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Annual Survey of Virginia Law: Property Law

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PROPERTY LAW

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This article reviews some of the more significant cases and legislation affecting Virginia property law over the past year. The Virginia Supreme Court revisited a wide range of issues, including the level of visibility to which an adverse use must rise to establish title by adverse possession. The court also revisited the steps that a mechanic's lienor must take in order to protect his or her lien. Additionally, the court also explored some new issues, such as the applicability of the rule against perpetuities to a purchase option contained in a lease.

Meanwhile, the Virginia General Assembly continued refining various provisions of both the Virginia Condominium Act and the Virginia Property Owners' Association Act, the Virginia Real Estate Time Share Act. In addition, the General Assembly cracked open the door for consumers suffering from defective FRT plywood by expanding the scope of parties entitled to enforce a FRT plywood manufacturer's warranty. Other important cases and statutes are discussed below.

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I. JUDICIAL DECISIONS

A. *Adverse Possession*

The issue on appeal in *Calhoun v. Woods*¹ was whether the trial court correctly ruled that several claimants failed to establish title to three adjacent parcels of unimproved mountain land by adverse possession. To establish title to the property by adverse possession, the claimants had to show by clear and convincing evidence actual, hostile, exclusive, visible, and continuous possession, under a claim of right, for the statutory period of fifteen years.²

The claimants, Henry and Katharine Calhoun, asserted that their period of adverse possession began in 1931 when Mrs. Calhoun's father acquired title to property adjacent to the land at issue. The Calhouns acquired title to the property in 1966.³ Evidence produced by the Calhouns showed that from 1931 they or their predecessors used the property for "sawmill operations, logging, firewood gathering, construction and maintenance of gates, construction and use of buildings, installation and use of water and electricity, hunting, property posting, erection and maintenance of fencing, husbandry, orchardry, recreational activities, conservation activities, occupation and leasing, and construction and maintenance of roads."⁴ The record, however, did not indicate whether the disputed property was used for these purposes or the time and duration of the uses.⁵ For example, three small buildings built in connection with the mill were abandoned when the mill ceased operations after two years.⁶

Reviewing its past decisions, the court noted that all presumptions favor the holder of legal title to the disputed land,⁷

1. 246 Va. 41, 431 S.E.2d 285 (1993).

2. *Id.* at 43, 431 S.E.2d at 286-87 (citing *Grappo v. Blanks*, 241 Va. 58, 61, 400 S.E.2d 168, 170-71 (1991)).

3. *Id.* at 45, 431 S.E.2d at 287.

4. *Id.*

5. *Id.*

6. *Id.* at 46, 431 S.E.2d at 288.

7. *Id.* at 44, 431 S.E.2d at 287 (citing *Matthews v. W.T. Freeman Co.*, 191 Va. 385, 395, 60 S.E.2d 909, 914 (1950) (ruling that the burden of proving all elements of adverse possession is on the party asserting title, as all presumptions favor the title-

and that wild and uncultivated land cannot be made subject to adverse possession without a cognizable change in its condition.⁸ As a result, although the claimants presented some evidence of their use of the disputed property during the statutory period, the court viewed the evidence as insufficient to provide notice of a hostile and adverse claim.⁹

B. *Condemnation*

In *Jenkins v. County of Shenandoah*,¹⁰ Jenkins and adjacent landowners sued the county to recover for property damage arising from storm water drainage that backed onto their lands out of a county-owned drainage facility. The facility had been approved by and dedicated to the county concurrently with the development of a residential subdivision. The county, however, failed to maintain the facility. The trial court upheld the county's two-part defense: first, the county had no duty to maintain the facility, and second, the lawsuit was barred by the doctrine of sovereign immunity.¹¹ The Virginia Supreme Court overruled the lower court on both counts.

First, the court disposed of the sovereign immunity defense, citing Article I, Section 11 of the Constitution of Virginia, which prohibits the General Assembly from enacting any law that enables private property to be taken or damaged for public use without just compensation to the landowner.¹² This self-operating section permits a landowner to enforce his constitutional rights in a common law action "where his property is

holder)).

8. *Id.* (citing *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 233, 101 S.E. 225, 229 (1919) (holding that the periodic cutting and sale of timber on undeveloped land does not effect a cognizable change in condition)).

9. *Id.* at 46, 431 S.E.2d at 288.

10. 246 Va. 467, 436 S.E.2d 607 (1993).

11. *Id.* at 468-69, 436 S.E.2d at 608.

12. *Id.*; see VA. CONST. art. I, § 11; see also *Burns v. Board of Supervisors*, 218 Va. 625, 627, 238 S.E.2d 823, 825 (1977) (holding that landowners may recover for property damage based upon implied contract in the absence of valid eminent domain law); *Morris v. Elizabeth River Tunnel Dist.*, 203 Va. 196, 197, 123 S.E.2d 398, 399 (1962) (finding that owner of property damaged by state construction of river tunnel district was entitled to just compensation); *Heldt v. Elizabeth River Tunnel Dist.*, 196 Va. 477, 481, 84 S.E.2d 511, 514 (1954) (ruling that a right of recovery exists for damage done to property by the government's exercise of eminent domain).

taken for public uses and where it is *damaged* for public uses, irrespective of . . . negligence in the taking or the damage."¹³ The court noted that it previously held landowners' actions under Article I, Section 11 to be contract actions, not tort actions, and accordingly, were not barred by the doctrine of sovereign immunity.¹⁴

The Virginia Supreme Court then turned to the county's assertion that the landowners failed to present a case for compensation from inverse condemnation. As basis for this claim, the county stated it had never taken any actions to maintain, construct, supervise or operate the drainage easements. In response, the court cited the facts in *Burns*, which were similar to the facts in the instant case. There, as here, the drainage system was dedicated to the board of supervisors and the board accepted the dedication.¹⁵ Also, in *Burns* the system damaged abutting properties. The only distinction, which the court dismissed as irrelevant, was that in the instant case, the drainage system fell into disrepair.¹⁶ The court then noted that in *Burns* an inference arose that the drainage system was used for a public purpose because the board of supervisors, as a public body, can only acquire property for a public purpose.¹⁷ The court then jumped to the conclusion that when the board of supervisors accepted the dedication of the easement, it also accepted the burden of maintaining the easement to protect the subservient properties. Therefore, the landowners had made a *prima facie* case of inverse condemnation, and the case was remanded for further action by the lower court.¹⁸

In *Board of Supervisors v. Parsons*,¹⁹ Prince William County's appetite proved bigger than its stomach. The county condemned 117.83 acres owned by the Parsons family which initially was to be used to expand the county's landfill and later, as a public park. The county's valuation of the land was

13. *Jenkins*, 246 Va. at 470, 436 S.E.2d at 609 (citing *Heldt*, 196 Va. at 482, 84 S.E.2d at 514) (emphasis in original).

14. *Id.* (citing *Burns*, 218 Va. at 627, 238 S.E.2d at 825).

15. *Id.* (citing *Burns*, 218 Va. at 626, 238 S.E.2d at 824).

16. *Id.* at 471, 436 S.E.2d at 610.

17. *Id.*

18. *Id.*

19. 245 Va. 489, 428 S.E.2d 905 (1993).

initially \$1,895,000,²⁰ but the commissioners valued it much higher in two proceedings. In the second trial the value was fixed by the commissioners at \$3,425,000.²¹ The circuit court confirmed the award in August 1991, and its order provided that "the execution of this order shall be suspended pending the appeal of this matter to the Supreme Court of Virginia, and shall be suspended until all appeals are finally disposed of."²² In March, 1992, the county filed a motion to withdraw the condemnation proceedings and to pay the Parsons their expenses. The county believed that because of the excessive price, the purposes for which it had sought to acquire the property were frustrated.²³

The Virginia Supreme Court then considered whether a condemnor has the right under Virginia Code section 25-46.34(b)²⁴ to withdraw a condemnation proceeding *after* the lapse of the thirty-day period for the filing of a notice of appeal fixed in Rule 5:9(a).²⁵ First, the court summarily dismissed the county's assertion that, absent a statutory provision to the contrary, eminent domain permits a condemnor who has not taken title to the land to withdraw at any time during the pendency of an appeal from the commissioner's ruling.²⁶ The court also noted that Code section 25-46.34(b) specifically addresses that is-

20. *Id.* at 491, 428 S.E.2d at 906. The landowners asserted a value of \$59,100,000. *Id.*

21. *Id.*

22. *Id.* at 491, 428 S.E.2d at 906-07.

23. *Id.* at 492, 428 S.E.2d at 907.

24. VA. CODE ANN. § 25-46.34(b) (Repl. Vol. 1993).

25. VA. SUP. CT. R. 5:9(a).

26. *Parsons*, 245 Va. at 493, 428 S.E.2d at 907.

sue.²⁷ The Virginia Supreme Court concluded this part of its analysis by holding:

[t]he General Assembly has provided that a condemnor's right to withdraw eminent domain proceedings expires upon the lapse of 30 days following entry of the "final order upon a report of just compensation." At that time, if a condemnor has not exercised its right to note an appeal, the respective rights of the parties vest, title passes to the condemnor, and the landowner becomes entitled to payment of the award.²⁸

The court went on to analyze whether the August 1991 order was "final." The county argued that the withdrawal period had not run because the August 1991 order had been "suspended simultaneously with its entry," and that this suspension provision had "extended the time for the Board to exercise its legislative discretion to withdrawal."²⁹ The final order, according to the county, did not occur until the court denied the Board's petition for appeal.³⁰

After analyzing Virginia Code sections 25-46.26³¹ and 25-46.31(d),³² the court concluded (somewhat tautologically) that "the final order in this case provided that 'the *execution* of the order shall be suspended pending the appeal.' Supersedeas affects only the enforceability, not the finality, of an appealable

27. *Id.*

Manifestly, Code § 25-46.34(b) provides that after commencement of a just compensation hearing, a petitioner that has not acquired a vested interest in the property . . . has a privilege, 'as a matter of right,' to withdraw the petition if it does so 'before the time for noting an appeal from any final order upon a report of just compensation.' The time for noting an appeal is '30 days after entry of the final judgment or other appealable order or decree.'

Id. The court also noted the difference between other jurisdictions and Virginia with respect to the appeal period. For example, see MD. CODE ANN., REAL PROP. § 12-109 (1992) and N.J. STAT. ANN. § 20:3-35 (West Cum. Supp. 1992) which permit the condemnor to withdraw its case until after it has lost an appeal to a higher court. In Virginia, the statute limits the right to withdraw the proceeding at a point before the time for noting an appeal. See *Parsons*, 245 Va. at 493-94, 428 S.E.2d at 908.

28. *Parsons*, 245 Va. at 494, 428 S.E.2d at 908.

29. *Id.* at 494-95, 428 S.E.2d at 908.

30. *Id.* at 495, 428 S.E.2d at 908.

31. VA. CODE ANN. § 25-46.26 (Repl. Vol. 1993).

32. *Id.* § 25-46.31(d).

order."³³ Finally, the court modified the circuit court's order regarding the moment from which interest in favor of the landowner is to run to thirty days after entry of the final order, that being the instant when the respective rights of the parties vest.³⁴

A condemnation certificate does not constitute a continuing offer to purchase, explained the Virginia Supreme Court in *Commonwealth Transportation Commission v. Klotz, Inc.*³⁵ Upon receiving an unfavorable environmental report on the two parcels of land affected by the certificate, Klotz, the owner of the parcels, notified the commissioner in writing that he accepted the commissioner's \$15,190 value for the parcels set forth in the certificate. The commissioner, however, subsequently sought to amend the certificate to take fee simple title to only one parcel, an easement over the other and reduce the value of the parcels to \$71.³⁶ The trial court held that the certificate constituted a continuing offer to purchase and denied the commissioner's request to amend the certificate.³⁷

The Supreme Court of Virginia's strict construction of Virginia Code section 33.1-122³⁸ precluded treating Klotz's acceptance letter as an agreement between the parties as to the value of

33. *Parsons*, 245 Va. at 495, 428 S.E.2d at 909 (emphasis in original).

34. *Id.* at 496, 428 S.E.2d at 909 (citing *Bartz v. Bd. of Supervisors*, 237 Va. 669, 672, 379 S.E.2d 356, 357 (1989) (stating that an interest on compensation award is appropriate for time periods during which condemnor has "taken" the property and the land owner has not yet been paid)).

35. 245 Va. 101, 425 S.E.2d 508 (1993).

36. *Id.* at 103-04, 428 S.E.2d at 510.

37. *Id.* at 104, 425 S.E.2d at 510.

38. VA. CODE ANN. § 33.1-122 (Repl. Vol. 1990 & Cum. Supp. 1994). Section 33.1-122 provides, in part, that:

The certificate of the Commissioner shall be recorded in the clerk's office of the court where deeds are recorded. Upon such recordation, the interest or estate of the owner of such property shall terminate and the title to such property or interest or estate of the owner shall be vested in the Commonwealth and such owner shall have such interest or estate in the funds held on deposit by virtue of the certificate as he had in the property taken or damaged, and all liens by deed of trust, judgment or otherwise upon such property or estate or interest shall be transferred to such funds. The title in the Commonwealth shall be defeasible until the reaching of an agreement between the Commissioner and such owner, as provided in § 33.1-129, or the compensation determined by condemnation proceedings as hereinafter provided.

Id.

the parcels. The letter was merely an indication of his willingness to settle the matter for a set amount.³⁹ Absent some other agreement between the parties, the trial court erred in holding that the acceptance letter from Klotz bound the commissioner.⁴⁰

C. *Contracts*

The Supreme Court of Virginia considered whether the plaintiffs produced sufficient evidence of fraud to support a jury's award of damages in the amount of \$8,000 in *Thompson v. Bacon*.⁴¹ Shortly after the Bacons purchased a house from the Thompsons, the basement flooded after a heavy rainfall. The Bacons claimed that the Thompsons fraudulently concealed evidence of water damage in the basement of the house.⁴²

The court considered the following evidence. First, the Bacons viewed the house twice prior to purchasing it. In addition, a home inspection report prepared on behalf of the Bacons disclosed evidence of past dampness in the basement, but no evidence of water damage.⁴³ Also, three water leakage experts testified at trial that the basement showed evidence of prior water damage, but they were unable to describe the location of such evidence in the basement.⁴⁴ Furthermore, when the Thompsons moved out of the house, they left furniture blocking the area that the Bacons claimed was damaged by the flood. The Thompsons, however, established that the furniture had been located in the same place for the four years that they owned the house.⁴⁵

The owners of the house prior to the Thompsons testified that the basement had flooded after a heavy snow, but that they repaired the water leakage problem. Consequently, the previous owners did not inform the Thompsons of the flooding. Additionally, the contractor who installed new carpeting in the

39. *Klotz*, 245 Va. at 106, 425 S.E.2d at 511.

40. *Id.*

41. 245 Va. 107, 425 S.E.2d 512 (1993).

42. *Id.* at 108, 425 S.E.2d at 513.

43. *Id.* at 109, 425 S.E.2d at 513.

44. *Id.* at 110, 425 S.E.2d at 513.

45. *Id.* at 109, 425 S.E.2d at 513.

basement for the Bacons testified that the pad under the carpet did not appear to have water damage and was, in fact, reused by the contractor.⁴⁶

The court held that the Bacons failed to prove that the Thompsons had any knowledge of any water damage.⁴⁷ In addition, the court did not find that the Thompsons' alleged misrepresentation had any causal relationship with the damages suffered by the Bacons.⁴⁸

In a matter involving the interpretation of a purchase contract subject to several conditions precedent, the Virginia Supreme Court affirmed the decision of the trial court in *Vega v. Chattan Associates, Inc.*⁴⁹ In November of 1989, Chattan Associates agreed to purchase a tract of land from Vega and Lamay,⁵⁰ conditioned upon "the obtaining of financing acceptable to" Chattan.⁵¹ The purchase contract further provided that "[i]n the event [the] contract is declared null and void due to [certain] circumstances . . . Sellers will reimburse [Chattan], for the deposits it had paid and 'any other costs' it might have incurred in preparation for improving the land."⁵²

A dispute arose when Chattan notified Vega and Lamay of Chattan's inability to obtain suitable financing and demanded the return of its deposit money and reimbursement of incurred improvement costs.⁵³ Vega and the Lamays contended that

46. *Id.* at 110, 425 S.E.2d at 514.

47. *Id.* at 111, 425 S.E.2d at 514.

48. *Id.* at 112, 425 S.E.2d at 515.

49. 246 Va. 196, 435 S.E.2d 142 (1993).

50. *Id.* at 197-98, 435 S.E.2d at 143. The tract contained approximately two acres composed of one parcel owned by Guillermina Vega and another owned by Russell and Yvonne Lamay. *Id.*

51. *Id.* at 198, 435 S.E.2d at 143 (quoting the purchase contract).

52. *Id.* The "null and void clause" of the contract provided:

In the event this contract is declared null and void due to circumstances which hold the Purchaser not in default, as provided for elsewhere in this contract, Sellers will reimburse Purchaser for all monies disbursed by Purchaser for Lot purchase, and, as provided for elsewhere in this contract, for any other costs necessary to obtain Fairfax County approval of a five (5) bedroom percolation site and survey and engineering costs incurred to sub-divide and record subject lot. Purchaser is to be reimbursed within one hundred and twenty (120) days of this contract being declared null and void.

Id. at 199, 435 S.E.2d at 144.

53. *Id.* at 198, 435 S.E.2d at 143.

Chattan was barred from recovery under the contract because the contract became null and void for failure of the condition precedent relating to financing.⁵⁴

Upon analyzing the contract language, the court found that the parties intended the deposit and cost reimbursement provision to be severable and to survive the termination of the contract for failure of a condition precedent.⁵⁵ The court further observed that the financing contingency was identified in the contract as a condition that, if not satisfied, would not hold Chattan in default. Chattan, consequently, would be permitted to declare the contract null and void and trigger the refund and reimbursement provision.⁵⁶

In *Christopher Associates v. Sessoms*,⁵⁷ the Supreme Court of Virginia was asked to construe the liquidated damages provision of a contract for the sale of real property. Sessoms agreed to sell a 132 acre parcel to Christopher Associates. The sales contract required the purchaser to post a \$10,000 deposit upon execution of the contract and the additional sum of \$40,000 upon successfully re-zoning the property to permit the development of a residential subdivision.⁵⁸ The purchaser obtained the appropriate zoning but did not post the additional sum of \$40,000. The purchaser subsequently defaulted on its obligation to purchase the property.⁵⁹

The seller sued the purchaser for the additional sum of \$40,000 claiming that the \$40,000 constituted part of the depos-

54. *Id.*

55. *Id.* at 199, 435 S.E.2d at 143. The court opined that "[t]o read the contract otherwise would render the deposit-refund and cost-reimbursement provision meaningless." *Id.*; see also *Ames v. American Nat'l Bank*, 163 Va. 1, 39, 176 S.E. 204, 216 (1934) (holding that a contract is to be read as a whole and no word or phrase is to be treated as meaningless if any reasonable meaning consistent with the rest of the contract can be given to it).

56. 246 Va. at 201, 435 S.E.2d at 144-45.

57. 245 Va. 18, 425 S.E.2d 795 (1993).

58. *Id.* at 19-20, 425 S.E.2d at 796. The liquidated damages provision stated: If on or before the date of closing, Buyer shall default in the payment of the purchase price or shall otherwise default in the performance of any of the other terms of this Contract, Seller shall retain the Deposit as liquidated damages, as its sole and exclusive remedy against Buyer.

Id. at 21, 425 S.E.2d at 796.

59. *Id.*

it the purchaser was obligated to post.⁶⁰ The court disagreed, holding that the contract allowed the seller to retain only the \$10,000 actually posted by the purchaser.⁶¹ The seller could not "retain" the \$40,000, the court noted, because it was never paid by the purchaser.⁶²

D. Deeds

In *Hanson v. Harding*,⁶³ Floyd Diehl's heirs challenged the validity of a deed of gift purporting to convey Diehl's home to his daughter, Frances Hanson. Diehl executed the deed, which was prepared by Hanson's attorney, in a nursing home in the presence of Hanson, her husband, and the nursing home administrator in her capacity as a notary. Witnesses for the heirs testified that after Diehl executed the deed of gift he made statements to the effect that he intended to return to his home after leaving the nursing home and that he wanted all of his children to share in his property after his death. Diehl did not tell anyone that he had executed the deed to Hanson.⁶⁴

The heirs sought to overturn the deed on two grounds. First, the heirs claimed that Hanson procured the deed by fraud. Second, the heirs alleged that there was no effective delivery of the deed.⁶⁵ The court noted that had the heirs presented evidence (1) that a confidential or fiduciary relationship existed between Diehl and Hanson, (2) that the consideration for the deed was grossly inadequate, and (3) that Diehl suffered from "great weakness of mind," the heirs could have created a presumption of fraud.⁶⁶ That presumption would have shifted to Hanson the burden of producing evidence of the deed's validity.⁶⁷ The record, however, indicated that Diehl was aware of what he was doing. Therefore, the heirs retained the burden of proving fraud

60. *Id.*

61. *Id.* at 22, 425 S.E.2d at 797.

62. *Id.* at 23, 425 S.E.2d at 797.

63. 245 Va. 424, 429 S.E.2d 20 (1993).

64. *Id.* at 426, 429 S.E.2d at 21.

65. *Id.* at 427, 429 S.E.2d at 22.

66. *Id.* at 426, 429 S.E.2d at 21.

67. *Id.*

by clear and convincing evidence, which, based on the evidence in the record, they failed to do.⁶⁸

With respect to the heirs' claim that the deed was not effectively delivered to Hanson, the court noted that Diehl's statements regarding his intent to return home after leaving the nursing home and statements made by Hanson that she did not think that she would own the property until her father's death, were not inconsistent with the creation of a life estate in favor of Diehl and a present intent to convey to Hanson fee simple title to the property.⁶⁹ In addition, statements made by Diehl after executing the deed that he wanted all of his children to share in his property were not inconsistent with his intent to convey the property to Hanson at the time Diehl executed the deed. These facts failed to overcome the presumption of a valid delivery arising when a grantee is in possession of a duly executed deed.⁷⁰

In *Richardson v. Parris*,⁷¹ the Supreme Court of Virginia considered whether a purchaser at a tax sale was entitled to an allowance for improvements to the property where the tax sale was based on a facially defective affidavit.⁷² The Parris family failed to pay real estate taxes on their unimproved lot. The county proceeded against them by order of publication, mistakenly believing that they were not residents of the Commonwealth. At the time of the suit, however, the Parris family resided in Springfield, Virginia.⁷³ Richardson bought the property at the judicial sale for \$2,200.⁷⁴

The Parris family successfully challenged the sale, claiming that an affidavit filed with the court regarding their residence rendered the order of publication void and that they were not effectively subjected to the jurisdiction of the court authorizing the sale.⁷⁵ Richardson filed an application pursuant to section

68. *Id.* at 428, 429 S.E.2d at 22.

69. *Id.*

70. *Id.*

71. 246 Va. 203, 435 S.E.2d 389 (1993).

72. *Id.* at 204, 435 S.E.2d at 390.

73. *Id.*

74. *Id.*

75. *Id.* The Virginia Supreme Court noted that pursuant to § 8.01-316(1)(a)(iii) of the Virginia Code, a successful order of publication requires the claimant to file an

8.01-166 of the Virginia Code requesting an allowance for the improvements he made to the property subsequent to the judicial sale.⁷⁶

The court held that Richardson's constructive notice of the faulty affidavit, a matter of record in the judicial sale, prohibited Richardson's recovery under section 8.01-166.⁷⁷ "Interpreting the predecessor to Code § 8.01-166, this Court has said that in order to be a bona fide purchaser, the belief in the validity of the title must be founded on ignorance of fact, not ignorance of law."⁷⁸ Richardson had a duty to inquire into the validity of the sale. Had he done so, he would have discovered that the affidavit was faulty on its face, and that the court lacked jurisdiction.⁷⁹

E. Joint Tenants

The question presented to the Supreme Court of Virginia in *Overby v. White*⁸⁰ was whether property interests of a tenant in common can be affected by a deed of trust executed by a cotenant.⁸¹ The matter was brought before the court by Lisa Dawn Overby, the owner of an undivided one-fourth interest in property once owned by her mother, Aeleen Brooks Holley, and her deceased father as tenants by the entirety⁸² Aeleen and Overby's father divorced. Aeleen subsequently remarried and titled her interest in the property in herself and Paul, her new husband, as tenants by the entirety.⁸³ After Lisa Overby and

affidavit stating that the party to be served "is" not a resident of the state, not "may not be" as was stated in the affidavit in the present case. *Id.*; VA. CODE ANN. § 8.01-316(1)(a)(iii) (Repl. Vol. 1992).

76. *Richardson*, 246 Va. at 206, 435 S.E.2d at 391. Section 8.01-166 permits a recovery for improvements when the person who made the improvements held the land believing his title to be good. VA. CODE ANN. § 8.01-166 (Repl. Vol. 1992).

77. 246 Va. at 206, 435 S.E.2d at 391. "We have stated . . . that a person with notice, actual or constructive, of infirmity in the title cannot recover for improvements." *Id.* (citing *White v. Pleasants*, 227 Va. 508, 515, 317 S.E.2d 489, 493 (1984)).

78. *Id.* at 207, 435 S.E.2d at 392 (citing *Kian v. Kefalogiannis*, 158 Va. 129, 134, 163 S.E. 535, 536 (1932) (holding that notice of title defect is imputable to purchaser where defect is matter of record)).

79. *Id.*

80. 245 Va. 446, 429 S.E.2d 17 (1993).

81. *Id.* at 447, 429 S.E.2d at 18.

82. *Id.*

83. *Id.* at 448, 429 S.E.2d at 18.

her sister filed suit, the status of title to the property was as follows: Lisa and her sister each owned an undivided one-quarter interest in the property as tenants in common. Aeleen and Paul owned a one-half undivided interest as tenants in common with Overby and her sister and as tenants by the entirety as between themselves.⁸⁴

When Paul and Aeleen Holley signed a promissory note secured by a deed of trust on the property, Overby asked the court to declare their respective interests in the property. The substitute trustee under the deed of trust securing the note petitioned to intervene in the suit to determine "the state of title of [the] property and the extent and priority of the . . . [d]eed of [t]rust."⁸⁵

The court held that Aeleen and Paul could not impair the property rights of Overby when they signed the deed of trust and the deed of trust note because Overby neither executed nor authorized anyone to execute the documents on her behalf.⁸⁶ Additionally, the court held that a trustee under a deed of trust that encumbers real property held in tenancy in common is not entitled to place a constructive trust on the property over the objection of a co-tenant who has not signed the note or deed of trust.⁸⁷ The court found no fraud or injustice attributable to Overby that would give rise to a constructive trust.⁸⁸

F. *Landlord and Tenant*

The issue addressed in *Marina Shores, Ltd v. Cohn-Phillips, Ltd.*⁸⁹ was whether the provisions of a lease avoided the necessity of complying with the five day pay-or-quit language in section 55-225 of the Virginia Code.⁹⁰ The lease required pay-

84. *Id.*

85. *Id.*

86. *Id.* at 449, 429 S.E.2d at 19.

87. *Id.*

88. *Id.*

89. 246 Va. 222, 435 S.E.2d 136 (1993).

90. *Id.* at 223, 435 S.E.2d at 137. Section 55-225 provides in part, that:

[i]f any tenant or lessee of premises in a city or town . . . , being in default in the payment of rent, shall so continue for five days after notice, in writing, requiring possession of the premises or the payment of rent, such tenant or lessee shall thereby forfeit his right to the posses-

ment of rent, without demand, on the first of each month for the prior month, and provided that nonpayment of rent constituted a default under and breach of the lease.⁹¹ The lease further stated that in the event of default, the lessor could terminate the possessory rights of the lessee by any lawful means.⁹²

When the lessee failed to pay the rent due on May 1 and June 1, counsel for the lessor wrote a letter to the lessee terminating the lease. Upon receipt of the letter on June 3, the lessee tendered the delinquent rent, which the lessor refused to accept.⁹³

The trial court held that the lessor was required to comply with the five-day notice requirement contained in section 55-225.⁹⁴ The Virginia Supreme Court disagreed stating that the clear and unambiguous default and remedies provisions of the lease governed the disposition of the case.⁹⁵ Accordingly, the

sion. In such case the possession of the defendant may, at the option of the landlord or lessor, be deemed unlawful, and he may proceed to recover [possession].

VA. CODE ANN. § 55-225 (Repl. Vol. 1986).

91. 246 Va. at 224, 435 S.E.2d at 138.

92. *Id.* at 224-25, 435 S.E.2d at 137-38. Paragraph 11 of the lease specifically provided, in pertinent part, as follows:

(a) Defaults. The occurrence of any one or more of the following events shall constitute a default and breach of the Lease by [Cohn Phillips]:

. . .
 (2) The failure by [Cohn Phillips] to make any payment of rent . . . as and when due.

. . .
 (b) Remedies. In the event of any such default or breach by [Cohn Phillips], [Marina Shores] may at any time thereafter, with or without notice or demand and without limiting [Marina Shores] in the exercise of any right or remedy which may have by reason of such default or breach:

(1) Terminate [Cohn Phillips's] right to possession of the Premises by any lawful means, in which case this Lease shall terminate and [Cohn Phillips] shall immediately surrender possession of the Premises to [Marina Shores].

Id.

93. *Id.* at 225, 435 S.E.2d at 138.

94. *Id.*

95. *Id.*; see *Marriott Corp. v. Combined Properties*, 239 Va. 506, 512, 391 S.E.2d 313, 316 (1990) (ruling that the terms of a clear and unambiguous contract will be given their ordinary plain meaning); *Winn v. Aleda Const. Co.*, 227 Va. 304, 307, 315 S.E.2d 193, 194 (1984) (stating that the contract of the parties becomes the law of the case unless it is repugnant to some rule of law or public policy).

court held that the lessee's nonpayment of rent constituted a default and breach of the lease that entitled the lessor to terminate the lease.⁹⁶ The court also determined that the notification letter sent by the lessor's attorney to the lessee was a lawful means of terminating the lease, notwithstanding the fact that the letter did not comply with section 55-225.⁹⁷

In *Wells v. Shoosmith*,⁹⁸ the Supreme Court of Virginia considered whether successors to a landlord's interest in property subject to two existing leases met their burden of proving the invalidity of the lease descriptions so as to render the two leases unenforceable.⁹⁹

By deed dated January 7, 1964, a special commissioner "on behalf of the Commonwealth, conveyed 66 acres of marshland . . . to Lewis S. Pendleton, Jr."¹⁰⁰ Approximately 9.74 acres of the 66 acres conveyed were part of a 441.64-acre farm owned by John Lofton Johnson.¹⁰¹ On July 25, 1980, Johnson executed a fifty-year lease of the 9.74 acres with William A. Wells and others referring to the area as "that certain marsh belonging to the [Johnsons], but claimed by Louis [sic] Pendleton."¹⁰² In 1982, the Johnsons executed a second lease with Wells permitting him to hunt on "the marsh located on the Appomattox River between the high land of the [Johnsons] and the marsh claimed by Louis [sic] Pendleton, along with the marsh bordering on Johnson Creek."¹⁰³ Shoosmith Brothers acquired the Johnson property in 1990 subject to the two existing leases, and subsequently conveyed the property to Jack and Nina Shoosmith. The Shoosmiths thereafter brought a proceeding in equity, claiming that the Wells leases were invalid for lack of sufficient land descriptions and lack of valid consideration.¹⁰⁴

96. 246 Va. at 226, 435 S.E.2d at 138.

97. *Id.*

98. 245 Va. 386, 428 S.E.2d 909 (1993).

99. *Id.* at 387, 428 S.E.2d at 910.

100. *Id.* at 388, 428 S.E.2d at 910. The land was characterized as "waste and unappropriated" land subject to sale under § 41.1-16 of the Virginia Code. *Id.* at 388, 428 S.E.2d at 911.

101. *Id.*

102. *Id.*

103. *Id.* at 389, 428 S.E.2d at 911.

104. *Id.* at 389, 392, 428 S.E.2d at 911, 913.

The court denied the Shoosmiths' claim, noting that a legal description "is not [provided] to identify the land, but to furnish means of identification."¹⁰⁵ The court further determined that the Shoosmiths were charged with knowledge of all facts that a diligent inquiry would have disclosed as to the property referring to both the Pendleton deed, which contained a plat, and the lease descriptions, which referred to the deed. Both the deed and lease also were duly recorded.¹⁰⁶ The court also held that property owners who purchase property subject to leases, having only privity of estate, lack standing to challenge the validity of leases absent privity of contract.¹⁰⁷

In an analogous case involving the sufficiency of a lease description, *Sovran Bank, N.A. v. Creative Industries, Inc.*, the Supreme Court of Virginia held that a contract of sale did not create a leasehold estate because it failed to identify the leased premises with reasonable certainty.¹⁰⁸ Creative Industries occupied the property subject to dispute when it was sold at a foreclosure sale by Sovran Bank.¹⁰⁹ The contract of sale provided, in pertinent part, that the owner and grantor under the deed of trust would "lease to [Creative Industries] approximately 3,088 sq. feet of office space for a period of one year . . . [although it] may not be the space currently occupied by [Creative Industries]."¹¹⁰ The contract of sale was entered into prior to the recordation of Sovran's deed of trust.¹¹¹

Applying well-settled Virginia law,¹¹² the court found that the lease provision in the contract was insufficient to create the leasehold estate because the subject property consisted of two

105. *Id.* at 391, 428 S.E.2d at 912; (citing *Midkiff v. Glass*, 139 Va. 218, 123 S.E. 329 (1924) (holding that land described as "located in the Staunton Magisterial District and is adjoining the land of a brother of the purchaser" was an adequate description)); see *infra* text accompanying notes 95-100; *Cf.* *Sovran Bank v. Creative Ind.*, 245 Va. 93, 95-96, 425 S.E.2d 504, 508 (1993) (holding that descriptions must be sufficient to identify the property with reasonable certainty).

106. 245 Va. at 391, 428 S.E.2d at 912-13.

107. *Id.* at 392, 428 S.E.2d at 913 (citations omitted).

108. 245 Va. 93, 425 S.E.2d 504 (1993).

109. *Id.* at 94, 425 S.E.2d at 505.

110. *Id.* at 95, 425 S.E.2d at 506.

111. *Id.* at 94, 425 S.E.2d at 505.

112. *Id.* at 96, 425 S.E.2d at 506; see *Chesapeake Corp. v. McCreery*, 216 Va. 33, 37, 216 S.E.2d 22, 25 (1975) (ruling that a deed conveying land must contain a description sufficient to identify it within reasonable certainty).

separate parcels, and the lease failed to state which property was the subject of the lease.¹¹³

In *Cavalier Square Ltd. v. ABC Board*,¹¹⁴ the Supreme Court of Virginia considered whether a lessee was relieved of paying rent on the ground of constructive eviction. The lessee vacated the premises and assigned its rights and obligations under its sixteen-year lease with the lessor to a third party. Upon learning of the assignment, the lessor advised the lessee and the assignee that the lessee was in breach of the lease due to the lessee's vacation of the premises and attempted assignment of the lease.¹¹⁵ The lessor also warned that it would institute legal action to prevent the assignee's unauthorized activities on the premises.¹¹⁶ The lessee denied that it owed any rent under the lease, asserting that the lessor's actions in "interfere[ing] with and block[ing]" its right to sublease the demised premises constituted a constructive eviction and relieved the lessee of its obligations under the lease.¹¹⁷

The court held that to constitute constructive eviction, the lessee must completely abandon "the demised premises within a reasonable time after intentional conduct by the lessor permanently deprives the lessee, or its assignee, of the beneficial enjoyment of the premises."¹¹⁸ The court also noted that "an assignment of a lease does not relieve the lessee of its liability under the lease even when the lessor consents to the assignment."¹¹⁹

In this instance, no constructive eviction occurred because neither the lessee nor its assignee abandoned the premises within a reasonable time following notice from the lessor,¹²⁰ and because the lessee failed to show that the lessor acted in bad faith when it threatened to resort to legal process, or that

113. *Creative Industries*, 245 Va. at 95, 425 S.E.2d at 506.

114. 246 Va. 227, 435 S.E.2d 392 (1993).

115. *Id.* at 229-30, 435 S.E.2d at 394.

116. *Id.*

117. *Id.* at 231, 435 S.E.2d at 395.

118. *Id.*

119. *Id.*; see *Jones v. Dokos Enter.*, 233 Va. 555, 557, 357 S.E.2d 203, 205 (1987).

120. *Cavalier Square*, 246 Va. at 232, 435 S.E.2d at 395.

such action permanently deprived the lessee or the assignee of the beneficial enjoyment of the premises.¹²¹

G. *Mechanic's Liens*

In *Vansant and Gusler, Inc. v. Washington*,¹²² the Supreme Court of Virginia considered whether or not section 43-13 of the Virginia Code¹²³ created a private right of action for damages. *Vansant and Gusler, Inc.*, a subcontractor, sued *Washington*, the general contractor, and its officers to recover damages for work it performed on behalf of the general contractor on several projects. The subcontractor claimed that the general contractor received payment for all or almost all of the work performed by the subcontractor, but failed to pay the funds to the subcontractor as required by section 43-13.¹²⁴

The general contractor's officers argued that section 43-13 imposed no civil liability on the part of the general contractor or its officers.¹²⁵ The Supreme Court of Virginia agreed, noting

121. *Id.*

122. 245 Va. 356, 429 S.E.2d 31 (1993).

123. VA. CODE ANN. § 43-13 (Repl. Vol. 1990). Section 43-13 states:

Any contractor, subcontractor or owner-developer . . . or any officer, director or employee of such contractor, subcontractor or owner-developer who shall, with intent to defraud, retain or use the funds, or any part thereof, paid by the owner or his agent, the contractor or lender to such contractor or by the owner or his agent, the contractor or lender to a subcontractor under any contract for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold, for any other purpose than to pay persons performing labor upon or furnishing material for such construction, repair, removal or improvement, shall be guilty of larceny in appropriating such funds for any other use while any amount for which the contractor or subcontractor, or owner-developer may be liable or become liable under his contract for such labor or materials remains unpaid, and may be prosecuted upon complaint of any person or persons who have not been fully paid any amount due them. The use by any such contractor or subcontractor or any officer, director or employee of such contractor or subcontractor of any moneys paid under the contract, before paying all amounts due or to become due for labor performed or material furnished for such building or structure, for any other purpose than paying such amounts, shall be prima facie evidence of intent to defraud.

Id.

124. 245 Va. at 359, 429 S.E.2d at 32.

125. *Id.*

that nothing in the section expressly provided the subcontractor with a private right of action.¹²⁶

Does a shipment of parts requested to replace lost or stolen parts previously delivered entitle the supplier to extend the time for filing materialmen's liens? This was one of three issues considered by the Supreme Court of Virginia in *American Standard Homes Corp. v. Reinecke*.¹²⁷ The second issue included whether the claimant was entitled to claim the legal rate of interest or the interest rate set forth in the contract.¹²⁸ The final issue was whether the claimant could collect attorney's fees incurred by enforcing the lien.¹²⁹

American Standard agreed to sell to C.D.H. Corporation pre-fabricated homes pursuant to a general contract describing the materials available for purchase and the sales price of each item. The parties entered into a material order contract for each separate dwelling setting forth the particular materials required for that project, including any extras. Each material order contract included an exclusive agreement provision.¹³⁰ The material order contract obligated C.D.H. to pay American Standard interest at the rate of eighteen percent per annum on any payment thirty days overdue and its costs of collection,

126. *Id.* at 359-60, 429 S.E.2d at 33. The court rejected the subcontractor's argument that Virginia Code section 8.01-221, read in conjunction with section 43-13, created a private right of action in favor of the subcontractor. *Id.*

It is very evident that the purpose of section [8.01-221] was merely to preserve to any injured person the right to maintain his action for the injury he may have sustained by reason of the wrong-doing of another, and to prevent the wrong-doer from setting up the defence [sic] that he had paid the penalty of his wrong-doing under a penal statute. It cannot be supposed that, in enacting section [8.01-221], the Legislature had the remotest idea of creating any new ground for bringing an action for damages.

245 Va. at 360, 429 S.E.2d at 33 (quoting *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 62-63, 40 S.E. 618, 622 (1902) (holding that the historic provision of law was created to preserve the right to maintain action against wrongdoer, and not to create a new ground for bringing an action for damages)).

127. 245 Va. 113, 425 S.E.2d 515 (1993).

128. *Id.* at 121, 425 S.E.2d at 519.

129. *Id.* at 123, 425 S.E.2d at 520.

130. *Id.* at 116, 425 S.E.2d at 516. The entire contractual provision stated, "This is THE COMPLETE AGREEMENT BETWEEN THE PARTIES. There are no written or oral agreements or understandings directly or indirectly connected with this agreement that are not incorporated herein unless they are put in writing, signed by the parties and attached hereto." *Id.*

including attorney's fees of twenty-five percent of the amount owed.¹³¹ American Standard shipped materials for each separate project in two parts. The first shipment contained the dry-wall, framing, and other structural materials. The second shipment included the trim package.¹³²

American Standard filed memoranda of mechanic's liens against twenty-seven properties after C.D.H. discontinued operations and left a number of homes in various stages of completion.¹³³ Evidence produced before the commissioner appointed in the enforcement action showed that American Standard shipped material to six projects more than ninety days after the last day of the month during which materials described in the materials order contract were shipped.¹³⁴ American Standard claimed that the delivery of these materials extended the date by which it could file valid liens for the materials shipped pursuant to the material order contracts.¹³⁵ C.D.H. purchased these materials to replace lost, stolen, or damaged materials previously shipped by American Standard.¹³⁶

The court rejected American Standard's argument that the purchase orders for the replacement materials, along with the material order contract for each project, constituted one contract.¹³⁷ The court found that the purchase orders for the replacement parts were separate from the material order contracts. American Standard was not required to provide the materials requested in the replacement purchase orders, nor

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 117, 425 S.E.2d at 516-17.

135. *Id.* at 117, 425 S.E.2d at 517. Section 43-4, in effect at the time, provided:

A general contract, or any other lien claimant . . . in order to perfect the lien given by § 43-3, shall file . . . not later than ninety days from the last day of the month in which he last . . . furnishes material . . . a memorandum showing . . . the amount and consideration of his claim, and the time or times when the same is or will be due and payable, verified by the oath of the claimant.

VA. CODE ANN. § 43.4 (Repl. Vol. 1990).

The court observed that "a lien created by § 43-3 is one in derogation of the common law." 245 Va. at 119, 425 S.E.2d at 518 (citing *Rosser v. Cole*, 237 Va. 572, 576, 379 S.E.2d 323, 325 (1989) (examining the validity of a road builders perfected mechanic's lien)).

136. 245 Va. at 120, 425 S.E.2d at 518.

137. *Id.*

was CDH required to purchase the replacement materials from American Standard. American Standard satisfied its obligations under the material order contracts when it shipped the structural and trim packages for each project.¹³⁸

With respect to the other two issues, the court determined that the trial court correctly permitted American Standard to collect interest at the rate set forth in the contract between the parties as opposed to the legal rate of interest.¹³⁹ The court, however, refused to permit American Standard to include its attorney's fees as an element of the claim secured by its lien. Unlike interest, the General Assembly did not include attorney's fees as one of the elements secured by the lien.¹⁴⁰

138. *Id.*

139. *Id.* at 123, 425 S.E.2d at 520. Pursuant to section 6.1-330.53 of the Virginia Code, the legal rate of interest is eight percent. That section also provides that "the legal rate of interest shall be imposed where there is an obligation to pay interest and no express contract to pay interest at a specified rate." VA. CODE ANN. § 6.1-330.53 (Repl. Vol. 1988).

The court noted that the legal rate of interest applies only in the absence of a lawful contract rate. Where a specified rate of interest is contracted for upon an obligation, and the rate is lawful, that rate will continue to apply after maturity of the obligation, and even after judgment, until the debt is fully paid. The reason for this is the court's lack of power to dispense with the obligations of lawful and valid private contracts. 245 Va. at 122, 425 S.E.2d at 519 (citing *Fleming v. Bank of Virginia*, 231 Va. 299, 307, 343 S.E.2d 341, 345 (1986) (ruling that the legal rate of interest applies only in the absence of a lawful contractual rate)).

The court was not swayed by CDH's argument that contracts giving rise to mechanic's liens should be treated differently from other contracts providing for the accrual of interest after maturity of the obligation because statute mechanic's liens enjoy priority over the liens of third parties, such as deed of trust beneficiaries. 245 Va. at 123, 425 S.E.2d at 520. The court noted that the Virginia General Assembly provided mechanic's lien claimants with this special priority. *Id.* Had it intended, the General Assembly could have excluded interest as an element of the claim entitled to special priority, but it did not do so. The forms of mechanic's liens set forth in Virginia Code §§ 3-5, -8 and -10 each include a blank for the date from which interest is to accrue. VA. CODE ANN. §§ 43-5, -8, -10 (Repl. Vol. 1990). In addition, § 43-22 requires a claimant filing suit to enforce a lien to "file with his bill an itemized statement . . . showing the amount and the character of the work done or materials furnished, the prices charged therefor . . . the balance due, and the time from which interest is claimed thereon." *Id.* § 43-22.

While these code sections confirm that the General Assembly intended to permit a claimant to collect interest as part of its claim, they are not helpful in determining the *rate* at which interest should accrue. However, the court seemed unwilling to abandon its longstanding effort to enforce parties' contracts as written for the benefit of third party lien creditors by limiting the interest element of a mechanic's lien claim to the legal rate of interest.

140. 245 Va. at 124, 425 S.E.2d at 521.

Isle of Wight Materials Co., Inc. v. Cowling Bros., Inc.,¹⁴¹ involved putative attempts to enforce mechanic's liens. The Virginia Supreme Court confirmed existing law by holding that mechanic's liens are creatures of statute and the rules respecting their filing and enforcement will be strictly construed.¹⁴² Moss, a subcontractor, failed to pay two materialmen, Cowling Brothers, Inc. ("Cowling") and Isle of Wight Materials Company, Inc. ("Isle of Wight"). Both filed timely mechanic's liens against Moss. Isle of Wight timely filed a petition to enforce its lien. Cowling did not. Instead, Cowling claimed to be properly before the court by virtue of having been interpleaded into the case and, alternatively, that the interpleader tolled the statute of limitations which would otherwise prevent it from petitioning to enforce its lien.¹⁴³ The trial court hearing the interpleader action ruled that the interpleader action acted to toll the statute of limitations.¹⁴⁴ The trial court also recognized both Isle of Wight's and Cowling's claims and divided certain monies interpleaded with the court between Cowling and Isle of Wight.¹⁴⁵ On appeal, Isle of Wight argued that Cowling had not properly enforced its duly filed mechanic's lien as provided by statute¹⁴⁶ and that the interpleader action did not toll the statute of limitations precluding such enforcement.¹⁴⁷

The Virginia Supreme Court reiterated that enforcement of mechanic's liens rests upon statutory provisions and requirements, not equitable principles.¹⁴⁸ The court noted that Cowling neither complied with the time limits for enforcement in section 43-17¹⁴⁹ nor the manner by which to enforce a lien prescribed by section 43-22.¹⁵⁰ The fact that Cowling was

141. 246 Va. 103, 431 S.E.2d 42 (1993).

142. *Id.* at 105, 431 S.E.2d at 43.

143. *Id.*

144. *Id.*

145. *Id.* Section 43-17 of the Virginia Code provides that a lienor must bring suit to enforce its lien within six months of filing the lien or 60 days after completion of the structure or termination of the work, whichever is later. VA. CODE ANN. § 43-17 (Repl. Vol. 1990).

146. 246 Va. at 105, 431 S.E.2d at 43.

147. *Id.*

148. *Id.* (citing *Wallace v. Brumack*, 177 Va. 36, 40, 12 S.E.2d 801, 802 (1941) (stating that "a mechanic's lien is purely a creature of statute")).

149. *Id.*

150. VA. CODE ANN. § 43-22 (Repl. Vol. 1990).

named as a defendant in the interpleader did not satisfy the requirement of section 43-17 that the lienor file suit to enforce its mechanic's lien.¹⁵¹

The court then addressed the trial court's ruling that the interpleader action naming Cowling as a defendant tolled the statute of limitations on mechanic's lien enforcement. The court noted that there are only two situations where the limitation period would be tolled: (i) cases where liens are filed by the general contractor and his subcontractor and (ii) cases where the lienors become third parties to enforcement suits by filing suits to intervene.¹⁵² Accordingly, because Cowling did not fall within either exception, the court decided that the trial judge erred and that Cowling had no defense to the statute of limitations asserted by Isle of Wight.¹⁵³

H. Rule Against Perpetuities

In *Citgo Petroleum Corp. v. Hopper*,¹⁵⁴ a case of first impression, the Virginia Supreme Court examined whether the rule against perpetuities applied to an option to purchase contained within a long-term commercial lease and exercisable during the term of the lease.

In 1965, Rowena and Sparks Hopper leased a parcel of unimproved real property to Sun Oil Company on which Sun Oil constructed a service station. Thereafter, Sun Oil assigned its rights under the lease to The Southland Corporation which, in turn, assigned its interests in the lease to Citgo Petroleum Corporation.¹⁵⁵ The fifteen-year lease provided for two five-year renewal periods and gave the lessee "the option to purchase the [leased premises] at any time during the term of the lease or any renewal or extension thereof."¹⁵⁶ When Citgo offered to exercise its option to purchase the property during the

151. 246 Va. at 106, 431 S.E.2d at 44; see *Commonwealth Mechanical Contractors, Inc. v. Standard Fed. Sav. & Loan*, 222 Va. 330, 332, 281 S.E.2d 811, 812 (1981).

152. 246 Va. at 107, 431 S.E.2d at 44; see *Commonwealth*, 222 Va. at 333, 281 S.E.2d at 812-13.

153. *Id.*

154. 245 Va. 363, 429 S.E.2d 6 (1993).

155. *Id.* at 364, 429 S.E.2d at 7.

156. *Id.*

second renewal period, the Hoppers declined to accept, claiming the option void as against the rule against perpetuities.¹⁵⁷

Drawing a distinction between appendant options and options in gross,¹⁵⁸ the court held that the rule against perpetuities did not apply to Citgo. Appendant options, such as the one contained in Citgo's long-term lease, the court explained, promote the use of property and do not violate the rule against perpetuities if they are exercisable within a specified period.¹⁵⁹

I. Zoning

In *Riles v. Board of Zoning Appeals*,¹⁶⁰ the Board of Zoning Appeals for the City of Roanoke (the "BZA") granted Roanoke Mental Hygiene Services a special exception to operate a residential substance abuse group care facility for twenty-four persons in an area zoned for residential use. Persons convicted of drug-related offenses would occupy the facility and receive therapy.¹⁶¹ The residential use classification, however, did not permit such a use. Neighbors of the facility filed a writ of certiorari with the trial court and the trial court affirmed the BZA's decision.¹⁶²

The Supreme Court of Virginia reversed the trial court's decision, overturning the BZA's grant of the special exception. The court noted that in order for the BZA to grant a special exception, it must: (i) determine that special circumstances exist; (ii) find that strict application of the zoning ordinance

157. *Id.*

158. *Id.* at 366, 429 S.E.2d at 8.

159. *Id.* at 365, 429 S.E.2d at 8. The court relied on section 395 of the Restatement of Property which provides:

When a lease limits in favor of the lessee an option exercisable at a time not more remote than the end of the lessee's term

- (a) to purchase the whole or any part of the leased premises; or
- (b) to obtain a new lease or an extension of his former lease, then such option is effective in accordance with the terms of the limitation, even when it may continue for longer than the maximum period [of the rule against perpetuities].

Id. (quoting RESTATEMENT OF PROPERTY § 395 (1944)); see RALPH C. MINOR, REAL PROPERTY § 823 (1928).

160. 246 Va. 48, 431 S.E.2d 282 (1993).

161. *Id.* at 50, 431 S.E.2d at 283-84.

162. *Id.* at 49, 431 S.E.2d at 283.

would produce an undue hardship; (iii) that such hardship is not shared by other properties in the same district; and (iv) that the granting of the special exception would not constitute a substantial detriment to the adjacent property or change the character of the district.¹⁶³ In *Riles*, the court found no special condition. The literal enforcement of the zoning classification did not unreasonably restrict the use of the property.¹⁶⁴

When asked to review the decision of a board of zoning appeals to uphold the rejection of a proposed site plan, the Supreme Court of Virginia considered for the first time whether a trial court had jurisdiction to rule on the constitutionality of zoning legislation in *Board of Zoning Appeals v. University Square Associates*.¹⁶⁵ University Square Apartments sought a special use permit ("SUP") from James City County to expand a shopping center. The county board of supervisors approved the application for the SUP including a requirement for a fifty-foot setback along the right of way of future Route 199, a condition recommended by the county planning commission.¹⁶⁶ The board also approved a master plan for the shopping center. The plan depicted the 20,000 square foot building near existing Route 199 but contained no setbacks.¹⁶⁷

A few days later, University Square Apartments filed a site plan with the county zoning administrator depicting a fifty-foot set back from existing Route 199. The zoning administrator rejected the plan for failure to depict a fifty-foot setback from

163. *Id.* at 51-52, 451 S.E.2d at 284; see VA. CODE ANN. § 15.1-495(2) (Cum. Supp. 1994). In reaching its decision, the court noted that a writ of certiorari is not a trial *de novo*. The board's decision is presumed correct and the appellant has the burden of overcoming this presumption. The board's decision may be overturned only if the board applied erroneous principles of law or the decision was plainly wrong. See *Allegheny Enterprises v. Covington*, 217 Va. 64, 67, 225 S.E.2d 383, 385 (1976) (holding that the evidence supported a finding that the hardship created by strict application of a zoning ordinance to the land owners' property was self-inflicted).

164. 246 Va. at 52, 431 S.E.2d at 284-85. The court, in passing, stated that the property had been for sale for a long period of time before Roanoke Mental Hygiene agreed to purchase the property on the condition that the board issue a special exception permitting the use of the property as a group home. *Id.* This indicates that the inability of an owner to sell a piece of property at a given price is not enough to prove the existence of a special condition.

165. 246 Va. 290, 435 S.E.2d 385 (1993).

166. *Id.* at 292, 435 S.E.2d at 386.

167. *Id.* at 293, 435 S.E.2d at 387.

the right of way of future Route 199.¹⁶⁸ University Square Apartments appealed the zoning administrator's decision to the county board of zoning appeals (the "BZA") which upheld the rejection. University Square Apartments then appealed the BZA's decision to the trial court, filing a writ of certiorari and a bill of complaint seeking to reverse the BZA's decision and to obtain a declaratory judgment and injunctive relief. On the ground that the requirement for a setback from future Route 199 was "so vague and uncertain that it was totally unenforceable,"¹⁶⁹ the trial court reversed the BZA's decision. The BZA appealed.

The Supreme Court of Virginia held that the trial court lacked jurisdiction to invalidate a portion of the SUP in its review of the BZA's decision on a writ of certiorari.¹⁷⁰ "The certiorari process does not authorize a trial court to rule on the validity or constitutionality of legislation underlying a board of zoning appeals decision,"¹⁷¹ the court explained. Under the writ of certiorari, the court noted that the constitutionality of the underlying zoning legislation was beyond the scope of the trial court's review. The trial court's review was limited solely to whether the BZA's decision was plainly wrong or based on erroneous principles of law.¹⁷² University Square Apartments failed to meet this burden, the court held. It was clear that the SUP required the fifty-foot setback from the future right of way of Route 199, the location of which was known to University Square Apartments.¹⁷³

*Steele v. Fluvanna County Board of Zoning Appeals*¹⁷⁴ demonstrates the importance of a good survey. The Garretts owned a subdivided, residential lot in Fluvanna County. Relying on a representation from the homeowners' association for the subdivi-

168. *Id.*

169. *Id.* at 293, 435 S.E.2d at 387.

170. *Id.* at 294, 435 S.E.2d at 388.

171. *Id.*

172. *Id.* at 295, 435 S.E.2d at 388.

173. *Id.* at 296, 435 S.E.2d at 388-89. The court also rejected the partnership's argument that the BZA's requirement for the 50 foot setback from the future right of way of Route 199 would render the site plan inconsistent with the master plan approved by the board of supervisors. The county code did not require the master plan to show any setbacks. *Id.* at 297, 435 S.E.2d at 389.

174. 246 Va. 502, 436 S.E.2d 453 (1993).

vision that the front corners of the lot were located at a telephone pedestal and water meter, the Garretts constructed a house on the lot.¹⁷⁵ Subsequently, after obtaining a survey of the lot and the completed house, the Garretts discovered that the location of the house violated the county's ten-foot side yard setback requirement.¹⁷⁶

The Board of Zoning Appeals for the County of Fluvanna (the "BZA") granted the Garretts a variance from the setback requirement on the grounds that withholding the variance would cause an unnecessary hardship; the Garretts would be required to move part of the house to comply with the setback requirement.¹⁷⁷ The Steeles, the owners of the lot adjacent to the Garretts' lot, filed a petition for a writ of certiorari seeking to overturn the variance. The trial court upheld the variance and the Steeles appealed.¹⁷⁸ On appeal, the Steeles argued that there was insufficient evidence upon which the BZA could base a finding of undue hardship as required by section 15.1-495(2) of the Virginia Code.¹⁷⁹ The Garretts argued that since

175. *Id.* at 504, 436 S.E.2d at 455.

176. *Id.*

177. *Id.*

178. *Id.* at 505, 436 S.E.2d at 455.

179. *Id.* Virginia Code § 15.1-495(2) provides as follows:

When a property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of such piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of such variance will alleviate a clearly demonstrable hardship approaching confiscation, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.

VA. CODE ANN. § 15.1-495(2) (Cum. Supp. 1994). In addition to finding that one of these special conditions exists, the applicant for a variance must also provide evidence that the following three tests have been satisfied: (a) that the strict application of the ordinance would produce an undue hardship; (b) that such hardship is not shared generally by other properties in the same zoning district and the same vicinity; and (c) that the authorization of the variance sought by the applicant will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance. *Id.*; see Riles, 246 Va. 48, 51-52,

the lot was only 100 feet in width and the corners of the lot were incorrectly marked through no fault of their own, sufficient evidence to support the variance existed.¹⁸⁰

The Virginia Supreme Court held that the evidence did not support the variance.¹⁸¹ The phrase "situation or condition of such piece of property" as used in section 15.1-495(2) refers to the natural condition of the property, not monuments placed on the parcel.¹⁸² Also, the court found the hardship to be self-inflicted. The Garretts could have avoided the difficulty by obtaining an accurate survey of the property prior to constructing the house. As the court noted, "[A] self-inflicted hardship, whether deliberately or ignorantly incurred, provides no basis for the granting of a variance."¹⁸³ Instead, section 15.1-495(2), the court explained, was intended to provide a basis for variances where strict application of the zoning ordinance would constitute an unconstitutional confiscation of the property.¹⁸⁴ A self-inflicted hardship, therefore, cannot give rise to an unconstitutional taking of an owner's rights.¹⁸⁵

In *City Council of Alexandria v. Potomac Greens Associates Partnership*,¹⁸⁶ Potomac Greens Associates Partnership and other interested parties ("Potomac") filed a declaratory judgment action against the City of Alexandria, the City Council of Alexandria and the Planning Commission of Alexandria (the "City") seeking relief from the City's denial of Potomac's proposed site plan for the development of a parcel of land in the

431 S.E.2d 282, 284 (1993) (denying group home for substance abuse special exemption and variance from city ordinance); *Packer v. Hornsby*, 221 Va. 117, 121, 267 S.E.2d 140, 142 (1980) (finding evidence that it was more convenient for home owner to build an addition on one side of house rather than the other, in that the average set-back of homes in the area was 16 feet and did not show an undo hardship entitling home owner to variance from a thirty-foot set-back).

180. 246 Va. at 506-07, 436 S.E.2d at 456.

181. *Id.* at 507, 736 S.E.2d at 456.

182. *Id.*

183. *Id.*, 439 S.E.2d at 457 (citing *Allegheny Enterprises v. Covington*, 217 Va. 64, 69, 225 S.E.2d 383, 386 (1976)).

184. The court noted that the extraordinary conditions listed in § 15.1-495(2) "demonstrate[d] the General Assembly's intent that variances be granted only where application of zoning restrictions would appear to be constitutionally impermissible." *Id.* (citing *Packer*, 221 Va. at 122, 267 S.E.2d at 142).

185. *Id.*

186. 245 Va. 371, 429 S.E.2d 225 (1993).

City of Alexandria. Potomac's suit alleged that the City's denial of its site plan was unlawful on several counts involving matters of Virginia law. Central to the dispute was the fact that the City based its denial of the site plan on Potomac's refusal to comply with the Transportation Management Plan Ordinance (the "Ordinance") adopted by the City after Potomac filed its site plan.¹⁸⁷ Among its arguments, Potomac claimed that the Ordinance was invalid because the City failed to give proper public notice of a hearing by the planning commission before enacting the Ordinance. The parties stipulated that only one notice was given for the Planning Commission hearing preceding enactment of the Ordinance.¹⁸⁸

The trial court ruled that the City enacted the Ordinance following proper notice but found the Ordinance unlawful on other grounds. Both parties appealed to the United States Court of Appeals and, thereafter, four questions went to the Virginia Supreme Court: (i) Did the Ordinance violate Dillon's Rule?; (ii) Was the Ordinance unconstitutionally vague?; (iii) Was the Ordinance void due to the City's failure to give proper notice prior to enactment?; and (iv) Did the filing of Potomac's site plan prior to enactment of the Ordinance preclude the City from retroactive enforcement of the Ordinance?¹⁸⁹

Because the other issues would be moot if the ordinance was *void ab initio*, the court addressed only the third issue. Specifically, the court focused on the conflict between the municipal law and the state law which resulted from differing provisions in the Code of Virginia and the Alexandria City Code. The Alexandria City Code provided for only one notice for a planning commission hearing.¹⁹⁰ The City Charter, while specifying the requirement for a public hearing, was silent on the notice requirement for the planning commission.¹⁹¹ Virginia Code Section 15.1-431,¹⁹² however, provides that a planning commission cannot recommend nor can the governing body adopt an

187. *Id.* at 373, 429 S.E.2d at 226.

188. *Id.* at 376, 429 S.E.2d at 227.

189. *Id.* at 373-74, 429 S.E.2d at 226.

190. *Id.* at 377, 429 S.E.2d at 228.

191. *Id.*

192. VA. CODE ANN. § 15.1-431 (Cum. Supp. 1993).

ordinance without first giving notice once a week for two successive weeks.¹⁹³

According to the court, "When a conflict exists between state law and municipal law, state law must prevail."¹⁹⁴ The court also recognized that the Virginia General Assembly could, by specific intent, authorize the City to take actions which are inconsistent with provisions of state law, but that such intent must be expressly provided for in the City Charter.¹⁹⁵ The court found no such intent. As a result, the City's failure to give the requisite second notice prior to enactment of the Ordinance rendered it *void ab initio*.¹⁹⁶

II. LEGISLATION

A. Condemnation

Municipally owned gas utility pipes, lines, and related facilities have been added to the list of facilities for which lands or easements may be obtained pursuant to the provisions of section 33.1-119.¹⁹⁷ Additionally, effective July 1, 1994, condem-

193. Virginia Code section 15.1-431, in pertinent part, provides:

The [Planning] Commission shall not recommend nor the governing body adopt any plan, ordinance or amendment until notice of intention to do so has been published once a week for two successive weeks

The term "two successive weeks" as used in this paragraph shall mean that such notice shall be published at least twice in such newspaper with not less than six days elapsing between the first and second publication.

VA. CODE ANN. § 15.1-431 (Cum. Supp. 1993).

194. 245 Va. at 378, 429 S.E.2d at 228; see *City of Norfolk v. Tiny House*, 222 Va. 414, 421, 281 S.E.2d 836, 840 (1981) (holding that state law must govern in conflicts between state law and municipal law).

195. *Id.*; see *Town of Vinton v. Falcun Corp.*, 226 Va. 62, 67, 306 S.E.2d 867, 870 (1983) (ruling that a town lacked authority to adopt ordinance amending local zoning laws of emergency measure absent notice, public hearings, and referral to its planning commission).

196. *Id.* "Indeed, an ordinance that conflicts with a state law of general character and state-wide application is invalid." *Id.*; see, e.g., *Town of Vinton*, *supra* note 193; *Hanbury v. Commonwealth*, 203 Va. 182, 185, 122 S.E.2d 911, 913 (1961) (declaring that the city lacked power to convert the crime of forgery to a misdemeanor since Commonwealth made forgery a felony).

197. Act of Apr. 5, 1994, ch. 332, 1994 Va. Acts 462 (codified at VA. CODE ANN. § 15.1-898 (Cum. Supp. 1994)). Virginia Code section 33.1-119 permits the expedited acquisition and possession of land to permit the construction of highways. VA. CODE ANN. § 33.1-119 (Repl. Vol. 1990).

nation awards deposited with the court pursuant to Virginia Code section 33.1-128 will accrue interest at the general account composite rate,¹⁹⁸ compiled by the Department of the Treasury of Virginia for the month in which the award is rendered.¹⁹⁹ Any interest accrued between July 1, 1981 and July 1, 1994 will be paid at the rate of eight percent.²⁰⁰

Furthermore, the authority of school boards to condemn land for school purposes has been increased pursuant to amended Virginia Code section 22.1-127.²⁰¹ A school board now has the same right of entry as a county, city, or town, pursuant to section 25-232.1 of the Virginia Code, to determine the suitability of land for school purposes.²⁰²

B. *Condominiums*

The General Assembly amended section 55-79.74:1, making it clear that the names and addresses of the owners of units in a condominium must be made available for examination by all of the unit owners.²⁰³ A condominium unit owner must now furnish to the contract purchaser of the owner's unit a copy of the owners' association's current budget or budget summary prepared by the association in addition to the other documents required by Virginia Code section 55-79.97.²⁰⁴

C. *Deeds of Trust*

The owner of the beneficial title to property under a deed of trust may extend the twenty year limitation period for enforcement of the deed of trust encumbering the property for an addi-

198. VA. CODE ANN. § 33.1-120 (Cum. Supp. 1994).

199. Act of Apr. 9, 1994, ch. 584, 1994 Va. Acts 835 (codified at VA. CODE ANN. § 33.1-128 (Cum. Supp. 1994)).

200. VA. CODE ANN. § 33.1-128 (Cum. Supp. 1994).

201. Act of Apr. 11, 1994, ch. 786, 1994 Va. Acts 17 (codified at VA. CODE ANN. § 22.1-127 (Cum. Supp. 1994)). Condemnation proceedings generally are governed by Virginia Code §§ 25-46.1 to -46.36. Eminent domain and damages are governed by Virginia Code §§ 33.1-89 to -136.

202. VA. CODE ANN. § 22.1-127 (Cum. Supp. 1994).

203. *Id.* § 55-79.74:1; Act of Apr. 8, 1994, ch. 463, 1994 Va. Acts 71 (codified at VA. CODE ANN. § 55-79.74:1 (Cum. Supp. 1994)).

204. VA. CODE ANN. § 55-79.97(A)(5) (Cum. Supp. 1994).

tional twenty years by filing a certificate in the clerk's office in which the deed of trust is recorded.²⁰⁵ Virginia Code section 8.01-241.1 sets forth the permissible form of the certificate.²⁰⁶

The General Assembly amended Virginia Code section 55-59(9) to clarify that a substitute trustee is vested with all of the rights granted to the original trustees in a deed of trust upon the noteholder's execution of an instrument appointing the substitute trustee.²⁰⁷ The instrument appointing the substitute trustee must be recorded in the clerk's office where the original deed of trust is recorded before the substitute trustee records any instrument pursuant to which the substitute trustee exercises any of the rights or powers conferred upon him by the deed of trust.²⁰⁸

D. *Foreclosures*

The General Assembly also added property owners' associations, condominium unit owners' associations and proprietary lessees' associations holding liens against property targeted for foreclosure to the list of parties who must be given notice of the proposed foreclosure sale. Virginia Code section 55-59.1 now provides that if a condominium unit owners' association, property owners' association or proprietary lessees' association files a lien against the property at least thirty days prior to the proposed sale, notice of the sale to those lienholders is mandatory.²⁰⁹

E. *Landlord and Tenant*

New section 55-225.1²¹⁰ prohibits a landlord from willfully interfering with utilities or services required to be provided to a residential tenant pursuant to a rental agreement or interfering

205. *Id.* § 8.01-241 (Cum. Supp. 1994).

206. *Id.* § 8.01-241.1.

207. Act of Apr. 9, 1994, ch. 551, 1994 Va. Acts 773 (codified at VA. CODE ANN. § 55-59(9) (Cum. Supp. 1994)).

208. VA. CODE ANN. § 55-59(9) (Cum. Supp. 1994).

209. *Id.* § 55-59.1(A) (Cum. Supp. 1994).

210. Act of Apr. 9, 1994, ch. 583, 1994 Va. Acts 835 (codified at VA. CODE ANN. § 55-225.1 (Cum. Supp. 1994)).

with the tenant's access to the property, except pursuant to the execution of a writ of possession.²¹¹ If the landlord violates section 55-255.1 and the tenant occupies residential premises, the tenant may either regain possession of the premises and obtain an order requiring the resumption of the interrupted services or terminate the lease.²¹² In either case, the tenant is entitled to recover his actual damages and reasonable attorney's fees.²¹³

Beginning January 1, 1995, landlords subject to the Virginia Residential Landlord and Tenant Act must accrue interest on deposits posted by tenants at a rate equal to the Federal Reserve Board discount rate as of January 1 of each year.²¹⁴ The General Assembly made it clear that the interest begins to accrue as of the effective date of the rental agreement, even though the tenant may not be entitled to the interest if the landlord does not hold the deposit for a period exceeding thirteen months after the date of the rental agreement.²¹⁵

F. *Mechanic's Liens*

New Virginia Code section 43-13.3²¹⁶ requires the owner of one or two family residential dwellings to provide the purchaser of the property an affidavit stating that all persons performing work or supplying materials to the property within 120 days prior to the date of settlement have been paid in full. If such persons have not been paid in full, the owner must provide the name, address, and amount payable to or claimed by any person performing labor or furnishing material, and with whom the seller is in privity of contract.²¹⁷ Any willful misrepresentation in the affidavit resulting in monetary loss to any finan-

211. *Id.*

212. VA. CODE ANN. § 55.225.2 (Cum. Supp. 1994).

213. *Id.*

214. Act of Apr. 7, 1994, ch. 402, 1994 Va. Acts 575 (codified at VA. CODE ANN. § 55-248.11 (Cum. Supp. 1994)).

215. VA. CODE ANN. § 55-248.11B (Cum. Supp. 1994).

216. Act of Apr. 6, 1994, ch. 388, 1994 Va. Acts 565 (codified at VA. CODE ANN. § 43-13.3 (Cum. Supp. 1994)).

217. VA. CODE ANN. § 43-13.3 (Cum. Supp. 1994).

cial institution, title company, or the purchaser constitutes a class three misdemeanor.²¹⁸

Virginia Code section 43-1²¹⁹ now states that any Virginia attorney, any company authorized to write title insurance in Virginia, or any financial institution authorized to provide banking services in Virginia "may perform mechanics' lien agent services as any legal entity."²²⁰

G. *Recordation of Instruments*

New section 55-66.1:01 permits either the assignor or assignee of a note secured by a deed of trust to record a certificate of assignment of the note in the clerk's office where the deed of trust is recorded.²²¹ The certificate must be signed by the assignor, transferrer or endorser.²²² Section 55-66.1:01 sets forth a permissible form of the certificate of assignment.²²³

Writings will be recorded in circuit courts as to any party whose original signature is on the writing and acknowledged by the signatory or two witness.²²⁴ Signatures of parties acting on behalf of another may be acknowledged or proved in the same manner.²²⁵

The General Assembly provided new examples of the permissible form for certificates of satisfaction and certificates of partial satisfaction are in Virginia Code section 55-66.4:1.²²⁶

218. *Id.*

219. Act of Apr. 6, 1994, ch. 382, 1994 Va. Acts 558 (codified at VA. CODE ANN. § 43-1 (Cum. Supp. 1994)).

220. VA. CODE ANN. § 43-1 (Cum. Supp. 1994).

221. Act of Apr. 11, 1994, ch. 812, 1994 Va. Acts 1259 (codified at VA. CODE ANN. § 55-66.1:01 (Cum. Supp. 1994)).

222. VA. CODE ANN. § 55-66.1:01 (Cum. Supp. 1994).

223. *Id.*

224. Act of Apr. 9, 1994, ch. 554, 1994 Va. Acts 776 (codified at VA. CODE ANN. § 55-106 (Cum. Supp. 1994)). A signature may also be made before the clerk of court or his deputy or acknowledged in a manner proscribed in Virginia Code §§ 55-113 to -115, §§ 55-118.1 to -118.9, and §§ 55-119 to -121.

225. VA. CODE ANN. § 55-106 (Cum. Supp. 1994).

226. *Id.* § 55-66.4:1. Any release by a certificate of satisfaction or certificate of partial satisfaction must comply with Virginia Code sections 55-66.3, 55-66.3:1 and 55-66.4. *Id.* §§ 55-66.3, .3:1, .4 (Repl. Vol. 1986 and Cum. Supp. 1994).

Only one fee may now be charged for recording a certificate of satisfaction that releases the original deed of trust and any corrected or revised deeds of trust.²²⁷

The General Assembly amended Virginia Code section 8.01-446 to include the requirement that a judgment state that it is a judgment for money in a specific amount, in favor of a named party, or against a named party or with that party's address, if known.²²⁸ The judgment must also state the time from which the judgment bears interest.²²⁹

H. *Subdivision Plats*

Roads within the secondary system of highways may now be vacated under either of the two methods set forth in Virginia Code section 15.1-482.²³⁰ The roads may be vacated if the land shown on the plat to be vacated was the subject of a rezoning or special exception application approved after a public hearing held in compliance with section 15.1-431. The vacation must be necessary, however, to implement a proffer accepted by the governing body or to implement a condition to the approval of a special exception.²³¹

I. *Taxation*

Amended section 58.1-3340²³² now provides a mechanism for purchasers of a portion of a tax parcel to apply the sales proceeds to any unpaid taxes and levies assessed against the property. Purchasers can have their portion of the parcel relieved of

227. Acts of Mar. 10, 1994; Apr. 8, 9 & 20, 1994, chs. 64, 432, 498, 842, 1994 Va. Acts 138, 604, 702, 1328 (codified at VA. CODE ANN. § 14.1-112(2) (Cum. Supp. 1994)). The recordation fee permitted under Virginia Code section 14.1-112(2) is thirteen dollars for up to four pages plus one dollar for each page in excess of four. VA. CODE ANN. § 14.1-112(2) (Cum. Supp. 1994).

228. Act of Apr. 9, 1994, ch. 538, 1994 Va. Acts 764 (codified at VA. CODE ANN. § 8.01-446 (Cum. Supp. 1994)).

229. VA. CODE ANN. § 8.01-446 (Cum. Supp. 1994).

230. Act of Apr. 5, 1994, ch. 341, 1994 Va. Acts 472 (codified at VA. CODE ANN. § 15.1-482 (Cum. Supp. 1994)).

231. VA. CODE ANN. § 15.1-482 (Cum. Supp. 1994).

232. Act of Apr. 6, 1994, ch. 386, 1994 Va. Acts 562 (codified at VA. CODE ANN. § 58.1-3340 (Cum. Supp. 1994)).

the tax lien to the extent that the sales proceeds exceed its pro rata share of the taxes.²³³

The General Assembly also enacted legislation providing that real estate taxes for property in land use must be paid on June 1 rather than November 1 if the property is to remain in land use.²³⁴ The treasurer where the property is located is required to give notice of the delinquent taxes to the owner by April 1 of the year.²³⁵

The General Assembly expanded the scope of the localities that may provide partial exemptions to include not only those properties that have been rehabilitated, but also those properties that have undergone substantial renovation or replacement.²³⁶ No partial exemption, however, is available if rehabilitation of commercial or industrial property is achieved through demolition and replacement of historic property.²³⁷

Pursuant to an addition to Virginia Code section 58.1-3506A.20,²³⁸ furniture, office equipment, and maintenance equipment owned and used by a homeowners' association, for the purpose of maintaining or using open or common space, may be taxed as a separate class of personal property.²³⁹

Meanwhile, revised section 58.1-3965²⁴⁰ requires that, as a condition to foreclosing its lien for delinquent real estate taxes,

233. VA. CODE ANN. § 58.1-3340 (Cum. Supp. 1994). The pro-rated share of the taxes is based on the relation of the purchase price of the portion of the parcel acquired to the most recent assessed value of the entire tax parcel. The treasurer or other officer of the taxing authority shall be responsible for releasing the lien on the purchaser's portion of the tax parcel upon payment of the tax allocable to the acquired property. *Id.*

234. Act of Apr. 2, 1994, ch. 199, 1994 Va. Acts 290 (codified at VA. CODE ANN. § 58.1-3235 (Cum. Supp. 1994)).

235. VA. CODE ANN. § 58.1-3235 (Cum. Supp. 1994).

236. Acts of Apr. 7, 8 & 10, 1994, chs. 424, 435, 608, 1994 Va. Acts 597, 625, 876 (codified at VA. CODE ANN. § 58.1-3221(E) (Cum. Supp. 1994)).

237. VA. CODE ANN. § 58.1-3221(E) (Cum. Supp. 1994). This is consistent with similar provisions designed to protect residential, hotel and motel historic properties; see *id.* §§ 58.1-3220(E) and -3220.1(E).

238. Acts of Apr. 2, 4 & 10, 1994, chs. 171, 221, 266, 631, 1994 Va. Acts 265, 316, 365, 904 (codified at VA. CODE ANN. § 58.1-3506 (Cum. Supp. 1994)).

239. VA. CODE ANN. § 58.1-3506(A)(20) (Cum. Supp. 1994); see *id.* § 58.1-3284.1 (Repl. Vol. 1991).

240. Act of Apr. 20, 1994, ch. 884, 1994 Va. Acts 1469 (codified at VA. CODE ANN. § 58.1-3965 (Cum. Supp. 1994)).

the locality entitled to the lien must first give thirty days notice to the owner, any trustee under a deed of trust, mortgagee or lien creditor interested in the property.²⁴¹ Beneficiaries, lien creditors and trustees under deeds of trust, mortgages or other security interests securing financial institutions, however, must be made party defendants in the suit to enforce the lien.²⁴² The General Assembly also reduced from one year to ninety days the period during which a party served by publication may petition the court to have the lien enforcement case reheard.²⁴³

Though taxes delinquent for twenty years or more are barred and canceled, Virginia Code section 58.1-3441 stipulates that taxes deferred by ordinance²⁴⁴ are not considered delinquent during the pendency of such deferral, and will therefore remain valid for twenty years plus any period afforded by the deferral.²⁴⁵

J. *Virginia Property Owners' Association Act*

Revised section 55-513B²⁴⁶ provides that the amount of charges assessed against a unit owner in response to the unit owner's violation of the declaration is not limited to the amount of damage or expense incurred by the association.²⁴⁷ The charges still may not exceed fifty dollars for a single offense and ten dollars a day for a continuing offense.²⁴⁸

241. VA. CODE ANN. § 58.1-3965 (Cum. Supp. 1994). The notice to the trustee, mortgagee or lien creditor is only required if the trustee, mortgagee or lien creditor has not been made a party defendant pursuant to Virginia Code § 58.1-3967; see *id.* § 58.1-3967.

242. *Id.* § 58.1-3967 (Cum. Supp. 1994). Beneficiaries who are not financial institutions must only be noticed of the sale pursuant to section 58.1-3965.

243. *Id.*

244. Deferrals must be enacted in conformity with Virginia Code §§ 58.1-3210 to 3218 or §§ 58.1-3219 to 3219.3 (Repl. Vol. 1991 and Cum. Supp. 1994).

245. *Id.* § 58.1-3341 (Cum. Supp. 1994).

246. Act of Apr. 6, 1994, ch. 368, 1994 Va. Acts 536 (codified at VA. CODE ANN. § 55-513 (Cum. Supp. 1994)).

247. VA. CODE ANN. § 55-513 (Cum. Supp. 1994).

248. *Id.*

K. *Virginia Real Estate Time-Share Act*

The Virginia General Assembly made numerous amendments to the Virginia Time Share Act (the "Act"),²⁴⁹ including adding definitions of "additional land," "alternative purchase," "incidental benefit," "product," "situs," "situs time-share act," and "time-share estate occupancy expense."²⁵⁰ New section 55-364.1²⁵¹ includes a list of terms that describe a time-share and must be included in the name of the project to identify it as such.²⁵²

Section 55-367(A) now requires a time-share instrument to include additional representations regarding the addition or deletion of incidental benefits²⁵³ and alternative purchases,²⁵⁴ and the extent to which the project may be added to or removed from the developer's time-share program.²⁵⁵

Management agreements executed during the developer control period are no longer void after two years, but are voidable by the association.²⁵⁶ Section 55-369B²⁵⁷ now permits the developer to convey to the association fee simple title to phases of the project.

Time-share associations are now empowered to foreclose the lien for assessments against time-share units as if the lien were a deed of trust.²⁵⁸

249. *Id.* §§ 55-360 to -400 (Repl. Vol. 1986 & Cum. Supp. 1994).

250. Act of Apr. 9, 1994, ch. 580, 1994 Va. Acts 821 (codified at VA. CODE ANN. § 55-362 (Cum. Supp. 1994)).

251. *Id.* Act of Apr. 9, 1994, ch. 580, 1994 Va. Acts 823 (codified at VA. CODE ANN. § 55-364.1 (Cum. Supp. 1994)).

252. VA. CODE ANN. § 55-367(A)(1) (Cum. Supp. 1994).

253. *Id.* § 55-367(A)(15).

254. *Id.* § 55-367(A)(16).

255. *Id.* § 55-367(A)(17). Disclosures regarding incidental benefits, alternative purchases and whether or not the developer has reserved the right to add or delete either of the foregoing must also be included in the public offering statement. *Id.* § 55-374(A)(1)(f) (Cum. Supp. 1994).

256. *Id.* § 55-368.3.

257. *Id.* § 55-369(B).

258. Acts of Apr. 8 & 9, 1994, chs. 432, 580, 1994 Va. Acts 618, 825 (codified at VA. CODE ANN. § 55-370 (Cum. Supp. 1994)). The foreclosure must occur within two years following the perfection of the lien and in accordance with the Virginia Code. VA. CODE ANN. §§ 55-59, -59.1 to -59.4 and -60 (Cum. Supp. 1994).

Several sections of the Act presently afford fuller disclosure to both existing time-share owners and potential owners. The annual report for each project must include additional disclosures, including a copy of the current budget for the project.²⁵⁹ The developer must provide a potential purchaser with a public offering statement *prior* to the execution of a purchase contract.²⁶⁰ Public offering statements now must make it clear that the statement need not include information about the developer's other time-share projects, unless the other projects are included in the same time-share program and marketed jointly.²⁶¹ The General Assembly expanded other disclosure requirements for the public offering statement.²⁶²

L. *Virginia Residential Property Disclosure Act*

Homebuilders must now disclose in writing all known material defects which would constitute a building code violation before acceptance of the purchase contract when selling an existing structure, or after issuance of a certificate of occupancy when selling a partially constructed dwelling.²⁶³ Disclosure, however, is not required if the builder is unaware of the defects.²⁶⁴

M. *Warranties*

Home purchasers may waive, modify or exclude any or all express and implied warranties on new homes, only if the words "as is" are conspicuously²⁶⁵ displayed on the purchase

259. *Id.* Act of Apr. 9, 1994, ch. 580, 1994 Va. Acts 827 (codified at VA. CODE ANN. § 55-370.1(B)(6) (Cum. Supp. 1994)). The budget must disclose: (1) who prepared it, (2) the occupancy assumptions used when preparing the budget, (3) a description of repair and replacement reserves, (4) the anticipated common expense liability of each time-share estate owner, (5) a statement of any services provided by the developer but not included in the budget, and (6) a statement of the developer as to what expenses it expects will become common expense liabilities. VA. CODE ANN. § 55-370.1B.6a to .6f (Cum. Supp. 1994).

260. *Id.* § 55-374(A).

261. *Id.*

262. *Id.* § 55-374.

263. Act of Mar. 10, 1994, ch. 80, 1994 Va. Acts 173 (codified at VA. CODE ANN. § 55-518(B) (Cum. Supp. 1994)).

264. VA. CODE ANN. § 55-518(B) (Cum. Supp. 1994).

265. *See id.* § 8.1-201(10) (Repl. Vol. 1991 & Cum. Supp. 1994) (defining "conspicuously").

contract in capital letters at least two points larger than the type in the contract.²⁶⁶

Home purchasers are also now able to bring direct causes of action against manufacturers of fire-retardant treated plywood sheathing or other roof sheathing material used in their homes for any breach of warranty, even if a manufacturer's warranty limits the right of third parties.²⁶⁷

N. *Water and Sewer Liens*

The General Assembly clarified when counties may impose liens for water and sewer charges on residential rental real estate by amending Virginia code section 15.1-295.²⁶⁸ The section now provides that no lien will attach to residential rental real estate unless the user of the water or sewer services is also the owner of the property, or unless the owner negotiated or executed the water or sewer service agreement.²⁶⁹

Liens for unpaid charges of water and sewer authorities now rank on a parity with liens for unpaid real estate taxes.²⁷⁰ Water and sewer authorities may require a locality to collect amounts due on properly recorded utility liens in the same manner as unpaid real estate taxes due to the locality.²⁷¹

O. *Zoning*

Current law provides that, upon the filing of a petition by a party aggrieved by any decision of a board of zoning appeals, the board must file a return in which it sets forth the facts and

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266. VA. CODE ANN. § 55-70.1(C) (Repl. Vol. 1986 & Cum. Supp. 1994).

267. Act of Apr. 8, 1994, ch. 483, 1994 Va. Acts 681 (codified at VA. CODE ANN. § 55-70.1(G) (Cum. Supp. 1994)).

268. Act of Apr. 10, 1994, ch. 627, 1994 Va. Acts 901 (codified at VA. CODE ANN. § 15.1-295 (Repl. Vol. 1989 & Cum. Supp. 1994)). Rockingham County was added to the list of counties that may provide that taxes and charges on water and sewer lines be designated a lien on the real estate served by such lines. VA. CODE ANN. § 15.1-295 (Repl. Vol. 1989 & Cum. Supp. 1994).

269. VA. CODE ANN. § 15.1-295 (Repl. Vol. 1989 & Cum. Supp. 1994).

270. Acts of Apr. 10, 1994, ch. 599 and 602, 1994 Va. Acts 859 & 863 (codified at VA. CODE ANN. § 15.1-1263(a) (Repl. Vol. 1989 & Cum. Supp. 1994)).

271. VA. CODE ANN. § 15.1-1263(a).

materials used to make its decision.²⁷² Virginia Code section 15.1-497 now provides that if such an appeal is withdrawn by the petitioner subsequent to the board's filing of the return, the board may ask the court to decide whether the appeal was frivolous, and thereby force the petitioner to pay the board's cost in making the return.²⁷³

Purchasers of residential property in areas affected by above average noise levels from aircraft should find comfort in two additions to the Virginia Code. New section 15.1-491.03²⁷⁴ provides that local governing bodies may enforce building regulations relating to the provision of acoustical treatment measures in structures for which building permits are issued after January 1, 1995.²⁷⁵ Regulations for the installation of such treatment measures must be promulgated by the Board of Housing and Community Development by October 1, 1994.²⁷⁶

In addition to the other notice requirement of section 15.1-431,²⁷⁷ where a proposed comprehensive plan, amendment to such a plan, change in zoning map classification, or an application for a special exception or variance affects a parcel of land located within one-half mile of an adjoining county or municipality. Written notice must be given to the chief administrative officer of the adjoining county or municipality at least ten days before the hearing.²⁷⁸

A county, city or town without a zoning ordinance may provide by ordinance that a person seeking to establish a detention

272. *Id.* § 15.1-497.

273. *Id.*

274. Act of Apr. 11, 1994, ch. 745, 1994 Va. Acts 1136 (codified at VA. CODE ANN. § 15.1-491.03 (Cum. Supp. 1994)).

275. VA. CODE ANN. § 15.1-491.03 (Cum. Supp. 1994).

276. Act of Apr. 11, 1994, ch. 745, 1994 Va. Acts 1126 (codified at VA. CODE ANN. § 36-99.10:1 (Cum. Supp. 1994)). In establishing its regulations, governing bodies may adopt one or more noise overlay zones as an amendment to its zoning map and establish measures for treating the noise. After January 1, 1995, however, a statement must be placed on all subdivision plats and site plans giving notice if the property lies either wholly or partially in a noise overlay zone. Any such amendments to existing zoning maps must provide a process for reasonable notice to affected property owners. No existing property use will be considered a non-conforming use because of such amendments. *Id.*

277. Act of April 11, 1994, ch. 774, 1994 Va. Acts 1181 (codified at VA. CODE ANN. § 15.1-431 (Repl. Vol. 1989 & Cum. Supp. 1994)).

278. VA. CODE ANN. § 15.1-431 (Repl. Vol. 1989 & Cum. Supp. 1994).

home, group home, residential care facility for children in need of services, or home for delinquent youth must first provide notice of the proposed use and participate in a public hearing as set forth in Virginia Code section 15.1-503.4.²⁷⁹

III. CONCLUSION

Over the past year, the Supreme Court of Virginia addressed a number of important issues affecting Virginia property law, including the visibility of activities upon land necessary to establish title by adverse possession, the effect of a deed of trust executed by one tenant in common upon the interest of another tenant in common, the applicability of Virginia's five day pay or quit statute to a non-residential lease, and the actions that must be taken by a mechanic's lienor to properly enforce its lien.

The Virginia General Assembly continued to modify and refine the Virginia Condominium Act and the Virginia Property Owners' Association Act. The increasingly important roles that both homeowners' associations and condominium associations play in modern life are reflected by the General Assembly's extension of notice obligations under the non-judicial deed of trust foreclosure statutes to associations benefitted by perfected liens for assessments.

279. *Id.* § 15.1-503.4 (Cum. Supp. 1994).

