e.g.*, *Taylor v. Virginia Constr. Corp.*, 209 Va. 76, 80 (1968) (allowing tenant to recover damages for injury suffered in building common area).

DON'T LET YOUR CLIENTS GET CAUGHT WITH THEIR ILSA DOWN

by S. Jill Pisner[*]

Sometimes referred to as the "don't buy a swamp in Florida" law, the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701 *et seq.* ("ILSA" or the "Act") protects purchasers of "lots" by imposing mandatory disclosure requirements, and strict liability for failure to adhere to the statute's disclosure requirements, on developers. It is a statute that many real estate practitioners know little about but may find they need to consider, particularly during market downturns. ILSA was passed in 1968 to protect out-of-state purchasers of vacant land, was substantially rewritten in 1979, and has been held to apply to condominium projects as well as undeveloped land sales. The application of ILSA to condominium sales has expanded the scope of ILSA, as well as the need for practitioners to become familiar with it; pre-construction condominium investments present many of the same abusive practices by developers as sales of vacant land.

Real estate practitioners whose clients include developers, builders, and financial institutions need to be proactive in ensuring that their clients comply with ILSA's registration and disclosure requirements. Practitioners having clients who are lot or condominium purchasers, who are victims of fraud or misrepresentation, and who bought in a subdivision subject to the Act need to consider ILSA among their available remedies.

The frequency of litigation based on ILSA correlates to fluctuations of the real estate market. If values are stable or increasing, there is little likelihood that purchasers will look for relief from mortgages incurred as a result of ill-advised investments in raw land or preconstruction condominium sales. When real estate values decline, the number of ILSA claims increases since ILSA provides a means for purchasers to revoke purchases they made two years earlier and to otherwise seek redress for developers' disclosure failures or other misconduct. As more purchasers have turned to ILSA during the current recession, many developers have been caught with their ILSA down.

ILSA was designed to protect purchasers from developers whose advertising suggested that the real estate investment opportunity was valuable, but, as it turned out, the lots lacked access to the infrastructure or resources needed to sustain a viable community. Patterned after the Securities Act of 1933, the provisions of the Act include prohibitions against fraud and misrepresentation, requirements for registration of the subdivisions, including condominium projects with the U.S. Department of Housing and Urban Development ("HUD"), as well as delivery of a detailed Property Report to the purchaser before the purchaser signs a contract of sale. The ILSA statute, the HUD Regulations, 24 C.F.R. §§ 1710.1 *et seq.*, and the HUD Guidelines, 61 Fed. Reg. 13595 (Mar. 27, 1996), set forth extensive registration and disclosure requirements and require specific contract language. For example, sales contracts must describe the property in accordance with the Act and must advise the purchaser of both the right to receive a Property Report and the right to revoke the purchase. In some instances, the fraud provisions of the Act apply, but the registration and disclosure provisions do not. The broad scope of ILSA includes not only sales, but also certain installment sales and leases, and it applies to both direct and indirect sellers as well as their agents. Purchasers cannot waive the developer's compliance with ILSA.

Sellers subject to the Act include many who may never have realized they could be a developer under ILSA. The current wave of foreclosures, for example, has left many financial institutions in a position of holding so many condominiums or lots within a subdivision that they fall within the definition of an ILSA developer. Banks may also be subject to the Act when they join in the developer's marketing efforts to an impermissible degree. Others subject to ILSA include individuals who purchase a certain number of lots at a tax sale or auction for resale to others, builders who act in concert with the developer,

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and the officers, directors, and agents of the developer. Notably, attorneys are specifically excluded from the definition of "agents" under the statute.

Whether practitioners are representing those who began as "developers" under ILSA or those who found themselves in that position due to the economy, real estate attorneys need to consider ILSA well before their clients enter into a contract of sale. The requirements of ILSA come into play before a purchaser signs a contract. For ILSA's purposes, the time of contract signing is the operative event, prior to which the required disclosures must be made. If there are questions as to the applicability of any exemptions to ILSA, they are determined based on the facts and circumstances at the time the purchaser signs a contract. For purchasers, the two-year rescission period runs from the date of contract signing, rather than the date of closing.

Many sales are exempt from ILSA, but the burden of proving an exemption falls upon the developer and ILSA is narrowly construed against the exemption. It is therefore critical that real estate attorneys who represent developers, builders, and financial institutions become familiar with the extensive exemptions or obtain assistance from practitioners who thoroughly understand the Act. For example, although the Act excludes sales in certain subdivisions containing less than 100 lots, if the developer or builder is simultaneously marketing non-contiguous lots in multiple scattered subdivisions or if there is a thread of common ownership between developers, there may nonetheless be a presumption or determination of a "common promotional plan" as defined under the Act, and ILSA will apply.

The consequences of a developer's failure to comply with ILSA are harsh. If the developer does not provide a Property Report to the purchaser in a non-exempt transaction, then the purchaser has the right to rescind the purchase contract for up to two years from the date the contract was signed (and another year in which to file suit to enforce the rescission), even if the purchaser went to closing and a deed was delivered and recorded. When a purchaser exercises this right, the developer must return the purchase price. Purchasers have up to three years to seek other equitable relief and damages under the Act. In addition to private causes of action for rescission and damages, violations of ILSA can result in criminal penalties, including up to five years in prison. Moreover, HUD can impose civil penalties and can shut down the developer's sales.

The cost of ILSA litigation can be quite high. Pesner, Kawamoto, & Conway has handled several ILSA cases that have required over 10,000 man hours of work. It is well worth the cost for a developer to take the necessary prophylactic measures to avoid expensive litigation through careful compliance with the Act and the HUD Regulations.

Although purchasers who have been misled by unscrupulous developers may be able to afford an individual cause of action, in some instances they will discover that there are other similarly situated victims and that a mass action is the most financially viable approach to seeking redress.

In representing purchasers of lots or condominiums who are dissatisfied with their purchases because the developer failed to deliver on promised amenities, made misrepresentations, or engaged in fraud, real estate practitioners need to determine whether ILSA or an exception to ILSA applies. If the Act applies, the next inquiry is whether the developer delivered the required Property Report and otherwise complied with ILSA. If the developer violated the statute, rescission and damages are available forms of relief. Although rescission of the contract may be the most attractive remedy, keep in mind that obtaining a refund of the purchase price from the developer may be difficult in the current economy. The developer may be bankrupt, and the lot or condominium is likely to be worth far below its purchase price. Damages under ILSA from the principals or agents of the developer are another possible avenue of relief.

If the purchaser cannot get the funds back from the developer, the purchaser may not be able to pay back the financial institution that loaned the funds for the purchase. Unless the bank co-marketed the property with the developer, courts are not likely to find bank liable under ILSA. Purchasers may be

forced to seek relief from their mortgage loans using standard work-out remedies. If you have evidence demonstrating that the lender directly participated in or had actual knowledge of any fraud or misrepresentations by developers, then your client may still be able to get relief. The bank may lose its status as a holder in due course and therefore be unable to enforce the mortgage obligation against the buyer. In addition, common law remedies may apply, and unfair trade practices acts or other consumer protection statutes may provide relief against the mortgage lender in states other than Virginia (where banks are exempt from Virginia's consumer protection act).

Purchasers may be willing to overlook developer violations of ILSA when the real estate market is in an upturn and their land or condominium purchases are increasing in value. During a downturn, however, and particularly if buyers are facing foreclosure, purchasers are more likely to scrutinize the circumstances under which they purchased a lot. Whether your clients are sellers, purchasers, or financial institutions, current market conditions require familiarity with the Interstate Land Sales Full Disclosure Act. Don't get caught with your ILSA down!

SECONDARY EASEMENTS

by Douglas K. Baumgardner[*]

Demand for energy is ever-growing. As utilities purchase and condemn additional rights-of-way, lawyers will increasingly encounter easements granting the right to travel over adjacent land to access such rights-of-way. Lawyers should thoroughly investigate these "secondary easements."[1]

Secondary easements include the right to enter upon a servient tenement for the purpose of repairing, maintaining, renewing, or protecting an artificial structure. Such a right is a mere incident of the easement that passes by express or implied grant. *See Va. Elec. & Power Co. v. Coleman*, 212 Va. 171, 173, 183 S.E.2d 130, 131 (1971); *Va. Elec. & Power Co. v. Webb*, 196 Va. 555, 84 S.E.2d 735, 741 (1954).

An example of a secondary easement can be found in the standard utility right-of-way agreement of a major Virginia utility:

> If there are no public or private roads reasonably convenient to the right of way, Company shall have such right of ingress and egress over the lands of Owner adjacent to the right of way and lying between public or private roads and the right of way in such manner as shall occasion the least practicable damage and inconvenience to Owner.

The Circuit Court of the City of Suffolk recently held that this broad language justified injunctive relief, effectively establishing a fifteen foot wide access easement across the property of an adjacent landowner despite the utility's existing access to its right of way from a public highway at another, less convenient location. *See Obayuwana v. Virginia Elec. & Power Co.*, Case Nos.: CL0800033 & CL07000614 (Suffolk Cir. Ct. 2008). As a result, the landowners were unable to complete the construction of their home.

In *Obayuwana* the utility's alternative access from the public highway was deemed irrelevant because of wetlands and an embankment rendering such access less convenient, less safe and more expensive. Indeed, the Court held that the secondary easement should be read to grant the utility the right to cross the landowner's property to reach any *portion* of the right of way that was not accessible by a public or private road reasonably convenient to the utility.

There is ample reason to believe that the Suffolk Circuit Court's holding is no anomaly. Indeed, the Court's holding may well be upheld on appeal as a straightforward application of the Virginia Supreme Court's demonstrated policy favoring a broad reading of secondary easements. This policy, when coupled with the "plain meaning rule," may prove sufficient to overcome an application of other traditional rules of construction.

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[1] "The right of general access to and over each tract of land sought to be acquired as incidental and necessary to the utilization and enjoyment of the easement [is] sometimes designated as a subordinate or secondary easement." *Va. Elec. & Power Co. v. Webb*, 196 Va. 555, 84 S.E.2d 735, 739 (1954).

The plain meaning rule holds that documents are to be read literally and that the plain meaning is enforced where the language is clear. "[T]he language used is to be taken in its ordinary signification." *Appalachian Power Co. v. Greater Lynchburg Transit Co.*, 374 S.E.2d 10, 12 (Va. 1988).

The law provides no special recourse when a deed grants an easement. The language employed typically determines the scope of the easement:

> When an easement is granted by deed, unless it is ambiguous, the rights of the parties must be ascertained from the words of the deed, and the extent of the easement cannot be determined from any other source. We have held that when the language of a deed is clear, unambiguous, and explicit, a court interpreting it should look no further than the four corners of the instrument under review. Only when the language is ambiguous may a court look to parol evidence, or specifically, to the language employed in light of the circumstances surrounding the parties and the land at the time the deed was executed.

Pyramid Development v. D & J Associates, 553 S.E.2d 726, 728 (Va. 2001) (citations and quotations omitted).

The failure of an agreement to specify the location, width and precise use of an easement would appear, in most contexts, to invite a challenge to inequitable consequences based upon the agreement's ambiguity. However, when a utility is granted a secondary easement, ambiguities will likely not be part of the equation; in other words, landowners should not expect to benefit greatly from the rule that ambiguities are construed in favor of non-drafters.[2] The intent of secondary easements is, more often than not, plain: to encumber adjacent property with a blanket easement to facilitate the utilities' access.

Similarly, the general principle that contractual ambiguities regarding easements are fixed by the use made thereof is unlikely to yield a favorable outcome when secondary easements are in play.[3] Again, the intent of the scrivener is plain: to create a blanket easement and facilitate the utility's access for its rights-of-way.

A landowner challenging inequitable consequences flowing from a secondary easement may nonetheless choose to emphasize the ambiguities. This analysis gives rise to several questions:

First, when is a public or private roadway reasonably convenient to a right-of-way?

Second, how, if at all, does the analysis change when repairs are needed miles away from the intersection of a public or private roadway with a utility right-of-way?

Third, does the utility's right of ingress and egress guarantee it a pathway sufficient for the passage of a pedestrian or, at the other end of the spectrum, for the passage of large equipment?

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[2] "Any doubt as to the true meaning of an agreement should be solved adversely to the party who prepared it, and an agreement prepared by the grantee will not be construed most favorable to the grantee under the general rule." *Martin & Martin, Inc. v. Bradley Enterprises, Inc.*, 256 Va. 288, 291 (1998); *See also* 6B MICHIE'S JURISPRUDENCE, Easements § 7, at 189 (Repl. Vol. 1998).

[3] *See Hamlin v. Pandapas*, 90 S.E.2d 829, 834 (Va. 1956) (stating that "where there is no express agreement between the parties with respect to the location of a way granted, but not located, the use by the grantee or owner of the dominant estate of a reasonable way, which is acquiesced in by the grantor or owner of the servient estate, sufficiently locates the way which the parties intended to create.") (citations omitted); 5C MICHIE'S JURISPRUDENCE, Deeds § 63, at 462 (Repl. Vol. 2006) ("If the language of a deed is doubtful, the long continued interpretation placed upon it by the parties thereto will be conclusive.").

Fourth, what is "the least practicable damage and inconvenience" to the owner of the servient estate?

Again, landowners will, despite the rules of construction and questions referenced above, likely find Virginia courts unsympathetic to a narrow construction of secondary easements. *Webb* underscores the Virginia Supreme Court's liberal construction of such easements. In holding that a power company's statutory powers of condemnation extend not only to land and rights-of-way, but also to secondary easements, *Webb* notes that:

> Whenever an electric transmission line is erected, many citizens of the areas served become dependent upon that facility for light, heat and power. Once installed, its maintenance is necessary for their health, comfort and welfare.
>
> It is common knowledge that hurricanes and tornadoes of unusual violence cause widespread destruction. It is also known that transmission lines are among the chief victims of that character of elemental disturbance. When extensively damaged, prompt repair of electric transmission lines and resumption of service become urgent public necessities.
>
> Only recently Mother Nature in an angry mood forcefully emphasized engineer Shaw's statement that rights of ingress and egress to transmission lines are at times necessary so that repairs may be promptly made and electric service resumed. When 'Hurricane Hazel,' spawned on the restless waters of the Caribbean, swept across the Carolinas and Virginia on October 15, 1954, with wind velocity of 60 to 100 miles per hour, and thence buffeted her way on over other States and into the Dominion of Canada, she left in her wake widespread havoc and destruction. In the nature of things we should take judicial notice that no character of facilities suffered more from the violent swish and swirl of her skirts as she hurriedly traversed these areas than did electric transmission lines serving the public along her course. The immediate repair of damaged transmission lines and resumption of electric service was an urgent and dire public necessity.

84 S.E.2d at 740.

The record in *Obayuwana* suggests that the Suffolk Circuit Court was compelled by the policy expressed in *Webb* to hold in favor of the utility. The Court made several findings that echo *Webb's* focus on the necessity for prompt repair of facilities customarily associated with the provision of utility services. First, the Court found that the construction of the home, if completed, would effectively prevent the utility from crossing the property with heavy machinery. On this basis, the Court granted an injunction barring the landowners from completing the construction of their home. The Court considered, but rejected, the argument that the utility could access its right of way by a less direct route that crossed other lots. The record does not show on what basis the Court rejected this argument, but it stands to reason that the Court concluded that an indirect route would have made it more difficult for the utility to make prompt repairs. The Court noted, *inter alia*, that the public road traversing the utility right of way was separated by a ten to fifteen foot tall embankment that could not be conveniently traversed by the utility's equipment; that the right of way, from the highway to the tower, passed through one-hundred yards of wetlands; that access to the tower "would require specialized equipment, would be jeopardized by tidal flooding and would also adversely impact the wetlands areas;" and that access to the tower from the adjacent property would be "more reliable, safer, and not subject to the impacts of the weather, more convenient and less expensive that access across the . . . wetlands area."

Obayuwana and *Webb* suggest a potentially significant curtailment of adjacent landowners' use and enjoyment of their property whenever uses of the servient estate risk preventing a utility from accessing its rights of way.

The bottom line is this: properties encumbered by secondary easements are fraught with uncertainty. Such properties are, in a sense, encumbered by the legal equivalent of floating minefields.

While servient landowners are rarely stripped of all uses of their land, they are obliged not to unreasonably interfere with an easement holder's lawful use and enjoyment of the property. *Shenandoah Acres, Inc. v. D.M. Conner, Inc.*, 505 S.E.2d 369, 371, 256 Va. 337 (1998).

The potential breadth of secondary easements mandates that lawyers should scrutinize agreements and condemnation orders carefully. Counsel should determine the degree to which a secondary easement damages the residue of the client's property by investigating a number of factors, including the property's topography, soils and buildable area.

Real estate appraisers in condemnation cases should be instructed to consider secondary easements before testifying to the value of property. Secondary easements are, to state the obvious, fertile ground for damages to the residue.

As *Obayuwana* demonstrates, the consequences of failing to fully and accurately account for the impact of secondary easements are potentially draconian. Where appropriate a purchaser of property is well advised to consult not only with an appraiser but with an engineer, land surveyor and building contractor before purchasing or improving property encumbered by a secondary easement. Landowners involved in eminent domain proceedings should explore the impact of such easements on the highest and best use of their property when ascertaining damages to the residue.

Caveat emptor

REAL ESTATE ATTORNEYS AND PROFESSIONALISM

by Colin W. Uckert[*]

This article is a revision of a piece that was published in the FEE SIMPLE in 1999, titled *On Ethics and Professionalism*. The passage of ten years has not diminished the importance of ethics and professionalism, nor has it resolved the most important issues practitioners face. In the past ten years, the Virginia Bar has replaced the Code of Professional Responsibility with the Rules of Professional Conduct (effective January 1, 2000), and the Virginia Supreme Court has endorsed the Principles of Professionalism for Virginia Lawyers (2008). These actions were designed to re-focus our collective attention on the important concepts related to ethics and professionalism; this article is designed to have the same effect, particularly for real estate attorneys.

A. THE ATTORNEY'S ROLE IN REAL ESTATE TRANSACTIONS

Always do right; this will gratify some people and astonish the rest.

- Mark Twain

Attorneys play a multi-faceted role in the practice of law generally, and in real estate matters specifically. The Preamble to the Virginia Rules of Professional Conduct provides:

> A lawyer is a representative of clients . . . an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skills to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

Real estate attorneys are not simply scriveners. Attorneys often play a pivotal role in guiding purchasers, sellers, lenders and investors through the complexities of real estate transactions. Attorneys for the parties often must apply both their legal knowledge and their counseling skills to fully represent their clients' interests in these transactions; they should be professional.

B. COMPARING ETHICS AND PROFESSIONALISM

Be kind, for everyone you meet is fighting a great battle.

- Jacob A. Stein

The ethics rules represent the mandatory minimum standard of conduct below which no attorney may fall, without being subject to disciplinary action.[1] By contrast, concepts of professionalism represent

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[*] Colin W. Uckert is a partner with the Washington, D.C. office of Bryan Cave LLP. This article is an excerpt of the 2009 update of Chapter 14, *Ethics and Professionalism*, of the practitioner's desk reference titled REAL ESTATE PRACTICE IN THE DISTRICT OF COLUMBIA, MARYLAND AND VIRGINIA (Paul D. Pearlstein ed.).

[1] Practitioners are often counseled with regard to the seven cardinal rules for ethical behavior:

1. Keep the client informed.
2. Don't procrastinate.
3. Have a clear, written agreement with the client regarding fees and costs.

aspirational standards of conduct, above and beyond those ethics standards. The preamble to the Virginia Rules of Professional Conduct is instructive: "The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law."

Many articles have been written, bemoaning the decline of professionalism among lawyers, and calling on attorneys to acknowledge and fulfill the responsibilities associated with their professional status. How do we define "professional"? In a broad sense, a professional is one who puts the interests of others above his or her self-interest. It's more than simply doing what's right or treating others with dignity. Jerome Shestack, past-president of the American Bar Association, defined a "professional" lawyer as an "expert in the law, pursuing a learned act, in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and the public good."[2]

The message of professionalism is a combination of competency and diligence, conformance to ethics, civility to others in the system, providing service to the needy and improving the system. Former Virginia State Bar President Edward Lowry focused on attorneys' obligations as counselors, "to provide greater context and meaning for their clients." Clients sometimes can't see the forest for the trees. "When their clients come to them angry, hurt, bewildered or confused, lawyers offer choices and provide perspective. It is as simple as asking clients how they want to feel about themselves when the case is settled, when the dust clears and they look back in hindsight . . . When attorneys go through this process with their clients . . . they elevate legal representation to an act of human service encompassing the broader needs of the client."[3] "The American lawyer generally regards it as his obligation to solve his clients' problems, not merely to answer his questions. He is conscious of a duty to his profession and of an obligation to the law and the society which has licensed him."[4]

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4. Accept matters only in those areas of law in which you are competent. (Enlist the assistance of co-counsel, or refer a matter out if you are not competent to do the work.)
5. Avoid conflicts of interest; do not compromise your independent professional judgment.
6. Maintain appropriate controls over client funds.
7. Be honest with your client, opposing counsel and the court.

[2]Jerome J. Shestack, *A National Message on Professionalism*, MARYLAND STATE BAR ASSOCIATION BAR BULLETIN, Jan. 15, 1998.

[3]Edward B. Lowry, *The Virtue of the Practice of Law*, VIRGINIA LAWYER, Apr. 1998.

[4]Simon H. Rifkind, Remarks to the American Bar Association (Feb. 15, 1985). Mr. Rifkind, in his remarks, also quoted an opinion of the highest court in New York:

> A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation. These qualities distinguish professionals from others whose limitations on conduct are largely prescribed only by general legal standards and sanctions, whether civil or criminal. Interwoven with the professional standards, of course, is pursuit of the ideal and that the profession not be debased by lesser commercial standards.

Matter of Freeman, 34 N.Y. 2d 1, 311 N.E.2d 480 (1974).

Virginia's former Code of Professional Responsibility, Ethical Consideration EC-1-5 provided:

> A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and ethically reprehensible conduct which reflects adversely on his fitness to practice law. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

Similarly, Ethical Consideration EC-7-34 provided:

> In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill felling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

Note that effective January 1, 2000, Virginia moved from the former Code of Professional Responsibility, in effect since 1971 and revised in 1983, to the Rules of Professional Conduct which are based upon the ABA's Model Rules of Professional Conduct.

C. CODES OF CIVILITY; PRINCIPLES OF PROFESSIONALISM

> *The lawyer's contribution to the civilizing of humanity is evidenced in the capacity of lawyers to argue furiously in the courtroom, then sit down as friends over a drink or dinner. This habit is often interpreted by the layman as a mark of their ultimate corruption. . . . In my opinion it is their greatest moral achievement: It is a characteristic of humane tolerance that is most desperately needed at the present time.*
>
> *- John R. Silber, quoted in the* WALL STREET JOURNAL, *March 16, 1972*

The concept of promoting civility among participants in the legal system is based upon achieving a number of different goals. Justice Anthony Kennedy stated that "civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself." Most of us would enjoy a more genteel approach to the inevitable differences in negotiating positions, tempered by the duty to zealously represent the client. But Kennedy's point is that civility also has deep roots in the democratic ideal of respect for individual rights.

Stated another way, we are civil to each other because we respect each other's human aspirations and equal standing in a democratic society. Taken to an extreme, lawyers who trample on civility undercut the law's role in society. All members of the bar are engaged in a common enterprise, obligated to see to the better working of the legal system. Of course, it is easier to discuss the niceties of the practice of law in a book, than it is to be subjected to opposing counsel's slights (real or perceived), to withstand the temptation to bring an abrupt end to unproductive meetings or telephone calls, or even to avoid adopting a "pit-bull" approach if that is what clients believe they want or need.

Additionally, if we show little respect for ourselves, then we invite others to treat us similarly. Codes of civility or professionalism may serve to articulate the standards of conduct for members of the profession to which all practitioners in those jurisdictions might voluntarily aspire. The Virginia Supreme

Court endorsed the Principles of Professionalism for Virginia Lawyers in 2008. Similarly, the Virginia Bar's Litigation Section adopted the Principles of Professional Courtesy in 1988. Perhaps the most succinct way to sum up civility is captured by this quote, attributed to Cookie Stinnett: "A diplomat is a person who can tell you to go to hell in such a way that you actually look forward to the trip."

D. CONCLUSION

Professionalism will continue to be among the best attributes of real estate attorneys. We benefit ourselves and our colleagues by re-focusing our attention to these principles and re-dedicating our efforts to incorporate them into our approach to the practice of law.

COUNSELING YOUR CLIENT ABOUT MEDIATION — TEN POINTS TO MAKE

by Rosemarie Annunziata*

Disputes involving real property matters are not uncommon. Their resolution short of litigation can challenge all the skill, ingenuity and experience that counsel can bring to bear. Under Virginia's Rules of Professional Conduct, lawyers have a duty to advise their clients about the "availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen." When litigation appears inevitable, here are ten attributes of mediation that you can discuss with your client that suggest an approach that may better serve the client's personal and business interests. The ten points define mediation as a special problem-solving process and underscore why the client should consider mediation as an alternative to litigation, particularly when self-determination, speed, efficiency and cost-savings are among the client's most important values.

I. CONTROL REMAINS IN THE CLIENT

Mediation is a non-binding, voluntary process that permits the client to retain control of the resolution of the dispute and to be actively engaged in the process of finding a solution to a business or personal problem. Mediation provides the parties a forum in which they, themselves, can work out a solution, rather than having one imposed by a third party. The role of the mediator is not to decide the case or dictate the outcome, but to help the parties discern the solution that is in their mutual best interest. In addition to the outcome, the process is also within the control of the client. Will the mediation involve an evaluative or facilitative approach? What issues will be addressed? Who will the mediator be? How long will the session last? Questions about the where, when, and how of the process are all within the client's domain.

II. A QUALIFIED NEUTRAL WILL MANAGE THE CASE

The mediator is a trained, neutral facilitator of the communications between the parties and is charged with helping bring about a resolution that is acceptable to all. In addition to convening the parties, the mediator assists them in identifying the issues as well as the conditions and terms that will govern the negotiation. The mediator keeps the process moving, helps overcome impasse, assists in the effective presentation of settlement offers and responses, and helps catalyze possible alternative approaches for the parties to consider.

III. MEDIATION EXPEDITES THE RESOLUTION OF THE DISPUTE

The mediation hearing can take place at any time, either pre- or post-filing of a court action. The hearing can be scheduled to suit the needs of the client and at a time when it is determined to be the most effective. Resolution of the dispute is also expedited. Mediation typically involves the voluntary and confidential sharing of the information needed to settle the case, obviating the need for extensive formal discovery. It also involves a highly focused examination, facilitated by the mediator, of the strengths and weakness of each party's case, allows for a realistic assessment of the risks of not settling, and channels the energies of all participants into devising acceptable solutions. Such steps are integral to reaching a prompt out- of- court resolution of the dispute.

* The Honorable Rosemarie Annunziata (Ret.) has over twenty-five years' experience as an administrative agency hearing officer, trial judge (Fairfax County Circuit Court), appellate judge, (Court of Appeals of Virginia), litigator, and a JAMS mediator and arbitrator (based in its Washington, D.C. Resolution Center and serving the entire metropolitan area). Her work centers on resolving commercial, employment, real estate, sales, personal injury, and family law disputes. She can be reached at rannunziata@jamsadr.com.

IV. IT IS LESS COSTLY

By shortening the time needed to effect a resolution of the dispute and by avoiding some of the more costly elements of litigation, including extensive discovery and the resolution of discovery disputes, the costs of mediation are normally kept low. The parties also, typically, share the cost of mediation. In short, considerable cost savings can be realized both in terms of money and time.

V. IT IS LESS RISKY

Because an acceptable solution remains in the control of the client, the end result is more predictable and less risky.

VI. IT PRESERVES RELATIONSHIPS

Mediation helps preserve important relationships in a variety of ways. It is less adversarial, it is based on the understanding of and appreciation for each party's position, and it results in both parties consenting to the solution. Mediation may also introduce the parties to a way of resolving disputes that can be utilized in the future.

VII. IT PROTECTS CONFIDENTIALITY

Absent authorization by the client, confidential communications and materials provided in the course of mediation, both by counsel and the client, may not be disclosed by the participants or the mediator to the other party or to a third party, including a court of law. The nature of the dispute and its resolution remain a private matter.

VIII. IT FACILITATES BETTER UNDERSTANDING OF THE ISSUES AND MORE REALISTIC ASSESSMENT OF THE CASE

With the assistance of the mediator, the process is strongly oriented to effecting an understanding of the strengths and weakness of the client's case as well as that of the opposing party, to the likely prospects of prevailing or losing at trial, and to the reordering of expectations. The mediator may also play a more active evaluative role when asked by the parties.

IX. IT PERMITS CREATIVE SOLUTIONS TAILORED TO THE NEEDS OF THE CLIENT

Creative solutions, generated by the parties, their counsel and encouraged by the mediator, which are not necessarily those achievable in court, may be adopted in settling the case. Such solutions may involve valuable trade-offs, compromises or other inventive remedies that benefit both parties and are consistent with their interests, but are not necessarily those that a court of law would order.

X. SATISFACTION WITH THE PROCESS AND THE OUTCOME

Participants in the mediation process report satisfaction with the process, itself, with its strong emphasis on autonomy and control by the client, and the expedited, less costly, voluntary and collaborative nature of the negotiation that results in an acceptable settlement of their dispute. Even when the mediation does not achieve a successful outcome, benefits accrue from the experience. The process generally narrows the issues and identifies the differences that remain, setting a foundation for further negotiation by the parties and their counsel.

8 TIPS FROM 90 DAYS: THE EXPERIENCE OF A FRESHLY MINTED REAL ESTATE LAWYER

by Mark W. Graybeal*

It is one of the hardest things that you will ever do. You've invested countless hours of your life to get where you are, to learn what you have learned. With your degree in your hands, having passed the bar, you are ready to head out in the world and begin the practice, your practice, of law. In the past, many lawyers I know started out as an associate with a large law firm in a large town. Some cut their teeth in the commonwealth attorney's office. However, when I became licensed in the fall of 2008, all of the old patterns had changed. Large firms were not hiring new associates right out of law school. The Commonwealth and municipalities were cutting back. Even my summer legal intern employers had hiring freezes in place. It was difficult to be where I was, fresh out of law school and hunting down THE JOB, my first as a lawyer in the middle of one of the worst national economic downturns. Sheer perseverance and a personal dedication to finding an entry position that would give me practical training paid off. I started work at a firm in the spring of 2009 that fell somewhere between small and medium, with a focus on residential real estate.

Beginning my career as I did offered an interesting perspective on the practice of law. What I got in my training was large portions of nuts & bolts training leavened by big picture philosophy. My first three months consisted mostly of processing residential real estate closings, while handling some additional cases. This immersion enabled me to learn the practice from the bottom up. Having gone through that 90 days and come out the other side, I hope to share some of that experience and some tips that may be useful for others just starting, and perhaps even for those with years of experience.

#1: BE ABLE TO DO IT ALL

The central theme of my training was to be able to do every part of the settlement process, from the initial contact with the parties to the closing itself. Why is this important? Close your eyes for a moment and picture this: It's late winter. A snowy day, you barely make it into the office only to find that your assistant has called in to say that they are snowed in. You look outside to the rapidly accumulating white and say to yourself: "Well, the purchaser and seller won't be coming in." Unfortunately, the first call of the morning happens to be the purchaser and seller calling to let you know that they will be there at 2:00 pm as scheduled. Apparently, the listing agent is a former Iditarod champion with a full sled dog team standing by. You pick up their file and quickly scan the contents. What tasks are still outstanding? Has the lender seen or approved the HUD-1? Are there any documents left to draft? If you know the process from start to finish, then it doesn't matter what shape the file is in. You just need the resolve to get it done. While my example is somewhat silly, people do get sick, people do quit. The takeaway lesson is to be ready and able to finish the settlement from any point.

#2: HAVE A SYSTEM

Building off of the last tip, you need to have a system. It doesn't really matter how the system works or the level of its technological sophistication, but it needs to be a system that tracks what's done, what's left to be done and the things that are unique about the transaction, all to enable you to hit the ground running. I won't use this space to explain our system, because, again, the particular shape or style of the system is not important. What really matters is that your office system, whatever it is, must be used consistently, each and every transaction. Forgetting to use it can leave you stranded.

* Mark W. Graybeal is an associate with Pesner | Kawamoto | Conway, PLC in McLean, Virginia. His practice includes real estate law and business formation. His email address is mgraybeal@pkc-law.com.

#3: START EARLY

Any time that a sale or refinance file reaches your desk, it needs to be opened up and activity started that day. Putting the order in with your Title Examiner for an abstract, ordering a survey and sending out letters with information forms to the agents and parties are all critical because they are going to arm you with information. Having the information early and at your fingertips is the only way you are going to be able to spot issues and resolve them quickly. You never want to be in a position where you are paralyzed because you have to wait on a third party to get you a document.

#4: ASK QUESTIONS

I learned very early on in my training that you can never ask too many questions. While law school and the bar exam had trained me well, only a few days into my new position I felt the truth of Socrates' famous quote — that I knew nothing except the fact of my own ignorance. While I answered many of my questions by a quick study of the CODE OF VIRGINIA or a fast search of Westlaw, many others could only be answered by a more experienced person in my office. Having several good mentors in the office has been invaluable. The bottom line is that you should never feel that you will look foolish asking a question. It would only be more foolish to try to wing it.

#5: DEVELOP YOUR CUSTOMER SERVICE AND SHOWMANSHIP SKILLS

This was something that I did not expect or anticipate. When a client comes in for his or her purchase, sale or refinance, there needs to be some serious "customer service" given, and maybe even a little razzle-dazzle. Transactions involving a house will most certainly be a major event in the mind of your client. There are many imposing documents to sign. There are keys to be handed over. There is anticipation and stress. All of these things mean that the person conducting the settlement must not only be knowledgeable of the documents, but have patience to deal with clients that have never done this before, are intimidated by the documentation, and may even be a little panicked by the hustle and bustle of the last minute details. So why not present that last document, that last signature that says "You did it! It's YOURS!" with a little flourish?

#6: BE ABLE TO EXPLAIN ALL THE HUD-1 FEES

This is something that seems so simple, yet can quickly turn sour if not handled right. Many of the items on the HUD-1 are oddly named or vague. Clients who are inquisitive will ask you what is an "R-5 Compliance Fee" or a "Release Fee". It has been my experience that nearly every charge can be explained in less than 90 seconds to the average lay person. Make sure that you can do this and it will save you many a headache. And the real estate agents that refer business to your firm will remember how easily you handled those questions and, hopefully, be back and asking for you as the settlement agent.

#7: BUILD THE TEAM

While I have spent some time expounding on the fact that you need to be able to handle it all, it is highly important to develop your team in any transaction. I'm not referring just to the people in your office. Remember that your contacts at the lender's office, the real estate agents, the third party vendor's (like your Title Insurance agent, your surveyor, your examiner, etc.) are all part of your team as well. Work to ensure that everyone is playing together rather than against each other. This goes a long way when things get down to crunch time. Remember to say "Thank You" again and again.

#8: DON'T REPEAT MISTAKES

This one speaks for itself. People make mistakes. You will make mistakes. Learn the lesson from them and then move on.

At the end of each day I stop, step back and I am amazed at how far I have moved transactions in just a 9 to 10 hour business day. It is no surprise then that the same is true in my skills after all these months. I am fortunate that I am in a place where I have understanding mentors, a professional ethic that training me is a valuable investment for the future of the firm, and dedicated co-workers focused on each and every transaction. Now that I look back on it, I really did get THE JOB.

NEW STUDY SHOWS ATTORNEY CONDUCTED SETTLEMENT FEES TO GENERALLY BE NO MORE THAN NON-ATTORNEY SETTLEMENT FEES

by Susan M. Pesner*

Attached please find the press release from CRA International in connection with a study about settlement fees. All lawyers who perform settlements through their law firm should be using the information provided in the CRA International study for marketing purposes.

Click on the link http://www.crai.com/Publications/listingdetails.aspx?id=10944&pubtype to see the entire report. If you only have a few moments, click on the link and read the Conclusion.

* * *

NEW STUDY REFUTES FTC/DOJ CONTENTION THAT ATTORNEYS COST MORE TO CLOSE HOME REAL ESTATE LOANS THAN NON-ATTORNEY CLOSERS

The *Real Estate Attorneys Coalition for Housing* (REACH) has released the results of an new study that calls into question the assertions of the *Federal Trade Commission* (FTC) and *Department of Justice* (DOJ) that attorneys charge more than non-attorney settlement agents to close residential real estate loans, and that state regulations limiting the provision of settlement services to lawyers increase the costs to consumers.

The study, which was directed by Michael Kemp of *CRA International* (CRA), a leading global economics and business consulting firm, is based on a detailed survey of 1,260 residential borrowers across the country. It finds that closing costs are influenced by a wide range of factors, and that it is rare either for the type of firm performing the settlement or for regulatory considerations to be the most important influences on costs. These results do not provide support for the FTC and DOJ position, set out in widely circulated letters and amicus briefs, that contends that regulatory regimes such as "unauthorized practice of law" rules are anti-competitive and result in higher costs to consumers. But the new study's findings are consistent with previous research performed by HUD and the *Veterans Administration* in 1970 and by *Peat, Marwick, Mitchell* in 1980.

Unlike the much more fragmentary empirical evidence cited in the FTC/DOJ letters and briefs, the REACH study is based on a carefully designed survey, using a randomly selected, nationally representative panel of individuals maintained by *Knowledge Networks*. The survey was completed on-line and required the respondents to enter information from the Uniform Settlement Statements (Forms HUD-1 or HUD-1A) used in their purchase or refinance transactions. The data collected from the borrowers were analyzed using standard econometric methods to explore how variations in the reported closing costs relate to the characteristics of the transaction, the characteristics of the borrower, and the characteristics of the geographic region (including, importantly, the regulations about who may legally provide settlement services).

The members of REACH include: Attorneys' Title Insurance Fund; CATIC®; North American Bar-Related® Title Insurers; Real Estate Bar Association of Massachusetts; Attorneys' Title Guaranty Fund; Illinois Real Estate Lawyers Association; Professional National Title Network; and the General Practice Section of the American Bar Association. A copy of the complete study report may be found at the following web sites:

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* Susan M. Pesner is the former Chair of the Real Property Section of the Virginia State Bar, presently serves as an Area Representative, and is Chair of the Ethics Subcommittee and a frequent contributor to the FEE SIMPLE.

Insert REACH website list; at the end, add:

http://www.crai.com/Publications/listingdetails.aspx?id=10944&pubtype=

Contact: ***REACH PR contact details first;***
Michael Kemp, (617) 425-3350; mkemp@crai.com

EXTENSION OF FDIC PROGRAM TO PROTECT CERTAIN TRANSACTION ACCOUNTS

August 26, 2009

The FDIC extended its temporary Transaction Account Guarantee Program through June 30, 2010. This program provides depositors with unlimited protection for *noninterest-bearing transaction accounts* at participating FDIC-insured institutions. The unlimited protection applies to all personal and business checking deposit accounts that do not earn interest (including Demand Deposit (DDA) accounts), low-interest NOW accounts (NOW accounts that cannot earn more than 0.5% interest), Official Items, and IOLTA accounts.

For more information, visit: http://www.fdic.gov/news/news/financial/2009/fil09048.html.

REPORT OF THE COMMERCIAL REAL ESTATE SUBCOMMITTEE

MINUTES OF A MEETING OF THE COMMERCIAL REAL ESTATE SUBCOMMITTEE OF THE VIRGINIA STATE BAR REAL PROPERTY SECTION

HELD BY CONFERENCE CALL ON OCTOBER 1, 2009, AT 3:00 P.M.

by William L. Nusbaum

Pursuant to e-mailed notice to the members of the Commercial Real Estate Subcommittee, a conference call meeting of the Subcommittee was convened by Subcommittee Chair Bill Nusbaum (Williams Mullen) on October 1, 2009, at 3:00 p.m. Also participating in the call were Howard E. Gordon (Williams Mullen), Whitney Levin (Wharton Aldhizer & Weaver) and Joseph M. Cochran (Richmond & Fishburn, and Chair of the Real Property Section Board of Governors). Ms. Levin was welcomed to the Subcommittee and thanked for her interest in participating in its work.

The meeting opened with a brief discussion of current trends and activity (or lack thereof) in the members' respective practices, followed by a plea from the Chair for commercial real estate articles for the November issue of the FEE SIMPLE. Two possible article topics were discussed - recent legislation concerning conservation easements and LEED buildings - with Mr. Cochran and the Chair pursuing the recruitment of authors on those two topics, respectively.

The Subcommittee then discussed prospective topics for the Section's Advanced Real Estate Seminar in February, 2010, at Kingsmill Resort, in Williamsburg. Topics suggested (without any ranking by the Subcommittee), and the party suggesting each, were:

- Examination of Certificates of Insurance – what do you really get from being designated on an Insurance Certificate if a claim is subsequently filed? (Levin)
- LEED Building Certification and the "Greening" of Real Estate Documents, perhaps with a panel to conduct mock negotiations of green terms in a contract for an existing green building, the construction documents for a new green building, and a commercial lease in a green building (Gordon & Nusbaum)
- Economic Development Incentives in use around the Old Dominion (Nusbaum)
- Siting Wind Farms – a discussion of the recent Highlands Co. litigation, the issues likely to arise with an offshore wind farm, and issues to be addressed in easements for the construction and operation of a land-based wind farm (Cochran)
- Charging rent for private use of public waters by owners of piers and filled land (Gordon)
- Negotiating ground leases (Gordon).

There being no other business to come before the Subcommittee, the meeting was adjourned at 3:42 p.m.

REPORT OF THE CREDITORS' RIGHTS AND BANKRUPTCY SUBCOMMITTEE

by J. Philip Hart

The purposes of the Creditors' Rights and Bankruptcy Subcommittee of the Virginia State Bar Real Property Section are to bring attention to real estate-related issues that arise in workouts and bankruptcies and to serve as a resource group to other Section members who are facing such issues. The Subcommittee has done so over the last year by submitting an article that was published in the November 2008 issue of the FEE SIMPLE, by presenting one of the main segments of the May 2009 Annual Real Estate Practice Seminar, and by answering questions that have been directed to the Subcommittee from time to time.

The Subcommittee has six members, located in Richmond, Roanoke and Fairfax. Our members have extensive experience in real estate workouts and bankruptcies, but also have diverse practices, including large law firm, small law firm and in-house legal department practices.

The Subcommittee's goals for this year include submitting one or more articles to the FEE SIMPLE, continuing to act as a resource to Section members confronting creditors' rights and bankruptcy issues, and increasing the size of the Subcommittee. We are particularly interesting in adding members from parts of Virginia not now represented on the Subcommittee, including Hampton Roads, Southside, Charlottesville and the Valley.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

by Douglass W. Dewing

The 24th annual ABA TECHSHOW educates lawyers and legal professionals through three days of CLE sessions and a two-day EXPO. Visit the site at www.techshow.com for details about the March 25-27 conference.

Brett Burney identifies a number of features within Adobe Acrobat which may be of interest (see http://www.abanet.org/genpractice/ereport/2009/vol8/num3/technotes.html) and references two resources for those who might want to know more: Rick Borstein's Acrobat for Legal Professionals at <http://blogs.adobe.com/acrolaw/> and PDF for Lawyers at <http://www.pdfforlawyers.com/> (authored by Ernest Svenson).

Apple has released an applications upgrade for its I-phone. If you can't find your keys, or your glasses, then you may, from time to time, also have trouble finding your phone. The new application addresses that problem in GPS-capable phones if you also have a MobileMe account. While the mapping is not precise enough to tell you if the phone is in the kitchen or the bedroom, it can (unless you have a home office) answer the question of whether or not you remembered to bring the phone to the office. Once you think you are within range, the phone can be instructed to play an "alert" sound to help you reclaim your lost partner. You can also have the phone display a message on the home screen identifying you and asking that it be returned to you. Most importantly, for data security purposes, you can do a remote wipe of the phone's memory, restoring it to factory settings and a blank memory. Jeffrey Allen describes this, and other applications, in his MacNotes column at <http://www.abanet.org/genpractice/ereport/2009/vol8/num3/macnotes.html>.

Speaking of wiping a phone's memory, the plaintiff in *Casella v. Borders*, *available at* <http://www.vawd.uscourts.gov/OPINIONS/MOON/CASELLAPUBLISHED.PDF>, may be wishing she had had such an I-phone. After she and her (now former) boyfriend were arrested, digital photos on the cell phone were passed around the precinct house. The plaintiff in a suit against Culpeper police for an unauthorized game of show-and-telephone of her nude pictures on a cell phone had no "objectively reasonable expectation of privacy in the images stored" on the phone. In ruling against the plaintiff's § 1983 suit and her emotional distress claims, Judge Moon noted that given the lack of security, a police search wasn't the only exposure Casella had to worry about. The full article by Deborah Elkins appeared September 3, 2009, in VIRGINIA LAWYERS WEEKLY, <http://valawyersweekly.com/vlwblog/2009/09/03/show-and-telephone/>.

Which smartphone (a cell phone/PDA combination) offers the best options for the business user who wants to be connected to, but not chained to, the desk? The staff at CNet describe six options. For those options, see http://reviews.cnet.com/4321-6452_7-6544038.html?tag=smallCarouselArea.2.

If you replace your phone, what will you do with the old one? Fun Facts from cellforcash.com offers some incentives for recycling. The cell phones retired each year:

- …if laid end to end would stretch from NY to LA 6.6 times;
- …would fill 199 boxcars;
- …weigh more than 174 space shuttles;
- …would pay the salaries of members of Congress for over 15 years;
- …and more.

The company advocates recycling old phones for fun and profit at its website: http://www.cellforcash.com.

Sarah Rodriguez explores some of the niche data bases and other features at Google in the September 9, 2009, VIRGINIA LAWYERS WEEKLY, <http://valawyersweekly.com/blog/2009/09/07/exploring-google%e2%80%99s-niche-search-engines/>, including: news and archives, patents, books (you can read about the litigation in the news section), blogs, "knols" (a knowledge unit - a wiki by another name), maps, definitions, e-mail (this IS google, so it is now g-mail), even a browser.

VIRGINIA LAWYERS WEEKLY reported an IP dispute that vaguely resembles the real property doctrine of *idem sonans* as spiegelaw.com litigated naming rights with spiegellaw.com. The case seems to be ending on a note of judicial economy. The blog summarizes a portion of the ruling by noting: "Had either party hired outside counsel, rather than taking the pro se route, 'it is extremely unlikely' the case would have gotten as far as it did." VIRGINIA LAWYERS WEEKLY, http://valawyersweekly.com/vlwblog/2009/08/31/dust-settles-in-dueling-web-site-case/.

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SUBJECT INDEX
NOVEMBER 1987 - MAY 2009

VIRGINIA STATE BAR
Real Property Section
Membership Application

Please enroll me in the Real Property Section. Please send me copies of the section's newsletter and notices of section events at the following address:

NAME:_____

VSB MEMBER NUMBER: _____

FIRM NAME/EMPLOYER:_____

OFFICIAL ADDRESS OF RECORD:_____

_____

TELEPHONE NUMBER: (___) _____ FACSIMILE NUMBER: (___)_____

E-MAIL ADDRESS: _____

DUES: $25.00 (Payable to the Virginia State Bar) (membership effective until next June 30)

Subcommittee Selection - I would like to serve on the following subcommittee:

Standing	Substantive	
(___) Fee Simple Newsletter	(___) Commercial Real Estate	(___) Creditors Rights and Bankruptcy
(___) Programs	(___) Residential Real Estate	(___) Land Use and Environmental
(___) Membership	(___) Ethics	(___) Title Insurance
(___) Technology	(___) Eminent Domain	

Print this application and return with dues to:

Dolly C. Shaffner, Section Liaison
Real Property Section
Virginia State Bar
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Richmond, Virginia 23219-2803