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REAL ESTATE AND LAND USE LAW

John V. Cogbill, III *

D. Brennen Keene **

I. INTRODUCTION

This article provides a survey of the significant property law case decisions rendered by the Supreme Court of Virginia during the period beginning June 1, 2001 and ending June 1, 2002. The cases covered involve, inter alia, condemnation litigation, contract disputes, the doctrine of equitable subrogation, easement disputes and land use litigation. In addition, this article will discuss the significant changes made to the Virginia Code during the 2002 Virginia General Assembly Session that will be of interest to the Virginia property law practitioner.¹ The significant legislative changes that are discussed in this article include enactment of the Business Trust Act, amendments related to condemnation proceedings, enactment of a requirement that property owners' associations maintain a capital reserve account, amendments to CRESPA, amendments regarding the recordation of certificates of satisfaction, and enactment of cluster housing enabling legislation for local zoning ordinances.

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1. Unless otherwise noted, all changes to the Virginia Code became effective as of July 1, 2002.

II. JUDICIAL DECISIONS

A. Condemnation

1. Damage to the Residue

In *City of Virginia Beach v. Oakes*,² the City of Virginia Beach initiated condemnation proceedings to acquire the fee interest in a portion of the landowners' property fronting along Oceana Boulevard.³ The taking deprived the landowners of 195 feet of road frontage, leaving the landowners with 148 feet of road frontage.⁴ The city also sought a permanent drainage easement for the installation of a detention pond to collect storm water runoff from 3,400 linear feet of Oceana Boulevard (a four-lane highway).⁵ The city intended to use the detention pond to filter pollutants that would be contained in the roadway runoff, including such pollutants as lead, mercury, oil, and grease.⁶ The landowners and the city agreed that the value of the condemned land was \$60,000, "which included the fee simple value of the land used for a drainage easement even though the city only acquired an easement on that land."⁷

The landowners contended, however, that the taking damaged the value of the remainder of the property and that the landowners were entitled to receive additional compensation.⁸ The trial court heard expert testimony from an environmental scientist who testified that the landowners would incur increased costs for monitoring the land to detect whether pollutants in the detention pond had infiltrated other portions of the landowners' property.⁹ A land-planning expert also testified that the location and size of the detention pond prevented the landowners from constructing 14,000 square feet of office/warehouse space on the remainder of the property.¹⁰ The land planner testified that, even though the

2. 263 Va. 510, 561 S.E.2d 726 (2002).

3. *Id.* at 512, 561 S.E.2d at 726.

4. *Id.* at 512-13, 561 S.E.2d at 726.

5. *Id.* at 513, 561 S.E.2d at 726-27.

6. *Id.* at 513, 561 S.E.2d at 727.

7. *Id.* at 512, 561 S.E.2d at 726.

8. *See id.* at 513-15, 561 S.E.2d at 727-28.

9. *Id.* at 513, 561 S.E.2d at 727.

10. *Id.* at 514, 561 S.E.2d at 727.

zoning designation for the property did not currently permit the office/warehouse use, such use was the highest and best use of the portion of the property near the detention pond.¹¹ Building on the testimony of the environmental scientist and the land planner, a real estate appraiser stated that, given the impacts of the taking on the remainder of the property, the damage to the residue amounted to \$120,000.¹²

The city argued that the landowners' claim of damages to the residue was based upon hypothetical development plans and were too remote and speculative.¹³ The Supreme Court of Virginia agreed with the city.¹⁴ The court stated that "[i]n ascertaining such damages, both present and future circumstances which actually affect the value of the property at the time of the taking may be considered, but remote and speculative damages may not be allowed."¹⁵ The court concluded that the landowners' potential office building was a "product of pure speculation" because the building could be built only if the city rezoned the property and approved a sewage treatment system for the property.¹⁶ The court further stated that the evidence of possible contamination was speculative,¹⁷ and cited its previous decisions, which held that the "eminent domain provisions in the Virginia Constitution have no application to tortious or unlawful conduct, whether by contractors engaged in constructing public improvements, governmental agents, or third parties who are strangers to condemnation proceedings."¹⁸

11. *Id.*

12. *Id.* at 514, 561 S.E.2d at 728. The real estate appraiser testified that the damage estimate "was based upon \$65,000, which included contingencies and 'monitoring costs' associated with the detention pond and \$55,000 in lost rents" from the loss of size in the potential office building that could be constructed on the property. *Id.* at 515, 561 S.E.2d at 728.

13. *Id.* at 515, 561 S.E.2d at 728.

14. *Id.* at 516, 561 S.E.2d at 728.

15. *Id.* at 516, 561 S.E.2d at 728-29 (quoting *E. Tenn. Natural Gas Co. v. Riner*, 239 Va. 94, 100, 387 S.E.2d 476, 479 (1990)).

16. *Id.* at 517, 561 S.E.2d at 729.

17. *Id.*

18. *Id.* (quoting *State Highway & Transp. Comm'r v. Lanier Farm, Inc.*, 233 Va. 506, 510-11, 357 S.E.2d 531, 533-34 (1987)) (citations omitted).

2. Lessee's Role in Condemnation Proceedings

The Supreme Court of Virginia dealt with the lessee's role in a condemnation proceeding in *Lamar Corp. v. Commonwealth Transportation Commissioner*.¹⁹ In *Lamar*, the Commonwealth Transportation Commissioner recorded a certificate condemning a portion of land owned by L. F. Loree, III and Norwood H. Davis, Jr. as co-trustees under the Goodwin Children's Trust Agreement (the "landowners").²⁰ The Lamar Corporation ("Lamar") leased a portion of the property subject to the certificate for the installation and maintenance of a billboard.²¹

After the Commonwealth filed a petition to appoint commissioners to set the value of the land taken, Lamar filed a petition to intervene in the valuation proceedings.²² Lamar filed its petition on the basis that it was an owner of the billboard and, as a tenant of the land, subject to the certificate of take.²³ The Commonwealth moved the trial court to dismiss Lamar's petition to intervene or "to restrict Lamar's participation in the valuation proceeding to that of a 'tenant' to the extent authorized by [Virginia] Code § 25-46.21:1."²⁴ The circuit court granted Lamar's pe-

19. 262 Va. 375, 552 S.E.2d 61 (2001).

20. *Id.* at 378, 552 S.E.2d at 62. The condemned property is located near the intersection of Route 250 and Three Chopt Road in Henrico County. *Id.* The Commonwealth desired to use the property for the widening of Route 250. *Id.*

21. *Id.* Lamar is a company engaged in the business of leasing billboard space for advertising purposes. *Id.* Lamar leased the property under a lease agreement first executed in August 1992, providing for an initial term of five years with the lease continuing on a year-to-year basis thereafter "unless either party . . . give[s] the other party written notice of nonrenewal at least 60 days prior to the expiration of the then-current term." *Id.* The lease vested ownership in the billboard in Lamar, and the lease further provided that "[i]n the event of condemnation of the subject premises[,] . . . [a]ny condemnation award for [Lamar's] property shall accrue to [Lamar]." *Id.* at 378-79, 552 S.E.2d at 62 (alterations in original).

22. *Id.* at 379, 552 S.E.2d at 62.

23. *Id.*

24. *Id.* Virginia Code section 25-46.21:1, as it was in effect at the time this litigation was commenced, provided as follows:

Any tenant under a lease with a term of twelve months or longer may participate in the proceedings described in § 25-46.21 to the same extent as his landlord or the owner Nothing in this section shall be construed, however, as authorizing such tenant to offer any evidence in the proceedings described in § 25-46.21 concerning the value of his leasehold interest in the property involved therein or as authorizing the commissioners or juror, as applicable, to make any such determination in formulating their report.

VA. CODE ANN. § 25-46.21:1 (Repl. Vol. 2000).

tition to intervene but limited Lamar's participation in the valuation proceedings to the extent authorized by Virginia Code section 25-46.21:1.²⁵ The circuit court also granted the Landowners' motion to preclude Lamar from nominating commissioners.²⁶

During the valuation proceedings, the Commonwealth filed motions in limine to exclude various portions of Lamar's experts' testimony.²⁷ The circuit court granted both motions in limine, which specifically excluded the testimony of Donald T. Sutte ("Sutte"),²⁸ who was to testify that "just compensation in this case consist[ed] of two elements: (1) the fair market value of the land taken plus damages, if any, to the residue; and (2) the fair market value of the billboard."²⁹ After the presentation of experts, the commissioners awarded \$115,000 for the value of the land taken (including construction easements) and \$35,000 for damage to the residue of the property.³⁰ In the allocation proceedings, Lamar presented evidence that the fair market value of the billboard structure plus the value of the leasehold (including the billboard site) was \$60,600 based on a sales comparison method of valuation and \$63,000 based on an income method of valuation.³¹ The landowners presented testimony that the rental value of the billboard site (approximately 500 square feet) was \$794 per year.³² The landowners' expert assigned no value to the billboard structure.³³ The circuit court held that Lamar's interest in the overall award was \$6,462, including the value of the property taken (based upon the commissioners' award) plus two months of gross income.³⁴

On appeal, Lamar argued that the circuit court erred because it failed to qualify Lamar as an "owner," thus denying Lamar the right to participate in the valuation proceedings as an owner

25. *Lamar*, 262 Va. at 379, 552 S.E.2d at 62.

26. *Id.* at 379, 552 S.E.2d at 63.

27. *Id.* at 380, 552 S.E.2d at 63.

28. *Id.*

29. *Id.* at 379-80, 552 S.E.2d at 63. The Commonwealth also sought to exclude testimony of a real estate appraiser appearing on behalf of Lamar who would have testified that the fair market value of the billboard was \$60,600. *Id.* at 380, 552 S.E.2d at 63.

30. *Id.* at 381, 552 S.E.2d at 64.

31. *Id.* at 382, 552 S.E.2d at 64.

32. *Id.*

33. *Id.*

34. *Id.*

rather than as a “tenant.”³⁵ The Supreme Court of Virginia disagreed with Lamar, stating that the court has consistently held that a lessee of condemned property must be treated as a “tenant” in the condemnation proceedings even if the lessee has affixed a structure to the land.³⁶ The court did, however, agree with Lamar that the circuit court improperly excluded much of Lamar’s proposed testimony during the valuation proceedings.³⁷ The court held that the billboard constituted a “structure” under Virginia Code section 25-252(b), and that the fair market value of that structure must be included in the total award of just compensation—even when a lessee has the ability to remove the structure under the terms of its lease.³⁸

The court disagreed with the Commonwealth’s contention that Sutte’s methods of valuation (the sales comparison and income methods) were inappropriate and therefore inadmissible.³⁹ The court held that Sutte’s evaluation of the billboard’s value under the income method considered income as a component of the intrinsic value of the billboard structure, stating that “his consideration of the income generated by the sign was not a violation of the general rule barring a landowner from presenting evidence of expected income from the operation of a business conducted on the condemned property.”⁴⁰ Finally, the court agreed with Lamar that the testimony presented by the Commonwealth’s expert was inadmissible because his appraisal determined the value of the lease to the landowners, “rather than the value of the billboard affixed to the land as if it belonged to the landowner.”⁴¹

35. *Id.*; see *infra* Part III.G.3 (listing legislative changes to the definition of “owner” in condemnation proceedings).

36. *Lamar*, 262 Va. at 382–83, 552 S.E.2d at 64. The General Assembly amended the Virginia Code during the 2002 session to include billboard owners within the definition of “owner” in a condemnation proceeding against property subject to a billboard owner’s lease brought by the Virginia Department of Transportation. See *infra* Part III.G.3.

37. *Lamar*, 262 Va. at 384, 552 S.E.2d at 65.

38. *Id.*; see VA. CODE ANN. § 25-252(b) (Repl. Vol. 2000). The court stated that “Code § 25-252(a) provides that a condemnor who acquires real property also acquires ‘an equal interest in all buildings, structures, or other improvements located upon the real property.’” *Lamar*, 262 Va. at 384, 552 S.E.2d at 65; see VA. CODE ANN. § 25-252(a) (Repl. Vol. 2000).

39. *Lamar*, 262 Va. at 385, 552 S.E.2d at 66.

40. *Id.* (citing *Ryan v. Davis*, 201 Va. 79, 82, 109 S.E.2d 409, 413 (1959); *Anderson v. Chesapeake Ferry Co.*, 186 Va. 481, 495–96, 43 S.E.2d 10, 18 (1947)).

41. *Id.* at 386–87, 552 S.E.2d at 67.

B. *The Sanctity of Sepulchre*

Virginia has long recognized that the descendants of a buried person are the beneficiaries of a property right in the nature of an easement in the final resting place of that buried person.⁴² A court in equity may permit the disinterment of a body for relocation to a new resting place,⁴³ but the court should allow a disinterment only on a showing of good cause.⁴⁴ In *Grisso v. Nolen*,⁴⁵ the Supreme Court of Virginia was faced with the question of whether a decedent's ex-husband had standing to seek disinterment of his ex-wife for reburial in a grave plot that the ex-husband had purchased while cohabitating with his ex-wife.⁴⁶ The court in *Grisso* determined that any property interest that the ex-husband may have had in his ex-wife's final resting place was severed upon divorce.⁴⁷ Thus, he did not have standing to seek disinterment of his ex-wife's remains for re-interment in the burial plot he purchased prior to her death.⁴⁸

C. *Contracts*

During the period covered by this survey article, the Supreme Court of Virginia decided several cases that dealt with real estate contracts. The cases involve questions of whether a contract was formed, the enforceability of a right of first refusal, the interpretation of an "attorney's fees" provision, a damages claim for breach of contract, and a claim for tortious interference with contract.

42. See, e.g., *Goldman v. Mollen*, 168 Va. 345, 354–55, 191 S.E.2d 627, 631 (1937).

43. *Grisso v. Nolen*, 262 Va. 688, 695, 554 S.E.2d 91, 95 (2001) (citing *Grinnan v. Fredericksburg Lodge*, 118 Va. 588, 592, 88 S.E. 79, 80 (1916)).

44. *Id.* at 695, 554 S.E.2d at 95 (citing *Goldman*, 168 Va. at 356, 191 S.E.2d at 631).

45. 262 Va. 688, 554 S.E.2d at 91 (2001). For further discussion of this case see also J. Rodney Johnson, *Annual Survey of Virginia Law: Wills, Trusts, and Estates*, 37 U. RICH. L. REV. 357, 376 (2002).

46. *Id.* at 690, 554 S.E.2d at 92.

47. *Id.* at 695, 554 S.E.2d at 95.

48. *Id.* at 695–96, 554 S.E.2d at 95–96 (stating that "[t]o the extent that the authority to determine the disposition of a decedent's remains is a quasi-property right of the surviving spouse, that right would not survive the entry of a divorce decree") (citation omitted).

1. Contract Formation

In *G & M Homes II, Inc. v. Pearson*,⁴⁹ the Supreme Court of Virginia held that the signature of one of two joint sellers in a contract for the sale of undivided interests in land is not sufficient to consummate the agreement, even in regard to the interest held by the individual signor.⁵⁰ The property subject to this contract dispute had been owned by one of the sellers, Mrs. Pearson, and her late husband as tenants in common.⁵¹ Prior to execution of the contract Mr. Pearson died, and his last will and testament provided that all his real estate would pass to Mrs. Pearson.⁵² After Mrs. Pearson signed the contract with G & M Homes II, Inc., she disclaimed the property in dispute in this case, and Mr. Pearson's interest in the property passed to the Pearsons' daughter, Herta Ann Pearson Gould.⁵³ The contract named both Mrs. Pearson and Ms. Gould as sellers.⁵⁴

In support of its holding, the Supreme Court of Virginia pointed out that the contract: (1) had signature blanks for both sellers; (2) referred to both Mrs. Pearson and Ms. Gould collectively as the "Seller"; (3) anticipated a fee simple interest in the Seller; and (4) never contemplated the transfer of a divided interest.⁵⁵ As such, the court determined that the contract "was never consummated."⁵⁶

2. Right of First Refusal

In *Firebaugh v. Whitehead*,⁵⁷ Martha F. Sowers conveyed approximately 13.77 acres of land to Charles and Martha Whitehead on July 22, 1987.⁵⁸ Shortly thereafter, the parties executed a right of first refusal for the Whiteheads to purchase additional

49. 263 Va. 107, 556 S.E.2d 743 (2002).

50. *Id.* at 109, 556 S.E.2d at 744.

51. *Id.*

52. *Id.*

53. *Id.* at 109-10, 556 S.E.2d at 744.

54. *Id.* at 110, 556 S.E.2d at 745.

55. *Id.* at 112-15, 556 S.E.2d at 746-48.

56. *Id.* at 115, 556 S.E.2d at 747.

57. 263 Va. 398, 559 S.E.2d 611 (2002). For further discussion of this case, see Johnson, *supra* note 45, at 382.

58. *Id.* at 400, 559 S.E.2d at 613.

acreage adjacent to the 13.77 acres.⁵⁹ The right of first refusal was recorded in the Botetourt County Clerk's Office.⁶⁰ The Whiteheads later moved to Mississippi and did not notify Sowers that they were leaving the area.⁶¹ Sowers later died in 1993, and William C. Firebaugh and Evelyn O. Carlson were qualified as co-executors of the Sowers' estate.⁶² The co-executors received an offer from the Botetourt County Club to purchase land in the Sowers' estate, including the property subject to the Whiteheads' right of first refusal.⁶³ On May 21, 1993, the co-executors conveyed the land to the country club.⁶⁴ The Whiteheads were notified of the sale in March 1994, and subsequently brought suit against the co-executors and the country club.⁶⁵ The trial court awarded the Whiteheads damages in the amount of \$64,000 plus prejudgment interest from November 5, 1997, and post-judgment interest until the award was paid.⁶⁶ The Whiteheads and the co-executors appealed, and the Supreme Court of Virginia granted the co-executors' appeal and denied the Whiteheads' appeal.⁶⁷

The supreme court upheld the validity of the right of first refusal to buy real property, despite the lack of some significant terms.⁶⁸ The court also denied the claims of the seller's co-executors that the right was personal in nature and, thus, was not binding on the co-executors.⁶⁹ The court held that a right of first refusal need not include information about notification, or provisions about how and when the holder must exercise the right.⁷⁰ The agreement did not run afoul of the rule against perpetuities because the right was found to be personal to the holders and therefore would have terminated upon their deaths (the "lives in being").⁷¹ The court restated its position from *Smith v.*

59. *Id.*

60. *Id.* at 400-01, 559 S.E.2d at 613.

61. *Id.* at 401, 559 S.E.2d at 613.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* The Whiteheads requested specific performance or, in the alternative, monetary damages from the co-executors. *Id.* at 401, 559 S.E.2d at 614.

66. *Id.* at 402, 559 S.E.2d at 614.

67. *Id.*

68. *Id.* at 404, 559 S.E.2d at 615.

69. *Id.* at 405, 559 S.E.2d at 616.

70. *Id.*

71. *Id.* at 404-05, 559 S.E.2d at 615-16.

Bailey,⁷² stating that the description of the property need only be sufficient “to afford the means, with the aid of extrinsic evidence, of ascertaining with accuracy what is conveyed and where it is.”⁷³ The court explained that executors are “held to be liable on all contracts of the testator which are broken in his lifetime, and, with the exception of contracts in which personal skill or taste is required, on all contracts broken after his death.”⁷⁴ Granting an interest in land, it held, does not require such skill or taste and the death of the grantor does not discharge the obligation.⁷⁵

3. Attorney’s Fees Provision in a Nonsuit Context

The parties in *Sheets v. Castle*⁷⁶ executed a contract for the purchase and sale of land, in which the “prevailing party” to any dispute arising out of the contract was entitled to compensation for its attorney’s fees.⁷⁷ After filing suit against the seller for specific performance, the buyer moved for a nonsuit.⁷⁸ The seller then filed a petition for attorney’s fees claiming to be the “prevailing party.”⁷⁹

In his petition, the seller argued that the Supreme Court of Virginia had already decided whether a defendant in a nonsuit is a “prevailing party” when it denied appeal of a circuit court case that had stated the rule as such.⁸⁰ Specifically, the seller argued that because petitions for appeal are resolved on the merits, denying the appeal bestowed binding precedential application of the circuit court opinion throughout the Commonwealth.⁸¹ The Supreme Court of Virginia disagreed that a denial of review bestows

72. 141 Va. 757, 127 S.E. 89 (1925).

73. *Firebaugh*, 263 Va. at 403, 559 S.E.2d at 615 (quoting *Smith*, 141 Va. at 768, 127 S.E. at 93 (citing *Merritt v. Bunting*, 107 Va. 174, 179, 57 S.E. 567, 568 (1907))).

74. *Id.* at 405, 559 S.E.2d at 616 (quoting *Looney v. Belcher*, 169 Va. 160, 170–71, 192 S.E. 891, 895 (1937)).

75. *Id.*

76. 263 Va. 407, 559 S.E.2d 616 (2002).

77. *Id.* at 409, 559 S.E.2d at 617–18.

78. *Id.* at 409–10, 559 S.E.2d at 618.

79. *Id.* at 410, 559 S.E.2d at 618.

80. *Id.* at 410–11, 559 S.E.2d at 618.

81. *Id.* at 411, 559 S.E.2d at 618–19.

precedential value and held that there is no “prevailing party” when a nonsuit is awarded.⁸²

4. Damages for Breach of Contract

*Countryside Corp. v. Taylor*⁸³ dealt with an expert’s calculation of damages for a breach of contract for real property.⁸⁴ Countryside had contracted to construct a road on its property in such a way as to provide access to an adjacent tract of land that Taylor intended to subdivide and develop.⁸⁵ When the road was constructed, Countryside left a strip of its own land between the road and the Taylor property, significantly reducing access to the road from the Taylor tract.⁸⁶

When Taylor first filed suit in 1997, Countryside deeded the strip of land to Taylor.⁸⁷ However, the strip contained various structures that inhibited access to the road and was encumbered by a drainage easement in favor of Henrico County.⁸⁸ Taylor later filed suit against Countryside alleging that the placement of the road had reduced the marketability of his property.⁸⁹

At trial Taylor called an expert real estate appraiser who used a “project value analysis” to calculate the difference between the value of the project with the road in place, as well as the value with the road where it was contracted to be constructed.⁹⁰ However, the real estate appraiser failed to take into consideration the conveyance of the strip of land to Taylor in his real estate appraisal.⁹¹ The jury awarded \$200,000 to Taylor, which Countryside appealed, asserting that the appraiser’s testimony “was speculative as a matter of law because it was based upon an erroneous factual foundation.”⁹² Stating that conveyance of the strip of land to Taylor was a critical fact in determining damages be-

82. *Id.* at 414, 559 S.E.2d at 620.

83. 263 Va. 549, 561 S.E.2d 680 (2002).

84. *Id.* at 550, 561 S.E.2d at 680.

85. *Id.* at 550–51, 561 S.E.2d at 680.

86. *Id.* at 551, 561 S.E.2d at 680–81.

87. *Id.* at 551, 561 S.E.2d at 681.

88. *Id.*

89. *Id.*

90. *Id.* at 551–52, 561 S.E.2d at 681.

91. *Id.* at 552, 561 S.E.2d at 681.

92. *Id.* at 552–53, 561 S.E.2d at 682.

cause it provided access to the Taylor tract, the Supreme Court of Virginia agreed and reversed the trial court, entering judgment for Countryside.⁹³

5. Tortious Interference with Contract

In *Rappahannock Pistol & Rifle Club, Inc. v. Bennett*,⁹⁴ the Supreme Court of Virginia affirmed a judgment of the Circuit Court of Lancaster County that set aside a jury's compensatory award of \$125,000 for tortious interference with contract.⁹⁵ With knowledge of the Rappahannock Pistol & Rifle Club's ("Club") valid contract to sell a parcel of land, the Bennetts had negotiated and closed a contract to buy the land for a higher price.⁹⁶ The court stated that placing a backup contract for a higher price "does not, in and of itself, constitute tortious interference."⁹⁷ Despite the Club's attempt to demonstrate that the Bennetts had motivated the local community to stop the Club's transaction—and, in fact, had caused the County's Board of Supervisors to amend the County's zoning ordinance in a manner that favored the Club's use of another site—the court decided that, as a matter of law, the Club did not produce evidence linking the backup contract with the seller's refusal to close on the Club's contract.⁹⁸ The court stated that the link could not be inferred from the evidence provided and noted that "it is only what the Bennetts did, and not what their neighbors or others may have done on their own, that is relevant to the question whether the Bennetts are liable to the Club."⁹⁹

D. Doctrine of Equitable Subrogation

In *Centreville Car Care, Inc. v. North American Mortgage Co.*,¹⁰⁰ the Supreme Court of Virginia decided whether the doc-

93. *Id.* at 553–54, 561 S.E.2d at 682.

94. 262 Va. 5, 546 S.E.2d 440 (2001).

95. *Id.* at 7, 17, 546 S.E.2d at 440, 446.

96. *See id.* at 8–10, 546 S.E.2d at 441–42.

97. *Id.* at 16, 546 S.E.2d at 445 (quoting the trial court's letter opinion).

98. *Id.* at 13–14, 546 S.E.2d at 444.

99. *Id.* at 14, 546 S.E.2d at 444.

100. 263 Va. 339, 559 S.E.2d 870 (2002).

trine of equitable subrogation should be applied to a purchase money deed of trust recorded in favor of North American Mortgage Company ("North American").¹⁰¹ In the *Centreville* case, Margaret Lynch ("Lynch") purchased a residential property for \$210,000 on September 2, 1996.¹⁰² Lynch obtained loan financing for \$199,500 of the purchase price from Financial Mortgage, Inc., who recorded a deed of trust evidencing the loan note.¹⁰³ On October 7, 1996, Lynch and her husband, Abed E. Higassi ("Higassi"), borrowed \$150,000 from B&T Car Care, Inc. (Centreville's predecessor in interest), which was evidenced by a promissory note and a second deed of trust on the residential property.¹⁰⁴

On March 10, 2000, Lynch conveyed the property to Mohammed Bouzghaia and Corrina Y. Bouzghaia ("Bouzghaias") for a purchase price of \$210,000.¹⁰⁵ The Bouzghaias financed the purchase price with a promissory note in the amount of \$208,250 that was secured with a first deed of trust on the property in favor of North American.¹⁰⁶ Prior to closing, the settlement agent caused a title search to be conducted on the property; however, the title examiner failed to discover the existence of Centreville's second deed of trust.¹⁰⁷ Thus, when the settlement agent caused the recordation of the deed of trust in favor of North American, that deed of trust was inferior in priority to the deed of trust in favor of Centreville.¹⁰⁸ The settlement agent disbursed \$198,928.07 of the Bouzghaia loan proceeds to pay off Lynch's first deed of trust and then disbursed \$3,953.93 to Lynch.¹⁰⁹ The beneficiary under the first deed of trust recorded a certificate of satisfaction for the first deed of trust on April 28, 2000.¹¹⁰ Subsequently, Centreville notified the trustee under Lynch's second deed of trust that Lynch and Higassi were in default on their

101. *Id.* at 342, 559 S.E.2d at 870-71.

102. *Id.* at 342, 559 S.E.2d at 871.

103. *Id.*

104. *Id.*

105. *Id.* at 343, 559 S.E.2d at 871.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

payments, and “the trustee advertised a trustee’s sale of the property for August 29, 2000.”¹¹¹

On August 23, 2000, North American and the trustee under the North American deed of trust filed a bill of complaint against Centreville and the trustee under the Centreville deed of trust seeking equitable subrogation.¹¹² The chancellor agreed with North American and granted subrogation.¹¹³ The chancellor based this decision on the fact that Centreville’s predecessor in interest knew that its note was essentially unsecured when its second deed of trust was recorded and that Centreville would not be prejudiced by the subrogation.¹¹⁴ Centreville appealed.¹¹⁵

The Supreme Court of Virginia reversed the chancellor’s final decree.¹¹⁶ In reaching this decision, the court stated that the doctrine of equitable subrogation requires a fact-specific inquiry into the circumstances of the particular case, and that “no general rule can be laid down which will afford a test in all cases for its application.”¹¹⁷ The court did say, however, that there are several principles that assist in the analysis of an equitable subrogation claim: “[f]irst, the subrogation is not appropriate where intervening equities are prejudiced. Second, ordinary negligence of the subrogee does not bar the application of subrogation where ‘[a]n examination of the facts . . . shows that the equities *strongly favor*’ the subrogee.”¹¹⁸ Considering the facts of this case, the court determined that Centreville had a right to anticipate that Lynch

111. *Id.*

112. *Id.*

113. *Id.* at 344, 559 S.E.2d at 872.

114. *Id.* The chancellor did not subrogate the entire amount of North American Mortgage’s deed of trust. *Id.* The chancellor awarded North American a first lien of \$198,928.07, with Centreville’s entire lien being given second priority. *Id.* The balance of North American’s lien (\$9,321.93) was third in priority. *Id.* It appears from the case that the chancellor believed that, at the time Lynch obtained the second lien from Centreville Car Care’s predecessor in interest, the difference in the original purchase price and the amount of Lynch’s first deed of trust was an amount that Centreville’s predecessor in interest could have expected to receive if it had to sell the property by trustee’s sale and satisfy the first deed of trust. *See id.*

115. *Id.* at 345, 559 S.E.2d at 872. The circuit court also stated that Centreville would be unjustly enriched by allowing it the position of first lien. *Id.* at 344, 559 S.E.2d at 872.

116. *Id.* at 348, 559 S.E.2d at 874.

117. *Id.* at 345, 559 S.E.2d at 872 (quoting *Fed. Land Bank v. Joynes*, 179 Va. 394, 402, 18 S.E.2d 917, 920 (1942)).

118. *Id.* (quoting *Fed. Land Bank*, 179 Va. at 404–05, 18 S.E.2d at 921) (alterations in original).

and Higassi would satisfy the liens against the property.¹¹⁹ Centreville also had a reasonable expectation that, when the Lynch first deed of trust was satisfied, Centreville's deed of trust would move into a position of first priority.¹²⁰ The court determined that it would be inequitable to grant North American equitable relief when North American's negligence created the circumstance, particularly when doing so would prejudice an innocent party—Centreville.¹²¹

E. Easements

1. Prescriptive Easements

a. Defense of Mistaken Belief of an Express Easement

In *Nelson v. Davis*,¹²² the Nelsons accessed their property by use of a gravel driveway that crossed over property owned by Davis.¹²³ The Nelsons acquired their property by a deed which referenced a plat that showed the gravel driveway crossing the Davis property.¹²⁴ The plat referenced in the deed conveying the Davis property also included a description of the gravel drive-

119. *Id.* at 346, 559 S.E.2d at 873.

120. *Id.* at 346–47, 559 S.E.2d at 873.

121. *Id.* at 347, 559 S.E.2d at 873–74. The court's rationale is as follows:

The realities are that under those circumstances Centreville would be prejudiced because there would be no incentive for Lynch and Higassi to pay their debt to Centreville in order to protect any equitable ownership in the property. In addition, there would be little, if any, reason to anticipate that the Bouzghaias would pay the debt secured by North American Mortgage's lien on their property because the property would remain encumbered by Centreville's lien. Under this circumstance, the primary realities are that upon the chancellor's granting of subrogation, North American Mortgage and the Bouzghaias would logically effect a "friendly foreclosure" to eliminate Centreville's lien and leave Centreville with little or no recovery under the foreclosure sale. Equity will not condone the creation of such a circumstance, especially when that circumstance flows directly from the negligence of the party seeking the benefit of it to the prejudice of an innocent party. Similarly, our commitment to a "liberal application of the principle of subrogation" is not offended by that reasoning.

Id. at 347–48, 559 S.E.2d at 874 (citations omitted).

122. 262 Va. 230, 546 S.E.2d 712 (2001).

123. *Id.* at 232, 546 S.E.2d at 713–14.

124. *Id.*

way.¹²⁵ At trial, the Nelsons presented witnesses who testified that the Nelsons and prior owners of the Nelson property had used the gravel driveway to access the Nelson property for more than twenty years, thus establishing a presumption that the Nelsons had a prescriptive right to use the gravel driveway.¹²⁶

Davis rebutted this argument with evidence that no prior easement had been granted to benefit the Nelson property; rather, a review of the chain of title for the Nelson property showed that an access easement that benefited the Nelson property actually crossed another parcel of land.¹²⁷ Thus, Davis claimed that the Nelsons could not prove that use of the gravel driveway was adverse to Davis because their assertion was based on the mistaken belief that a recorded right existed.¹²⁸ The trial court ruled in favor of Davis, declaring that the Nelsons failed to prove that they were the beneficiaries of an express easement or an easement by prescription.¹²⁹

The Supreme Court of Virginia reversed the trial court's ruling and found in favor of the Nelsons.¹³⁰ First, the court stated that the record in the *Nelson* case contained no evidence that "anyone using the gravel road in question did so under a mistaken belief that there was an express easement."¹³¹ The court also determined that the Nelsons had established by clear and convincing evidence that their use of the gravel road across the Davis property had been "open, visible, continuous, exclusive and unmolessted" for at least twenty years.¹³² Further, the court determined

125. *Id.* at 232, 546 S.E.2d at 713.

126. *Id.* at 233-34, 546 S.E.2d at 714.

127. *Id.* at 234, 546 S.E.2d at 714-15. The gravel driveway ran along the boundary of the Davis property, and the recorded easement was just across that boundary on an adjacent property. *Id.*

128. *See id.* at 234-35, 546 S.E.2d at 715. The trial court, relying on the case of *Chaney v. Haynes*, 250 Va. 155, 458 S.E.2d 451 (1995), agreed with Davis that the Nelsons had failed to prove that their use of the gravel driveway was adverse to Davis. *Nelson*, 262 Va. at 234-35, 546 S.E. 2d at 715. The Supreme Court of Virginia in *Chaney* held that "[u]se of property, under the mistaken belief of a recorded right, cannot be adverse as long as such mistake continues." *Chaney*, 250 Va. at 159, 458 S.E.2d at 453 (citations omitted).

129. *Nelson*, 262 Va. at 234, 546 S.E.2d at 715.

130. *Id.* at 237, 546 S.E.2d at 716.

131. *Id.* at 236, 546 S.E.2d at 715-16.

132. *Id.* at 236-37, 546 S.E.2d at 716.

that Davis had offered no direct evidence to rebut the claim of adverse use of the gravel road.¹³³

b. Failure to Rebut the Presumption of an Easement by Prescription

In *Martin v. Moore*,¹³⁴ the Moores filed a bill of complaint seeking to enjoin the Martins from interfering with the Moores' use of an entrance road and driveway that crossed a portion of the Martins' property.¹³⁵ The joint driveway served both the Moores' property and the Martins' property and had been in continuous use since the late 1960s.¹³⁶ The Martins responded that use of the driveway had been permissive and therefore the Moores could not claim an easement by prescription.¹³⁷ The trial court determined that the Moores had proven by clear and convincing evidence that the basic elements of an easement by prescription existed.¹³⁸ In addition, the trial court determined that the Martins failed to produce evidence to rebut the Moores' prima facie showing of a prescriptive easement.¹³⁹ Thus, the trial court determined that the Moores had an easement by prescription over the joint driveway.¹⁴⁰

The Supreme Court of Virginia affirmed the trial court's ruling on this point, holding that the Martins had failed to rebut the presumption of a prescriptive easement.¹⁴¹ The court stated that "[c]ircumstantial evidence may not be used to establish a permissive use in cases involving joint driveways. 'There must be a posi-

133. *Id.* at 237, 546 S.E.2d at 716.

134. 263 Va. 640, 561 S.E.2d 672 (2002). The *Martin* case also involved questions regarding trespass and nuisance, which are discussed in *infra* Part II.I.2.

135. *Martin*, 263 Va. at 643, 561 S.E.2d at 674.

136. *See id.* at 644, 561 S.E.2d at 675.

137. *Id.* at 643, 561 S.E.2d at 674.

138. *Id.* at 646, 561 S.E.2d at 676.

139. *Id.* at 647, 561 S.E.2d at 676.

140. *Id.* at 644, 561 S.E.2d at 675. The trial court also determined that the Moores had an easement by implication. *Id.* at 647 n.*, 561 S.E.2d at 677 n.*. The Martins sold the property owned by the Moores to the prior owners of the Moore property, and the driveway was in existence at the time of that conveyance. *See id.* at 645, 561 S.E.2d at 675. The Supreme Court of Virginia did not address this part of the trial court's finding because the issue became moot when the Moores proved that they had an easement by prescription. *Id.* at 647 n.*, 561 S.E.2d at 677 n.*.

141. *Id.* at 647, 561 S.E.2d at 677.

tive showing that an agreement existed.”¹⁴² The only evidence that the Martins could establish was that they had discussed maintenance of the road with Mr. Bryant, the prior owner of the Martin property.¹⁴³ Mr. Martin and Mr. Bryant both testified that Martin gave Bryant “permission” to use the joint driveway.¹⁴⁴ The court did not find this fact to be dispositive, stating that

the chancellor, as trier of fact, properly could conclude from all the evidence that what the parties meant was that both knew that a portion of the driveway and entrance was on the Martins’ side of the property line, and that the [Martins] never prevented the Bryants from using the road. [In his testimony, Mr.] Bryant agreed that what he meant by “getting permission” was that Martin “didn’t object” to the use.¹⁴⁵

2. Parole Evidence for Interpretation of an Express Easement

In *Pyramid Development, L.L.C. v. D&J Associates*,¹⁴⁶ D&J Associates (“D&J”) sought a judicial decree that the language of a deed that conveyed a rail siding easement was ambiguous and thus could be used by D&J for vehicular ingress and egress to property.¹⁴⁷ When the easement was first created, a main rail line was located in the vicinity of the D&J property, and a rail spur track branched off the main line and ran behind a group of buildings—including a building on the D&J property.¹⁴⁸ Rail service along the main rail line was discontinued in the 1970s.¹⁴⁹ In 1998, Pyramid purchased the property over which the rail siding easement crossed.¹⁵⁰

142. *Id.* at 646, 561 S.E.2d at 676 (quoting *Causey v. Lanigan*, 208 Va. 587, 593, 159 S.E.2d 655, 660 (1968)).

143. *See id.* at 647, 561 S.E.2d at 676. The Martins owned their property for less than twenty years; however, the prior owner of the Martin property also used the joint driveway and the Martins were able to tack the time of the previous use to their ownership period to meet the twenty-year requirement. *Id.* at 646, 561 S.E.2d at 676.

144. *Id.* at 647, 561 S.E.2d at 676.

145. *Id.* at 647, 561 S.E.2d at 676–77.

146. 262 Va. 750, 553 S.E.2d 725 (2001).

147. *Id.* at 753, 553 S.E.2d at 727.

148. *Id.* at 752, 553 S.E.2d at 726.

149. *Id.* at 752, 553 S.E.2d at 727.

150. *Id.* at 753, 553 S.E.2d at 727. After purchasing its property in 1998, Pyramid sought to improve that property by paving it and adding parking spaces. *Id.* Pyramid approached the owners of the properties that had been beneficiaries of the rail siding easement about contributing financially to defray the costs of providing the paved drive aisles

The parties agreed that if the easement was not extinguished when the rail service ceased, then the easement continued to encumber the property owned by Pyramid.¹⁵¹ The pertinent granting language in the easement is as follows:

[T]he right, privilege and easement to use in common the said spur tracks and sidings, and so much of the property of Davis Brothers, Incorporated, in the block bounded by Patton Avenue, the Boulevard, Altamont Avenue, Norfolk Street, and Summit Avenue, and abutting said spur tracks and sidings as may be necessary to afford the property hereby conveyed and the improvements thereon free and convenient access to and use of the said spur tracks and sidings¹⁵²

The trial court determined that this language was ambiguous and permitted D&J to introduce parol evidence to determine whether the scope of the easement included use of motor vehicles.¹⁵³ D&J introduced evidence that it regularly used the Pyramid property for “loading and unloading trucks and other vehicles.”¹⁵⁴ The trial court found in favor of D&J, stating that the easement rights afforded to D&J included the “use of the way to access [its] building in a reasonable manner in the ordinary course of [its] business.”¹⁵⁵ The trial court also stated that “the more modern use of motor vehicles to access plaintiff’s building instead of the spur tracks [did] not violate the terms of the easement at issue.”¹⁵⁶

The Supreme Court of Virginia found that the easement lan-

and parking areas. *Id.* In exchange, Pyramid would grant the property owner/contributors use of the parking areas. *Id.* Pyramid planned to rent the spaces to owners who did not enter into the agreement. *Id.* Needless to say, D&J Associates did not enter into the agreement. *See id.*

151. *Id.* at 752, 553 S.E.2d at 727.

152. *Id.* at 752, 553 S.E.2d at 726–27.

153. *Id.* at 753, 553 S.E.2d at 727.

154. *Id.*

155. *Id.* (quoting the trial court opinion) (alterations in original).

156. *Id.* (quoting the trial court opinion) (alterations in original). In making this determination, the trial court relied on the Supreme Court of Virginia’s opinion in *Wagoner v. Jack’s Creek Coal Corp.*, 199 Va. 741, 744–45, 101 S.E.2d 627, 629 (1958). In *Pyramid Development*, the supreme court determined that the easement in *Wagoner* was distinguishable from the easement in question in *Pyramid Development*. 262 Va. at 755, 553 S.E.2d at 728. Specifically, the court stated that the easement of the “wagon haul road” in *Wagoner* was not limited as to use, and the road continued in existence after wagons were no longer used for transportation. *Id.* On the other hand, the easement in *Pyramid Development* “is specifically limited to allowing access to the spur tracks and sidings. The spur tracks and sidings are no longer in use; therefore, the limited purpose of the easement is no longer in existence.” *Id.*

guage was not ambiguous and that the trial court improperly admitted parol evidence.¹⁵⁷ The court stated that the easement was “expressly limited to allowing access to the spur tracks and sidings, and nothing more.”¹⁵⁸ The court also determined that “[w]hen the rail service was discontinued, the purpose of the easement, which was to allow access to the spur tracks and sidings, ceased to exist” and thus the easement itself was extinguished.¹⁵⁹

F. Home Warranty

In *Vaughn, Inc. v. Beck*,¹⁶⁰ a case that was overturned by legislative action,¹⁶¹ the Supreme Court of Virginia considered “whether under Code § 55-70.1, a purchaser of a new home is required to notify the builder of a defect in construction within the statutory warranty period before bringing an action against the builder for breach of that warranty.”¹⁶² The purchasers of a new

157. *Pyramid Dev., L.L.C.*, 262 Va. at 753, 553 S.E.2d at 727.

158. *Id.* The court also distinguished this case from *Strickland v. Barnes*, 209 Va. 438, 164 S.E.2d 768 (1968), a case in which the Supreme Court of Virginia determined that a plat that showed a twenty-five foot strip “reserved for future R.R. Siding” was ambiguous. *Pyramid Dev., L.L.C.*, 262 Va. at 754, 553 S.E.2d at 728. The court explained that the easement in *Strickland* was referenced on a plat for a railroad siding that had not been constructed, “so the Court was called upon to decide whether any right had been granted in the 25-foot strip pending the construction of the siding.” *Id.* at 754–55, 553 S.E.2d at 728. Thus, the deed in *Strickland* was ambiguous because it did not make clear what the intended use of the easement was prior to construction of the rail siding. *Id.* at 755, 553 S.E.2d at 728. The court stated that

in the present case, however, the deed unambiguously granted an easement “to use in common the said spur tracks and sidings, and so much of the property . . . abutting said spur tracks and sidings as may be necessary to afford the property hereby conveyed . . . free and convenient access to and use of the said spur tracks and sidings.

Id.

159. *Id.* at 756, 553 S.E.2d at 728–29.

160. 262 Va. 673, 554 S.E.2d 88 (2001).

161. See *infra* notes 384–87 and accompanying text.

162. *Vaughn*, 262 Va. at 675, 554 S.E.2d at 89. Virginia Code section 55-70.1, as it was written at the time of this case decision, provided, in pertinent part:

B. In addition, in every contract for the sale of a new dwelling, the vendor, if he is in the business of building or selling such dwellings, shall be held to warrant to the vendee that, at the time of transfer of record title or the vendee’s taking possession, whichever occurs first, the dwelling together with all its fixtures is sufficiently (i) free from structural defects, so as to pass without objection in the trade, (ii) constructed in a workmanlike manner, so as to pass without objection in the trade, and (iii) fit for habitation.

home, the Becks, discovered within one year of owning their new home that their water well produced such an inadequate flow of water that they could not “perform routine household functions, such as washing dishes, washing clothes, and bathing.”¹⁶³ To remedy the problem, the Becks hired a company to dig and install a second well at their own cost.¹⁶⁴ At first the Becks believed that the problem with the original well was caused by a faulty water pump, an item for which the Becks thought Vaughn, Inc. (“Vaughn”) would not have been responsible.¹⁶⁵ The Becks later determined that Vaughn was responsible for correcting the defect with the well, but they did not notify Vaughn of the defect until they filed suit against him.¹⁶⁶ Vaughn denied the breach of warranty claim and asserted an affirmative defense that the Becks failed to notify Vaughn of the defect within the one-year statutory warranty period.¹⁶⁷

The Supreme Court of Virginia, affirming the trial court, determined that Virginia Code section 55-70.1 “plainly does not require the purchaser of a new dwelling to give notice of a defect in construction to the builder within the one-year statutory warranty period as a prerequisite for bringing a breach of warranty

....

D. If there is a breach of warranty under this section, the vendee, or his heirs or personal representatives in case of his death, shall have a cause of action against his vendor for damages.

E. The warranty shall extend for a period of one year from the date of transfer of record title or the vendee's taking possession, whichever occurs first, except that the warranty pursuant to subdivision (i) of subsection B for the foundation of new dwellings shall extend for a period of five years from the date of transfer of record title or the vendee's taking possession, whichever occurs first. Any action for its breach shall be brought within two years after the breach thereof. As used in this section, the term “*new dwelling*” shall mean a dwelling or house which has not previously been occupied for a period of more than sixty days by anyone other than the vendor or the vendee or which has not been occupied by the original vendor or subsequent vendor for a cumulative period of more than twelve months excluding dwellings constructed solely for lease. The term “*new dwelling*” shall not include a condominium or condominium unit created pursuant to Chapter 4.2 (§ 55-79.39 to -79.103) of this title.

VA. CODE ANN. § 55-70.1 (Repl. Vol. 1995).

163. *Vaughn*, 262 Va. at 675, 554 S.E.2d at 89.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 676, 554 S.E.2d at 89.

action under the statute based on that defect.”¹⁶⁸ The court stated that Virginia Code section 55-70.1 required two things to happen in order to bring a breach of warranty action: (1) a breach of warranty within one year from the date that record title is transferred to the purchaser or the date the purchaser takes possession, whichever occurs first; and (2) filing of the breach of warranty action within two years after the breach occurs.¹⁶⁹ The court stated that to find that the code section in question required notice “would require [the court] to add new language to the statute.”¹⁷⁰ The General Assembly resolved this issue for the court by amending section 55-70.1 to require such notice.¹⁷¹

G. *Lease Interpretation*

*Pocahontas Mining Limited Liability Co. v. Jewell Ridge Coal Corp.*¹⁷² involved the interpretation of a provision in a mining lease.¹⁷³ Pocahontas Mining (“Pocahontas”) leased land to Jewell Ridge Coal Corporation (“Jewell Ridge”) for the purpose of mining and processing coal for sale.¹⁷⁴ The lease was originally executed in 1941 (the “1941 lease”), and the parties amended and extended the 1941 lease in 1969 (the “1969 Amendment”), so that the lease would expire on October 31, 2001 unless terminated sooner pursuant to the terms of the lease.¹⁷⁵ Jewell Ridge maintained a coal preparation plant on the property subject to the lease, but discontinued the plant’s operation in 1979 because it became “obsolete and uneconomical to operate.”¹⁷⁶ Thereafter, the plant fell into disrepair and parts of the plant were vandalized or stolen.¹⁷⁷

168. *Id.* at 678, 554 S.E.2d at 90–91.

169. *Id.* at 678, 554 S.E.2d at 91.

170. *Id.*

171. For discussion of this legislative change, see *infra* Part III.E.

172. 263 Va. 169, 556 S.E.2d 769 (2002).

173. *Id.* at 171, 556 S.E.2d at 769. This case arose as a result of both parties appealing the decision of the Buchanan County Circuit Court. *Id.* The Supreme Court of Virginia granted both appeals and consolidated the cases for purposes of the appeal. *Id.*

174. *Id.* at 172, 556 S.E.2d at 771.

175. *Id.*

176. *Id.* at 171–72, 556 S.E.2d at 771. The preparation plant operated by Jewell Ridge was capable of processing coal from only one coal seam known as the Raven seam. *Id.* at 172, 556 S.E.2d at 771. At the time of the preparation plants closure, almost all of the Raven seam coal in the vicinity of the preparation plant had been mined. *Id.*

177. *Id.*

The 1969 Amendment included a provision that required Jewell Ridge to leave “the [coal] preparation plant with all fixed machinery and fixed equipment necessary for its operation” on the premises upon termination of the lease.¹⁷⁸ Pocahontas sought declaratory judgment in the Buchanan County Circuit Court requesting interpretation of the lease provision.¹⁷⁹ The trial court ruled that

Jewell Ridge was obligated to restore ‘to functional capabilities and operational standards’ all fixed machinery and fixed equipment at the preparation plant “at a level consistent with health, safety, and environmental laws, rules and regulations . . . in effect on the last date [Jewell Ridge] commercially operated the preparation plant.”¹⁸⁰

On appeal, Jewell Ridge argued “that the lease provision only precluded it from removing the preparation plant and certain of its fixed equipment from the premises”¹⁸¹ Pocahontas argued that the plain meaning of the language required Jewell Ridge to leave “an *operational* plant complete with equipment necessary for its operation” and that the trial court erred in determining that Jewell Ridge was not obligated to upgrade the plant to current health, safety and environmental laws and regulations.¹⁸²

The Supreme Court of Virginia affirmed and modified the circuit court’s decision.¹⁸³ First, the court determined that the lease provision was unambiguous.¹⁸⁴ The court then looked at the lease

178. *Id.* (quoting the lease). The entire lease provision read as follows:

Upon final termination of this lease, whether on October 31, 2001, prior exhaustion of mineable and merchantable coal, or upon termination of any extensions which Lessee may have made as above provided, the premises shall revert to Lessor and there shall remain intact upon the premises the preparation plant with all fixed machinery and fixed equipment necessary for its operation including, without limitation, all outside tracks, power lines, conveyor belts and equipment, and tipples, but not including any moveable equipment above-ground or below-ground and not including any underground power lines, substations, conveyor belts or other movable underground equipment and machinery.

Id. at 171, 556 S.E.2d at 770.

179. *Id.*

180. *Id.* at 172, 556 S.E.2d at 771 (quoting the trial court opinion) (alterations in original). The trial court also ruled “that the lease provision did not require the preparation plant and its fixed equipment to be ‘upgraded to current health, safety and environmental laws, rules and regulations.’” *Id.* (quoting the trial court opinion).

181. *Id.* at 173, 556 S.E.2d at 771.

182. *Id.* (quoting the lease) (emphasis added).

183. *Id.* at 174, 556 S.E.2d at 772.

184. *Id.* at 173, 556 S.E.2d at 772.

provision and determined that the plain meaning of the word “intact” in the lease provision required Jewell Ridge to leave the preparation plant “physically and functionally complete.”¹⁸⁵ The court also determined that the plain meaning of the term “necessary for [the plant’s] operation’ plainly means that the fixed machinery and equipment must be functional and capable of being run.”¹⁸⁶ The court also determined, however, that even though the plant had to be “functional and capable of being run,” Jewell Ridge did not have to upgrade the plant to current legal standards for preparation plans.¹⁸⁷ A “functional plant,” according to the court, is “one that will perform in a physical sense, but not necessarily in a legal sense.”¹⁸⁸ Thus, the court affirmed the trial court’s ruling, but provided one modification. The court stated that “[i]f Pocahontas institutes an action for breach of contract against Jewell Ridge, any damages for the breach shall be determined as of October 31, 2001, the final termination date of the lease, and not as of 1979, the date operation of the plant ceased.”¹⁸⁹

H. *Mechanic’s Lien*

*Reliable Constructors, Inc. v. CFJ Properties*¹⁹⁰ involved a mechanic’s lien filed by Reliable Constructors, Inc. (“Reliable”), a subcontractor, in the amount of \$330,846.02 for labor and materials for plumbing and mechanical work performed at a travel plaza development in Caroline County.¹⁹¹ Reliable filed a bill of complaint to enforce the lien against Oakmont Corporation (“Oakmont”), the general contractor, CFJ Properties (“CFJ”), the owner of the real estate, and Flying J, Inc. (“Flying J”), CFJ’s purported agent.¹⁹² Oakmont, CFJ, and Flying J filed a motion to dismiss the mechanics lien as invalid and unenforceable because “the mechanic’s lien memorandum included a sum due for labor

185. *Id.* at 173–74, 556 S.E.2d at 772 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1173 (1981)).

186. *Id.* at 174, 556 S.E.2d at 772 (quoting the lease).

187. *Id.*

188. *Id.*

189. *Id.* The court also stated that since Jewell Ridge failed to leave a functional preparation plant intact, it breached the lease. *Id.*

190. 263 Va. 279, 559 S.E.2d 681 (2002).

191. *Id.* at 280, 559 S.E.2d at 682.

192. *Id.*

or materials furnished more than 150 days prior to the last day on which labor was performed or material was furnished to the job preceding the filing of that memorandum in violation of [Virginia] Code § 43-4.¹⁹³ The lien memorandum included a \$250 charge for a fine levied by the Virginia Department of Labor and Industry's Occupational Safety and Health Enforcement Division for failing to provide a "hand wash" facility on site for Reliable's employees.¹⁹⁴ According to the defendants, the fine was levied "212 days prior to the last day on which Reliable supplied labor to the job."¹⁹⁵ The circuit court entered a final order dismissing Reliable's bill of complaint to enforce the mechanic's lien.¹⁹⁶

On appeal, Reliable asserted that the circuit court erred because it failed to hear "evidence on the nature, timing, and details of the administrative fine' levied by the Department of Labor and Industry."¹⁹⁷ Reliable admitted that it committed error when it included the fine in the lien memorandum, but that Virginia Code section 43-15 allows for curing of this error without invalidating the entire mechanic's lien.¹⁹⁸ Virginia Code section 43-15 states that

No inaccuracy in the memorandum filed, or in the description of the property to be covered by the lien, shall invalidate the lien, if the property can be reasonably identified by the description given and the memorandum conforms substantially to the requirements of §§ 43-5, 43-8 and 43-10, respectively, and is not willfully false.¹⁹⁹

The Supreme Court of Virginia held that the circuit court should not have invalidated the lien without first permitting Reliable to submit evidence that including the fine in the mechanic's lien memorandum constituted an inaccuracy within the context of Virginia Code section 43-15.²⁰⁰ The court went on to define the term "inaccuracy" in the context of Virginia Code section 43-15 as "the condition of being inaccurate" and the term "inaccurate" as

193. *Id.* at 281, 559 S.E.2d at 682; *see also* VA. CODE ANN. § 43-4 (Repl. Vol. 2002) (establishing procedure for perfecting mechanic's liens).

194. *Reliable Constructors*, 263 Va. at 280, 559 S.E.2d at 682.

195. *Id.* at 281, 559 S.E.2d at 682 (quoting the motion to dismiss).

196. *Id.*

197. *Id.* (quoting Reliable's assignment of error).

198. *Id.*

199. *Id.* (quoting VA. CODE ANN. § 43-15 (Repl. Vol. 2002)).

200. *Id.*

“not accurate: as . . . containing a mistake or error: incorrect, erroneous.”²⁰¹

I. *Nuisance*

1. Public Nuisance

In *Jordan v. Commonwealth*,²⁰² Charles and Elaine Jordan appealed a conviction for maintaining a public nuisance in violation of Virginia Code section 48-3.²⁰³ The statute holds the owner of real estate responsible for permitting the continuation of a nuisance on the owner's land even if the owner did not create or cause the nuisance.²⁰⁴ The Jordans were the sole members of Marquee, L.L.C. (“Marquee”), and Marquee was the owner of record of a banquet hall.²⁰⁵ Marquee rented the banquet hall for events, and the Commonwealth received numerous complaints that it constituted a public nuisance because of increased noise from traffic, car stereos, and pedestrians yelling in the street during banquet hall events.²⁰⁶ The Jordans were convicted of maintaining a public nuisance in the Richmond Circuit Court.²⁰⁷ They appealed their conviction to the Virginia Court of Appeals, which reversed the conviction, stating that the Commonwealth failed to prove that the Jordans were the owners of the banquet hall.²⁰⁸ The court of appeals stated that “[t]itle to real property acquired by the company vests in the company, Code § 13.1-1021, and a member of the company is not a proper party to a proceeding by or against the company, Code § 13.1-1020.”²⁰⁹ Thus, since the property was owned by Marquee and not the Jordans, the Jordans could not be held responsible for the public nuisance.²¹⁰

201. *Id.* at 281–82, 559 S.E.2d at 682 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1139 (1986) (alterations in original)).

202. 36 Va. App. 270, 549 S.E.2d 621 (Ct. App. 2001).

203. *Id.* at 272, 549 S.E.2d at 622.

204. VA. CODE ANN. § 48-3 (Repl. Vol. 2002).

205. *Jordan*, 36 Va. App. at 273, 549 S.E.2d at 622.

206. *Id.* at 272, 549 S.E.2d at 622.

207. *Id.*

208. *Id.* at 276, 549 S.E.2d at 624.

209. *Id.* at 274, 549 S.E.2d at 623.

210. *Id.* at 276, 549 S.E.2d at 624.

2. Private Nuisance and Trespass

The case of *Martin v. Moore*²¹¹ involved a bill of complaint by the Moores regarding the use of a joint gravel driveway and a cross-bill by the Martins claiming that the Moores maintained a nuisance and were guilty of trespass.²¹² The Moores operated a trucking business on property adjacent to the Martin property, and the trucks used in their business traveled along the joint gravel driveway serving both the Martin and Moore properties.²¹³ The Martins claimed that “the trucking operation was excessively noisy; created odor, dust, and excessive traffic on the driveway; and caused dangerous and unsafe blockages of the entrance road.”²¹⁴ The court reviewed the trial court’s findings of fact and found that the trial court did not err in determining that the Martins failed to prove “substantial harm,” a necessary element in a successful private nuisance claim.²¹⁵

The Martins also complained that clearing operations and daily truck washing on the Moore property caused silt to run off into a pond on the Martins’ property.²¹⁶ The trial court found that the activities on the Moore property did adversely impact the stream flows into the Martins’ pond and entered judgment in the amount of \$26,000 in favor of the Martins to cover the cost of removing the silt and restoring the pond.²¹⁷

211. 263 Va. 640, 561 S.E.2d 672 (2002).

212. *Id.* at 643, 561 S.E.2d at 674; see also *supra* Part II.E.1.b. for a discussion of the easement dispute in this case.

213. *Martin*, 263 Va. at 643, 561 S.E.2d at 674.

214. *Id.* at 648, 561 S.E.2d at 677.

215. *Id.* at 647, 561 S.E.2d at 677. The Martins pointed to *Bowers v. Westvaco Corp.*, 244 Va. 139, 419 S.E.2d 661 (1982), as a case with similar factual circumstances. *Martin*, 263 Va. at 650, 561 S.E.2d at 678. In *Bowers*, Westvaco maintained a truck staging operation located approximately twenty-five feet from the Bowers’ living room. *Bowers*, 244 Va. at 143, 419 S.E.2d at 664. Vibrations from the trucks caused damage to the Bowers home, and the operation’s impact on the Bowers caused Mrs. Bowers to suffer emotional problems that caused the family to incur medical bills. *Id.* The Supreme Court of Virginia stated that *Bowers* was distinguishable from the *Martin* case for two reasons: (1) the procedural posture was different because the trial court in *Bowers* found that a private nuisance existed; and (2) the facts of the *Bowers* case were more egregious than the *Martin* case. *Martin*, 263 Va. at 650, 561 S.E.2d at 678. The court also found persuasive the fact that the Martins never complained about the Moores’ trucking operations until after the original bill of complaint was filed. *Id.*

216. *Martin*, 263 Va. 644, 561 S.E.2d at 674.

217. *Id.* at 644, 651, 561 S.E.2d at 675, 679.

The Supreme Court of Virginia reversed the trial court, stating that the Martins had failed to “present sufficient evidence to permit an intelligent and probable estimate of the amount” of damages.²¹⁸ The court stated that while the Martins had presented evidence that it would cost \$26,000 to remove 2,000 cubic yards of silt from the pond, they had not presented evidence regarding the amount of silt actually in the pond.²¹⁹

J. Roll-Back Tax

In *Chesterfield County v. Stigall*,²²⁰ the court considered whether the division of one parcel of land subject to land use tax assessments into two parcels and conveyance of the two parcels triggered the requirement to pay roll-back taxes even though there was no change in use of the parcels.²²¹ The property in question contained approximately 120 acres when Charles Stigall acquired it in 1954.²²² In 1975, Chesterfield County adopted an ordinance providing for reduced real estate tax assessments for property devoted to agricultural, horticultural, forest or open space uses, and the Stigall property was thereafter accepted into the program.²²³ In 1979 or 1980, the Commonwealth of Virginia acquired by eminent domain a portion of the Stigall property for construction of a portion of Route 76, commonly known as the “Powwhite Parkway.”²²⁴

After the taking, the property was split into two unequal sections, with twenty-six acres of the property lying north of the

218. *Id.* at 651, 561 S.E.2d at 679.

219. *Id.* at 651–52, 561 S.E.2d at 679. The court stated that

There was no evidence, such as data or test results, regarding cubic yards of silt actually in the lake. There was no evidence of any measurements or observations to determine the depth of the silt, or whether the condition spread over the entire lake bed or was limited to the area of the creek entrance.

Id.

220. 262 Va. 697, 559 S.E.2d 49 (2001).

221. *Id.* at 697, 554 S.E.2d at 49.

222. *Id.* at 700, 554 S.E.2d at 51. Stigall actually acquired two separate parcels by one deed in 1954, with the second parcel containing approximately fifteen acres. *Id.* The fifteen acre parcel was not included in the land use assessment program, so it is not an issue in the case. *Id.* at 700 n.1, 554 S.E.2d at 51 n.1.

223. *Id.* at 700, 554 S.E.2d at 51. Chesterfield County enacted the ordinance pursuant to enabling legislation contained in Virginia Code sections 58.1-3229 to -3244 (Repl. Vol. 1997 & Cum. Supp. 2002).

224. *Id.*

Powwhite Parkway and eighty-four acres lying south of that highway.²²⁵ Chesterfield County thereafter continued to tax the property as one parcel even though the two portions were separated by the Powwhite Parkway.²²⁶ Mr. Stigall took no action to cause a legal separation or subdivision of the parcel into two separate parcels of record.²²⁷

Charles Stigall died in 1998.²²⁸ On October 7, 1999, his widow, Margaret Stigall, conveyed the portion of the parcel south of the highway to The Margaret B. Stigall Living Trust, and she also conveyed the portion of the parcel north of the highway to The Stigall Family Limited Partnership.²²⁹ On December 27, 1999, Chesterfield County assessed roll-back taxes against both parcels,²³⁰ citing Virginia Code section 58.1-3241(A) as the County's authority for the assessment.²³¹ Virginia Code section 58.1-3241(A) requires the payment of roll-back taxes for portions of properties subdivided, separated, or split-off from a parcel that is in the special land use assessment program, but it does not require the payment of roll-back taxes for the "remaining real estate" so long as that remaining real estate still qualifies for the program.²³²

The circuit court determined that the property had been split off by the Commonwealth when it took a portion of the property by eminent domain; thus, the circuit court reasoned that since the separation was not the result of "an action of the owner," the roll-back tax requirement was not triggered.²³³

225. *Id.*

226. *Id.* at 700-01, 554 S.E.2d at 51.

227. *Id.* at 701, 554 S.E.2d at 51.

228. *Id.*

229. *Id.*

230. *Id.* Under the land use assessment program, if a triggering event occurs, the property owner is obligated to pay a one-time roll-back tax. VA. CODE ANN. § 58.1-3241(A) (Repl. Vol. 1997 & Cum. Supp. 2002). Triggering events include a change in use of a parcel or a re-zoning of a parcel to a use not permitted for inclusion in the land use program. *See Stigall*, 262 Va. at 703, 554 S.E.2d at 52. The roll-back tax represents "the difference between the actual tax paid under the special land use tax program and the tax which would have been due had the real estate been taxed on its fair market value assessment during 'the five most recent complete tax years.'" *Id.* at 701, 554 S.E.2d at 51 (quoting VA. CODE ANN. § 58.1-3237(B) (Repl. Vol. 1997 & Cum. Supp. 2002)).

231. VA. CODE ANN. § 58.1-3241(A) (Rep. Vol. 1997 & Cum. Supp. 2002).

232. *Id.*

233. *Stigall*, 262 Va. at 702, 554 S.E.2d at 52.

The Supreme Court of Virginia agreed that no roll-back taxes were due as a result of the conveyances, but for different reasons.²³⁴ First, the court stated that the taking by the Commonwealth did not cause a “separation or split-off” of that property as contemplated by Code § 58.1-3241(A).²³⁵ That fact notwithstanding, the court determined that Virginia Code section 58.1-3241(A) was inapplicable in this case, stating that

Code § 58.1-3241(A) is only applicable when the conveyance or other action of the owner of real estate causes a separation or split-off of lots, pieces, or parcels of land “from the real estate which is being valued, assessed and taxed” under a local special land use tax ordinance. The “remaining real estate” continues to receive the benefit of reduced assessment and taxation “without liability for roll-back taxes” provided it continues to qualify for beneficial treatment. Thus, by its express terms, this statute contemplates a separation or split-off of a portion of the real estate in such a manner that there is a “remaining” portion of the original parcel. It does not contemplate or address the conveyance of the original parcel in its entirety by the owner. Rather, when the owner conveys the real estate in its entirety to a new owner or owners either as one parcel or as separate “lots, pieces or parcels,” the liability to roll-back taxes, if any, is controlled by the provisions of Code § 58.1-3237(D).²³⁶

K. Land Use Cases

1. Interpretation and Enforcement of Conditions and Voluntary Proffers

a. Conditions Regulating Alcohol Sales

In *County of Chesterfield v. Windy Hill, Ltd.*,²³⁷ Windy Hill, Ltd., (“Windy Hill”) operated an outdoor recreational establishment on property leased from E. M. Ciejek, Inc.²³⁸ Windy Hill operated its business subject to a conditional use permit issued by Chesterfield County, which stipulated that no alcoholic beverages would be permitted on the property.²³⁹ Even though the condi-

234. *Id.* at 704, 554 S.E.2d at 53.

235. *Id.* at 705, 554 S.E.2d at 54.

236. *Id.* at 706, 554 S.E.2d at 54 (footnote omitted) (alteration in original).

237. 263 Va. 197, 559 S.E.2d 627 (2002).

238. *Id.* at 201, 559 S.E.2d at 628.

239. *Id.* at 201, 559 S.E. 2d at 629.

tional use permit purported to disallow the sale of alcoholic beverages, Windy Hill applied to the Virginia Alcoholic Beverage Control Board (“ABC Board”) for a license to sell and serve beer on the property.²⁴⁰ Over objections of Chesterfield County, the ABC Board issued the license.²⁴¹ Chesterfield County then filed a bill of complaint to enjoin Windy Hill from serving alcohol on the property.²⁴² On Windy Hill’s motion for summary judgment, the circuit court found in favor of Windy Hill, deciding that the alcohol prohibition in the conditional use permit conflicted with the powers of the ABC Board, contrary to Virginia Code section 4.1-128(A).²⁴³

The Supreme Court of Virginia reversed the circuit court.²⁴⁴ The court cited its opinion in *City of Norfolk v. Tiny House, Inc.*,²⁴⁵ for the proposition that “exclusive authority to license and regulate the sale and purchase of alcoholic beverages in Virginia does not preclude a municipality from utilizing valid zoning ordinances to regulate the location of an establishment selling alcoholic beverages.”²⁴⁶ The court agreed that the *Windy Hill* case was governed by the *Tiny House* case, stating that the court found no conflict between the ABC Board’s authority to regulate the use or dispensing of alcoholic beverages and a locality’s authority to regulate the location of the establishment selling such beverages.²⁴⁷

b. Enforcement of Proffered Conditions

The case of *Jefferson Green Unit Owners Ass’n v. Gwinn*²⁴⁸ in-

240. *Id.*

241. *Id.*

242. *Id.* at 201–02, 559 S.E.2d at 629.

243. *Id.* at 202, 559 S.E.2d at 629. Virginia Code section 4.1-128(A) provides in pertinent part that “no county, city or town shall . . . adopt any ordinance or resolution which regulates or prohibits the manufacture, . . . drinking, use, . . . or dispensing of alcoholic beverages in the Commonwealth.” VA. CODE ANN. § 4.1-128(A) (Cum. Supp. 2002). Virginia Code Section 4.1-128(C) provides in pertinent part that “all local acts, including charter provisions and ordinances of cities and towns, inconsistent with any of the provisions of this title, are repealed to the extent of such inconsistency.” *Id.* § 4.1-128(C).

244. *Windy Hill*, 263 Va. at 200, 559 S.E.2d at 628.

245. 222 Va. 414, 281 S.E.2d 836 (1981).

246. *Windy Hill*, 263 Va. at 200, 559 S.E.2d at 628 (quoting *Tiny House*, 222 Va. at 423, 281 S.E.2d at 841).

247. *Id.* at 204, 559 S.E.2d at 630.

248. 262 Va. 449, 551 S.E.2d 339 (2001).

volved the enforceability of a voluntarily proffered zoning condition.²⁴⁹ When seeking an amendment to the zoning for the Jefferson Green condominium development in 1981, the developer submitted a voluntarily proffered condition that required the developer to purchase one membership per unit in the Bren Mar Park Recreation Association ("Bren Mar").²⁵⁰ The condition also required that the Jefferson Green Unit Owners Association, (the "Association") would pay annual dues to Bren Mar.²⁵¹ In 1999, the Association discontinued paying dues to Bren Mar, and Jane W. Gwinn, Fairfax County Zoning Administrator, brought suit against the Association to enforce the proffered condition.²⁵² The Association filed a cross-bill seeking to declare the condition unconstitutional as "forced association" in violation of the United States Constitution, invalid as special legislation under the Virginia Constitution, and invalid under Virginia Code sections 15.2-2297 and 15.2-1102.²⁵³ The circuit court upheld the validity of the proffered condition under Virginia Code section 15.2-2297,²⁵⁴ but then found that the proffer constituted special legislation in violation of Article IV, section 14(18) of the Virginia Constitution,²⁵⁵ and that it violated the "freedom of association" provisions of the First Amendment of the United States Constitution.²⁵⁶ The constitutional problems notwithstanding, the circuit court determined that the condition must be enforced against the Association because the Association had consented to the condition's adoption by virtue of their status as successor-in-interest to the developer.²⁵⁷

The Supreme Court of Virginia upheld the proffered condition and reversed the circuit court's determination that the condition violated the United States Constitution and the Virginia Consti-

249. *Id.* at 453, 551 S.E.2d at 341.

250. *Id.* at 453-54, 551 S.E.2d at 341. The arrangement with Bren Mar was created in lieu of the developer building recreation facilities as part of the Jefferson Green development. *Id.* The Bren Mar recreation facilities were nearby to the Jefferson Green development. *Id.* at 460, 551 S.E.2d at 345.

251. *See id.* at 454, 551 S.E.2d at 341.

252. *Id.* at 454, 551 S.E.2d at 341-42.

253. *Id.* at 454, 551 S.E.2d at 342.

254. *Id.* at 454-55, 551 S.E.2d at 342.

255. *Id.* at 461, 551 S.E.2d at 346.

256. *Id.* at 462, 551 S.E.2d at 346.

257. *Id.* at 455, 551 S.E.2d at 342.

tution.²⁵⁸ First, the court rejected the Association's argument that former Virginia Code section 15.1-491.2 (recodified as 15.2-2297) prohibited Fairfax County from accepting a proffered condition that required the payment for, or construction of, off-site improvements.²⁵⁹ The court pointed out that at the time the proffer was submitted, Fairfax County operated under the urban executive form of government.²⁶⁰ The section 15.1-491.2 prohibition against accepting proffers for construction of off-site improvements only applied to counties with the urban executive form of government that opted to impose such a restriction.²⁶¹ Fairfax County did not impose that restriction in its zoning ordinance.²⁶² The court also stated that the proffer did not amount to special legislation because it bore a reasonable relation to the legislative goal of providing recreational facilities to the citizens of Fairfax County.²⁶³ Finally, the court determined that the proffer did not violate the First Amendment of the United States Constitution because "the affected association is not one involving intimate human relationships or activities specifically protected by the First Amendment. Instead, it is only a generalized 'social association,' which is not a right recognized by the Constitution."²⁶⁴

2. Interpretations of Zoning Ordinances by Boards of Zoning Appeal

a. Mobile Home as a Nonconforming Use

In *City of Emporia Board of Zoning Appeals v. Mangum*,²⁶⁵ Wayne Mangum owned a mobile home park where he leased spaces for mobile homeowners to place their mobile homes.²⁶⁶ Mr. Mangum's park existed prior to the enactment of a zoning ordi-

258. *Id.* at 462, 551 S.E.2d at 346-47.

259. *Id.* at 457, 551 S.E.2d at 343.

260. *Id.* at 456, 551 S.E.2d at 343.

261. *Id.*

262. *Id.* at 457, 551 S.E.2d at 343.

263. *Id.* at 459, 551 S.E.2d at 345.

264. *Id.* at 462, 551 S.E.2d at 346 (citing *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)).

265. 263 Va. 38, 556 S.E.2d 779 (2002). This case was "overturned" by the General Assembly by an amendment to Virginia Code section 15.2-2307 (Cum. Supp. 2002). *See infra* notes 535-36 and accompanying text.

266. *Mangum*, 263 Va. at 39-40, 556 S.E.2d at 780.

nance in Emporia, and the park became a nonconforming use upon enactment of that ordinance.²⁶⁷ A fire destroyed one of the mobile homes in the park, and the City Manager for Emporia advised Mangum that he could not allow a tenant to replace the mobile home because the park was nonconforming and a "new mobile home 'may not be substituted upon damage to 50% of its value.'"²⁶⁸ Mangum appealed the City Manager's determination to the Board of Zoning Appeals ("BZA"), which upheld the City Manager's determination.²⁶⁹ Mangum appealed the BZA's decision to the circuit court, which subsequently reversed the BZA's decision.²⁷⁰

The Supreme Court of Virginia reversed the circuit court and found that the City Manager's interpretation of the City's zoning ordinance was correct.²⁷¹ The City of Emporia Code states, in relevant part, that "[n]o nonconforming building or use shall be enlarged, extended, reconstructed, substituted, or structurally altered, except when required by law or order, unless the use thereof is changed to a use permitted in the district in which located"²⁷² The court analyzed Emporia's zoning ordinance and determined that it was unambiguous with regard to nonconforming uses.²⁷³ The court then stated that when reviewing a decision of a board of zoning appeals, the decision is presumed to be correct on appeal unless the appealing party shows that "the board applied erroneous principles of law or that the board's decision was plainly wrong and in violation of the purpose and intent of the zoning ordinance."²⁷⁴ The court stated that the plain meaning of the ordinance "prohibits the substitution of a nonconforming building except under certain prescribed conditions, which are not present" in the *Mangum* case.²⁷⁵ Further, the court noted that a mobile home *is* a building under the definition contained in the Emporia Code.²⁷⁶ The court also determined that the City Man-

267. *Id.* at 40, 556 S.E.2d at 780.

268. *Id.* at 40, 556 S.E.2d at 781 (quoting EMPORIA, VA., CODE § 90-12 (1972)).

269. *Id.*

270. *Id.*

271. *Id.* at 42, 556 S.E.2d at 782.

272. *Id.* at 41, 556 S.E.2d at 781 (quoting EMPORIA, VA., CODE § 90-12).

273. *Id.*

274. *Id.* at 42, 556 S.E.2d at 781-82 (citations omitted).

275. *Id.* at 42, 556 S.E.2d at 782.

276. *Id.* The City of Emporia Code defines the term "building" as "a structure having a roof supported by columns or walls for the shelter, support or enclosure of persons, ani-

ager was correct in holding that the mobile home use constituted a nonconforming activity.²⁷⁷ Given these circumstances, the court held that the BZA did not apply erroneous principles of law and was not plainly wrong in its decision.²⁷⁸

b. Defining a Use in a Zoning Ordinance

In *Fritts v. Carolinas Cement Co.*,²⁷⁹ Carolinas Cement Company (“Carolinas Cement”) applied for a by-right use application with the Warren County Department of Planning and Zoning for approval to construct a bulk cement and flyash terminal.²⁸⁰ The application stated that the terminal constituted a “warehousing and distribution” facility, a by-right use in the industrial park where Carolinas Cement intended to locate.²⁸¹ Carolinas Cement intended to transport flyash and bulk cement by rail car to the facility, where the materials would then be stored in silos until processed and carried away by truck.²⁸² The property subject to the application is located in an industrial park.²⁸³

The Warren County Economic Development Authority (“EDA”) owned the particular parcel that Carolinas Cement intended to purchase.²⁸⁴ Carolinas Cement intended to—and did—purchase the property from the EDA.²⁸⁵ Joyce and Tommy Fritts, nearby homeowners, appealed the approval of the by-right use application to the Warren County Board of Zoning Appeals.²⁸⁶ The Frittses argued that the terminal constituted a storage yard, a use that requires a conditional use permit under the zoning district regulations for the industrial park.²⁸⁷ The Board of Zoning Appeals upheld the approval of the by-right use application, and the

mals or chattels.” EMPORIA, VA., CODE § 90-1.

277. *Magnum*, 268 Va. at 42, 556 S.E.2d at 782.

278. *Id.*

279. 262 Va. 401, 551 S.E.2d 336 (2001).

280. *Id.* at 403, 551 S.E.2d at 337–38.

281. *Id.* at 403, 551 S.E.2d at 338.

282. *Id.* at 403, 551 S.E.2d at 337.

283. *Id.* at 402, 551 S.E.2d at 337.

284. *Id.* at 402–03, 551 S.E.2d at 337.

285. *Id.* at 403, 551 S.E.2d at 337.

286. *Id.* at 403–04, 551 S.E.2d at 337–38.

287. *Id.* at 404, 551 S.E.2d at 338.

circuit court upheld the Board of Zoning Appeals' decision on appeal.²⁸⁸

The Supreme Court of Virginia upheld the circuit court's decision.²⁸⁹ The court analyzed the zoning ordinance and found that the ordinance did not define the word "warehousing."²⁹⁰ The court therefore looked to the dictionary definition of the word, which defined "warehouse" as "a structure or room for the storage of merchandise or commodities."²⁹¹ The silos, the court determined, clearly fell within the definition of a "warehouse" because it stores commodities such as the dry cement and flyash.²⁹² The court noted that the operation also qualified as a "distribution facility" under the Warren County zoning ordinance.²⁹³ Thus, the court determined that the circuit court did not err in upholding the determination made by the Warren County Board of Zoning Appeals.²⁹⁴

3. Denial of a Special Use Permit

In balancing the concerns for protection of the commercial poultry industry, the Supreme Court of Virginia held in *Board of Supervisors of Rockingham County v. Stickley*²⁹⁵ that the Rockingham County Board of Supervisors did not act arbitrarily, capriciously, or unreasonably in denying a special use permit for a game bird shooting preserve.²⁹⁶ Dr. William Stickley, a poultry farmer in Rockingham County, raised upland game birds in pens on his poultry farm, and he released the birds on his property for hunting during the regular hunting season.²⁹⁷ Stickley applied for and obtained a license to operate a shooting preserve on the prop-

288. *Id.* at 403–04, 551 S.E.2d at 238.

289. *Id.* at 406, 551 S.E.2d at 339.

290. *Id.* at 405, 551 S.E.2d at 339.

291. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2576 (1993)).

292. *Id.*

293. *Id.* (citing WARREN COUNTY, VA., CODE § 180-8 (1996) (defining a distribution facility as "[a]n establishment engaged in the receipt, storage and distribution of goods, products, cargo and materials, including transshipment by rail, air or motor vehicle")).

294. *Id.* at 406, 551 S.E.2d at 339.

295. 263 Va. 1, 556 S.E.2d 748 (2002).

296. *Id.* at 11–12, 556 S.E.2d at 754.

297. *Id.* at 3, 556 S.E.2d at 749.

erty surrounding his commercial poultry operation.²⁹⁸ Thereafter, on the advice of the Rockingham County Zoning Administrator, Stickley submitted an application for a special use permit to operate a shooting preserve, including the raising of game birds to be released for hunting on the shooting preserve.²⁹⁹ After conducting two public hearings and receiving input from the Poultry Federation and several poultry companies, the Rockingham County Board of Supervisors denied the special use permit.³⁰⁰ The basis of that decision hinged on the fear that the game birds would spread avian diseases to the commercial poultry operations in Rockingham County.³⁰¹ At trial, Stickley presented three experts in the area of avian diseases and poultry farming who testified that the risk of commercial poultry flocks being infected with avian diseases by game birds was minimal, but not nonexistent.³⁰² The Board of Supervisors presented an expert in avian diseases, Dr. Elizabeth Krushinskie, who stated that the biosecurity measures used to prevent infections of commercial poultry flocks are effective, but not perfect, and that the risk of infection for commercial flocks from game birds could increase if the game birds are bred and concentrated on Stickley's farm.³⁰³ The circuit court overturned the Board of Supervisors' decision, holding that it was not fairly debatable and was therefore "unreasonable, arbitrary and capricious."³⁰⁴

The Supreme Court of Virginia stated the test for reviewing a local government's approval or denial in a zoning action as follows:

If the presumptive reasonableness of zoning action is challenged by probative evidence of unreasonableness, the challenge must be met by evidence of reasonableness. If such evidence of reasonableness is sufficient to make the issue fairly debatable, the legislative action must be sustained; if not, the presumption is defeated by the evi-

298. *Id.* at 5, 556 S.E.2d at 750.

299. *Id.*

300. *Id.* at 5-6, 556 S.E.2d at 750-51.

301. *Id.* at 6, 556 S.E.2d at 751. Commercial poultry production is one of the primary industries in Rockingham County. *Id.* at 3, 556 S.E.2d at 744 ("The county ranks among the top ten nationwide in turkey production. Three of the top ten taxpayers in the county are poultry producers employing more than 8,500 people in 1999, not counting individuals who are 'poultry farmers.'").

302. *Id.* at 7-9, 556 S.E.2d at 752-53.

303. *Id.* at 10-11, 556 S.E.2d at 753-54.

304. *Id.* at 6, 556 S.E.2d at 751.

dence of unreasonableness and the legislative act cannot be sustained.³⁰⁵

In the present case, the court stated that, even if one assumes that Stickley presented probative evidence of unreasonableness, the Board of Supervisors clearly presented evidence of reasonableness sufficient enough to make the question fairly debatable.³⁰⁶ The court stated that

the question in this case is not who presented the greatest number of expert witnesses or even who won the battle of the experts. . . . In our opinion, Dr. Krushinski's common-sense appraisal of the "significant risk" to poultry from the release of pen-raised game birds is amply sufficient to make the issue fairly debatable.³⁰⁷

4. Piecemeal Downzoning

A piecemeal zoning ordinance is generally considered

"one initiated by the zoning authority on its own motion; one selectively addressed to landowners' single parcel and an adjacent parcel; and one that reduces the permissible residential density *below* that recommended by a duly-adopted [m]aster [p]lan. . . ." [T]hese factors are not exhaustive, and other factors may be considered when determining whether a zoning ordinance is piecemeal. . . .³⁰⁸

When a court determines that a zoning ordinance amendment constitutes piecemeal downzoning, the governing body must present evidence of mistake, fraud, or changed circumstances warranting the downzoning.³⁰⁹ The standard established for this determination is as follows: "[I]f the governing body produces evidence sufficient to make reasonableness fairly debatable, the ordinance must be sustained. If not, the ordinance is unreasonable and void."³¹⁰ Historically, when the supreme court has determined that a locality has enacted a piecemeal (rather than comprehensive) downzoning, the court has struck down that ac-

305. *Id.* at 7, 556 S.E.2d at 751 (quoting *County Bd. of Arlington v. Bratic*, 237 Va. 221, 227, 377 S.E.2d 368, 371 (1989)).

306. *Id.* at 11, 556 S.E.2d at 754.

307. *Id.*

308. *Turner v. Bd. of County Supervisors*, 263 Va. 283, 289, 559 S.E.2d 683, 686 (2002) (quoting *Fairfax County v. Snell Constr. Corp.*, 214 Va. 655, 658, 202 S.E.2d 889, 893 (1974)).

309. *Id.* at 291, 559 S.E.2d at 687.

310. *Id.* (quoting *Snell*, 214 Va. at 659, 202 S.E.2d at 893).

tion.³¹¹ The authors are aware of only one case decided by the supreme court which validated an action that it determined to be a piecemeal downzoning.³¹²

With that background, the Supreme Court of Virginia recently reviewed a piecemeal downzoning case, *Turner v. Board of Supervisors*.³¹³ In *Turner*, the Prince William County Board of Supervisors downzoned approximately 0.22% of the county's land area.³¹⁴ This downzoning reduced the permitted density of the affected properties from four residential units per acre to one residential unit per acre.³¹⁵ Lea Turner ("Turner") and Anne Moncure Wall ("Wall") each owned a parcel of land that was affected by the downzoning.³¹⁶ Collectively, the Turner and Wall properties constituted sixty-five percent of the land area affected by the downzoning.³¹⁷ Prince William County (the "County") argued that the downzoning was in response to increases in traffic on roads in the vicinity of the properties and impacts on the environment, including increased silt runoff in area streams.³¹⁸

The court first determined that the zoning action was, in fact, a piecemeal downzoning.³¹⁹ The court then analyzed the County's argument that a change in circumstances occurred.³²⁰ One of the issues on appeal involved that date from which the County had to prove that a change in circumstances had occurred.³²¹ The County argued that the change had to be measured from 1958 when the properties in question were first zoned to permit four residential

311. See, e.g., *City of Virginia Beach v. Va. Land Inv. Ass'n No. 1*, 239 Va. 412, 389 S.E.2d 312 (1990); *Henrico County Bd. of Supervisors v. Fralin & Waldron, Inc.*, 222 Va. 218, 278 S.E.2d 859 (1981); *Snell*, 214 Va. at 661, 202 S.E.2d at 894.

312. See *Seabrooke Partners v. City of Chesapeake*, 240 Va. 102, 106-07, 393 S.E.2d 191, 193-94 (1990) (finding that a change in circumstances justified downzoning one parcel of land from multi-family uses to single family uses when the entire area around the parcel had developed for single family uses).

313. 263 Va. 283, 559 S.E.2d 683 (2002).

314. *Id.* at 290, 559 S.E.2d at 686.

315. *Id.* at 290, 559 S.E.2d at 687.

316. *Id.* at 287, 559 S.E.2d at 685.

317. *Id.* at 290, 559 S.E.2d at 686-87.

318. *Id.* at 288, 559 S.E.2d at 688.

319. *Id.* at 289, 559 S.E.2d at 686. The court stated that "[f]or the [County] to argue that the downzoning is anything but piecemeal ignores the reality." *Id.* at 290, 559 S.E.2d at 686 (quoting the circuit court's opinion) (citation omitted).

320. See *id.* at 291-96, 559 S.E.2d at 687-90.

321. *Id.* at 292, 559 S.E.2d at 687.

units per acre.³²² The court determined that the appropriate date from which the change should be measured was 1991, the last date that the County repealed and reenacted its zoning ordinance.³²³ The court then determined that, as a matter of law, the County failed to present sufficient evidence to support its argument that a change in circumstances justified the piecemeal downzoning.³²⁴ First, the County failed to present any evidence as to the traffic counts in 1991, which would have provided a baseline with which to compare the traffic counts at the time of the downzoning.³²⁵ Second, the County failed to present quantitative evidence that development on the property under the zoning classification enacted in 1958 would compound the problem of silt build-up in area streams.³²⁶ The court also stated that the County could not satisfy its “evidentiary burden by relying upon the potential impact of future residential development on traffic conditions.”³²⁷

5. Freedom of Religion and Zoning Ordinance Restrictions

In the case of *Thanh Van Tran v. Gwinn*,³²⁸ the Supreme Court of Virginia was called upon to determine whether the Fairfax County Zoning Ordinance was unconstitutionally vague and overbroad and violative of First Amendment³²⁹ rights of religion, speech, and association.³³⁰ Tran owned five acres in Fairfax

322. *Id.* at 292, 559 S.E.2d at 687–88.

323. *Id.* at 292–93, 559 S.E.2d at 688. The County’s 1991 zoning ordinance contained the following language:

The Zoning Ordinance of Prince William County, as herein presented, is hereby adopted on October 22, 1991, and becomes effective at 5:00 p.m. on November 21, 1991. The Zoning Ordinance of Prince William County as enacted May 4, 1982, and subsequently amended theretofore, is simultaneously repealed, except those provisions expressly retained herein, upon this chapter taking effect.

Id. (quoting PRINCE WILLIAM COUNTY, VA., CODE art. II, § 32-200.06(i) (1991)).

324. *Turner*, 263 Va. at 293, 559 S.E.2d at 688.

325. *Id.* at 294, 559 S.E.2d at 689.

326. *Id.* at 296, 559 S.E.2d at 696.

327. *Id.* at 295, 559 S.E.2d at 689.

328. 262 Va. 572, 554 S.E.2d 63 (2001). The case commenced prior to enactment of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000), by the United States Congress, and thus the statute was not an issue in this case.

329. *Tran*, 262 Va. at 577–78, 554 S.E.2d at 66; *see also* U.S. CONST. amend. I.

330. *Tran*, 262 Va. at 577–78, 554 S.E.2d at 66.

County, which property was subject to the county's residential conservation zoning district ("R-C District") regulations.³³¹ The R-C District regulations required the issuance of a special use permit for certain "Group Uses," which include, among other things, "Institutional Uses" such as churches and other places of worship, "Community Uses," "Outdoor Recreation Uses," "Older Structures," "Temporary Uses," and "Uses Requiring Special Regulation."³³²

Tran, a Buddhist monk and president of the Vietnamese Buddhist Association ("VBA"), had been cited by the Fairfax County zoning administrator on four occasions for conducting religious services on his property without a special use permit.³³³ Tran appealed the fourth notice of violation to the Fairfax County Board of Zoning Appeals, and the board upheld the zoning administrator's determination.³³⁴ Tran did not appeal the decision of the board of zoning appeals.³³⁵ Thereafter, the zoning administrator filed an action against Tran for declaratory judgment and injunctive relief to enforce the R-C District regulations.³³⁶ Tran responded that he was not using the property for a place of worship, that the ordinance was unconstitutionally vague and overbroad, and that the ordinance violated the First Amendment rights of religion, speech, and association.³³⁷ The circuit court found that Tran was bound by the Board of Zoning Appeals' decision since he failed to appeal.³³⁸ The circuit court then found in favor of Fairfax County and enjoined Tran from violating the zoning ordinance.³³⁹

The Supreme Court of Virginia upheld the circuit court's decision with regard to the applicability of the zoning ordinance, but vacated the injunction and remanded the case for entry of a different injunction consistent with the court's opinion.³⁴⁰ The court concluded that the ordinance in question

331. *Id.* at 576, 554 S.E.2d at 65.

332. *Id.* at 580 n.5, 554 S.E.2d at 67 n.5.

333. *Id.* at 576, 554 S.E.2d at 65.

334. *Id.* at 577, 554 S.E.2d at 65.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* at 577, 554 S.E.2d at 65-66.

340. *Id.* at 585, 554 S.E.2d at 70. The court determined that the injunction was overbroad and not "tailored to the offensive activities" conducted by Tran. *Id.* Specifically, the court determined that the trial court's injunction should not have required Tran to remove shoe racks, a collection box, and a speaker system from his property. *Id.* at 584, 554 S.E.2d at 70.

requiring a special use permit to use property in the R-C district as a synagogue, temple, church, or other place of worship imposes a minimal and incidental burden on the constitutional right of free exercise of religion. The ordinance does not totally prohibit operation of a church in the R-C district and any financial cost associated with the permit process or relocation of the church does not impact any religious belief or practice and thus is not of constitutional dimension.³⁴¹

The court also determined that the R-C District ordinance was neutral because it applied to "Group Uses," which includes secular and non-secular uses, and not just to places of worship.³⁴²

III. LEGISLATIVE CHANGES

A. Billboards

The General Assembly defined the term "lawfully erected" as it applies to outdoor advertising billboards to mean "any sign that was erected pursuant to the issuance of a permit from the Commonwealth Transportation Commissioner under § 33.1-360 unless the local governing body has evidence of noncompliance with ordinances in effect at the time the sign was erected."³⁴³ This change clarifies Virginia Code section 33.1-370(E), which states that "*lawfully erected* and maintained nonconforming signs, advertisements, and advertising structures shall not be removed or eliminated by amortization under state law or local ordinances without compensation"³⁴⁴ That same code section also provides that "[t]he Commonwealth Transportation Commissioner is authorized to acquire by purchase, gift or the power of eminent domain and to pay just compensation upon the removal of nonconforming signs, advertisements or advertising structures *lawfully erected* and maintained under state law or state regulations."³⁴⁵ The General Assembly also clarified that the twenty-five

341. *Id.* at 580, 554 S.E.2d at 67 (footnote omitted). The court came to this conclusion after surveying cases in a number of federal and state courts that dealt with similar facts. *See id.* at 578-80, 554 S.E.2d at 66-69. In each of those cases, the courts upheld the ordinance restrictions so long as those restrictions imposed only a minimal burden on the exercise of religion and did not discriminate among different religions. *See id.*

342. *Id.* at 582, 554 S.E.2d at 68.

343. VA. CODE ANN. § 33.1-351 (Cum. Supp. 2002).

344. *Id.* § 33.1-370(E) (Cum. Supp. 2002) (emphasis added).

345. *Id.* § 33.1-370(F) (emphasis added).

dollar tax for the recordation of outdoor advertising sign leases must be paid for “signs *owned by a person engaged in the business of outdoor advertising licensed by the Virginia Department of Transportation . . .*”³⁴⁶

B. *Business Trust Act*

In an effort to provide more opportunities for the organization of real estate investment trusts in Virginia, the General Assembly enacted the Virginia Business Trust Act (the “Act”).³⁴⁷ The Act will not become effective until October 1, 2003,³⁴⁸ at which time it will repeal the Real Estate Investment Trust Act.³⁴⁹ The Act provides for the formation of a business trust,³⁵⁰ for the conversion from one business entity to a business trust, and for the domestication of a foreign business trust.³⁵¹ Because of the complexity of the Act and the opportunities that it might present to the owners of multiple real estate assets, the authors expect that there will be a great deal of commentary forthcoming with regard to the Act prior to its effective date.

C. *Charitable Organizations*

1. Land Held by the Trustees of a Church, Church Diocese, Religious Congregation, or Religious Society

The Virginia Code limits the acreage that the trustees of a church, church diocese, religious congregation, or religious society may hold to fifteen acres of land within a city or town and two hundred fifty acres “outside of a city or town within the same

346. *Id.* § 58.1-807(E) (Cum. Supp. 2002) (new language shown in italics). The new language was substituted for the phrase “for which permit fees have been paid to” the Virginia Department of Transportation. *See id.* at § 58.1-807(E) (Cum. Supp. 2001).

347. S.B. 512, Va. Gen. Assembly (Reg. Sess. 2002) (enacted as Act of Apr. 6, 2002, ch. 621, 2002 Va. Acts 488) (codified at VA. CODE ANN. §§ 1-13.19:1, 6.1-343 to -351, 13.1-1200 to -1284, & 55-106.4 (Cum. Supp. 2002)). For further discussion of this Act, see C. Porter Vaughan, III, et al., *Annual Survey of Virginia Law: Corporate and Business Law*, 37 U. RICH. L. REV. 1, 2 (2002).

348. Va. S.B. 512.

349. *See* VA. CODE ANN. §§ 6.1-343 to -351 (Cum. Supp. 2002).

350. *Id.* §§ 13.1-1209 to -1219 (Cum. Supp. 2002).

351. *Id.* §§ 13.1-1264 to -1277 (Cum. Supp. 2002).

county.³⁵² The fifteen acre limitation can be increased to no more than fifty acres of land in a city or town if the city or town passes an ordinance permitting such an increase.³⁵³ However, any such increase in the amount of acreage that such trustees may hold in a city or town is subject to specific parameters as provided in an amendment to Virginia Code section 57-12 enacted during the 2002 General Assembly.³⁵⁴ Specifically, the amendment permits an increase above the fifteen acre limitation only

if such acreage is to be devoted exclusively, and is subsequently so devoted, to (i) a church building, chapel, cemetery; (ii) offices exclusively used for administrative purposes of the church; (iii) a Sunday school or parochial school building or playgrounds thereof; (iv) parking lots for the convenience of those attending any of the foregoing; (v) administrative offices located on such church property leased by the church to a nonprofit hospital; or (vi) a church manse, parsonage or rectory.³⁵⁵

In addition, the General Assembly amended Virginia Code section 57-12 to state that the Office of the Attorney General is charged with enforcing this section on behalf of the affected city, county, or town, and that the Office of the Attorney General is the proper party to be named as defendant in any action challenging the validity of section 57-12.³⁵⁶

2. Land Held by a Benevolent Association

Virginia Code section 57-20 places specified acreage limitations on the amount of land that the trustees of certain benevolent associations may own.³⁵⁷ The 2002 General Assembly amended this

352. *Id.* § 57-12 (Cum. Supp. 2002).

353. *Id.*

354. *See id.*

355. *Id.* This new language is similar to language that was deleted from Virginia Code section 57-12 during the 2001 General Assembly. *See* S.B. 943, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 15, 2001, ch. 253, 2001 Va. Acts 210) (codified at VA. CODE ANN. § 57-12 (Cum. Supp. 2001)).

356. *See* VA. CODE ANN. § 57-12 (Cum. Supp. 2002).

357. *See id.* § 57-20. The Virginia Code does provide an explicit definition of the term "benevolent association," but it is clear that the group must be an "unincorporated body or society" that operates for charitable purposes. *Id.* § 57-18 (Repl. Vol. 1995). The Virginia Code also provides that "benevolent associations" include

any society of Freemasons, Odd Fellows, Sons of Temperance, posts of Veterans of Foreign Wars or of the American Legion, Spanish War Veterans, Disabled American Veterans and of other associations of veterans of the armed

section to expand the groups that may hold up to thirty-five acres to include “groups organized for rural community civic purposes or improvement of farm life or operations of like purposes and not for profit”³⁵⁸ The amendment specifies that “[a]ll such holdings heretofore acquired are validated; except holdings which are in litigation on or before July 1, 2002.”³⁵⁹

3. Constitutional Amendment Regarding Property Exempt From Taxation

The General Assembly voted to submit to the voters in the Commonwealth an amendment to section 6 of article X of the Virginia Constitution, which deals with property exempt from taxation.³⁶⁰ The amendment, if approved in the referendum, will allow for the exemption from taxation for property “used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation by . . . *an ordinance adopted by the local governing body*”³⁶¹ As currently written, section 6 of article X of the Virginia Constitution permits the exemption from taxation for such properties only after “a three-fourths vote of the members elected to each house of the General Assembly”³⁶²

forces of the United States, or any other benevolent or literary associations, or school league, or other groups organized for rural community civic purposes or improvement of farm life or operations of like purposes and not for profit

Id. § 57-19 (Repl. Vol. 1995).

358. *Id.* § 57-20 (Cum. Supp. 2002). The other group that has the same thirty-five acre limitation is the Benevolent and Protective Order of Elks. *Id.*

359. *Id.*

360. H.B. 36, Va. Gen Assembly (Reg. Sess. 2002) (enacted as Act of Apr. 6, 2002, ch. 630, 2002 Va. Acts 543); *see also* VA. CONST. art. X, § 6.

361. Va. H.B. 36. (new language in italics).

362. VA. CONST. art. X, § 6, cl. 6.

D. *Condominium Associations, Property Owners' Associations and Real Estate Cooperatives*

1. Capital Reserve Accounts

The General Assembly amended both the Condominium Act³⁶³ and the Property Owners' Association Act³⁶⁴ to require condominium associations and property owner associations to maintain and audit capital reserve accounts.³⁶⁵ First the General Assembly defined the term "capital components" as the items owned in common by the condominium owners or the property owners, as the case may be, for which they have "the obligation for repair, replacement or restoration and for which" the governing body of the association "determines funding is necessary."³⁶⁶ The General Assembly then enacted requirements for those groups to conduct a study every five years "to determine the necessity and amount of reserves required to repair, replace and restore the capital components."³⁶⁷ After the study is conducted, the unit owners' executive organ or the property owners' board of directors, as the case may be, is required to review the results of the study on an annual basis and make any adjustments necessary to maintain reserves to pay for those capital components.³⁶⁸ If the study indicates a need for budget reserves, the association's governing body is required to make adjustments to its budget to provide for those capital components.³⁶⁹ Finally, the most current reserve study must be included in any disclosure packets provided to purchasers of a condominium unit or a property governed by a property owners' association, as the case may be.³⁷⁰

363. VA. CODE ANN. §§ 55-79.39 to -79.103 (Repl. Vol. 1995 & Cum. Supp. 2002).

364. *Id.* §§ 55-508 to -516.2 (Repl. Vol. 1995 & Cum. Supp. 2002).

365. *Id.* §§ 55-79.83:1(B)(2), -514(A) (Cum. Supp. 2002). These requirements will not apply if the governing documents for the condominium association or the property owners' association, as the case may be, require a more stringent standard with regard to capital reserve accounts. *Id.* § 55-79.83:1(A) (regarding condominiums); *Id.* § 55-514(A) (regarding property owners' associations).

366. *Id.* §§ 55-79.41, -509 (Cum. Supp. 2002).

367. *Id.* §§ 55-79.83:1(A)(1), -514.1(A)(1) (Cum. Supp. 2002).

368. *Id.* §§ 55-79.83:1(A)(2)-(3), -514(A)(2)-(3).

369. *Id.* §§ 55-79.83:1(B)(1)-(3), -514(B)(1)-(3).

370. *Id.* §§ 55-79.97(C)(5), -512(A)(5) (Cum. Supp. 2002).

2. Disqualification of a Condominium Owners' Association Officer

The Virginia Code now requires that, unless the condominium instruments require otherwise, a person is disqualified from being an officer of a condominium owners' association if that person disposes of all his/her units in fee.³⁷¹ Under prior law, unless the condominium instruments provided otherwise, a person was disqualified from being an officer of a condominium owners' association if that person disposed of his/her interest in fee "and/or [disposed of his/her interest in the unit] for a term or terms of six months or more"³⁷²

3. Property Owners' Association Disclosure Packets

As revised, the Property Owners' Association Act³⁷³ now requires that "[a] copy of the fully completed one-page cover sheet developed by the Real Estate Board pursuant to § 54.1-2105.1" be included as part of the association disclosure packet that must be delivered from a seller to a purchaser.³⁷⁴ In addition, the information contained in the disclosure packet obtained by a seller must be current as of the date specified on the disclosure packet.³⁷⁵

4. Taxation of Real Estate Cooperatives

The General Assembly amended the Virginia Real Estate Cooperative Act (the "Co-op Act")³⁷⁶ to clarify the taxation of real estate cooperatives.³⁷⁷ First, the General Assembly stated that any cooperative that qualifies as a real estate cooperative under the Co-op Act "shall not be deemed to be a business for any state and local purposes, including, but not limited to, liability for payment of sales, meals, hotel, motel or gross receipts taxes and business licenses, to the extent that it collects payments from residents of

371. *Id.* § 55-79.78(A).

372. *Id.* § 55-79.78(A) (Repl. Vol. 1995).

373. *Id.* §§ 55-508 to -516.2 (Repl. Vol. 1995 & Cum. Supp. 2002).

374. *Id.* § 55-512(A)(14).

375. *Id.* § 55-511(C) (Cum. Supp. 2002).

376. *Id.* §§ 55-424 to -506 (Repl. Vol. 1995 & Cum. Supp. 2002).

377. *See id.* § 55-428 (Cum. Supp. 2002).

the cooperative.³⁷⁸ Further, the Virginia Code now provides that tangible personal property owned by a real estate cooperative that would be considered household goods and personal effects if those goods or effects were owned by an individual or family, must be treated as if they were owned by an individual for purposes of state and local taxation.³⁷⁹

E. *Consumer Real Estate Protection Act and Home Warranties*

The 2002 General Assembly made two amendments to the Consumer Real Estate Protection Act ("CRESPA").³⁸⁰ The first amendment exempts any "title insurance company if such company's financial statements are audited annually by an independent certified public accountant" from the requirement that a settlement agent have an audit of its escrow accounts conducted by a certified public accountant at least once every twelve months.³⁸¹ Prior to this amendment, only attorneys were exempt from this auditing requirement.³⁸² The second amendment expanded the definition of a "settlement agent" to include "[a]ny person, other than a party to the transaction, who conducts the settlement conference and receives or handles money"³⁸³

In response to the result in the case of *Vaughn, Inc. v. Beck*,³⁸⁴ the General Assembly amended the Virginia Code to require the purchaser of a new home who discovers any defects after July 1, 2002 to provide the home builder with written notice of those defects before instituting legal actions against the home builder.³⁸⁵ The written notice must be sent by registered or certified mail to the home builder's last known address, and the notice must state the nature of the warranty claim.³⁸⁶ The home builder will have a

378. *Id.* § 55-428(F).

379. *Id.* § 55-428(G).

380. *Id.* §§ 6.1-2.19 to -2.29 (Repl. Vol. 1999 & Cum. Supp. 2002).

381. *Id.* § 6.1-2.21(E)(1) (Cum. Supp. 2002).

382. *Id.* § 6.1-2.21(E)(1) (Repl. Vol. 1999).

383. *Id.* § 6.1-2.20 (Cum. Supp. 2002).

384. 262 Va. 673, 554 S.E.2d 88 (2001) (discussed *supra* Part II.F).

385. VA. CODE ANN. § 55-70.1(D) (Cum. Supp. 2002).

386. *Id.* The revised language does not state whether the notice must be given prior to the expiration of the applicable warranty period. *See id.*

reasonable time period, not to exceed six months, to cure the defect.³⁸⁷

F. *Deeds of Trust, Priority of Mortgages, and Recordation of Documents*

1. Release of Deed of Trust

During the 2002 session, the General Assembly enacted several amendments to the Virginia Code regarding obtaining and recording a certificate of satisfaction for a deed of trust.³⁸⁸ First, the General Assembly clarified that the debtor may provide its lien creditor with the name and address of the person to whom a certificate of satisfaction may be sent.³⁸⁹ In addition, a creditor now may satisfy its requirement to record a full or partial certificate of satisfaction by having that document delivered by hand courier provided that the creditor obtains a receipt from the clerk's office.³⁹⁰ The Virginia Code now also provides that if the owner of a mortgage, deed of trust, vendor's lien, or other lien transfers that lien to someone other than the original lien creditor, the new owner is "subject to the same requirements . . . for failure to comply" with the requirement to provide certificate of satisfaction in accordance with the applicable provisions of the Virginia Code.³⁹¹

Another significant amendment to the Virginia Code involves settlement agents who are licensed under CRESPA.³⁹² The Virginia Code now authorizes settlement agents who have paid an obligation secured by a mortgage or deed of trust to file a certificate of satisfaction evidencing a release of the satisfied lien in certain limited circumstances.³⁹³ The settlement agent can exe-

387. *Id.*

388. *See id.* § 55-66.3(A)(1)-(2) (Cum. Supp. 2002).

389. *Id.* § 55-66.3(A)(1).

390. *Id.*

391. *Id.* § 55-66.3(A)(2). Under prior law, the new owner of the lien would only be liable for recording a certificate of satisfaction that accrued during the new owner's ownership of the lien. *See id.* § 55-66.3(A)(2) (Repl. Vol. 1995).

392. *See id.* § 55-66.3(E) (Cum. Supp. 2002).

393. *Id.* This section applies to any lien created before or after July 1, 2002 and applies only to transactions involving the liens against real estate located in the Commonwealth containing no more than four residential dwelling units. *Id.* § 55-66.3(E)(5)(a)-(b). It also applies only to complete releases of liens and does not apply to partial releases of liens. *Id.* § 55-66.3(E)(5)(c).

cute and record the certificate of satisfaction even if that agent is not named as a trustee under the deed of trust or the agent has not received some other authority from the lienholder to release the lien.³⁹⁴ However, the settlement agent can exercise this authority only under specified procedures. First, the settlement agent must submit a notice to the lienholder, which notice must conform substantially to a statutory form.³⁹⁵ If, within ninety days of the settlement agent's mailing of the notice of intent, the lienholder fails to provide the settlement agent with evidence that the certificate of satisfaction has been recorded, the settlement agent may prepare and record a certificate of satisfaction.³⁹⁶ The settlement agent's certificate of satisfaction must be accompanied with a copy of the notice of intent sent to the lienholder and an affidavit stating that the settlement agent has met the statutory requirements to prepare and record the certificate of satisfaction.³⁹⁷

2. Definition of a "Subordinate Mortgage"

Virginia Code section 55-58.3 provides guidance for determining when a refinance mortgage takes priority over a subordinate mortgage.³⁹⁸ The General Assembly amended the definition of a "subordinate mortgage" in that section to include "a mortgage or deed of trust securing an original principal amount not exceeding \$50,000, encumbering or conveying an interest in real estate containing not more than one dwelling unit that is subordinate in priority . . . *as a result of a previous refinancing.*"³⁹⁹

394. *Id.* § 55-66.3(E).

395. *Id.* § 55-66.3(E)(1)(a)-(b).

396. *Id.* § 55-66.3(E)(2)(a).

397. *Id.* The affidavit must certify:

- (i) that the settlement agent has satisfied, and possesses satisfactory evidence of payment of the obligation secured by the mortgage described in the certificate; (ii) that the lien of the mortgage may be released; (iii) that the person executing the certificate is the settlement agent or is duly authorized to act on behalf of the settlement agent; and (iv) that the notice of intent to release was delivered to the lien creditor or servicer and the settlement agent received evidence of receipt of such notice by the lien creditor or servicer.

Id. § 55-66.3(E)(2)(b). The affidavit must be substantially in the form proscribed in the amendment to Virginia Code section 55-66.3. *See id.* (providing a sample form of affidavit).

398. *Id.* § 55-58.3 (Cum. Supp. 2002).

399. *Id.* § 55-58.3(A) (new language in italics). Also included in the definition of a subordinate mortgage is a mortgage or deed of trust that is subordinate in priority under Vir-

3. Grantor/Grantee Indexes; Electronic Filing

In recent years there has been significant pressure to conduct business electronically rather than using paper. During the 2002 session, the General Assembly made one amendment to the Virginia Code that made it clear that using paper was still an acceptable practice for circuit court clerk's offices.⁴⁰⁰ In that amendment, the General Assembly allowed a circuit court clerk's office to maintain its grantor and grantee indexes on paper.⁴⁰¹ In another action, the General Assembly made it clear that electronic filings will continue to be promoted.⁴⁰² Under new legislation, circuit court clerks are authorized to enter into agreements with banks, mortgage companies, or other lending institutions "for the purpose of electronically recording certificates of satisfaction and assignments of the underlying notes secured by previously recorded deeds of trust."⁴⁰³

4. Notary Public

The General Assembly more clearly defined the duty of care that a notary public must exercise with regard to the identity of any person whose identity is the subject of a notarial act.⁴⁰⁴ If the notary is unfamiliar with the person subject to the notarial act, the notary must ascertain that person's identity

by examination of one or more of the following documents: a United States Passport, a certificate of United States citizenship, a certificate of naturalization, an unexpired foreign passport, an alien registration card with photograph, a state-issued driver's license or a state-issued identification card or a United States military card.⁴⁰⁵

ginia Code section 55-96(A)(1) "to a mortgage, deed of trust or other security interest in real estate (otherwise known as the prior mortgage) . . ." *Id.*

400. *Id.* § 17.1-249(I) (Cum. Supp. 2002).

401. *Id.* A circuit court clerk already had authority to maintain his/her indexes "on computer, word processor, microfilm, microfiche, or other micrographic medium . . ." *Id.*

402. *Id.* § 17.1-256 (Cum. Supp. 2002).

403. *Id.*

404. *See id.* § 47.1-14 (Cum. Supp. 2002).

405. *Id.*

G. *Eminent Domain*

1. Repeal of Sunset Provision in Act of April 19, 2000, Chapter 1029

During the 2000 session, the General Assembly enacted some broad-reaching and significant changes that impacted eminent domain proceedings.⁴⁰⁶ This legislation, which was set to expire on July 1, 2002,⁴⁰⁷ made several changes to the Virginia Code. First, it provides that property owners subject to eminent domain proceedings have the right to have compensation awards determined by a jury.⁴⁰⁸ Second, it states that in negotiations to acquire land for public use, agencies commencing such actions must provide the owner of the property to be condemned a copy of the agency's appraisal of the property to be taken.⁴⁰⁹ Third, it requires the condemning agency to conduct a title search of the property before making an offer to purchase the property or before filing a certificate of take, as the case may be.⁴¹⁰ Fourth, it requires the Virginia Department of Transportation to acquire real estate appraisals from licensed real estate appraisers for any fee simple acquisition that the department intends to acquire.⁴¹¹ Fifth, it permits tenants of land to be condemned who have a lease of twelve months or longer to intervene in condemnation proceedings to participate in the compensation proceedings.⁴¹² Further, the General Assembly repealed the sunset provisions, thus making these changes permanent parts of the Virginia Code.⁴¹³

406. S.B. 453, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 19, 2000, ch. 1029, 2000 Va. Acts 2443) (codified at VA. CODE ANN. §§ 25-46.3, -46.5, -46.9, -46.11, -46.17, -46.19 to -46.22, -46.24, -46.25, -46.29, -46.32, and -248 (Repl. Vol. 2000)); *Id.* §§ 33.1-89, 36.27 (Cum Supp. 2000)).

407. *Id.*

408. See VA. CODE ANN. §§ 25-46.9, -46.20 (Repl. Vol. 2000).

409. *Id.* § 25-248 (Cum. Supp. 2002).

410. *Id.* § 25-46.5(C) (Repl. Vol. 2000); see also *id.* § 33.1-89 (Cum. Supp. 2002) (applying specifically to the Virginia Department of Transportation).

411. *Id.* § 33.1-89 (Cum. Supp. 2002).

412. *Id.* § 25-46.21:1 (Repl. Vol. 2000). See also *supra* Part II.A.2. for a discussion of *Lamar Corp. v. Commonwealth Transportation Commissioner*, 262 Va. 375, 552 S.E.2d 61 (2001) (regarding tenant's involvement in eminent domain proceedings).

413. H.B. 844, Va. Gen. Assembly (Reg. Sess. 2002) (enacted as Act of Apr. 5, 2002, ch. 1056, 2002 Va. Acts 1056).

2. Pretrial Settlement Conferences

Under new legislation, either the property owner or the condemning authority may request that the parties have a pre-trial settlement conference conducted by a neutral third party.⁴¹⁴ The pre-trial settlement conference must be held no sooner than thirty days prior to trial, and the settlement conference is not binding on the parties.⁴¹⁵

3. Definition of an "Owner"

As discussed earlier in this article, one of the issues that has been raised in condemnation litigation is who qualifies as an "owner" in the condemnation proceedings.⁴¹⁶ The General Assembly clarified the meaning of the term "owner" by providing a definition for that term as it relates to eminent domain proceedings.⁴¹⁷ The definition specifically includes the owners of "structures or improvements for which an outdoor advertising permit has been issued by the Commonwealth Transportation Commissioner"⁴¹⁸ However, the General Assembly also made it clear that the definition of the term "owner" would "not alter in

414. VA. CODE ANN. § 25-46.17(A) (Cum. Supp. 2002). In addition, the General Assembly amended Virginia Code section 36-27, deleting a similar pre-trial conference option applicable only to condemnations arising under Title 36 of the Virginia Code; however, the requirements of Virginia Code section 25-46.17 are incorporated by reference into section 36-27. *See id.* § 36-27 (Cum. Supp. 2002).

415. *Id.* § 25-46.17(A) (Cum. Supp. 2002).

416. *See supra* Part II.A.2 (discussing *Lamar Corp.*, 262 Va. at 375, 552 S.E.2d at 61).

417. *See* VA. CODE ANN. § 25-46.3 (Cum. Supp. 2002) (applying to general eminent domain provisions); *id.* § 25-238 (Cum. Supp. 2002) (applying to relocation assistance requirements); *id.* § 33.1-89 (Cum. Supp. 2002) (applying to condemnation actions by the Commonwealth Transportation Commissioner). Specifically, each of the foregoing sections define "owner" as follows:

"*Owner*" means any person owning land, buildings, structures or improvements upon land where such ownership is of record in the land records of the clerk's office of the circuit court of the county or city where the property is located. Owner shall not include trustees or beneficiaries under a deed of trust, any person with a security interest in the property, or any person with a judgment or lien against the property. In proceedings instituted by the Commonwealth Transportation Commissioner under this title or Title 33.1, owner also includes persons owning structures or improvements for which an outdoor advertising permit has been issued by the Commonwealth Transportation Commissioner pursuant to § 33.1-360.

Id. §§ 25-46.3, -238, 33.1-89 (emphasis in original).

418. *Id.*

any way the valuation of such land, buildings, structures or improvements under existing law."⁴¹⁹

4. Limitation on Housing Authorities to Acquire Property in Designated Areas of Norfolk

The General Assembly added a new section to the Virginia Code that limits the authority of housing authorities to exercise the power of eminent domain in certain areas of the City of Norfolk.⁴²⁰ Specifically, the new legislation states that

no housing authority transacting business and exercising powers as provided in § 36-4 in the City of Norfolk shall be authorized *after July 1, 2007*, to acquire by the exercise of the power of eminent domain, any real property located within the boundaries set forth in the Conservation and Redevelopment Plan for the East Ocean View Conservation and Redevelopment Project adopted July 1989, as amended by Amendment No. 1 to such plan adopted September 1992.⁴²¹

It is important to note that this legislation will not apply to condemnation proceedings initiated prior to July 1, 2007.⁴²²

H. *Enterprise Zones*

Prior to the 2002 General Assembly Session, local governments had the authority to establish by ordinance a local technology zone for the promotion of technology based businesses.⁴²³ The General Assembly expanded this authority to allow local governments to establish a special taxation program for such zones as if those zones were designated as enterprise zones.⁴²⁴ The locality can designate such a technology zone and enact the accompanying local enterprise zone taxation program for a technology zone without first obtaining an enterprise zone designation from the Governor.⁴²⁵

419. *Id.*

420. *Id.* § 36-27.2 (Cum. Supp. 2002).

421. *Id.* (emphasis added).

422. *Id.*

423. *Id.* § 58.1-3850 (Rep. Vol. 2000).

424. *Id.* §§ 58.1-3245.12, -3850 (Cum. Supp. 2002).

425. *Id.* § 58.1-3245.12 (Cum. Supp. 2002).

I. Virginia Residential Landlord Tenant Act Amendments

The 2002 General Assembly made a number of amendments to the Virginia Residential Landlord Tenant Act (the “Residential Landlord Tenant Act”),⁴²⁶ including amendments to certain defined terms including prepaid rent, security deposits, liquidated damages for early termination by military personnel, and abandonment by a tenant of the premises and the tenant’s property.⁴²⁷ These amendments are discussed below.

1. Defined Terms

The General Assembly added the term “authorized occupant” to the Residential Landlord Tenant Act, defining it as “a person entitled to occupy a dwelling unit with the consent of the landlord, but who has not signed the rental agreement and therefore does not have the rights and obligations as a tenant under the rental agreement.”⁴²⁸ This definition of “authorized occupant” affects the definition of a “tenant” under the Residential Landlord Tenant Act.⁴²⁹ As amended, the definition of “tenant” does not include “(i) an *authorized occupant*, (ii) a guest or invitee, or (iii) any person who guarantees or cosigns the payment of the financial obligations of a rental agreement but has no right to occupy a dwelling unit.”⁴³⁰

Also the Residential Landlord Tenant Act definition of “security deposit” was amended to delete “prepaid rent” as part of the definition of the term “security deposit.”⁴³¹ Prepaid rent is now included within the term “rent.”⁴³² The term “security deposit” was also amended to state that the term does not include “a bond or commercial insurance policy purchased by a tenant to a landlord to secure the performance of the terms and conditions of a rental agreement.”⁴³³

426. *Id.* §§ 55-248.2 to -248.40 (Repl. Vol. 1995 & Cum. Supp. 2002).

427. *See infra* Part III.I.1-5.

428. VA. CODE ANN. §55-248.4 (Cum. Supp. 2002).

429. *Id.*

430. *Id.* (emphasis added).

431. *Id.*

432. *Id.* Prepaid rent is discussed *infra* Part III.I.2.

433. VA. CODE ANN. § 55-248.4 (Cum. Supp. 2002).

2. Prepaid Rent

Under a new provision of the Virginia Code, tenants may offer and landlords may accept prepaid rent.⁴³⁴ If a landlord receives prepaid rent, the landlord has five business days to place the prepayment funds in an escrow account with a federally insured depository in Virginia.⁴³⁵ The funds must remain in the escrow account until the prepaid rent becomes due, and the landlord is forbidden from removing the funds from escrow before they become due unless the tenant gives the landlord prior written consent.⁴³⁶

3. Security Deposits

As stated above, the General Assembly clarified the definition of a "security deposit" to state that it also does "not include a bond or commercial insurance policy purchased by a tenant to secure the performance of the terms and conditions of a rental agreement."⁴³⁷ In furtherance of this change, the General Assembly also amended the provisions that are prohibited from inclusion in rental agreements.⁴³⁸ Specifically, a rental agreement may not contain a provision that a tenant agree "to both the payment of a security deposit and the provision of a bond or commercial insurance policy purchased by the tenant to secure the performance of the terms and conditions of a rental agreement."⁴³⁹

4. Limitations on Liquidated Damages Provisions for Early Termination by Military Personnel

The Residential Landlord Tenant Act permits a member of the United States armed forces or a member of the Virginia National Guard who is serving on full-time duty or as a Civil Service technician with a National Guard unit (collectively, "military personnel") to terminate a rental agreement under specified circum-

434. *Id.* § 55-248.7:1 (Cum. Supp. 2002).

435. *Id.*

436. *Id.*

437. *Id.* § 55-248.4 (Cum. Supp. 2002).

438. *Id.*

439. *Id.* § 55-248.9(A)(7) (Cum. Supp. 2002).

stances.⁴⁴⁰ If military personnel cause an early termination in accordance with those specified circumstances, the landlord is limited to collecting liquidated damages equal to one month's rent if the tenant completes less than six months of the tenancy as of the effective date of termination.⁴⁴¹ The landlord is also limited to collecting liquidated damages equal to one-half of one month's rent if the tenant completes at least six months but less than twelve months of the tenancy as of the effective date of the termination.⁴⁴² However, prior to this year, the liquidated damages provision was silent as to what, if any, liquidated damages a landlord could collect from military personnel if the termination date was after twelve months of the tenancy was completed.⁴⁴³ The General Assembly resolved this ambiguity by amending the Residential Landlord Tenant Act to state that a landlord can collect no liquidated damages from military personnel who terminate their leases early due to the specified circumstances discussed above and who have completed at least twelve months of their lease term prior to the early termination date.⁴⁴⁴

5. Tenant Abandonment

If a landlord is unsure whether a tenant has abandoned the leased premises, the landlord now has a process to follow to determine whether a tenant has abandoned the premises.⁴⁴⁵ First, the landlord must serve the tenant with written notice requiring the tenant to give the landlord written notice within seven days "that the tenant intends to remain in occupancy of the premises."⁴⁴⁶ If the tenant gives notice of his/her intent to remain or the landlord otherwise determines that the tenant has not abandoned the premises, the landlord may not treat the premises as abandoned.⁴⁴⁷ If, within seven days of delivery of the notice, the tenant fails to respond and the landlord does not otherwise de-

440. *Id.* § 55-248.21:1(A) (Cum. Supp. 2002).

441. *Id.* § 55-248.21:1(C)(1).

442. *Id.* § 55-248.21:1(C)(2).

443. *Id.* § 55-248.21:1(C) (Repl. Vol. 1995).

444. *Id.* § 55-248.21:1(C) (Cum. Supp. 2002).

445. *Id.* § 55-248.33 (Cum. Supp. 2002).

446. *Id.* See generally *id.* § 55-248.6 (Cum. Supp. 2002) (stating the requirements for notice).

447. *Id.* § 55-248.33 (Cum. Supp. 2002).

termine that the tenant has not abandoned the premises, “there shall be [a] rebuttable presumption that the premises have been abandoned by the tenant and the rental agreement shall be deemed to terminate on that date.”⁴⁴⁸ The landlord is then required to begin mitigating damages.⁴⁴⁹

In addition to the procedure for determining whether a tenant has abandoned the premises, the Residential Landlord Tenant Act now has a specific procedure for disposing of abandoned property left in the premises by a tenant.⁴⁵⁰ The landlord has three options for giving notice to the tenant of the landlord’s intent to dispose of the abandoned property.⁴⁵¹ First, the landlord may give the tenant a termination notice that includes a statement that the property left in the premises will be disposed of within twenty-four hours after termination of the rental agreement.⁴⁵² Second, if the landlord uses the aforementioned procedure to determine whether the tenant has abandoned the premises, the landlord can include in his notice to the tenant a statement that any personal property left in the premises will be “disposed of within the twenty-four hour period after expiration of the seven-day notice period.”⁴⁵³ Third, the landlord may give a separate notice to the tenant that “includes a statement that any items of personal property left in the premises would be disposed of within twenty-four hours after expiration of a ten-day period from the date such notice was given to the tenant.”⁴⁵⁴ The tenant has “the right to remove his personal property from the premises at reasonable times during the twenty-four hour period after termination or at such other reasonable times until the landlord has disposed of the [tenant’s] remaining personal property.”⁴⁵⁵ The landlord has no “liability for the risk of loss for such personal property” during the twenty-four hour period and until the land-

448. *Id.*

449. *Id.*; *see id.* § 55-248.35 (Cum. Supp. 2002) (stating landlord’s obligation to mitigate damages).

450. *Id.* § 55-248.38:1 (Cum. Supp. 2002).

451. *Id.* In each instance, the landlord must follow the notice requirements contained in the Residential Landlord Tenant Act. *See id.* § 55-248.6 (Cum. Supp. 2002) (stating the requirements for notice).

452. *Id.* § 55-248.38:1 (Cum. Supp. 2002).

453. *Id.*

454. *Id.*

455. *Id.*

lord disposes of the tenant's personal property.⁴⁵⁶ If the landlord fails to provide the tenant with "reasonable access" to the tenant's personal property during the specified periods, the tenant has a right to recover the property by seeking injunctive or other relief.⁴⁵⁷

J. Mechanics Liens

The items that can be included in the fifty-dollar threshold for filing a mechanics lien have been expanded to include "the reasonable rental or use value of equipment"⁴⁵⁸ The General Assembly also enacted an amendment that requires a subcontractor furnishing labor or materials to a general contractor or other subcontractor to give both a preliminary and second written notice stating the nature and character of the subcontractor's contract and the probable amount of his claim.⁴⁵⁹ Prior to this amendment, the subcontractor only had to provide the general contractor or other subcontractor with one notice of the subcontractor's claim.⁴⁶⁰

K. Sanitary Districts and Service Districts

Localities now have the authority to base a special assessment tax for properties in sanitary districts and service districts on the full assessed value of the taxable property in the district, even if a property in the district is subject to a special use value assessment.⁴⁶¹ The locality can only make such an assessment with the written consent of the property owner.⁴⁶² The General Assembly also included Goochland County among the jurisdictions that may enact an ordinance that provides "that taxes or charges hereafter made, imposed or incurred for water or sewers or use thereof within or outside such county or city shall be a lien on the real es-

456. *Id.*

457. *Id.*

458. *Id.* § 43-3(A) (Repl. Vol. 2002).

459. *Id.* § 43-11 (Repl. Vol. 2002).

460. *Id.* § 43-11 (Repl. Vol. 1999).

461. *Id.* § 15.2-2403(6) (Cum. Supp. 2002) (regarding service districts); *id.* § 21-118(6) (Cum. Supp. 2002) (regarding sanitary districts).

462. *Id.* § 21-118(6) (Cum. Supp. 2002).

tate served by such waterline or sewer.”⁴⁶³ Finally, the General Assembly granted local governments the authority to establish open space service districts for the purpose of acquiring “by purchase, gift, devise, bequest, grant or otherwise title to or any interests or rights of not less than five years’ duration in real property that will provide a means for the preservation or provision of open-space land as provided for in the Open-Space Land Act (§ 10.1-1700 et seq.).”⁴⁶⁴ However, the locality may not use the power of eminent domain for the purpose of acquiring property for an open-space service district.⁴⁶⁵

L. *Sale or Lease of Property Owned by the Commonwealth*

Prior to the sale or lease of state-owned property, the Department of General Services now is required to “request the written opinion of the Secretary of Natural Resources as to whether the property to be sold is a significant component of the Commonwealth’s natural or historic resources, and, if so, how those resources should be protected in the sale of the property.”⁴⁶⁶ The Secretary of Natural Resources is required to provide his/her review of the sale “within fifteen business days of receipt of full information” from the Department of General Services.⁴⁶⁷

The 2002 General Assembly provided that the Department of State Police can receive and retain in-kind goods or services for leases or conveyances of an interest in a Department of State Police communications tower or site.⁴⁶⁸ The in-kind goods or services must be “used in the operation, acquisition, maintenance, construction or replacement of communication towers, sites, and systems of the department.”⁴⁶⁹ If the Department of State Police enters into an agreement for in-kind goods or services, such

463. *Id.* § 15.2-2118 (Cum. Supp. 2002). This section also provides that “[w]here residential rental real estate is involved, no lien shall attach (i) unless the user of the water or sewer services is also the owner of the real estate or (ii) unless the owner of the real estate negotiated or executed the agreement by which such water or sewer services were provided to the property.” *Id.*

464. *Id.* § 15.2-2403(11) (Cum. Supp. 2002).

465. *Id.*

466. *Id.* § 2.2-1156(A) (Cum. Supp. 2002).

467. *Id.*

468. *Id.* § 2.2-1150.1 (Cum. Supp. 2002).

469. *Id.*

agreement need not be reviewed and approved by the Department of General Services.⁴⁷⁰

M. *Real Estate Taxes*

During the 2002 session, the General Assembly enacted four noteworthy changes to the real estate tax provisions contained in the Virginia Code. The first change involves the minimum acreage requirements for inclusion in the open-space use designation under a locality's special land use assessment program.⁴⁷¹ The Virginia Code now provides that

for real estate adjacent to a scenic river, a scenic highway, a Virginia Byway or public property in the Virginia Outdoors Plan or for any real estate in any city, county or town having a density of population greater than 5,000 per square mile, for any real estate in any county operating under the urban county executive form of government, or the unincorporated Town of Yorktown chartered in 1691, the governing body may by ordinance prescribe that land devoted to open-space uses consist of a minimum of *one quarter of an acre*.⁴⁷²

The Virginia Code provides the authority for certain localities to exempt or defer real estate taxes for the elderly and permanently and totally disabled, provided that the taxpayer meets certain criteria.⁴⁷³ One criteria involved is a calculation of the income and financial worth of the taxpayer involved, and the taxpayer may exempt certain property from the financial worth calculations.⁴⁷⁴ The General Assembly amended this legislation to provide that local governments in the Eighth Planning District⁴⁷⁵ may allow elderly or permanently disabled taxpayers to exclude the taxpayer's dwelling and twenty-five acres of non-income pro-

470. *Id.* (stating that such transactions are exempt from the requirements of Virginia Code section 2.2-1156 (Cum. Supp. 2002)).

471. *Id.* § 58.1-3233 (Cum. Supp. 2002).

472. *Id.* § 58.1-3233(2) (new language in italics). Prior to this amendment, the minimum acreage for those designated areas was two acres. *See id.* § 58.1-3233(2) (Repl. Vol. 2000).

473. *See id.* § 58.1-3211(1)(a)-(b) (Cum. Supp. 2002).

474. *Id.* § 58.1-3211(3)-(4).

475. The Eighth Planning District, which is primarily Northern Virginia, includes "(i) any county having a population of more than 800,000, as determined by the 1990 United States Census; (ii) any county or city adjacent thereto; (iii) any city contiguous to such adjacent counties and cities; and (iv) any incorporated town located in the counties described in clauses (i) and (ii) . . ." *Id.* § 58.1-3211(4).

ducing land from the financial worth calculations.⁴⁷⁶ Under prior law, taxpayers in the Eighth Planning District were only permitted to exclude one acre of land from the calculations.⁴⁷⁷

The remaining two amendments to the real estate tax provisions involve partial exemptions for rehabilitated properties.⁴⁷⁸ First, the General Assembly removed the total square footage limitation for the replacement of commercial and industrial structures, where the local government has provided a partial exemption from real estate property tax in an effort to promote such rehabilitation.⁴⁷⁹ Second, with regard to rehabilitated multi-family residential structures, the General Assembly deleted the requirement that the total square footage of the replacement structure may not exceed thirty percent of the replaced multi-family residential unit; rather, the General Assembly granted local governments the authority to set the square footage requirements by ordinance.⁴⁸⁰

N. *Uniform Statewide Building Code*

1. Inspections of Rental Properties

The 2002 General Assembly amended the Uniform Statewide Building Code⁴⁸¹ with regard to the frequency of inspections of rental properties.⁴⁸² The amendment provides that a local building official may perform inspections of specific rental properties "at specific time intervals . . . but not more than once each calendar year upon a separate finding that such additional inspections are necessary to protect the public health, safety or welfare."⁴⁸³ However, if the building official determines that such inspections

476. *Id.*

477. *Id.* § 58.1-3211(4) (Cum. Supp. 2001).

478. *Id.* § 58.1-3220(A) (Cum. Supp. 2002); *id.* § 58.1-3231 (Cum. Supp. 2002).

479. Compare *id.* § 58.1-3231(A) (Cum. Supp. 2002), with *id.* § 58.1-3231 (Cum. Supp. 2001). The deleted provision stated that "[s]uch replacement structures may exceed the total square footage of the replaced structures by no more than 110 percent in areas designated as enterprise zones by the Commonwealth, and by no more than 100 percent in all other areas." *Id.* § 58.1-3231(A) (Cum. Supp. 2001).

480. Compare *id.* § 58.1-3220(A) (Cum. Supp. 2002), with *id.* § 58.1-3220(A) (Cum. Supp. 2001).

481. *Id.* §§ 36-97 to -119.1 (Repl. Vol. 1996 & Cum. Supp. 2002).

482. See *id.* § 36-105 (Cum. Supp. 2002).

483. *Id.*

are necessary, the building official is precluded from conducting inspections of the specific property upon the occurrence of a change in ownership or a termination of a tenancy.⁴⁸⁴

2. Adoption of the Standards of the International Code Council, Rehabilitation of Existing Commercial Properties and Fire Prevention

By enacting House Bill 1211,⁴⁸⁵ the General Assembly made several significant changes to the Uniform Statewide Building Code.⁴⁸⁶ The General Assembly provided that the Board of Housing and Community Development (the "Housing Board") should develop the statewide building code while giving "due regard for generally accepted standards as recommended by nationally recognized organizations, including . . . the International Code Council and the National Fire Protection Association."⁴⁸⁷

The General Assembly also made a declaration that there is an urgent need to improve and rehabilitate the existing stock of commercial properties in the Commonwealth, and that the application of the existing building code sometimes has caused rehabilitation of such properties to be costly and time-consuming.⁴⁸⁸ According to the declaration, the additional cost and time involved with rehabilitation of commercial properties in the Commonwealth have resulted "in a significant reduction in the amount of rehabilitation activity taking place."⁴⁸⁹ In conformance with that declaration, the General Assembly directed that the Housing Board enact building regulations "that facilitate the maintenance, rehabilitation, development and reuse of existing

484. *Id.*

485. H.B. 1211, Va. Gen. Assembly (Reg. Sess. 2002) (enacted as Act of Apr. 5, 2002, ch. 555, 2002 Va. Acts 1077) (codified at VA. CODE ANN. §§ 36-99, -99.01, -103, -119.1, -137 and -139 (Cum. Supp. 2002)).

486. *See* VA. CODE ANN. § 36-98 (Cum. Supp. 2002) (giving the Board of Housing and Community Development the power to adopt and promulgate a Uniform Statewide Building Code).

487. *See id.* § 36-99(B) (Cum. Supp. 2002). The amendment to this section deleted references to the Southern Building Code Congress and the Building Officials Conference of America and replaced them with the International Code Council. *See id.*

488. *Id.* § 36-99.01(B) (Cum. Supp. 2002).

489. *Id.*

buildings at the least possible cost to ensure the protection of the public health, safety and welfare.”⁴⁹⁰

In furtherance of the declaration to promote rehabilitation and to promote fire prevention, the General Assembly directed the Housing Board to appoint a “Building Code Academy Advisory Committee” (“the Committee”) that is to be comprised of code enforcement personnel and representatives of the construction industry.⁴⁹¹ The Committee is to advise the Housing Board and the Director of the Department of Housing and Community Development regarding “policies, procedures, operations, and other matters pertinent to enhancing the delivery of training services provided by the Building Code Academy.”⁴⁹² In addition, the General Assembly stated that the Building Code Academy must be established and operated “for the training of persons in *the content, application, and intent of specified subject areas of the building and fire prevention regulations promulgated*” by the Housing Board.⁴⁹³

O. *Land Use*

1. Subdivision Plats, Site Plans, and Other Development Plans

The General Assembly amended the Virginia Code relative to preliminary subdivision plats to provide that such plats are valid for a five-year period once approved, subject to satisfying certain criteria.⁴⁹⁴ To ensure the plat remains valid during the five-year period, the subdivider must submit “a final subdivision plat for all or a portion of the property within one year of such approval or such longer period as may be prescribed by local ordinance,” and the subdivider must “diligently pursue[] approval of the final subdivision plat.”⁴⁹⁵ According to the amendment, “[d]iligent pursuit of approval means that the subdivider has incurred extensive obligations or substantial expenses relating to the submitted final

490. *Id.* § 36-103 (Cum. Supp. 2002).

491. *Id.* § 36-137(7) (Cum. Supp. 2002).

492. *Id.*

493. *Id.* § 36-139(14) (Cum. Supp. 2002) (new language in italics).

494. *Id.* § 15.2-2260(F) (Cum. Supp. 2002).

495. *Id.*

subdivision plat or modifications thereto.”⁴⁹⁶ However, after three years following approval of the preliminary subdivision plat, the planning commission or the subdivision agent, as the case may be, “may revoke such approval upon a specific finding of facts that the subdivider has not diligently pursued approval of the final subdivision plat.”⁴⁹⁷ The planning commission or the subdivision agent, as the case may be, may revoke the plat only after giving the subdivider ninety days prior written notice sent by certified mail.⁴⁹⁸

In what appears to be a curative statute, the General Assembly amended the Virginia Code to validate certain recorded subdivision plats and site plans even though those plats or plans conflict with the underlying zoning.⁴⁹⁹ Specifically, the new provision states that if the provisions of a recorded subdivision plat or final site plan conflict with the underlying zoning, but the plat or plan “was specifically determined by the governing body and not its designee, to be in accordance with the zoning conditions” approved under conditional zoning, “the provisions of the recorded plat or final site plan shall control”⁵⁰⁰ Further, the notice requirements contained in Virginia Code section 15.2-2204 are deemed satisfied in this particular set of circumstances.⁵⁰¹

Subdividers often must post a performance bond or other form of surety to ensure the construction of public facilities that will be dedicated to a locality, a public agency or the Commonwealth.⁵⁰² The construction of those facilities often involves inspections to ensure that the construction is in conformance with the terms and conditions of a performance agreement.⁵⁰³ The General Assembly amended the Virginia Code to limit the scope of those inspections to the particular terms of the performance agreement.⁵⁰⁴ The inspection limitation is as follows:

496. *Id.*

497. *Id.*

498. *Id.*

499. *Id.* § 15.2-2261.1 (Cum. Supp. 2002).

500. *Id.*

501. *Id.*

502. *Id.* § 15.2-2245(A) (Cum. Supp. 2002).

503. *Id.*

504. *Id.*

Any inspection of such public facilities shall be based solely upon conformance with the terms and conditions of the performance agreement and the approved design plan and specifications for the facilities for which the performance guarantee is applicable, and shall not include the approval of any person other than an employee of the governing body, its administrative agency, the Virginia Department of Transportation or other political subdivision or a person who has contracted with the governing body, its administrative agency, the Virginia Department of Transportation or other political subdivision.⁵⁰⁵

During the 2002 session, the General Assembly enacted a few other minor amendments relative to subdivision plats, site plans and other development plans. First, if a property lies within an airport noise overlay zone, any survey recorded after January 1, 2003 and any final subdivision plat or final site plan approved after January 1, 2003 for that property must contain a statement giving notice that the "property either partially or wholly lies within an airport noise overlay zone."⁵⁰⁶ Second, the term "such facilities" as used in Virginia Code section 15.2-2241 is defined to be inclusive of all the public facilities constructed as part of a subdivision and dedicated to a locality, the Commonwealth, or a public agency.⁵⁰⁷ Third, the General Assembly gave local governments the authority to enact an ordinance to require applicants for "land disturbing permit[s], including building permits and erosion and sediment control permits" to provide evidence that any delinquent real estate taxes owed to the locality on the property subject to the permit have been paid.⁵⁰⁸ Finally, local governments with a population density of at least seventy-five persons per square mile who have adopted a tree replacement ordinance may enact a tree canopy bank ordinance.⁵⁰⁹ The tree canopy bank will allow developer's to satisfy their tree canopy requirements by providing off-site plantings or by the replacement of trees at the direction of the locality.⁵¹⁰

505. *Id.*

506. *Id.* § 15.2-2295 (Cum. Supp. 2002).

507. *Id.* § 15.2-2241(5) (Cum. Supp. 2002).

508. *Id.* § 15.2-2286(B) (Cum. Supp. 2002). Local governments already had the authority to require such evidence for special exception, special use permit, variance, and rezoning applicants. *Id.*

509. *Id.* § 15.2-961(A) (Cum. Supp. 2002).

510. *Id.* § 15.2-961(B).

2. Advertisement of Zoning Amendments

Local governments now have the obligation to notify individual land owners of public hearings before the planning commission or the governing body for proposed zoning ordinance text amendments that will decrease the allowed dwelling unit density of twenty-five or more parcels of land.⁵¹¹ This notice must be written and mailed to each individual property owner affected by the proposed zoning text amendment.⁵¹² However, the locality is not required to send individually mailed notices to the owner of lots that contain less than 11,500 square feet of area.⁵¹³

3. Clustering of Single-Family Dwellings

One of the more significant changes in the land use arena made during the 2002 General Assembly involves the clustering of single-family dwellings.⁵¹⁴ Now localities have affirmative authority to enact ordinances for the clustering of single-family dwellings for the purpose of preserving open space.⁵¹⁵ In adopting a cluster housing ordinance, the locality may provide

standards, conditions and criteria for clustering of single-family dwellings and the preservation of open space developments. In establishing such standards, conditions and criteria, the governing body may, in its discretion, include any provisions it determines appropriate to ensure quality development, preservation of open space and compliance with its comprehensive plan and land use ordinances.⁵¹⁶

Cluster development density calculations must be based upon the same criteria that the locality would otherwise use under its land use ordinances.⁵¹⁷ In addition, a locality may have different cluster housing standards for different zoning districts within the locality.⁵¹⁸

511. *Id.* § 15.2-2204(B) (Cum. Supp. 2002).

512. *Id.*

513. *Id.*

514. *Id.* § 15.2-2286(A)(12) (Cum. Supp. 2002).

515. *Id.*

516. *Id.* § 15.2-2286(A)(12)(a).

517. *Id.*

518. *Id.*

If a cluster housing proposal complies with the localities' "adopted standards, conditions and criteria," the development is permitted "by right under the local subdivision ordinance" and must be approved administratively without the requirement of a public hearing.⁵¹⁹ For cluster developments that satisfy the standards, conditions, and criteria, "no local ordinance shall require that a special exception, special use, or conditional use permit be obtained."⁵²⁰ However, an exemption may be set out in the ordinance that "exempt[s] developments of two acres or less from the provisions" of the cluster-housing development.⁵²¹ If the cluster housing proposal does not comply with the density calculations contained in the locality's land use ordinances, the locality may still approve the development under specific procedures:⁵²²

To implement and approve such increased density development, the locality may, at its option, (i) establish and provide in its zoning or subdivision ordinance standards, conditions, and criteria for such development, and if the proposed development complies with those standards, conditions and criteria, it shall be permitted by right and approved administratively by the locality staff in the same manner provided in subdivision A 12 a [the cluster housing enabling legislation], or (ii) approve the increased density development upon approval of a special exception, special use permit, conditional use permit or rezoning.⁵²³

In enacting the cluster housing legislation, the General Assembly gave localities that had housing ordinances as of January 1, 2002, time to conform the locality's ordinances to the new enabling legislation.⁵²⁴ The General Assembly also enacted amendments to provide for cluster housing in subdivision ordinances,⁵²⁵ to clarify when localities may require a special use permit for certain residential uses,⁵²⁶ and to state that the statewide building code shall not supersede the "conditions imposed upon a clustering of single-family homes and preservation of open space devel-

519. *Id.*

520. *Id.*

521. *Id.*

522. *Id.* § 15.2-2286(A)(12)(b).

523. *Id.*

524. *Id.* § 15.2-2286(A)(12)(c).

525. *Id.* § 15.2-2242(8) (Cum. Supp. 2002).

526. *Id.* § 15.2-2288.1 (Cum. Supp. 2002) (stating that a locality may require issuance of a special exception, special use or conditional use permit for "a cluster or town center as an optional form of residential development at a density greater than that permitted by right, or otherwise permitted by local ordinance").

opment through standards, conditions, and criteria established by a locality” pursuant to the enabling legislation discussed above.⁵²⁷

4. Miscellaneous Amendments Affecting Land Use

Under new legislation, the chairman of a board of zoning appeals may select one of the alternate members of the board of zoning appeals to vote in the place of a sitting member who is absent from a meeting or for a sitting member who abstains from a particular application.⁵²⁸ The General Assembly also amended the power of the board of zoning appeals with regard to the revocation of special exceptions.⁵²⁹ The new provision states that a board of zoning appeals may revoke a special exception only if the special exception was granted by the board of zoning appeals.⁵³⁰ If the governing body reserves to itself the authority to grant special exceptions, it may revoke the special exception only after following the same procedures required of a board of zoning appeals in revoking a special exception.⁵³¹

The General Assembly amended the Virginia Freedom of Information Act⁵³² to exempt from disclosure “[t]he names, addresses and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints made to a local governing body.”⁵³³

The General Assembly also authorized the City of Chesapeake to utilize supervised and trained volunteer zoning inspectors to monitor external maintenance of property and compliance with local zoning ordinances relating to motor vehicles and trailers.⁵³⁴

Finally, in response to the decision in *City of Emporia Board of Zoning Appeals v. Mangum*,⁵³⁵ the General Assembly amended

527. *Id.* § 36-98 (Cum. Supp. 2002).

528. *See id.* § 15.2-2308(A) (Cum. Supp. 2002).

529. *Id.* § 15.2-2309(7) (Cum. Supp. 2002).

530. *Id.*

531. *Id.*

532. *Id.* §§ 2.2-3700 to -3714 (Repl. Vol. 2001 & Cum. Supp. 2002).

533. *Id.* § 2.2-3705(A)(81) (Cum. Supp. 2002).

534. *Id.* § 15.2-1132 (Cum. Supp. 2002). Prior to this amendment, only the City of Virginia Beach had this authority. *Id.* § 15.2-1132 (Cum. Supp. 2000).

535. 263 Va. 38, 556 S.E.2d 779 (2002). For a discussion of this case, see *supra* Part II.K.2.a.

the Virginia Code to state that a validly nonconforming manufactured housing unit may be replaced with another comparable manufactured housing unit, and the replacement unit "shall retain the valid nonconforming status of the prior unit."⁵³⁶

IV. CONCLUSION

During the period beginning June 1, 2001 and ending June 1, 2002 the areas of condemnation law and land use law continued to be fertile ground for legislative changes by the General Assembly and for litigation. These areas will likely continue to see significant activity on the legislative and judicial fronts as Virginia continues to grow and develop. In addition, over the past year, the Supreme Court of Virginia decided significant cases regarding the doctrine of equitable subrogation, home warranties, easement disputes, contract disputes, and nuisance claims.⁵³⁷ The General Assembly made a number of changes that will affect property law practitioners, particularly the enactment of the Business Trust Act and changes related to property owners' associations.⁵³⁸

536. VA. CODE ANN. § 15.2-2307 (Cum. Supp. 2002).

537. *See supra* Part II.

538. *See supra* Part III.