

1991

Annual Survey of Virginia Law: Property Law

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Recommended Citation

Charles H. Rothenberg & Gloria L. Freye, *Annual Survey of Virginia Law: Property Law*, 25 U. Rich. L. Rev. 859 (1991).
Available at: <http://scholarship.richmond.edu/lawreview/vol25/iss4/15>

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PROPERTY LAW

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I. INTRODUCTION

This article reviews selected judicial decisions and legislation affecting property law in Virginia during the past year. Part I of this article examines decisions of the Supreme Court of Virginia and the United States District Court for the Western District of Virginia. Also included are several decisions from the United States Bankruptcy Courts for the Eastern and Western Districts of Virginia that examine the relationship between lenders and owners of commercial properties producing rental income.

Part II of this article reviews legislation affecting property law passed by the fairly active Virginia General Assembly of 1991. In particular, it will focus on amendments to the Virginia Property Owners' Association Act, the Virginia Residential Landlord and Tenant Act, various sections of the Code of Virginia ("Code") that regulate zoning, and the disposition of unclaimed personal property. Reference is also made to the adoption of Article 2A of the Commercial Code on the leasing of goods.

II. JUDICIAL DECISIONS

A. *Abandonment*

The question presented to the Supreme Court of Virginia in *Tidewater Area Charities v. Harbour Gate Owners Association*.¹ was whether the land underlying an abandoned street was a separate parcel, requiring a separate conveyance by the owner of an

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1. 240 Va. 221, 224, 396 S.E.2d 661, 663 (1990). Lot 17 was located south of Beach Street, a fifty foot wide street running along the Chesapeake Bay's high water mark. *Id.*

abutting lot ("Lot 17"), or was it attached to the abutting lot. The parties agreed that the entire width of the street and the beach area to the north of the street, which was widened by accretion both vested in the abutting lot owner upon the local government's abandonment of the street.² A dispute developed when the original owners of Lot 17 conveyed the land underlying the abandoned street and its accretions as a separate parcel to Tidewater eight years after conveying Lot 17 to Harbour Gate's predecessor in title.³ Tidewater sought to eject Harbour Gate from the abandoned street and its accretions.⁴

The court stated that "a conveyance of land which is bounded by an abandoned road carries with it all the grantor's interest in the former road, unless a contrary intention is expressly set forth in the deed."⁵ The deeds conveying Lot 17 contained no reservation of the land underlying the abandoned street or its accretions. Therefore, the deeds conveyed all of the original owners' interest in the abandoned street and the accretions to Harbour Gate's predecessor in title.⁶ Accordingly, the original owner no longer had a property right in the road to convey to Tidewater.

B. *Adverse Possession*

In *Grappo v. Blanks*,⁷ Grappo sought to defend against Blanks' ejectment action by establishing title to a 3.68-acre tract of land through adverse possession, and by showing that Blanks was not

2. 240 Va. at 225, 396 S.E.2d at 663. The court noted that § 15-967.18 of the Code, in effect at the time of the 1962 abandonment, survived as § 15.1-483 of the Code. *Id.* Section 15.1-483 of the Code provides, in pertinent part, that an abandonment operates to:

vest fee simple title to the centerline of any streets, alleys or easements for public passage so vacated in the owners of abutting lots free and clear of any rights of the public or other owners of lots shown on the plat. . . . If any such street, alley or easement for public passage is located on the periphery of the plat, such title for the entire width thereof shall vest in such abutting lot owners.

VA. CODE ANN. § 15.1-483 (Repl. Vol. 1989).

3. *Tidewater Area Charities*, 240 Va. at 225, 396 S.E.2d at 664. The owners of Lot 17 at the time of the abandonment subsequently conveyed it to a Mr. Brown and made no mention of the abandoned street in the deed. In 1973, Brown conveyed Lot 17 to Harbour Gate, which built a high rise condominium on the waterfront property. A 1973 survey showed that the beach had widened 180 feet north of the north line of the abandoned street. *Id.* at 225, 396 S.E.2d at 663-64.

4. *Id.* at 226, 396 S.E.2d at 664.

5. *Id.* at 227, 396 S.E.2d at 665 (citing *Williams v. Miller*, 184 Va. 274, 35 S.E.2d 127 (1954)).

6. *Id.* at 228, 396 S.E.2d at 665.

7. 241 Va. 58, 59, 400 S.E.2d 168, 169 (1991).

the record owner of the property. The disputed 3.68-acre tract was originally part of thirty-two acres owned by Kibler. In 1942, Kibler conveyed the 3.68-acre tract to Strickler, who later conveyed it to Blanks. The remaining twenty-nine acres were conveyed to Menefee in 1948. In 1959, Menefee erected a fence around the boundaries of his 118 acres of land as well as Blanks' 3.68 acres, thereby separating the 3.68 acres from Blanks' other property. Until 1983, Menefee regularly maintained the fence and grazed cattle on the entire fenced tract. In 1983, Grappo purchased Menefee's farm. However, neither the deed nor the survey indicated that the property included Blanks' 3.68-acre tract.⁸

The court first reviewed the evidence relevant to Grappo's claim that Blanks did not own the property.⁹ The evidence showed that a surveyor had matched the monuments on the ground with the description in the deed to Blanks. The surveyor also testified, without challenge, that, in his opinion, the property conveyed to Strickler and Blanks were "one and the same."¹⁰ The court held that the factually supported and uncontradicted opinion of the surveyor was sufficient to affirm the trial court's finding that Blanks owned title to the contested property.¹¹

The court then determined, however, that the record supported a *prima facie* case of title by adverse possession for Menefee, Grappo's predecessor in title.¹² Menefee's possession of the 3.68-acre tract was actual, hostile, exclusive, visible, and continuous under a claim of right for more than the fifteen-year statutory period.¹³ The supreme court disagreed with the trial court's determination that Grappo failed to satisfy the claim of right element and stated that the claim of right element relates to "a possessor's intention to appropriate and use the land as his own to the exclusion of all others."¹⁴ Menefee's intention to possess the 3.68-acre tract under a claim of right was implied by his using and improving the

8. *Id.* at 60-61, 400 S.E.2d at 170.

9. *Id.* at 61, 400 S.E.2d at 170.

10. *Id.* at 60-61, 400 S.E.2d at 170.

11. *Id.* at 61, 400 S.E.2d at 170. The court cited *Swanenburg v. Bland*, 240 Va. 408, 422, 397 S.E.2d 859, 862 (1990), for the proposition that when evidence about the location of property lines is factually supported, uncontradicted, unimpeached and consistent with evidence in the record, the matter is one of law for the court to determine. *See infra* notes 171-80 and accompanying text.

12. *Grappo*, 241 Va. at 63, 400 S.E.2d at 171.

13. *Id.* at 61-62, 400 S.E.2d at 170-71; *see* VA. CODE ANN. § 8.01-236 (Repl. Vol. 1984).

14. *Grappo*, 241 Va. at 62, 400 S.E.2d at 170-71 (citing *Marion Inv. Co. v. Virginia Lincoln Furniture Corp.*, 171 Va. 170, 182, 198 S.E.2d 508, 513 (1938)).

property as if he owned it.¹⁵ The court found that there was sufficient evidence to present the issue of adverse possession to the jury and remanded the case.¹⁶

C. *Assignment of Rents*

The United States Bankruptcy Court for the Eastern District of Virginia, in *In re Oceanview/Virginia Beach Real Estate Association*,¹⁷ recently considered whether hotel room receipts constituted rent or personalty, an issue of first impression. The matter was brought before the court on a creditor's motion to prohibit the debtor's use of cash collateral under section 363(e) of the Bankruptcy Code.¹⁸ The creditor alleged that the debtor's hotel room receipts were rents subject to the creditor's lien, which was perfected through the recordation of an assignment of rents.¹⁹

The court examined Virginia law, as well as that of other jurisdictions, and determined that hotel rent receipts, which other jurisdictions have described as being similar to "accounts receivable," are personalty and not rents when derived from guests occupying rooms for less than thirty days.²⁰ Since the creditor did not file a financing statement to perfect a security interest in the hotel room receipts, the court refused to characterize the receipts as cash collateral.²¹

Another recent bankruptcy decision provides mortgagees with some guidance on how to draft assignment language which will entitle them to collect rental income without fear of violating the automatic stay in bankruptcy. In *In re Townside Partners, Ltd.*,²² the court reviewed Virginia law to determine whether post-petition rents collected by a Chapter 11 debtor-in-possession constituted

15. 241 Va. at 62-63, 400 S.E.2d at 171.

16. *Id.* at 63, 400 S.E.2d at 171-72.

17. 116 Bankr. 57 (Bankr. E.D. Va. 1990).

18. *Id.*; see 11 U.S.C. § 363(e) (1988) (secured creditor may prohibit or condition debtor's use of cash collateral).

19. *In re Oceanview*, 116 Bankr. at 58.

20. *Id.* at 58-59. The court noted that Virginia law distinguishes hotel guests from tenants. In particular, the Virginia Residential Landlord and Tenant Act, VA. CODE ANN. §§ 55-248.2 to .40 (Repl. Vol. 1986 & Cum. Supp. 1990), exempts from its jurisdiction occupancy in a hotel or motel "held out for transients, unless let continuously to one occupant for more than thirty days." VA. CODE ANN. § 55-248.5(4) (Repl. Vol. 1986).

21. *In re Oceanview*, 116 Bankr. at 59. To perfect a security interest in the hotel room receipts, the creditor needed to file a financing statement in accordance with § 8.9-302 of the Code. *Id.*; see VA. CODE ANN. § 8.9-302 (Cum. Supp. 1990).

22. 125 Bankr. 8 (Bankr. W.D. Va. 1991).

cash collateral.

The *Townside Partners* case involved a wrap deed of trust pursuant to which the debtor made a present and irrevocable assignment of rents, effective upon the execution of the deed of trust.²³ The court recognized that unless contracted otherwise, a mortgagee must take possession of the subject property before it is entitled to receive rental income.²⁴ However, relying on section 55-59 of the Code, the court viewed this deed of trust as a contract that governed the status of the rents.²⁵ The language of the deed of trust, when read as a whole, effected an absolute assignment of the rents immediately upon execution.²⁶ Because the assignment of the rents to the mortgagee was present and irrevocable, the rents constituted cash collateral in which the mortgagee held an interest even though the mortgagee was not in possession.²⁷

D. Contracts

1. Breach

Does “breach of contract” mean the same thing as “default in the performance of a contract” where the contract involves the construction and sale of a residence? The supreme court answered this question affirmatively in *Clevert v. Soden*.²⁸ Soden, a building contractor, agreed to sell a lot improved with a house to Clevert.²⁹

23. *Id.* at 9.

24. *Id.* at 10 (citing *Frayser's Adm'r. v. Richmond & A.R.R. Co.*, 81 Va. 388 (1886) (absent contractual provisions otherwise, mortgagee must be in possession to collect rental income)).

25. *In re Townside Partners*, 125 Bankr. at 10-11. Section 55-59 of the Code describes a deed of trust as being “in the nature of a contract.” VA. CODE ANN. § 55-59 (Repl. Vol. 1988).

26. *In re Townside Partners*, 125 Bankr. at 10. The court acknowledged a potential inconsistency between language in the deed of trust which stated “[i]n the event of default and without limiting the generality of the granting clauses hereof, the Grantor specifically hereby presently and irrevocably assigns . . . all rents . . . due or to become due,” and other language in the deed of trust, but determined that the clauses indicated a present and irrevocable assignment. *Id.* at 9-10.

27. *Id.* at 10-11.

28. 241 Va. 108, 400 S.E.2d 181 (1991).

29. *Id.* at 109, 400 S.E.2d at 182. The contract provided in part that:

[i]f either party *defaults in the performance of this contract*, such defaulting party shall be liable for the commission to which the agent would have been entitled if the contract had been performed and any expenses incurred by the non-defaulting party or agent, including reasonable attorneys' fees in connection with this transaction and the enforcement of this contract. The parties further agree that in the event purchaser shall default in the performance of this contract after its acceptance by seller, the deposit of [\$10,000] shall inure to and become the property of [Soden's real estate agent] and shall be applied as credit on the commission due by the defaulting party.

Clevert then sued Soden for damages in connection with breaches of the construction provisions of the contract. Clevert claimed unreasonable delays in completion and defective workmanship and materials. In addition, Clevert sought to recover attorney's fees and costs incurred in the suit, as provided for in the "default in the performance" provision of the contract.³⁰ The trial court held that although Soden breached the contract due to defective performance he did not default in his performance, because he ultimately completed and conveyed the house to Clevert. Therefore, Soden was not obligated to reimburse Clevert for attorney's fees and expenses.³¹

As a threshold matter, the supreme court considered Soden's argument that the contract provision obligated him to reimburse Clevert for attorney's fees and expenses only if those costs were incurred in an attempt to enforce the performance of the entire contract, which Soden characterized as primarily the sale of real estate.³² The court rejected this narrow interpretation of the contract, finding that the enforcement of the whole or a portion of the contract triggered the obligation to pay those expenses.³³

The court next considered the issue of default. Soden sought to ascribe a special meaning to the term "default." Referring to the harsh penalties imposed on a defaulting party under the contract, Soden argued that the parties intended that "default" allude to something "fairly grievous."³⁴ The court did not debate this point, but found that Soden's delay in completing the house and defective workmanship were hardly immaterial.³⁵

In an alternative and novel argument, Soden contended that the contract was essentially for the sale of real estate. Therefore, only Soden's failure to convey the property would constitute a default

Id. at 109-10, 400 S.E.2d at 182 (emphasis in original).

30. 241 Va. at 110, 400 S.E.2d at 182.

31. *Id.* at 110, 400 S.E.2d at 183.

32. *Id.*

33. *Id.* at 110-11, 400 S.E.2d at 183 (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 345(b), 346 comment (a) (1981) (enforcement of contract could be based on specific performance or on damages claim for total or partial breach)).

34. *Id.*

35. *Id.* Soden delayed 61 days in completing the house. Also, the trial court had awarded Clevert damages in an amount exceeding 10 percent of the purchase price for the house as compensation for Soden's defective materials and workmanship. The court regarded such default as "fairly grievous" and a material breach of the contract." *Id.*

thereunder.³⁶ The court noted two flaws in this argument. First, a comparison of the lot price and the component of the price attributable to Soden's construction of the house, revealed that Soden's obligation to construct the house was clearly a material component of the contract.³⁷ Second, Soden overlooked a provision of the contract which, by its terms, would result in a forfeiture of Clevert's deposit only if Clevert failed to close under the contract.³⁸ Therefore, it was unnecessary to adopt Soden's interpretation of "default" in order to avoid construing the contract to require Clevert's forfeiture of the deposit in the event of his breach of some immaterial duty.³⁹

Applying the plain meaning of the term "default," the court determined that Soden's furnishing of defective materials and workmanship constituted a default under his obligation as a contractor to build the house in a workmanlike manner.⁴⁰ Thus, Soden's defective performance constituted a default under the contract.⁴¹

The primary issue in *Bryant v. Peckinpaugh*,⁴² was whether the seller of a farm breached his contract with the purchaser or committed a fraud on the purchaser when he transferred the farm's tobacco allotment to a third party. A real estate agent showed the defendant's farm, which was for sale, to Peckinpaugh. Peckinpaugh asked the agent if the farm had a tobacco allotment, to which he replied "[F]or these figures you don't need to add it in, it's insignificant."⁴³ Peckinpaugh then submitted a signed contract to the agent, who delivered the contract to the seller on December 16, 1985. The contract did not address the tobacco allotment.⁴⁴

Prior to receiving the contract, the seller had reached an oral agreement with a third party for the sale of the tobacco allotment. On the morning of December 16, 1985, the seller transferred by written instrument the tobacco allotment to the third party in consideration of \$8,155.50.⁴⁵ The seller then executed the contract for

36. 241 Va. at 110-11.

37. *Id.* at 111-12, 400 S.E.2d at 183-84.

38. *Id.* at 112, 400 S.E.2d at 184.

39. *Id.*

40. *Id.* at 111, 400 S.E.2d at 183.

41. *Id.*

42. 241 Va. 172, 174, 400 S.E.2d 201, 202 (1991).

43. *Id.* at 174, 400 S.E.2d at 202.

44. *Id.* at 174, 400 S.E.2d at 203.

45. *Id.*

the sale of the property to Peckinpaugh.⁴⁶ Peckinpaugh did not learn until April of 1986 that the farm previously had a substantial tobacco allotment which had been sold.⁴⁷

On appeal, the supreme court held that Peckinpaugh failed to prove by clear and convincing evidence all of the elements of fraud.⁴⁸ The court characterized the agent's statement about the tobacco allotment as immaterial.⁴⁹ Additionally the court ruled that Peckinpaugh had failed to prove the reliance element of an action for fraud.⁵⁰

With respect to the breach of contract claim, the court noted that even though the contract did not specifically mention the tobacco allotment, such allotments run with the land.⁵¹ Therefore, the seller's transfer of the allotment to the third party constituted a breach of contract entitling Peckinpaugh to damages equal to the reasonable fair market value of the allotment.⁵²

2. Retraction of Repudiation

In *Vahabzadeh v. Mooney*,⁵³ a case of first impression, the Supreme Court of Virginia was asked to determine whether a seller had effectively retracted his repudiation of a contract for the sale of land. The parties executed a contract, but on numerous occasions thereafter, the seller stated that he would not sell the property unless the purchaser paid an additional \$400,000. The purchaser refused to pay the additional sum and demanded that the seller perform under the contract. The contract set the closing date for October 23, 1988, with time being of the essence.⁵⁴

The week before the scheduled closing, the seller sent the purchaser's attorney a letter stating that he would proceed to closing "provided we can work out a tax-free exchange."⁵⁵ Neither the seller nor his attorney made any subsequent efforts to arrange such

46. 241 Va. at 174, 400 S.E.2d at 203.

47. *Id.*

48. *Id.* at 175, 400 S.E.2d at 203.

49. *Id.*

50. *Id.* at 175-76, 400 S.E.2d at 203.

51. *Id.* at 176-77, 400 S.E.2d at 204. Transfers of tobacco allotments are governed by the Agricultural Adjustment Act of 1938. See 7 U.S.C. §§ 1281 to 1407 (1988).

52. *Bryant*, 241 Va. at 177-78, 400 S.E.2d at 204-05.

53. 241 Va. 47, 399 S.E.2d 803 (1991).

54. *Id.* at 48-49, 399 S.E.2d at 804.

55. *Id.* at 50, 399 S.E.2d at 804.

an exchange and the October 23, 1988 closing date passed. The purchaser's attorney rescheduled the closing for November 28, 1988, and notified the seller that the purchaser was ready, willing and able to close. The seller failed to tender a deed on the rescheduled closing date.⁵⁶

The trial court held that the seller effectively retracted his repudiation when he offered to proceed to settlement if a tax-free exchange could be arranged. Consequently, the purchaser's request for an order requiring the seller to perform was denied.⁵⁷ On appeal, the supreme court held that "to be effective, a retraction of a repudiation must be clear, definite, absolute, and unequivocal in evincing the repudiator's intention to honor his obligations under the contract."⁵⁸ The court found the seller's offer to close if a tax-free exchange could be arranged to be "indefinite and non-committal" and not an effective retraction of his earlier repudiation of the contract.⁵⁹

3. Specific Performance

A party to a contract cannot unilaterally waive a condition designed to benefit himself as well as other parties to the contract and obtain specific enforcement of the contract. *Flippo v. F & L Land Co.*⁶⁰ involved a four-party contract designed to effect a tax-free exchange of like-kind property and certain sums of cash by using an escrow agent to receive and transfer the parties' assets after various conditions had been satisfied.⁶¹ The exchange agreement conditioned settlement upon a simultaneous transfer of all the properties and provided that the agreement could only be amended by a writing signed by all of the parties. The agreement also specified a settlement date of July 31, 1988, but time was not of the essence.⁶² After several delays, settlement was scheduled for October 14, 1988, and time was made of the essence. When the transaction failed to close, F & L terminated the agreement.⁶³ Flippo initiated a suit against F & L and claimed he was entitled

56. *Id.* at 50, 399 S.E.2d at 804-05.

57. *Id.* at 50, 399 S.E.2d at 805.

58. *Id.* at 51, 399 S.E.2d at 805. The court applied the same standard used to determine whether a contract has been repudiated.

59. *Id.*

60. 241 Va. 15, 400 S.E.2d 156 (1991).

61. *Id.* at 17, 400 S.E.2d at 157.

62. *Id.* at 18, 400 S.E.2d at 157.

63. *Id.* at 19-20, 400 S.E.2d at 158-59.

to specific performance because he had waived the simultaneous closing provision of the agreement.⁶⁴

The supreme court affirmed the trial court's dismissal of Flippo's suit. First, Flippo was not prepared to close; he never delivered funds and executed documents to the escrow agent, as provided by the agreement.⁶⁵ Furthermore, the simultaneous closing provision of the agreement benefitted parties other than Flippo. Therefore, Flippo had no right to unilaterally waive this condition.⁶⁶

4. Tortious Interference

In *Century-21, Gail Boswell & Associates v. Elder*,⁶⁷ the supreme court considered whether a real estate agent's activities amounted to tortious interference with a contract for the purchase of a house and lot. The Blankses executed a written contract to purchase property from Elder conditioned on the closing of the sale of the Blankses' home. Subsequently, Dowdy, a real estate sales agent unaware of the contract between Elder and the Blankses, provided the Blankses with prices of other homes near the Elder property and showed them other properties in which they expressed an interest.⁶⁸

Disputes arose between the Blankses and Elder regarding the accuracy of certain representations made by Elder with respect to the property.⁶⁹ Consequently, the Blankses decided to sign a contract to purchase another house shown to them by Dowdy. While Dowdy was preparing the contract, the Blankses informed Dowdy that they had already entered into a contract to purchase the Elder property but that the contract was conditioned on the sale of the Blankses' home. Dowdy told the Blankses that if the condition was satisfied, the Blankses would be obligated to purchase the Elder property. Nevertheless, the Blankses proceeded to contract

64. 241 Va. at 18, 400 S.E.2d at 157.

65. *Id.* at 21-22, 400 S.E.2d at 159. The trial court's decision was based on six findings: (1) performance under the agreement required the participation of all the parties; (2) it was not established that a simultaneous transfer was possible; (3) the conditions of the agreement could not be unilaterally waived; (4) amendment of the agreement had to be in writing signed by all the parties; (5) it was not established that the parties were ready to settle or that they had delivered any funds or documents; and (6) it was not shown that the escrow agent was in a position to perform. *Id.* at 20-21, 400 S.E.2d at 159.

66. *Id.* at 22, 400 S.E.2d at 160.

67. 239 Va. 637, 638, 391 S.E.2d 296, 297 (1990).

68. *Id.* at 639-40, 391 S.E.2d at 297-98.

69. *Id.* at 639-40, 391 S.E.2d at 298.

for the purchase of the other property and subsequently purchased it after selling their own home. Elder then sued Dowdy for tortious interference with contractual rights.⁷⁰

The court found that Elder had failed to establish that Dowdy engaged in intentional interference that induced or caused the Blankses to breach the contract with Elder.⁷¹ The evidence indicated that Dowdy showed the Blankses additional properties at their request; that the Blankses requested information about the prices of other homes near the Elder property; and that the Blankses contracted to purchase the other property after Dowdy explained their liability under the contract with Elder.⁷²

E. Deeds

In *Gilbert v. Summers*,⁷³ Gilbert sought to establish title to approximately fifteen acres of timberland by either deed or adverse possession. Both Gilbert and Summers derived title to their parcels from Miller. However, their respective chains of title contained different property descriptions.⁷⁴ When experts were unable to locate various landmarks used in the 1905 deed from Miller to Summers' predecessor in title, the experts turned to a 1906 deed and subsequent deeds in the chain of title. This later deed contained a different metes and bounds description of the property and favored Summers.⁷⁵

The supreme court determined that the conflicting expert testimony as to the location of certain landmarks in the 1905 deed did not render the deed ambiguous. Rather, it merely raised an issue of fact for the jury to determine the location of those landmarks based on extrinsic evidence.⁷⁶ The court then held that the trial court erred by admitting into evidence the 1906 deed and subsequent deeds.⁷⁷

The supreme court also determined that the record lacked sufficient evidence to support Gilbert's claim of title by adverse posses-

70. 239 Va. at 640, 391 S.E.2d at 298.

71. *Id.* at 642, 391 S.E.2d at 299.

72. *Id.*

73. 240 Va. 155, 393 S.E.2d 213 (1990).

74. *Id.* at 156, 393 S.E.2d at 213.

75. *Id.* at 157, 393 S.E.2d at 214.

76. *Id.* at 158, 393 S.E.2d at 214-15 (citing 2 MINOR, THE LAW OF REAL PROPERTY § 1076 n.1 (F. Ribble 2d ed. 1928)).

77. *Id.* at 158-59, 393 S.E.2d at 215.

sion.⁷⁸ Since the record showed that the property contained no dwellings and had not been cultivated, the elements of adverse possession had not been satisfied.⁷⁹ While Summers' predecessors in title had cut timber and raised cattle on the property, nothing in the record indicated the length of time or the location of these activities.⁸⁰

F. *Deed of Trust Priority*

In *United States v. Lomas Mortgage, USA*,⁸¹ the United States District Court for the Western District of Virginia was asked to determine the rights of various parties whose liens on a parcel of land had been incorrectly indexed and recorded. Specifically, the government sought an injunction against foreclosure proceedings and a declaration of the rights of various parties in land subject to Farmers Home Administration (FmHA) trust deeds. Poff Construction, Inc. originally owned and subdivided the land in dispute and developed Tyson Hills subdivision.⁸² Poff obtained a construction loan from the National Home Acceptance Corporation (predecessor of Lomas) to finance the construction of a house on the disputed lot in the subdivision. The loan was secured by a recorded deed of trust.⁸³

Poff then conveyed the lot to the Chrisleys, who purchased it with a loan from the FmHA. The Chrisleys did not assume, nor did Poff pay, the National loan. Furthermore, the closing attorney for the Chrisleys, relying upon the property description in the grantor index when searching the title, found only a lien for the benefit of Virginia National Bank, which was paid from part of the sale proceeds. Unknown to the parties, the index incorrectly showed the lien from Poff to National on another lot rather than the lot acquired by the Chrisleys.⁸⁴ Additionally, Poff continued to meet the obligations of the loan without informing National or Lomas of the conveyance to the Chrisleys.⁸⁵

The Chrisleys then conveyed the property to Foulz, who also

78. 240 Va. at 160, 393 S.E.2d at 215-16.

79. *Id.* at 160, 393 S.E.2d at 216 (citation omitted).

80. *Id.*

81. 742 F. Supp. 936, 937-38 (W.D. Va. 1990).

82. *Id.* at 937.

83. *Id.*

84. *Id.* at 938.

85. *Id.*

made the purchase with a FmHA loan. Again, the conveyance was made without Lomas' knowledge and the National loan was neither assumed nor paid. Furthermore, the new closing attorney searched title back only to the point certified by the previous closing attorney and failed to find National's recorded deed of trust.⁸⁶

Six years later, Poff filed a Chapter 11 bankruptcy petition and stopped making payments on the loan. The government obtained a temporary injunction against any foreclosure on the property. The government argued that even though the National deed of trust was recorded prior to the FmHA deed of trust, the National deed of trust did not have priority because it was mis-indexed. Therefore, the government did not have notice of the prior deed of trust. Lomas argued that despite the mis-indexing, the government had constructive notice of the National deed of trust.⁸⁷

The court stated that whether or not the deed of trust was properly indexed was not a justiciable issue because section 55-96 of the Code provides that "[r]ecordation of an instrument constitutes constructive notice of the instrument to all subsequent purchasers and mortgagees."⁸⁸ Additionally, the court held that the person delivering the instrument for recordation is not responsible for proper indexing.⁸⁹ Consequently, because there was constructive notice in this case, the National deed of trust had priority over the subsequent FmHA deeds of trust.⁹⁰

G. Easements

1. Implied Easements

The Supreme Court of Virginia reviewed the elements necessary to establish an implied easement in *Stoney Creek Resort v. Newman*.⁹¹ The plaintiffs had acquired lakefront property by a deed which incorporated restrictions and conditions set forth in a sales

86. 742 F. Supp. at 938.

87. *Id.*

88. *Id.* at 939.

89. *Id.*

90. *Id.* The court also found unpersuasive the government's equitable defenses of estoppel and unclean hands to Lomas' foreclosure under the National deed of trust. The court stated that even if Poff had fraudulently represented that no other deeds of trust encumbered the property at the time the Chrisleys acquired the property, neither National nor Lomas could be held responsible for the misrepresentation. *Id.*

91. 240 Va. 461, 397 S.E.2d 878 (1990).

contract previously recorded with a separate deed.⁹² The conditions permitted lot owners to use the lake if they were members in good standing of the Singers Mountain Lake Outdoor Club. The plaintiffs and other lot owners used the lake and facilities for fourteen years without challenge until the lake property was conveyed to Stoney Creek Resort, Inc. From that time on, Stoney Creek denied the plaintiffs' use of the lake unless they paid a \$4,000.00 annual fee.⁹³

The defendants argued that the original deed and contract created only personal obligations upon the grantors to allow the plaintiffs to use the lake. The supreme court rejected this argument and found that the lot owners had an easement to use the lake.⁹⁴ The court found sufficient evidence that the use of the lake was "continuous, apparent, reasonably necessary for the enjoyment of the property conveyed, and in existence at the time of the conveyance."⁹⁵ These facts established the existence of an implied easement in favor of the lot owners.⁹⁶

In *Russakoff v. Scruggs*,⁹⁷ the owners of lakefront properties alleged that they were entitled to easement rights to use an adjoining lake. The lake, originally owned by developers of a subdivision, escheated to the state when they stopped paying taxes on the lake property.⁹⁸ Scruggs then purchased the lake property at a tax sale and, after building a fence around the lake and posting "no trespassing" signs thereon, sent a notice to the owners of the lakefront lots that they would be required to pay an annual fee to use the lake.⁹⁹

The Supreme Court of Virginia determined that the lot owners had established an easement by implication.¹⁰⁰ The record showed

92. 240 Va. at 463, 397 S.E.2d at 879.

93. *Id.* at 463-64, 397 S.E.2d at 880.

94. *Id.* at 464-65, 397 S.E.2d at 880.

95. *Id.* at 466-67, 397 S.E.2d at 881.

96. *Id.*

97. 241 Va. 135, 400 S.E.2d 529 (1991).

98. *Id.* at 137, 400 S.E.2d at 531.

99. *Id.*

100. *Id.* at 139-41, 400 S.E.2d at 532-33. The court set forth the elements of an easement as follows: "(1) the dominant and servient tracts [must] originate from a common grantor, (2) the use [must have been] in existence at the time of the severance, and . . . (3) the use must be apparent, continuous, and reasonably necessary for enjoyment of the dominant tract." *Id.* at 139, 400 S.E.2d at 532 (citations omitted). Justices Russell and Compton, however, expressed in their dissent that the lakefront lot owners' claim should have been barred by laches. The lakefront lot owners delayed four years before bringing the suit, during which

that (1) the lakefront lots and the lake property originated from a single tract of land; (2) the lake property was a servient tract used by the lakefront lot owners; and (3) the use of the lake property for boating, ice skating and as a source for lawn sprinkler systems was apparent at the time of Scruggs' acquisition, and was continuous and reasonably necessary for the enjoyment of the lakefront properties.¹⁰¹

2. Prescriptive Easements

In *Umbarger v. Phillips*,¹⁰² Umbarger appealed a trial court decision granting Phillips a prescriptive easement across Umbarger's land. Phillips' driveway, which was situated along the common boundary line between the parties' properties, extended on to Umbarger's property for distances up to sixteen feet. Constructed in 1945, the driveway had been used daily for ingress and egress to Phillips' property. In 1985, Umbarger erected a fence which blocked part of Phillips' driveway. Phillips removed the fence and sought to enjoin Umbarger from further interference with the right of way.¹⁰³

The supreme court examined the elements necessary to establish a prescriptive easement and determined that Phillips had established a rebuttable presumption that the use of the driveway was under a claim of right.¹⁰⁴ More importantly, the court rejected Umbarger's contention that the prescriptive easement failed because Umbarger did not have actual knowledge of and did not ac-

time Scruggs had invested over \$5,000 on physical improvements to the lake. *Id.* at 142, 400 S.E.2d at 534.

101. 241 Va. at 139-41, 400 S.E.2d at 532-33.

102. 240 Va. 120, 122, 393 S.E.2d 198, 198 (1990).

103. *Id.* at 122-23, 393 S.E.2d at 99.

104. *Id.* at 124, 393 S.E.2d at 199-200. The elements necessary to establish a right of way by prescription are that the use must be "adverse, under a claim of right, exclusive, continuous [for at least 20 years], uninterrupted, and with the knowledge and acquiescence of the owners of the land over which it passes," *Id.* (quoting *Ward v. Harper*, 234 Va. 68, 70, 360 S.E.2d 179, 181 (1987)). A presumption that the use is under a claim of right is created where the use of the right of way is open, visible, continuous and exclusive for more than 20 years. *Id.*, 393 S.E.2d at 200.

Phillips presented evidence that the driveway was used daily for ingress and egress for almost 40 years, and that they had "posted the driveway as private." *Id.* Nevertheless, Umbarger argued that Phillips could not claim the use was adverse because the daughter of the owners of the driveway testified at trial that the driveway was believed to have been constructed on Phillips' property. The court rejected this argument stating that a third party's assumption as to the user's intentions about the property was insufficient evidence to prove a mistaken intent. *Id.* at 124-25, 393 S.E.2d at 200.

quiesce to the adverse use of her property, even though the use was open, visible, and uninterrupted for almost forty years.¹⁰⁵ The court then articulated for the first time the standard to be applied in determining whether the owner of a servient estate has knowledge of the adverse use of her property. It stated that “[i]f the nature of the use was such that a reasonable person would discover its existence; i.e., open, continuous, uninterrupted, and obvious, the presumption [of an easement by prescription] arises, and it encompasses the elements of the landowner’s knowledge of the use.”¹⁰⁶

H. *Eminent Domain*

In *Sheffield v. Department of Highways and Transportation*,¹⁰⁷ the supreme court considered for the first time whether the common law action of ejectment is available to a landowner whose property has been taken wrongfully and without compensation for “highway purposes” by the state.¹⁰⁸ The state had condemned a parcel of land belonging to Mabel Farnsworth and Leona Farnsworth Eads. After the condemnation, the heirs of A.B. Lowe claimed ownership of the property and inquired into their rights as to the condemned property. They decided not to pursue their claim against the state for compensation. However, Sheffield purchased the property from the Lowe heirs several years later and filed an ejectment action against the state.¹⁰⁹

The court noted that the object of an action for ejectment is to determine who holds title and who is entitled to possession of real property.¹¹⁰ The court then stated that permitting ejectment suits against the state would be adverse to the public interest because it could result in the interruption of the public use of streets and highways.¹¹¹ The court agreed that landowners are entitled to en-

105. 240 Va. at 125-26, 393 S.E.2d at 200-01.

106. *Id.* at 126, 393 S.E.2d at 201. The court, noting that its rule conformed with rules adopted by the majority of other states, opined that a rule requiring the owner to have actual knowledge would “unfairly favor the absent or careless landowner.” *Id.* (citing THOMPSON, REAL PROPERTY, § 340, at 194 (1990)).

107. 240 Va. 332, 397 S.E.2d 802 (1990).

108. *Id.* at 333, 397 S.E.2d at 802.

109. *Id.* at 333-34, 397 S.E.2d at 802-03.

110. *Id.* at 335, 397 S.E.2d at 803.

111. *Id.* at 336, 397 S.E.2d at 804. The supreme court also stated that a landowner’s constitutional right is for just compensation, not for possession. *Id.*

Throughout the proceedings, the state asserted sovereign immunity as a bar to the land-

force their rights to just compensation in a common law action.¹¹² However, it ruled that the common law action of ejectment was not an appropriate remedy by which to pursue an inverse condemnation claim against the state.¹¹³

In *Hamer v. School Board*,¹¹⁴ the landowners appealed the trial court's condemnation of approximately fifty acres of property which the school board of the City of Chesapeake planned to use for a public high school. On appeal, the landowners challenged the necessity of the taking, contended that the school board should have carried the burden of proof as to the determination of just compensation and the selection of the site, and demanded a new trial because of improper remarks made by counsel for the school board.¹¹⁵

The supreme court, addressing the owners' contention that the school board should have borne the burden of proof as to the necessity of the taking, stated that the necessity of a taking is a legislative question not subject to review, provided a public purpose for the taking has been shown.¹¹⁶ However, the landowners' contention that the selection of the condemned site was arbitrary and capricious was entitled to judicial review. The supreme court ruled that the burden of persuasion and of going forward with evidence establishing a prima facie case that the condemned site was selected arbitrarily and capriciously or with manifest fraud rests upon the condemnee.¹¹⁷ The condemnor must then produce sufficient evidence to show that the issue was fairly debatable. In this case, the landowners failed to establish a prima facie case.¹¹⁸

The landowners also alleged that the trial court erred in not assigning to the board the burden of proving just compensation.¹¹⁹

owner's suit. *Id.* In finding that an ejectment action is not a remedy available to landowners against the state under these circumstances, the supreme court assumed, but did not decide, that sovereign immunity would not bar such an action. *Id.*

112. 240 Va. at 336, 397 S.E.2d at 804.

113. *Id.*

114. 240 Va. 66, 69, 393 S.E.2d 623, 625 (1990).

115. *Id.* at 69, 393 S.E.2d at 625.

116. *Id.* at 70, 393 S.E.2d at 625-26. The court noted that § 15.1-237 of the Code imposes some limitation on condemnation for certain specific purposes, imposing a judicial review of the necessity of those takings. However, public school uses are not uses which require judicial review pursuant to section 15.1-237. *Id.* at 70-71, 393 S.E.2d at 626; see VA. CODE ANN. § 15.1-237 (Repl. Vol. 1990).

117. *Hamer*, 240 Va. at 71-72, 393 S.E.2d at 626.

118. *Id.* at 72, 393 S.E.2d at 627.

119. *Id.*

On this issue of first impression, the court, after reviewing the history of condemnation law in England and Virginia, upheld the trial court's holding that the burden-of-proof principles applicable to actions at law are inapplicable to the determination of just compensation in condemnation proceedings.¹²⁰

Even though the supreme court upheld the trial court on three of the four issues presented on appeal, the court ultimately reversed and remanded the case for a new trial on the just compensation issue.¹²¹ The court agreed with the landowners that remarks by the board's counsel repeatedly appealed to the commissioners' personal financial interests as taxpayers and were sufficiently improper and prejudicial to warrant a new trial.¹²²

I. *Gifts Causa Mortis*

The supreme court addressed causa mortis gift delivery in *Brown v. Metz*.¹²³ This case is discussed in another article in this survey.¹²⁴

J. *Insurance*

1. Home Warranty

*Cobert v. Homeowner's Warranty Corp.*¹²⁵ involved a breach of contract action brought by owners of a new home seeking warranty performance from a home warranty corporation and a home warranty insurer. The supreme court was asked to decide whether the

120. 240 Va. at 72-74, 393 S.E.2d at 627-28. Commissioners are charged with independently ascertaining the value of condemned property. Unlike a jury, commissioners are not bound by expert opinion and are not required to make their determination based on the weight of the evidence presented. *Id.* at 73-74, 393 S.E.2d at 627-28.

The landowners in *Hamer* also failed to prevail on their theory that landowners have the right to open and close final arguments. Case law in Virginia gives the condemnor the right to open and close condemnation proceedings. *Id.* at 74, 393 S.E.2d at 628 (citing *Ryan v. Davis*, 201 Va. 79, 84-85, 109 S.E.2d 409, 414 (1959)).

121. *Id.* at 75-76, 393 S.E.2d at 628-29.

122. *Id.* The board's counsel had asked one expert witness "[i]s that what you are going to pay your money for?" and, during rebuttal argument, he instructed the commissioners to "[b]e fair, but be fair to yourself when you come in with your award." *Id.* at 75, 393 S.E.2d 628. In his dissent, Justice Compton did not view the comments as sufficiently egregious to warrant a new trial because the compensation award was within the range of conflicting evidence. *Id.* at 76-77, 393 S.E.2d at 629 (Compton, J., dissenting).

123. 240 Va. 127, 129, 393 S.E.2d 402, 403 (1990).

124. See Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 25 U. RICH. L. REV. 925 (1991).

125. 239 Va. 460, 391 S.E.2d 263 (1990).

homeowners were third-party beneficiaries under the insurance documents entered into by the builder, the home warranty corporation, and the home warranty insurer.¹²⁶

The homeowners informed their builder of several defects in their house which the builder failed to correct. The homeowners then pursued their claims against the home warranty insurer as third-party beneficiaries under the policy. The informal dispute settlement procedure did not produce satisfactory results and the homeowners subsequently initiated suit.¹²⁷

The trial court decided that the homeowners were not third-party beneficiaries under the home warranty corporation's products liability coverage provided to the builder. The supreme court reversed this ruling and found that the contract documents clearly intended to benefit the homeowners.¹²⁸ The court relied on the contract documents' definition of "purchaser" as a beneficiary of the insurance coverage and their provision for payments to the purchaser for builder defaults and major structural defects.¹²⁹

2. Title Insurance

In *Brenner v. Lawyers Title Insurance Corp.*,¹³⁰ the owners of adjoining property claimed a prescriptive easement over a corner of Brenner's property where a portion of a concrete driveway provided the only access from the adjoining property to a public street.¹³¹ The disputed portion also included land which was previously conveyed to the City of Alexandria for a storm sewer easement. Lawyers Title refused to defend Brenner against the adjoining property owners' prescriptive easement claim because

126. *Id.* at 461, 391 S.E.2d at 263.

127. *Id.* at 464, 391 S.E.2d at 265.

128. *Id.* at 466, 391 S.E.2d at 266.

129. *Id.* The supreme court rejected the home warranty corporation's argument that the contract documents were controlled by the federal Product Liability Risk Retention Act and not state law. *Id.* at 465-66, 391 S.E.2d at 265. Congress enacted the Product Liability Risk Retention Act, 15 U.S.C. §§ 3901 to 3906 (1988), in 1981 to enable businesses to create risk retention groups where manufacturers, including home builders, could self-insure. The court determined that the federal legislation does not change or preempt the tort or contract law of the states. *Cobert*, 239 Va. at 465, 391 S.E.2d at 265-66 (citing *Home Warranty Corp. v. Elliott*, 572 F. Supp. 1059, 1061 (D. Del. 1983); *Home Warranty Corp. v. Caldwell*, 777 F.2d 1455, 1473 (11th Cir. 1985), *cert. denied*, 479 U.S. 852 (1986)).

130. 240 Va. 185, 397 S.E.2d 100 (1990).

131. *Id.* at 187, 397 S.E.2d at 101. The facts revealed continuous use of the driveway for over 43 years. *Id.* at 190, 397 S.E.2d at 102. Brenner knew of the existence and daily use of the driveway when she purchased the property. *Id.* at 191, 397 S.E.2d at 103.

Brenner's owner's policy contained a survey exception.¹³²

Brenner alleged that the claim against her property affected the entire storm sewer easement area, not just the driveway portion, and that the insurer had a duty to defend against such a claim on title.¹³³ The supreme court, however, disagreed and determined that the prescriptive easement claim applied only to the area affected by the driveway and that the duty of the insurer to defend applies only to the actual claim. The driveway would have been disclosed by a survey and thus fell within the survey exception of the policy.¹³⁴ Because Lawyers Title would not have been liable for any judgment stemming from the prescriptive easement claim, it had no duty to defend against the claim.¹³⁵

K. *Landlord and Tenant*

1. Continuous Use Clause

In *Bradlees Tidewater v. Walnut Hill Investment, Inc.*,¹³⁶ Bradlees appealed an injunction ordering it to operate a retail business on leased premises for not less than six hours a day, six days a week. The landlord obtained the injunction to enforce the continuous use provision in Bradlees' lease.¹³⁷ Bradlees, the anchor tenant in the shopping center, had entered an agreement to assign its lease to the Hechinger Company. The landlord objected to the assignment because Hechinger did not plan to occupy the premises.¹³⁸

The landlord claimed that the loss of Bradlees as the anchor

132. *Id.* at 190, 397 S.E.2d at 102. The survey exception denied coverage for encroachments or matters not of record that would have been revealed by an accurate survey. *Id.*

133. 240 Va. at 191, 397 S.E.2d at 103. Brenner based this allegation on language in the quitclaim deed to the abutting landowners which conveyed the grantor's right, title and interest to that portion of Villa Site "A" (Brenner's property) which was subject to the storm sewer easement granted to the city. *Id.* at 190-91, 397 S.E.2d at 103.

134. *Id.* at 192, 397 S.E.2d at 103. The court acknowledged that coverage may have been afforded under the policy if a claim had been made against the larger easement area pursuant to the quitclaim language, for "[t]he insurer's obligation to defend is broader than its obligation to pay." *Id.* at 189, 397 S.E.2d at 104 (citing *Lerner v. General Ins. Co. of America*, 219 Va. 101, 102, 245 S.E.2d 249, 251 (1978)). But such a claim was not made. *Id.* Thus, "if it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations, 'it has no duty even to defend.'" *Id.* (quoting *Travelers Indem. Co. v. Obershain*, 219 Va. 44, 46, 245 S.E.2d 247, 249 (1978)).

135. *Id.* at 193, 397 S.E.2d at 104.

136. 239 Va. 468, 391 S.E.2d 304 (1990).

137. *Id.* at 469, 391 S.E.2d at 305.

138. *Id.* at 470, 391 S.E.2d at 305.

tenant would cause the center to lose its economic viability and that an exception to the general rule that irreparable damages must be proven should apply for the landlord's benefit.¹³⁹ The court rejected this argument and stated that the landlord failed to prove irreparable damage in support of its request for an injunction.¹⁴⁰

The court noted that the five-year-period set forth in the lease, during which Bradlees was required to function as an anchor tenant, had expired. Additionally, by the terms of the lease, Bradlees was free after that same five year period to assign its interest in the lease, in whole or in part, to any lawful retail business.¹⁴¹ Those lease provisions significantly weakened the landlord's argument that the shopping center's economic well-being rested on the continued operation of the Bradlees store. Therefore, the court ruled that the trial court erred in granting injunctive relief because the landlord failed to prove irreparable damages.¹⁴²

2. Use Restrictions

The primary issue in *Marriott Corp. v. Combined Properties, Ltd. Partnership*,¹⁴³ was whether the phrase "drive-in food establishment" in a use restriction clause of Marriott's lease prohibited the landlord from leasing space to McDonald's Corporation for the purpose of constructing and operating a McDonald's restaurant. In 1967, predecessors of Marriott and the landlord entered into a lease which contained the following non-competition provision:

Landlord covenants that Landlord will not at any time during the continuance of this Lease directly or indirectly engage primarily in the business of operating a drive-in food establishment within an area of 2,000 feet in any direction of the Leased Premises; nor will Landlord, except with respect to present tenants of property owned by Landlord presently engaged in such business, sell, rent, or permit

139. 239 Va. at 472, 391 S.E.2d at 306. The landlord, citing *Southern R. Co. v. Franklin & P.R. Co.*, 96 Va. 693, 32 S.E. 485 (1899), argued that an injunction is an appropriate remedy when a lease requires continued operation of a business and "where clear and uncontradicted evidence of the breach and resulting injury is presented." *Id.* The court found *Southern*, which dealt with the effect of a statute requiring forfeiture of an abandoned railroad on an agreement by which a lessee was bound to operate a railroad, inapposite to the case at bar. *Id.*

140. *Id.* at 473, 391 S.E.2d at 307.

141. *Id.* at 475, 391 S.E.2d at 308.

142. *Id.*

143. 239 Va. 506, 391 S.E.2d 313 (1990).

any land owned or controlled by Landlord to be used for such purpose during such period in such area. With respect to property sold or leased by Landlord subject to the restrictions of this Section, appropriate covenants will be made a part of any deed or lease in order to accomplish the objectives hereof.¹⁴⁴

The supreme court deferred to the trial court's conclusion that in 1967 the plain and ordinary meaning of the phrase "drive-in food establishment" referred to one of two types of establishments.¹⁴⁵ One was a car-hop or curbside service type establishment where the customer parked his car on the lot, placed his order, had the order delivered to the car, and consumed the food in the car. The other type of establishment required the customer to park on the lot, leave the car, purchase his food at a window, and return to his car to consume the food.¹⁴⁶ In both cases, food was consumed in cars on the lots.

The proposed McDonald's restaurant, the court noted, would include inside seating for 122 customers and a "drive through" feature where the customer places and picks up his order from a window and then drives away. In addition, the court noted that only about one percent of McDonald's food is eaten in cars on parking lots.¹⁴⁷

The supreme court upheld the trial court's determination that the parties' intent at the time the lease was executed was to protect Marriott from competition from drive-in food establishments of the two types discussed above.¹⁴⁸ The proposed McDonald's did not fall into the prohibited category. The court refused to expand the protection afforded by the plain meaning of the non-competition provision to include all similar competitors, even though those competitors evolved from the establishments targeted in the provision.¹⁴⁹

144. 239 Va. at 508, 391 S.E.2d at 314.

145. *Id.* at 509-10, 391 S.E.2d at 315.

146. *Id.*

147. *Id.* at 511, 391 S.E.2d at 316.

148. *Id.*

149. *Id.* at 512, 391 S.E.2d at 317.

3. Insurable Interests

In *Scottsdale Insurance Co. v. Glick*,¹⁵⁰ the Supreme Court of Virginia interpreted a lease and a liability insurance policy. Greca, Ltd. ("Greca") leased the first floor of a building from the Glicks. Pursuant to the lease, Greca's liability insurance, carried by Scottsdale Insurance Company ("Scottsdale"), listed the Glicks as additional insureds.¹⁵¹ Subsequently, a police officer and a fireman investigating a reported burglary at the building were injured when an exterior stairway leading from the first floor to the second floor collapsed. The officer and the fireman sued Greca and the Glicks. However Scottsdale refused coverage under the liability policy.¹⁵² Greca and the Glicks sought a declaratory judgment interpreting the lease and the insurance policy.

Scottsdale and Greca challenged the trial court's determination that the stairway was a part of the leased premises and covered by the policy. While the court disagreed with the trial court that the stairway was a part of the leased premises, it determined that Greca nevertheless had an insurable interest in the stairway.¹⁵³ The court found that notwithstanding Greca's lack of any legal or equitable property interest in the stairway, Greca did have an insurable interest in the safety of persons who may bring suit to recover damages, such as the officer and fireman.¹⁵⁴ The court determined that the burglary investigation was incidental to the operation of the restaurant, and, therefore, within the coverage afforded by the liability policy.¹⁵⁵

The court also interpreted an indemnification provision in the lease which provided as follows:

Tenant agrees that he will indemnify and save the Landlord harmless from any and all liability, damage, expense, cause of action, suit,

150. 240 Va. 283, 397 S.E.2d 105 (1990).

151. *Id.* at 285, 397 S.E.2d at 106.

152. *Id.* at 286, 397 S.E.2d at 107.

153. *Id.* at 288, 397 S.E.2d at 107. The leased premises described in the lease included "the first floor of the building with improvements thereon." *Id.* at 286, 397 S.E.2d at 107. The court noted that the "stairway was neither a part of the first floor nor an 'improvement thereon.'" *Id.* at 287, 397 S.E.2d at 107.

154. *Id.* at 287, 397 S.E.2d at 107.

155. *Id.* at 289, 397 S.E.2d at 108. The policy insured against damages incurred by Greca because of bodily injury "caused by an occurrence and arising out of the ownership, maintenance or use of the insured premises and *all operations necessary or incidental thereto.*" *Id.* at 288, 397 S.E.2d at 108 (emphasis in original).

claim or judgment arising from injuries to person or property on the demised premises, or upon the adjoining sidewalks or parking lots which arise out of any alleged act, failure to act or negligence of Tenant, its agents or employees.¹⁵⁶

Even though the court stated that this language did not constitute an unqualified obligation to indemnify the Glicks, it did require Greca to indemnify the Glicks against the acts or omissions of Greca. Nevertheless, since the Glicks were named as additional insureds in the liability policy, Scottsdale was still obligated to defend the Glicks.¹⁵⁷

L. *Lien Enforcement*

The Supreme Court of Virginia considered the validity of a lienor's sale of a motor vehicle at public auction in *Newport News Shipbuilding Employees' Credit Union v. B & L Auto Body*.¹⁵⁸ This case is discussed in another portion of this survey.¹⁵⁹

M. *Mechanic's Liens*

In the case *In re Richardson Builders*,¹⁶⁰ the court considered whether the bankruptcy of a general contractor stays the suits of subcontractors to enforce mechanics' liens, even though the general contractor has no interest in the real property to which the liens attach. A subcontractor sought relief from the automatic stay. The bankruptcy court noted that relief from the automatic stay is necessary before enforcement of a subcontractor's mechanic's lien because a general contractor is a necessary party under Virginia statutes.¹⁶¹

Under Virginia law, a subcontractor can only enforce a lien against a general contractor if the owner owes the general contractor money. Therefore, the indebtedness of the owner to the general contractor will always be an issue in a subcontractor's claim.¹⁶² Additionally, under section 362(a)(4) of the Bankruptcy Code, the in-

156. *Id.* at 290, 397 S.E.2d at 109.

157. 240 Va. at 290, 397 S.E.2d at 109.

158. 241 Va. 31, 400 S.E.2d 512 (1991).

159. See Herbert, *Commercial Law: Annual Survey of Virginia Law*, 25 U. RICH. L. REV. 681 (1991).

160. 123 Bankr. 736 (Bankr. W.D. Va. 1990).

161. *Id.* at 739; VA. CODE ANN. §§ 43-7, -9 (Repl. Vol. 1990).

162. *In re Richardson*, 123 Bankr. at 738-40.

debtedness of the owner to the general contractor is included in the debtor's estate.¹⁶³ Since both the owner and the general contractor may have interests to protect or advance in an enforcement action by a subcontractor, the court concluded that the automatic stay does apply to a subcontractor's mechanic's lien enforcement action against a general contractor who does not possess an ownership interest in the real property.¹⁶⁴ Therefore, relief from the stay is a condition to pursuing enforcement of the lien.¹⁶⁵

N. *Real Estate Brokers*

In *Kuga v. Chang*,¹⁶⁶ the sellers of a residence appealed from a trial court order granting a real estate agent her commission and a share of the earnest money deposit, even though the purchaser procured by the agent refused to close on the property. The purchaser found another home which he preferred over the Kuga home and repudiated the contract. Contrary to the trial court's findings, the sellers contended that the contract language, which made the commission payable on the sales price and deductible from the sale proceeds, made the employment contract a special contract rather than a general contract.¹⁶⁷

The supreme court determined that both the listing agreement and the sales contract, when read together, were the employment contract between the seller and the agent.¹⁶⁸ The listing agreement entitled the agent to a commission upon producing a ready, willing and able purchaser. The deposit forfeiture provision in the sales contract was not sufficient to transform this general employment

163. *Id.* at 738; 11 U.S.C. § 362(a)(4) (1989).

164. *In re Richardson*, 123 Bankr. at 738. The court noted that applying the automatic stay to subcontractors' enforcement suits against general contractors who had petitioned for bankruptcy promoted two policies. The stay prevents a race to the courthouse by subcontractors, and it prevents similar creditors from being treated differently in the bankruptcy. *Id.* at 741.

165. *Id.* at 738.

166. 241 Va. 179, 182, 399 S.E.2d 816, 818 (1991).

167. *Id.* at 181-82, 399 S.E.2d at 818. Under a general contract of employment, an agent enjoys an inchoate right to the commission set forth in the contract if he produces a purchaser who is ready, willing, and able to perform under the terms of the contract, and who is accepted by the seller. *Id.* The inchoate nature of the agent's right to the commission was emphasized by the supreme court. The right becomes actionable if the failure to close is not due to the fault of the agent, regardless of whether it is the seller or the purchaser who defaults. *Id.* If the parties condition the payment of the commission upon the receipt of the purchase price or some other event, then the contract of employment is considered "special" and not governed by the above-stated rule. *Id.* at 183, 399 S.E.2d at 819.

168. *Id.* at 184, 399 S.E.2d at 819.

contract into a special contract.¹⁶⁹ The court also rejected the sellers' argument that the real estate agent should have been limited to a share of the forfeited deposit pursuant to the forfeiture provision. The forfeiture provision provided the agent with an option by which the agent could obtain her commission, not an "exclusive source of compensation . . . in the event of default by the purchaser."¹⁷⁰

O. *Riparian Rights*

*Swanenburg v. Bland*¹⁷¹ involved a dispute among three landowners whose adjoining properties fronted on the north side of a navigable river. The owners of the peripheral lots obtained an injunction which prohibited the owner of the middle lot from constructing a pier extending to the line of navigation.¹⁷² On appeal, the owner of the triangularly shaped middle lot claimed that his lot lines, if extended into the river, would converge at a point south of the mean low-water mark, thus giving him statutory riparian rights.¹⁷³

The supreme court agreed with the middle lot owner, reversed the trial court's finding, and remanded the case to have the middle lot owner's riparian rights determined.¹⁷⁴ The trial court erred in deciding that the mean low-water mark was south of the point of convergence of the middle lot owner's lot lines without probative evidence to support that finding. The only probative evidence before the trial court which located the mean low-water mark was uncontradicted testimony presented by the middle lot owner's surveyor.¹⁷⁵ The evidence submitted by a surveyor retained by the owners of the peripheral lots and relied upon by the trial court failed to indicate where the mean low-water mark was located and contained no factual basis. Because the testimony of the middle lot

169. *Id.* at 184-85, 399 S.E.2d at 819-20.

170. 241 Va. at 184-85, 399 S.E.2d at 819-20. The forfeiture provision of the contract provided that if the purchaser failed to close then the deposit could be forfeited at the option of the seller and/or the agent. If forfeited, the deposit would be divided equally between the seller and agent. *Id.*

171. 240 Va. 408, 397 S.E.2d 859 (1990).

172. *Id.* at 410, 397 S.E.2d at 860.

173. *Id.*; see VA. CODE ANN. § 62.1-2 (Repl. Vol. 1987). Section 62.1-2 of the Code provides that the rights and privileges of landowners whose property is situated on rivers extends to the mean low-water mark.

174. *Swanenburg*, 240 Va. at 413-14, 397 S.E.2d at 862.

175. *Id.* at 412, 397 S.E.2d at 861.

owner's surveyor was uncontradicted, the supreme court ruled that the trial court should have found in favor of the middle lot owner.¹⁷⁶

In *Zappulla v. Crown*,¹⁷⁷ the Supreme Court of Virginia considered the authority of the Marine Resources Commission ("MRC") to determine the riparian rights of private landowners. The MRC had granted a permit to Crown, the operator of a marina, to construct additional piers and boat slips. The adjoining landowner, Zappulla, alleged that the enlargement of the marina would encroach upon his underwater flats and sought a declaratory judgment to determine his riparian rights and to void the MRC's actions as to any determination of his riparian rights. The trial court ruled that the MRC decision was dispositive and *res judicata* because no appeal had been taken from the MRC decision.¹⁷⁸

The supreme court held that "the sole jurisdiction to resolve conflicting private riparian claims is vested in a court of equity."¹⁷⁹ The MRC has jurisdiction only to determine the rights of an applicant and the public in state-owned bottomlands. The MRC's action in issuing a permit to one riparian landowner had no effect on the private rights of another riparian landowner.¹⁸⁰

P. Taxation

Whether a tax assessor gave proper consideration to contract rent as relevant evidence of economic rent when assessing two commercial properties in Fairfax County was at issue in *Tyson's International, Ltd. Partnership v. Board of Supervisors*.¹⁸¹ Tyson's

176. *Id.* at 414, 397 S.E.2d at 862. The court found that the testimony given by the surveyor retained by the peripheral lot owners lacked a factual basis. "If a surveyor does not have a factual basis for his location of a property line, his conclusion regarding its position is not evidence of its location." *Id.* (citing *Gilbert v. Summers*, 240 Va. 155, 159-60, 392 S.E.2d 213, 215 (1990)); see *infra* notes 73 to 80 and accompanying text.

177. 239 Va. 566, 391 S.E.2d 65 (1990).

178. *Id.* at 568, 391 S.E.2d at 66.

179. *Id.* at 569, 391 S.E.2d at 67.

180. *Id.* at 570-71, 391 S.E.2d at 67-68; see VA. CODE ANN. § 62.1-3 (Cum. Supp. 1991) (MRC authority to issue permits for wharves in waters opposite those of riparian landowners).

181. 241 Va. 5, 400 S.E.2d 151 (1991). This same issue regarding Fairfax County's economic rent methodology of assessing commercial property has been considered by the supreme court on four previous occasions and each time it was found that contract rent had not been properly considered. *Id.* at 7, 400 S.E.2d at 151; see *Smith v. Board of Supervisors*, 234 Va. 250, 361 S.E.2d 351 (1987); *Nassif v. Board of Supervisors*, 231 Va. 472, 345 S.E.2d 520 (1986); *Board of Supervisors v. Donatelli & Klein*, 228 Va. 620, 325 S.E.2d 342 (1985);

argued that the county, in capitalizing the income from the properties, considered market rent but failed to consider contract rent.¹⁸² The supreme court found that the actual income and expenses submitted by the taxpayers as evidence of contract rent were not used for calculating market rent because the assessor viewed them as too low and not indicative of economic rent.¹⁸³ Instead, the assessor had used a formula based on market data, figures produced by the county from surveys of rental income and expenses reported by taxpayers, and information from deeds, deeds of trusts, and on-site inspections of buildings.¹⁸⁴ The supreme court ruled that the assessor's methodology for calculating economic rent was faulty because he failed to factor contract rent into the formula.¹⁸⁵ The court adopted Tysons' actual rent as the fair market value of the properties for purposes of the assessment and relieved Tysons from any erroneous taxes.¹⁸⁶

The Virginia Constitution requires that property tax assessments must be based on the property's fair market value.¹⁸⁷ In *Arlington County v. Department of Taxation*,¹⁸⁸ the supreme court was asked to determine whether the unit method, an appraisal technique used to assess railroad real estate, was constitutional. The case involved 420 acres of property in northern Virginia owned by the Richmond, Fredericksburg and Potomac Railroad (RF&P) and known as the Potomac Yard.¹⁸⁹

In 1984, the task of assessing railroad properties shifted from the State Corporation Commission ("SCC") to the Department of Tax-

Fairfax County v. Nassif, 223 Va. 400, 290 S.E.2d 822 (1982).

182. *Tysons Int'l, Ltd. Partnership*, 241 Va. at 8, 400 S.E.2d at 152. Economic rent is the amount a typical tenant is willing to pay for premises during a certain period of time. *Id.* at 6 n.1, 400 S.E.2d at 151 n.1. Contract rent is the actual income and expenses relating to the premises. *Id.*

183. 241 Va. at 10, 400 S.E.2d at 154.

184. *Id.* at 8-9, 400 S.E.2d at 152-53. After determining income, losses and expenses are then deducted to derive an expense ratio and a net operating income for the building being assessed. The actual income and expenses of the building are then compared to the county's estimated economic rent derived from the market data. *Id.*

185. *Id.* at 12, 400 S.E.2d at 155.

186. *Id.* at 12-13, 400 S.E.2d at 155. In his dissent, Justice Compton stated that the taxpayers' evidence of actual income and expenses needed only to be considered, not adopted. *Id.* at 13, 400 S.E.2d at 155 (Compton, J., dissenting). He stated that the trial court's finding that the county had reviewed the taxpayers' evidence should be binding on appeal. *Id.*

187. VA. CONST. art. X, § 2.

188. 240 Va. 108, 393 S.E.2d 194 (1990).

189. *Id.* at 110, 393 S.E.2d at 195. The Potomac Yard is used as a railroad marshalling yard. *Id.*

ation ("Department"). The SCC had used a market value review of comparable properties to appraise the Potomac Yard, but when the Department appraised the land in 1984, it used the unit method.¹⁹⁰ The unit method resulted in much lower appraisals upon which the local taxing jurisdictions, such as Arlington County, could apply its tax rates. Arlington County's "Application For Correction of Erroneous Assessment" was denied by the trial court and the county appealed.¹⁹¹

The Department argued that it was within the tax commissioner's field of discretion to use the unit method of appraisal.¹⁹² The county argued that the Department was without legal authority to use the unit method.¹⁹³ The supreme court stated that real estate assessments should be based on the property's fair market value determined by considering "its highest and best use in its *particular* location."¹⁹⁴ The Department's appraisal of the Potomac Yard reflected its fair market value as part of the railroad unit, but not its fair market value in its particular location. The court held that the unit method is not an appropriate method of appraisal when it does not reflect the fair market value of the specific property.¹⁹⁵ Therefore, the court ruled that the Department's assessments of the Potomac Yard were not valid because they did not reflect the fair market value of the property in its particular location, as required by the state constitution.¹⁹⁶

190. *Id.* at 110-11, 393 S.E.2d at 195-96. The unit method considers all of the railroad property as a single operating unit. The first step in the formula is to capitalize the railroad's weighted average net income by dividing it by the weighted average cost of debt or equity. Then estimated values of certain types or units of railroad properties are deducted from the capitalized value. The assessed value is then divided proportionately among the local taxing jurisdictions. *Id.* at 108-110, 393 S.E.2d at 185. The unit method is a component of the capitalization of income method, which is one of the generally accepted approaches used to assess real estate. *Id.* at 112, 393 S.E.2d at 196-97.

191. *Id.* at 110-11, 393 S.E.2d at 195-96. The Potomac Yard was appraised at \$80,820,700 by the SCC market value review in 1983 and at \$6,882,152 by the Department unit method in 1984. *Id.*

192. *Id.* This argument was based on §§ 58.1-202(1) and 58.1-2655 of the Code. See VA. CODE ANN. § 58.1-202(1) (Repl. Vol. 1991) (commissioner has power to ascertain best method); *Id.* § 58.1-2655 (assess railroad real property on best, most reliable information).

193. *County Board of Arlington County*, 240 Va. at 112, 393 S.E.2d at 196.

194. *Id.* (emphasis in original).

195. *Id.* at 112-14, 393 S.E.2d at 190-97. The Department's appraisal was found to be the Potomac Yard's "use value" defined as "*the value a specific property has for a specific use.*" *Id.* at 112, 393 S.E.2d at 196 (quoting AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, *THE APPRAISAL OF REAL ESTATE* 20 (9th ed. 1987 (emphasis in original))).

196. *Id.* at 114, 393 S.E.2d at 197.

Q. Zoning

1. Changed Circumstances

In *Seabrooke Partners v. City of Chesapeake*,¹⁹⁷ the supreme court considered whether changed circumstances operated to divest Seabrooke Partners, the owner of a 9.88 acre parcel, of its rights to multi-family zoning. The key issue in *Seabrooke Partners* was whether the residential character of the neighborhood surrounding the parcel zoned multi-family residential had changed sufficiently to justify the city's downzoning of the property to the lower density classification of single family dwellings.¹⁹⁸ The original thirty-four-acre tract, of which the 9.88 acre parcel was a part, had been previously rezoned from single-family to multi-family, but was never developed as multi-family. The original owner developed approximately one-half the tract as single-family, under the condition that the remaining property would be downzoned. The owner contracted to sell the 9.88 acre parcel to Seabrooke, which intended to construct an apartment complex. Soon thereafter, the city downzoned the property to single-family, and Seabrooke challenged the downzoning.¹⁹⁹

Applying well-settled principles of judicial review, the court presumed that the city's legislative action of downzoning the subject parcel was reasonable.²⁰⁰ However, the court stated that in downzoning cases:

[w]hen an aggrieved landowner makes a *prima facie* showing that since enactment of the prior ordinance there has been no change in circumstances substantially affecting the public health, safety, or welfare, the burden of going forward with evidence of such mistake, fraud or changed circumstances shifts to the governing body. If the governing body produces evidence sufficient to make reasonableness fairly debatable, the ordinance must be sustained.²⁰¹

Seabrooke Partners advanced a *prima facie* showing of unreasonableness through the testimony of an expert who stated that the neighborhood contained a variety of single and multi-family resi-

197. 240 Va. 102, 393 S.E.2d 191 (1990).

198. 240 Va. at 103, 393 S.E.2d at 192.

199. *Id.* at 103-04, 393 S.E.2d at 192-93.

200. *Id.* at 105, 393 S.E.2d at 193.

201. *Id.* at 106, 393 S.E.2d at 193 (citing *Fairfax County v. Snell Corp.*, 214 Va. 655, 658-59, 202 S.E.2d 889, 892-93 (1974)).

dences and that there had been no change in circumstances since the city rezoned the parcel for multi-family use. The city, however, defined the neighborhood as the entire thirty-four-acre tract plus adjacent areas, most of which were zoned single-family. The city contended that the neighborhood had changed to the extent that a multi-family use would have been surrounded by single-family homes.²⁰² The court upheld the downzoning, finding that the city's evidence of reasonableness in downzoning the parcel based on changed circumstances was sufficient to characterize the need for the downzoning as fairly debatable.²⁰³

2. Conditional Use Permits

In *County of Lancaster v. Cowardin*,²⁰⁴ the county appealed the trial court's decision overturning the county's denial of the applications of two landowners for conditional use permits to construct boathouses on their respective properties. The properties of both landowners were zoned A-2, which permitted boathouses with a conditional use permit.²⁰⁵

Because both zoning enactments and rulings on applications for conditional use permits constitute legislative action, the supreme court applied the "fairly debatable" analysis used in *Seabrooke* to the county's denial of the conditional use permits.²⁰⁶ The court determined that the denial of the conditional use permits was probative evidence of unreasonableness because the relevant zoning ordinance specifically permitted boathouses in A-2 districts.²⁰⁷ The burden then fell on the county to produce evidence of reasonableness sufficient to make the issue fairly debatable. Upon examining the facts and circumstances of each case, the court determined that the county had carried its burden.²⁰⁸ One of the landowners did not possess a certificate of occupancy, a condition precedent to the issuance of a conditional use permit. The county denied the other landowner's application because the location of a boathouse,

202. *Id.* at 106-07, 393 S.E.2d at 193-94.

203. 240 Va. at 107, 393 S.E.2d at 194.

204. 239 Va. 522, 524, 391 S.E.2d 267, 268 (1990).

205. *Id.* at 523 n.1, 391 S.E.2d at 268 n.1.

206. *Id.* at 525, 391 S.E.2d at 269. The presumption of legislative validity can only be overcome with probative evidence of unreasonableness that is so strong that no evidence of reasonableness would be sufficient to make the issue fairly debatable. *Id.* at 526, 391 S.E.2d at 269.

207. *Id.* at 526, 391 S.E.2d at 269.

208. *Id.* at 527, 391 S.E.2d at 269.

where no others existed, would have adversely affected the local waterway.²⁰⁹

3. Referenda

In *R.G. Moore Building Corp. v. Committee for the Repeal of Ordinance R(C)-88-13*,²¹⁰ the supreme court was asked to decide whether the referendum provisions of the municipal charter of the City of Chesapeake apply to zoning amendments.²¹¹ The controversy began when, contrary to the planning commission's recommendation, the Chesapeake City Council approved a landowner's application to rezone 691 acres of agricultural real estate to single-family residential and conservation categories. Individuals opposed to the rezoning formed the Committee for the Repeal of Ordinance R(C)-88-13. When the city council refused to repeal the zoning amendment, the Committee petitioned the circuit court for a referendum decree and a special election.²¹² The landowner responded by filing a petition for a declaratory judgment that the referendum provisions were not applicable to rezoning ordinances. At a consolidated hearing, the trial court ruled that the referendum ordinance applied to the zoning amendment, and the voters subsequently voted against the rezoning.²¹³

Agreeing with the trial court's determination, the supreme court reasoned that a referendum is a reserved power which allows the voters to ratify or reject decisions of elected representatives; and, therefore, is not an improper delegation of power.²¹⁴ The court also rejected the landowner's contention that a referendum was not applicable in this case because referenda apply only to legislative acts, while rezoning is an administrative act.²¹⁵ The court held that "rezoning ordinances are legislative acts, and not administrative,

209. *Id.* at 526, 391 S.E.2d at 269.

210. 239 Va. 484, 391 S.E.2d 587 (1990).

211. *Id.* at 486, 391 S.E.2d at 587. Section 3.07 of the Chesapeake City Charter provides that ordinances, other than an emergency measure or annual appropriation, become effective 30 days after passage. However, a petition by a specified number of voters may be filed with the City Clerk within that 30-day period requesting the ordinance be amended or repealed. If the City Council fails to amend or repeal the ordinance, the petitioners may request the circuit court to order a referendum to submit the ordinance to the voters in a special election. *R. G. Moore*, 239 Va. at 486-87, 391 S.E.2d at 588.

212. *Id.* at 486-87, 391 S.E.2d at 587-88.

213. *Id.* at 488, 391 S.E.2d at 588.

214. *Id.* at 489, 391 S.E.2d at 589.

215. *Id.* at 491, 391 S.E.2d at 590.

and thus are subject to referendum."²¹⁶

4. Spot Zoning

In *Barrick v. Board of Supervisors*,²¹⁷ residents of Mathews County alleged that the county board of supervisors arbitrarily and capriciously rezoned parcels of land from Residential-1 (R-1) to Business-2 (B-2) in order to permit development of condominiums. The residents challenged the rezonings as incompatible with the mostly residential and some B-1 uses which surrounded the subject parcels.²¹⁸

The supreme court reviewed the record and determined that the residents produced probative evidence of unreasonableness because the B-2 use varied from and was incompatible with the comprehensive plan and zoning ordinance.²¹⁹ However, the evidence did not establish illegal spot zoning since the plaintiffs failed to address the legislative purpose of the rezoning, a critical element of the test for illegal spot zoning.²²⁰

If the purpose of a zoning ordinance is solely to serve the private interests of one or more landowners, the ordinance represents an arbitrary and capricious exercise of legislative power, constituting illegal spot zoning; but if the legislative purpose is to further the welfare of the entire county or city as a part of an overall zoning plan, the ordinance does not constitute illegal spot zoning even though private interests are simultaneously benefitted.²²¹

The court found that the record included sufficient evidence to make the reasonableness of the board's rezoning fairly debatable.²²² For example, the county's comprehensive plan permitted four units per acre on the waterfront property. In addition, the board presented evidence that the zoning ordinance, which provided that B-2 designations are generally not located on the water-

216. *Id.* at 491, 391 S.E.2d at 591.

217. 239 Va. 628, 630, 391 S.E.2d 318, 319 (1990).

218. *Id.* at 631-32, 391 S.E.2d at 320.

219. *Id.* at 633, 391 S.E.2d at 320.

220. *Id.*

221. *Id.* at 632, 391 S.E.2d at 320 (quoting *Wilhem v. Morgan*, 208 Va. 398, 403-04, 157 S.E.2d 920, 924 (1967) (quoting *Kozenik v. Township of Montgomery*, 24 N.J. 154, 113, 131 A.2d 1, 11 (1957))).

222. *Id.* at 635, 391 S.E.2d at 322.

front, did not prohibit the rezoning.²²³ Further, evidence of reasonableness was found in the staff reports and minutes of the board meeting.²²⁴ Because the legislative purpose of the rezoning furthered the welfare of the entire county, and not solely the interests of private landowners, the court held that reasonableness of the rezoning was fairly debatable, and, therefore, valid.²²⁵

5. Vested Rights

The Supreme Court of Virginia considered whether a developer acquired vested rights in the zoning classification of his property in *Stephens City v. Russell*.²²⁶ Intending to build three apartment buildings, the developer purchased property zoned to permit thirty-three units. The developer subsequently filed a revised site plan and a subdivision plat. Neither the revised site plan nor the subdivision plat were approved by any government official before the town amended the zoning ordinance to reduce the number of units permitted from thirty-three to twenty-one. The developer asserted, and the trial court agreed, that he had acquired a vested property right in the pre-amended zoning classification.²²⁷

On appeal, the town argued against the developer's claim of substantial compliance and asserted that the developer had not met the legal requirements because of certain deficiencies in the plan.²²⁸ The supreme court agreed. Applying the principle set forth in *Fairfax County v. Medical Structures*,²²⁹ *Fairfax County v. Cities Service*,²³⁰ and *Notestein v. Board of Supervisors*,²³¹ that there

223. *Id.* at 633, 391 S.E.2d at 321.

224. 239 Va. at 634, 391 S.E.2d at 321-22. The staff recommended the rezoning on the condition of accepting the proffer which limited the use under the B-2 classification to residential only. Remarks by the board indicated that the rezoning was a compatible use with numerous community benefits, such as creating taxable revenue and desirable housing for the area. *Id.* at 634-35, 391 S.E.2d at 321-22.

225. *Id.* at 635, 391 S.E.2d at 322.

226. 241 Va. 160, 399 S.E.2d 814 (1991).

227. *Id.* at 162, 399 S.E.2d at 815.

228. *Id.* The revised site plan failed to locate sidewalks, omitted an erosion control plan and landscape plan and was not approved by the state highway department. *Id.* The subdivision plat was pending when the town adopted the amendment. *Id.*

229. 213 Va. 355, 192 S.E.2d 799 (1972) (vested right acquired when special use permit granted, site plan filed and substantial expense incurred).

230. 213 Va. 359, 193 S.E.2d 1 (1972) (vested right acquired when special use permit issued and site plan filed).

231. 240 Va. 146, 393 S.E.2d 205 (1990) (no vested right to operate landfill when no significant governmental act supported claim); see *infra* notes 234 to 243 and accompanying text.

must be some official government act to support a claim of a vested property right, the court found that the trial court had erred.²³² The developer had not obtained any "governmental permit or approval" and, therefore, had not acquired a vested right in the former zoning classification.²³³

In *Notestein v. Board of Supervisors*,²³⁴ the owners of approximately 600 acres of land in Appomattox County challenged the validity of a zoning ordinance prohibiting the operation of a non-hazardous waste landfill on their property. The owners applied for a landfill permit from the Virginia Department of Waste Management to operate the facility. The department notified the county of the application and demanded that the county respond within thirty days concerning whether the landfill was consistent with the county's zoning ordinance, or waive any violation of the ordinance.²³⁵ At that time, no zoning ordinance existed which would prohibit the issuance of a permit to the owners. Within the thirty-day period, the county notified the department of unspecified objections to the permit. The owners, in good faith reliance on the county administrator's representations that no legal basis existed to prohibit the operation of the landfill, obtained financing for the development of the landfill. Additionally, the owners rejected several offers to buy the land for up to \$2,600 more per acre than previous offers that were based on the agricultural value of the property.²³⁶

The owners then learned that the board of supervisors was considering the adoption of a new zoning ordinance which would include agricultural districts and environmental districts. The county administrator and several members of the board represented to the owners that any change to the zoning ordinance would not affect the owners' ability to operate the landfill.²³⁷ The ordinance, which the county subsequently adopted, located the owners' property in an agricultural district where the development and operation of a landfill was prohibited. The county's landfill, however, fell within the environmental hazard district in which landfills are permitted with a special use permit. The county then advised the department

232. *Russell*, 241 Va. at 164, 399 S.E.2d at 816.

233. *Id.* at 162, 399 S.E.2d at 815.

234. 240 Va. 146; 393 S.E.2d 205 (1990).

235. *Id.* at 148-49, 393 S.E.2d at 206.

236. *Id.* at 149, 393 S.E.2d at 206.

237. *Id.* at 150, 393 S.E.2d at 207.

that the zoning ordinance prohibited the development and operation of the owners' landfill.²³⁸

The owners sought to overturn the zoning ordinance on a number of grounds, only three of which will be considered here. First, the Notesteins argued that the board violated section 15.1-493(C) of the Code²³⁹ because the county's landfill was placed in a more intensive district than that disclosed in the public advertisement. The board argued that since the environmental hazard classification did not permit any use as of right, it was more restrictive than the agricultural classification, and therefore no additional public hearing was required under the Code.²⁴⁰ The supreme court, unable to discern whether the location of the county landfill in the environmental hazard classification constituted a more or less intensive classification, determined that if the owners successfully proved that the county placed its landfill in a more intensive zoning classification, the ordinance would be invalid.²⁴¹

The supreme court rejected the owners' second theory, finding no significant official act on the county's part, such as the issuance of a special use permit, to support the owners' claim of vested rights.²⁴² The court also rejected the owners' third assertion: the county's failure to respond to the department's inquiry resulted in

238. *Id.*

239. VA. CODE ANN. § 15.1-493(C) (Cum. Supp. 1990). Section 15.1-493(C) provides as follows:

Before approving and adopting any zoning ordinance or amendment thereof, the governing body shall hold at least one public hearing thereon, pursuant to public notice as required by § 15.1-431, after which the governing body may make appropriate changes or corrections in the ordinance or proposed amendment. . . . However, no land may be zoned to a more intensive use classification than was contained in the public notice without an additional public hearing after notice required by § 15.1-431. Such ordinances shall be enacted in the same manner as all other ordinances.

Id.

240. *Notestein*, 240 Va. at 153, 393 S.E.2d at 208.

241. *Id.* at 153, 393 S.E.2d at 209 (citing *Town of Vinton v. Falcun Corp.* 226 Va. 62, 306 S.E.2d 867 (1983)).

242. *Id.* at 152, 393 S.E.2d at 208 (citing *Fairfax County v. Medical Structures*, 213 Va. 355, 356-57, 192 S.E.2d 799, 800-01 (1973) (issuance of special use permit constituted significant official act); *Fairfax County v. Cities Service*, 213 Va. 359, 362, 193 S.E.2d 1, 3 (1972) (similar holding)).

One might ask what possible significant official action could the county have taken to support the owners' vested rights because, under the county zoning ordinance in effect at the time, no requirement for a special use permit or other affirmative action on behalf of the county, except a favorable response to the department's inquiry, was required to approve the landfill. Apparently, the county's favorable response or no response to that inquiry would have constituted a significant official action.

a waiver of any conflict. The court stated that “[t]he county cannot be deemed to have waived its right to object to the issuance of a permit because no zoning ordinance existed at the time of the required certification.”²⁴³

III. LEGISLATION

A. *Condominium Act*

The Condominium Act underwent a number of modifications during the 1991 session of the General Assembly. Except as provided in section 55-79.74:3 of the Code,²⁴⁴ an institutional lender which acquires title to a condominium unit is not a “declarant” as defined in section 55-79.41 of the Code, unless the lender offers to convey title to the unit to anyone not in the business of selling real estate for his own account.²⁴⁵ Additionally, the definition of “common profits” has been deleted from the Code.²⁴⁶

The General Assembly also added a provision to several provisions of section 55-79.43 of the Code. Section 55-79.43(B) now provides that the declarant may record condominium instruments prior to applying for or obtaining subdivision approval if a site plan approval has been obtained.²⁴⁷ One new subsection, section 55-79.43(C) of the Code, prescribes requirements for the subdivision of land which can no longer be added to an expandable condominium.²⁴⁸ Another new subsection, section 55-79.43(D) of the Code, provides that the association and its authorized agents are the proper parties to apply for subdivision site plan approval and rezoning requests, notwithstanding the fact that the association does not own the land upon which the condominium is located. The applications, however, must not adversely affect the rights of the declarant to develop additional land. The section also clarifies that the unit owners are responsible for obtaining building and occupancy permits for the units, and the association is responsible

243. 240 Va. at 154, 393 S.E.2d at 209. With respect to the Notestein’s estoppel argument, the court reiterated the familiar rule that “[e]stoppel does not apply to the government in the discharge of its governmental functions.” *Id.* at 152, 393 S.E.2d at 208 (quoting *Gwinn v. Alward*, 235 Va. 616, 621, 369 S.E.2d 410, 413 (1988)).

244. VA. CODE ANN. § 55-79.41:3 (Cum. Supp. 1991).

245. *Id.* § 55-79.41.

246. *See Id.* (editor’s comments on 1991 amendment); *see infra* notes 259-60 and accompanying text.

247. *Id.* § 55-79.43(B).

248. *Id.* § 55-79.43(C).

for obtaining permits for the common elements.²⁴⁹

In addition to the Uniform Statewide Building Code, local ordinances regulating road construction and utilities installation must be applied to condominiums in the same manner that they are applied to other buildings of similar form and nature of occupancy.²⁵⁰

Further, the association now bears the burden of recording an amendment to the declaration effecting the reassignment of limited common elements. The unit owner or owners concerned must first pay the association the reasonable costs for the preparation and recordation of the amendment.²⁵¹

Where a common element is assigned as a limited common element pursuant to section 55-79.54(a)(6) of the Code, the declarant must prepare and record the amendment at no cost to any unit owner.²⁵² Otherwise, the association must prepare and record the amendment effecting the assignment after the concerned unit owner or owners concerned pay the association the reasonable costs for the preparation and recordation of the amendment.²⁵³ A copy of the amendment must also be delivered to the concerned unit owner or owners.²⁵⁴ Section 55-79.57(D) of the Code, a new section, authorizes the association to record an amendment effecting the assignment of common elements as limited common elements in accordance with the assignment rights reserved in the condominium instruments, if the declarant failed to record such an amendment prior to the time that the declarant ceased to be a unit owner.²⁵⁵

Section 55-79.58(C) of the Code was revised to permit the declarant to rely on previously recorded plats and plans in converting convertible land or adding additional land to an expandable condominium, provided that the certifications required by section 55-

249. *Id.* § 55-79.43(D). However, in the case of convertible land, the declarant is responsible for obtaining permits. *Id.*

250. VA. CODE ANN. § 55-79.43(F).

251. *Id.* § 55-79.57(B).

252. *Id.* Section 55-79.54(a)(6) of the Code provides that the declaration for the condominium must describe common elements, outside of convertible lands, which may be assigned as limited common elements. The declaration must also include a statement that the common elements may be so assigned and the manner in which the assignment must be effected. VA. CODE ANN. § 55-79.54(a)(6) (Repl. Vol. 1986).

253. *Id.* § 55-79.57(C) (Cum. Supp. 1991).

254. *Id.* § 55-79.57(C).

255. *Id.* § 55-79.57(D).

79.59 of the Code are recorded.²⁵⁶ Therefore, the declarant can avoid the expense of preparing new plats to effect such conversions or additions. In addition, the declarant may rely on plats and plans recorded pursuant to section 55-79.54(a), (b) and (c) of the Code in lieu of new plats and plans to satisfy the requirements of sections 55-79.56(b), 55-79.61(B) and 55-79.63 of the Code if the declarant records the certifications required by sections 55-79.58(A) and (B) of the Code.²⁵⁷ A savings provision has been added to section 55-79.59 of the Code for condominium instruments recorded prior to July 1, 1991.²⁵⁸

The General Assembly deleted the phrase "and rights to common profits" from section 55-79.69(D) of the Code which now requires the association to record an amendment to the condominium bylaws that reallocates the liability for common expenses upon the relocation of boundaries between units.²⁵⁹ The association must prepare and record the amendment effecting the reallocation of common expenses after the concerned unit owner or owners pay the association the reasonable costs for the preparation and recording of the amendment.²⁶⁰

The condominium instruments may provide a formula for the distribution of rights in the assets of the association upon the ter-

256. *Id.* § 55-79.58(C). The certifications required by § 55-79.59 of the Code include, among other things, certifications by a licensed land surveyor, licensed engineer or licensed architect that the improvements depicted on the plat or plan have been substantially completed and that the plat or plan is accurate. *Id.* § 55-79.58(A),(B), and (C). However, the recording of both new plans and certifications are required to effect the conversion of convertible space into units or common elements. *Id.* § 55-79.58(D).

257. VA. CODE ANN. § 55-79.59.

258. *Id.* The savings provision states: "All condominium instruments for condominiums created prior to July 1, 1991, are hereby validated notwithstanding that the plats were pre-recorded as if in compliance with this section and not recorded with amendments converting convertible land or adding additional land if the plats or subsequent amendments contained the required certifications." *Id.*

259. *Id.* § 55-79.69(E). The same language was deleted from § 55-79.70(D) of the Code regarding the allocation of common profits to new units created upon the subdivision of existing units, § 55-79.72(F) of the Code regarding the declarant's right to unilaterally amend the condominium instruments to correct errors in the instruments, and § 55-79.72(H) of the Code regarding the disposition of common profits upon the termination of a condominium. Section 55-79.82 of the Code, which provided for the allocation of common profits to common expenses and the distribution of common profits to unit owners, has been repealed. Act of Mar. 22, 1991, ch. 497, 1 1991 Va. Acts 767, 785.

260. VA. CODE ANN. § 55-79.69(F) (Cum. Supp. 1991). The association also has the burden of recording an amendment to the condominium instruments for the purpose of reallocating the costs of the common expenses upon the subdivision of an owner's unit, provided that the subdivider pays the association for its reasonable costs in preparing and recording the amendment. *Id.* § 55-79.70(F).

mination of the condominium other than in proportion to the owners' respective undivided interests in the common elements.²⁶¹

The General Assembly made several changes to the voting procedures for members of condominium associations. Where members' votes are cast by proxy, "any proxy shall terminate after the first meeting held on or after the date of that proxy or any recess or adjournment of that meeting held within thirty days."²⁶² Votes allocated to units owned by the association must be included for the purpose of determining whether a quorum is present at meetings of the members of the association. Such votes are deemed to be cast in the same proportion as the votes cast by individual unit owners.²⁶³

The General Assembly also granted the association additional authority with respect to the common elements of the condominium. This additional authority includes the right to assert, defend, and settle claims related to the common elements during and after the declarant control period, but not claims involving the declarant during his control period.²⁶⁴

The General Assembly amended section 55-79.80:1 of the Code to provide that the owner of a unit may pay a percentage of the total amount due under a judgment for money against the condominium association and thereby have the lien removed from his or her unit.²⁶⁵ This percentage is equal to the unit owner's share of common expenses.²⁶⁶

The General Assembly also altered the requirements for public offering statements prepared in connection with the sale of units in conversion condominiums. Specifically, it modified the representations regarding asbestos inspections and asbestos abatement if asbestos has been found.²⁶⁷

Upon the resale of a unit by an owner other than the declarant, the information which the owner is required to provide to the purchaser must include "[a] statement of whether the condominium or any portion thereof is located within a development subject to

261. *Id.* § 55-79.72(H).

262. VA. CODE ANN. § 55-79.77(D).

263. *Id.* § 55-79.77(F).

264. *Id.* § 55-79.80(B).

265. *Id.* § 55-79.80:1(D).

266. *Id.*

267. *Id.* § 55-79.94(A)(5).

the Property Owners' Association Act (§ 55-508 et seq.) of Chapter 26 of this title."²⁶⁸

B. *Conveyance by Husband and Wife*

Section 55-41 of the Code, which provides that a writing signed by a husband and wife purporting to convey any estate, real or personal, operates to convey all of the spouse's right, title and interest in the estate conveyed thereby, now applies to all writings, whether or not executed before January 1, 1991.²⁶⁹

C. *Eminent Domain*

The General Assembly adopted a number of amendments to the condemnation procedures set out in the Code. For example, the definition of "freeholder" was added to section 25-46.3 of the Code.²⁷⁰ The General Assembly substituted "enhancement" for "peculiar benefits" in section 25-46.7(3) of the Code.²⁷¹ A sentence was also added to section 25-46.7(6) of the Code, which requires the clerk of the circuit court to index the petition of condemnation against the names of all of the owners of the property subject to condemnation where two or more separate parcels of land are joined in the same petition.²⁷²

Sections 25-46.20(B) and 25-46.20:1 through :5 of the Code establish the new procedures by which condemnation commissioners must be appointed when the Commonwealth Transportation Commissioner is the condemnor in a county with the urban county executive form of government, or in a city adjacent to such a county, or in a county contiguous to any such county, or in a city adjacent to a county adjacent to a county with the urban county executive form of government.²⁷³ These amendments become effective on De-

268. *Id.* § 55-79.97(A)(10). In addition, the General Assembly relaxed the requirement that the information include a disclosure of all pending suits or judgments against the association. The information must only disclose the nature and status of pending suits or judgments to which the association is a party "which either could or would have a material impact on the association or the unit owners or which relates to the unit being purchased." *Id.* § 55-79.97(A)(6).

269. VA. CODE ANN. § 55-41. For a discussion of related issues see Johnson, *Wills, Trusts, and Estates: Annual Survey of Virginia Law*, 25 U. RICH. L. REV. 925 (1991).

270. *Id.* § 25-46.3. "Freeholder" means any person owning an interest in land in fee, including a person owning a condominium unit." *Id.*

271. *Id.* § 25-46.7(3).

272. *Id.* § 25-46.7(6).

273. *Id.* §§ 25-46.20(B); *Id.* §§ 25-46.20:1 to :5. Condemnation commissioners must be

ember 1, 1991 and expire on July 1, 1994.²⁷⁴

D. *Escheats and Disposition of Unclaimed Property*

In this past session, the General Assembly modified the requirements which a banking or financial institution must satisfy in order to impose charges or cease accruing interest on accounts in its possession. The General Assembly increased from twenty-five dollars to fifty dollars the value of an account in an institution's possession for which it may not make assess charges for dormancy or inactivity in excess of charges for active accounts or cease to pay interest unless the institution has first given the owner of the account three months notice of the imposition of the charges or cessation of the accrual of interest.²⁷⁵ The General Assembly also rewrote section 55-210.3:01(B)(3) of the Code to prevent financial institutions from charging accounts or ceasing the accrual of interest on accounts unless it does not reverse or cancel charges or retroactively credit accrued interest to accounts once the charges have been imposed or the accrual of interest ceased, except to correct documented internal errors.²⁷⁶

The General Assembly reduced from seven years to five years the period of time after which an intangible interest in a business association is presumed abandoned when the owner of the interest has neither claimed a dividend nor corresponded in writing with the association, provided that the association does not know the location of the owner at the end of the five-year period.²⁷⁷ Section 55-210.6:1(B) of the Code was amended by the deletion of the phrase "or is held or owing by a business association whose records indicate that the last known address of the person entitled thereto is in this State."²⁷⁸

The seven-year statute of limitations contained in section 55-210.25 of the Code was also rewritten.²⁷⁹ Finally, section 55-210.6

disinterested freeholders residing in the county or city where the property subject to the condemnation action is located. *Id.* § 25-46.20:1.

274. 1 1991 Va. Acts 838.

275. VA. CODE ANN. § 55-210.3:01(B)(2) (Cum. Supp. 1991).

276. *Id.* § 55-210.3:01(B)(3).

277. *Id.* § 55-210.6:1(A).

278. *Id.* § 55-210.6:1(B).

279. *Id.* § 55-210.25. The section now provides, in part, that "[t]he administrator shall commence enforcement for compliance with the provisions of this Act within seven years, unless the holder has failed to file a report required under § 55-210.12. The holder may waive in writing the protection of this section." *Id.*

of the Code was repealed.²⁸⁰

Real property owners should not expect to escape liability for hazardous waste contamination by abandoning contaminated property. The General Assembly has granted the Virginia Waste Management Board of the Department of Waste Management the authority to pursue prior owners of contaminated property for clean-up costs.²⁸¹

E. *Housing*

1. Virginia Housing and Development Authority

The General Assembly has authorized the Virginia Housing and Development Authority ("VHDA") to supervise a housing sponsor who receives a VHDA mortgage loan to finance the ownership and operation of housing developments and multi-family residential housing intended for occupancy by low and moderate income people during the time that the VHDA mortgage loan is outstanding "and thereafter as necessary to preserve the federal tax exemption of the notes or bonds issued by [V]HDA to finance such [V]HDA mortgage loan."²⁸² Identical language was added to section 36-55.33:(D)(4) of the Code, with respect to mortgage loans made by VHDA to housing sponsors or persons of low or moderate income for the construction, rehabilitation, preservation or improvement of housing developments or residential housing.²⁸³ The same language was added to section 36-55.34:1 of the Code, which sets forth the manner in which the VHDA may supervise a housing sponsor and its real and personal property.²⁸⁴

Additionally, the General Assembly added language to section 36-55.34:1 of the Code to allow that where an agreement providing for the regulation or supervision of housing is recorded in the land

280. 1 1991 Va. Acts 546; see VA. CODE ANN. § 55-210.6 (Repl. Vol. 1986) (repealed 1991) (providing conditions for presumption of abandonment of stock held or owing by business association).

281. VA. CODE ANN. § 55-182.2 (Cum. Supp. 1991). The new section provides as follows: In addition to any other remedy provided by law, the Virginia Waste Management Board, pursuant to its authority granted in § 10.1-1402, or the Department of Waste Management, shall have recourse against any prior owner or the estate of any prior owner for the costs of clean-up of escheated property in or upon which any hazardous material as defined in § 44-146.34 is found.

282. *Id.* § 36-55.33:1(B)(5).

283. *Id.* § 36-55.33:1(D)(4).

284. *Id.* § 36-55.34:1.

records of the jurisdiction in which the housing is located, the agreement shall "run with the land and be binding on the successors and assigns of the owner thereof until released of record by [V]HDA."²⁸⁵ The General Assembly also extended the VHDA's power to purchase, acquire, construct, and rehabilitate multi-family residential housing from June 30, 1992 to July 1, 1997.²⁸⁶

2. Virginia Fair Housing Law

The new Virginia Fair Housing Law,²⁸⁷ enacted by the 1991 General Assembly, supersedes sections 36-86 through 36-96 of the Code.²⁸⁸ The purpose of the act is to promote Virginia's policy "to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of race, color, religion, national origin, sex, elderliness, familial status, or handicap. . . ."²⁸⁹ Purchasers, sellers, real estate agents, lenders and attorneys engaged in the sale and leasing of residential real estate should be familiar with the new Virginia Fair Housing Law.

F. *Landlord and Tenant*

The General Assembly curtailed some exemptions of the Virginia Residential Landlord and Tenant Act. Now, a natural person owning more than four single-family residences subject to rental agreements and located in any city or county having either the urban county executive form or county manager plan of government is subject to the act.²⁹⁰

Other changes to the act include an additional prohibition on the inclusion of certain provisions in rental agreements. A landlord cannot include in a rental agreement for public housing a provision by which a tenant, as a condition to the tenancy, agrees to a prohibition of the lawful possession of firearms within the rental unit, unless required by federal law.²⁹¹ In addition, the General Assem-

285. VA. CODE ANN. § 36-55.34:1(8).

286. *Id.* § 36-55.33:2(E).

287. *Id.* §§ 36-96.1 to .23.

288. *Id.* §§ 36-86 to -96 (Repl. Vol. 1990) (repealed 1991).

289. VA. CODE ANN. § 36-96.1(B) (Cum. Supp. 1991).

290. *Id.* § 55-248.5(A)(10).

291. *Id.* § 55-248.9(A)(6). This legislation followed on the heels of *Richmond Tenants Org. v. Richmond Redevelopment and Hous. Auth.*, 753 F. Supp. 607 (E.D. Va. 1990), where the United States District Court stated that leases which prohibit public housing residents from possessing firearms are not unreasonable and do not violate the United States Housing

bly revised the definition of "single-family residence" to exclude multi-family residential structures.²⁹²

G. *Leasing of Goods*

The 1991 General Assembly enacted Article 2A of the Commercial Code which, effective January 1, 1992, governs leases of goods.²⁹³ This enactment is discussed fully in another article in this survey.²⁹⁴

H. *Manufactured Housing Licensing and Recovery Fund*

The General Assembly added the Manufactured Housing Licensing and Transaction Recovery Fund Law to the Code to address a number of issues revolving around manufactured homes.²⁹⁵ The act creates the nine member Virginia Manufactured Housing Board ("Housing Board") within the Department of Housing and Community Development to oversee licensing, to establish and maintain a recovery fund, to process complaints, and to promulgate regulations authorized under the act with respect to the construction and sale of manufactured homes.²⁹⁶

Act.

292. VA. CODE ANN. § 55-248.4. The modification of this definition is important because the exemption from the act contained in § 55-248.5(A)(10) only applies to owners of single-family residences. The definition of "single-family residence" makes it clear that the General Assembly did not intend for the exemption to apply to apartment complexes, regardless of their size.

293. *Id.* § 8.2A-101 to -532.

294. See Herbert, *Commercial Law: Annual Survey of Virginia Law*, 25 U. RICH. L. REV. 681 (1991).

295. VA. CODE ANN. §§ 36-85.16 to .36 (Cum. Supp. 1991). It is important to note that the act becomes effective on July 1, 1992. Act of Mar. 25, 1991, ch. 555, 1 1991 Va. Acts 957, 970.

A manufactured home is defined as:

a structure constructed to federal standards, transportable in one or more sections, which, in the traveling mode, is 8 feet or more in width and is 40 feet or more in length, or when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein.

Id. § 36-85.16.

296. *Id.* § 36-85.17 and .18. The terms "manufacturer," "dealer," "broker," and "salesperson," and other significant terms are defined in § 36-85.16 of the act. *Id.* § 36-85.16. The act requires that all manufacturers, dealers, brokers, and salespersons obtain an annual license from the Housing Board. *Id.* § 36-85.19.

In addition, § 36-85.22 of the act modifies hazard insurance policies which would exclude coverage under the policy for damage sustained to a manufactured home by windstorm because the home was incorrectly anchored or tied down. *Id.* § 36-85.22.

Pursuant to section 36-85.23 of the Code, each manufacturer, dealer and supplier of manufactured homes is deemed to have made certain warranties to manufactured home buyers.²⁹⁷ Further, the act includes a procedure by which buyers may submit claims for breach of a warranty, as well as a provision regarding the obligations and liabilities between manufacturers, dealers, and suppliers.²⁹⁸ If a manufacturer, dealer, or supplier denies that it is obligated to make repairs to a manufactured home unit pursuant to its warranty, it must notify the buyer of that fact and inform the buyer that he may file a claim with the Housing Board.²⁹⁹ Generally, defects must be remedied within forty-five days after receipt of written notice of the claim.³⁰⁰

The act also prohibits dealers from making alterations to mobile homes which are unauthorized by the manufacturer.³⁰¹ Additionally, it releases the manufacturer from liability for unauthorized alterations made by the owner of the unit.³⁰²

Under the act, each manufacturer, dealer, broker, and salesperson in Virginia is required to pay a fee to the Virginia Manufactured Housing Transaction Recovery Fund.³⁰³ Manufactured home buyers may submit claims to the Housing Board for compensation from the fund for damages suffered as the result of a regulant's breach of the act, but only if the regulant fails to pay the claim within thirty days following receipt of the Housing Board's written determination that the regulant must pay the claim.³⁰⁴

I. *Mobile Home Lot Rental Act*

The General Assembly made several amendments to the Mobile Home Lot Rental Act, including addition of the defined term

297. VA. CODE ANN. § 36-85.23. The warranties are effective for twelve months following delivery of the manufactured home to the buyer. *Id.*

298. *Id.* § 36-85.24. Section 36-85.25 of the act also provides that any manufacturer, dealer or supplier that, pursuant to a service contract, agrees to remedy certain defects is directly liable to the buyer as well as the other party to the contract. *Id.* § 36-85.25.

299. *Id.* § 36-85.24.

300. *Id.* § 36-85.25. Defects which constitute safety hazards must be remedied within three days. *Id.*

301. *Id.* § 36-85.26(A).

302. *Id.* § 36-85.26(B).

303. *Id.* § 36-85.31(A). Section 36-85.31(B) sets forth a schedule of the fees to be paid by each manufacturer, dealer, broker and salesperson.

304. *Id.* § 36-85.32. The act limits the amount that a claimant is entitled to receive from the fund for a single violation and the maximum exposure of the fund for claims asserted against a single regulant during any year. *Id.* § 36-85.32.

“abandoned mobile home.”³⁰⁵ Further, new section 55-248.42(B) of the Code provides that all parties having secured interests in the mobile home must be referenced in the written agreement or rental application for the mobile home. The agreement must also require the tenant to notify the landlord of any new security interests in the mobile home.³⁰⁶

The General Assembly also established the procedure by which a party holding a security interest in a mobile home may be required to pay the landlord of the mobile home park rent and “any reasonable charge in addition to rent” owed by the tenant.³⁰⁷ The secured party’s rental obligations to the landlord must be satisfied prior to the removal of the mobile home from the lot.³⁰⁸ If a secured party is liable to a landlord for rent and other charges, the rental agreement between the landlord and tenant governs the relationship between the landlord and the secured party. However, the tenancy automatically converts to a month-to-month tenancy with either party having the right to terminate on thirty days written notice.³⁰⁹

The General Assembly also provided that if a lot rental agreement is terminated due to rehabilitation or change in the use of some or all of the mobile home park by the landlord, the landlord is required to provide the tenant with a 120-day written notice.³¹⁰

J. *Notice of Violations of Lead-Based Paint Standards*

The legislature’s growing concern with illnesses related to lead paint is evident in the passage of section 36-107.1 of the Code. This section provides that the owner of a residential structure receiving notice from any health department that the structure contains unacceptable levels of lead paint must disclose the violation

305. VA. CODE ANN. § 55-248.41.

306. *Id.* § 55-248.42.

307. *Id.* § 55-248.44:1. The secured party is liable for rent and other reasonable charges in addition to rent accruing from 15 days after the secured party’s receipt of notice of abandonment until disposition of the mobile home or its removal from the mobile home park. The term “reasonable charges in addition to rent” include maintenance and utility costs for which the tenant under the rental agreement is liable. *Id.* § 55-248.44:1(F).

308. *Id.* § 55-248.44:1(G).

309. *Id.* § 55-248.44:1(H).

310. *Id.* § 55-248.46. Changes include, among other things, conversion to commercial use, planned unit development or the sale of the property to a contract purchaser. This notice requirement may not be waived except by a separate written agreement executed after such notice is given. *Id.*

to a potential purchaser of the structure.³¹¹ The disclosure must be in writing and must include a copy of the notice received from the health department and the requirements concerning the removal of the lead paint.³¹² In addition, the disclosure must be given to potential purchasers "prior to the signing of a purchase or sales agreement or, if there is no purchase or sales agreement, prior to the signing of a deed."³¹³ An owner who fails to comply with the disclosure requirement is liable for all damages caused to the purchaser by the owner's non-compliance. In addition, the owner will be required to pay a civil penalty not to exceed \$1,000.³¹⁴

K. *Partnership Property — Continuity of Title*

When the name of a limited partnership is changed, or a domestic limited partnership succeeds to the ownership of an interest in real estate, the clerk of the State Corporation Commission will, on request, issue a certificate reciting the change of name of the limited partnership or succession of title in the real estate.³¹⁵ The certificate may be recorded in the circuit court of any jurisdiction in which real estate owned by the partnership is located to track title to the real estate. Only the clerk's fee must be paid to record the certificate.³¹⁶

The General Assembly also provided that upon the merger of a foreign limited partnership owning real estate in Virginia with another foreign limited partnership, the property passes to the sur-

311. VA. CODE ANN. § 36-107.1.

312. *Id.* The disclosure requirement does not apply to sales agreements or deeds signed prior to July 1, 1991. However, the disclosure requirement applies where the owner has accepted a written purchase offer prior to July 1, 1991, if the owner has not executed a written sales agreement or deed prior to July 1, 1991. *Id.*

313. *Id.* If an agreement does exist, the seller should insist on a provision by which the purchaser acknowledges the receipt of the disclosure. In the absence of an agreement, the owner should obtain a written acknowledgement from the purchaser of the receipt of the disclosure or at least maintain a copy of the written notice the owner provided to the purchaser.

Section 36-107.1 of the Code does not require the owner to give the purchaser notice of a violation that the owner receives after the execution of a sales agreement, or, in the absence of an agreement, after the execution of a deed.

314. *Id.* Section 36-107.1 of the Code does not expressly provide that the owner will be liable for the purchaser's attorney's fees and costs incurred in enforcing the purchaser's remedies under the section. Each day that an owner fails to remove or cover lead-based paint to comply with the Uniform Statewide Building Code constitutes a separate offense. *Id.* § 36-106.

315. *Id.* § 50-37.3(A).

316. *Id.*

viving limited partnership, except as provided by the laws of the state governing the surviving limited partnership.³¹⁷ The issuance of a certificate tracking title to real estate acquired by a foreign limited partnership after the merger of two or more foreign limited partnerships pursuant to the laws of a foreign jurisdiction has also been addressed.³¹⁸

L. *Real Estate Brokers*

Pursuant to amended section 54.1-2105(2) of the Code,³¹⁹ the Virginia Real Estate Board must include in its regulations educational requirements for the relicensure of brokers and salespersons to whom the board has issued active licenses. The educational requirements, which must be satisfied prior to each renewal or reinstatement, apply to applicants seeking relicensure as active brokers or salespersons.³²⁰ The General Assembly added a provision to the section permitting licensees called to serve in the United States armed forces to complete the educational requirements within six months after release from active duty.³²¹

M. *Recordation of Instruments*

1. Deeds

The General Assembly added language to section 17-79(B) of the Code to make it clear that the name of the beneficiary of a deed of trust need not be listed in the first clause of the deed of trust as a condition to recordation.³²²

Section 17-79(C) of the Code has been revised to provide that a deed made by a person in a representative capacity, devisees or coparceners must be indexed in the names of the grantors and grantees. In addition, the name of the former record title owner must be listed in the first clause of the instrument.³²³

The General Assembly has also required that a clerk or deputy clerk who is correcting an indexing mistake to note, in the margin

317. VA. CODE ANN. § 50-37.3(B)(1).

318. *Id.* § 50-37.3(B)(2).

319. *Id.* § 54.1-2105(2) (Repl. Vol. 1991).

320. *Id.* Applicants seeking to elevate inactive status licenses to active status licenses must also satisfy the continuing education requirements. *Id.*

321. *Id.*

322. *Id.* § 17-79(B).

323. *Id.* § 17-79(C).

of the index, the nature of the correction as well as the date and his name or initials. Alternatively, the clerk may make the correction by any other means capable of maintaining a permanent record of the change together with the original recording, provided that the date and nature of the change is recorded along with the name of the person making the change.³²⁴

2. Releases

The General Assembly amended section 55-66.3(A)(1) of the Code by deleting the language authorizing the notation of a certificate of satisfaction or a certificate of partial satisfaction in the margin of the page of the book where the encumbrance is recorded. The certificate of satisfaction or certificate of partial satisfaction must be recorded in the clerk's office.³²⁵

The General Assembly also amended section 55-66.3(B) of the Code with respect to lost note affidavits. If the creditor is unable to produce for recordation an affidavit stating that the debt has been paid and that the instrument evidencing the debt has been canceled and delivered to the debtor or has been lost or destroyed and cannot be produced, "and files with the clerk an affidavit to that effect," the lien debtor may file an affidavit with the clerk stating that the lien has been paid and the instrument evidencing the debt was cancelled and delivered to him or lost or destroyed.³²⁶

N. Rescission of Contracts

In an apparent response to cases like *Frank v. Tipco Homes*,³²⁷ the General Assembly repealed section 11-2.3 of the Code.³²⁸ In *Tipco*, the trial court, construing this section, held that a contract for the purchase of a lot and the construction of a residence on the

324. VA. CODE ANN. § 17-79.1.

325. *Id.* § 55-66.3(A)(1). Language in §§ 55-66.3(B) and 55-66.6 relating to marginal notations of releases has been deleted. The General Assembly also deleted the requirement for a court order to permit recordation of marginal releases on microfilmed records. The clerk of the circuit court may make this determination without a court order. *Id.* § 70-60.1.

326. *Id.* § 55-66.3(B).

327. 19 Va. Cir. 291 (County of Fairfax Cir. Ct. April 16, 1990); see *Bell v. Burleigh*, 5 Va. L. Weekly, Dec. 17, 1990, at 600, col. 2 (City of Norfolk Cir. Ct. Nov. 30, 1990) (V.L.W. 90-H-489). *But cf.* *Glenwood Constr. Co. v. The Drees Co.*, 5 Va. L. Weekly, Jan 21, 1991, at 20, col. 1 (County of Stafford Cir. Ct. Jan. 9, 1991) (VLW 91-H-31) (Section 11-2.3 of the Code is inapplicable to contract for acquisition of unimproved tract by buyer for development of residential subdivision).

328. VA. CODE ANN. § 11-2.3 (Repl. Vol. 1989) (repealed 1991).

lot was voidable at the buyer's option because the contract did not require completed performance within two years after the date of execution of the contract.³²⁹

O. *Subdivisions*

The provisions which must be included in subdivision ordinances³³⁰ have been amended to allow a governing body, or its designated administrative agency, to make partial releases of bonds or other performance guarantees that result in bond or guarantee amounts lower than eighty percent of the original amount of the guarantee.³³¹ Partial releases in lower amounts would be based upon the percentage of the facilities completed and approved by the appropriate jurisdictional body or agency.³³² Partial releases are still not permitted before completion of at least thirty percent of the facilities covered by the guarantee, but the prohibition against partial releases after completion of over eighty percent of the facilities has been repealed.³³³

Section 15.1-466 of the Code, which governs single divisions of a lot for the purpose of sales or gifts to members of the immediate family, was further amended to expand the definition of immediate family.³³⁴ Grandchildren and grandparents of the owner are now considered immediate family, as well as the owner's children and spouse.³³⁵

The conveyance of common or shared easements, permitted by section 15.1-466 of the Code,³³⁶ has been amended to include franchised cable television operators. The shared easements were previously available only to public service corporations that furnished cable television, gas, telephone and electric service to a pro-

329. Form contracts for the sale of lots and the construction of residences in developments subject to the Federal Interstate Full Disclosure Land Sales Act, 15 U.S.C. §§ 1701-1720 (1982), should still be drafted to comply with the regulations promulgated by the Federal Department of Housing and Urban Development in connection with the act. The Department considers contracts which do not require complete performance within two years after the purchaser's execution of the contract unqualified for the improved lot exemption to the registration requirements of the act. 24 C.F.R. pt. 1710, app. A, part IV(b) (1991).

330. VA. CODE ANN. § 15.1-466 (Cum. Supp. 1991).

331. *Id.* § 15.1-466(A)(4).

332. *Id.*

333. *Id.*

334. *Id.* § 15.1-466(A)(2).

335. *Id.*

336. *Id.* § 15.1-466(A)(6).

posed subdivision.³³⁷ To share the easement, however, franchised cable television operators must agree to the terms and conditions of the common or shared easement as set out in the declaration referred to on the final subdivision plat.³³⁸ Failure to do so will not defeat or impair the common easement conveyed.³³⁹

P. *Taxation*

1. Special Assessments for Local Improvements

Governing bodies of counties, cities and towns are now authorized to include in taxes or assessments imposed on property owners whose lands abut improved land, "the legal, financial or other directly attributable costs incurred by the locality in creating the district and financing the payment of the improvements."³⁴⁰ However, the General Assembly retained the limitation that the taxes not exceed the "peculiar benefits resulting from the improvements to such abutting property owners."³⁴¹

Additionally, a new section has been added to the Code to authorize localities to operate stormwater utilities and stormwater control programs.³⁴² The localities may assess service charges to all property owners based upon the amount of stormwater runoff that each property contributes.³⁴³ Unpaid charges constitute a lien against the property.³⁴⁴ The localities may finance the infrastructure and equipment for a stormwater control program with the issuance of general obligation bonds or revenue bonds,³⁴⁵ and may enter cooperative agreements with other localities.³⁴⁶

Section 15.1-321 of the Code,³⁴⁷ as amended, permits counties, cities and towns to assess fees, rents or charges on resident users of a municipality's water or sewer system for the purpose of control-

337. VA. CODE ANN. § 15.1-466(A)(6).

338. *Id.*

339. *Id.*

340. VA. CODE ANN. § 15.1-239 (Cum. Supp. 1991). Such improvements include, among other things, enlargements to walkways on existing streets, improving and paving existing alleys, and constructing sanitary and stormwater sewers. *Id.*

341. *Id.*

342. *Id.* § 15.1-292.4.

343. *Id.* § 15.1-292.4(B).

344. *Id.* § 15.1-292.4(D). Liens for unpaid charges have the same priority as liens for unpaid taxes. *Id.*

345. *Id.* § 15.1-292.4(C).

346. *Id.* § 15.1-292.4(E).

347. *Id.* § 15.1-321.

ling the discharges from combined sanitary and stormwater sewer systems.³⁴⁸

2. Land Use Assessments

The General Assembly amended section 58.1-3233(1) of the Code to provide that the governing body of a county operating under the urban county form of government may, by ordinance, permit real property located there to qualify for lower land use assessments by reducing the minimum acreage for open-space use from five acres to two acres.³⁴⁹

The General Assembly also provided that a county and town may agree to send to each taxpayer, at least fourteen days prior to the date when due, single tax bills for real property taxes and personal property taxes.³⁵⁰ In addition, the section which provides that penalties and interest will not be imposed where, through no fault of the taxpayer the tax is not paid, was clarified by explaining what constitutes a lack of fault on the part of the taxpayer.³⁵¹

Finally, the General Assembly provided that in a bill in equity for the sale of property to recover delinquent real estate taxes, the bill may cover two or more parcels owned by different parties but with separate assessed values that do not exceed \$100,000.³⁵²

Q. *Virginia Property Owners' Association Act*

In 1991, the General Assembly made significant changes to the Virginia Property Owners' Association Act³⁵³ ("POAA"). The

348. VA. CODE ANN. § 15.1-321.

349. *Id.* § 58.1-3233(2). At this point in time, Fairfax County is the only county operating under the urban county form of government.

350. *Id.* § 58.1-3912(D).

351. *Id.* § 58.1-3916. The General Assembly added the following provision to § 58.1-3916 of the Code:

The failure to file a return or to pay a tax due to a medically determinable physical or mental impairment on the date the return or tax is due shall be presumptive proof of lack of fault on the taxpayer's part, provided the return is filed or the taxes are paid within thirty days of the due date; however, this provision shall not apply if there is a committee, legal guardian or other fiduciary handling the individual's affairs.

Id.

352. *Id.* § 58.1-3968. The section previously only permitted the bill to cover two or more parcels if the assessed value of each parcel did not exceed \$20,000. VA. CODE ANN. § 58.1-3968 (Cum. Supp. 1990).

353. *Id.* §§ 55-508 to -516 (Cum. Supp. 1991). The General Assembly added "Virginia" to the official name of the POAA. *Id.* § 55-509.

POAA now exempts from its provisions developments which impose on the homeowners' association maintenance or operational responsibilities in an amount less than \$150 per year per lot, or on the owners or occupants of lots in the development a mandatory regular annual assessment of less than \$150 per year per lot. Also exempt are associations which do not have authority under the declaration to impose regular annual assessments in excess of \$150 per year.³⁵⁴

The General Assembly clarified the applicability of the POAA. For instance, language inserted in section 55-508 of the Code states that the POAA is intended to supplement, not affect the validity of, the provisions of declarations recorded prior to July 1, 1989.³⁵⁵ The section also provides that if any lot in a development is subject to the POAA, the entire development is subject to the POAA.³⁵⁶

Several definitions used in the POAA were also modified. For instance, common area must be designated as such in the declaration to fall within the POAA definition of "common area."³⁵⁷ The definition of "development" now includes the additional elements that any person owning a lot in the development must be a member of an association and must be obligated to pay assessments provided for in a declaration.³⁵⁸ The definition of "association" now refers to the incorporated or unincorporated entity upon which responsibilities are imposed and authority granted by the declaration.³⁵⁹

The General Assembly amended the association's record keeping and disclosure requirements. The records that the association is re-

354. VA. CODE ANN. § 55-509. A development would not qualify for the exemption if the association merely imposed an annual assessment of \$150 per year per lot or less. If the association is authorized to impose a greater annual assessment, even though the annual assessment does not actually exceed \$150 per lot per year, the exemption does not apply. It is not clear whether the term "authorized" refers to an express grant of authority in the declaration or the absence of a restriction on the association's right to impose an annual assessment in excess of \$150 per year per lot. The declaration should include an express cap on the annual assessment if it is intended that a development fall within this exemption. It should also be noted that this exemption is not available "to any development subject to a declaration recorded prior to July 1, 1991." *Id.* § 55-508.

355. *Id.* § 55-508(A).

356. *Id.* Therefore, the POAA applies to retail and business parcels treated within mixed use developments.

357. *Id.* § 55-509.

358. *Id.*

359. *Id.*

quired to maintain are now confined to "receipts and expenditures affecting the operation and administration of the association."³⁶⁰

Perhaps the most significant changes in the POAA are those addressing the issues of sales contract disclosures and cancellation rights. The General Assembly amended the disclosure statement which a seller is required to insert into the sales contract for a lot in a development subject to the POAA.³⁶¹ More importantly, the General Assembly armed purchasers with the right to cancel the sales contract after receiving, or after failing to receive, the disclosure packet referred to in the contract.³⁶² These cancellation rights are set forth in section 55-511(C) of the Code.³⁶³

Unlike the previous disclosure requirements, providing the purchaser with the disclosure packet or a notice that the packet is unavailable is now mandatory. Additionally, a request from the purchaser to the seller for the disclosure packet is no longer required.³⁶⁴

360. VA. CODE ANN. § 55-510(A). The General Assembly also clarified an ambiguity in § 55-510 of the Code by deleting the phrase "to protect his interest," an apparent limitation on a member's right of access to association records. *Id.* § 55-510(B).

361. *Id.* § 55-511. The disclosure statement is required to provide that:

- (i) the lot is located within a development which is subject to the Virginia Property Owners' Association Act, (ii) the Act requires the seller to obtain from the property owners' association an association disclosure packet and provide it to the purchaser, (iii) the purchaser may cancel the contract within three days after receiving the association disclosure packet or being notified that the association disclosure packet will not be available, and (iv) the right to receive the association disclosure packet and the right to cancel the contract are waived conclusively if not exercised before settlement.

Id. § 55-511(A). New language in § 55-512(A) of the Code establishes that the association is deemed to receive a request for a disclosure packet six days after the postmark date if sent by United States mail and on the date of delivery if delivered by hand. *Id.*

362. *Id.* § 55-511(C). The General Assembly clarified an ambiguity in § 55-511(B) of the Code by providing that a purchaser may cancel a sales contract only prior to settlement if the sales contract omits the disclosure statement. The General Assembly also substituted "cancel" for "avoidance" with reference to the purchaser's remedies. *See id.* § 55-511(B).

363. *Id.* Section 55-511(C) of the Code provides that the purchaser may cancel the contract within three days after the date of the contract if, prior to or upon signing the contract, the purchaser received the disclosure packet or notice that the packet would not be available. If the disclosure packet or notice of unavailability is not provided to the purchaser prior to or upon the date of the contract, the purchaser may cancel the contract within three days after hand delivery of the packet or notice that the packet is unavailable or, if the packet is sent to the purchaser by United States mail, within six days after the postmark date. The purchaser also has the right to cancel the contract at any time prior to settlement if the purchaser does not receive the disclosure packet or notice that the packet is unavailable. *Id.* However, the purchaser's rights to cancel the contract are waived if not exercised prior to settlement. *Id.* § 55-511(E).

364. *See id.* § 55-511(A)(ii). The General Assembly also deleted some confusing language

These new disclosure and cancellation provisions should motivate sellers to provide contract purchasers with the disclosure packet early in the contract period. This is the only way to dispose of the purchaser's cancellation rights, unless the purchaser waives those rights in a separate writing pursuant to new section 55-511(F) of the Code.³⁶⁵ Sellers should also consider obtaining a written receipt from each contract purchaser when the disclosure packet is delivered to the purchaser, whether before or after the purchaser's execution of the contract.

The requirements for the contents of the disclosure packet have been renumbered, but not substantively changed. Section 55-511(C) of the Code now requires that the information disclosed by the association be current "to a specified date within thirty days of the date of the contract."³⁶⁶ Additionally, when more than six months have passed between the contract date and settlement, a contract purchaser may obtain directly from an association, for a fee not to exceed \$50, assurances that a disclosure packet previously delivered to the purchaser is still accurate or a statement specifying material changes to the information.³⁶⁷ The POAA, however, does not provide the purchaser with a right of cancellation if material changes have occurred. Therefore, the purchaser may want to reserve this right in the contract.

Section 55-512(E) of the Code was amended to clarify that neither the inclusion of the disclosure statement in the contract nor the delivery of the disclosure packet is required for particular transactions.³⁶⁸ Added to the list of excluded transactions is "[a]

from § 55-512(A) of the Code which appeared to have required the purchaser to provide the seller with a second written request for the disclosure packet after the seller received the packet from the association. *See id.* § 55-519(A)(10).

365. VA. CODE ANN. § 55-511(F).

366. *Id.* § 55-511(C). This provision, which requires that the disclosure packet be accurate as of a specified date not more than 30 days prior to the date of the contract, is probably for the purpose of protecting the purchaser from stale information. Unfortunately, the Act does not expressly provide whether or not the delivery of a stale disclosure packet to the purchaser constitutes a complete failure to deliver. Arguably, a disclosure packet containing accurate information but current only as of a date 31 days before the date of the contract is null and void, thereby allowing the purchaser to cancel the contract at any time prior to settlement.

367. *Id.* § 55-511(D). In order to obtain the assurances, the purchaser is required to submit a copy of the purchase contract to the association with a request for the assurances or a statement of any material changes. The association must provide the assurances within 10 days after receipt of the contract and request. *Id.*

368. *Id.* § 55-512(E). This amendment corrected an inconsistency in § 55-511 of the Code, which required the inclusion of the disclosure statement in all contracts, notwithstanding

disposition of a lot to a person in the business of selling real estate who offers lots for his own account."³⁶⁹ For example, lot sales contracts between developers and builders will no longer require the disclosure statement nor necessitate the delivery of the disclosure packet to the builder.

The General Assembly modified the procedures by which the association may promulgate regulations and impose punitive assessments and special assessments. A majority of votes cast at a meeting of the association convened in accordance with the association's bylaws will effect the amendment or repeal of regulations adopted by the board of directors of the association.³⁷⁰ Also, the board of directors of a homeowners' association may, if the declaration or rules and regulations of the association expressly provide, assess charges against members for violations of the declaration or rules and regulations.³⁷¹ Added to the Code is a provision requiring the association to indemnify its officers and directors if a special assessment providing funds necessary to carrying out the officer's or director's duties is rescinded by the members.³⁷²

Several amendments affect the mechanism for filing a memorandum of lien for assessment against a member's lot. The association now has twelve months instead of six months from the date the assessment became due to file a memorandum of lien for the as-

the exemption of certain transactions from the requirement for the delivery of the disclosure packet as set forth in § 55-512(E) of the Code. *See id.* §§ 55-511, 512(E) (Cum. Supp. 1990).

369. VA. CODE ANN. § 55-512(E)(5) (Cum. Supp. 1991).

370. *Id.* § 55-513(A). This section previously required a vote by the majority of the members of the association to amend or repeal a rule or regulation. However, that language ignored the reality of current association voting structures. Voting rights in many associations provide for various classes of voting rights. The one-person-one-vote voting structure is rare, especially in associations affiliated with large developments built over an extended period of time. The amended section accommodates more sophisticated voting structures.

The substitution of "bylaws" for "declaration," is consistent with actual practice in that an association's bylaws customarily outline the quorum and other voting requirements for matters presented to the members for action.

371. *Id.* § 55-513. This section previously provided that the board of directors could seek an injunction against a member for a violation of the declaration or the association's rules and regulations. *Id.* § 55-513(B) (Cum. Supp. 1990).

Notice and a hearing are required prior to the imposition of the charges. The charges, which will be treated as assessments for the purpose of § 55-516 of the Code, must not exceed \$50 for a single offense or \$10 per day for a continuing offense. *Id.* § 55-513(B) (Cum. Supp. 1991).

372. *Id.* § 55-514(A) of the Code. Section 55-514(A) grants to the members the right to rescind a special assessment adopted by the board of directors.

assessment.³⁷³ The memorandum must include a statement that the association is obtaining a lien pursuant to the POAA.³⁷⁴ Finally, the judgment or decree enforcing the lien must include "reimbursement for costs and reasonable attorney's fees, together with interest at the maximum lawful rate for the sums secured by the lien from the time each such sum became due and payable."³⁷⁵

R. *Virginia Real Estate Time-Share Act*

The 1991 General Assembly made a number of amendments to the Virginia Real Estate Time-Share Act. Many of the changes affect the dissemination of information about the association and its affairs to the members. Section 55-369 of the Code, concerning developer responsibilities, has been added to the list of sections that apply to time-share projects created prior to July 1, 1985.³⁷⁶ The General Assembly has also now defined "board of directors" as the governing body in a time-share estate owner's association.³⁷⁷

The time-share instrument, which is required to outline arrangements for the management of the project, must now include a provision permitting the association to terminate maintenance and service contracts entered into by the developer after the expiration of the developer control period.³⁷⁸ The time-share instrument must also provide for the dissemination of information to time-share owners regarding debts incurred in the operation of the project and the manner in which the debts will be satisfied.³⁷⁹

The definition of "time-share estate occupancy expenses" was amended to include expenses incurred in the time-share estate owners' "use and occupancy of the time-share estate project in-

373. VA. CODE ANN. § 55-516(B).

374. *Id.* § 516(B)(7). The addition of the word "Virginia" was the only change to this requirement.

375. *Id.* § 55-516(F).

376. *Id.* § 55-361.1. Section 55-369(A) of the Code outlines the developer's obligation to bear the cost of operating and managing the project during the developer's control period. Section 55-369(B) of the Code requires the developer to convey the project, except for units, to the time-share estate owners' association upon the happening of certain events.

377. *Id.* § 55-362.

378. *Id.* § 55-368(4). The General Assembly deleted language from § 55-369(B) which provided the association with termination rights upon the expiration of ten years after the first sale of a time-share unit by the developer. *Id.* § 55-369(B)(1) (Cum. Supp. 1990).

379. *Id.* § 55-368(5) (Cum. Supp. 1991). The General Assembly deleted a provision contained in § 55-369(B) of the Code requiring the developer to prepare a summary of the debts incurred in managing and operating the time-share project and the manner in which the debts would be satisfied. *Id.* § 369(B) (Cum. Supp. 1990).

cluding its completed and occupied time-share estate units and amenities available for use.”³⁸⁰ This broader definition permits the developer to pass on a greater portion of the costs of maintaining and operating the project to time-share estate owners.

Section 55-369(B) of the Code now provides that the developer control period may terminate in phases as portions of the project are conveyed to the association.³⁸¹

The General Assembly squarely placed with the board of directors of the project’s association the authority to impose special assessments and raise the annual assessments charged to time-share estate owners.³⁸² However, the assessments or increases must be in the best interests of the association and must be used “primarily for the maintenance and upkeep, including capital expenditures, of the project.”³⁸³

The General Assembly clarified that the association’s lien for unpaid assessments affects the defaulting owner’s time-share estate, not the time-share unit.³⁸⁴ In addition, the memorandum of lien which the association must record to perfect its lien on a time-share estate is now required to include the description of the unit in which the time-share is located.³⁸⁵

Section 55-370(C) of the Code was revised to provide that, notwithstanding the provisions of the Virginia Nonstock Corporation Act,³⁸⁶ the bylaws of the association may prescribe different quorum requirements for meetings of members.³⁸⁷ Also, the association is now required, subject to a broad exception, to make the books and records of the association available to its members.³⁸⁸

The General Assembly has permitted the developer to provide in the time-share instrument, in bold type, that the developer will not

380. VA. CODE ANN. § 55-369(A) (Cum. Supp. 1991). The old definition of “time-share estate occupancy expenses” was more narrowly drawn to include only expenses incurred in operating and maintaining the interior time-share units. *See id.* § 55-369(A) (Repl. Vol. 1986).

381. *Id.* § 55-369(B) (Cum. Supp. 1991).

382. *Id.* § 55-370(A).

383. *Id.*

384. *Id.* § 55-370(B).

385. *Id.* § 55-370(B)(2).

386. *See id.* §§ 13.1-801 to -944 (Repl. Vol. 1989 and Supp. 1990).

387. *Id.* § 55-370(C)(1) (Cum. Supp. 1991). Former § 55-370(C) of the Code has been renumbered as § 55-370(C)(1).

388. *Id.* § 55-370(C)(3). The association’s books and records may be made unavailable for “use in matters not concerning the members of the time-share association.” *Id.*

be responsible for assessments charged by the association after the expiration of the developer control period.³⁸⁹ Absent such a provision, the developer is responsible for paying those assessments on the same footing as other time-share estate owners.³⁹⁰

The developer, during its control period, and thereafter the association, are required to produce an annual report of pertinent information regarding the association and its finances. However, this report need not be prepared for the first year of the time-share program.³⁹¹ The report must now include "[a] statement of the time-share occupancy expenses, dues, special assessments or other charges due for the current year from each time-share estate owner."³⁹²

Two final changes to the act worthy of note are the addition of section 55-374.1(C) of the Code, which provides that in the event of a conflict, the provisions of the Prizes and Gifts Act³⁹³ control over section 55-374.1 of the Code,³⁹⁴ and the addition of an exception to the requirement that a developer provide an amended offering statement to a purchaser if the statement is amended after the contract is signed but before settlement.³⁹⁵

S. *Wet Settlement Act*

Under the Virginia Wet Settlement Act, lenders are now permitted to deliver loan funds to settlement agents in the form of teller's checks with equivalent funds available in conformity with the federal Expedited Funds Availability Act.³⁹⁶

389. VA. CODE ANN. § 55-350(E).

390. *Id.* § 55-370(E). The General Assembly deleted a portion of § 55-369(A) of the Code which allocated time-share operating expenses and time-share occupancy expenses between the association and the developer after the expiration of the developer control period. *See id.* § 369(A) (Cum. Supp. 1990).

391. *Id.* § 55-370.1(A) (Cum. Supp. 1991).

392. *Id.* § 55-370.1(B)(5).

393. *Id.* §§ 59.1-415 to -423 (Cum. Supp. 1990).

394. *Id.* § 55-374.1(C) (Cum. Supp. 1991). Section 55-374.1 of the Code regulates time-share project developers' advertising practices.

395. *Id.* § 55-376(C). The developer is not required to provide the contract purchaser with an amended statement where the amendment is the result of "the orderly development of the time-share project in accordance with the project instrument." *Id.*

396. *Id.* § 6.1-2.10(5) (citing 12 U.S.C. §§ 4001 to 4010 (1987)).

T. Zoning and Land Use

1. Adoption of Zoning Ordinances

An amendment to section 15.1-493 of the Code requires that the public notice for proposed amendments to a zoning map state the general usage and density range, if any, set forth in the pertinent part of the comprehensive plan. This requirement is in addition to stating the general usage and density range of the proposed zoning amendment.³⁹⁷

2. Affordable Housing

The list of local governments eligible to adopt amendments to their zoning ordinances to provide for an affordable housing dwelling unit program has been expanded with the General Assembly's amendments of sections 15.1-491.8³⁹⁸ and 15.1-491.9 of the Code.³⁹⁹ The list of authorized governing bodies includes: (a) counties with the urban county executive form of government;⁴⁰⁰ (b) counties or cities adjacent to or surrounded by counties with the urban county executive form of government;⁴⁰¹ (c) cities completely surrounded by counties with the county executive form of government;⁴⁰² (d) cities with populations of 31,000 to 66,000;⁴⁰³ (e) cities with populations of 140,000 to 160,000;⁴⁰⁴ (f) counties with populations of 40,000 to 45,000;⁴⁰⁵ and (g) counties with populations of 64,000 to 73,000.⁴⁰⁶ Other localities that had ordinances which provided optional increases in density for low and moderate income housing that were adopted prior to December 31, 1988, were grandfathered.⁴⁰⁷

Subsection B of section 15.1-491.9 of the Code lists the regula-

397. VA. CODE ANN. § 15.1-493(C) (Cum. Supp. 1991).

398. *Id.* § 15.1-491.8.

399. *Id.* § 15.1-491.9.

400. *Id.* § 15.1-491.8. Fairfax County is the only county with the urban county executive form of government.

401. *Id.* § 15.1-491.9(A)(i). These governing bodies include Loudoun County, Prince William County, Arlington County and the Cities of Fairfax, Alexandria and Falls Church.

402. *Id.* § 15.1-491.9(A)(ii). These cities are Manassas, Manassas Park and Charlottesville.

403. *Id.* § 15.1-491.9(A)(iii). Petersburg, Suffolk and Danville have populations of this size.

404. *Id.* § 15.1-491.9(A)(iv). Only the City of Chesapeake falls within this classification.

405. *Id.* § 15.1-491.9(A)(v). York County's population meets this requirement.

406. *Id.* § 15.1-491.9(A)(vi). Albemarle County's population is within this range.

407. *Id.* § 15.1-491.9(A).

tions and provisions which may be included in a zoning ordinance which establishes an affordable housing dwelling unit program.⁴⁰⁸ The requirements for an affordable housing program may be applied to any site which is the subject of a rezoning application or special exception and, with this amendment, may also be applied to site plans or subdivision plats, at the discretion of the local governing body.⁴⁰⁹ The developable density of each site subject to the ordinance may be increased up to twenty percent.⁴¹⁰ Up to twelve and one-half percent of the total units approved, including the optional density increase, may be required by the ordinance to be affordable dwelling units.⁴¹¹ The twenty percent to twelve and one-half percent ratio must be maintained in the event a twenty percent increase is not achieved.⁴¹² Alternatively, ordinances may provide for density increases of up to ten percent of the density,⁴¹³ and may require six and one-quarter percent of the total number of approved dwelling units to be affordable dwelling units.⁴¹⁴ Under this scenario, a ratio of ten percent to six and one-quarter percent must be maintained in the event a ten percent increase is not achieved.⁴¹⁵ The amended statute also provides for regulations which require the construction of affordable dwelling units offered for sale or rental to be in proportion to those units being offered at market rates.⁴¹⁶

3. Board of Zoning Appeals

The amendment of section 15.1-495⁴¹⁷ of the Code expands the powers of the boards of zoning appeals. Boards of zoning appeals now have the authority to limit the duration of permits which have been granted,⁴¹⁸ and may, after proper notice and hearing, revoke special exceptions whose conditions have been violated.⁴¹⁹

408. VA. CODE ANN. § 15.1-491.9(B).

409. *Id.* § 15.1-491.9(B)(2).

410. *Id.* § 15.1-491.9(B)(3).

411. *Id.*

412. *Id.*

413. *Id.* § 15.1-491.9(B)(6).

414. *Id.* § 15.1-491.9(B)(7).

415. *Id.*

416. *Id.* § 15.1-491.9(B)(14).

417. *Id.* § 15.1-495.

418. *Id.* § 15.1-495(6).

419. *Id.* § 15.1-495(7).

4. Comprehensive Plan

Section 15.1-447 of the Code was amended to include environmental factors as one of the matters to be considered relating to the purposes of the comprehensive plan.⁴²⁰ Also, a current map of the area covered by the comprehensive plan is now required.⁴²¹

5. Conditional Zoning

The General Assembly amended and re-enacted section 15.1-491.2:1 of the Code to include towns that experience a population growth of ten percent or more among the municipalities whose zoning ordinances may provide for voluntary written proffers from owners as part of their requests for rezoning or amendments to a zoning map.⁴²² Previously, section 15.1-491.2:1(A) of the Code applied to any county or city.⁴²³

6. Demolition of Historic Structures

Today, counties that have adopted the urban county executive form of government may impose a civil penalty against persons who, without prior approval, demolish or move buildings that are designated as historic or are located in historic districts.⁴²⁴ This remedy is being provided, in addition to the zoning administrator's authority to bring legal action⁴²⁵ and actions by a governing body,⁴²⁶ when zoning ordinances are violated.

The civil penalty is enforceable by the county attorney in the circuit court.⁴²⁷ The violator's liability must be proven by a preponderance of the evidence.⁴²⁸ The fine imposed is limited to the market value of the historic structure together with the market value of the real property at the time of the demolition or removal of the historic structure.⁴²⁹

420. VA. CODE ANN. § 15.1-447(A)(1).

421. *Id.* § 15.1-447(B).

422. *Id.* § 15.1-491.2:1(A)(i).

423. *Id.* § 15.1-491.2:1(A)(T) (Cum. Supp. 1990).

424. *Id.* § 15.1-499.2 (Cum. Supp. 1991).

425. *Id.* § 15.1-491(d) (Cum. Supp. 1990).

426. *Id.* § 15.1-499 (Cum. Supp. 1991).

427. *Id.* § 15.1-499.2.

428. *Id.*

429. *Id.*

7. Expedited Land Development Review Procedure

A separate review procedure for expedited approval of subdivision and site plans and other development plans is now available to certain counties.⁴³⁰ Counties having a population between 80,000 and 90,000 (for example, Loudoun County) and between 212,000 and 216,000 (for example, Prince William County) are eligible to establish an expedited land development review procedure where qualified individuals, called plans examiners, review and recommend which submitted plans may qualify for the separate processing procedure.⁴³¹

The new statute sets forth the qualification criteria for the persons who may participate in the program.⁴³² The adoption of an expedited review procedure requires the establishment of a plans examiner board to serve in an advisory capacity to the board of supervisors regarding the general operation of the program.⁴³³

8. Manufactured Housing

The uniform regulations for manufactured housing as set forth in section 15.1-486.4 of the Code were also amended.⁴³⁴ Manufactured housing units shall be permitted in all agricultural zoning districts, or in districts similarly classified, such as horticultural or forest uses, subject to development standards equal to those for conventional, site-built single family dwellings.⁴³⁵

430. VA. CODE ANN. § 15.1-501.1.

431. *Id.* § 15.1-501.1(A).

432. *Id.* § 15.1-501.1(B). The minimum requirements are:

1. A bachelor of science degree in engineering, architecture, landscape architecture or related science or equivalent experience or a land surveyor. . . .
2. Successful completion of an education program specified by the board.
3. A minimum of two years of land development engineering design experience acceptable to the board.
4. Attendance at continuing educational courses specified by the board.
5. Consistent preparation and submission of plans which meet all applicable ordinances and regulations.

Id. References to the 'board' are to the board of supervisors. *Id.*

433. *Id.* § 15.1-501(C). The plans examiner board shall be composed of six members appointed by the board of supervisors for staggered four year terms. *Id.* Three of the plans examiner board members must be licensed engineers or land surveyors in private practice. Other members are to include one citizen member, one person employed by the county government and one non-voting member from the Virginia Department of Transportation. *Id.*

434. *Id.* § 15.1-486.4(A).

435. *Id.*

9. Penalties for Violation of Ordinances

The penalties which may be established by governing bodies for violating county ordinances, or the ordinances of municipal corporations, have been increased by amendments to sections 15.1-505⁴³⁶ and 15.1-901 of the Code.⁴³⁷ Maximum allowable fines were increased from \$1,000.00 to \$2,500.00 or jail confinement of up to twelve months. The \$2,500.00 maximum fine may be exceeded if a greater amount is dictated by the charter of any city or town.⁴³⁸

IV. CONCLUSION

During the past year, courts in Virginia, including the Supreme Court of Virginia, have addressed a number of issues relating to property law. The issues ranged from the standard of knowledge by which a land owner will be measured to determine if the owner had sufficient knowledge of an adverse use of his property to the requirements for creating vested rights in zoning classifications beneficial to a property owner.

The 1991 General Assembly continued attempts to clarify and improve the Virginia Condominium Act and the Virginia Property Owners' Association Act. In addition, the General Assembly broadened the application of the Virginia Residential Landlord and Tenant Act and made significant amendments to the Mobile Home Lot Rental Act which will inure to the benefit of tenants. And, consistent with recent years, the General Assembly remained active in the field of zoning.

436. VA. CODE ANN. § 15.1-505.

437. *Id.* § 15.1-901.

438. *Id.*

