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I. INTRODUCTION

The following is a survey of significant judicial decisions in the Commonwealth of Virginia during the period beginning June 1, 2002, and ending June 1, 2003. The cases in this article discuss, among other things, a number of issues pertaining to contract interpretation, land trusts, condemnation, marketability of title, easements, and restrictions on the use of land. This article will also review a number of legislative changes from the 2003 Session of the General Assembly of Virginia. These legislative changes include matters relating to banking and finance, privacy, conservation, changes to zoning, subdivision enabling legislation, and matters relating to condominiums and planned unit developments.

II. RECENT CASE LAW

A. *The Interplay of Option and Right of First Refusal in a Lease*

In *Shepherd v. Davis*,[1] Richard F. and Amelia D. Davis (collectively the "Davises") entered into an installment land sale contract with George J. Parker ("Parker") for the purchase of land ("Parker Parcel").[2] Under the contract, the Davises would not receive title to the Parker Parcel until they paid the full purchase

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1. 265 Va. 108, 574 S.E.2d 514 (2003).
2. *Id.* at 112, 574 S.E.2d at 516.

price.[3] The Davises had no right to assign the contract to a third party.[4] The Davises entered into a lease agreement ("Shepherd Lease") with William R. Shepherd, Jr. ("Shepherd") pursuant to which Shepherd leased the Parker Parcel, as well as another parcel that was owned by the Davises ("Davis Parcel").[5] The lease agreement contained a fixed price option to purchase both parcels, as well as a right of first refusal.[6]

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3. *Id.*

4. *Id.*

5. *Id.* at 112–13, 574 S.E.2d at 516.

6. *Id.* at 113–14, 574 S.E.2d at 516–17. The relevant sections of the lease state the following:

> 23. OPTION TO PURCHASE AND RIGHT OF FIRST REFUSAL
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> *23.1. Option.* Upon compliance with the provisions of this Section 23, Tenant shall have the sole and exclusive Option to purchase the Property pursuant to the terms of this Agreement for the continuous period of time commencing on the Commencement Date and ending on the date the lease terminates. If the Option is properly and timely exercised, as provided in this Agreement, a contract shall then exist between Landlord and Tenant pursuant to which Landlord agrees to sell and Tenant agrees to buy the Property upon the terms and conditions specified in this Section 23.
>
> *23.2. Exercise of Option.* The Option may be exercised, subject to the terms of paragraph 23.8, by Tenant at any time prior to the expiration of the Lease, which shall be midnight of the last day this lease is in effect. Tenant shall exercise the Option by sending written notice to Landlord prior to the expiration date of the Option specifying Tenant's desire to exercise the Option.
>
> *23.3. Purchase Price.* The purchase price ("Purchase Price") to be paid by Tenant to Landlord for the Property shall be ONE HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($150,000.00)[.]
>
> *23.4. Title.* Landlord shall convey to Tenant, at Closing, good, indefeasible and marketable title to the Property, free and clear of all liens, encumbrances and easements, other than those to which the Tenant fails to object . . . .
>
> . . . If Landlord is unwilling or unable to correct such objections within [thirty days,] Tenant shall have the option of taking such title as Landlord can give without abatement of the Purchase Price, or terminating this Agreement[.]
>
> . . . .
>
> *23.11. Right of First Refusal.* Notwithstanding anything contained in this Agreement to the contrary, if Landlord shall receive from a third party ("Offeror") a bona fide written offer to purchase the Property, or any part of it, Landlord shall send to Tenant a copy of the proposed offer ("Offer"), with notification that Landlord intends to accept the Offer. Tenant shall have the right within ten (10) days thereafter to exercise the Option to purchase the Property, or such part of it described in the Offer, pursuant to the terms and conditions contained in the Offer. If Tenant does not elect to purchase the Property or such part of it described in the Offer, within such five (5) day period, Landlord may sell the Property or the part described in the Offer to the Offeror. If Landlord does not sell the Property or any part of it, according to

After a time, a third party ("Henning") submitted an offer to the Davises to purchase both the Parker Parcel and the Davis Parcel.[7] The Davises entered a contract with Henning ("Henning Contract"), which was conditioned upon Shepherd's waiver of the right of first refusal.[8] The Davises then submitted the Henning Contract to Shepherd in conformity with the lease provision granting Shepherd the right of first refusal.[9] Shepherd did not respond to the right of first refusal and elected, instead, to exercise the fixed price option under the lease at a lower cost.[10] The Davises refused to close with either party and were sued by both.[11]

Upon considering the evidence, the Commissioner in Chancery issued a report holding: (1) that Shepherd waived his right of first refusal by failing to respond to the Henning offer, because the right of first refusal language in the lease overrode the option clause; (2) that Henning was not entitled to specific performance under the Henning Contract, because the Davises could not convey marketable title to the Parker Parcel; (3) that Henning should recover restitutionary damages, as well as attorneys' fees and costs; and (4) that Shepherd should also recover certain costs.[12]

Analyzing the language of the Shepherd Lease, the Supreme Court of Virginia considered a number of decisions in which courts considered the interplay of rights of first refusal and fixed price options.[13] However, the court found it unnecessary to select

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the Offer, then Tenant's right of first refusal shall remain in full force.

Id. (quoting the lease creating the dual option) (alterations in original).

7. *Id.* at 114, 574 S.E.2d at 577.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 115, 574 S.E.2d at 518. Under the Commissioner's initial report, Henning was to receive $376,430 to compensate Henning for the loss of his bargain. *Id.* The Commissioner later revised his initial report, reducing the damage award to nominal and out-of-pocket damages. *Id.* at 116, 574 S.E.2d at 518. The Commissioner reasoned that Henning had failed to meet his burden of showing that the Davises had acted in bad faith—voluntarily deciding not to perform or neglecting or refusing to perform the contract. *Id.* at 116, 574 S.E.2d at 518–19.

13. *Id.* at 118, 574 S.E.2d at 520. The Supreme Court of Virginia noted that some courts previously held that a lessee may exercise a fixed-price option without regard to a first right of refusal. *Id.* (citing Gulf Oil Corp. v. Chiodo, 804 F.2d 284, 286 (4th Cir. 1986); Amoco Oil Co. v. Snyder, 478 A.2d 795, 798–99 (Pa. 1984); Butler v. Richardson, 60 A.2d 718, 722 (R.I. 1948); Crowley v. Patterson, 306 N.W.2d 871, 875 (S.D. 1981)). The court also acknowledged that other courts have concluded that a lessee forfeits the right to pur-

one of these positions, because the clear and unambiguous language in the lease dictated which provision should control.[14] The prefatory language to the right of first refusal "'[n]otwithstanding anything . . . to the contrary,'" meant that the right of first refusal would operate despite the fixed price option and that the right of first refusal would take precedence over the option.[15] Having forfeited the right of first refusal by failing to respond to it, Shepherd was not entitled to receive either specific performance or damages from the Davises.[16]

In the Henning appeal, the court addressed two questions: (1) whether the chancellor erred by refusing to grant specific performance to Henning, and (2) whether the chancellor erred by awarding only nominal damages rather than damages based on the benefit of Henning's bargain.[17] In affirming the denial of specific performance, the court dismissed the notion that the chancellor should have ordered the Davises to convey at least the Davis Parcel.[18] The court was not persuaded to apply the rule that when there is a deficiency of title, the purchaser has the option to require the seller to convey such title as the seller is able, with the abatement of the purchase price for any deficiency.[19] This rule is not absolute and does not apply when, in the discretion of the court, the plaintiff asks the court to substitute an agreement for which the parties did not contract.[20]

On the issue of damages, the court agreed with the Commissioner that Henning should only be entitled to restitutionary damages.[21] The court applied the general rule "'that the measure of damages for failure of the vendor to convey as agreed is the purchase price, or any part thereof, paid by the vendee, with interest from the date of payment,'" with damages for the loss of the

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chase under a fixed-option when the lessee refuses to exercise a right of first refusal after being presented with a third-party offer. *Id.* (citing Shell Oil Corp. v. Blumberg, 159 F.2d 251, 252–53 (5th Cir. 1946); Northwest Racing Ass'n v. Hunt, 156 N.E.2d 285, 288 (Ill. App. Ct. 1959); Tarrant v. Self, 387 N.E.2d 1349, 1353 (Ind. Ct. App. 1979); M & M Oil Co. v. Finch, 640 P.2d 317, 320–21 (Kan. Ct. App. 1982)).

14. *Id.* at 118–19, 574 S.E.2d at 520.
15. *Id.* at 119, 574 S.E.2d at 520 (quoting the Shepherd Lease) (alteration in original).
16. *Id.* at 121, 574 S.E.2d at 521.
17. *Id.* at 121, 574 S.E.2d at 521–22.
18. *Id.* at 123–24, 574 S.E.2d at 523.
19. *Id.* at 122, 574 S.E.2d at 522.
20. *Id.*
21. *Id.* at 126, 574 S.E.2d at 524.

bargain if the purchaser proves that the seller acted in bad faith, voluntarily disabled himself from making the conveyance, or willfully neglected or refused to do so.[22] The court also found that Henning failed to meet his burden of proving with reasonable certainty the amount of damages and the cause from which they resulted.[23] The expert testimony on the value of the property was premised upon a sale of the subject property to the developer of adjacent property and based upon the premise that the subject property could be rezoned to accommodate such use.[24] The court remanded Henning's claim for additional attorneys' fees to the Commissioner.[25]

B. *Capacity of the Party Executing a Deed / Trust*

In the case of *Austin v. City of Alexandria*,[26] the settlor conveyed real property to himself as trustee for the benefit of a trust ("Trust I") in 1993.[27] The settlor was the lifetime beneficiary of Trust I, and upon his death the trust corpus was to be distributed to three remainder trusts.[28] A deed in trust, executed concurrently with Trust I, specifically provided that revocation of the trust was to be accomplished by deed.[29]

In 1999 the settlor, in his individual capacity, executed a second deed purporting to convey the same property to himself as trustee for a second trust ("Trust II"), with different beneficiaries.[30] The 1999 deed made no reference to the prior conveyance of the property for the benefit of Trust I.[31] Shortly after recording the second deed, the settlor, as trustee under Trust II, executed a contract to sell the property to a third party.[32] Before the scheduled closing under the contract, the settlor died, and new trustees

22. *Id.* at 124, 574 S.E.2d at 523 (quoting Williams v. Snider, 190 Va. 226, 228, 56 S.E.2d 63, 64 (1949)).
23. *Id.* at 125, 574 S.E.2d at 524.
24. *Id.*
25. *Id.* at 126, 574 S.E.2d at 525.
26. 265 Va. 89, 574 S.E.2d 289 (2003).
27. *Id.* at 91–92, 574 S.E.2d at 290.
28. *Id.*
29. *Id.* at 92, 574 S.E.2d at 290–91.
30. *Id.* at 92–93, 574 S.E.2d at 291.
31. *Id.* at 93, 574 S.E.2d at 291.
32. *Id.*

were appointed for Trust I and Trust II.[33] The substitute trustee under Trust I filed a declaratory judgment action seeking to establish that he held legal title to the property for the benefit of Trust I and that he was not bound by the contract executed by the settlor, as the trustee for Trust II.[34]

The lower court found that the 1999 deed was an effective revocation of the initial trust, that the trustee for Trust II held legal title to the property, and that the contract in favor of the third party was valid.[35]

The Supreme Court of Virginia addressed the question of whether title was conveyed by the 1999 deed or whether, as a matter of law, the trustee still owned the property for the benefit of Trust I.[36] In holding in favor of Trust I, the court reasoned that upon conveying the property to himself as trustee for Trust I, the settlor's interest in the property as beneficiary became personalty.[37] The supreme court reversed the trial court, reasoning that before the settlor could again convey the property in his individual capacity, Trust I had to be revoked in accordance with the requirements of the trust agreement for Trust I.[38] Consequently, the purported conveyance of the property for the benefit of Trust II was ineffective.[39]

C. *Condemnation*

In *Ottofaro v. City of Hampton*,[40] the Supreme Court of Virginia was asked to consider: (1) whether a condemnation was for a permitted public purpose; (2) whether the resolution by the city authorizing the condemnation was adequate; (3) whether the delegation of authority over certain aspects of the condemnation proceedings to the city attorney was appropriate; and (4) whether the condemnation of the residue was permissible.[41]

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33. *Id.* at 93–94, 574 S.E.2d at 291.
34. *Id.* at 94, 574 S.E.2d at 291–92.
35. *Id.* at 94, 574 S.E.2d at 292.
36. *Id.* at 95, 574 S.E.2d at 292.
37. *Id.* at 95, 574 S.E.2d at 292–93.
38. *Id.* at 96, 574 S.E.2d at 293.
39. *Id.* at 97, 574 S.E.2d at 293.
40. 265 Va. 26, 574 S.E.2d 235 (2003).
41. *Id.* at 28, 32–34, 574 S.E.2d at 235–36, 238–39.

In this case, the plaintiff's entire property was condemned by the City of Hampton to facilitate the construction of a planned road, with the residue devolving to the city's Industrial Development Authority.[42] The residue was leased by the Industrial Development Authority to a private developer.[43] The supreme court found that the condemnation was for an appropriate public purpose, because public interest dominated any consequential private gain, and because the property came under the control of the governing body.[44] The city's comprehensive plan had reflected the road in this location for a number of years.[45] The court also noted that the city's Industrial Development Authority would control the residue, and the residue would be leased to a private developer in a manner consistent with the mission of the Industrial Development Authority.[46]

The court also disagreed that alleged ambiguity in the city's condemnation resolution constituted an improper delegation to the city attorney of the city's condemnation powers.[47] The resolution at issue specified the parcels to be taken and the use to which they would be put.[48]

The court also rejected the plaintiff's contention that the resolution was defective for failing to specify what portion of the property was to be taken.[49] The language at issue directed the city attorney to acquire the entire tract of land upon which the road would be located, but only if the requirements of Virginia Code section 33.1-91 governing the condemnation of residue were satisfied.[50] The resolution did not confer upon the city attorney

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42. *Id.* at 29–30, 574 S.E.2d at 236.
43. *Id.* at 30, 574 S.E.2d at 236–37.
44. *Id.* at 32, 574 S.E.2d at 238.
45. *Id.*
46. *Id.*
47. *Id.* at 32–33, 574 S.E.2d at 238. Virginia Code section 15.2-1903(B) states:
> Prior to initiating condemnation proceedings, the governing body shall adopt a resolution or ordinance approving the proposed public use and directing the acquisition of property for the public use by condemnation or other means. The resolution or ordinance shall state the use to which the property shall be put and the necessity therefor.

VA. CODE ANN. § 15.2-1903(B) (Repl. Vol. 2003).
48. *Ottofaro*, 265 Va. at 33, 574 S.E.2d at 238.
49. *Id.* at 34, 574 S.E.2d at 239.
50. *Id.* Under Virginia Code section 33.1-91, a city can condemn an entire parcel:
> whenever the remainder of such tract or part thereof can no longer be utilized for the purpose for which the entire tract is then being utilized, or a portion of

discretionary authority to decide how much land to acquire by condemnation.[51] The court found that the condemnation of the entire parcel did not violate Virginia Code section 33.1-91.[52] The court relied upon Virginia Code section 33.1-91 in finding that the exercise of eminent domain over an entire tract of land is appropriate when the remainder of the condemned tract can no longer be utilized for the purposes for which the entire tract was being utilized.[53] The court noted that the residue of the Plaintiff's land, which constituted less than two acres, could no longer be used as residential rental property and would no longer have access to a public highway.[54]

D. *Marketability of Title*

The case of *Haisfield v. Lape*[55] involves the conveyance of two separate portions of a 148-acre farm.[56] In 1994 the Moseses acquired approximately forty-eight acres of the farm, including the original farmhouse.[57] The seller also placed a line-of-sight easement over the 100-acre residual tract in favor of the Moseses.[58] Subsequently, Haisfield entered into a contract for the purchase of the residual land.[59] The contract contained a $50,000 earnest money deposit which would constitute liquidated damages in the event of the purchaser's breach.[60] The contract also provided that the seller was obligated to convey the property "'by a general warranty deed . . . free of all encumbrances, tenancies, and liens . . .

> a building is to be taken or the cost of removal or relocation of the buildings, or other improvements on the remaining portion, necessitated by the taking, would exceed the cost of destroying such buildings or other improvements, or the highway project will leave the remaining portions without a means of access to a public highway . . . provided, however, that the [City] shall not acquire the remainder of such tracts . . . by condemnation where the remaining portion is in excess of two acres.

VA. CODE ANN. § 33.1-91 (Cum. Supp. 2003).

51. *Ottofaro*, 265 Va. at 34, 574 S.E.2d at 239.
52. *Id.* at 34–35, 574 S.E.2d at 239.
53. *Id.*
54. *Id.* at 35, 574 S.E.2d at 239.
55. 264 Va. 632, 570 S.E.2d 794 (2002).
56. *Id.* at 634–35, 570 S.E.2d at 795.
57. *Id.* at 635, 570 S.E.2d at 795.
58. *Id.*
59. *Id.* at 634–35, 570 S.E.2d at 795.
60. *Id.* at 635, 570 S.E.2d at 795.

but subject to such restrictive covenants and utility easements of record which do not materially and adversely affect the use of the Property for residential purposes or render the title unmarketable.'"[61] Prior to closing, Haisfield discovered the line-of-sight easement prohibiting the construction of a residence within sight of the original farmhouse and refused to close.[62] The trial court awarded the earnest money deposit to the seller, holding that "the line-of-sight easement did not materially or adversely affect the use of the . . . property for residential purposes nor did it render title unmarketable under the terms of the Purchase Agreement."[63]

However, the Supreme Court of Virginia found that the restriction rendered title to the property unmarketable and held in favor of Haisfield.[64] The court reasoned that the line-of-sight easement acts as a building restriction upon the property, rendering title unmarketable.[65] The court also noted that the line-of-sight easement was not an "'open, visible, physical [e]ncumbrance'" on the property that was taken into consideration when fixing the price of the property.[66]

E. *Condominiums, Awards of Attorneys Fees*

In *Mozley v. Prestwould Board of Directors*,[67] a unit owner challenged the assessment of costs to all unit owners for the replacement of windows in some of the units within the condominium.[68] Mozley alleged that the windows should not have been characterized as limited common elements[69] and should not have been charged to unit owners other than those whose units were served by the replacement windows.[70] Mozley paid the full amount of the

61. *Id.* at 635–36, 570 S.E.2d at 795 (quoting Paragraph 14 of the Purchase Agreement).

62. *Id.* at 635, 570 S.E.2d at 795.

63. *Id.* at 636, 570 S.E.2d at 796.

64. *Id.* at 637, 570 S.E.2d at 796.

65. *Id.* at 638, 570 S.E.2d at 797.

66. *Id.* (quoting Riner v. Lester, 121 Va. 563, 572, 93 S.E. 594, 597 (1917)).

67. 264 Va. 549, 570 S.E.2d 817 (2002).

68. *Id.* at 552, 570 S.E.2d at 819.

69. *Id.* A "limited common element" is defined as "a portion of the common elements reserved for the exclusive use of those entitled to the use of one or more, but less than all, of the units." VA. CODE ANN. § 55-79.41 (Repl. Vol. 2003).

70. *Mozley*, 264 Va. at 552, 570 S.E.2d at 819.

assessment against her and attempted to nonsuit the case after the Prestwould Board of Directors ("Board") filed its motion for summary judgment with the lower court.[71] The chancellor denied Mozley's motion to nonsuit and granted the Board's cross-motion for summary judgment.[72] The court also awarded the Board attorneys' fees under Virginia Code sections 55-79.53(A) and 55-79.84, as well as costs totalling $15,855.08.[73]

On review, the Supreme Court of Virginia concluded that Mozley's view of Virginia Code section 55-79.84 was correct in that the plain language of the statute authorizes an award of attorneys' fees only for suits brought by a unit owners' association

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71. *Id.*

72. *Id.*

73. *Id.* at 554, 570 S.E.2d at 820. Virginia Code section 55-79.53(A) states:

> The declarant, every unit owner, and all those entitled to occupy a unit shall comply with all lawful provisions of this chapter and all provisions of the condominium instruments. Any lack of such compliance shall be grounds for an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the unit owners' association, or by its executive organ or any managing agent on behalf of such association, or, in any proper case, by one or more aggrieved unit owners on their own behalf or as a class action. A unit owners' association shall have standing to sue in its own name for any claims or actions related to the common elements as provided in subsection B of § 55-79.80. The prevailing party shall be entitled to recover reasonable attorneys' fees and costs expended in the matter.

VA. CODE ANN. § 55-79.53(A) (Repl. Vol. 2003). Virginia Code section 55-79.80(B) provides in relevant part:

> Except to the extent prohibited by the condominium instruments, and subject to any restrictions and limitations specified therein, the executive organ of the unit owners' association, if any, and if not, then the unit owners' association itself, shall have the irrevocable power as attorney-in-fact on behalf of all the unit owners and their successors in title with respect to the common elements, including without limitation the right, in the name of the unit owners' association, . . . (ii) to assert, through litigation or otherwise, defend against, compromise, adjust, and settle any claims or actions related to common elements . . . .

Id. § 55-79.80(B) (Repl. Vol. 2003). Virginia Code section 55-79.84 states, in relevant part:

> (A) The unit owners' association shall have a lien on every condominium unit for unpaid assessments levied against that condominium unit in accordance with the provisions of this chapter and all lawful provisions of the condominium instruments.
>
> . . . .
>
> (E) The judgment or decree in an action brought pursuant to this section shall include, without limitation, reimbursement for costs and attorneys' fees of the prevailing party.

Id. § 55-79.84(A)–(E) (Repl. Vol. 2003).

to enforce a lien for unpaid assessments levied against a condominium unit owner in accordance with the Virginia Condominium Act ("VCA").[74] However, the court did not agree with Mozley's interpretation that Virginia Code section 55-79.53(A) only justifies an award of attorneys' fees and costs in an action brought by the unit owners' association against an individual unit owner for failure to comply with provisions of the condominium instruments or the VCA.[75] The court noted that the plain language of Virginia Code section 55-79.53(A) authorizes the award of attorneys' fees for actions arising out of a "failure to comply with provisions contained in relevant condominium instruments or in the [VCA]," as well as suits brought related to the common elements.[76]

Clearly, the case relates to the characterization of certain improvements as relating to limited common elements.[77] The court affirmed the chancellor's ruling pursuant to Virginia Code section 55-79.53(A), finding his ruling to be consistent with the General Assembly's intent that unit owners will not have to absorb their association's cost of litigation simply because one unit owner brings an unsuccessful suit against the association.[78] The court remanded the case to the chancellor for costs associated with the appeal.[79]

F. *Federal Statute of Limitations—Deeds of Trust*

In *Long, Long & Kellerman, P.C. v. Wheeler*,[80] the Supreme Court of Virginia was asked to consider whether a private assignee of a Small Business Administration ("SBA") loan, secured by a deed of trust in Virginia property, can foreclose on that deed of trust more than twenty years after its recordation.[81] In this case, the deed of trust was given to secure a personal guaranty on a loan from the SBA.[82] The deed of trust, executed on September 30, 1980, provided that the "'instrument [was] to be construed

74. *Mozley*, 264 Va. at 554–55, 570 S.E.2d at 820.
75. *Id.* at 555, 570 S.E.2d at 820.
76. *Id.* at 555, 570 S.E.2d at 821.
77. *Id.* at 555–56, 570 S.E.2d at 821.
78. *Id.* at 556, 570 S.E.2d at 821.
79. *Id.* at 557, 570 S.E.2d at 822.
80. 264 Va. 531, 570 S.E.2d 822 (2002).
81. *Id.* at 533, 570 S.E.2d at 823.
82. *Id.*

and enforced in accordance with applicable Federal law.'"[83] After the SBA made unsuccessful demands for payment under the guaranty, the note was transferred to a private party for collection.[84] Foreclosure proceedings were commenced in 2001, and the Wheelers filed for an injunction against the foreclosure, claiming that pursuant to Virginia Code section 8.01-242 a foreclosure could not be commenced more than twenty years after the recordation of the deed of trust.[85] The trial court agreed and permanently enjoined the trustee from selling the property.[86]

The trustees appealed, arguing that under 28 U.S.C. § 2415, Congress established a statute of limitations for such matters by stating that "'[n]othing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.'"[87] The court affirmed the trial court, holding that 28 U.S.C. § 2415 did not establish a statute of limitations for federal foreclosure actions.[88] The court also acknowledged that Virginia Code section 8.01-242 could not "bar a

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83. *Id.* (quoting paragraph 16 of the deed of trust).

84. *Id.*

85. *Id.* at 533–34, 570 S.E.2d at 823.

86. *Id.* at 534, 570 S.E.2d at 823. Virginia Code section 8.01-242 states:

> No deed of trust or mortgage given to secure the payment of money, other than credit line deeds of trust described in § 55-58.2, and no lien reserved to secure the payment of unpaid purchase money, in which no date is fixed for the maturity of the debt secured by such deed of trust, mortgage, or lien, shall be enforced after twenty years from the date of the deed of trust, mortgage, or other lien.

Id. § 8.01-242 (Repl. Vol. 2000 & Cum. Supp. 2003).

87. *Wheeler*, 264 Va. at 534, 570 S.E.2d at 824. 28 U.S.C. § 2415 states in part:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later . . . .
>
> (b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues . . . .
>
> (c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

28 U.S.C. § 2415(a)–(c) (2000).

88. *Wheeler*, 264 Va. at 536, 570 S.E.2d at 824.

federal agency, such as the [SBA], from initiating foreclosure proceedings on real property."[89]

However, the property right in question was no longer in the hands of a federal agency at the commencement of foreclosure proceedings.[90] The court disagreed with the trustee's assertion "that as an assignee of a federal agency, the trustee 'stands in the shoes' of the federal assignor and is not barred from foreclosing by virtue of any Virginia statute of limitations."[91]

G. *Easements*

1. *Taylor v. McConchie*[92]

In *Taylor v. McConchie*, the Supreme Court of Virginia considered a case in which the grantor of a deed reserved over the servient parcel an ingress/egress easement which was to "'be of sufficient width to permit the free and convenient passage of motor vehicles and farm vehicles with loads of hay and other farm products, and with further sufficient width for cuts and fills, and to permit the convenient working of said road.'"[93] The plaintiffs entered into a real estate purchase contract for the portion of the dominant parcel served by the easement.[94] In the contract, the sellers covenanted that they had a right-of-way across the adjoining property—in the form of an existing road—that extended to the state road.[95] After execution of the contract, but prior to closing, the sellers entered into a new easement agreement (the "New Easement") with the adjoining property owners.[96] The New Easement fixed the location of the easement along the "'New Shale Surface Road'" and also provided that the New Easement

89. *Id.* at 535, 570 S.E.2d at 824. The court noted that "[t]he federal government and its agencies are not bound by statutes of limitations unless Congress explicitly states otherwise," due to the common law rule "*nullum tempus ocurrit regi*," which means "that the sovereign is immune from the operations of statutes of limitations." *Id.*

90. *See id.* at 533–34, 570 S.E.2d at 823.

91. *Id.* at 537–38, 570 S.E.2d at 825–26 (quoting Union Recovery Ltd. P'ship v. Horton, 252 Va. 418, 423, 477 S.E.2d 521, 523 (1996)).

92. 264 Va. 377, 569 S.E.2d 35 (2002).

93. *Id.* at 379, 569 S.E.2d at 36 (quoting the deed in question).

94. *Id.* at 380, 569 S.E.2d at 36.

95. *Id.*

96. *Id.*

superceded the original reservation.[97] At closing, the deed to the plaintiffs referred to the New Easement agreement and did not refer to the original reservation easement.[98] After closing, the defendants erected fences along the boundary of the road, which made it impossible for the plaintiffs to traverse the road with farm vehicles.[99] The defendants were not grantors under the New Easement agreement.[100]

The plaintiffs sued to establish the location and width of the road.[101] At trial, it was established that the New Easement fell short of the state road by twenty feet and was, in part, on the property owned by the defendants.[102] The lower court held that the portion of the easement not on the grantor's property constituted a breach of the special warranty in the easement.[103] The lower court also reformed a portion of the New Easement to traverse a different portion of the grantor's property so that it could extend to the state road, but refused to allow the route or width of the New Easement to be altered to accommodate farm vehicles.[104]

The supreme court agreed with the trial court, at least in part, holding that the New Easement supplanted the original grant.[105] According to the court, nothing in the New Easement entitled the plaintiffs to route the easement to better accommodate farm vehicles.[106] The court held that the doctrine of merger extinguished the contract of sale—cutting off the plaintiff's claim that the original reservation could not be extinguished without their consent.[107] The language in the deed indicating that the conveyance was made subject to all easements and rights-of-way of record did not serve to revive the original reservation.[108]

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97. *Id.*
98. *Id.*
99. *Id.* at 381, 569 S.E.2d at 36–37.
100. *See id.* at 380, 569 S.E.2d at 36.
101. *Id.* at 381, 569 S.E.2d at 37.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 382–83, 569 S.E.2d at 38.
106. *Id.* at 383–84, 569 S.E.2d at 38.
107. *Id.* at 383, 569 S.E.2d at 38.
108. *Id.*

2. *Shooting Point, L.L.C. v. Wescoat*[109]

In *Shooting Point, L.L.C. v. Wescoat*, the plaintiffs owned a 176-acre tract ("Shooting Point Farm") which, among other land parcels, was served by a recorded easement across a tract of land owned by John W. Wescoat.[110] The easement served as the only means of access between Shooting Point Farm and a nearby state highway.[111] References to natural markings in the grant fixed the location of the easement.[112] Later recorded documents, including those recorded to subdivide Shooting Point Farm into building lots, included a plat that depicted by metes and bounds the location of the easement.[113] The litigation arose out of Wescoat's objection to the use of portions of his property outside the original right-of-way and an alleged overburdening of the easement caused by the subdivision of the Shooting Point Farm.[114] Shooting Point sought to have several fence posts and stakes removed along what Wescoat asserted was the right-of-way, because the posts' locations and the easement's width were not consistent with the original intended use of the easement and brought the road too close to the adjacent woodland, making passage difficult.[115]

The Supreme Court of Virginia ruled in favor of Wescoat on the issue of location, noting that the recorded plat—first depicting the easement of record—was prepared only five years after the ease-

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109. 265 Va. 256, 576 S.E.2d 497 (2003).

110. *Id.* at 258, 576 S.E.2d at 498.

111. *Id.*

112. *See id.* at 259, 576 S.E.2d at 498–99. The easement grant read as follows:

> [S]aid right-of-way easement to follow the present road leading from Virginia State Highway Route 622 to lands . . . known as Shooting Point Farm, said present road running generally in a northerly direction from a point in a turn of said Virginia State Highway Route 622 to a point at or near a corner of a certain woods, thence turning in a generally easterly direction and running along the northern edge of said woods to a point at or near the edge of said woods, thence turning in a generally northerly direction and following along the edge of said woods to a point at or near a corner of said woods, thence turning in a generally easterly direction and running along the edge of said woods until the boundary line separating Shooting Point Farm from the [Wescoat parcel] is reached, at which boundary line the said right-of-way easement terminates.

Id. (quoting the easement grant) (alterations in original).

113. *Id.* at 260, 576 S.E.2d at 499.

114. *Id.*

115. *Id.* at 260–61, 576 S.E.2d at 499.

ment was established, and subsequent plats placed the easement in the same location.[116] The court found that evidence of usage was irrelevant, stating that "when a fixed location of a granted easement is established, [the] location may be changed only with the express or implied consent of the persons interested."[117]

The court also found that the owner of the servient estate did not meet its burden of establishing that using the land for a residential subdivision would unreasonably burden the servient estate.[118] "Generally, when an easement is created by grant or reservation and the instrument creating the easement does not [specifically] limit its use, the easement may be used for 'any purpose to which the dominant estate may then, or in the future, reasonably be devoted.'"[119] This general rule, however, "is subject to the qualification that no use may be made of the easement, different from that established when the easement was created, which imposes an additional burden on the servient estate."[120] The court reasoned that if the type of use does not change, it is, in theory, possible that the degree of burden from intensified usage could be of such a degree as to constitute an additional burden.[121] However, the court did not believe that the increase in the number of vehicles using the easement in this case would rise to the level of an additional burden.[122]

H. *Restrictions on Use*

1. *Chesterfield Meadows v. Smith*[123]

The case of *Chesterfield Meadows v. Smith* involves the continuing validity of a covenant against certain uses.[124] In this case, a covenant was placed on property in 1980, in connection with a

116. *Id.* at 264, 576 S.E.2d at 501.
117. *Id.* at 265, 576 S.E.2d at 502.
118. *Id.* at 266, 576 S.E.2d at 502.
119. *Id.* at 266, 576 S.E.2d at 502–03 (quoting Hayes v. Aquia Marina, Inc., 243 Va. 255, 258, 414 S.E.2d 820, 822 (1992)).
120. *Id.* at 266, 576 S.E.2d at 503.
121. *Id.* at 266–67, 576 S.E.2d at 503.
122. *Id.* at 267, 576 S.E.2d at 503.
123. 264 Va. 350, 568 S.E.2d 676 (2002).
124. *Id.* at 351, 568 S.E.2d at 677.

rezoning of that property for office use.[125] The covenant prohibited certain retail and commercial activity.[126] The beneficiary of the covenant was the owner of a historic home known as Wrexham Hall, which was located across the road from the burdened property.[127] Testimony at trial indicated that the purpose of this covenant was to maintain the historic character of the area around Wrexham Hall.[128] In 1985 the Wrexham Hall site was conveyed to a commercial developer.[129] Wrexham Hall itself was relocated a few miles down the road, and a strip shopping center was built on the former Wrexham Hall site.[130] In 1996 a developer later contracted to buy the burdened property and sought to rezone that property for commercial purposes.[131] When the owner of the shopping center refused to release the covenant, a declaratory judgment action was filed seeking to have the covenant rendered void.[132]

Because the covenant was silent as to its purpose, the Supreme Court of Virginia held that the trial court could rely upon testimony that the covenant was intended to protect Wrexham Hall and the historic character of the surrounding area.[133] The court reasoned that "'covenants restricting the free use of land, although widely used, are not favored . . . [and that] [s]ubstantial doubt or ambiguity is to be resolved against the restrictions and in favor of the free use of property.'"[134] In this case, the court concluded that changed conditions had "defeated the purpose of the restrictive covenant rendering it null and void," since the change in the area was "'so radical as practically to destroy the essential objects and purposes of the [covenant].'"[135]

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125. *Id.* at 352, 568 S.E.2d at 677.
126. *Id.*
127. *Id.*
128. *Id.* at 353–54, 568 S.E.2d at 678–79.
129. *Id.* at 352–53, 568 S.E.2d at 678.
130. *Id.*
131. *Id.* at 353, 568 S.E.2d at 678.
132. *Id.*
133. *Id.* at 355, 568 S.E.2d at 679.
134. *Id.* (quoting Woodward v. Morgan, 252 Va. 135, 138, 475 S.E.2d 808, 810 (1996)).
135. *Id.* at 356, 568 S.E.2d at 680 (quoting Booker v. Old Dominion Land Co., 188 Va. 143, 148, 149 S.E.2d 314, 317 (1948)) (alteration in original).

2. *Forster v. Hall*[136]

In *Forster v. Hall*, an owner within a residential subdivision alleged a breach of an implied reciprocal negative easement, which prohibited the placement of a mobile home on any lot within a subdivision.[137] The owners of the offending lots sought to defend their case by asserting that the use was not prohibited since there was no restrictive covenant in their chain of title prohibiting the use of a mobile home,[138] and by asserting that the structure on their property was no longer a mobile home, because the wheels and tongue had been removed and the structure set on a masonry foundation.[139]

Of the 113 lots sold within the subdivision, 105 of the lots contained a restriction against parking and/or erecting a single or doublewide mobile home on the lot.[140] The chain of title to the subject property contained no such restriction.[141] Evidence in the case suggested that the covenant was included as a matter of course, unless the purchasing owner requested omission of the covenant.[142] At trial, the developer testified that the intent of the covenant was to prohibit "mobile homes with 'the tongues sticking out and the wheels hanging down,'" but not to bar all manufactured homes.[143] In finding for the defendant, the chancellor concluded that an implied reciprocal negative easement prohibited the placement of mobile homes on any lot within the subdivision, but that the structure placed on the defendant's lot did not violate the restriction.[144] In reaching this conclusion, the chancellor found it persuasive that the structures were annexed to the real estate and that the structures, as they currently existed, were not the type the developer intended to prohibit with the restrictions contained in the majority of the deeds.[145]

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136. 265 Va. 293, 576 S.E.2d 746 (2003).
137. *Id.* at 297–98, 576 S.E.2d at 748.
138. *Id.* at 299–300, 576 S.E.2d at 749–50.
139. *Id.* at 300–03, 576 S.E.2d at 750–51.
140. *Id.* at 298, 576 S.E.2d at 748–49.
141. *Id.* at 297, 576 S.E.2d at 748.
142. *Id.* at 298, 576 S.E.2d at 748.
143. *Id.* at 298, 576 S.E.2d at 749 (quoting the developer's testimony at trial).
144. *Id.* at 298–99, 576 S.E.2d at 749.
145. *Id.* at 299, 576 S.E.2d at 749.

The Supreme Court of Virginia upheld the chancellor's conclusion that an implied reciprocal negative easement did arise because the:

> "common grantor develop[ed] land for sale in lots and pursue[d] a course of conduct which indicate[d] an intention to follow a general scheme of development for the benefit of himself and his purchasers and, in numerous conveyances of the lots, impose[d] substantially uniform restrictions, conditions, and covenants relating to [the] use of the property."[146]

The supreme court held that the subdivider's omission of the covenant in certain deeds was not done with the consent of the remaining lot owners, and the request by certain landowners to delete the restriction clearly indicated the lot purchasers had actual or constructive knowledge that the covenant could burden the use of their lots even though the restriction was omitted from their deeds.[147]

Turning to whether the existing structures violated the implied reciprocal negative easement, the court analyzed whether the recorded covenants contained sufficient ambiguity to allow the use of parole evidence to prove the intent of the restrictive covenant.[148] In holding that the covenants did not contain ambiguity, the court found the testimony of the developer to be irrelevant.[149] Indeed, at the time the first deeds containing the restriction were recorded, the term "mobile home" was defined by statute.[150] In holding for the plaintiff, the court found that the covenants did not contain language contemplating that a mobile home under the statutory definition may be transformed into something other than a mobile home.[151] The structures, in this case, violated the covenant when they were brought to the property.[152]

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146. *Id.* at 300, 576 S.E.2d at 749–50 (quoting Duvall v. Ford Leasing Dev. Corp., 220 Va. 36, 41, 255 S.E.2d 470, 472 (1979)).

147. *Id.* at 300, 576 S.E.2d at 750.

148. *Id.* at 301, 576 S.E.2d at 750–51.

149. *Id.* at 302–03, 576 S.E.2d at 751.

150. *Id.* at 301, 576 S.E.2d at 751. The term "mobile home" was defined as:

> a building unit constructed on a chassis for towing to the point of use and designed to be used as a dwelling; or two or more such units separately towable, but designed to be joined together at the point of use to form a single dwelling and which is designed for removal to and installation or erection on other sites.

VA. CODE ANN. § 55-248.41 (Repl. Vol. 1981); *cf.* VA. CODE ANN. § 55-248.41 (Repl. Vol. 2003).

151. *Forster*, 265 Va. at 302, 576 S.E.2d at 751.

152. *Id.*

I. *Opposing Land Use Permitting—Anti-Competitive Activity*

In the case of *Titan America, L.L.C. v. Riverton Investment Corp.*,[153] the Supreme Court of Virginia was asked to consider a so-called "*Noerr-Pennington* doctrine" governing the interplay of the exercise of free speech in opposition to government permitting and the anti-competitive effect resulting from both opposing and financing opposition to the permitting of a competitor's facilities.[154] In the *Noerr*[155] and *Pennington*[156] cases, the Supreme Court of the United States held that actions taken to influence legislative or executive action cannot serve as a basis for violating the Sherman Anti-Trust Act unless the activities are a mere sham and are based upon the federal constitutional right to petition the government.[157] In subsequent cases, the Supreme Court of the United States has expanded this doctrine "to apply to actions taken in adjudicatory proceedings before administrative agencies and courts."[158]

In this case, Titan, a cement company, sought to build a distribution facility.[159] Riverton, a competing cement company, recruited individual litigants to oppose and challenge the permitting of the facility by the local governing body.[160] Riverton financed an appeal to the local board of zoning appeals and subsequent litigation at the circuit court level.[161] As a result, Titan abandoned pursuit of this location for the facility.[162]

Subsequently, Titan sought land use permits for a distribution facility at a second location owned by the Economic Development Authority of Warren County ("EDA").[163] Riverton challenged the sale by the EDA to Titan, claiming that the sale violated the Virginia Freedom of Information Act[164] and that the EDA failed to

153. 264 Va. 292, 569 S.E.2d 57 (2002).

154. *See id.* at 296–302, 569 S.E.2d at 58–62.

155. E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

156. United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965).

157. *See Noerr*, 365 U.S. at 144; *Titan Am.*, 264 Va. at 301, 569 S.E.2d at 61.

158. *Titan Am.*, 264 Va. at 301, 569 S.E.2d at 61 (citing Ca. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510–11 (1972)).

159. *Id.* at 296, 569 S.E.2d at 58.

160. *Id.* at 297, 569 S.E.2d at 59.

161. *Id.* at 296, 569 S.E.2d at 59.

162. *Id.* at 298, 569 S.E.2d at 60.

163. *Id.*

164. VA. CODE ANN. §§ 2.2-3700 to -3714 (Repl. Vol. 2001 & Cum. Supp. 2003).

give proper notice of its intention to vote on the sale of the land.[165] Ultimately, the lower court denied the injunction filed by Riverton and other recruited litigants, finding that the EDA gave proper notice and acted in accordance with its internal guidelines for selling property.[166] Subsequently, Riverton challenged the zoning administrator's determination that the contemplated use was a use by-right.[167] The case arising from this dispute ultimately came before the Supreme Court of Virginia, where the court affirmed the zoning administrator's by-right determination.[168]

Titan subsequently filed suit alleging that the pattern of opposition, the recruitment of complainants, and the financing of litigation constituted "tortious interference with contract and business expectancy, statutory and common-law conspiracy and defamation."[169] Riverton filed a demurrer and motion for protective order, citing the *Noerr-Pennington* doctrine.[170] The trial court sustained Riverton's demurrers, and Titan asserted on appeal that even if the *Noerr-Pennington* doctrine was applicable, the trial court applied the wrong test to determine whether the litigation was a sham.[171]

The Supreme Court of Virginia, affirming the trial court, held that a defendant should be allowed to utilize the *Noerr-Pennington* doctrine in an action for tortious interference with business expectancy and conspiracy.[172] In holding for Riverton, the trial court applied a two-pronged test to determine whether the conduct of Riverton was protected under the *Noerr-Pennington* doctrine.[173] First, the trial court looked to "whether the challenged litigation was objectively baseless"—which occurs when there can be no reasonable belief that the claim may be held valid upon adjudication.[174] Second, if the litigation was objectively baseless, whether the litigation was filed with an anti-

165. *Titan Am.*, 264 Va. at 298, 569 S.E.2d at 60.
166. *Id.* at 298–99, 569 S.E.2d at 60.
167. *Id.* at 299, 569 S.E.2d at 60.
168. *Id.* at 299–300, 569 S.E.2d at 60–61.
169. *Id.* at 300, 569 S.E.2d at 61.
170. *Id.*
171. *Id.*
172. *Id.* at 302, 569 S.E.2d at 62.
173. *Id.*
174. *Id.*

competitive purpose.[175] However, "[i]f the litigation was not objectively baseless, the second inquiry is not necessary."[176] Titan sought to distinguish this case, because it involved a series of proceedings and not just a single suit.[177] Titan argued that the court should have applied "a subjective test when multiple filings [were] alleged to have been 'pursued to harass, delay and coerce a competitor.'"[178] In addition, Titan argued that the court should have looked at "'the totality of the filings [in] determin[ing] whether they were truly undertaken out of a genuine interest in redressing grievances, or whether they were merely a part of a pattern or practice of successive filings undertaken for the purpose of harassing and injuring a competitor.'"[179]

In rejecting Titan's argument, the court noted that the "objectively baseless" test provides an "'indispensable objective component.'"[180] The court further concluded that "'anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham.'"[181]

The court also rejected Titan's argument that Riverton was not entitled to protection under *Noerr-Pennington,* because Riverton lacked standing to bring the various suits and recruited, solicited, and financed others in the prosecution of that litigation.[182] The court rejected this argument reasoning that to hold otherwise would subject any party who "'provid[es] aid to litigants, whether through financial backing, legal assistance, amicus briefs, or moral support'" to litigation.[183]

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175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* (quoting Ca. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972)).

179. *Id.* at 303, 569 S.E.2d at 62–63 (second alteration in original).

180. *Id.* at 303, 569 S.E.2d at 63 (quoting Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 58 (1993)).

181. *Id.* (quoting *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 59).

182. *Id.* at 303–05, 569 S.E.2d at 63–64.

183. *See id.* at 304, 569 S.E.2d at 63–64 (quoting Baltimore Scrap Corp. v. David J. Joseph Co., 237 F.3d 394, 401 (4th Cir. 2001)).

J. *Accord and Satisfaction*

In the case of *Gelles & Sons General Contracting, Inc. v. Jeffrey Stack, Inc.*,[184] the Supreme Court of Virginia clarified the rule for accord and satisfaction when payment is tendered as "final payment" on a contract in which a dispute exists as to the amount owed.[185] In this case, a contractor billed an owner for $26,175—the balance due under the contract.[186] The owner disputed the bill in writing, indicating only $13,580 was owed after adjustments were made for work and materials provided by the owner in order to properly complete the work.[187] The owner then tendered a check in the amount of $13,580 along with a cover letter indicating that the enclosed check represented "'final payment on the contract.'"[188] The contractor negotiated the check.[189] The court rejected the contractor's argument that the owner's letter did not meet the requirements of Virginia Code section 8.3A-311[190] and that the letter "was neither conspicuous nor sufficiently clear to inform a reasonable person that cashing the check constituted a settlement of the claims between the parties."[191] The court reasoned that the Virginia Code's definition of conspicuous "describes a physical attribute of the statement, not the content or meaning conveyed by the statement" and no statute requires "the

184. 264 Va. 285, 569 S.E.2d 406 (2002).

185. *See id.*

186. *Id.* at 288, 569 S.E.2d at 407.

187. *Id.*

188. *Id.* (quoting Letter from Jeffrey Stack, Inc. to Gelles & Sons General Contracting, Inc. (Dec. 13, 2000)).

189. *Id.*

190. VA. CODE ANN. § 8.3A-311 (Repl. Vol. 2001 & Cum. Supp. 2003). This section provides in pertinent part:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
>
> (b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

Id. § 8.3A-311(a)–(b) (Repl. Vol . 2001 & Cum. Supp. 2003).

191. *Gelles & Sons Gen. Contracting, Inc.*, 264 Va. at 289, 569 S.E.2d at 407.

term or clause [to] be displayed in specific type or in any other distinguishing manner."[192]

The court then examined whether the language of the letter was so unclear that a reasonable person would not know the check was being offered in full satisfaction of the claim.[193] The court distinguished Virginia Code section 8.3A-311 from the common law of accord and satisfaction.[194] "Under the common law, an accord and satisfaction requires both that the debtor intend that the proffered amount be given in full satisfaction of the disputed claim and that the claimant accept that amount in accordance with the debtor's intent."[195] In contrast, Virginia Code section 8.3A-311 requires a plaintiff to satisfy an objective standard, as opposed to a subjective standard—"that is, would a reasonable person have considered that the 'instrument was tendered as full satisfaction of the claim?'"[196] The court agreed with the trial court and found that a reasonable person could interpret the letter to mean the check constituted a final settlement of the amount due to the contractor.[197]

K. *Permitting of Wireless Towers*

In *USCOC of Virginia RSA# 3, Inc. v. Montgomery County Board of Supervisors*,[198] the United States District Court for the Western District of Virginia was asked to decide a case arising out of the denial of a special use permit request for a wireless telecommunications transmission tower.[199] The application encountered no citizen opposition.[200] At the meeting where the special use permit was denied, the Montgomery County Board of Supervisors also granted a special use permit for a significantly shorter tower.[201] However, the discussion among the board of su-

192. *Id.*
193. *Id.*
194. *Id.* at 289–90, 569 S.E.2d at 407–08.
195. *Id.* at 289, 569 S.E.2d at 408.
196. *Id.* at 290, 569 S.E.2d at 408 (quoting Webb Bus. Promotions, Inc. v. Am. Elecs. & Entm't Corp., 617 N.W.2d 67, 76 (Minn. 2000)).
197. *Id.* at 291, 569 S.E.2d at 408.
198. 245 F. Supp. 2d 817 (W.D. Va. 2003).
199. *Id.* at 818.
200. *Id.* at 824–25.
201. *Id.* at 823–24.

pervisors at the public hearing, and the conditions imposed on the issuance of a grant for the smaller tower, indicated that the board of supervisors' actions were solely motivated by aesthetic concerns.[202]

The Telecommunications Act of 1996[203] ("TCA") limits the manner in which local governments may restrict the location and design of towers.[204] First, a local government's regulation of wireless facilities cannot "prohibit or have the effect of prohibiting the provision of personal wireless services."[205] Second, a local government's denial of a request to "place, construct, or modify" a wireless service facility must "be in writing and supported by substantial evidence contained in a written record."[206] The court determined that the board of supervisors satisfied the first prong of the test by proposing an alternative site for the tower.[207] Clearly the Montgomery County Board of Supervisors did not intend to prohibit the provision of wireless services.[208]

Next, the court addressed whether the board of supervisors' decision was supported by substantial evidence contained in a written record.[209] The court concluded that the scientific data before the board of supervisors did not support or justify its decision to reject the 240-foot tower and approve the 195-foot tower.[210] No evidence before the board of supervisors suggested that the two towers were even roughly equivalent "from an engineering standpoint."[211] In ruling against the board of supervisors, the court noted that the board's decision was based upon aesthetics alone, and that settled Virginia law states that aesthetics "is not a valid basis by itself for a zoning decision."[212] In some cases, aesthetics may be considered if some other element within the locality's police power is also examined.[213] The court concluded that the

202. *See id.*
203. 47 U.S.C. §§ 1–1110 (2000).
204. *Id.* § 332(c)(7)(B) (2000).
205. *Id.* § 332(c)(7)(B)(i)(II) (2000).
206. *Id.* § 332(c)(7)(B)(iii) (2000).
207. *USCOC of Va. RSA# 3*, 245 F. Supp. 2d at 827.
208. *Id.*
209. *Id.* at 829.
210. *Id.* at 830.
211. *Id.*
212. *Id.* at 831.
213. *Id.*

Montgomery County Board of Supervisors did not act as reasonable legislators in reaching a decision about the towers, because reasonable legislators would not base a decision solely upon a principle that has previously been held invalid under Virginia law.[214]

III. LEGISLATIVE CHANGES

A. *Conveyances of Right-of-Way Usage*

In balancing the concerns of property owners and the need to allow certain service companies and utilities right-of-way easements, the Virginia Code now provides that it is unlawful for the Department of Transportation to issue a land use permit to any company other than a public utility, an owner or operator of an interstate natural gas pipeline, or a cable company which owns or operates a utility line,

> unless such company has (i) registered as an operator with the appropriate notification center as defined by § 56-265.15 and (ii) notified the commercial and residential developer, owner of commercial or multifamily real estate, or local government entities with a property interest in any parcel of land located adjacent to the property over which the land use is being requested, that application for the permit has been made.[215]

B. *Banking and Finance*

1. Real Estate Brokerage Subsidiaries of Banks

The General Assembly amended the Banking Act to specify that real estate brokers are not prohibited from owning or operating a state bank as long as the requirements imposed by the Banking Act on all bank owners and operators are met.[216] It also added a section to the Banking Act providing the conditions under which a state bank, through a controlled subsidiary corpora-

214. *Id.* at 832.

215. VA. CODE ANN. § 2.2-1151.1(B) (Cum. Supp. 2003).

216. Act of Mar. 18, 2003, ch. 536, 2003 Va. Acts ___ (codified at VA. CODE ANN. § 6.1-5 (Cum. Supp. 2003)).

tion, may own and operate a real estate brokerage firm.[217] The conditions established by this section are consistent with the Banking Act's avoidance of anticompetitive activity[218] and are subject to Virginia Code section 6.1-58.1, which governs investments in stock or securities of controlled subsidiary corporations.[219]

2. Priority of Mortgages Securing Payment of Amounts Due to the Commonwealth

Under Virginia law, a mortgagee may refinance a first mortgage without altering its primary relationship to a subordinate mortgage and without first notifying or obtaining the consent of the subordinate mortgagor, provided that certain qualifications are met.[220] The 2003 General Assembly passed legislation providing that such a provision does not apply when the subordinate mortgage is one securing a promissory note payable to the Commonwealth or any local government and financed pursuant to an affordable dwelling unit ordinance if such mortgage states that it shall not, without the consent of the secured party, be subordinated.[221]

C. *Computer Services and Uses*

1. Remote Access to Land Records

The 2003 General Assembly amended the Virginia Code to require that remote access to land records be granted only through subscription services provided by individual circuit court clerk's

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217. *Id.* (codified at VA. CODE ANN. § 6.1-58.3 (Cum. Supp. 2003)).

218. *See id.*

219. VA. CODE ANN. § 6.1-58.1 (Cum. Supp. 2003).

220. *Id.* § 55-58.3 (Repl. Vol. 2003). The refinance mortgage must state on the first page in bold or capital letters the outstanding principal balance or the prior mortgage and that it is a refinance of the prior mortgage. *See id.* § 55-58.3(B)(1) (Repl. Vol. 2003). The principal amount secured by the refinance mortgage must not exceed the outstanding principal balance secured by the prior mortgage plus $5,000. *Id.* § 55-58.3(B)(2) (Repl. Vol. 2003). Further, the interest rate must be stated in the refinance mortgage when recorded, and it must not exceed the rate of the prior mortgage. *Id.* § 55-58.3(B)(3) (Repl. Vol. 2003).

221. Act of Mar. 16, 2003, ch. 381, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-58.3(D) (Repl. Vol. 2003)).

offices or through designated application service providers.[222]

2. Prohibition on Posting Personal Information on the Internet

The General Assembly passed several measures in 2003 to help protect the privacy rights of its citizens with regard to information available over the Internet. One such piece of legislation prohibits clerks of courts in Virginia from posting, on a court-controlled Web site, a document containing any of the following information: an actual signature, a social security number, a date of birth identifiable to a particular person, a parent's maiden name identifiable to a particular person, any financial account numbers, or the name and age of a minor child.[223] The statute provides for an exception, however, for network systems that are certified by the Department of Technology Planning to be secure, and among other things, provide restricted access only to persons whose identity, address, and citizenship status have been established either in person or by means of a notarized or sworn application.[224]

D. *Conservation*

1. Creation of Low Impact Development Task Force

A new task force was established to study low impact alternatives to existing stormwater and water quality control methods.[225] The task force will be comprised of eleven members appointed by the Director of the Department of Environmental Quality ("DEQ").[226] The task force, operating as an entity of the DEQ, must develop a certification process for low impact development techniques, provide guidance for local governments and the general public on the most effective way to implement the techniques, recommend changes to existing laws and regulations

222. Act of Mar. 16, 2003, ch. 205, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 17.1-279 (Repl. Vol. 2003)). This provision expires on July 1, 2008. *Id.*

223. Act of Apr. 2, 2003, ch. 988, 2003 Va. Acts ___ (codified at VA. CODE ANN. § 2.2-3808.2 (Cum. Supp. 2003)). This provision expires on July 1, 2005. *Id.*

224. VA. CODE ANN. § 2.2-3808.2(D)(1) (Cum. Supp. 2003).

225. *Id.* § 10.1-1186.5 (Cum. Supp. 2003).

226. *Id.* § 10.1-1186.5(A) (Cum. Supp. 2003).

which facilitate the use of the techniques, and create a model ordinance to be used by local governments.[227]

2. Conservation Easements

The Virginia Conservation Easement Act[228] establishes the requirements for holders of conservation easements.[229] Previously, a sole holder of a conservation easement had to have maintained its principal office in the Commonwealth for at least five years, while any organizations not meeting this qualification could only be co-holders of such easements with an entity that met the requirements.[230] Thus, national organizations could only co-hold conservation easements under prior law.[231] The 2003 General Assembly amended the Conservation Easement Act to allow national organizations that have been in existence for five years or more, have an office in the Commonwealth, and remain registered and in good standing with the State Corporation Commission to be sole holders of conservation easements.[232]

3. Enjoyment of Easements Generally

The General Assembly added a section to the Virginia Code providing specified remedies for a breach of an easement.[233] The new section states that "the owner of a dominant estate shall not use an easement in a way that is not reasonably consistent with the uses contemplated by the grant of the easement, and the owner of the servient estate shall" in no way obstruct or otherwise unreasonably interfere with the owner of the dominant estate's enjoyment of the easement.[234] The section states that a violation of the terms of an easement may constitute a private

227. *Id.* § 10.1-1186.5(A)–(B) (Cum. Supp. 2003).

228. *Id.* §§ 10.1-1009 to -1016 (Repl. Vol. 1998 & Cum. Supp. 2003).

229. *Id.* § 10.1-1010 (Cum. Supp. 2003).

230. *Id.* § 10.1-1010(C) (Repl. Vol. 1998).

231. *Id.*

232. Act of Apr. 2, 2003, ch. 1014, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 10.1-1010(C) (Cum. Supp. 2003)).

233. Act of Mar. 20, 2003, ch. 774, 2003 Va. Acts ___ (codified at VA. CODE ANN. § 55-50.1 (Repl. Vol. 2003)).

234. VA. CODE ANN. § 55-50.1 (Repl. Vol. 2003).

nuisance; however, the remedy for any violation does not hinder any other remedies provided in law or equity.[235]

E. *Counties, Cities, and Towns*

1. Compliance with Subdivision Ordinances

The Virginia Code provides that any subdivision, transfer, or sale of a lot or parcel of land must comply with any applicable subdivision ordinances.[236] The 2003 General Assembly of Virginia amended the Virginia Code to clarify that any violation of such ordinances carries with it a fine of not more than $500 per lot and a requirement that the violator comply with the applicable ordinances.[237]

2. Replacement of Manufactured Housing

The Virginia Code assures landowners that their vested land use rights will not be impaired by the subsequent amendment of a zoning ordinance.[238] Should such an amendment cause a landowner's current use of the land to be nonconforming, the landowner may continue such use so long as the buildings and structures on the land "are maintained in their then structural condition" and the use is not discontinued for more than two years.[239] Virginia Code section 15.2-2307 also provides that the owner of a mobile or manufactured home may remove a nonconforming manufactured home and replace it with a comparable mobile or manufactured home that conforms with the current HUD manufactured housing code.[240] The General Assembly also modified Virginia Code section 15.2-2307 to specify what types of mobile or manufactured homes may replace current nonconforming mobile or manufactured homes—drawing a distinction between the requirements for a nonconforming mobile or manufac-

235. *Id.*

236. *See id.* § 15.2-2254 (Repl. Vol. 2003).

237. Act of Mar. 16, 2003, ch. 408, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2254(4) (Repl. Vol. 2003)).

238. VA. CODE ANN. § 15.2-2307 (Repl. Vol. 2003).

239. *Id.*

240. *Id.*

tured home located within a mobile or manufactured home park and one not located in such a park.[241]

3. Establishment of Civil Penalties for Violations of the Zoning Ordinance

The Virginia Code allows localities to implement a uniform schedule of civil penalties for violations of the zoning ordinance.[242] It establishes maximum dollar amounts that may be assessed as a penalty for violating the zoning ordinance.[243] In 2003 the General Assembly increased the maximum penalty allowed for any additional summons after an initial summons for any one violation to $250 and the maximum penalty for "a series of specified violations arising from the same operative set of facts" to $5,000.[244] Prior to the change, the maximum penalty assessments were $150 for an additional summons and $3,000 for a series of specified violations.[245]

4. Regulation of Vehicular and Pedestrian Traffic in Residential Subdivisions

Prior to amendment by the General Assembly, the Virginia Code allowed the governing body of any county, city, or town which has adopted subdivision zoning ordinances to require "the posting and maintenance of signs or other appropriate markings regulating the operation and parking of motor vehicles and pedestrian traffic" in any residential subdivision in which roadways and parking areas are "open to the public but not in public ownership."[246] The General Assembly amended Virginia Code section 46.2-1305 by omitting the requirement that such roadways and parking areas be open to the public.[247]

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241. Act of Mar. 16, 2003, ch. 189, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2307 (Repl. Vol. 2003)).

242. VA. CODE ANN. § 15.2-2209 (Repl. Vol. 2003).

243. *Id.*

244. Act of Mar. 16, 2003, ch. 192, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2209 (Repl. Vol. 2003)).

245. VA. CODE ANN. § 15.2-2209 (Repl. Vol. 1997).

246. *Id.* § 46.2-1305 (Repl. Vol. 2002).

247. Act of Mar. 16, 2003, ch. 418, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 46.2-1305 (Supp. 2003)).

5. Repair of Deteriorating Buildings

The General Assembly also amended the Virginia Code to allow localities to prescribe civil penalties for violations of any ordinance relating to the removal or repair of deteriorating buildings.[248] Any penalty for violating this provision may not exceed a total of $1,000.[249]

6. Comprehensive Plan for Affordable Housing

Prior to amendment in 2003, the Virginia Code required each locality in the Commonwealth to develop a comprehensive plan for the long term physical development of the territory under the locality's jurisdiction.[250] The Virginia Code suggested that each locality's plan include, among other things, "[t]he designation of areas for the implementation of measures to promote the construction and maintenance of affordable housing."[251] The 2003 amendment requires that each plan include the designation *and* implementation of such measures and that similar measures be included for the rehabilitation of existing affordable housing units.[252] The 2003 change places a greater duty on localities to set out how maintenance and construction of affordable housing will be accomplished.[253]

7. Community Development Authorities

The General Assembly amended two sections of the Virginia Code to reflect that community development authorities are now considered "public bod[ies] politic and corporate and political subdivision[s] of the Commonwealth."[254]

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248. Act of Mar. 16, 2003, ch. 207, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-906(5) (Repl. Vol. 2003)).

249. VA. CODE ANN. § 15.2-906(5) (Repl. Vol. 2003).

250. *Id.* § 15.2-2223 (Repl. Vol. 1997).

251. *Id.* § 15.2-2223(8) (Repl. Vol. 1997).

252. Act of Mar. 21, 2003, ch. 811, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2223 (Repl. Vol. 2003)).

253. *Compare* VA. CODE ANN. § 15.2-2223 (Repl. Vol. 1997), *with* VA. CODE ANN. § 15.2-2223 (Repl. Vol. 2003).

254. Act of Mar. 19, 2003, ch. 712, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 15.2-5152, -5155 (Repl. Vol. 2003)).

8. Plat Approval

In response to recent practice by certain county commissions attempting to slow development by failing to act on proposed plats, the General Assembly amended the requirements of local planning commissions to compel them to make a good faith effort to, within sixty days of submission for approval, specifically identify all deficiencies with the initial submission and reasons for disapproval along with any modifications or corrections needed to permit approval.[255] The revised provision also requires that local planning commissions act on any proposed plat for which they have previously denied approval within forty-five days after modification and resubmission of the plot to the commission.[256] Further, if the subdivider petitions the circuit court, as permitted under Virginia Code section 15.2-2259(B), the court must "give the petition priority on the civil docket, hear the matter expeditiously," and enter an order as approving or rejecting the plat.[257]

9. Standard of Review for Board of Zoning Appeals

The 2003 General Assembly also amended the Virginia Code to provide for a new, less stringent standard of review for board of zoning appeals' orders, requirements, decisions, or other determinations appealed to the circuit court.[258] In such cases, the court shall presume any decision of the board to be correct.[259] However, the presumption may be rebutted by proving by a preponderance of the evidence that the board erred in its decision.[260] In appeals from decisions of the board denying an application for a variance or for a special exception, a presumption also exists that the board's decision is correct, but the presumption may only be rebutted by a showing that the board applied erroneous principles of law, or—if the board exercised discretion when rendering its decision—that the board's decision was plainly wrong and vio-

255. Act of Mar. 19, 2003, ch. 716, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2259(A) (Repl. Vol. 2003)).

256. VA. CODE ANN. § 15.2-2259(A) (Repl. Vol. 2003).

257. *Id.* § 15.2-2259(B) (Repl. Vol. 2003).

258. Act of Mar. 18, 2003, ch. 568, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2314 (Repl. Vol. 2003)).

259. VA. CODE ANN. § 15.2-2314 (Repl. Vol. 2003).

260. *Id.*

lated the zoning ordinance's intent and purpose.[261] Current case law providing for the latter standard of review for all board decisions is therefore overturned.

10. Reimbursement of Property Taxes in Condemnation Cases

A new provision was added to the Virginia Code requiring localities to reimburse property owners for the pro rata portion of real property taxes paid by the property owner covering the period subsequent to the date title vested in the locality or the date the locality took possession of the real property, whichever occurs earlier.[262]

11. Conservation of Trees During Development

The 2003 General Assembly amended the current provision of the Virginia Code which allows localities to adopt ordinances requiring planting and replacement of trees during the localities' development process.[263] The amendments require local ordinances to include "reasonable provisions for reducing the tree canopy requirements or granting tree cover credit in consideration of the preservation of existing tree cover or for preservation of trees of outstanding age, size or physical characteristics."[264] The amendments also allow such ordinances to designate certain tree species that cannot be used to meet tree cover requirements due to their undesirable nature.[265]

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261. *Id.*

262. Act of Mar. 19, 2003, ch. 680, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-1904(E) (Repl. Vol. 2003)).

263. Act of Mar. 22, 2003, ch. 875, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-961(A) (Repl. Vol. 2003)).

264. *Id.* (codified as amended at VA. CODE ANN. § 15.2-961(C) (Repl. Vol. 2003)).

265. *Id.* (codified as amended at VA. CODE ANN. § 15.2-961(E) (Repl. Vol. 2003)). The General Assembly made explicit the fact that none of the provisions in the legislation invalidate the ten-year-minimum tree cover standards adopted by cities founded prior to 1780, or the twenty-year-minimum tree cover replacement standards adopted after July 1, 1990. *Id.* (codified as amended at VA. CODE ANN. §§ 15.2-961(K)–(L) (Repl. Vol. 2003)).

F. *Courts of Record*

1. Requirement of Date and Time Stamp on All Recorded Documents

In response to problems created by courts not recording instruments on the day of their delivery to the clerk due to the high volume of such instruments received by some courts, the General Assembly added a provision requiring any circuit court which does not record documents on the same day they are delivered to install a time stamp machine to affix the current date and time of delivery to each document not immediately recorded and entered into the general or daily index.[266] The Virginia Code now also states that the time of admission to the record shall be presumed to be the date and time affixed to the instrument unless the clerk determines that the requirements for recordation have not been satisfied.[267]

2. Clerk's Right to Refuse Documents Containing Private Information

Ever conscious of privacy concerns, the General Assembly of Virginia amended the Virginia Code to allow court clerks to refuse to accept instruments submitted for recordation if they include a grantor's, grantee's, or trustee's social security number.[268]

G. *Eminent Domain*

1. Requirements of Filing a Condemnation Proceeding

The Virginia Code was amended to require the Commonwealth Transportation Commissioner ("Commissioner") to institute a

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266. Act of Mar. 20, 2003, ch. 776, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-96(A)(3)(a) (Repl. Vol. 2003)). If, however, there is no time stamp machine or if the time stamp machine is not functioning, an employee of the clerk's office shall affix the current date and time of delivery to each instrument. VA. CODE ANN. § 55-96(A)(3)(b) (Repl. Vol. 2003).

267. VA. CODE ANN. § 55-96(A)(3)(c) (Repl. Vol. 2003).

268. Act of Mar. 22, 2003, ch. 862, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 17.1-227 (Repl. Vol. 2003)).

condemnation proceeding within 180 days after recordation of a certificate with respect to property being taken or damaged, unless an agreement is reached with the affected property owner as to compensation for the taking of or damage to the property.[269] The Virginia Code also provides that if the Commissioner fails to institute condemnation proceedings within 180 days after recordation of any such certificate, the property owner may file a proceeding in the circuit court.[270]

2. Recodification of Title 25—Eminent Domain

Pursuant to Virginia Code section 30-152,[271] the Virginia Code Commission ("Commission") recodified Title 25 as Title 25.1.[272] Title 25 established the general procedure pursuant to which authorities exercise the power of eminent domain to acquire property on behalf of the Commonwealth.[273] The Commission rewrote and restructured the title to clarify its provisions, amend sections to reflect current practices, and eradicate archaic, obsolete, and redundant language and provisions.[274]

H. *Housing*

1. Protection from Disclosure of Certain Records in the Possession of Building Officials

The Virginia Freedom of Information Act ("VFOIA")[275] provides for the protection of certain records which are excluded from the VFOIA's disclosure requirements.[276] As one of its many anti-terrorism measures, the General Assembly has added exclusions for any and all portions of engineering and construction drawings,

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269. Act of Mar. 16, 2003, ch. 317, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 33.1-127 (Cum. Supp. 2003)).

270. VA. CODE ANN. § 33.1-132 (Cum. Supp. 2003).

271. *Id.* § 30-152 (Repl. Vol. 2001).

272. *Id.* §§ 25.1-100 to -106 (Repl. Vol. 2003).

273. *See id.* §§ 25-46.1 to -46.36 (Repl. Vol. 2000 & Cum. Supp. 2002).

274. *Id.* § 25.1-100 (Repl. Vol. 2003) (editor's note). For additional discussion of the recodification of Title 25, see B. Paige E. Holloway, *Annual Survey of Virginia Law: Public Utility Law*, 38 U. RICH. L. REV. 195, 221 (2003).

275. VA. CODE ANN. §§ 2.2-3700 to -3714 (Repl. Vol. 2001 & Cum. Supp. 2003).

276. *Id.* § 2.2-3705 (Cum. Supp. 2003).

plans, or other documents:

> that reveal critical structural components, security equipment and systems, ventilation systems, fire protection equipment, mandatory building emergency equipment or systems, elevators, electrical systems, telecommunications equipment and systems, and other utility equipment and systems . . . the disclosure of which would jeopardize the safety or security of any public or private commercial office, multi-family residential or retail building or its occupants in the event of terrorism or other threat to public safety.[277]

The General Assembly also added a section which requires building code officials to institute procedures to ensure the safekeeping of all such engineering and construction documents in their possession.[278]

2. Ratio Utility Billing Systems

In addition to submetering and energy allocation systems already provided for in the Virginia Code,[279] Virginia Code section 55-226.2(A) now also allows landlords to use ratio utility billing systems to allocate portions of utilities owed among multiple tenants of a commercial or residential building, provided that the use of such a system is clearly stated in the rental agreement or lease.[280] Landlords may allocate billings based on square footage, the number of bedrooms, occupancy, or some other specifically stated formula agreed upon in the rental agreement or lease.[281]

3. Condominium Act

a. Condominium Association Meetings Open to All Unit Owners

The General Assembly added language to the Virginia Code to ensure that all committee and subcommittee meetings of the ex-

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277. Act of Mar. 22, 2003, ch. 891, 2003 Va. Acts ____ (codified as amended at VA. CODE ANN. § 2.2-3705(A)(39) (Cum. Supp. 2003)).

278. *Id.* (codified as amended at VA. CODE ANN. § 36-105.3 (Cum. Supp. 2003)). For additional information regarding ratio billing, see Holloway, *supra* note 274, at 220.

279. VA. CODE ANN. § 56-245.2 (Repl. Vol. 2003).

280. *Id.* § 55-226.2(A) (Repl. Vol. 2003).

281. *Id.* § 55-226.2(F) (Repl. Vol. 2003).

ecutive organ of a unit owners' association be open to all unit owners.[282] Prior to the 2003 amendments, it was unclear whether all committee meetings must be open to all owners, or only meetings of the full executive organ.[283] The amendments also provided that an executive organ of a unit owners' association is not required to obtain approval before disseminating material regarding matters concerning the association.[284]

b. Responsibility for Insurance Deductibles

The Virginia Code, as amended in 2003, provides that, unless specified in a condominium instrument, any insurance deductibles paid due to damage to a condominium—the cause of which originated in a common element of the condominium—must be paid by the unit owners' association as a common expense.[285] If, however, a deductible must be paid for damages to a condominium resulting from a cause originating in any unit or component of the condominium, the owner of the unit must pay the deductible, regardless of whether the unit owner was negligent.[286]

c. Imposition of Additional Assessments for Common Expenses

The General Assembly also granted executive organs of unit owners' associations the authority to impose additional assessments on all unit owners, based on each unit owner's proportional interests, to cover the common expenses of the association when the executive body determines that the assessments levied are insufficient to cover such expenses.[287] Written notice must be given to each unit owner of the amount, reasons for, and due date of any payment for additional assessments.[288] If due in a lump sum, payment may not be required until ninety days after the mailing

282. Act of Mar. 16, 2003, ch. 405, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-79.75(B) (Repl. Vol. 2003)).

283. *See* VA. CODE ANN. § 55-79.75 (Cum. Supp. 2001).

284. Act of Mar. 16, 2003, ch. 405, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-79.75:1(B) (Repl. Vol. 2003)).

285. VA. CODE ANN. § 55-79.81(C) (Repl. Vol. 2003).

286. *Id.*

287. Act of Mar. 16, 2003, ch. 421, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-79.83(E) (Repl. Vol. 2003)).

288. VA. CODE ANN. § 55-79.83(E) (Repl. Vol. 2003).

or delivery of the notice.[289] Unit owners must pay the additional assessment unless a majority of owners, at a meeting held within sixty days of delivery of the notice, vote to rescind or reduce the assessment.[290]

4. Property Owners' Association Act

a. Applicability

The 2003 General Assembly removed the $150 threshold previously imposed for determining whether an association is subject to the Property Owners' Association Act ("POAA").[291] The revisions to the POAA—specifically Virginia Code section 55-511—also establish when an association disclosure packet shall be deemed unavailable for purposes of determining when a person selling a lot must disclose that the purchaser may cancel the contract.[292]

b. Amendments to Declarations

The provision establishing how declarations of property owners' associations may be amended under the POAA now states that any declaration recorded prior to July 1, 1999, may be amended by a two-thirds vote of the property owners in the absence of a provision in the declaration specifying the procedure for amendment.[293]

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289. *Id.*

290. *Id.*

291. Act of Mar. 16, 2003, ch. 422, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-511 (Repl. Vol. 2003)).

292. *See* VA. CODE ANN. § 55-511(A)–(B) (Repl. Vol. 2003). The new language states that:

> the association disclosure packet shall be deemed not to be available if (i) a current annual report has not been filed by the association with either the State Corporation Commission pursuant to § 13.1-936 or with the Real Estate Board pursuant to § 55-516.1, (ii) the seller has made a written request to the association that the packet be provided and no such packet has been received within 14 days in accordance with subsection E of § 55-512, or (iii) written notice has been provided by the association that a packet is not available.

Id. § 55-511(A) (Repl. Vol. 2003).

293. *Id.* § 55-515.1(D) (Repl. Vol. 2003).

5. Virginia Residential Landlord and Tenant Act

a. Access to Cable and Other Television Facilities

The General Assembly also amended the Virginia Code to allow landlords to enter into service agreements with television service providers to market the providers' services and to allow the landlord to receive reasonable compensation for the marketing services the landlord provides.[294] Under these service agreements, landlords may also be compensated for the value of the landlord's property used by the provider.[295]

b. Terms and Conditions of Rental Agreements

The Virginia Code was amended to allow rental agreements to contain a provision providing for the automatic renewal of the agreement as well as provisions establishing the requirements for notice of intent to vacate or terminate the agreement.[296]

c. Definition of Prepaid Rent

The General Assembly clarified the definition of prepaid rent by adding the explanatory phrase: "paid more than one month in advance of the rent due date."[297]

d. Confidentiality of Tenant Information

In a further attempt to protect the privacy rights of the citizens of the Commonwealth, the General Assembly amended the Virginia Code to severely limit the circumstances under which in-

294. Act of Mar. 16, 2003, ch. 68, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-248.13:2 (Repl. Vol. 2003)).

295. VA. CODE ANN. § 55-248.13:2 (Repl. Vol. 2003).

296. Act of Mar. 16, 2003, ch. 424, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-248.7(A) (Repl. Vol. 2003)).

297. Act of Mar. 16, 2003, ch. 425, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-248.4 (Repl. Vol. 2003)).

formation pertaining to a tenant can be released and the type of information that can be released by a landlord to third parties.[298]

e. Acceptance of Rent with Reservation

The General Assembly added a section to the Virginia Code to codify the common law meaning of accepting rent under reservation.[299] The new section clarifies the duties a landlord owes a tenant upon accepting rent with reservation.[300] Under Virginia Code section 55-248.34:1, when a landlord accepts rent with reservation during the pendency of any aspect of the tenant's material noncompliance, the landlord does not waive his right to terminate the tenancy.[301]

f. Award of Attorneys' Fees

The 2003 General Assembly also amended the circumstances under which a landlord and tenant can recover attorneys' fees.[302] Under prior law, a landlord or tenant could only recover attorneys' fees if the other party was found to be guilty of willful noncompliance.[303] Under the new law, a landlord and tenant may receive attorneys' fees unless the other party proves by a preponderance of the evidence that its actions were reasonable under the circumstances.[304]

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298. Act of Mar. 16, 2003, ch. 426, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-248.9:1 (Repl. Vol. 2003)). Under the new law, a landlord may not release information pertaining to a tenant unless: (1) the tenant has given prior written consent; (2) the information released is a matter of public record; (3) the information is a summary of the tenant's payment record; (4) the information is a copy of a material noncompliance notice that the tenant has failed to comply with a termination notice and the tenant did not remain on the premises after the notice was issued; (5) the information is requested by a law-enforcement or public safety official; or (6) the information is provided in the case of an emergency. VA. CODE ANN. § 55-248.9:1 (Repl. Vol. 2003).

299. Act of Mar. 16, 2003, ch. 427, 2003 Va. Acts ___ (codified at VA. CODE ANN. § 55-248.34:1 (Repl. Vol. 2003)).

300. VA. CODE ANN. § 55-248.34:1 (Repl. Vol. 2003).

301. *Id.* § 55-248.34:1(B) (Repl. Vol. 2003).

302. Act of Mar. 16, 2003, ch. 363, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-248.21 (Repl. Vol. 2003)).

303. VA. CODE ANN. §§ 55-248.21, -248.31 (Repl. Vol. 1995).

304. *Id.* §§ 55-248.21, -248.31 (Repl. Vol. 2003).

g. Security Deposits

The General Assembly amended the Virginia Code to clarify that when a landlord owes a tenant any amount of money held as a security deposit, that amount plus interest is to be applied to offset any amount owed to the landlord by the tenant.[305] In addition, Virginia Code section 55-248.15:2 was added as a new statutory provision that sets forth a schedule of interest rates for security deposits beginning with July 1, 1975.[306]

h. Definition of Rental Application

The Virginia Residential Landlord Tenant Act,[307] as amended, now provides a definition for "rental application."[308] The definition establishes what information a landlord may ask a prospective tenant in determining whether the prospective tenant satisfies the requirements for becoming a tenant of the landlord.[309]

i. Mechanics' Liens

The Virginia Code requires general contractors claiming mechanics' liens to file a memorandum of lien no later than ninety days after completion of their work.[310] The 2003 General Assembly placed an additional burden upon the general contractor to file, along with the memorandum of lien, "a certification of mailing of a copy of the memorandum of lien on the owner of the property at the owner's last known address."[311]

305. Act of Mar. 16, 2003, ch. 438, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-248.15:1 (Repl. Vol. 2003)).

306. Act of Mar. 16, 2003, ch. 438, 2003 Va. Acts ___ (codified at VA. CODE ANN. § 55-248.15:2(B) (Repl. Vol. 2003)).

307. VA. CODE ANN. §§ 55-248.2 to -248.40 (Repl. Vol. 2003).

308. *See id.* § 55-248.4 (Repl. Vol. 2003).

309. *Id.*

310. *Id.* § 43-4 (Supp. 2003).

311. Act of Mar. 19, 2003, ch. 698, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 43-4 (Supp. 2003)).

j. Time Period for Recording Certificate of Satisfaction

Due to recent budget cuts and staffing shortages, the 2003 General Assembly extended the time period in which a circuit court clerk must record a certificate of satisfaction before incurring liability for civil damages.[312]

k. Assignment of Penalty for Failure to Release a Deed of Trust

The Virginia Code provides a $500 penalty on a lien obligor for the failure of a lien creditor to properly file a release of a deed of trust or other lien on property.[313] Furthermore, as a result of the 2003 amendments, no agent or attorney may take an assignment of the penalty.[314]

l. Real Estate Appeals to Boards of Equalization and Circuit Court

The 2003 General Assembly made several amendments to the current process for appealing real estate assessments, the most significant of which are discussed herein. First, the General Assembly extended the number of years in which an aggrieved person may contest a real property assessment over the next few years.[315] Specifically, Virginia Code section 15.2-717 states that:

> [a]ny person aggrieved by an assessment of real estate made by the department of real estate assessments may apply for relief to the circuit court of the county within one year from December 31 of the year in which such assessment is made for assessments made prior to January 1, 2005; within two years from December 31 of the year in which such assessment is made for assessments made on and after January 1, 2005, but prior to January 1, 2007; and within the time frame as provided by general law pursuant to § 58.1-3984 for assessments made on and after January 1, 2007.[316]

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312. Act of Mar. 16, 2003, ch. 245, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-66.6 (Repl. Vol. 2003)). The provisions of this act expire on July 1, 2004. *Id.*

313. VA. CODE ANN. § 55-66.3(A)(1) (Repl. Vol. 2003).

314. Act of Mar. 19, 2003, ch. 745, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-66.3(A)(1) (Repl. Vol. 2003)).

315. Act of May 1, 2003, ch. 1036, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-717 (Repl. Vol. 2003)).

316. VA. CODE ANN. § 15.2-717 (Repl. Vol. 2003). Virginia Code section 58.1-3984, effec-

Second, the General Assembly provided nine-year term limits for members of boards of equalization.[317] Third, the General Assembly added a requirement that each member of a board of equalization must take continuing education classes at least once every four years.[318]

m. Repeal of Limit on Real Property a Church May Hold

The 2003 General Assembly repealed the limitation on the amount of real property a church may hold.[319] Previously, churches were only permitted to hold up to fifteen acres in a city or town and up to 250 acres outside a city or town.[320]

IV. CONCLUSION

The period from June 1, 2002, to June 1, 2003, was fairly ordinary in terms of the number and types of cases decided in the area of real estate. With the preoccupation of budgetary matters in the General Assembly, the 2003 Session was not proactive as in previous years. With several localities in the Commonwealth actively seeking to slow development, litigation in the area of zoning and vested rights should be very active in the coming year.

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tive January 1, 2004, provides that an aggrieved person may apply to the circuit court: "(a) within three years from the last day of the tax year for which any such assessment is made, (b) within one year from the date of the assessment, [or] (c) within one year from the date of the Tax Commissioner's final determination . . . whichever is later." *Id.* § 58.1-3984 (Cum. Supp. 2003).

317. Act of May 1, 2003, ch. 1036, 2003 Va. Acts ___ (codified as amended at VA. CODE ANN. § 58.1-3374 (Cum. Supp. 2003)).

318. *Id.*

319. Act of Mar. 21, 2003, ch. 813, 2003 Va. Acts ___.

320. VA. CODE ANN. § 57-12 (Cum. Supp. 2002).