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Annual Survey of Virginia Law: Property Law

James W. Theobald

Charles H. Rothenberg

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PROPERTY LAW

*James W. Theobald**

*Charles H. Rothenberg***

Numerous court decisions affecting property law in Virginia have been announced since the last edition of this portion of the annual survey.¹ Significant decisions of the Supreme Court of Virginia, Virginia Court of Appeals and the Court of Appeals for the Fourth Circuit are discussed in Section I of this article. Furthermore, a prolific General Assembly has passed various legislation affecting property law ranging from condominiums to zoning. Significant legislation is discussed in Section II.

I. JUDICIAL DECISIONS

A. *Adverse Possession*

In *Alford v. Alford*,² the Supreme Court of Virginia reversed and remanded a trial court decision upholding title by adverse possession. In May of 1967, Helen and Robert Alford conveyed a portion of their property to Marvin and Kent Alford. Marvin and Kent built a store on the property. Subsequently, Helen and Robert filed a correction deed to: (a) amend the legal description in the earlier conveyance and; (b) grant Marvin and Kent permission to use a twenty-foot lane on Helen and Robert's adjacent property to accommodate ingress and egress to the customer parking lot appurtenant to Marvin and Kent's store. In 1977, Marvin and Kent's tenants installed gasoline pumps and underground storage tanks on the property.³

* Shareholder, Hirschler, Fleischer, Weinberg, Cox & Allen, Richmond, Virginia. A.B., 1974, College of William and Mary; J.D., 1977, Cleveland-Marshall College of Law.

** Associate, Hirschler, Fleischer, Weinberg, Cox & Allen, Richmond, Virginia. B.A., 1984, State University of New York, College at Oneonta; J.D., 1987, T.C. Williams School of Law, University of Richmond.

1. See Berryhill, *Property: Annual Survey of Virginia Law*, 21 U. RICH. L. REV. 821 (1987).

2. 236 Va. 194, 372 S.E.2d 389 (1988).

3. *Id.* at 195-96, 372 S.E.2d at 389-90. The deed of correction provided that "this permission is not to be construed as any type of easement, it will not be an appurtenance to the land hereby conveyed and it may be terminated at any time." *Id.* at 196, 372 S.E.2d at 390.

In 1983, Helen filed a lawsuit to determine the boundary lines of her property. Marvin and Kent claimed title of the twenty-foot lane by adverse possession.⁴ In reaching a decision, the Supreme Court of Virginia reaffirmed the general rule that “[w]here the original entry on another’s land was by agreement or permission, possession regardless of its duration presumptively continues as it began, in the absence of an explicit disclaimer.”⁵ The court found no evidence of a disclaimer of the permissive use of the twenty-foot lane. Further, Helen filed suit to determine the boundary lines within six years after the installation of the gas pumps, thereby prohibiting any claim of adverse possession.⁶

B. *Cities, Counties and Towns*

In *Smith v. Board of Supervisors*,⁷ taxpayers sought relief from increased assessments on two high rise office buildings. The actual rents and expenses incurred by the taxpayers were not considered in the county’s reassessment. Instead, the county determined the economic income for the buildings by determining the rents and expenses incurred by all commercial buildings of similar size and age in the county. This stream of income was then capitalized at a rate determined by the county. The taxpayer property owners complained that the county’s method of assessment disregarded the actual expenses incurred by the taxpayer.⁸ The court, applying the general rule that “[w]here an assessment is based on the capitalization of income, contract rent and actual expenses must be considered in arriving at economic income,”⁹ held that the assessment was erroneous.¹⁰

4. *Id.* at 195, 372 S.E.2d at 389.

5. *Id.* at 197, 372 S.E.2d at 390 (emphasis omitted) (citing *Matthews v. W.T. Freeman Co.*, 191 Va. 385, 395, 60 S.E.2d 909, 914 (1950)).

6. *Alford*, 236 Va. at 197-98, 372 S.E.2d at 391; *see also* VA. CODE ANN. § 8.01-236 (Repl. Vol. 1984) (limitation of entry on or action for land).

7. 234 Va. 250, 361 S.E.2d 351 (1987).

8. *Id.* at 252-54, 361 S.E.2d at 352-53.

9. *Id.* at 257-58, 361 S.E.2d at 355. The taxpayer has the burden of showing that actual rents and expenses were not considered in determining the assessment in order to overcome the assessment’s presumption of correctness. The assessing authority must then produce evidence to show that actual rents and expenses do not reflect economic rent income for the specific property appraised. *Id.* at 258, 361 S.E.2d at 356.

10. *Id.* In reaching its decision, the court relied on principles announced in three previous cases relating to real property assessments. *See Nassif v. Board of Supervisors*, 231 Va. 472, 484, 345 S.E.2d 520, 527 (1986) (“the determination of economic rent must be specific to the property under review as opposed to some abstract or theoretical property”); *Board of Supervisors v. Donatelli & Klein, Inc.*, 228 Va. 620, 629, 325 S.E.2d 342, 347 (1985) (county

In another appeal from a trial court decision affirming a tax assessment, the evidence showed that the county assessor determined the tax assessment without regard to the actual contract rent produced by the property.¹¹ The court in *Clarke Associates v. County of Arlington* reversed the trial court's decision on the basis that the contract rent for the property was not considered in determining the fair market value of the properties.¹²

C. Contracts

1. Damages

In *Schickling v. Aspinall*,¹³ the Supreme Court of Virginia determined the proper allocation of losses suffered by co-tenants upon the sale of property. The Schicklins entered into an agreement with Aspinall to jointly purchase and own a lot owned by a third party. The co-ownership agreement provided that the Schicklins would occupy the house and pay 38% of the monthly mortgage installments, while Aspinall paid 62% of the installments. The agreement also provided that profits and losses from the sale of the property would be allocated 95% to Aspinall and 5% to the Schicklins. The property was sold at a loss and the Schicklins covered the deficiency. Mr. Schickling's employer paid him \$7,179.50 to defray moving costs occasioned by the job transfer. Aspinall claimed 95% of the amount advanced by the employer pursuant to the co-ownership agreement. The Schicklins counterclaimed for 95% of the \$3,429.50 shortfall.¹⁴ The court determined that: (1) the co-ownership agreement entitled the Schicklins to reimbursement of 95% of the shortfall from Aspinall; and (2) Aspinall was not entitled to any portion of the \$7,179.50 paid by Schickling's employer as reimbursement for moving expenses.¹⁵

cannot ignore actual rents and expenses for the sake of uniformity and arrive at higher than fair market value assessment); *Fairfax County v. Nassif*, 223 Va. 400, 404-05, 290 S.E.2d 822, 824-25 (1982) ("economic rent is the measure to be used in capitalizing income for fair market value determination; however, contract rent is relevant as evidence of economic rent").

11. *Clarke Assocs. v. County of Arlington*, 235 Va. 624, 369 S.E.2d 414 (1988).

12. *Id.* at 629, 369 S.E.2d at 416.

13. 235 Va. 472, 369 S.E.2d 172 (1988).

14. *Id.* at 474-75, 369 S.E.2d at 173.

15. *Id.* at 475-76, 369 S.E.2d at 174. The court declined to decide whether or not the collateral source rule applies to contract cases on the grounds that Mr. Schickling was a defendant in the case. By definition, the rule applies to collateral compensation received by a plaintiff. Arguably, the Schicklins' counterclaim for 95% of the \$3,429.50 shortfall casts Mr. Schickling in the role of plaintiff. However, the court stated that Aspinall could not

At issue in *Danburg v. Keil*,¹⁶ was whether certain damages claimed by a contract purchaser were recoverable as expenses under an action for breach of contract. Pursuant to a contract dated October 1, 1983, the Keils agreed to sell property to Danburg.¹⁷ The contract provided that in the event of default the "defaulting party shall be liable for . . . any expenses incurred by the non-defaulting party, including attorneys' fees, in connection with this transaction and the enforcement of such [c]ontract."¹⁸ The parties signed a typewritten letter dated October 5, 1983, whereby the Keils gave Danburg permission to perform certain landscaping and exterior improvements on the property. A dispute arose among the parties, and Danburg sought to rescind the contract and claimed reimbursement for the expenses he incurred in making the improvements.¹⁹ The Supreme Court of Virginia determined that Danburg's claim for funds expended was for consequential and not direct damages.²⁰ The court held that Danburg was not entitled to recover his landscaping expenses because they were consequential damages, which were not contemplated by the parties at the time the purchase contract was executed.²¹

2. Failure of Conditions Precedent

The two issues considered in *Smith v. McGregor*²² were: (1) whether the failure of a condition precedent left either party to a contract for the purchase of land in default under the contract; and, (2) whether, in view of the parties' repudiation of the contract for failure of the condition precedent, the realtor was entitled to a commission.²³ The contract required the sellers to furnish the purchasers with a survey showing that the property contained 200 acres. The actual survey depicted only 191 acres.²⁴ The court inter-

derive a benefit from Mr. Schickling's employment contract since Aspinall was not a party to that contract. *Id.* at 475, 369 S.E.2d at 174.

16. 235 Va. 71, 365 S.E.2d 754 (1988).

17. *Id.* at 72, 365 S.E.2d at 755.

18. *Id.* at 74, 365 S.E.2d at 756 (emphasis omitted).

19. *Id.* at 74-75, 365 S.E.2d at 756-57.

20. *Id.* at 75-76, 365 S.E.2d at 757. The court compared direct damages, "which naturally or ordinarily flow from the breach" of a contract to consequential damages, which "arise from the intervention of special circumstances not ordinarily predictable." *Id.* (quoting *Morris v. Mosby*, 227 Va. 517, 523, 317 S.E.2d 493, 497 (1984)).

21. *Danburg*, 235 Va. at 76, 365 S.E.2d at 757.

22. 237 Va. 66, 376 S.E.2d 60 (1989).

23. *Id.* at 68, 376 S.E.2d at 61.

24. *Id.*

preted this requirement as a condition precedent, which, not being satisfied, permitted the purchasers to void the contract.²⁵

As to the second issue, the court held that the realtor was not entitled to his fee. The failure of the condition precedent relieved both parties of their obligations under the contract. Therefore, the broker failed to produce a purchaser who was ready, willing and able to purchase the property upon the terms of the contract.²⁶

3. Fraud

In *Patrick v. Summers*,²⁷ Patrick, a real estate broker, and Summers entered into an exclusive listing agreement by which Patrick agreed to buy the Summers' home, assume existing obligations thereon and pay the Summers \$5,000 if Patrick did not sell the property within 120 days. The Summers purchased another house but Patrick was unable to sell their old home and failed to purchase it pursuant to the listing agreement. The Summers rented their old home and finally sold it through another realtor. The net proceeds from the sale were less than the \$5,000 they would have received had Patrick performed under his agreement.²⁸ The Supreme Court of Virginia reversed the trial court's decision overruling Patrick's motion to set aside the trial jury's verdict for \$15,000 in punitive damages, holding that the evidence did not clearly, cogently and convincingly prove that Patrick entered into the agreement with an intention not to perform his obligations. Thus, the evidence was insufficient to establish an action for fraud or deceit.²⁹

In *Boykin v. Hermitage Realty*,³⁰ the Supreme Court of Virginia considered whether the evidence that supported a jury verdict in a suit for damages for fraud was sufficient to show that the purchasers were induced to purchase property by a real estate agent's misrepresentation. Four couples, the plaintiffs, purchased units in a

25. *Id.* at 75, 376 S.E.2d at 65.

26. *Id.* at 75-76, 376 S.E.2d at 65.

27. 235 Va. 452, 369 S.E.2d 162 (1988).

28. *Id.* at 453-54, 369 S.E.2d at 163-64.

29. *Id.* at 455-56, 369 S.E.2d at 164. The general rule is that fraud must relate to an existing fact, not unfulfilled promises. *Id.* at 454, 369 S.E.2d at 164 (citing *Soble v. Herman*, 175 Va. 489, 500, 9 S.E.2d 459, 644 (1940)). This rule is qualified in that fraud may be proved where a party makes promises with no intent to perform. *Patrick*, 235 Va. at 454, 369 S.E.2d at 164 (citing *Lloyd v. Smith*, 150 Va. 132, 142, 145 S.E. 363, 365 (1928)).

30. 234 Va. 26, 360 S.E.2d 177 (1987).

condominium developed by Yeonas. Yeonas' exclusive real estate agent represented to each couple that the wooded area behind the units would not be developed. Each couple paid an additional \$1,000 for this added privacy. Yeonas later constructed a playground in the wooded area.³¹

The plaintiffs appealed the trial court's decision to set aside a verdict in their favor. The defendants contended that the general rule that "an action based upon fraud must aver the misrepresentation of present pre-existing facts, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events"³² prohibited a finding of misrepresentation based on Yeonas' failure to live up to its promise not to develop the wooded area. The Supreme Court of Virginia disagreed, pointing out that fraud may be based on an intent not to perform a promise at the time such promise is made.³³ The court also rejected the agent's caveat emptor defense, stating that "a vendor who procures the sale by fraudulent representations may not invoke the doctrine of *caveat emptor*."³⁴

4. Rescission of Contracts

In *Marriott v. Harris*,³⁵ the court considered whether purchasers of lots in a subdivision were entitled to rescission of their purchase contracts. The contracts required the purchasers to execute promissory notes and deeds of trust to secure the repayment of the balance of the purchase price. The contracts incorporated a report filed by the developer with the United States Department of Housing and Urban Development ("HUD") for approval in accordance with the Interstate Land Sales Full Disclosure Act.³⁶ The report represented that the developer would install water and sewer facilities, roads and underground utilities by December 31, 1974.³⁷ The

31. *Id.* at 27-29, 360 S.E.2d at 177-78.

32. *Id.* at 29, 360 S.E.2d at 178 (quoting *Lloyd v. Smith*, 150 Va. 132, 145, 142 S.E. 363, 365 (1928)).

33. *Id.* at 29-30, 360 S.E.2d at 178-79.

34. *Id.* at 30, 360 S.E.2d at 179.

35. 235 Va. 199, 368 S.E.2d 225 (1988). The case actually involves three appeals from litigation arising out of the development of a residential subdivision. The first appeal is not relevant to this discussion. See *id.* at 207-12, 368 S.E.2d at 228-31. For a discussion of the third appeal heard by the court, see *infra* notes 79-80 and accompanying text.

36. *Marriott*, 235 Va. at 206, 368 S.E.2d at 227; see 15 U.S.C. §§ 1701-1720 (1982 & Supp. V 1987).

37. *Marriott*, 235 Va. at 206, 368 S.E.2d at 227.

developer assigned each contract, promissory note and deed of trust to its lender in order to secure financing for the project. The roads, water lines and sewer facilities were not installed. The developer abandoned the project, and the purchasers ceased making payments on their promissory notes. In July 1975, the county approved a comprehensive development plan. In June 1978, the county downzoned the development making it ineligible for central water and sewer service.³⁸

The Supreme Court of Virginia, holding that the purchasers were entitled to rescission of the contracts based on a substantial failure of consideration, addressed a number of contentions raised by the developer. The court rejected the developer's argument that the Interstate Land Sales Full Disclosure Act preempted Virginia's longer statute of limitations for an action seeking rescission of contract.³⁹ The court found that the HUD report, incorporated by reference into the purchase contract, was properly considered by the trial court. It was also proper for the trial court to consider the subdivision plats showing the roads, waterlines and sewer facilities, as well as subdivision ordinances requiring developers to install such facilities, in determining that the developer was obligated to install this infrastructure in the development.⁴⁰ The court held that the purchasers were entitled to rescission of the purchase contracts based on a substantial failure of consideration, specifically the developer's failure to install the roads, water and sewage facilities.⁴¹

5. Specific Performance

In *Bass v. Smith*,⁴² Carter and Bass agreed to convey property to Smith. The sellers, whose wives were not parties to the contract, appealed a decree ordering specific performance.⁴³ The Supreme

38. *Id.*

39. *Id.* at 213-14, 368 S.E.2d at 232. "[T]he rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." 15 U.S.C. § 1713 (1982); see VA. CODE ANN. § 8.01-246(2) (Repl. Vol. 1984).

40. *Marriott*, 235 Va. at 214-15, 368 S.E.2d at 232-33. The court also characterized as "absurd" the developer's contention that the purchasers were prohibited from enforcing their rights to have the developer fulfill its obligation to install the infrastructure because a clause in the contract required the purchasers to purchase the property "as is." *Id.* at 216, 368 S.E.2d at 233.

41. *Id.* at 216-18, 368 S.E.2d at 233-34.

42. 234 Va. 1, 360 S.E.2d 162 (1987).

43. *Id.* at 2, 360 S.E.2d at 162.

Court of Virginia determined that Smith's refusal to pay full consideration for the property, notwithstanding the wives' failure to convey their interests in the property, was fatal to Smith's suit for specific performance.⁴⁴

6. Statute of Frauds

In *Beach v. Virginia National Bank*,⁴⁵ the Supreme Court of Virginia affirmed the trial court's decision to sustain an executor's demurrer to a complaint for specific performance of an oral promise to convey land. Jones promised to convey four and one-half acres of land with improvements thereon to Beach in consideration for Beach's promise to perform labor one day each week on a farm owned by Jones. Beach performed the work and, relying on the oral contract to convey, took occupancy of and made valuable improvements to the property. Jones died without conveying the property to Beach.⁴⁶ The court determined that Beach did not escape operation of the statute of frauds because the oral agreement did not state with certainty all of the terms of the agreement. Specifically, the consideration for the property was uncertain because the agreement did not establish the time period for which Beach was required to perform work in consideration for the property.⁴⁷

7. Terminable-At-Will Contracts

In *Duggin v. Adams*,⁴⁸ the Supreme Court of Virginia considered whether a motion for judgment contained sufficient allegations to support a prima facie case of tortious interference with a terminable-at-will sales contract. Duggin contracted to purchase real estate from Williams. The contract provided that either party could terminate the contract if certain conditions were not satisfied. Duggin assigned his rights to purchase the property to Centennial in consideration of an assignment fee. Duggin alleged that Centennial notified Williams' attorney, Adams, that Centennial was prepared to settle. At Adams' direction, Williams did not attend the closing. Adams provided Williams with \$50,000 to refund Duggin's deposit. Then, Adams and Williams signed a contract pursuant to which

44. *Id.* at 2-3, 360 S.E.2d at 163.

45. 235 Va. 376, 367 S.E.2d 516 (1988).

46. *Id.* at 377, 367 S.E.2d at 517.

47. *Id.* at 378-79, 367 S.E.2d at 517-18; see VA. CODE ANN. § 55-2 (Repl. Vol. 1986).

48. 234 Va. 221, 360 S.E.2d 832 (1987).

Adams agreed to purchase the property and Williams agreed to cancel her contract with Duggin. Later, Adams offered to sell the property to Centennial.⁴⁹ The court determined that Duggin's motion for summary judgment set forth allegations sufficient to show a prima facie case for tortious interference with a terminable-at-will contract.⁵⁰

D. Deeds

In *Martin v. Phillips*,⁵¹ the Supreme Court of Virginia reversed and remanded a trial court decision setting aside two deeds and a lease on the grounds of undue influence. The court found two errors in the lower court's judgment. First, the trial court erred in requiring that the elements of undue influence be proven by a preponderance of the evidence; the proper standard of proof is one of clear and convincing evidence.⁵² Second, the court found error in the trial court's determination that once the party attacking the validity of a deed or lease established a presumption of undue influence, the burden of persuasion shifted to the proponents of the instruments.⁵³ A presumption operates to shift to the opposing party the burden of producing evidence which tends to rebut the presumption; however, no presumption "can operate to shift the ultimate burden of persuasion from the party upon whom it was originally cast."⁵⁴

In *Spence v. Griffin*,⁵⁵ the Supreme Court of Virginia upheld the trial court's finding of actual fraud. The facts in the case were as follows: Mr. Spence, a preacher, and his wife received permission

49. *Id.* at 222-25, 360 S.E.2d at 834-35.

50. *Id.* at 230, 360 S.E.2d at 838. The elements of a prima facie showing of tortious interference with a contract not terminable at will include: (1) a binding contractual relationship; (2) knowledge of the contractual relationship; (3) intentional interference with the contractual relationship causing a breach of the contract; and (4) damage to the party whose contractual relationship has been disrupted. *Id.* at 226, 360 S.E.2d at 835 (citing *Chaves v. Johnson*, 230 Va. 112, 120, 335 S.E.2d 97, 102 (1985)). Where a terminable-at-will contract is involved, the injured party must also show that the interfering party employed improper methods of interference. Improper methods of interference include illegal or independently tortious means, including violence, threats, bribery, malicious prosecution, duress, undue influence, fraud, and breach of fiduciary relationship. *Duggin*, 234 Va. at 227-28, 360 S.E.2d at 836.

51. 235 Va. 523, 369 S.E.2d 397 (1988).

52. *Id.* at 528, 369 S.E.2d at 400.

53. *Id.* at 526, 369 S.E.2d at 399.

54. *Id.* (citing *Redford v. Booker*, 166 Va. 561, 569, 185 S.E. 879, 883 (1936)).

55. 236 Va. 21, 372 S.E.2d 595 (1988).

from Mrs. Griffin to use a vacant lot adjacent to her restaurant for religious services. Several months before the Spences' arrival, Mrs. Griffin's estranged husband had taken the life of Mrs. Griffin's son by a previous marriage. In addition, Mrs. Griffin was under a doctor's supervision following heart surgery several years before. Mrs. Griffin attended Mr. Spence's revivalist prayer meetings. At one such meeting, and in the presence of his congregation, Mr. Spence asked Mrs. Griffin to donate the lot for the construction of a church. Mrs. Griffin agreed to convey the lot subject to an easement for parking in connection with her restaurant and a reversionary interest in the event the property ceased to be used for a church.⁵⁶ Mrs. Griffin communicated these limitations to the attorney retained by the Spences to draft the deed.

One afternoon, the Spences and their attorney asked Mrs. Griffin to meet them at the circuit court clerk's office prior to the office closing for the day. Mrs. Griffin left her restaurant to meet them. When she arrived at the clerk's office, the attorney represented that the deed had been drawn pursuant to Mrs. Griffin's directions. Mrs. Griffin, anxious to return to her busy restaurant, signed the deed without reading it carefully, and the deed was recorded.⁵⁷ The Spences began constructing improvements on the lot and sought financing to complete the work. However, they could not obtain financing because of the parking easement which was reserved by Mrs. Griffin. Mr. Spence demanded that Mrs. Griffin correct the deed by removing the easement. Mrs. Griffin, reading the deed for the first time, noted that the instrument conveyed the lot to the Spences rather than to the church and that the instrument did not contain the requested reversionary provision. The Spences brought suit to have the easement removed alleging mistake and fraud. Mrs. Griffin's cross bill demanded rescission on the grounds of fraud and undue influence.⁵⁸

The court rejected the Spences' contention that the absence of any false misrepresentation on their part prohibited a finding of actual fraud. Where one party relies on the existence of a material fact and the other party knows of this reliance but, by word or conduct, fails to disclose the material fact, the failure to disclose satisfies the requirement for a false representation.⁵⁹ The condi-

56. *Id.* at 23-24, 372 S.E.2d at 595-96.

57. *Id.* at 24-25, 372 S.E.2d at 596.

58. *Id.* at 27, 372 S.E.2d at 598.

59. *Id.* at 28, 372 S.E.2d at 598-99.

tions under which Mrs. Griffin executed the deed, the Spences' attorney's representations regarding the inclusion of the reversionary provision in the deed, and the fact that the Spences knew that Mrs. Griffin signed the deed under a false assumption were sufficient evidence to support a finding of actual fraud.⁶⁰

E. *Deeds of Trust*

Two recent cases evidence the Supreme Court of Virginia's continuing scrutiny of non-judicial foreclosures. The facts in *Smith v. Credico Industrial Loan Co.*⁶¹ are as follows: Patterson and Morin were named as substitute trustees under a deed of trust securing a note made by Smith and payable to Credico. Smith defaulted on the note and a foreclosure was held at which Patterson was the sole acting trustee. Morin, who had not resigned as trustee as of the date of foreclosure, bid the property in on behalf of Credico. Smith challenged the sale contending that a trustee cannot purchase property at her own sale.⁶² The court agreed, holding that "a co-trustee under a deed of trust cannot purchase property on behalf of herself or another at a foreclosure sale, even when that sale is conducted by another trustee, and even where the trustee who makes the purchase was not an active participant in conducting the sale."⁶³

In *Deep v. Rose*,⁶⁴ the court considered whether a foreclosure sale should be set aside for the trustee's failure to advertise the foreclosure pursuant to the terms of the deed of trust. A partnership defaulted on a loan secured by a deed of trust on an apart-

60. *Id.* at 29, 372 S.E.2d at 599. The court, acknowledging the rule that a grantor is bound by his deed even though he fails to read it, determined that the rule was inapplicable when the grantee induced the grantor not to read the deed. *Id.* (citing *Carter v. Carter*, 223 Va. 505, 509, 291 S.E.2d 218, 221 (1982)).

61. 234 Va. 514, 362 S.E.2d 735 (1987).

62. *Id.* at 515, 362 S.E.2d at 736.

63. *Id.* at 517-18, 362 S.E.2d at 737; see *Whitlow v. Mountain Trust Bank*, 215 Va. 149, 207 S.E.2d 837 (1974) (setting aside foreclosure sale where acting trustee purchased trust property indirectly through corporation in which trustee owned stock); *Smith v. Miller*, 98 Va. 535, 37 S.E. 10 (1900) (setting aside foreclosure sale where acting trustee purchased property with bid intended to insure that the full value was obtained for the trust property). The court's decision in *Credico Indust. Loan Co.* is consistent with *Whitlow* and *Miller* in that public policy demands that the trustee, a fiduciary, represent the interests of those for whom he acts. However, Justice Whiting, in *Credico Indust. Loan Co.* contends that the holdings in *Whitlow* and *Miller* should only extend to active trustees. 234 Va. at 518, 362 S.E.2d at 737-38 (Whiting, J., dissenting).

64. 234 Va. 631, 364 S.E.2d 228 (1988).

ment project. The deed of trust required publication of a foreclosure advertisement five times in a newspaper of general circulation in the city or county in which the property was located. Keith, the trustee, advertised the sale on five consecutive days and held the foreclosure sale on the last day of the advertisement.⁶⁵

The Supreme Court of Virginia held that the foreclosure sale was void because it failed to comply with the mandatory requirements of section 55-59.2 of the Code of Virginia (the "Code").⁶⁶ The court also determined that the trustee was not entitled to recover his commission or expenses because by failing to comply with the mandatory requirements of section 55-59.2 resulting in the setting aside of the foreclosure, he rendered no service to the trust or the parties.⁶⁷

In *Yaffe v. Heritage Savings & Loan Association*,⁶⁸ the trustee conducted a foreclosure sale pursuant to an advertisement stating that the sale was subject to a first deed of trust in addition to any unfilled mechanics' liens. Yaffe bid the property in at the foreclosure. The trustee drafted and signed a memorandum of sale. Yaffe refused to tender a deposit or close the transaction, claiming that he did not know that the property was sold subject to a prior deed of trust. The trustee readvertised the foreclosure and sold the property to another purchaser on a bid \$30,000 less than Yaffe's bid. Heritage and the trustee brought suit to recover the \$30,000 from Yaffe.⁶⁹

The Supreme Court of Virginia addressed a number of issues in *Yaffe*. First, the court determined that section 55-59.4(2) of the Code is permissive; the trustee may waive or require a deposit in his discretion.⁷⁰ Second, the court rejected Yaffe's contention that the foreclosure sale was incomplete. Although "[t]here is no rigidly

65. *Id.* at 634, 364 S.E.2d at 229-30.

66. *Id.* at 636, 364 S.E.2d at 231. Section 55-59.2 provides that "the sale shall be held on any day following the day of the last advertisement which is no earlier than eight days following the first advertisement nor more than thirty days following the last advertisement." VA. CODE ANN. § 55-59.2 (Repl. Vol. 1986).

67. *Deep*, 234 Va. at 638, 364 S.E.2d at 232.

68. 235 Va. 577, 369 S.E.2d 404 (1988).

69. *Id.* at 579-80, 369 S.E.2d at 405; see *Definite Contract Bldg. & Loan Ass'n v. Tumin*, 158 Va. 771, 790, 164 S.E. 562, 568 (1932) (describing a trustee's authority to readvertise a foreclosure sale at the risk of a purchaser who fails to close pursuant to his bid).

70. *Yaffe*, 235 Va. at 581, 369 S.E.2d at 406. Section 55-59.4(2) provides that "[t]he Trustee may require of any bidder at any sale a cash deposit of as much as ten per cent of the sale price . . . before his bid is received." VA. CODE ANN. § 55-59.4(2) (Repl. Vol. 1986).

prescribed prerequisite for the conclusion of an auction sale for real property," a foreclosure sale is complete when the auctioneer (1) receives the last and highest bid; (2) gives clear notice of his intent to accept that bid if no other bids are made; (3) gives other potential bidders at the foreclosure an opportunity to submit higher bids; and, (4) clearly announces that the highest bid is accepted and the sale complete.⁷¹ Third, the court found that Yaffe could not withdraw from the contract on the grounds that he was unaware of the prior deed of trust where the status of title to the property was clearly stated in the foreclosure advertisement.⁷²

Finally, the court addressed Yaffe's contention that the statute of frauds prohibited the enforcement of the memorandum of sale signed only by the trustee after the foreclosure sale. The court determined that when a trustee acts as auctioneer, he acts as agent for both buyer and seller at the foreclosure sale and his signature as the purchaser's agent is sufficient to charge the purchaser with his obligations under the memorandum of sale.⁷³ The trustee's execution of the memorandum of sale in his capacity as auctioneer satisfied the statute of frauds.⁷⁴

F. *Deed of Trust Notes*

The issue in *Taylor v. Roeder*,⁷⁵ was whether a variable interest rate note was negotiable. Old Town Investment Corporation borrowed \$18,000 from VMC Mortgage Company. The loan was evidenced by a note secured by a deed of trust on land. The note provided for interest at three percent over the prime rate of Chase Manhattan Bank which is adjusted monthly. Taylor purchased the land from Old Town and sent funds to VMC for payment of the loan. Taylor never received a cancelled note or a release from the deed of trust. Prior to the conveyance, VMC pledged the note to

71. *Yaffe*, 235 Va. at 581, 369 S.E.2d at 406.

72. *Id.* at 582, 369 S.E.2d at 406-07 ("Where the terms and conditions of an auction sale are plain and unambiguous and are plainly announced at the time and place of sale, they are binding upon a purchaser at the sale, *whether he heard them announced or not and though he may not have understood them.*" *Id.* (quoting *Definite Contract Bldg. & Loan Ass'n v. Tumin*, 158 Va. 771, 782, 164 S.E. 562, 565 (1932)) (emphasis added in *Yaffe*)).

73. *Yaffe*, 235 Va. at 582, 369 S.E.2d at 407; see VA. CODE ANN. § 11-2(6) (Repl. Vol. 1989).

74. *Yaffe*, 235 Va. at 583, 369 S.E.2d at 407.

75. 234 Va. 99, 360 S.E.2d 191 (1987). *Taylor* encompasses two cases consolidated at trial and on appeal. The relevant facts for both cases are substantially the same. Therefore, only one set of facts is summarized in the text.

the trustee of a pension fund to secure a loan from the pension fund. VMC defaulted on the loan from the pension fund and filed for bankruptcy. The trustee demanded payment from Old Town, the original maker, and Taylor, the new owner of the property, claiming holder in due course status. Old Town and Taylor defended on the grounds that the note had been paid in full.⁷⁶ The Supreme Court of Virginia held that the note was not negotiable because it required an outside source to determine the amount due — in this case, the Chase Manhattan Bank's varying prime rate. Therefore, the trustee took the note subject to the defense of payment in full.⁷⁷

In one of the three cases consolidated in *Marriott v. Harris*,⁷⁸ the purchasers of residences in the subdivision sought to enjoin the developer's lender from foreclosing on their lots pursuant to the deeds of trust and notes executed by the purchasers and assigned to the lender to secure financing for the project.⁷⁹ The court held that the lender did not forfeit its holder in due course status by accepting an assignment of the notes with the knowledge that the notes were given pursuant to executory contracts and were, therefore, subject to rescission for failure of consideration if the infrastructure of the development was not completed.⁸⁰

76. *Id.* at 101-02, 360 S.E.2d at 192-93.

77. *Id.* at 104, 360 S.E.2d at 193. Section 8.3-104(1)(b) of the Code of Virginia provides that in order to be deemed negotiable, an instrument must "contain an unconditional promise or order to pay a sum certain in money." VA. CODE ANN. § 8.3-104(1) (Add. Vol. 1965 & Cum. Supp. 1989). The Virginia General Assembly recently amended section 8.3-106(1) of the Code of Virginia to create an exception to the sum certain requirement for variable interest rate notes. See *infra* note 163 and accompanying text.

78. 235 Va. 199, 368 S.E.2d 225 (1988).

79. 235 Va. at 220, 368 S.E.2d at 235. For a summary of the relevant facts in this case, see *supra* notes 35-38 and accompanying text.

80. *Id.* at 225, 368 S.E.2d at 239. At the time the developer assigned the notes to the lender, no breach had occurred. Therefore, the lender had no notice that the executory contracts were voidable. *Id.* The court also rejected the purchasers' contention that the lender's acceptance of the assignments of the notes and deeds of trust obligated the lender to complete the infrastructure for the subdivision. In reaching its determination, the court distinguished commercial assignments to secure obligations from general assignments of the assets and obligations of a business. *Id.* at 222, 368 S.E.2d at 236. In addition, the court determined that a reference in each note to the deed of trust securing the note was an acceleration clause which did not affect the negotiability of a note. *Id.* at 225, 368 S.E.2d at 238; see VA. CODE ANN. § 8.3-105(1)(c) (Add. Vol. 1965 & Cum. Supp. 1989).

G. Easements

1. Damages

The sole question before the court in *Dillingham v. Hall*,⁸¹ was the propriety of an award of damages where the owner of the servient estate blocked off a right of way. However, owners of the parcels served by the right of way failed to produce sufficient evidence of their loss at trial. The Supreme Court of Virginia held that the trial court's award of compensatory damages in the amount of one dollar per day was speculative and improper since the award was unsupported by any evidence quantifying the damages sustained by the owners of the parcels served by the blocked right of way.⁸²

2. Party Walls

In *C & E Partnership v. Donnelly*,⁸³ the Supreme Court of Virginia held that a wall located entirely upon one party's property did not constitute a party wall in favor of the owner of adjacent property. The court, noting that the wall did not straddle the boundary line dividing the adjacent owners' parcels, determined that the presumption of a party wall did not arise.⁸⁴ In addition, the wall failed to meet other definitions of party walls; specifically: (1) title to the wall was not held by the adjacent property owners as tenants in common; and, (2) the wall was not located on one owner's property and subject to an easement in favor of the adjacent property.⁸⁵

3. Prescriptive Easements

The issue in *Preshlock v. Brenner*⁸⁶ was whether a prescriptive easement could be obtained against a private party's property where the property was already subject to an easement for a public storm sewer. The dominant estate owner acknowledged that: (1) the prescriptive easement would be subject to the prior public easement; and, (2) the prescriptive easement was asserted against

81. 235 Va. 1, 365 S.E.2d 738 (1988).

82. *Id.* at 4, 365 S.E.2d at 739.

83. 235 Va. 301, 367 S.E.2d 490 (1988).

84. *Id.* at 304, 367 S.E.2d at 491; see *Bellenot v. Laube*, 104 Va. 842, 52 S.E. 698 (1906) (a wall located astride a property line is presumed to be a party wall subject to cross-easements in favor of the adjoining property owners).

85. *Donnelly*, 235 Va. at 304, 367 S.E.2d at 492.

86. 234 Va. 407, 362 S.E.2d 696 (1987).

the servient estate owner's fee, not the public easement. The court reasoned that since the public easement was nonexclusive, the servient estate owner was not prohibited from conveying subsequent easements or rights which did not unreasonably interfere with the public easement.⁸⁷ The court held that a prescriptive easement in the same property encumbered by the public easement was not unobtainable as a matter of law.⁸⁸

In *Ward v. Harper*,⁸⁹ the Supreme Court of Virginia considered whether a party's use of a right of way constituted a continuous use for the purpose of establishing a prescriptive easement in the right of way. For over twenty years, Harper used a road for logging purposes over property owned by Ward and Ward's predecessor in title. Harper used the road once or twice each year for transporting cut timber and machinery to and from his property. Ward erected a gate across the road prohibiting ingress and egress to Harper's property.⁹⁰ The court rejected Ward's argument that the use was sporadic and not continuous. Harper's continuous use of the right of way in a seasonal timber operation satisfied the continuous use element of adverse possession.⁹¹

H. *Eminent Domain*

In *Hampton Roads Sanitation District v. McDonnell*,⁹² the Supreme Court of Virginia considered whether Hampton Roads Sanitation District's pumping of raw sewage into a private party's property constituted a taking. The evidence showed that a pump station owned and operated by Hampton Roads was located near McDonnell's property. The pump station was intentionally designed to divert the overflow from the pump onto the adjacent property. Over 2,000,000 gallons of waste water were pumped onto McDonnell's property within an approximately nine month period.⁹³ The court held that the resulting damage to the property constituted a taking for which McDonnell was entitled to compen-

87. *Id.* at 410, 362 S.E.2d at 698. "Any easement that may be acquired by grant also may be acquired by prescription." *Id.* (citing *Haines v. Galles*, 76 Wyo. 411, 419, 303 P.2d 1004, 1006 (1936)).

88. *Preshlock*, 234 Va. at 411, 362 S.E.2d at 698.

89. 234 Va. 68, 360 S.E.2d 179 (1987).

90. *Id.* at 71-72, 360 S.E.2d at 180-81.

91. *Id.* at 72, 360 S.E.2d at 182.

92. 234 Va. 235, 360 S.E.2d 841 (1987).

93. *Id.* at 236-37, 360 S.E.2d at 842-43.

sation pursuant to the Constitution of Virginia.⁹⁴

The sole question in *United States v. 312.50 Acres, Prince William County, Virginia*,⁹⁵ was whether a trial court in a condemnation suit properly allowed into evidence the sale of adjacent comparable land under an unconditional contract executed as the result of an arm's length transaction. The purchase price in the contract was \$15,000 per acre. The jury fixed the value of the land at \$13,500 per acre. The court, relying on the doctrine of equitable conversion, found that the contract transcended a mere offer to purchase land and, therefore, was "unquestionably admissible to show value."⁹⁶

In *State Highway & Transportation Commissioner v. Lanier Farm, Inc.*,⁹⁷ the Supreme Court of Virginia considered the compensability of damages allegedly sustained by a developer. Lanier owned a 130 acre tract of land held for future development. An unrecorded subdivision plat located the entrance to the development on a curving road. The entrance did not meet the locality's visibility requirements, but Lanier believed that the city would agree that the curvature of the road would prohibit motorists from exceeding a thirty mile an hour speed limit. The highway commissioner sought to acquire one acre of the property for the purpose of straightening out the road. Lanier sought damages to compensate him for the costs he would incur in relocating the entrance and a decrease in the overall value of the development resulting from the less attractive entrance. The highway commissioner objected to the \$65,000 awarded to Lanier for damages to the residue of the development.⁹⁸

The court held that the award was inappropriate for several reasons. First, Lanier's contention that the city would require a relocation of the proposed entrance was speculative. Second, even if

94. *Id.* at 238, 360 S.E.2d at 845. The court distinguished *McDonnell* from *Elizabeth River Tunnel District v. Beecher*, 202 Va. 452, 117 S.E.2d 685 (1961) in which the court, applying the doctrine of sovereign immunity, held that the tunnel district was immune from an action arising out of personal injuries sustained by a passenger on a bus operated by the tunnel district. *McDonnell* arose out of damage to property. The court also quoted article I, § 11, of the Constitution of Virginia as guaranteeing to an owner "just compensation both where his property is taken for public uses and where it is damaged for public uses." *McDonnell*, 234 Va. at 238, 36 S.E.2d at 845.

95. 812 F.2d 156 (4th Cir. 1987).

96. *Id.* at 157.

97. 233 Va. 506, 357 S.E.2d 531 (1987).

98. *Id.* at 509, 357 S.E.2d at 532.

the city required Lanier to relocate the entrance, that requirement, which would not extinguish Lanier's access to a public right of way, would be a valid exercise of the city's police power and would not be compensable as a taking. Third, frustration of Lanier's plans for future development was speculative and not compensable. Finally, an increase in negligent or unlawful use of the highway by third parties arising by the taking was not compensable.⁹⁹

The sole issue resolved by the court in *State Highway & Transportation Commission v. Goodrich*¹⁰⁰ was whether the Virginia State Highway and Transportation Commissioner was entitled to amend a certificate recorded pursuant to section 33.1-122 of the Code of Virginia during a condemnation trial to reduce the amount of property taken. The court held that the commissioner could, absent fraud or arbitrary action, amend the certificate of deposit during the trial.¹⁰¹

I. *Future Interests*

In *Mullins v. Simmons*,¹⁰² the Supreme Court of Virginia considered the effect of the following inter vivos conveyance: "to Norcia . . . during her natural life, and at her death to her children, if any, and if the said Norcia . . . shall die without issue, then to the next of kin on her fathers [sic] side."¹⁰³ Norcia gave birth to a daughter, Laura. Laura gave birth to a daughter, Lynn. Laura died. Then Norcia died. The court determined that this conveyance created a life estate in Norcia and a vested remainder subject to open and a condition subsequent in Laura.¹⁰⁴

The appeal arose out of two ejectment suits filed by Lynn's husband, Mullins, after Lynn's death to recover property previously conveyed by Norcia and Laura. The court disposed of Mullins' argument that the remainder to Laura vested at Norcia's death noting that the law favors early vesting of estates. Therefore, Norcia and Laura could not convey more than Norcia's life estate.¹⁰⁵

The court also rejected Mullins' argument that Lynn was an

99. *Id.* at 509-10; 357 S.E.2d at 533-34.

100. 237 Va. 144, 375 S.E.2d 745 (1989).

101. *Id.* at 147, 375 S.E.2d at 747; see VA. CODE ANN. §§ 33.1-121, -122 (Repl. Vol. 1984).

102. 235 Va. 194, 365 S.E.2d 771 (1988).

103. *Id.* at 195-96, 365 S.E.2d at 772.

104. *Id.* at 196-97, 365 S.E.2d at 722.

105. *Id.* at 197, 365 S.E.2d at 772.

original taker under the deed. The court declined to construe "children" to include "grandchildren". Also, the court declined to imply a grant to Norcia's issue. Finally, the court ruled that Lynn could not take as next of kin because Norcia did not die without issue. Therefore, the gift over to the next of kin failed.¹⁰⁶

J. *Joint Tenancies*

In *Chosar Corp. v. Owens*,¹⁰⁷ the Supreme Court of Virginia was asked to decide whether nonconsenting tenants in common could enjoin coal mining on their property pursuant to agreements entered into by the remaining tenants in common. About eighty-five percent of the tenants in common of an eighty-one acre tract executed leases permitting Chosar to mine coal on the property. The court held that: (1) the mining constituted waste as to the nonconsenting tenants in common; (2) that an injunction against further mining was appropriate; and (3) that the mining constituted an exclusion of the nonconsenting co-tenants entitling them to an accounting of profits arising from the coal leases.¹⁰⁸

K. *Land Trusts*

In *Curtis v. Lee Land Trust*,¹⁰⁹ the Supreme Court of Virginia considered whether beneficiaries of a land trust could be held personally liable on a deed of trust note which they did not sign. The owners of a tract of land conveyed the property to a land trust. The sellers financed a portion of the purchase price by taking back a deed of trust note secured by a deed of trust on the property. Both instruments were executed by the trustee under the land trust. Payments were not made under the note and the seller foreclosed on the property. The foreclosure resulted in a deficiency which the seller sought to recover from the land trust and the land trust beneficiaries.¹¹⁰ The court, rejecting the seller's contention that the trustee under the land trust executed the note and deed of trust as an agent for the beneficiaries, ruled that the beneficiaries

106. *Id.* at 197, 365 S.E.2d at 772-73.

107. 235 Va. 660, 370 S.E.2d 305 (1988).

108. *Id.* at 664-65, 370 S.E.2d at 307-08. The court also held that the trial court properly enjoined Chosar's use of an underground passageway created by the mining to transport coal across the co-tenants' property from a third party's adjacent property. *Id.* at 665, 370 S.E.2d at 308.

109. 235 Va. 491, 369 S.E.2d 853 (1988).

110. *Id.* at 493, 369 S.E.2d at 853-54.

were not personally liable on the note.¹¹¹ The court also noted that exculpatory language contained in the note and deed of trust prohibited a finding of personal liability against the beneficiaries.¹¹²

L. *Landlord and Tenant*

In *Klingbeil Management Group Co. v. Vito*,¹¹³ the Supreme Court of Virginia was asked to determine whether a landlord has a duty to protect a tenant against injury from third parties. The facts showed that the front door to the tenant's apartment did not have a dead bolt lock. The tenant was raped in her apartment by an assailant who may have gained access to the apartment through the front door. The tenant sued the apartment complex owners and the manager of the apartment complex for negligence. The supreme court reversed the trial court's order entering judgment for the tenant and thereby reaffirmed the rule that a landlord owes no duty to protect his tenant from criminal acts by third persons.¹¹⁴ The court also determined that section 55-248.13:1 of the Code,¹¹⁵ which requires a landlord to install dead bolt locks upon written request by a tenant, preempted a county ordinance prohibiting any person from leasing an apartment to another unless all doors were equipped with dead bolt locks meeting minimum specifications.¹¹⁶

The supreme court distinguished *Klingbeil*, and similar cases arising out of tort, from the facts before it in *Richmond Medical Supply Co. v. Clifton*,¹¹⁷ a suit arising out of breach of contract.¹¹⁸ In *Clifton*, a landlord expressly agreed in writing to repair an entrance door to commercial property. The landlord failed to repair the door and thieves burglarized the leased premises by entering the defective door.¹¹⁹ The court, ruling that the landlord could be held liable for damages suffered by the tenant arising from the landlord's breach of its contractual obligation, reversed the trial court's order granting the landlord summary judgment and re-

111. *Id.* at 496-97, 369 S.E.2d at 855-56. The trustee under the land trust clearly signed the note and deed of trust in its capacity as trustee for the trust, not in any representative capacity for the trust beneficiaries. *See id.* at 497, 369 S.E.2d at 856.

112. *Id.* at 497, 369 S.E.2d at 856.

113. 233 Va. 445, 357 S.E.2d 200 (1987).

114. *Id.* at 447, 357 S.E.2d at 201.

115. VA. CODE ANN. § 55-248.13:1 (Repl. Vol. 1986 & Cum. Supp. 1989).

116. 233 Va. at 448, 357 S.E.2d at 203; *see infra* note 184 and accompanying text.

117. 235 Va. 584, 369 S.E.2d 407 (1988).

118. *Id.* at 587, 369 S.E.2d at 409.

119. *Id.* at 586, 369 S.E.2d at 408.

manded the case to permit the fact finder to consider the tenant's claim for breach of contract.¹²⁰

In a case of first impression, the court in *Jones v. Dokos Enterprises, Inc.*¹²¹ determined the rights of a lessee and his assignee as to security deposits. The facts showed that the lessee under two leases with McDonald Restaurant Corporation contracted to sell his interests in two McDonald stores to an assignee. The contracts made no reference to two \$15,000 security deposits required under the leases.¹²² The court held that since the rights to the security deposits were not addressed in the purchase contracts nor contemplated by the parties and the lessee's assignments of the leases did not relieve the lessee of its obligations under the lease, the lessee was entitled to receive back the security deposits.¹²³

M. Marital Property

In *Cousins v. Cousins*,¹²⁴ the Court of Appeals of Virginia considered whether the trial court properly classified property as the separate property of a spouse. The court held that property conveyed to a husband and wife as tenants by the entirety constituted marital property notwithstanding the fact that the property was conveyed by the wife's parents as an advancement on her inheritance.¹²⁵

N. Mechanics' Liens

In *McMerit Construction Co. v. Knightsbridge Development Co.*,¹²⁶ the Supreme Court of Virginia reaffirmed the rule that a

120. *Id.* at 587, 369 S.E.2d at 409.

121. 233 Va. 555, 357 S.E.2d 203 (1987).

122. *Id.* at 556, 357 S.E.2d at 204.

123. *Id.* at 559, 357 S.E.2d at 206.

124. 5 Va. App. 156, 360 S.E.2d 882 (1987).

125. *Id.* at 159, 360 S.E.2d at 884. The court noted that, by definition, separate property must be titled in one party. *Id.*

For additional cases involving property distribution upon divorce, see *Westbrook v. Westbrook*, 5 Va. App. 446, 364 S.E.2d 523 (1988) (property purchased in one party's name may be treated as marital property under the doctrine of transmutation, where the property is treated as marital property and a written instrument evidences the parties' intent that separate property will be marital property, even if the instrument is not a deed or will); *Brown v. Brown*, 5 Va. App. 238, 361 S.E.2d 364 (1987) (holding that property conveyed by a father to his son in consideration of son's assumption of a debt on the property jointly with his father was entirely marital property).

126. 235 Va. 368, 367 S.E.2d 512 (1988).

waiver of lien rights must be expressed or, if implied, established by clear and convincing evidence. The court determined that a contractor's execution and delivery of a document acknowledging receipt of full payment from the owner of property in connection with construction thereon did not constitute a waiver of the contractor's right to file liens against the property, especially in view of the fact that the owner and the contractor were engaged in a heated debate regarding additional sums due under the construction contract.¹²⁷

In *Donohoe Construction Co. v. Mount Vernon Associates*,¹²⁸ the supreme court determined that the words contained in a memorandum of mechanic's lien were entitled to an absolute privilege precluding recovery by a property owner on a slander of title claim. Since the filing of a memorandum of lien is a prerequisite to a mechanic's lien suit, filing the memorandum of lien constitutes a judicial proceeding entitling it to an absolute privilege if the words contained therein are relevant and pertinent to the suit.¹²⁹

O. *Notice of Lis Pendens*

At issue in *Green Hill Corp. v. Kim*,¹³⁰ was whether, by recording a notice of lis pendens, an unsecured creditor created a lien entitling the creditor to relief from a debtor's bankruptcy stay. The creditor obtained a personal judgment against the debtor. The debtor filed bankruptcy prior to the creditor docketing its judgment. The Court of Appeals for the Fourth Circuit affirmed the bankruptcy court and district court rulings denying the creditor relief from the stay on two grounds. First, the court reasoned that the lis pendens merely served as notice of the underlying suit; no lien was created by recording the notice.¹³¹ Second, the court noted that the Supreme Court of Virginia had interpreted the lis pendens statute as being applicable to disputes concerning title to real property, not actions for personal judgments.¹³²

127. *Id.* at 374, 367 S.E.2d at 515.

128. 235 Va. 521, 369 S.E.2d 857 (1988).

129. *Id.* at 538-39, 369 S.E.2d at 861.

130. 842 F.2d 742 (4th Cir. 1988).

131. *Id.* at 744; see VA. CODE ANN. § 8.01-268 (Cum. Supp. 1989); see *infra* notes 189-91 and accompanying text.

132. *Kim*, 84 F.2d at 744 (citing *Preston's Drive Inn Restaurant, Inc. v. Convery*, 207 Va. 1013, 154 S.E.2d 160 (1967)).

P. *Partition*

In *Leake v. Casati*,¹³³ the court considered whether a chancellor in a suit to partition land in kind is bound by a county subdivision ordinance. John and Joe Leake owned property as tenants in common. John Leake conveyed his property to Casati, the owner of an adjacent tract of land. Joe Leake refused to sell his interest to Casati, and Casati sued for partition by sale. The chancellor in the case, after determining that partition in kind would be subject to the county subdivision ordinance, ruled that the partition would be impracticable and inconvenient. The chancellor ordered the sale of Joe Leake's interest.¹³⁴ The court, refusing to find an implied legislative intent to deprive the court of its power to do equity between the parties, ruled that the subdivision ordinance did not apply to the court's exercise of its power to partition land in kind. The supreme court remanded the case to the lower court.¹³⁵

In *Smith v. Woodlawn Construction Co.*,¹³⁶ the Supreme Court of Virginia ruled that the trial court erred in dismissing a suit to partition where the parties seeking partition were unable to show the value of the property they sought to partition. The partitioners put on a prima facie case of ownership of the property entitling them to a partition in kind regardless of value.¹³⁷ The court also determined that the trial court erred in awarding costs to the defendants because the defendants failed to refute the complainant's prima facie showing of an interest in the land.¹³⁸

Q. *Real Estate Brokers*

In *Smithy Braedon Co. v. Hadid*,¹³⁹ the Court of Appeals for the Fourth Circuit considered, among other things, whether Virginia law prohibited the enforcement of a real estate brokerage contract pursuant to which commissions were to be split with an unlicensed

133. 234 Va. 646, 363 S.E.2d 924 (1988).

134. *Id.* at 649, 363 S.E.2d at 926.

135. *Id.* at 652, 363 S.E.2d at 928. For a case describing the proper method of determining parties' interests in property involved in a partition suit, see *Shannon v. Hall*, 235 Va. 360, 368 S.E.2d 695 (1988) (holding that the parties' interests in property should have been calculated on a percentage of ownership basis, not on a value basis).

136. 235 Va. 424, 368 S.E.2d 699 (1988).

137. *Id.* at 430, 368 S.E.2d at 703. The value of property is relevant only where partition by sale is sought. *Id.*

138. *Id.* at 430-31, 368 S.E.2d at 703.

139. 825 F.2d 787 (4th Cir. 1987).

broker which performed no services or acts restricted to licensed brokers. The court held that the statute in question did not apply to prohibit the enforcement of the contract where no services were performed or rendered by the unlicensed broker.¹⁴⁰

R. *Restrictive Covenants*

In *Bain v. Bain*,¹⁴¹ the Supreme Court of Virginia considered restrictions contained in deeds applied to property retained by the grantor. The grantor subdivided a portion of his ten acre tract into six lots. The subdivision plat provided that all lots in the subdivision were subject to restrictions contained in a recorded deed of dedication. The deed of dedication prohibited mobile homes on any lot. The subdivision plat showed the entire tract. However, the deed of dedication contained language which evidenced the grantor's intent to include only the six subdivided lots in the subdivision. Several lot purchasers sought to enforce the restriction on mobile homes against the grantor's remaining property on which the grantor maintained his mobile home and on which he sought to create a mobile home park.¹⁴²

The court affirmed the trial court's judgment denying the lot purchasers' request for injunctive relief. The court determined that any ambiguity arising from the subdivision plat and deed must be resolved in favor of the free use of the property. The court also refused to find an implied reciprocal negative easement because the lot purchasers failed to show a scheme of development evidencing the grantor's intent to bind his retained property with the restrictions. The court noted that the grantor maintained his mobile home on the retained property.¹⁴³

S. *Riparian Rights*

The central issue in *Langley v. Meredith*¹⁴⁴ involved the determination of riparian rights of owners of three parcels of land. The Supreme Court of Virginia held that the trial court erred in determining the parties' riparian rights by extending the property lines

140. *Id.* at 792; see VA. CODE ANN. § 54.1-2106 (Repl. Vol. 1988) (original version at VA. CODE ANN. § 54-749 (1982)).

141. 234 Va. 260, 360 S.E.2d 849 (1987).

142. *Id.* at 262-63, 360 S.E.2d at 850-51.

143. *Id.* at 264-65, 360 S.E.2d at 851-52.

144. 237 Va. 55, 376 S.E.2d 519 (1989).

dividing each parcel into the water. This method of determining riparian rights, the court noted, would deprive at least one owner of his legal right of access from his property to the line of navigability. Considering the meandering nature of the shore line, the court stated that the proper method of determining each owner's riparian rights was to allocate to each owner a share of the line of navigability proportionate to each owner's share of the shore line.¹⁴⁵

T. *Subdivision*

In *Baum v. Lunsford*,¹⁴⁶ the Supreme Court of Virginia reversed the trial court's holding that a landowner had been wrongfully denied a variance to permit subdivision of her land. The owner's proposed subdivision would have created two nonconforming lots. The supreme court held that the trial court erred inasmuch as the property owner's claim of financial loss standing alone was insufficient grounds to justify granting the variance.¹⁴⁷

U. *Zoning*

In *City Council v. Harrell*,¹⁴⁸ the Supreme Court of Virginia ruled that the trial court erred in entering a declaratory judgment invalidating the city council's denial of an application for a conditional use permit to operate a gasoline pump in connection with a convenience store. Harrell constructed a convenience store on property located at the entrance to a residential area. He applied for a conditional use permit to install gasoline pumps on the property. The application was approved, subject to certain conditions imposed by both the city's director of planning and the planning commission. However, the city council denied the permit on the basis that it would be inappropriate to locate the gasoline station at the entrance to the residential area.¹⁴⁹ The supreme court based its decision on its finding that Harrell failed to present evidence showing that the use permitted by the zoning ordinance was unreasonable.¹⁵⁰

145. *Id.* at 63, 376 S.E.2d at 523 (citing *Groner v. Foster*, 94 Va. 650, 652-53, 27 S.E. 493, 494 (1897)).

146. 235 Va. 5, 365 S.E.2d 739 (1988).

147. *Id.* at 8, 365 S.E.2d at 741.

148. 236 Va. 99, 372 S.E.2d 139 (1988).

149. *Id.* at 100-01, 372 S.E.2d at 140-41.

150. *Id.* at 103, 372 S.E.2d at 141-42. A prima facie case that denial of a conditional use

In *Gwinn v. Alward*,¹⁵¹ the supreme court considered several issues concerning the enforcement of remedies for zoning ordinance violations. A property owner operated a junkyard on his property in violation of the county's zoning ordinance. The county issued trash hauling permits to the owner for many years notwithstanding these violations. In 1984, the county denied the owner's trash hauling permit. The owner sought to compel the county to issue the permit, and the county sought to enjoin the use of the property as a junkyard. The owner failed to appeal a decision handed down by the county's zoning administrator in 1984 that the owner's use of the property as a junkyard was not permitted. The owner had also received communications from various county officials suggesting that the use of the property violated the zoning ordinance.¹⁵²

The central issue addressed by the court was whether the county could enforce its zoning ordinance by refusing to issue a trash hauling permit. The court ruled that nothing prohibited the zoning administrator from seeking to enforce the zoning ordinance through a cross-bill filed in a suit brought by the owner to appeal the denial of a trash hauling permit.¹⁵³ Therefore, the trial court erred in refusing to grant the county's request for injunctive relief against the owner's violation of the zoning ordinance.¹⁵⁴ The court also held that the owner's failure to appeal the zoning department's rulings that the owner's property use violated the zoning ordinance estopped the owner from contesting those determinations at the time of the suit. In addition, the court rejected the owner's argument that the county was estopped from denying his trash hauling permit, thereby reaffirming the rule that estoppel does not apply to the government and the exercise of governmental functions.¹⁵⁵

permit is unreasonable requires the party challenging the denial to show that: (1) the proposed use of the property is reasonable and; (2) the existing ordinance as applied to the property is unreasonable. Harrell failed to satisfy the second prong of this test. *Id.* at 103, 372 S.E.2d at 141. For a case addressing the validity of a denial of an application for a conditional use permit, see *City of Covington v. APB Whiting, Inc.*, 234 Va. 155, 360 S.E.2d 206 (1987) (where evidence tended to show the suitability of property for both residential and commercial use, the reasonableness of a decision by the city council to deny an application to rezone the property for commercial use was fairly debatable, and, therefore, should have been affirmed by the trial court.).

151. 235 Va. 616, 369 S.E.2d 410 (1988).

152. *Id.* at 617-20, 369 S.E.2d at 410-12.

153. *Id.* at 622, 369 S.E.2d at 413; see VA. CODE ANN. §§ 15.1-491(d), -499 (Repl. Vol. 1989).

154. *Gwinn*, 235 Va. at 622-23, 369 S.E.2d at 413.

155. *Id.* at 621, 369 S.E.2d at 412-13.

II. LEGISLATION

A. *Condominiums*

Section 55-79.40 of the Code of Virginia¹⁵⁶ has been amended to provide that the warranties against structural defects contained in section 55-79.79 of the Code¹⁵⁷ and the disclosure statement required in section 55-79.94¹⁵⁸ are not applicable to the declarant of a conversion condominium if a declarant is a proprietary lessees' association that immediately before the creation of the condominium owned fee simple title to or a fee simple reversionary interest in the real estate described in section 55-79.54(a)(3) of the Code.¹⁵⁹ Section 55-79.75 of the Code¹⁶⁰ is changed to provide that meetings of the executive organization of a condominium unit owners' association must be open to all unit owners, subject to certain exceptions.

B. *Deeds of Trust, Promissory Notes and Property Insurance (or Lender's Counsel's Corner)*

Section 55-58.2 allows a noteholder named in a credit line deed of trust to amend or modify the noteholder's address set forth in the deed of trust by a recorded amendment.¹⁶¹ Prior to this change, the noteholder's address could not be changed by amendment to the deed of trust.

Section 8.3-106 of the Code¹⁶² has been amended to provide that a sum payable is a sum certain if a rate of interest "is readily ascertainable by a reference in the instrument to a published statute, regulation, rule of court, generally accepted commercial or financial index, compendium of interest rates, or announced or established rate of a named financial institution."¹⁶³

Recently enacted section 6.1-2.6:1 of the Code¹⁶⁴ prohibits a lender from establishing, as a condition to receiving or maintaining

156. VA. CODE ANN. § 55-79.40 (Cum. Supp. 1989).

157. *Id.* § 55-79.79.

158. *Id.* § 55-79.94.

159. *Id.* § 55-79.54(a)(3) (Repl. Vol. 1986).

160. *Id.* § 55-79.95 (Cum. Supp. 1989).

161. VA. CODE ANN. § 55-58.2 (Cum. Supp. 1989).

162. *Id.* § 8.3-106.

163. *Id.* This section, as amended, vitiates the holding in *Taylor v. Roeder*, 234 Va. 99, 360 S.E.2d 191 (1987), *supra* notes 75-77 and accompanying text.

164. VA. CODE ANN. § 6.1-2.6:1 (Supp. 1989).

a loan secured by a deed of trust or mortgage, a requirement that the borrower provide property insurance in an amount "exceeding the replacement value of the improvements on the real property."¹⁶⁵

C. *Dower and Curtesy*

Section 55-40 of the Code¹⁶⁶ is amended to make the section gender neutral. Curtesy and dower rights are now disposed of similarly.

D. *Eminent Domain*

Section 36-27 of the Code¹⁶⁷ is amended to provide that a court may consider the effect which rezoning applications and applications for special use permits or variances may have on the value of property in condemnation proceedings.

E. *Escheats and Disposition of Unclaimed Property*

The General Assembly recently placed some additional responsibilities on escheators selling lands for cash. Section 55-186 of the Code¹⁶⁸ is changed to require the escheator at the time of sale to (a) have the purchaser sign an authorization for recording prior to distribution; and (b) collect the clerk's fee required by section 14.1-112(2) of the Code.¹⁶⁹ A procedure is established for paying the sale proceeds to the state treasurer and recording the grants with the local clerk's office. Also, this section provides that grants of escheated property are exempt from recording taxes.¹⁷⁰

The General Assembly made four significant revisions to the statutes affecting the disposition of unclaimed property. First, section 55-210.8:1 of the Code¹⁷¹ is amended to provide that a gift certificate or credit memo which remains unclaimed by the owner for more than three years after becoming payable or distributable is presumed abandoned.

165. *Id.*

166. VA. CODE ANN. § 55-40 (Cum. Supp. 1989).

167. VA. CODE ANN. § 36-27 (Cum. Supp. 1989).

168. VA. CODE ANN. § 55-186 (Cum. Supp. 1989).

169. *Id.* § 14.1-112(2) (Repl. Vol. 1989).

170. *Id.* § 55-186.

171. *Id.* § 55-210.8:1 (Cum. Supp. 1989).

The second change is that section 55-210.9:2 of the Code¹⁷² now requires the clerk of each circuit court or the general receiver, if any, to identify money held by them which remains unclaimed by the owner for more than one year after the money became payable or distributable. There is an exception for funds deposited as compensation or damages in condemnation proceedings.¹⁷³

Third, the General Assembly amended section 55-210.25 of the Code¹⁷⁴ to establish a seven year limitation period in which the state treasurer must commence an action to enforce the reporting, payment or delivery of property presumed abandoned.

Finally, the General Assembly changed section 55-210.27:1 of the Code¹⁷⁵ to reduce, from fifteen percent to ten percent, the fee which a person may charge another for the purpose of locating property included in a report to the state treasurer. Also, a person cannot enter into a contract to locate property which he knows has been reported, paid or delivered to the state treasurer prior to thirty-six months after such report, payment or delivery.¹⁷⁶

F. *Landlord and Tenant*

1. Virginia Residential Landlord and Tenant Act

The General Assembly amended section 55-248.14 of the Code¹⁷⁷ by deleting a sentence providing that a landlord, upon a conveyance of property subject to a rental agreement, is liable to his tenant for property or money to which the tenant is entitled unless the property or money is delivered to the landlord's purchaser with the consent of the purchaser and tenant.¹⁷⁸ Now a tenant must seek to recover the property or money from the landlords' purchaser, the new landlord. This amendment makes an assignment of security deposits from the landlord to his purchaser essential to protect the purchaser from tenants' demands for the repayment of security deposits upon the termination of their leases.

Recently, the General Assembly made numerous changes to landlords' remedies. For example, a landlord may now terminate a

172. *Id.* § 55-210.9:2. (Cum. Supp. 1989).

173. *Id.*

174. *Id.* § 55-210.25.

175. *Id.* § 55-210.27:1.

176. *Id.*

177. VA. CODE ANN. § 55-248.14 (Cum. Supp. 1989).

178. *Id.* § 55-248.14 (comment 3).

rental agreement immediately and obtain possession of the premises pursuant to section 55-248.35 of the Code¹⁷⁹ where a tenant's unremediable breach involves or constitutes a criminal or willful act.¹⁸⁰ Also, a landlord may accept rent with reservation by giving his tenant notice of acceptance of the rent with reservation so as not to waive the landlord's right to obtain an order of possession terminating the rental agreement.¹⁸¹ In addition, section 55-248.35 provides that after the termination of a rental agreement, the landlord, in obtaining post-possession judgments for actual damages, is not required to seek a judgment for accelerated rent to the end of the term of the tenancy.¹⁸² Finally, section 55-248.35 is amended to provide that where a landlord brings an unlawful detainer action, the court may grant the landlord a simultaneous judgment for money due and for possession of the premises without a credit for any security deposit. The security deposit will be credited to the tenant's account upon the tenant vacating the premises.¹⁸³

Any county, city or town, pursuant to section 55-248.13:1 of the Code,¹⁸⁴ may require a landlord who rents five or more units in any building to install security devices which meet minimum specifications.

2. Mobile Home Lot Rental Act

Section 55-248.45 of the Code¹⁸⁵ is amended to prohibit landlords from demanding or collecting fees from providers of cable television or other television broadcast services in exchange for giving tenants access to such services. Additionally, landlords may not charge tenants for such services unless landlords provide such services.¹⁸⁶

G. Marital Property

Section 20-107.3(A)(2) of the Code¹⁸⁷ is amended to provide that marital property is "presumed to be jointly owned unless there is a deed, title or other clear [evidence] that it is not jointly owned."

179. *Id.* § 55-248.35.

180. *Id.* § 55-248.31.

181. *Id.* § 55-248.34.

182. *Id.* § 55-248.35.

183. *Id.*

184. *Id.* § 55-248.13:1.

185. VA. CODE ANN. § 55-248.45 (Cum. Supp. 1989).

186. *Id.* § 55-248.45(A)(4).

187. VA.CODE ANN. § 20-107.3(A)(2) (Cum. Supp. 1989).

H. *Mortgage Brokers*

A real estate agent or broker who receives compensation from a lender for directing purchasers to the lender for loans in connection with the acquisition of real property must disclose to the purchaser in writing the real estate agent or broker's relationship with the lender and the fact that the lender may not offer the lowest interest rate or best terms available to the purchaser.¹⁸⁸

I. *Notice of Lis Pendens and Recordation of Liens*

Section 8.01-268 of the Code¹⁸⁹ provides that "[n]o memorandum of lis pendens shall be filed unless the action on which the lis pendens is based seeks to establish an interest by the filing party in the real property described in the memorandum."¹⁹⁰ In addition, section 8.01-269 of the Code¹⁹¹ now provides that if a lis pendens is dismissed, if the underlying cause is dismissed, or if a judgment is entered for the defendant, the court may impose sanctions as provided in section 8.01-271.1 of the Code.¹⁹²

J. *Recordation of Options*

Section 55-57.2 of the Code¹⁹³ describes the effect of recording an option or similar agreement. Further, the section describes the

188. VA. CODE ANN. § 6.1-422 (Supp. 1989); *see id.* § 6.1-411.9 (Supp. 1989).

189. VA. CODE ANN. § 8.01-268 (Cum. Supp. 1989).

190. *Id.* § 8.01-268(B).

191. *Id.* § 8.01-269.

192. *Id.*; § 8.01-271.1.

193. VA. CODE ANN. § 55-57.2 (Cum. Supp. 1989). Section 55-57.2 states:

EFFECT OF OPTION; RECORDING.—A. Any option to purchase real estate, and any memorandum, renewal or extension thereof, shall be void as to (i) all purchasers for valuable consideration without notice not parties thereto and (ii) lien creditors, until such instrument is recorded in the county or city where the property embraced in the option, memorandum, renewal or extension is located.

B. Notwithstanding any rule of law or equity denominated "fettering," "clogging the equity of redemption" or "claiming a collateral advantage" or any similar rule:

1. A party secured by a mortgage or deed of trust, without adversely affecting his security interest, may acquire from a borrower any direct or indirect present or future ownership interest in the collateral encumbered thereby, including rights to any income, proceeds or increase in value derived from such collateral; and

2. An option to acquire an interest in real estate granted to a party secured by a mortgage or deed or trust, other than an option granted to such party in connection with a mortgage loan as defined in § 6.1-409, is effective according to its terms and

effect of an option granted to a party secured by a mortgage or deed of trust.¹⁹⁴

K. *Subdivision*

The General Assembly recently amended the requirements and procedure for submitting and approving subdivision plats. Section 15.1-475 of the Code¹⁹⁵ now requires the identification of graves on site plans of land proposed for a subdivision. The section is also amended to provide that if the local commission or other agent fails to take action on a subdivider's preliminary plat within ninety days after it has been submitted for approval, the subdivider may, within ten days notice to the commission or agent, petition the circuit court for an order directing approval of the plat.¹⁹⁶ In addition, if the local commission or agent disapproves a proposed plat, the local commission or agent must identify the deficiencies in the plat which resulted in the disapproval by reference to specific ordinances, regulations or policies.¹⁹⁷ A subdivider may challenge a disapproval of its preliminary plat as improper, arbitrary or capricious by filing an appeal with the circuit court within sixty days after the written disapproval by the local commission or agent.¹⁹⁸

A zoning ordinance in a county having the urban county executive form of government may permit a single division of a lot or parcel of property for sale or gift to a member of the property owner's immediate family.¹⁹⁹

Municipalities may adopt ordinances requiring that, where streets in a subdivision will not qualify for state street maintenance funds paid to municipalities, the subdivision plat and similar instruments must disclose that the streets do not meet state standards and will not be maintained by the municipality enacting the ordinance or by the Virginia Department of Taxation. Counties and municipalities may enact ordinances establishing "minimum

takes priority as provided in subsection A of this section if the right to exercise the option is not dependent upon the occurrence of a default under the mortgage or deed of trust.

Id.

194. *Id.*

195. VA. CODE ANN. § 15.1-475 (Repl. Vol. 1989).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* § 15.1-466(A)(k1).

standards for the construction of streets that will not be built to state standards."²⁰⁰ The procedures²⁰¹ regarding the subdivider's financial commitment to complete such streets and the release of such financial commitment, respectively, may apply to such streets by duly adopted ordinance.²⁰²

L. *Virginia Property Owners' Association Act and Related Legislation*

The Virginia Property Owners' Association Act²⁰³ generally applies to property owners' associations which, pursuant to a recorded declaration of covenants or similar instrument, have the authority to impose assessments on lots and which are charged with the responsibility of maintaining or operating common areas.²⁰⁴ The act requires associations to keep accurate books and records of their income, expenses and activities. Members may inspect the association's records, except for records of a sensitive or privileged nature as more fully described in the act.²⁰⁵ More importantly, the act requires that contracts for the sale of lots in developments subject to the act include a statement disclosing that the lot is located in a development subject to the act and that the purchaser can require the seller to obtain information regarding the development from the association. Failure to include this disclosure statement in the contract permits the purchaser to rescind the contract.²⁰⁶ The act also establishes procedures for (a) the adoption and enforcement of rules by the board of directors of the association; (b) the levying of special assessments by the board of directors; and (c) filing liens for unpaid assessments due from lot owners.²⁰⁷

Section 13.1-870.1 of the Code²⁰⁸ is amended to limit the liability of officers and directors of community associations to the amount of compensation received by the officer or director from the association during the twelve months preceding the act or omission for which liability is imposed. However, this limit does not apply "if the officer or director engaged in willful misconduct or a knowing violation of the criminal law."²⁰⁹

200. *Id.* § 15.1-466(D).

201. *Id.* § 15.1-466(A)(f),(i).

202. *Id.* § 15.1-466(D).

203. VA. CODE ANN. §§ 55-508 to -516. (Cum. Supp. 1989).

204. *Id.* § 55-508, -514.

205. *Id.* § 55-510.

206. *Id.* § 55-511.

207. *Id.* §§ 55-513 to -516.

208. *Id.* § 13.1-870.1 (Repl. Vol. 1989).

209. *Id.*

M. Zoning

The General Assembly made two significant amendments to section 15.1-491 of the Code.²¹⁰ The section now provides that zoning ordinances may include reasonable regulations as to mixed-use developments, planned unit developments, and the administration of incentive zoning.²¹¹ Also, the section is amended to state that motions or petitions to amend a zoning ordinance shall be acted upon within twelve months unless the applicant withdraws his motion or petition in which event processing the motion or petition shall cease.²¹²

Section 15.1-493 of the Code²¹³ is amended to provide that the failure of a local commission to report its recommendations on a proposed amendment to, or re-enactment of, a zoning ordinance within ninety days shall be deemed approval of the amendment or re-enactment unless the "proposed amendment or reenactment has been withdrawn by the applicant prior to the expiration of such . . . period" in which event processing of the proposed amendment or re-enactment must cease.²¹⁴

Section 15.1-491.2:1 of the Code²¹⁵ permits certain counties and cities experiencing high levels of population growth to include in their zoning ordinances voluntary proffering of reasonable conditions by the owner seeking rezoning provided that: (i) the rezoning itself gives rise to the need for the conditions; (ii) such conditions have a reasonable relation to the rezoning; and (iii) all such conditions are in conformity with the comprehensive plan. Furthermore, the section prohibits counties, cities or towns from accepting proffers "unless it has adopted a capital improvement program pursuant to [section] 15.1-464 or local charter." If the proffered conditions include dedications of real property or payment of cash, the facilities for which such property is dedicated or cash is tendered

210. VA. CODE ANN. § 15.1-491 (Repl. Vol. 1989).

211. *Id.* § 15.1-491(i) to (j). "Mixed use developments," "planned unit developments" and "incentive zoning" are defined in section 15.1-430(r), (s) and (t), respectively of the Code of Virginia. *Id.* § 15.1-430(r) to (t).

212. *Id.* § 15.1-491(g).

213. *Id.* § 15.1-493.

214. *Id.* § 15.1-493(B).

215. *Id.* § 15.1-491.2:1.

must be included in the capital improvement program prior to accepting a dedication of the property or payment of cash.²¹⁶

Section 15.1-496 of the Code²¹⁷ is amended to provide that the governing body of any city, town or county may provide by ordinance that substantially the same applications for a special exception or variance will not be considered by the board within a period not to exceed one year.

Sections 15.1-498.1 to 15.1-498.10²¹⁸ establish procedures by which certain counties, cities and towns may adopt ordinances imposing impact fees for road improvements.

Section 15.1-499.1²¹⁹ is amended to provide that any county, city or town may adopt an ordinance establishing a "uniform schedule of civil penalties for violations" of zoning ordinances.

Section 15.1-446.1²²⁰ is changed to provide that a locality's comprehensive plan may include designated areas for the implementation of reasonable ground water protection measures.

Section 15.1-491.5²²¹ is amended to provide that in addition to the zoning applicant, any other person who is aggrieved by a decision of a zoning administrator may petition the governing body of the locality for a review of the zoning administrator's decision.

Section 15.1-493²²² is changed to provide that decisions of the local governing body adopting or failing to adopt proposed zoning ordinances or amendments or granting or failing to grant special exceptions must be filed within thirty days of such decision with the circuit court.

III. CONCLUSION

The Supreme Court of Virginia and the General Assembly have addressed a number of interesting issues over the past two years. Several areas have received, and should continue to receive, a heightened level of attention. A number of recent decisions rendered by the supreme court evidence a desire to protect existing

216. *Id.*

217. *Id.* § 15.1-496.

218. *Id.* § 15.1-498.1 to .10.

219. *Id.* § 15.1-499.1.

220. *Id.* § 15.1-446.1.

221. *Id.* § 15.1-491.5.

222. *Id.* § 15.1-493.

property rights. This is particularly clear in the area of nonjudicial foreclosure sales. Virginia practitioners should expect this trend to continue.

Many planned unit developments must now comply with the Virginia Property Owners' Association Act which became effective in 1989. Practitioners preparing declarations of covenants and constituent documents for planned unit developments must be familiar with the act. The authors predict that as the number of planned unit developments in Virginia increases, additional judicial and legislative guidance in the areas of drafting and enforcing such documents will be forthcoming.

Virginia practitioners should familiarize themselves with recent supreme court decisions interpreting easement rights. Case law interpreting easement rights should continue to evolve as reliance on easement rights for the enjoyment of property increases.

Both the cost and pace of real estate development in Virginia will undoubtedly foster many legislative initiatives and judicial attacks throughout the next decade. Impact fees and other growth management tools will attempt to allocate the cost of growth in Virginia.