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I. INTRODUCTION

It is our hope that this article represents a balanced survey of recent developments in real property law in the Commonwealth of Virginia arising out of both significant judicial decisions and legislative acts. Like the previous real estate law article published in the 2006 *Annual Survey*,[1] this article's scope also spans two years of judicial opinions and two sessions of the Virginia General Assembly. This article covers judicial opinions from 2006 to 2008, and the 2007 and 2008 sessions of the Virginia General Assembly.

II. SIGNIFICANT JUDICIAL HOLDINGS

A. *Constitutional Claims*

1. Fourteenth Amendment Due Process Clause

In *Jones v. Flowers,* the Supreme Court of the United States considered the parameters of the United States Constitution's Fourteenth Amendment Due Process Clause as it applies to the notice requirements for a government sale of real property on the basis of delinquent taxes.[2] As the property owner no longer resided at the subject property in *Jones*, multiple delinquency no-

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1. Paul H. Davenport & Lindsey H. Dobbs, *Annual Survey of Virginia Law: Real Estate Law*, 41 U. RICH. L. REV. 257 (2006).

2. 547 U.S. 220, 223 (2006).

tices addressed to the property went unclaimed.[3] In addition to the foregoing notices, the State of Arkansas published notice in the local newspaper.[4]

Quoting from *Mullane v. Central Hanover Bank & Trust Co.*, the Court reiterated the rule that due process consists of "'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[5] After considering the facts at hand, the Court reasoned, "We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed."[6] The Court went on to outline several reasonable steps that would have been appropriate for the State to take prior to effectuating the tax sale, including following up certified letters with regular mail, posting notice on the front door, and addressing undeliverable mail to "occupant."[7] Seeming to chastise the State for its actions, the Court held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so."[8]

Chief Justice Roberts, who authored the majority opinion, asserted that the *Jones* holding did not represent a departure from its previous holdings in *Mullane* and *Dusenberry v. United States*.[9] The Chief Justice defended the *Jones* holding as merely addressing a "new wrinkle," i.e., the circumstance "when the government becomes aware prior to the taking that its attempt at notice has failed."[10] Justice Thomas penned a lengthy dissent, focusing largely on the State's interest in efficiently managing its administrative system, and characterizing the majority's reason-

3. *Id.* at 223–24.

4. *Id.* at 224.

5. *Id.* at 226 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

6. *Id.* at 229.

7. *Id.* at 234–35.

8. *Id.* at 225.

9. *Id.* at 238 (citing Dusenberry v. United States, 534 U.S. 161, 171 (2002); *Mullane*, 339 U.S. at 315)).

10. *Id.* at 227.

able steps as "constitutionally unnecessary . . . burdensome, impractical, and no more likely to effect notice than the methods actually employed by the State."[11] Apparently having little sympathy for the property owner's plight, Justice Thomas reasoned that

> Arkansas was free to "indulge the assumption" that [the property owner] had either provided the state taxing authority with a correct and up-to-date mailing address—as required by state law—"or that he . . . left some caretaker under a duty to let him know that [his property was] being jeopardized."[12]

2. Fourth Amendment Protection Against Unreasonable Seizures

In *Presley v. City of Charlottesville*, the United States Court of Appeals for the Fourth Circuit sought to determine whether a landowner could bring a claim under the Fourth Amendment to the U.S. Constitution on the basis of an unreasonable seizure.[13] The parties charged with the purported constitutional rights violation were the city of Charlottesville, Virginia, and the Rivanna Trails Foundation.[14] Together, they published and distributed a trail map depicting a public trail through the landowner's private property, which they continued to distribute even after learning that a trail depicted on the map crossed over the private property.[15] Although the city and the foundation endeavored to acquire an easement for the trail from the private property owner, Presley refused to grant the easement.[16] She then took measures, such as installing razor wire, to deter trespassing.[17] In response, the city revised a local ordinance "to prohibit Presley's protective measures" and then criminally prosecuted her for the violation.[18]

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11. *Id.* at 246 (Thomas, J., dissenting).
12. *Id.* at 242–43 (quoting *Mullane*, 339 U.S. at 316).
13. 464 F.3d 480, 482–83 (4th Cir. 2006).
14. *Id.* at 482.
15. *Id.*
16. *Id.*
17. *Id.* at 483.
18. *Id.*

Presley then brought suit claiming an unlawful seizure.[19] The district court dismissed her unreasonable seizure claim, citing a two-fold basis: (1) failure to state a claim, and (2) lack of a complete deprivation of possessory property interests.[20] To begin, the Fourth Circuit analyzed the interplay between the Fourth Amendment's protection against seizure and the Fifth Amendment's prohibition against takings, it ultimately determined that Presley's possible additional takings claim did not foreclose her unreasonable seizure claim.[21] The Fourth Circuit also disagreed with the lower court's complete deprivation requirement, contending instead that "a deprivation need not be [that] severe to constitute a seizure subject to constitutional protections."[22] On the contrary, the Fourth Circuit cited the Supreme Court of the United States for the propositions that the Fourth Amendment extends to temporary or partial seizures and that the determinative question is whether "'there is some meaningful interference with an individual's possessory interests in that property.'"[23]

Considering the facts, the court was persuaded that the "regular presence of a veritable army of trespassers who freely and regularly traverse her yard, littering, making noise, damaging her land, and occasionally even camping overnight" constituted sufficiently "'meaningful interference.'"[24] Relying heavily on *Skinner v. Railway Labor Executives' Ass'n*,[25] in which the governmental entity "'did more than adopt a passive attitude toward the underlying private conduct,'" the Fourth Circuit was not deterred by the fact that the interference was the result of private individuals, and the court attributed the conduct of the private citizens to the governmental entities.[26]

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19. *Id.*
20. *Id.* at 484, 487.
21. *Id.* at 484–87.
22. *Id.* at 487.
23. *Id.* (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).
24. *Id.*
25. 489 U.S. 602 (1989).
26. *Presley*, 464 F.3d at 487–88 (quoting *Skinner*, 489 U.S. at 615).

B. *Eminent Domain*

In *Commonwealth Transportation Commissioner v. Target Corp.*, the Supreme Court of Virginia declined to expand the scope of damages available in conjunction with condemnation proceedings.[27] The Commissioner condemned a portion of the property owner's parcel for the purpose of building a public road.[28] The property owner, a "big box" retailer in Northern Virginia, sought $4,600,000 in damages to the residue of the parcel citing a "loss of visibility" resulting from a change in the traffic pattern and the construction of privacy barriers.[29] The lower court awarded the retailer $175,100 in compensation for the condemned portion of property and over $3,000,000 in damages attributable to the residue.[30]

On appeal, the supreme court affirmed the judgment of the lower court.[31] The court cited procedural grounds for its holding and expressly qualified its ruling by noting: "We observe, however, that we do not decide whether a landowner, whose real property is the subject of a condemnation proceeding, may recover damages for loss of visibility to the residue of the real property. This issue remains undecided in this Commonwealth."[32] Notwithstanding the foregoing caveat, it may be telling that the *Target* Court declined the opportunity to set aside the damage award as excessive.[33] The court concluded that the Commissioner "failed to establish that the report of the jurors is so excessive as to show prejudice or corruption."[34]

C. *Nuisance*

1. Remedies

In a case relevant to lawyers and laymen alike, *Fancher v. Fagella*, the Supreme Court of Virginia reconsidered the availability

27. 274 Va. 341, 353–54, 650 S.E.2d 92, 99 (2007).
28. *Id.* at 344, 650 S.E.2d at 94.
29. *Id.* at 345–46, 650 S.E.2d at 94–95.
30. *Id.* at 344, 650 S.E.2d at 94.
31. *Id.* at 353, 650 S.E.2d at 99.
32. *Id.* at 353–54, 650 S.E.2d at 99.
33. *Id.* at 353, 650 S.E.2d at 98.
34. *Id.*, 650 S.E.2d at 99.

of injunctive relief when a property owner alleges nuisance based on the intrusion of a neighbor's tree.[35] In *Fancher*, the complaining property owner sought to compel the removal of his neighbor's tree, contending that the tree's root system had damaged a retaining wall, patio, and his home's foundation, and that the tree's branches had damaged his roof and gutters.[36] Though he exercised self-help by removing the roots and branches, they continued to grow back.[37]

The supreme court took the opportunity to reverse its long-standing rule of law from *Smith v. Holt*,[38] known as the "Virginia Rule."[39] Under the Virginia Rule, "intrusion[s] of roots and branches from a neighbor's plantings which [are] 'not noxious in [their] nature' and [have] caused no 'sensible injury' [are] not actionable at law, the plaintiff being limited to his right of self-help."[40] Abandoning the Virginia Rule, the supreme court reasoned that "continued reliance on the distinction between plants that are 'noxious,' and those that are not, imposes an unworkable standard for determining the rights of neighboring landowners."[41]

The *Fancher* Court considered, but ultimately rejected, both the "Massachusetts Rule" and the "Restatement Rule."[42] Under the Massachusetts Rule, "a landowner's right to protect his property from the encroaching boughs and roots of a neighbor's tree is limited to self-help, i.e., cutting off the branches and roots at the point they invade his property."[43] Similarly, the Restatement Rule "imposes an obligation on a landowner to control vegetation that encroaches upon adjoining land if the encroaching vegetation is 'artificial,' i.e., planted or maintained by a person, but not if the encroaching vegetation is 'natural.'"[44] Instead, the supreme court adopted the "Hawaii Rule," which provides:

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35. 274 Va. 549, 552, 650 S.E.2d 519, 520 (2007).
36. *Id.*
37. *Id.*
38. 174 Va. 213, 5 S.E.2d 492 (1939).
39. *See Fancher*, 274 Va. 555–56, 650 S.E.2d at 522.
40. *Id.* at 554, 650 S.E.2d at 521 (quoting *Smith*, 174 Va. at 219–20, 5 S.E.2d at 495).
41. *Id.* at 555, 650 S.E.2d at 522.
42. *Id.* at 554–55, 650 S.E.2d at 521–22.
43. *Id.* at 554, 650 S.E.2d at 521.
44. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 839, 840 (1979)).

> [E]ncroaching trees and plants are not nuisances merely because they cast shade, drop leaves, flowers, or fruit, or just because they happen to encroach upon adjoining property either above or below the ground. However, encroaching trees and plants may be regarded as a nuisance when they cause actual harm or pose an imminent danger of actual harm to adjoining property. If so, the owner of the tree or plant may be held responsible for harm caused to [adjoining property], and may also be required to cut back the encroaching branches or roots, assuming the encroaching vegetation constitutes a nuisance. We do not, however, alter existing . . . law that the adjoining landowner may, at his own expense, cut away the encroaching vegetation to the property line whether or not the encroaching vegetation constitutes a nuisance or is otherwise causing harm or possible harm to the adjoining property. Thus, the law of self-help remains intact . . . .[45]

The supreme court therefore remanded the case to the trial court to consider whether equitable relief was appropriate in light of its new rule of law.[46]

2. Clean Hands Doctrine

In *Cline v. Berg*, the Supreme Court of Virginia considered the application of the "clean hands" doctrine in regard to a claim for nuisance based upon the erection of a 32-foot high, 200-foot long fence.[47] The neighboring parties in *Cline* had a history of disagreements.[48] Prior to the fence's construction, Berg, the party seeking to establish the fence as a nuisance, installed flood lights described as "'someone having their high beams on their car shining them towards the house,'" as well as surveillance cameras which captured the Clines' movements and interfered with their television reception.[49] In a series of letters from their attorney, the Clines formally requested that Berg redirect the lights and cameras.[50] Upon Berg's refusal, they constructed the fence in order to deflect Berg's various installations.[51] Siding with Berg, the circuit court characterized the fence as "'an ugly scar on a beauti-

45. *Id.* at 555–56, 650 S.E.2d at 522 (quoting Lane v. W.J. Curry & Sons, 92 S.W.3d 355, 364 (Tenn. 2002)).

46. *Id.* at 557, 650 S.E.2d at 523.

47. 273 Va. 142, 143–44, 639 S.E.2d 231, 231 (2007).

48. *Id.* at 144, 639 S.E.2d at 231–32.

49. *Id.*, 639 S.E.2d at 232.

50. *Id.* at 145, 639 S.E.2d at 232.

51. *Id.*, 639 S.E.2d at 232–33.

ful area,'" concluded that it was a private nuisance, and ordered its removal.[52]

The Clines argued on appeal that the circuit court had abused its discretion by failing to apply the doctrine of clean hands.[53] The supreme court described the doctrine as "'an ancient maxim of equity courts,'" which provides that "'[h]e who comes into equity must come with clean hands.'"[54] The rationale behind the doctrine is that:

> "[T]he complainant seeking equitable relief must not himself have been guilty of any inequitable or wrongful conduct with respect to the transaction or subject matter sued on. Equity will not give relief to one seeking to restrain or enjoin a tortious act where he has himself been guilty of fraud, illegality, tortious conduct or the like in respect of the same matter in litigation."[55]

Furthermore, "[a]pplication of the doctrine turns upon the facts of each particular case and is therefore left to the sound discretion of the fact finder."[56] In light of the circuit court's finding that the fence would not have been erected but for the conduct of Berg, the supreme court found that the circuit court abused its discretion in refusing to apply the doctrine.[57] The *Cline* Court further rejected Berg's contention that the application of the doctrine in this instance would be inequitable or violate public policy, noting that "[a] court of equity 'will not relieve against conditions brought about by the improper conduct of the party seeking relief.'"[58] Whether the fence was a nuisance was irrelevant to the supreme court because "Berg was not 'free from reproach in his conduct.'"[59]

D. *Zoning*

In *Goyonaga v. Board of Zoning Appeals*, the Supreme Court of Virginia considered whether the prior grant of a variance as to

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52. *Id.* at 146–47, 639 S.E.2d at 233.

53. *Id.* at 147, 639 S.E.2d at 233.

54. *Id.* (quoting Richards v. Musselman, 221 Va. 181, 185 & n.1, 267 S.E.2d 164, 166 & n.1 (1980)).

55. *Id.*, 639 S.E.2d at 233–34 (quoting *Richards*, 221 Va. at 185 n.1, 267 S.E.2d at 166–67 n.1).

56. *Id.* at 148, 639 S.E.2d at 234 (quoting Wiglesworth v. Taylor, 239 Va. 603, 608, 391 S.E.2d 299, 303 (1990)).

57. *Id.*

58. *Id.* (quoting Wilson v. Wall, 99 Va. 353, 356, 38 S.E. 181, 182 (1901)).

59. *Id.* (quoting McNeir v. McNeir, 178 Va. 285, 290, 16 S.E.2d 632 633 (1941)).

nonconforming features of a building renders the building in conformity for other purposes of the ordinance.[60] The landowner's lot, created prior to the enactment of the current zoning ordinance, did not comply with the width and total area requirements of the current ordinance.[61] Similarly, the home situated on the lot, built prior to the enactment of the current ordinance, did not comply with the setback requirements.[62] Both of the nonconformities were deemed to be prior, lawful, nonconforming features.[63] The landowner sought to construct an addition to the home pursuant to a provision of the zoning ordinance that permitted structural additions to nonconforming structures so long as "'[n]o portion of the addition would be closer to a front or side lot line than the existing structure.'"[64] The homeowner's proposed addition would not have reduced the existing, nonconforming setback yardage; the addition would, however, have resulted in a total lot coverage in excess of that permitted by the ordinance.[65]

The supreme court concluded that a variance for certain aspects of a zoning ordinance does not exempt the recipient landowner from compliance with aspects of the ordinance that are not expressly addressed by the variance.[66] Quoting prior supreme court rulings, the *Goyonaga* court reasserted that "'[v]ariances exist to relieve property owners from unnecessary or unreasonable hardship resulting from strict application of zoning provisions.'"[67] The court further explained that "assertion[s] that the variance 'establish[ed] new zoning regulations specific to this property' mischaracterize[ ] the purpose and function of a variance."[68] The supreme court therefore upheld the lower court's ruling that the Board of Zoning Appeals had not erred.[69]

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60. 275 Va. 232, 235–36, 657 S.E.2d 153, 155 (2008).

61. *Id.* at 236, 657 S.E.2d at 155.

62. *Id.*

63. *See id.*

64. *Id.* at 236–37, 657 S.E.2d at 155 (quoting FALLS CHURCH, VA., CODE § 38-6(c)(3) (Supp. 2006)).

65. *Id.* at 237, 657 S.E.2d at 155–56.

66. *Id.* at 242, 657 S.E.2d at 158.

67. *Id.* at 241, 657 S.E.2d at 158 (quoting Adams Outdoor Adver., Inc. v. Bd. of Zoning Appeals, 261 Va. 407, 415, 544 S.E.2d 315, 319 (2001)) (alteration in original).

68. *Id.*

69. *Id.* at 245, 657 S.E.2d at 160–61.

E. *Taxation*

In *Keswick Club, L.P. v. County of Albemarle,* a private recreational club challenged the assessment of its property, which included golf, swimming, spa, tennis, and exercise facilities.[70] In *Keswick*, the Supreme Court of Virginia noted that the Constitution of Virginia requires taxation of real property to be based on a fair-market-value assessment.[71] The supreme court defined fair market value as the "sale price when offered for sale 'by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it.'"[72] A landowner seeking relief from a purportedly excessive assessment must show that the assessor's valuation is greater than fair market value.[73]

The *Keswick* Court noted that there are three recognized valuation approaches available for consideration by taxing authorities: the cost approach, the income approach, and the sales approach.[74] According to the court:

> Each of these approaches utilizes different characteristics of a property to estimate fair market value, and each analyzes different elements of the property which would likely affect the price a potential buyer would be willing to pay for the property on the open market. Ideally, an appraisal should, if possible, derive its final determination of a property's value using all three approaches in order to maximize the likelihood that the valuation accurately reflects the property's fair market value.[75]

Notwithstanding that a composite of the three approaches is "ideal," the supreme court conceded that "a taxing authority may determine that the use of one or more of these approaches is not feasible."[76] In such cases, the court affords a presumption of validity to the valuation "so long as the taxing authority 'consider[s] and properly reject[s]' the other valuation methods."[77] An assessment is not entitled to such a presumption of validity, howev-

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70. 273 Va. 128, 132, 639 S.E.2d 243, 244–45 (2007).

71. *Id.* at 136, 639 S.E.2d at 247.

72. *Id.* (quoting Tuckahoe Woman's Club v. City of Richmond, 199 Va. 734, 737, 101 S.E.2d 571, 574 (1958)).

73. *Id.*

74. *Id.* at 137, 639 S.E.2d at 248.

75. *Id.*

76. *Id.*

77. *Id.* (quoting Bd. of Supervisors v. HCA Health Servs. of Va., Inc., 260 Va. 317, 330, 535 S.E.2d 163, 170 (2000)).

er, when the assessor "fail[s] to make an 'effort to acquire the data necessary to perform appraisals' based on the other approaches."[78] As a result, the taxpayer challenging the assessment bears a lower burden and must merely show that the assessment was erroneous.[79]

The *Keswick* Court found that the taxing authority's "categorical application of the cost approach to the valuation of all golf courses resulted in a failure by the county to consider and properly reject the income and sales approaches before solely utilizing the cost approach in assessing the fair market value of Keswick Club."[80] Noting that the assessor "did not attempt to obtain the data necessary to perform appraisals based on the income and sales approaches," the supreme court sided with the club and reversed and remanded the case for application of the "less stringent" standard of review.[81]

F. *Prescription*

In *Johnson v. Debusk Farm, Inc.*, whether a prescriptive easement existed and whether a purchaser of the servient tract had notice of the same were at issue.[82] In addition to challenging the easement, the servient tract owner, who had recently acquired the property, filed a cross-bill against her predecessor in interest citing breach of the general warranty covenant in her vesting deed.[83] The lower court determined that a prescriptive easement had been properly established and, in dismissing the cross-bill, deemed the servient tract owner to have been on notice of the easement.[84]

As the Supreme Court of Virginia recently reinforced in *Amstutz v. Everett Jones Lumber Corp.*, in order to establish a prescriptive easement, the claimant must prove by clear and convincing evidence that his use was "'adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land over which it passes,

78. *Id.* (quoting *HCA Health Servs.*, 260 Va. at 330, 535 S.E.2d at 170).
79. *Id.* at 141, 639 S.E.2d at 250.
80. *Id.* at 140, 639 S.E.2d at 250.
81. *Id.* at 140–41, 639 S.E.2d at 250.
82. 272 Va. 726, 727, 636 S.E.2d 388, 389 (2006).
83. *Id.* at 727–28, 636 S.E.2d at 389.
84. *Id.* at 728, 636 S.E.2d at 389.

and that the use has continued for at least 20 years.'"[85] Affording the trial court's decision great deference, the *Johnson* Court turned to the evidence, which it reviewed in the light most favorable to the party seeking the easement.[86] In *Johnson*, the facts revealed at the trial level showed that the dominant tract would be "virtually land-locked" but for the right-of-way at issue, and further that the right-of-way had been used by the dominant tract in excess of thirty years.[87] In fact, the servient tract owner testified to having observed the right-of-way during her property inspection prior to purchase.[88] In light of the foregoing facts, the *Johnson* Court affirmed the finding of the trial court because it was supported by the evidence and was not plainly wrong.[89] The supreme court also noted that, under the trial court's findings, the elements of a prescriptive easement had been satisfied approximately thirteen years prior to the current servient owner's acquisition of her property.[90]

G. *Owners' Associations*

1. Standing

In *Westlake Properties, Inc. v. Westlake Pointe Property Owners Ass'n, Inc.*, the Supreme Court of Virginia affirmed the trial court's holding that an owners' association had standing to file suit against the property developer and that individual property owners comprising the association were not requisite parties to the suit.[91] In *Westlake*, a townhome owners' association brought suit in conjunction with a "catastrophic failure" of the property's septic system.[92] The developer's declaration of covenants, conditions, and restrictions imposed an obligation on the association to maintain and repair the septic system.[93] The association alleged, inter alia, that the developer was negligent in constructing the

85. 268 Va. 551, 559, 604 S.E.2d 437, 441 (2004) (quoting Martin v. Moore, 263 Va. 640, 645, 561 S.E.2d 672, 675 (2002)); *see also Johnson*, 272 Va. at 730, 636 S.E.2d at 391.

86. *Johnson*, 272 Va. at 730, 636 S.E.2d at 390.

87. *Id.* at 728, 636 S.E.2d at 389–90.

88. *Id.* at 729, 636 S.E.2d at 390.

89. *Id.* at 731, 636 S.E.2d at 391.

90. *Id.*

91. *See* 273 Va. 107, 122, 639 S.E.2d 257, 266 (2007).

92. *Id.* at 114–15, 639 S.E.2d at 261–62.

93. *Id.* at 111–12, 639 S.E.2d at 260.

septic system and breached both contract and warranty.[94] In response, the developer argued that the association lacked standing because the individual townhome owners owned the septic system.[95]

The supreme court began its analysis with well-established case law. Pursuant to *Harbor Cruises, Inc. v. State Corp. Commission,* a party must possess "an immediate, pecuniary, and substantial interest in the litigation" to have standing.[96] The *Westlake* Court easily found that the foregoing standing requirement was met, stating that "even though the Association did not own the real property, the damage caused to the septic system by the erosion of the slope injured the Association."[97] The supreme court supported its finding by stating:

> It is clear . . . that the Association did not own the real property . . . where the majority of the common fixtures that made up the original septic system were located. . . . [I]t is also beyond dispute that the Association owned, and was the party legally responsible for the maintenance and repair of, the fixtures of the septic system that served the entire development. [The developer's] assertion that the individual property owners had the primary responsibility to maintain the septic system as a whole is simply contrary to clear and unambiguous express provisions of the pertinent recorded documents which require the individual property owners to maintain their individual sewer lines between their townhomes and the common septic system, but places responsibility for maintenance and repair of the common fixtures . . . exclusively with the Association.[98]

Siding further with the Association, the supreme court rejected the developer's contention that the individual townhome owners were requisite parties.[99] The *Westlake* Court determined that, although the individual property owners within the association may have also had claims against the developer, the association's claims "neither implicated nor imperiled any claim" on behalf of those individual property owners.[100]

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94. *See id.* at 115, 639 S.E.2d at 262.

95. *Id.*

96. 219 Va. 675, 676, 250 S.E.2d 347, 348 (1979); *see also Westlake*, 273 Va. at 120, 639 S.E.2d at 265.

97. *Westlake*, 273 Va. at 121, 639 S.E.2d at 265.

98. *Id.* at 120–21, 639 S.E.2d at 265.

99. *Id.* at 122, 639 S.E.2d at 266.

100. *Id.*

2. Property Owners' Association Act Qualification Requirements

Dogwood Valley Citizens Ass'n v. Shifflett provided the Supreme Court of Virginia with the opportunity to clarify the qualification requirements for owners' associations set forth in the Property Owners' Association Act ("POAA").[101] The association at issue in *Dogwood* purported to levy special assessments against property owners and thereafter filed warrants in debt against those who did not pay the assessment.[102] In their defense, the allegedly delinquent property owners contended that the association was not properly qualified under the POAA.[103]

According to the POAA, a "property owners' association" is defined as "an incorporated or unincorporated entity upon which responsibilities are imposed and to which authority is granted in the declaration."[104] The supreme court explained that "[q]ualification as a property owners' association under the POAA requires that a declaration recorded in the land records where the development is located impose on an association both the power to assess fees for road and common facilities maintenance and the duty to perform such maintenance."[105] In *Dogwood*, no such declaration was recorded; however, the association argued that filing articles of incorporation and bylaws in the land records was sufficient for qualification purposes and that the assessment was therefore justified.[106]

The supreme court disagreed: "We reject the [association's] argument that the plain language of the definition of 'declaration' includes instruments such as articles of incorporation and bylaws if such documents are filed in the appropriate land records and create either certain assessment authority or maintenance duties for the property owners' association."[107] In providing the rationale for its conclusion, the supreme court noted that the POAA

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101. 275 Va. 197, 200, 654 S.E.2d 894, 895 (2008); *see also* VA. CODE ANN. §§ 55-508 to -516.2 (Repl. Vol. 2007 & Supp. 2008).

102. *Dogwood*, 275 Va. at 201, 654 S.E.2d at 896.

103. *See id.*

104. VA. CODE ANN. § 55-509 (Supp. 2008).

105. *Dogwood*, 275 Va. at 200, 654 S.E.2d at 895 (citing Anderson v. Lake Arrowhead Civic Ass'n, 253 Va. 264, 271–72, 483 S.E.2d 209, 213 (1997)).

106. *Id.* at 202, 654 S.E.2d at 896.

107. *Id.*

"allows unilateral action in only limited circumstances"[108] and that the association's proposed interpretation

> would allow a property owners' association to acquire the right to issue special assessments under the POAA merely by filing in the appropriate land records a document, regardless of its nature, stating that the association has the authority to assess property owners for maintenance of common areas and the responsibility to maintain those areas.[109]

H. *Co-Tenancy*

In *Daly v. Shepherd*, the Supreme Court of Virginia added color to Virginia Code section 8.01-31, which provides for an "accounting in equity . . . by one . . . tenant in common . . . for receiving more than comes to his just share or proportion."[110] In the context of a suit for partition, the *Daly* Court considered one co-tenant's claim for the fair market rental value based upon her co-tenant's alleged "sole and exclusive" occupancy of the property.[111] The facts revealed in the lower court showed that the non-occupying co-tenant declined to move into the co-owned property and relocated to another state.[112] The occupying co-tenant ultimately brought a suit for partition so as to own the entire interest in the property.[113]

The supreme court set forth a new two-prong inquiry for determining whether a non-occupying co-tenant is entitled to receive rent from an occupying co-tenant: (1) "[I]s the property amenable to co-occupation?"; and (2) "[W]as there an exclusion or ouster of the non-occupying co-tenant?"[114] The *Daly* Court answered the first question in the affirmative, citing the nature of the property—a residence with multiple bedrooms—as "amenable to co-occupation."[115] The court went on to find that there had been no ouster, but rather a "choice" on behalf of the non-

108. *Id.* at 204, 654 S.E.2d at 897.
109. *Id.* at 203, 654 S.E.2d at 897.
110. 274 Va. 270, 273, 645 S.E.2d 485, 486 (2007) (quoting VA. CODE ANN. § 8.01-31 (Repl. Vol. 2007 & Supp. 2008)).
111. *Id.* at 271–72, 645 S.E.2d at 485–86.
112. *Id.* at 272, 645 S.E.2d at 486.
113. *Id.*
114. *Id.* at 274, 645 S.E.2d at 487.
115. *Id.*

occupying co-tenant not to inhabit the residence.[116] As a result of the application of its new two-prong test, the supreme court affirmed the trial court's denial of fair market rent from the occupying co-tenant.[117]

I. *Landlord/Tenant*

Isbell v. Commercial Investment Associates presented the Supreme Court of Virginia with the issue of whether the Virginia Residential Landlord and Tenant Act ("VRLTA") abrogates the common-law rule that a landlord has no responsibility to maintain any portion of leased premises which are in a tenant's exclusive control.[118] The *Isbell* Court outlined the "well-settled" common-law rule:

> Where the right of possession and enjoyment of the leased premises passes to the lessee, the cases are practically agreed that, in the absence of concealment or fraud by the landlord as to some defect in the premises, known to him and unknown to the tenant, the tenant takes the premises in whatever condition they may be in, thus assuming all risk of personal injury from defects therein.[119]

After falling down the stairs in his apartment, the *Isbell* tenant sought to recover against the landlord under a negligence theory for failure to inspect and maintain the staircase.[120] The tenant advanced the argument that a statutory cause of action was created by the VRLTA's provisions, which permit tenants

> to recover damages for personal injuries sustained as a result of a landlord's violation of the statutory duties to "[c]omply with the requirements of applicable building and housing codes materially affecting health and safety" and to "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition."[121]

The supreme court concluded:

> [T]he General Assembly did not plainly manifest an intention, either through express language or by necessary implication, to abrogate

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116. *Id.* at 274–75, 645 S.E.2d at 487.

117. *See id.* at 275, 645 S.E.2d at 487.

118. 273 Va. 605, 609, 644 S.E.2d 72, 73 (2007).

119. *Id.* at 611, 644 S.E.2d at 74 (quoting Caudill v. Gibson Fuel Co., 185 Va. 233, 239–40, 38 S.E.2d 465, 469 (1946)).

120. *Id.* at 609, 644 S.E.2d at 73.

121. *Id.* at 612, 644 S.E.2d at 74 (quoting VA. CODE ANN. § 55.248-13(A)(1)–(2) (Supp. 2008)).

> the common law and make a landlord liable in tort for a tenant's personal injuries sustained on leased premises within the tenant's control and possession as a result of the landlord's breach of duties imposed by the [VRLTA].[122]

The court explained that "[i]nstead, the Act provides a comprehensive scheme of landlords' and tenants' contractual rights and remedies."[123] As a result, the common-law rule controlled, and the supreme court affirmed the trial court's grant of summary judgment in favor of the landlord.[124]

J. *Contracts*

In *Boots, Inc. v. Singh,* the Supreme Court of Virginia clarified the rule for determining whether a liquidated damages clause in a contract is invalid.[125] The *Boots* parties entered into a real estate purchase and sale agreement that was expressly contingent upon the purchaser obtaining financing for the acquisition.[126] The purchase agreement further provided that the earnest money deposit would become non-refundable if the purchaser failed to terminate the contract by the expiration of the financing contingency period.[127] Despite an extension of the contingency period, the contract purchaser neither timely obtained proof of financing nor affirmatively terminated the contract.[128] The seller retained the purchaser's earnest money deposit as liquidated damages.[129] By the time the purchaser arranged for financing months later, the seller had sold the property to a third party.[130] Taking into account the forfeited deposit and the proceeds received pursuant to the third-party sale, the seller made a profit above the original purchase price.[131] On this basis, the purchaser argued that the damages provision was invalid.[132] Persuaded, the circuit court

122. *Id.* at 618, 644 S.E.2d at 78.
123. *Id.*
124. *See id.*
125. 274 Va. 513, 515, 649 S.E.2d 695, 696 (2007).
126. *Id.*
127. *Id.*
128. *Id.* at 515–16, 649 S.E.2d at 696–97.
129. *See id.* at 516, 649 S.E.2d at 697.
130. *Id.*
131. *See id.* at 517, 649 S.E.2d at 697–98.
132. *See id.*, 649 S.E.2d at 698.

invalidated the liquidated damages provision as an "impermissible penalty or forfeiture."[133]

The supreme court reversed and remanded the case, directing the lower court to award the deposit to the seller.[134] Emphasizing the timing aspects of the existing rule of law, the *Boots* court clarified that "a liquidated damages clause is invalid only when the actual damages contemplated *at the time of the agreement* are shown to be certain and not difficult to determine or the stipulated amount is out of all proportion to the actual damages."[135] The purchaser in *Boots* neglected to present any evidence to indicate that the deposit and probable loss were disproportionate at the time of contract execution.[136] In dicta, the supreme court made reference to its previous enforcement of liquidated damages clauses providing for 4.6% and 10% of the purchase price, noting also that the clause at issue in *Boots* required only forfeiture of the deposit, which was 3.3% of the purchase price.[137]

K. *Restrictive Covenants*

In the Supreme Court of Virginia case of *Scott v. Walker*, property owners in a residential subdivision sought to enjoin nightly and weekly rentals of a home within the subdivision.[138] Restrictive covenants recorded against the property provided that "[n]o lot shall be used except for residential purposes."[139] Although the covenants were silent as to renting, the complaining property owners argued that the phrase "'residential purposes'" implied a "'duration of time'" dimension, unambiguously prohibiting renting.[140]

After distinguishing several of its previous holdings, the supreme court found the covenant to be ambiguous:

> [The covenant] is ambiguous as to whether a residential purpose is viewed only in contradistinction to a business or commercial use;

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133. *Id.* at 516, 649 S.E.2d at 697.
134. *Id.* at 518, 649 S.E.2d at 698.
135. *Id.* (citing O'Brian v. Langley School, 256 Va. 547, 551, 507 S.E.2d 363, 365 (1998)).
136. *Id.*
137. *Id.*
138. 274 Va. 209, 212, 645 S.E.2d 278, 280 (2007).
139. *Id.* at 211, 645 S.E.2d at 280.
140. *Id.* at 213, 645 S.E.2d at 281.

> and, if not so limited, it is ambiguous both as to whether a residential purpose requires an intention to be physically present in a home for more than a transient stay and as to whether the focus of the inquiry is on the owner's use of the property or the renter's use.[141]

The supreme court then construed the ambiguous covenant "'in favor of the free use of property and against restrictions'" and concluded that the nightly and weekly rentals of the home did not violate the covenant.[142]

III. SIGNIFICANT LEGISLATIVE ACTS

A. *Eminent Domain*

The newly enacted Virginia Code section 1-219.1, entitled "Limitations on eminent domain," begins by stating: "The right to private property being a fundamental right, the General Assembly shall not pass any law whereby private property shall be taken or damaged for public uses without just compensation."[143] The new statute sets out to clarify the acceptable parameters of public use.[144] To this end, it sets forth six instances that qualify as "public uses," including those instances where:

> (i) the property is taken for the possession, ownership, occupation, and enjoyment of property by the public or a public corporation; (ii) the property is taken for construction, maintenance, or operation of public facilities by public corporations or by private entities provided that there is a written agreement with a public corporation providing for use of the facility by the public; (iii) the property is taken for the creation or functioning of any public service corporation, public service company, or railroad; (iv) the property is taken for the provision of any authorized utility service by a government utility corporation; (v) the property is taken for the elimination of blight provided that the property itself is a blighted property; or (vi) the property taken is in a redevelopment or conservation area and is abandoned or the acquisition is needed to clear title where one of the owners

141. *Id.* at 217, 645 S.E.2d at 283.

142. *Id.* at 218, 645 S.E.2d at 283 (quoting Schwarzchild v. Welborne, 186 Va. 1052, 1058, 45 S.E.2d 152, 155 (1947)).

143. VA. CODE ANN. § 1-219.1(A) (Repl. Vol. 2008). Note that this section was originally added as Virginia Code section 1-237.1 by Act of Apr. 4, 2007, chs. 882, 901, 926, 2007 Va. Acts 2392–93, 2483–84, 2597–98, but was renumbered as section 1-219.1 pursuant to the direction of the Virginia Code Commission. *See id.*

144. *Id.*

> agrees to such acquisition or the acquisition is by agreement of all the owners.[145]

The General Assembly expressly prohibited the use of eminent domain unless "the public interest dominates the private gain and . . . the primary purpose is not private financial gain, private benefit, an increase in tax base or tax revenues, or an increase in employment."[146] Pursuant to section 1-219.1(E), property owners are entitled to challenge a proposed exercise of eminent domain on the grounds that (1) it is not actually a public use, (2) the condemning authority's purported public use is a pretext for unauthorized use, or (3) the taking violates the prohibitions established in the previously referenced subsection (D).[147]

B. *Landlord/Tenant*

Newly enacted Virginia Code section 55-225.3(A)(5) imposes new statutory maintenance obligations on landlords with respect to mold conditions.[148] Landlords are now required to maintain their dwelling units so as "to prevent the accumulation of moisture and the growth of mold and to promptly respond to any notice[ ]" from tenants alleging a mold condition.[149] A parallel obligation is imposed on tenants by section 55-225.4(8), which requires that tenants "[u]se reasonable efforts to maintain the dwelling unit and any other part of the premises that he occupies in such a condition as to prevent accumulation of moisture and the growth of mold and to promptly notify the landlord of any moisture accumulation that occurs or of any visible evidence of mold discovered . . . ."[150]

In the event of a material mold condition in a dwelling unit, newly enacted Virginia Code section 55-225.9 authorizes landlords to require that tenants temporarily vacate their units to allow for remediation.[151] This section makes landlords responsible for the costs of remediation, except where the tenant has

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145. *Id.*

146. Act of Apr. 4, 2007, chs. 882, 901, 926, 2007 Va. Acts 2392, 2483, 2597 (codified as amended at VA. CODE ANN. § 1-219.1(D) (Repl. Vol. 2008)).

147. VA. CODE ANN. § 1-219.1(E) (Repl. Vol. 2008).

148. *See id.* § 55-225.3(A)(5) (Supp. 2008).

149. *Id.*

150. *Id.* § 55-225.4(8) (Supp. 2008).

151. *Id.* § 55-225.9 (Supp. 2008).

caused the mold condition.[152] While the tenant must continue to pay rent during the period of vacation, the landlord must provide the tenant with a comparable unit or hotel room at the landlord's expense.[153]

Newly enacted section 8.01-226.12 of the Virginia Code addresses liability for damages in a tenant's personal injury or wrongful death action relating to a purported mold condition in a dwelling unit.[154] Section 8.01-226.12(B) absolves both the landlord and managing agent from liability "if the mold condition is caused solely by the negligence of the tenant."[155]

Virginia Code section 8.01-226.7 addresses liability for damages arising from another noxious condition—lead-based paint.[156] In addition to the prior-existing obligation to disclose lead-based paint information prior to a tenant's signing a lease, the 2007 amendment to subsection (B)(5) imposes an ongoing obligation on the landlord to provide tenants with written disclosure of new information acquired by the landlord throughout the term of a lease.[157]

C. *Virginia Condominium Act*

New Virginia Code section 55-79.75:2 prevents condominium unit owners' associations from prohibiting the display of the American flag by unit owners, unless prohibited by the condominium documents.[158] Notwithstanding the foregoing, this section authorizes associations to establish reasonable restrictions as to the flag's display.[159] Pursuant to changes to section 55-79.90, flag prohibitions, limitations, and restrictions contained within the condominium documents must be disclosed in the condominium's public offering statement.[160]

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152. *Id.*
153. *Id.*
154. *See id.* § 8.01-226.12 (Supp. 2008).
155. *Id.* § 8.01-226.12(B) (Supp. 2008).
156. *Id.* § 8.01-226.7 (Repl. Vol. 2007).
157. *Id.* § 8.01-226.7(B)(5) (Repl. Vol. 2007).
158. *Id.* § 55-79.75:2(A) (Repl. Vol. 2007).
159. *Id.* § 55-79.75:2(B) (Repl. Vol. 2007).
160. *Id.* § 55-79.90(A)(14) (Repl. Vol. 2007).

In the context of conversion condominiums, additions to Virginia Code section 55-79.94 permit a disabled or elderly tenant in some cases to assign his right to purchase his unit to a government agency, housing authority, or nonprofit corporation that will then lease the unit back to the tenant.[161]

In the context of commercial condominiums, revisions to section 55-79.95 dispense with the requirement that deposits be escrowed in conjunction with the sale of a unit.[162]

D. *Land Use*

The General Assembly augmented Virginia Code section 15.2-2259(A) to establish a specific approval framework for plats, site plans, and plans of development involving commercial real estate in localities with populations of more than 90,000 residents.[163] Modifications to Virginia Code section 15.2-2307 prohibit zoning ordinances from slating a building for removal solely on the grounds of zoning nonconformity, so long as (1) such building was built in accordance with a building permit and subsequently received a certificate of occupancy, or (2) the property owner has paid taxes for more than fifteen years.[164] While this section previously permitted zoning ordinances to allow damaged, nonconforming buildings to be rebuilt without a building permit, changes to this section now require that zoning ordinances expressly include this right.[165] The ordinances, however, do permit owners "to repair, rebuild, or replace [a damaged] building to eliminate or reduce . . . non-conform[ities] . . . without the need to obtain a variance" if the damage was caused by a natural disaster.[166]

Section 15.2-2286 of the Virginia Code allows zoning ordinances to impose certain penalties for a zoning violation conviction.[167] Additions to section 15.2-2286(5) increase the available

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161. *Id.* § 55-79.94(B) (Supp. 2008).

162. *See id.* § 55-79.95(B) (Supp. 2008). The revisions create exceptions for "the declarant of a condominium consisting of more than 50 units." *Id.*

163. Act of Apr. 23, 2008, ch. 855, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2259(A) (Repl. Vol. 2008)).

164. VA. CODE ANN. § 15.2-2307 (Repl. Vol. 2008).

165. *Compare id., with id.* § 15.2-2307 (Cum. Supp. 2005).

166. *Id.* § 15.2-2307 (Repl. Vol. 2008).

167. *Id.* § 15.2-2286(4), (5) (Repl. Vol. 2008).

penalties for violations of a specific subset of ordinances—those which limit the number of unrelated persons occupying a single family residential dwelling.[168]

By amending Virginia Code section 15.2-2208, the General Assembly provided zoning administrators with the authority to file a memorandum of lis pendens on the basis of zoning violations.[169] Pursuant to modifications to this section and section 8.01-268, any lis pendens expires after 180 days.[170] Unless a lis pendens filed pursuant to the new legislation describes the zoning violation, a bona fide purchaser is protected against its filing by the 2008 modifications to section 8.01-268.[171]

Sections 15.2-2244 and 15.2-2244.1 of the Virginia Code require localities to enact legislation that specifically allows subdividing a single lot for conveyance to a family member, subject to certain limitations.[172] One such limitation is that the subdivided parcel must be encumbered by a restrictive covenant prohibiting conveyance to a non-family member for a period of fifteen years.[173] Localities may now reduce or provide exceptions to the fifteen-year restriction in accordance with modifications to Virginia Code section 15.2-2244.1.[174] In addition, stepchildren are now included within the definition of family members who may take advantage of the subdivision allowance.[175]

E. *Road Maintenance*

Pursuant to the new right granted by Virginia Code section 55-50.3, a property owner who accesses his property via a public road which is no longer maintained by the locality is permitted to maintain, repair, or improve the road at his expense.[176] The maintaining property owner is not required to secure the express

168. *Id.* § 15.2-2286(5) (Repl. Vol. 2008).
169. Act of Mar. 12, 2008, ch. 583, 2008 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2208(B) (Repl. Vol. 2008)).
170. VA. CODE ANN. § 8.01-268(A) (Supp. 2008); *Id.* § 15.2-2208 (Repl. Vol. 2008).
171. *Id.* § 8.01-268(A) (Supp. 2008).
172. *Id.* §§ 15.2-2244(A), -2244.1 (Repl. Vol. 2008).
173. *Id.* § 15.2-2244.1 (Repl. Vol. 2008).
174. *Id.*
175. *Id.* § 15.2-2244 (Repl. Vol. 2008).
176. *Id.* § 55-50.3 (Supp. 2008).

permission of other property owners who may be using the implicated road.[177]

F. *Doctrine of Worthier Title*

Through the passage of Virginia Code section 55-14.1, the General Assembly of Virginia, like so many of its counterparts, officially abolished the doctrine of worthier title in the commonwealth as both a rule of law and of construction.[178] The operation of the doctrine often resulted in unexpected and unintended results.[179] In light of its abolition, inter vivos and testamentary gifts to heirs will be interpreted more predictably.

IV. CONCLUSION

Perhaps the most publicized holding of the Supreme Court of Virginia discussed in this article is *Fancher v. Fagella.* This decision will change the way disputes between neighboring property owners regarding encroaching vegetation are assessed.[180] In another significant holding, *Daly v. Shepherd*, the Supreme Court of Virginia formulated a new rule of law applicable to cotenancies.[181] An opposite holding in *Isbell v. Commercial Investment Associates*, however, would have had far more reaching implications for residential landlords in the commonwealth to maintain leased premises.[182] *Keswick Club, L.P. v. County of Albemarle* reassures property owners that courts in the commonwealth will hold taxing authorities to high standards when setting fair market value for assessment purposes.[183] *Boots v. Singh* gives drafters of liquidated damages provisions in real estate contracts comfort that they will be enforced,[184] and *Scott v. Walker* reminds practitioners to deftly draft recorded covenants to ensure clearly expressed intent.[185]

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177. *Id.*

178. *See* Act of Mar. 9, 2007, ch. 215, 2007 Va. Acts 304 (codified as amended at VA. CODE ANN. § 55-14.1 (Supp. 2008)).

179. *See, e.g.*, Braswell v. Braswell, 195 Va. 971, 975–79, 81 S.E.2d 560, 562–64 (1954).

180. *See supra* notes 35–46 and accompanying text.

181. *See supra* notes 110–17 and accompanying text.

182. *See supra* notes 118–24 and accompanying text.

183. *See supra* notes 70–81 and accompanying text.

184. *See supra* notes 125—37 and accompanying text.

185. *See supra* note 138–42 and accompanying text.

For another two years running, the Virginia General Assembly was active in passing legislation addressing land use and landlord/tenant matters. Several bills modifying the Virginia Condominium Act again made their way into law as well. In somewhat of a departure from the notion that private property is a fundamental right, the General Assembly enacted detailed eminent domain legislation to clarify the circumstances under which condemnation is proper and lawful. When coupled with the possible implications of the *Target* case, the new eminent domain statutory provisions have the potential to significantly alter condemnation proceedings in the commonwealth.

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