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## Annual Survey of Virginia Law: Property Law

Michael H. Terry

Charles H. Rothenberg

Gloria L. Freye

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## PROPERTY LAW\*

*Michael H. Terry\*\**

*Charles H. Rothenberg\*\*\**

*Gloria L. Freye\*\*\*\**

The Supreme Court of Virginia, the United States Court of Appeals for the Fourth Circuit, and the Circuit Court of Fairfax County have decided a number of important property law cases over the past year. Part I of this article discusses the most significant of those cases. Legislation passed by the Virginia General Assembly with respect to property is discussed in Part II of this article.

### I. JUDICIAL DECISIONS

#### A. *Condominiums*

In *Nido v. Ocean Owners' Council*,<sup>1</sup> the Supreme Court of Virginia was asked to determine whether a condominium association was liable to a unit owner for damages suffered by the unit owner due to water leakage from common areas into his unit. The condominium's declaration required the association to repair the common elements,<sup>2</sup> and the condominium's bylaws stated that the council would not be liable for damage to property caused by water which may leak or flow from any portion of the common elements.<sup>3</sup> The court upheld the waiver of liability contained in the bylaws and limited the waiver's effect to the specific occurrences set forth in that section of the bylaws. The court also determined that

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\*\* Shareholder, Hirschler, Fleischer, Weinberg, Cox & Allen, Richmond, Virginia; B.A., 1978, University of Richmond; J.D., 1982, Marshall-Wythe School of Law, College of William and Mary.

\*\*\* Associate, Hirschler, Fleischer, Weinberg, Cox & Allen, Richmond, Virginia; B.A., 1984, State University of New York, College at Oneonta; J.D., 1987, T.C. Williams School of Law, University of Richmond.

\*\*\*\* Associate, Hirschler, Fleischer, Weinberg, Cox & Allen, Richmond, Virginia; B.S., 1972, Madison College; M.Ed., 1978, James Madison University; J.D., 1988, T.C. Williams School of Law, University of Richmond.

1. 237 Va. 664, 378 S.E.2d 837 (1989).

2. *Id.* at 666, 378 S.E.2d at 838.

3. *Id.* at 667, 378 S.E.2d at 838.

“[c]ontractually limiting the liability which a group may have to a member of the group, particularly for consequential damages, is not against public policy.”<sup>4</sup>

The dispositive question in *Rotonda Condominium Unit Owners Association v. Rotonda Associates*<sup>5</sup> was whether the unit owners' association had standing to initiate a suit in 1985 alleging defects in the common elements where the causes of action accrued prior to July 1, 1981.<sup>6</sup> The Supreme Court of Virginia determined that the association lacked standing to sue because representative suits on behalf of condominium owners were not permitted until July 1, 1981, when the Condominium Act was amended by section 55-79.80(b)(1) of the Code of Virginia (the “Code”).<sup>7</sup> Causes of action arising prior to that date vested solely in the individual unit owners.<sup>8</sup> The statute effected a substantive change in the law because it took the individuals' rights and transferred them to the association.<sup>9</sup> As a substantive change, the statute must be applied prospectively affecting only rights which accrue after its effective date.<sup>10</sup> The rights of the individual unit owners did not transfer to the association because the cause of action accrued prior to July 1, 1981.<sup>11</sup> Therefore, only the individual unit owners themselves had standing to bring the suit.

## B. *Contracts*

### 1. Conditions Precedent

In *Mann v. Addicott Hills Corp.*,<sup>12</sup> the Supreme Court of Virginia held that a “sale of existing residence” contingency to a sales contract containing affirmative obligations to be performed by the purchasers was a condition for the benefit of both the purchasers and the seller.<sup>13</sup> The contingency was included at the request of the purchasers for the sale of their present residence. However, for

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4. *Id.*

5. 238 Va. 85, 380 S.E.2d 876 (1989).

6. *Id.* at 86, 380 S.E.2d at 877.

7. *Id.* at 88, 380 S.E.2d at 878.

8. *Id.* at 88-9, 380 S.E.2d at 878.

9. *Id.* at 89, 380 S.E.2d at 878-79.

10. *Id.*

11. *Id.* at 90, 380 S.E.2d at 879; see *Wells v. Lorcom House Condominiums' Council*, 237 Va. 247, 254, 377 S.E.2d 381, 385 (1989) (condominium association lacked standing to sue for damage to common elements prior to amendment to section 55-79.80(b1) of the Code).

12. 238 Va. 262, 384 S.E.2d 81 (1989).

13. *Id.* at 263, 384 S.E.2d at 82.

the seller's benefit, the contingency provided that the purchasers would list their home for sale within a specific period of time, the purchasers would diligently pursue the sale of their residence, and that failure to timely list their home or to secure a contract for the sale of their home would be a default by the purchasers. Accordingly, the court affirmed the trial court's decision that the purchasers' breach of their obligations contained in the contingency provision was material. The seller was entitled to terminate the contract as a result of the breach, and the purchasers were not entitled to specific performance.<sup>14</sup>

## 2. Fraud

The trial court's decision to set aside a jury verdict in favor of the Murrays was affirmed in *Murray v. Hadid*.<sup>15</sup> The Murrays persuaded Hadid to become an investor to purchase land upon which the Murrays wanted to build and develop a townhouse project.<sup>16</sup> Relying upon Hadid's oral assurances that they would be the developers, the Murrays played a significant role in bringing Hadid together with the owner of the property and facilitating the sale of the property to Hadid.<sup>17</sup> Hadid subsequently assigned the purchase contract to a partnership, of which he was a limited partner, and retained a different developer for the project.<sup>18</sup>

The Murrays sued Hadid alleging that but for Hadid's fraud, they would have bought and developed the property and reaped the same profits as Hadid.<sup>19</sup> The trial court set aside the jury verdict in favor of the Murrays on two primary grounds: (1) The Murrays' damages were not proximately caused by Hadid's fraud, and (2) the Murrays' lost profits were too speculative.<sup>20</sup> The court unanimously agreed that the Murrays' real estate activities were illegal.<sup>21</sup> A majority of the court agreed that despite the Murrays' detrimental reliance on Hadid's misrepresentations, the Murrays failed to prove that actual damages were caused or that they lost

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14. *Id.* at 268-69, 384 S.E.2d at 85.

15. 238 Va. 722, 385 S.E.2d 898 (1989).

16. *Id.* at 725, 385 S.E.2d at 900-01.

17. *Id.* at 726, 385 S.E.2d at 901.

18. *Id.* at 727, 385 S.E.2d at 902.

19. *Id.* at 728, 385 S.E.2d at 902.

20. *Id.* A third reason for setting aside the jury verdict was that the Murrays' actions violated the real estate brokers licensing statutes. *Id.*

21. *Id.* at 729, 385 S.E.2d at 903.

certain prospective profits because of Hadid's fraud.<sup>22</sup>

### 3. Installment Sales Contracts

In *Daugherty v. Diment*,<sup>23</sup> the Supreme Court of Virginia decided whether the free assignability clause of an installment sales contract conflicted with the "due on sale" clause of a deed of trust securing payment of the amount due to the seller pursuant to the installment sales contract.<sup>24</sup> The court agreed with the trial court that there was no inconsistency between the two clauses.<sup>25</sup> The court concluded that where there are multiple documents in a business transaction, they must be construed together as a whole to ascertain the intent of the parties and that no provision should be treated as meaningless if any reasonable interpretation consistent with other provisions in the documents can be ascribed to it.<sup>26</sup>

When the assignee accepted the assignment of the rights provided by the installment sales contract, pursuant to an assignment instrument which referred to the original purchaser-assignee's obligations under the installment sales contract, the assignee became subject to the obligations of the two deeds of trust on the property, one of which contained a "due on sale" clause.<sup>27</sup> The consistency between the documents was supported by the intent of the parties: the original seller extended credit to the original purchaser but retained the right to evaluate the financial abilities of any unknown assignee and renegotiate the terms of the documents or require full payment of the note upon the sale of the property.<sup>28</sup>

### 4. Option Contracts

In *Dominion Bank, N.A. v. Wilson*,<sup>29</sup> the Court of Appeals for the Fourth Circuit determined that for the purposes of a security

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22. *Id.* at 731-32, 385 S.E.2d at 904-05. Justice Stephenson, Chief Justice Carrico and Justice Thomas dissented, stating that the Murrays' losses were not speculative and resulted from their reliance upon Hadid's misrepresentations. *Id.* at 734, 385 S.E.2d at 906. In the dissenting justices' opinion, the jury award for both compensatory and punitive damages should have been reinstated. *Id.*

23. 238 Va. 520, 385 S.E.2d 572 (1989).

24. *Id.* at 522, 385 S.E.2d at 572.

25. *Id.* at 525-26, 385 S.E.2d at 574-75.

26. *Id.* at 524, 385 S.E.2d at 574.

27. *Id.* at 525, 385 S.E.2d at 574.

28. *Id.* at 526, 385 S.E.2d at 575.

29. 867 F.2d 203 (4th Cir. 1989).

agreement, which by its terms encumbered only personal property, an interest in a real estate option contract constituted real property rather than personal property upon exercise of the option. Virginia law provides that contracts for the purchase of land or the exercise of an option to purchase land gives the purchaser an equitable interest in real estate.<sup>30</sup> The court applied this doctrine of equitable conversion to determine that Wilson's interest in the option contract, where the option had been exercised, was not subject to the bank's subsequently acquired security interest in Wilson's personal property.<sup>31</sup>

In *Landa v. Century 21 Simmons & Co.*,<sup>32</sup> the Supreme Court of Virginia interpreted language in a real estate sales contract purporting to grant the purchasers a first option to purchase property.<sup>33</sup> The purchasers closed on a seventy acre tract and by contract had a first option on a remaining tract. Subsequently, the purchasers learned that the seller had entered into a contract for the sale of the remaining tract to a third party. The purchasers instituted suit for breach of the purported option and for specific performance.<sup>34</sup>

The Supreme Court of Virginia reversed the trial court's denial of specific performance and the trial court's finding that the option was incomplete and uncertain.<sup>35</sup> The court determined that the contract provision created a first right of refusal, not an option to purchase. The contract obligated the seller to provide the purchasers with notice of an offer to purchase the property and an opportunity to elect to purchase the property on the same terms as the third party offer.<sup>36</sup>

The court relied on the language of the subject provision and the conduct of the parties characterizing the provision as a right of first refusal and not an option. Unlike an option, the language

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30. *Id.* at 205.

31. *Id.* at 206.

32. 237 Va. 374, 377 S.E.2d 416 (1989).

33. *Id.* at 378, 377 S.E.2d at 418.

34. *Id.* at 380, 377 S.E.2d at 419.

A right of first refusal is distinguished from an absolute option in that the former does not entitle the [buyer] to compel an unwilling owner to sell. Instead it requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the right of first refusal.

*Cities Serv. v. Estes*, 208 Va. 44, 47, 155 S.E.2d 59, 62 (1967).

35. *Id.* at 383, 377 S.E.2d at 421; see *Daugherty*, 238 Va. 520, 385 S.E.2d 572 (1989).

36. *Landa*, 237 Va. at 382, 377 S.E.2d at 420.

clearly did not commit the seller to sell the property. Also, notice was required to run from the seller to the purchasers. Normally, where an option has been granted, notice is required to run from the purchasers to the seller.<sup>37</sup>

The conduct of the parties also indicated that the provision created a right of first refusal for the benefit of the purchasers. For instance, when the purchasers initially filed suit, the seller sent a letter giving the purchasers an opportunity to elect to purchase the property under the same terms as contained in the third party's offer. Also, the seller provided the purchasers with a copy of the third party's contract as requested by the purchasers.<sup>38</sup>

## 5. Rescission

The Fairfax County Circuit Court case of *Frank v. Tipco Homes, Inc.*<sup>39</sup> has sent Virginia real estate attorneys scurrying to revise their contract forms. Frank entered a contract to buy a lot upon which Tipco Homes was to build a house. No closing was ever held on the subject property. The circuit court, applying section 11-2.3 of the Code, held that the contract was voidable at the buyer's option because the contract did not require completed performance within two years from the date of execution.<sup>40</sup>

*Bergmueller v. Minnick*<sup>41</sup> involved a suit brought in equity by the Bergmuellers praying for rescission of a contract for the sale of

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37. *Id.*

38. *Id.* at 379, 377 S.E.2d at 419.

39. No. 94415 (Fairfax County Cir. Ct. April 16, 1990).

40. Contracts made on and after July 1, 1977, for the sale of improved residential real estate which do not require completed performance within two years from the date of execution of the contract, shall be voidable at the option of the buyer unless such contract shall be (i) in such form as to be capable of being admitted to record under the provisions of Chapter 6 (§ 55-106 et seq.) of Title 55 of the Code of Virginia; (ii) made in duplicate and a copy capable of being admitted to record furnished to the buyer; and (iii) contain the following statement: "This contract must be recorded in the general index of the clerk's office of the circuit court of \_\_\_\_\_ (city or county in which land is located) in order to protect the buyer from claims of subsequent purchasers of, or other persons obtaining an interest in, this real estate or claims of judgment creditors, if any, of the seller." The term "improved real estate" shall be deemed to include any land within a subdivision, a plat of which subdivision has been recorded pursuant to Article 7 (§ 15.1 - 465 et seq.) of Chapter 11 of Title 15.1 or prior statutory authority.

Va. Code Ann. § 11-2.3 (Repl. Vol. 1989).

41. 238 Va. 332, 383 S.E.2d 722 (1989).

land based on an allegation of constructive fraud. In 1989, the Bergmuellers contracted to purchase land for a retirement home contingent upon satisfactory results from a percolation test to be performed prior to closing. The Bergmuellers, who resided out of state, proceeded to close relying upon the seller's real estate agent's representation that the percolation test had been performed and was satisfactory.<sup>42</sup>

No percolation test was ever performed. Instead, the real estate agent obtained a limited permit to install a sewage disposal system for a house of a certain size. The Bergmuellers were never aware that this permit existed nor that it expired twelve months after issuance.<sup>43</sup> Three years later, the Bergmuellers moved to Virginia and learned that a septic system could not be installed and the lot was not suitable for a residence.<sup>44</sup>

The Supreme Court of Virginia determined that the Bergmuellers had established all the elements of constructive fraud by clear and convincing evidence.<sup>45</sup> Furthermore, the Bergmuellers had not waived their rights to rescind the contract because they had no knowledge of the true facts, no reason to distrust the assertions of the real estate agent and no intention of waiving the contractual provision requiring satisfactory percolation test results.<sup>46</sup>

## 6. Parol Evidence

In *Anden Group v. Leesburg Joint Venture*,<sup>47</sup> the Supreme Court of Virginia was asked to determine whether a trial court properly admitted parol evidence in reaching its decision to deny specific performance. The Anden Group ("Anden") entered into two contracts with Leesburg Joint Venture ("Leesburg") for the purchase of two adjoining parcels of land. Anden also entered into an agreement to purchase property from Homet, Inc. ("Homet"). Each contract provided for feasibility periods, security deposits in different amounts and a separate purchase price for each parcel.

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42. *Id.* at 335, 383 S.E.2d at 723.

43. *Id.* at 335, 383 S.E.2d at 724.

44. *Id.* at 336, 383 S.E.2d at 724.

45. *Id.* at 337, 383 S.E.2d at 724.

46. *Id.* at 338, 383 S.E.2d at 725. A dissent suggested that the Bergmuellers should have been estopped from raising the lack of percolation test after neglecting their duty to determine the sufficiency of the percolation test for three years. *Id.* at 338-40, 383 S.E.2d at 725-26 (Whiting J., dissenting).

47. 237 Va. 453, 377 S.E.2d 452 (1989).



Anden defaulted under the second contract with Leesburg and acknowledged that it forfeited its deposit as liquidated damages. Leesburg and Homet refused to close on the other two contracts claiming that the contracts were interdependent. Anden sued for specific performance or, alternatively, damages.<sup>48</sup>

The trial court ruled that the contracts constituted one unitary contract. In reaching this decision the trial court ascertained the parties' intent from various letter agreements between the parties.<sup>49</sup> For example, the trial court relied on parol evidence that the reduction in the purchase price on one contract was acceptable to Leesburg because Leesburg had "negotiating room" under its other contract with Anden and Anden was obligated to purchase all three parcels.<sup>50</sup>

The Supreme Court of Virginia determined that the parol evidence rule prohibited the introduction of the evidence relied on by the trial court.<sup>51</sup> The parol evidence relied on by the trial court did not merely clarify ambiguous terms; the parol evidence contradicted the written document.<sup>52</sup> The reduction in the purchase price clearly applied to only one of the three contracts. Also, nothing in the contracts provided that settlement under one contract was a condition to settlement under the other contracts. In addition, the correspondence between the parties referred to the documents as separate and distinct "contracts" and treated Leesburg and Homet as separate entities. The court also noted that neither of the two sellers acting alone could effectively transfer all three parcels pursuant to the sales contracts. This evidence supported the court's conclusion that three separate contracts existed.<sup>53</sup>

## 7. Specific Performance

The sole issue considered by the court in *Hinkell v. Adams*<sup>54</sup> was whether the seller under a contract of sale was entitled to specific performance after the purchaser allegedly breached the contract of

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48. *Id.* at 455, 377 S.E.2d at 454.

49. *Id.* at 457-58, 377 S.E.2d at 454-56.

50. *Id.*; cf. *Landa v. Century 21 Simmons & Co.*, 237 Va. 374, 377 S.E.2d 416 (1989) (permitting parol evidence which clarified ambiguous terms of contract).

51. *Anden Group*, 237 Va. at 459, 377 S.E.2d at 456.

52. *Id.* at 458, 377 S.E.2d at 456.

53. *Id.* at 459, 377 S.E.2d at 456.

54. 237 Va. 635, 378 S.E.2d 621 (1989).

sale.<sup>55</sup> The purchaser contracted to purchase a thirty acre parcel of land from the seller. The contract required closing to occur on September 30, 1984, or as soon thereafter as financing could be arranged. The purchaser notified the seller that he was unable to obtain financing for the property and would be unable to settle.<sup>56</sup> After the seller brought suit for specific performance, he recorded a subdivision plat affecting the thirty acre parcel.<sup>57</sup>

The Supreme Court of Virginia held that the seller was not entitled to specific performance. The seller was unable to perform under the contract because of the recordation of the subdivision plat and its effect on the thirty acre parcel which was to be conveyed. The subdivision plat imposed easements on the parcel, in addition to setback lines and new lot lines, inconsistent with the original boundaries of the thirty acre parcel.<sup>58</sup> The court determined that the seller's recordation of the subdivision plat evidenced the seller's intent to abandon the contract.<sup>59</sup>

In *Shepherd v. Colton*,<sup>60</sup> the Supreme Court of Virginia considered whether the purchaser in a written contract for the purchase of real property was entitled to specific performance. Pursuant to a written contract, Shepherd agreed to purchase from the sellers Lot B in a proposed subdivision in Fairfax County. The instrument also granted Shepherd an option to purchase Lot A in the proposed subdivision. County approval of the proposed subdivision was a condition precedent to the sellers' obligation under the contract.<sup>61</sup> The county denied the subdivision request for Lot A but indicated that a subdivision including Lot B would be possible. However, the sellers refused to convey either lot and claimed that the contract was void.<sup>62</sup>

The court determined that the sellers' obligations to sell Lot A and Lot B were divisible. The contract set forth separate purchase prices for the two lots. Lot B was the subject of an agreement to sell and Lot A was the subject of an option granted to Shepherd.<sup>63</sup>

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55. *Id.*

56. *Id.* at 636, 378 S.E.2d at 621.

57. *Id.*

58. *Id.* at 636-37, 378 S.E.2d at 621-22.

59. *Id.* at 638, 378 S.E.2d at 622.

60. 237 Va. 537, 378 S.E.2d 828 (1989).

61. *Id.*

62. *Id.* at 539, 378 S.E.2d at 829.

63. *Id.* at 540-41, 378 S.E.2d at 830; compare *Anden Group v. Leesburg Joint Venture*, 237 Va. 453, 457-58, 377 S.E.2d 452, 454-56 (1989) (intent of parties implied from writings)

Because the sellers could have obtained subdivision approval for Lot B, the court held that the trial court erred in striking the evidence as to that lot and entering judgment for the sellers.<sup>64</sup> However, the court held that because the condition precedent relating to the sale of Lot A (i.e. subdivision approval) was not satisfied, Shepherd was not entitled to specific performance as to Lot A.<sup>65</sup>

The *Wingate v. Coombs*<sup>66</sup> decision definitely settled whether an oral partnership agreement to acquire and develop real property for profit is rendered unenforceable by the statute of frauds. Wingate and Bremner entered into an oral partnership agreement with four other individuals (the defendants) for the purpose of acquiring and developing a tract of land. Wingate and Bremner performed services with respect to contracting, acquiring and developing the tract. The parties agreed to purchase the tract and divide the profits from the sale thereof equally as partners.<sup>67</sup> Prior to the actual purchase of the tract by the partnership, the defendants notified Wingate and Bremner that Wingate and Bremner were no longer members of the partnership. Wingate and Bremner sought to enjoin the defendants from disposing of the tract and obtained a declaratory judgment confirming the validity of the partnership agreement.<sup>68</sup>

The court determined that its earlier decisions<sup>69</sup> holding that an oral partnership agreement with respect to the ownership of land was unenforceable under the statute of frauds, were overruled, *sub silentio*, by *Miller v. Ferguson*.<sup>70</sup> In *Miller*, the court adopted the majority rule set forth in *Wingate* on this question, which is that property acquired for partnership purposes is personalty.<sup>71</sup> Reaffirming the rule and applying the doctrine of *stare decisis*, the court held that the trial court had erred in concluding that the agreement was governed by, and therefore invalid under, the statute of frauds.<sup>72</sup>

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with *Shepherd*, 237 Va. 537, 540, 378 S.E.2d 828 (1989) (intent of parties derived from contractual language).

64. *Shepherd*, 237 Va. at 541, 378 S.E.2d at 830.

65. *Id.*

66. 237 Va. 501, 379 S.E.2d 304 (1989).

67. *Id.* at 503, 379 S.E.2d at 305.

68. *Id.*

69. *Henderson v. Hudson*, 15 Va. (1 Munf.) 510 (1810); *Walker v. Herring*, 62 Va (21 Gratt.) 678 (1872).

70. 107 Va. 249, 57 S.E. 649 (1907).

71. *Wingate*, 237 Va. at 507-08, 379 S.E.2d at 307.

72. *Id.* at 508, 379 S.E.2d at 307. The statute of frauds provides in pertinent part that no

### C. Deeds

*Brown v. Resort Developments*<sup>73</sup> stemmed from a suit that sought to have a deed set aside as invalid because the grantor, a seventy-two year old widow, lacked the mental capacity to understand the nature of the deed she executed.<sup>74</sup> The widow had sold four parcels of Virginia Beach real estate for a total of \$70,000 in September of 1986.<sup>75</sup> In October of 1986, the Department of Social Services of the City of Virginia Beach petitioned for guardianship of the widow and in November of 1986, a guardian was appointed. The guardian sought to have the deed set aside on the basis that the widow was incompetent at the time she executed the deed.<sup>76</sup>

The trial court held that the guardian failed to rebut the presumption that the widow was of sound mind at the time she executed the deed.<sup>77</sup> The burden was on the guardian to establish that the grantor, at the time the instrument was executed, did not have sufficient mental capacity to understand the nature of the transaction and to agree to its provisions. The Supreme Court of Virginia, reviewing the record and the commissioner's finding, acknowledged that the facts surrounding the execution of the deed are dispositive in determining mental capacity and that the testimony of witnesses present at the time of execution carries greater weight than those not present.<sup>78</sup> Those present at the closing, the grantor's attorney, the grantee's attorney and the real estate agent, all testified that the grantor understood the deed and the transaction which included the conveyance of her home.<sup>79</sup> Therefore, the court affirmed the trial court's determination that the deed was valid.<sup>80</sup>

The case of *Gant v. Gant*<sup>81</sup> involved a deed which purported to convey property to "Junius W. Gant and Helen T. Gant, his wife . . . as tenants by the entireties with the right of survivorship as at

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action on the sale of real estate may be brought unless the contract, agreement or promise of sale is in writing and signed by the party to be charged. VA. CODE ANN. § 11-2(6) (Cum. Supp. 1990).

73. 238 Va. 527, 385 S.E.2d 575 (1989).

74. *Id.* at 528, 385 S.E.2d at 576.

75. *Id.*

76. *Id.*

77. *Id.* at 529, 385 S.E.2d at 576.

78. *Id.*

79. *Id.* at 530-31, 385 S.E.2d at 577.

80. *Id.* at 532, 385 S.E.2d at 578.

81. 237 Va. 588, 379 S.E.2d 331 (1989).

common law."<sup>82</sup> At the time of the conveyance, Junius and Helen were divorced and they never remarried.<sup>83</sup> Mr. Gant died intestate survived by his ex-wife, his widow, and three daughters.<sup>84</sup> The widow and her daughter sought partition of the property pursuant to section 20-111 of the Code.<sup>85</sup>

The court rejected this contention and stated that section 20-111 does not apply to property acquired after a final divorce.<sup>86</sup> Divorced parties are not precluded from acquiring property as joint tenants with the right of survivorship.<sup>87</sup> Notwithstanding the parties' attempt to take title as tenants by the entirety, the language of the deed created a joint tenancy with the express retention of the right of survivorship.<sup>88</sup> Accordingly, the estate passed by survivorship to the ex-wife.<sup>89</sup>

The issue presented in *Poindexter v. Molton*<sup>90</sup> was how to determine the ownership interests of the parties where the property description in a deed of partition differed from the description in the simultaneously recorded plats.<sup>91</sup> The Supreme Court of Virginia employed the fundamental rule that the intent of the parties is the primary consideration when construing deeds.<sup>92</sup> Since the deed combined with the plats made the deed ambiguous, the court held that it was proper to consider parol evidence from the tax maps and from subsequent conveyances in order to resolve the ambiguity and determine the parties' intent.<sup>93</sup>

In *Williams v. Consolvo*,<sup>94</sup> the Supreme Court of Virginia applied the "general rule that payments made under a mistake of law

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82. *Id.* at 589, 379 S.E.2d at 331.

83. *Id.* at 589-90, 379 S.E.2d at 331.

84. *Id.* at 590, 379 S.E.2d at 331.

85. VA. CODE ANN. § 20-111 (Repl. Vol. 1990) provides that:

Upon the entry of a decree of divorce from the bond of matrimony . . . the right of survivorship in real or personal property title to which is vested in the parties as joint tenants or as tenants by the entirety, with survivorship as at common law, shall be extinguished, and such estate by the entirety shall thereupon be converted into a tenancy in common.

86. *Gant*, 237 Va. at 590-91, 379 S.E.2d at 332.

87. *Id.* at 592, 379 S.E.2d at 333.

88. *Id.*

89. *Id.* at 593, 379 S.E.2d at 333.

90. 237 Va. 448, 377 S.E.2d 450 (1989).

91. *Id.* at 449, 377 S.E.2d at 451.

92. *Id.* at 450, 377 S.E.2d at 452.

93. *Id.* at 451, 377 S.E.2d at 452.

94. 237 Va. 608, 379 S.E.2d 333 (1989).

are voluntary and not recoverable."<sup>95</sup> Williams had acquired certain real property which unbeknownst to him was encumbered by a deed of trust to secure repayment of a \$10,000 note. The deed of trust had been indexed improperly in the records of the clerk's office of the circuit court. The defendant law firm retained by Williams in connection with the acquisition did not discover the deed of trust during its title search. The clerk properly indexed the deed of trust approximately six months after Williams acquired the property.<sup>96</sup>

Williams learned of the deed of trust when he received a letter from counsel for the noteholder which stated payments were in arrears and foreclosure proceedings would be instituted if the debt remained unpaid. The defendant law firm made several demands upon the clerk of the circuit court to save Williams and the property harmless because the deed of trust had been misindexed. However, a notice of foreclosure was given. Williams retained a different law firm which negotiated an agreement to repay the outstanding debt and Williams subsequently made payments on the debt. Williams filed a two-count motion for judgment against the clerk for negligence in misindexing the deed of trust, and against the defendant law firm for negligence.<sup>97</sup> The defendant law firm had not advised Williams of his status as a bona fide purchaser for value and that any payments made to the noteholder by Williams would be viewed as voluntary.<sup>98</sup> However, Williams made no payment during the period when he was represented by the defendant law firm.<sup>99</sup>

The court concluded that Williams had received legal advice from a different attorney, was not at risk of losing his property and could have enjoined the threatened foreclosure proceedings.<sup>100</sup> Therefore, the trial court correctly ruled that Williams made voluntary payments to the noteholder and these payments could not be relied upon to prove damages in the suit against the clerk and the defendant law firm.<sup>101</sup>

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95. *Id.* at 614, 379 S.E.2d at 336.

96. *Id.* at 610, 379 S.E.2d at 334.

97. *Id.* at 612, 379 S.E.2d at 335.

98. *Id.* at 611, 379 S.E.2d at 335.

99. *Id.*

100. *Id.* at 615, 379 S.E.2d at 337.

101. *Id.* at 616, 379 S.E.2d at 337.

## D. Easements

### 1. Expansion of Scope of Easement

In *Walton v. Holland*,<sup>102</sup> the Supreme Court of Virginia ruled that an easement, granted for the benefit of one parcel, could not be expanded to benefit other properties owned by the grantee of the parcel because the expanded use would increase the burden on the servient estate.<sup>103</sup>

### 2. Easement by Necessity

In *American Small Business Investment Co. v. Frenzel*,<sup>104</sup> American Small Business Investment Company ("ASB") sought to establish a right-of-way by necessity from its landlocked triangular piece of Parcel A over Parcel B.<sup>105</sup>

The court found that no easement by necessity had been created.<sup>106</sup> The court said that when the common owner of Parcel A and Parcel B placed a deed of trust on Parcel A but not on Parcel B the unity of title to Parcels A and B was severed.<sup>107</sup> To establish an easement by necessity, the necessity must arise at the time the common ownership is severed.<sup>108</sup> Parcel A did not need a right-of-way over Parcel B until three years later when the state condemned part of Parcel A. As the necessity did not arise at the time unity of title was severed, ASB failed to establish an easement by necessity.<sup>109</sup>

### 3. Prescriptive Easements

In *Callahan v. White*,<sup>110</sup> the Callahans sought to establish a right-of-way over land owned by the Whites and to enjoin interference with their use of the right-of-way. The Callahans asserted that the right-of-way ran from State Route 623 over the Whites' land, continued over another tract of land owned by a third party

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102. 238 Va. 687, 385 S.E.2d 609 (1989).

103. *Id.* at 690, 385 S.E.2d at 610.

104. 238 Va. 453, 383 S.E.2d 731 (1989).

105. *Id.* at 455, 383 S.E.2d at 733.

106. *Id.* at 456, 383 S.E.2d 734.

107. *Id.* at 457, 383 S.E.2d at 734.

108. *Id.*

109. *Id.*

110. 238 Va. 10, 381 S.E.2d 1 (1989).

and known as the Elmore tract, and then ran to the boundary of the Callahans' land.<sup>111</sup> The Supreme Court of Virginia affirmed the trial court's denial of a prescriptive easement over the Whites' land primarily because the use of the right-of-way was not exclusive to the Callahans.<sup>112</sup> The Callahans' use of the right-of-way depended on the right of the owner of the Elmore tract to use the right-of-way.<sup>113</sup>

In *McNeil v. Kingrey*,<sup>114</sup> a case of first impression, the Supreme Court of Virginia determined whether the owners of the servient estate or the owners of the dominant estate bear the burden of proving a change in the use of a prescriptive easement. The court placed the burden of proof on the party claiming a prescriptive easement. That party must establish that the claimants' change in use imposes no additional burden on the servient estate.<sup>115</sup>

#### E. *Eminent Domain*

In *Commonwealth Transportation Commission v. DuVal*,<sup>116</sup> a Chesterfield County condemnation case, the Supreme Court of Virginia provided guidance on the issue of valuation instructions in condemnation suits. The court decided that a landowner is not entitled to any increase in value which is caused "in whole or in part" by the project for which the land is condemned.<sup>117</sup>

The principal issue considered by the Supreme Court of Virginia in *Bartz v. Board of Supervisors*<sup>118</sup> was determining when a taking occurred. The court rejected the landowners' argument that September 3, 1986, the date the county filed the condemnation petition, was the date of the taking for purposes of determining interest due to the landowners as just compensation.<sup>119</sup> The court noted that interest is a part of just compensation only after property is taken or damaged but before the award is made available to the landowner.<sup>120</sup> The county's filing of the *lis pendens* memoranda

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111. *Id.* at 12, 381 S.E.2d at 2.

112. *Id.* at 13, 381 S.E.2d at 3.

113. *Id.*

114. 237 Va. 400, 377 S.E.2d 430 (1989).

115. *Id.* at 406, 377 S.E.2d at 433.

116. 238 Va. 679, 686, 385 S.E.2d 605, 608 (1989).

117. *Id.* at 685, 385 S.E.2d at 608-09.

118. 237 Va. 669, 379 S.E.2d 356 (1989).

119. *Id.* at 673, 379 S.E.2d at 358; *see* Va. Const. Art. I, § 11 (just compensation must be provided when property is taken or damaged for public uses).

120. *Id.* at 675, 379 S.E.2d at 359. "A landowner is not entitled to compensation, either



and the condemnation suits did not constitute the taking. Therefore, potential diminution in property value resulting from the suits and the *lis pendens* memoranda did not constitute compensable damage to the property.<sup>121</sup> The taking occurred simultaneously with payment of the award and the passing of legal title. Therefore, the landowners were not entitled to any interest on the award.<sup>122</sup>

In the case of *East Tennessee Natural Gas Co. v. Riner*,<sup>123</sup> East Tennessee Natural Gas Company (the condemnor) sought to condemn a portion of the lands of Riner (the landowner) to construct and maintain two gas pipelines.<sup>124</sup> The landowner retained the right to use surface coal. The owner of the mineral rights to the underlying seams of coal running through the property was not a party to the condemnation proceeding.<sup>125</sup>

The commissioners heard expert testimony that the highest and best use of the property was for strip mining, a use wholly inconsistent with the maintenance of gas pipelines which would run between two seams of coal.<sup>126</sup> There was a sharp contrast in the testimony regarding the fair market value of the construction and maintenance easement and damages to the residue. The condemnor appealed the commissioners' award of \$35,000 for damages to the residue, arguing that the court erred in permitting the commissioners to consider the prospective use and value of the property if used for strip mining in determining fair market value.<sup>127</sup> The court agreed that the commissioners should have been instructed to disregard such evidence "because there was no competent evidence that the prospect of future strip mining had any effect upon the value of the landowner's interest in the residue

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included in the award or as interest, while he maintains legal title, control over and use of the property." *Id.*

121. *Id.* at 673, 379 S.E.2d at 348.

122. *Id.* at 675, 379 S.E.2d at 359. In the recent Court of Appeals for the Fourth Circuit case, *In re Knightsbridge Development Co.*, 884 F.2d 145 (4th Cir. 1989), the court established that filing a post-petition amendment to a notice of *lis pendens* does not violate the bankruptcy automatic stay provided by 11 U.S.C.S. § 362 (Law Co-op. Cum. Supp. 1990). The purpose of a *lis pendens* is to provide notice of pending litigation. An amendment to a *lis pendens* does not assert any control over the subject claim or property and has no effect on the bankruptcy estate. *Knightsbridge*, 884 F.2d at 148.

123. 239 Va. 94, 387 S.E.2d 476 (1990).

124. *Id.* at 96, 387 S.E.2d at 477.

125. *Id.*

126. *Id.* at 96-97, 387 S.E.2d at 477-78.

127. *Id.*

property immediately before the taking."<sup>128</sup>

#### F. *Landlord and Tenant*

In *Westminster Investing Corp. v. Lamps Unlimited*,<sup>129</sup> the Supreme Court of Virginia was asked to determine whether the statute of limitations barred a tenant's cause of action for breach of a lease. During lease negotiations, the landlord represented that it would include standard hours of operation in each lease with tenants at the shopping center. This representation induced Lamps Unlimited to enter into the lease.<sup>130</sup> The landlord never enforced the standard hours of operation. Lamps Unlimited terminated the lease and vacated its premises six years later, and filed suit nine years after the lease was executed alleging that the landlord breached its obligations under the lease.<sup>131</sup>

The tenant, in an effort to avoid the effect of the five-year statute of limitations, adopted a theory of continuous breach. Under this theory, the landlord's continuous breach of the lease constituted multiple defaults giving rise to a new cause of action against the landlord each day that it failed to enforce the hours of operation standard.<sup>132</sup> The court concluded that the five year statute of limitations for written contracts<sup>133</sup> began to run immediately upon the landlord's failure to enforce the standard hours of operation in the first year of the lease.<sup>134</sup> Therefore, the tenant's suit was barred because it was filed three years after the statute had run.

The construction of a typewritten addition to a shopping center lease was at issue in *Great Falls Hardware Co. v. South Lakes Village Center*.<sup>135</sup> The addition provided that the tenant's obligation to pay its proportionate share of real estate taxes and common area expenses would only be effective so long as ninety-five percent of the other tenants were required to comply with the terms and conditions "as herein provided."<sup>136</sup>

The language, which both parties stipulated to be unambiguous,

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128. *Id.* at 100, 387 S.E.2d at 479.

129. 237 Va. 543, 379 S.E.2d 316 (1989).

130. *Id.* at 545, 379 S.E.2d at 317.

131. *Id.*

132. *Id.* at 546, 379 S.E.2d at 317.

133. Va. Code Ann. § 8.01-230 (Repl. Vol. 1984).

134. *Lamps Unlimited*, 237 Va. at 549, 379 S.E.2d at 319.

135. 238 Va. 123, 380 S.E.2d 642 (1989).

136. *Id.* at 124, 380 S.E.2d at 643.

clearly meant that the tenant was only required to pay the costs so long as ninety-five percent of the other tenants complied with provisions similar to those in the tenant's lease, not those in the other tenants' leases.<sup>137</sup> The trial court erred in admitting extrinsic evidence<sup>138</sup> and in rewriting the lease.<sup>139</sup>

In the case of *Love v. Schmidt*,<sup>140</sup> a landlord attempted to disclaim liability for injury to a tenant's employee on the grounds that the landlord delegated to an independent contractor the landlord's common-law duty to maintain his premises in a reasonably safe condition. The loose toilet seat which caused the plaintiff to fall and injure her back had been twice reported to the independent contractor who failed to repair it.<sup>141</sup> The court held that the duty to maintain the premises cannot be delegated. Under the doctrine of *respondeat superior* and agency principles, the landlord's agent's knowledge of the condition of the toilet seat was imputed to the landlord.<sup>142</sup>

In *Reston Recreation Center Associates v. Reston Property Investors Ltd.*,<sup>143</sup> the Supreme Court of Virginia considered four issues: (1) whether the tenant was required to maintain public liability insurance for its subtenant's business activity on the premises in accordance with the lease; (2) whether the doctrine of impossibility of performance prevented the landlord from terminating the lease when the tenant failed to maintain such insurance or in the alternative, whether the *force majeure* provisions in the lease applied to the tenant's inability to obtain insurance; (3) whether the tenant's refusal to vacate the premises upon the landlord's demand prevented the tenant from benefitting from a lease provision requiring the landlord to pay the tenant \$225,000 for the tenant's personal property if the landlord required the tenant to leave the personal property on the premises; and (4) the proper measure of damages for the tenant's retention of the premises.<sup>144</sup> These issues arose out of the landlord's termination of a commercial lease before the stated expiration date due to the tenant's failure to

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137. *Id.*

138. *Id.* at 126, 380 S.E.2d at 644.

139. *Id.*

140. 239 Va. 357, 389 S.E.2d 707 (1990).

141. *Id.* at 359, 389 S.E.2d at 710.

142. *Id.* at 358, 389 S.E.2d at 708.

143. 238 Va. 419, 384 S.E.2d 607 (1989).

144. *Id.* at 421-22, 384 S.E.2d at 608.

carry liability insurance as required by the lease.<sup>145</sup> The trial court granted summary judgment to the landlord and the tenant appealed.

The facts briefly stated are as follows. The landlord leased facilities to the tenant for use as a recreation center. The lease required the tenant to provide the landlord with public liability insurance with respect to the premises in specified coverage amounts, but did not specify the risks to be insured. The tenant maintained the required public liability insurance protecting the landlord, tenant, and several subtenants in the occupation and use of the premises, including business activities on the premises until October 2, 1985, when the insurance carrier cancelled the public liability insurance on roller skating activities in the premises. The tenant, despite diligent efforts, was unable to obtain public liability insurance for the operation of the rink.<sup>146</sup> The landlord gave the tenant notice of default with thirty days to comply with the lease terms. Within the thirty-day period, the tenant formed a wholly owned subsidiary and subleased the roller skating rink operation to the subsidiary. The tenant obtained a public liability insurance policy for the subtenant, but the policy failed to meet the minimum insurance requirements of the lease.<sup>147</sup> The landlord gave the tenant notice terminating the lease and demanded possession within five days after the tenant's receipt of the notice. The landlord also gave the tenant notice that it was exercising its right under the lease to purchase the tenant's personal property for \$225,000 upon the expiration of the term of the lease.<sup>148</sup>

With respect to the insurance requirement issue, the court noted that while the lease only required public liability insurance with respect to the premises and did not specify the risks to be covered, during the first four years of the lease, the tenant maintained business activity public liability coverage on the premises. This course of dealing defined the type of insurance required and bound the tenant to obtain such insurance for the duration of the lease.<sup>149</sup>

The court also rejected the tenant's alternative argument that the insurance requirement did not apply to the subtenant's roller skating rink on the premises. Although the lease did not require

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145. *Id.* at 421, 384 S.E.2d at 609.

146. *Id.* at 423, 384 S.E.2d at 609.

147. *Id.*

148. *Id.*

149. *Id.* at 425, 384 S.E.2d at 610.

the tenant to obtain insurance for its subtenants, the tenant could not relieve itself of the insurance requirement by entering into a sublease without the landlord's consent.<sup>150</sup> Because the landlord did not consent to the sublease, the landlord could require the tenant, as the operator of the skating rink, to obtain the required public liability insurance.<sup>151</sup>

The tenant argued that even if it was required to obtain the public liability insurance, its failure to obtain the insurance was excused by the doctrine of impossibility of performance.<sup>152</sup> The court noted that even if the doctrine applied, it excuses future performance by both parties; the doctrine would not modify the contract to require the landlord to accept less than the required insurance coverage.<sup>153</sup> However, the court determined that the *force majeure* provisions of the lease could be applied to temporarily excuse the tenant's failure to obtain the required insurance coverage.<sup>154</sup>

The third issue focused on the tenant's failure to vacate the premises. The court determined that the tenant's failure to vacate the premises in accordance with the landlord's demand precluded the tenant from successfully asserting its right to the payment of \$225,000 in consideration for the tenant's personal property left on the premises.<sup>155</sup> The tenant, as a condition to its entitlement to the \$225,000, was obliged to comply with the landlord's demand to vacate, whether or not the demand was justified.<sup>156</sup>

The last issue addressed by the court stems from the tenant's argument that the landlord's five-day notice to vacate was ineffective. In the court's opinion, the tenant's failure to vacate the premises did not convert the tenancy into a tenancy from month to month requiring thirty-days' notice of termination under another

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150. *Id.* The court rejected the tenant's reliance on a provision of the lease creating an exception to the requirement that the landlord's consent be obtained to a sublease where "the effect of any such transfer is only to change the form of business entity or organization of the tenant." The creation of a subsidiary was not a change in form of the tenant; the subsidiary was a stranger to the lease. *Id.*

151. *Id.* The court also rejected the tenant's argument that because the insurance was not really necessary for the landlord's protection, the tenant's failure to obtain the insurance was not a material breach. *Id.* at 426, 384 S.E.2d at 610.

152. *Id.* at 426, 384 S.E.2d at 611.

153. *Id.*

154. *Id.* at 427, 384 S.E.2d at 611.

155. *Id.* at 428, 384 S.E.2d at 612.

156. *Id.*

provision of the lease. The five-day termination notice effectively terminated the lease and converted the tenant into a trespasser subject to ejectment.<sup>157</sup>

### G. *Mechanic's Liens*

In *Rosser v. Cole*,<sup>158</sup> the Supreme Court of Virginia was asked to rule on the validity of a mechanic's lien claimed by a road builder purporting to affect lots in a subdivision. Rosser recorded a plat subdividing 450 acres into 77 lots in Gloucester County. Rosser entered into a contract with Cole for the construction of roads in the subdivision. Cole filed a memorandum of mechanic's lien. The description contained in the mechanic's lien purported to encumber the entire 450 acre tract less nine specific lots. Rosser brought suit attacking the validity of the mechanic's lien.<sup>159</sup> The trial court dismissed Rosser's petition and ruled that Cole's mechanic's lien was valid. Rosser appealed.<sup>160</sup>

The court determined that the mechanic's lien only affected the roads or streets on which Cole worked and not the individual lots.<sup>161</sup> Cole's memorandum of mechanic's lien did not affect the lots because it failed to satisfy the statutory requirements for perfecting a mechanic's lien for work done involving the construction of streets in a subdivision.<sup>162</sup> The memorandum failed to ap-

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157. *Id.* at 429, 384 S.E.2d at 612.

158. 237 Va. 572, 379 S.E.2d 323 (1989).

159. *Id.* at 573-74, 379 S.E.2d at 324.

160. *Id.* at 574, 379 S.E.2d at 324.

161. *Id.* at 576, 379 S.E.2d at 325. Section 43-3(a) of the Code of Virginia provides:

(a) All persons performing labor or furnishing materials of the value of fifty dollars or more, for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold . . . shall have a lien, if perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment thereof . . . for the work done and materials furnished.

VA. CODE ANN. § 43-3(a) (Repl. Vol. 1986)..

162. *Id.* Section 43-3(b) provides, in part:

(b) Any person providing labor or materials for the installation of streets, sanitary sewers or water lines for the purpose of providing access or service to the individual lots in a development . . . shall have a lien on each individual lot in the development for that fractional part of the total cost of such labor or materials as is obtained by using 'one' as the numerator and the number of lots as the denominator . . . provided, however, no such lien shall be valid as to any lot . . . unless the person providing such labor or materials shall, prior to the sale of such lot . . . file with the clerk of the circuit court of the jurisdiction in which such land lies a document setting forth a full disclosure of the nature of the lien to be claimed, the amount claimed against each lot . . . and a description of the development . . . and shall, thereafter, comply

portion the amount claimed among the individual lots.<sup>163</sup> Relying on the often repeated rule that mechanics' liens, being in derogation of the common law, must strictly comply with the statutory requirements creating them, the court reversed the trial court's decision.<sup>164</sup>

The mechanic's lien suits in *Mendenhall v. Cooper*,<sup>165</sup> were dismissed because they were not timely filed against new, necessary defendants. Such suits must be brought within six months of recording a memorandum of lien.<sup>166</sup> The lienors filed a bill of complaint against the condominium developer,<sup>167</sup> but delayed more than a year after filing the memoranda to amend their complaint to add as defendants the condominium unit owners, the lender secured by a deed of trust on the property, and the trustees under the deed of trust.<sup>168</sup>

The court determined that the new defendants were necessary parties in the enforcement suits because their interests in the property were subject to and could be affected by the mechanic's liens.<sup>169</sup> The six month period mandated by section 43-17 had lapsed by the time the new necessary defendants were joined, therefore, the trial court should have dismissed the suit.<sup>170</sup>

The Supreme Court of Virginia considered for the first time the validity of mechanic's liens asserted against several parcels of land upon some of which the claimants performed no work or contributed no value. In *Woodington Electric, Inc. v. Lincoln Savings & Loan Association*,<sup>171</sup> the claimants argued that their liens should be upheld against the appropriate properties and dismissed as to those properties improperly included in the memorandum of lien.<sup>172</sup>

The court rejected the claimants' arguments and concluded that

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with all other applicable provisions of this chapter.

*Id.* § 43-3(b).

163. *Rosser*, 237 Va. at 578, 379 S.E.2d at 327.

164. *Id.*

165. 239 Va. 71, 76, 387 S.E.2d 468, 471 (1990).

166. VA. CODE ANN. § 43-17 (Repl. Vol. 1986).

167. *Mendenhall*, 239 at 73, 387 S.E.2d at 469.

168. *Id.* at 75, 387 S.E.2d at 470.

169. *Id.*

170. *Id.* at 76, 387 S.E.2d at 471.

171. 238 Va. 623, 385 S.E.2d 872 (1989).

172. *Id.* at 633, 385 S.E.2d at 877.

an over-inclusive lien is invalid in its entirety.<sup>173</sup> A mechanic's lien is a creature of statute and is in derogation of the common law. Therefore, the mechanic's lien statutes are strictly construed.<sup>174</sup> Mechanic's liens may only attach to property upon which work was performed or materials supplied. By asserting liens against inappropriate properties, the claimants overreached and abused the power conferred by the mechanic's lien statutes.<sup>175</sup>

In *McCoy v. Chrysler Condo Developers*,<sup>176</sup> a building owner's bankruptcy involved the automatic stay which prohibited the claimant from filing a suit to enforce his mechanic's lien.<sup>177</sup> Within the six months following the filing of the memorandum of lien, the claimant obtained a modification of the stay from the bankruptcy court, and was granted permission to file an enforcement suit. The claimant filed his bill of complaint thirty-three days after entry of the modification order.<sup>178</sup> The trial court, interpreting the bankruptcy court order as a termination of the stay, dismissed the claimant's suit as time-barred pursuant to section 108(c) of the United States Bankruptcy Code.<sup>179</sup> However, the bankruptcy court order only modified the stay, it did not terminate the stay.<sup>180</sup> Therefore, the enforcement suit was not time-barred.<sup>181</sup>

#### H. Real Estate Brokers

The Supreme Court of Virginia held in *Harrison & Bates, Inc. v. LSR Corp.*,<sup>182</sup> that a real estate broker not licensed in Virginia may not enforce a contract with a Virginia licensed real estate broker to split commissions which were earned on the sale of real estate located in Virginia.<sup>183</sup> This holding extends the requirement that any person who buys or sells real estate must be licensed to include persons who contract to share real estate commissions.<sup>184</sup>

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173. *Id.* at 634, 385 S.E.2d at 878.

174. *Id.* at 630, 385 S.E.2d at 875; *see supra* note 158.

175. *Id.* at 634, 385 S.E.2d at 878.

176. 239 Va. 321, 389 S.E.2d 905 (1990).

177. *Id.* at 323, 389 S.E.2d at 906.

178. *Id.*

179. *Id.* at 324, 389 S.E.2d at 907. 11 U.S.C.S. § 108(c)(2) permits an enforcement suit within "30 days after notice of the *termination* or *expiration* of the stay." 11 U.S.C.S. § 108(c)(2) (Law. Co-op. Cum. Supp. 1990) (emphasis added).

180. *McCoy*, 239 Va. at 323, 389 S.E.2d at 907.

181. *Id.* at 324, 389 S.E.2d at 907.

182. 238 Va. 741, 385 S.E.2d 624 (1989).

183. *Id.* at 747, 385 S.E.2d at 627; *see* VA. CODE ANN. § 54.1-2106 (Repl. Vol. 1988).

184. *Harrison*, 238 Va. at 747, 385 S.E.2d at 627.



In *Allen v. Lindstrom*,<sup>185</sup> the Supreme Court of Virginia considered whether a real estate agent has a duty to purchasers to communicate offers to sellers and whether purchasers were entitled to specific performance. The sellers received a series of offers and counter offers from two parties through two separate agents. The sellers subsequently learned, after signing a contract, that one of the agents failed to inform them of an offer containing conditions more favorable to the sellers. They then sold the property to the purchasers who presented the more favorable terms and refused to honor the first contract.<sup>186</sup> The purchasers under the first contract sued, but the trial court did not grant specific performance of their contract with the sellers.<sup>187</sup>

The Supreme Court of Virginia reversed, holding that the purchasers were entitled to specific performance.<sup>188</sup> The court further determined that the agent's failure to reveal information to the sellers did not preclude specific performance for the benefit of the purchasers absent evidence of any misconduct by the purchasers.<sup>189</sup>

With respect to the suit against the real estate firm and agent, the court declined to find that a duty was owed to prospective purchasers to communicate offers to the sellers.<sup>190</sup> The court determined that a regulation of the Virginia Real Estate Commission requiring real estate licensees to promptly tender all written offers to purchase property to a seller does not create a private cause of action for the benefit of prospective purchasers.<sup>191</sup> "[T]he public is protected adequately from the type of misconduct asserted by the plaintiffs by administrative regulation and policing of the real estate profession."<sup>192</sup>

In *Edmonds v. Coldwell Banker Residential Real Estate Services, Inc.*,<sup>193</sup> the issue considered by the Supreme Court of Virginia was whether a real estate broker was entitled to negotiate a contract on behalf of a seller during a ninety day protection period after termination of a listing agreement. The sellers listed their

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185. 237 Va. 489, 379 S.E.2d 450 (1989).

186. *Id.* at 495, 379 S.E.2d at 455.

187. *Id.*

188. *Id.* at 497, 379 S.E.2d at 455.

189. *Id.*

190. *Id.* at 498, 379 S.E.2d at 456.

191. *Id.* See VIRGINIA REAL ESTATE BOARD LICENSING REGULATIONS § 3.5.16 (1987).

192. *Allen*, 237 Va. at 500, 379 S.E.2d at 456.

193. 237 Va. 428, 377 S.E.2d 443 (1989).

property for a term of six months. The contract provided that the real estate commission would be paid if the property "is sold . . . within 90 days after the termination of this agreement . . . to anyone with whom the agent has negotiated or to whom the property has been shown by any person prior to . . . termination."<sup>194</sup> During the listing agreement, several offers from county officials to purchase the property were communicated to the sellers. However, the sellers rejected the county's proposals. After the ninety day protection period expired, the sellers sold the property to the county.<sup>195</sup>

The real estate broker sought to obtain his commission claiming that he was the procuring cause of the sale and that he had produced a purchaser ready, willing and able to buy upon the terms set forth in the listing agreement.<sup>196</sup> The Supreme Court of Virginia reversed the trial court's judgment for the real estate broker and found that the sellers had not interfered with the real estate broker's right to continue negotiations with the county during the protection period; that right did not exist.<sup>197</sup>

### I. *Record Title*

*Lester Group, Inc. v. Little*,<sup>198</sup> arose out of an ejectment action. The Lester Group, Inc. ("Lester") derived its title to property located in Franklin County from Grant. Grant acquired title in 1845 by a land grant from the Commonwealth of Virginia which was not recorded until 1957. By deed dated March 4, 1878, a special commissioner conveyed the property to Mitchell and Cabell as the result of a creditors' suit. The deed was indexed only in the commissioner's name. In 1960, a special commissioner sold the property to Saunders to recover delinquent real estate taxes after service of process by order of publication and suit against Grant and his heirs, devisees, assigns and unknown heirs.<sup>199</sup> Saunders conveyed the property to the Jessups.<sup>200</sup> Rhodes, a trustee, foreclosed on the property under a deed of trust executed by the Jessups. At the foreclosure sale, Lester publicly announced that he claimed title to

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194. *Id.* at 430, 377 S.E.2d at 444.

195. *Id.* at 431, 377 S.E.2d at 445.

196. *Id.* at 431-32, 377 S.E.2d at 445.

197. *Id.* at 432, 377 S.E.2d at 445.

198. 238 Va. 54, 381 S.E.2d 3 (1989).

199. *Id.* at 55-56, 381 S.E.2d at 4-5.

200. *Id.* at 56, 381 S.E.2d at 5.

the property. Roberts purchased the property at the foreclosure sale with full knowledge of Lester's claim. Roberts subsequently conveyed the property to Little.<sup>201</sup>

The court determined that the tax sale and conveyance to Saunders were void *ab initio* since taxes on the property were in fact paid by Lester and his predecessors in title.<sup>202</sup> Therefore, Little had no title to the property. The court noted further that because a special commissioner executed the 1878 deed to Cabell, the Franklin County assessing officials were not entitled to rely solely on the index to deeds for determining who held title to the property. Had the officials read the special commissioner's deed, they would have learned that the special commissioner conveyed the property on behalf of Grant's heirs and avoided a double assessment on the property.<sup>203</sup>

#### J. Restrictive Covenants

In *Williams v. Brooks*,<sup>204</sup> the Supreme Court of Virginia held that the following restrictive covenant did not prohibit mobile homes in a residential subdivision:

No structure of a temporary character, that is, a trailer, basement, tent, shack, garage, barn, or other outbuilding shall be used on any lot at any time as a residence either temporarily or permanently if it can be seen from any adjoining lot or from the road(s) adjoining said lot . . . .<sup>205</sup>

Owners of lots in a residential subdivision sought and obtained a mandatory injunction requiring mobile home owners in the subdivision to remove their mobile homes.<sup>206</sup> The mobile homes were permanently affixed to the realty.<sup>207</sup> The court determined that the restrictive covenant was ambiguous when applied to the mobile homes.<sup>208</sup> The court noted that restrictive covenants are not fa-

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201. *Id.*

202. *Id.* at 57, 381 S.E.2d at 5.

203. *Id.* at 57, 381 S.E.2d at 5-6.

204. 238 Va. 224, 383 S.E.2d 712 (1989).

205. *Id.* at 225, 383 S.E.2d at 712.

206. *Id.*

207. *Id.* at 225-26, 383 S.E.2d at 712-13. The hitches, wheels and springs were removed from the mobile homes; permanent piers, concrete footings, foundation, decks and brick steps were installed. *Id.*

208. *Id.* at 227, 383 S.E.2d at 713.

vored and should be construed not to limit the use of property.<sup>209</sup>

### K. *Subjacent Support*

In a case of first impression, the Supreme Court of Virginia refused to rule that a surface property owner's right to subjacent support is violated by mere subsidence of the surface. In *Large v. Clinchfield Coal Co.*,<sup>210</sup> a surface property owner (Large) and the owner of the coal under the surface (Clinchfield) both appealed a trial court order which prohibited Clinchfield from "longwall" coal mining beneath Large's property and which ruled that "longwall" mining would not damage the surface "to any appreciable degree."<sup>211</sup> The court stated that the "'absolute' nature of the right to subjacent support merely implies strict liability for its violation."<sup>212</sup> A surface landowner must establish appreciable damage or a diminution in use to maintain a cause of action.<sup>213</sup> The court concluded that the uniform subsidence of the surface in the form of a three foot deep swale above the excavated areas would not constitute appreciable damage,<sup>214</sup> and ruled that Clinchfield could continue its "longwall" mining operation.<sup>215</sup>

### L. *Zoning and Land Use*

The Supreme Court of Virginia invalidated the zoning ordinance at issue in *City of Virginia Beach v. Virginia Land Investment Association*.<sup>216</sup> In this case, Virginia Land Investment Association ("VLIA") property was rezoned from a planned unit development

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209. *Id.* at 228, 383 S.E.2d at 714 (citing *Hullett v. Grayson*, 265 N.C. 453, 454, 144 S.E.2d 206, 207 (1965)).

210. 239 Va. 144, 387 S.E.2d 783 (1990).

211. *Id.* at 146, 387 S.E.2d at 784. The "longwall" method of coal mining involves the removal of subsurface seams of coal in a manner which allows the exhausted area to cave in and causes the land surface to subside. *Id.*

212. *Id.* at 147, 387 S.E.2d at 785.

213. *Id.* at 148, 387 S.E.2d at 785.

214. *Id.*

215. *Id.* at 149, 387 S.E.2d at 785-86. Justice Russell and Justice Stephenson dissented, citing *Stonegap C. Co. v. Hamilton*, 119 Va. 271, 289, 89 S.E. 305, 310 (1916), which established a surface landowner's absolute right to surface support in Virginia. Evidence was produced to show that "longwall" mining "will cause the surface to subside into five swales, each three feet deep, 600 to 700 feet wide, and 3,000 to 5,000 feet long" across the property. *Large*, 239 Va. at 150, 387 S.E.2d at 787. According to the dissent, these conditions are similar to the consequences of a major earthquake and do show irreparable damage to the surface entitling the surface owner to injunctive relief.

216. 239 Va. 412, 389 S.E.2d 312 (1990).

district to an agricultural district. The court determined the zoning ordinance to be "piecemeal" downzoning and not a "comprehensive" rezoning as characterized by the city.<sup>217</sup>

The question in determining the validity of piecemeal downzoning is whether a change in circumstances or prior mistake justified the downzoning. The city admitted no change in circumstances affecting the public health, safety or welfare and presented no evidence of mistake.<sup>218</sup> The city failed to rebut VLIA's *prima facie* case that the downzoning was unjustified, therefore, the ordinance was held to be unreasonable and void. However, the court rejected VLIA's argument that it should have been awarded damages for the temporary regulatory taking of its property. The court said no taking occurred because VLIA was not deprived of *all* economically viable use of its land.<sup>219</sup>

In *Beacon Hill Farm Associates II, Ltd. v. Loudoun County Board of Supervisors*,<sup>220</sup> the Fourth Circuit held that a developer's claim that a zoning ordinance was facially unconstitutional was ripe for adjudication and remanded the case to the district court for further proceedings. The county had amended its zoning ordinance by creating an overlay zoning district to protect environmentally sensitive mountain lands.<sup>221</sup> As a consequence, 650 acres of land belonging to Beacon Hill could not be developed pursuant to the more relaxed requirements of the underlying A-3 zoning.<sup>222</sup>

Beacon Hill had not subdivided the property prior to the enactment of the ordinance, nor had Beacon Hill applied for a special exception from the ordinance.<sup>223</sup> The county argued that Beacon Hill's claim was premature based on its failure to apply for a special exception and receive a final determination of how the ordinance would affect its land use.<sup>224</sup>

The court distinguished a claim that the mere enactment of a regulation is unconstitutional from a claim that the application of a regulation to specific property is unconstitutional.<sup>225</sup> A facial at-

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217. *Id.* at 416, 389 S.E.2d at 314.

218. *Id.*

219. *Id.*

220. 875 F.2d 1081 (4th Cir. 1989). The developer sought damages under 42 U.S.C. § 1983.

221. *Id.* at 1081.

222. *Id.* at 1082.

223. *Id.*

224. *Id.*

225. *Id.* at 1084.

tack on the constitutionality of an ordinance which alleges that the mere existence of the ordinance adversely affects property rights is permissible without a determination of how the applied ordinance will affect the actual use of property where the ordinance greatly reduces the value of the property and destroys its marketability.<sup>226</sup>

The importance of building a record in zoning cases was eminent in *Ames v. Town of Painter*.<sup>227</sup> The trial court overturned a board of zoning grant of a special use permit for a migrant labor camp. The board made no express findings or conclusions regarding the standards which were provided in the zoning ordinance for the issuance of special use permits.<sup>228</sup> Therefore there was no basis in the record for a reviewing court to determine whether the "fairly debatable" standard could be established.<sup>229</sup> The Supreme Court of Virginia affirmed the trial court, stating that "the 'fairly debatable' standard cannot be established by a silent record."<sup>230</sup>

It was held in *Crestar Bank v. Martin*,<sup>231</sup> that a family subdivision which is exempt from the subdivision ordinance is nevertheless subject to land-use controls. The Martins' conveyances of their land to their daughters was held to be a subdivision within the contemplation of the zoning ordinance which prohibited the erection of mobile homes on private lots in subdivisions.<sup>232</sup>

*Marks v. City of Chesapeake*<sup>233</sup> involved a federal civil rights action where the owner of a house sought injunctive and declaratory relief and compensatory and punitive damages when the city denied him a conditional use permit to operate a palmistry and fortune telling business.<sup>234</sup> The B-2 classification specifically enumerated palmistry as a permitted use. During the public hearing, most of the residents who spoke against issuing the permit expressed

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226. *Id.* at 1084-85.

227. 239 Va. 343, 389 S.E.2d 702 (1990).

228. *Id.* at 349-50, 389 S.E.2d at 705.

229. *Id.*

230. *Id.* at 350, 389 S.E.2d at 706. Justice Whiting dissented, stating that taken as a whole, the record itself established that the standards in the zoning ordinance were considered by the board and that the issue was fairly debatable. Justice Whiting would have found the Board's action proper, or, in the alternative, would have remanded the case and directed the Board to express the reasons for its grant of the special use permit. *Id.* at 350-52, 389 S.E.2d at 706-07.

231. 238 Va. 232, 236, 383 S.E.2d 714, 716 (1989).

232. *Id.*

233. 883 F.2d 308 (4th Cir. 1989).

234. *Id.* at 310. Plaintiff's action alleged violations of 42 U.S.C. § 1983 and the fifth and fourteenth amendments.

religious reasons for opposing the permit. Two council members admitted that they were influenced by the public opposition.<sup>235</sup>

The court recognized Marks' fourteenth amendment claim and said public officials cannot decide permit applications by relying on public sentiment "instead of legislative determinations concerning public health and safety [or otherwise] dealing with zoning."<sup>236</sup> The court found no clear error in its review of the district court decision and so affirmed the ruling that the city acted arbitrarily and capriciously when it withheld Marks' permit because of religious prejudice expressed by the neighborhood.<sup>237</sup>

In *Resource Conservation Management v. Board of Supervisors*, Resource Conservation Management ("RCM") had applied for a special use permit to operate a debris landfill on a site which permitted such use.<sup>238</sup> While the application was pending, the Board of Supervisors amended the zoning ordinance to prohibit debris landfills in three zoning districts.<sup>239</sup> The Virginia Supreme Court affirmed the trial court's decision that the ordinance was within the Board's delegated power<sup>240</sup> and that the ordinance was not in conflict with nor preempted by the Virginia Solid Waste Management Act.<sup>241</sup> The court rejected RCM's argument that the ordinance was one regulating the ownership of land instead of a zoning ordinance.<sup>242</sup>

## II. LEGISLATION

### A. Condominiums

Sections 55-79.74:1<sup>243</sup> and 55-79.75<sup>244</sup> of the Code of Virginia (the "Code") relating to the Condominium Act have been amended. Section 55-79.74:1 of the Code now provides that unit owners are entitled to copies of unit owners' association records and minutes of meetings of the members and the executive organ

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235. *Id.* at 312.

236. *Id.* at 311 (quoting *Bayou Landing, Ltd. v. Watts*, 563 F.2d 1172, 1175 (5th Cir. 1977)).

237. *Id.* at 313.

238. 238 Va. 15, 380 S.E.2d 879 (1989).

239. *Id.* at 17, 380 S.E.2d at 880.

240. *Id.* at 20, 380 S.E.2d at 882.

241. *Id.* at 22, 380 S.E.2d at 883-84.

242. *Id.* at 21, 380 S.E.2d at 882.

243. VA. CODE ANN. § 55-79.74:1 (Cum. Supp. 1990).

244. *Id.* § 55-79.75.

at a reasonable cost. However, matters considered in closed session of the executive organ need not be made available to unit owners.<sup>245</sup>

The General Assembly broadened the scope of issues the executive organ of a condominium may consider in closed session. Section 55-79.75 of the Code now provides that the executive organ may meet in closed session to discuss threatened or pending litigation, violations of the condominium documents or rules and the liability of unit owners to the association.<sup>246</sup>

### B. *Deeds*

Any instrument submitted for recordation pursuant to sections 17-59,<sup>247</sup> 17-60,<sup>248</sup> and 17-79,<sup>249</sup> of the Code must include the names of all grantors and grantees in the first clause of the instrument in accordance with sections 55-48<sup>250</sup> and 55-58<sup>251</sup> of the Code. The instrument will only be indexed under those names appearing in the first clause. The form of deed contained in section 55-48 of the Code has been amended to include within the description of the property the name of the city or county in which the property is located.<sup>252</sup>

### C. *Dower and Curtesy*

Important legislation passed by the General Assembly this session was the amendment of section 64.1-19.2<sup>253</sup> which, effective January 1, 1991, abolishes the interests of dower and curtesy. Any dower or curtesy interest of a surviving spouse which vested prior to January 1, 1991, however, will not be changed or diminished. The right of a creditor or other interested third party in any real estate subject to a right of dower and curtesy will not be changed or diminished. The rights of these parties will be governed by the

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245. *Id.* § 55-79.74:1.

246. *Id.* § 55-79.75.

247. VA. CODE ANN. § 17-59 (Cum. Supp. 1990) (duties of a clerk as to recording and indexing writings).

248. *Id.* § 17-60 (documents to be recorded).

249. *Id.* § 17-79 (general index of clerk).

250. *Id.* § 55-48 (Cum. Supp. 1990) (forms of deeds and leases).

251. *Id.* § 55-58 (forms of deeds of trust).

252. *Id.* § 55-48.

253. VA. CODE ANN. § 64.1-19.2 (Cum. Supp. 1990).



laws in effect prior to January 1, 1991.<sup>254</sup>

In the same act, the General Assembly amended section 64.1-13 of the Code<sup>255</sup> which allows a surviving spouse within six months to claim an elective share in the spouse's augmented estate. Section 64.1-16.1 was added to define augmented estate, and to provide for exclusions and valuation.<sup>256</sup> "Augmented estate" is defined as the gross real and personal estate less payments for certain allowances and exceptions, funeral expenses, administration charges and debts plus the total value of:

1) property derived from the decedent without full consideration in money or money's worth;

2) property transferred by the surviving spouse, at any time during the marriage, to a person, other than the decedent, which would have been included in the augmented estate if the surviving spouse had predeceased the decedent; and

3) property transferred to anyone other than a bona fide purchaser for which the decedent did not receive full and adequate consideration, including the following types of transfers: where the decedent retained a life estate or a right to income from the property; where the decedent retained revocable powers; where the decedent was a joint tenant with a right of survivorship or where the transfer was made *causa mortis* or any aggregate transfers which exceeded \$10,000 to a single donee in a calendar year.<sup>257</sup>

Excluded from the augmented estate are transfers in which the surviving spouse joined or consented, the decedent's separate property received by gift, will or intestate succession, and transfers which are irrevocable as of January 1, 1991.<sup>258</sup> "Estate" and "property" does include insurance policies, retirement benefits, annuities, pension plans, deferred compensation arrangements and employee benefit plans.<sup>259</sup> This statute fails to limit the period of time for which property may be brought back into the augmented estate.

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254. *Id.*

255. *Id.* § 64.1-13.

256. *Id.* § 64.1-16.1.

257. *Id.*

258. *Id.*

259. *Id.*

#### D. *Eminent Domain*

Section 33.1-96 of the Code<sup>260</sup> provides for the acquisition of property needed for a highway project, where the property is currently owned or occupied by a railroad or public utility company for public use. In exchange for such property and the relocation of improvements upon the taken land, the section provides for the acquisition of land or easements, rights-of-way or interests in land adjacent to or near the land needed for the highway project and the conveyance of the same to the railroad or public utility.<sup>261</sup> The General Assembly amended this section to add any public service corporation or company, political subdivision, or cable television company as entities whose interests in land needed for a highway project would be subject to condemnation and eligible for relocation pursuant to section 33.1-96.<sup>262</sup>

#### E. *Financing Statements*

In a move to establish uniformity in the system of indexing financing statements, the General Assembly has amended sections 8.9-403 to 8.9-406 of Code.<sup>263</sup> Filing officers will now index financing statements by name of the debtor and the year the statement was filed. This procedure applies to all subsequent statements, such as continuations, terminations, assignments and releases of collateral.<sup>264</sup>

#### F. *Foreclosure*

The General Assembly amended section 26-58 of the Code<sup>265</sup> to provide that where the trustee in a deed of trust to secure a debt owed to a corporation is a stockholder, member, employee, officer or director of, or counsel to the corporation, the trustee is not disqualified, nor does his position render the sale voidable, so long as the trustee does not participate in setting the amount to be bid at the sale of the trust property. If the lender bids the amount secured, including interests and costs, the trustee's participation

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260. VA. CODE ANN. § 33.1-96 (Cum. Supp. 1990).

261. *Id.*

262. *Id.*

263. VA. CODE ANN. §§ 8.9-403 to -406 (Cum. Supp. 1990).

264. *Id.*

265. VA. CODE ANN. § 26-58 (Cum. Supp. 1990).

would not be improper and would not render the sale voidable.<sup>266</sup> This legislation is retroactive.

The amendment of section 55-59.2 of the Code<sup>267</sup> clarifies that where a deed of trust provides for daily newspaper advertisement for three days, the three days may be consecutive. Where the deed of trust does not provide for the number of publications and if the property is located in a city or a county immediately contiguous to a city, regardless of the size of the city, then the five different publications required by statute may be on consecutive days.<sup>268</sup>

### G. *Homestead and Other Exemptions*

The General Assembly updated chapter 3 of title 34 of the Code relating to property exempt from creditor process.<sup>269</sup> The exemptions are available to any Virginia resident, and an additional \$500 exemption is permitted for each dependent. Exemptions do not apply to spousal or child support obligations. The statute also sets forth specific forms to be used for filing a homestead deed for real property and a homestead deed for personal property.

The amendments also provide monetary limits as to certain articles of personal property which are exempt. The intent of the amended language appears to protect a debtor's ability to maintain his occupation or trade and to sustain a daily existence. The exemption for insurance benefits has been repealed and an exception for personal injury actions, awards or settlements has been added.

Subsection B of the newly enacted section 34-34<sup>270</sup> of the Code provides that the interest of an individual under a retirement plan is exempt from creditor process to a certain extent. The exemption is available to an individual whether his interest is that of a participant, beneficiary, contingent annuitant, alternate payee or otherwise, but must be claimed within certain time limits.<sup>271</sup> The ex-

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266. Section 26-58 was apparently amended in response to *United States v. Smith*, 99 Bankr. 724 (Bankr. W.D.Va. 1989). The foreclosure sale in *Smith* was held to be invalid due to the lack of the trustee's impartiality. The trustee was an employee of the Farmers Home Administration, the secured party, and had been actively involved throughout the disposition of the debtor's loan and property.

267. VA. CODE ANN. § 55-59.2 (Cum. Supp. 1990).

268. *Id.*

269. VA. CODE ANN. §§ 34-1, 34-3, 34-4, 34-4.1, 34-5, 34-6, 34-13, 34-14, 34-17, 34-18, 34-19, 34-21, 34-26, 34-28.1, 38.2-3123 (Cum. Supp. 1990).

270. *Id.* § 34-34.

271. *Id.* § 34.17.

emption does not apply if the interest would provide an annual benefit in excess of \$17,500; does not apply to earnings on contributions made to the retirement plan during the fiscal year which includes the date the individual claims the exemption and for the two preceding fiscal years; and does not apply to claims made against an individual by the alternate payee or the Commonwealth.<sup>272</sup>

In related legislation, the General Assembly amended section 55-19<sup>273</sup> to provide that the exception that spendthrift trusts are not subject to the debts and charges of the beneficiaries does not apply to an interest in a trust, contract, other fund maintained in conjunction with certain employee benefit plans, or similar plans regardless of whether the beneficiary claims the exemption under section 34-34.

#### H. *Marital Property*

Section 20-107.3 of the Code<sup>274</sup> relating to equitable distribution now includes language describing when property may be classified as part marital property and part separate property. Income received from and the increase in value of separate property during the marriage is marital property only to the extent that marital property or the significant personal efforts of either party contributed to the income or the increase and resulted in substantial appreciation of the property.<sup>275</sup> A marital share may be established in part of a pension plan, profit-sharing plan, retirement plan, personal injury or worker's compensation award.

If separate property and marital property are commingled to the extent the contributed property loses its identity, then the contributed property is transmuted to the category of the property receiving the contribution. Contributed property may retain its original classification if it can be retraced by a preponderance of the evidence and was not a gift. Where marital and separate property are commingled into newly acquired property, it is transmuted into marital property unless it is retraceable by a preponderance of the

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272. *See id.* § 63.1-251 (Cum. Supp. 1990).

273. *Id.* § 55-19 (Cum. Supp. 1990).

274. VA. CODE ANN. § 20.107.3 (Repl. Vol. 1990).

275. *Id.* Personal effort of a party includes labor, effort, inventiveness, physical or intellectual skill, creativity or managerial activity, promotional or marketing activity, which has been directly applied to the separate property of either party. *Id.*

evidence and was not a gift.<sup>276</sup>

### I. *Real Estate Appraisers*

Perceiving a need for the regulation of real estate appraisers, the General Assembly amended sections 2.1-1.6<sup>277</sup>, 2.1-20.4<sup>278</sup>, 9-6.25:2<sup>279</sup> and 54.1-300<sup>280</sup> of the Code and added chapter 20.1 in title 54.1, consisting of sections 54.1-2009 through 54.1-2019<sup>281</sup>. The effect of this legislation is the creation of a nine member Real Estate Appraiser Board within the Virginia Department of Commerce. Furthermore, it is now unlawful to engage in the appraisal of real estate for compensation without a license.<sup>282</sup> Certain exemptions are provided for persons directly supervised by licensed appraisers, public employees and the related activities of real estate brokers and salespersons.<sup>283</sup>

### J. *Recordation Tax*

Subdivision H has been added to Code section 58.1-811,<sup>284</sup> which provides that the release of a contractual right is exempt from recordation tax if the release is contained in a single deed where another function of the deed is subject to the recordation tax. Clerks' fees for recording and indexing any writing, with certain exceptions, were raised from ten dollars to thirteen dollars for the first four pages by amendments to sections 8.01-465.2<sup>285</sup> and 14.1-112<sup>286</sup> of the Code. The cost of each page over four pages remains one dollar.

### K. *Residential Landlord and Tenant Act*

The General Assembly has amended section 55-248.4<sup>287</sup> of the Code to add the definition of a natural person. Co-owners, either

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276. *Id.*

277. VA. CODE ANN. § 2.1-1.6 (Cum. Supp. 1990).

278. *Id.* § 2.1-20.4.

279. *Id.* § 9-6.25:2 (Cum. Supp. 1990).

280. *Id.* § 54.1-300 (Cum. Supp. 1990).

281. *Id.* §§ 54.1-2009 to -2019.

282. *Id.* § 54.1-2011.

283. *Id.* § 54.1-2010.

284. VA. CODE ANN. § 58.1-811 (Cum. Supp. 1990).

285. *Id.* § 8.01-465.2 (Cum. Supp. 1990).

286. *Id.* § 14.1-112 (Cum. Supp. 1990).

287. VA. CODE ANN. § 55-248.1 (Cum. Supp. 1990).

as tenants in common, joint tenants, tenants in partnership, tenants by the entirety, trustees or beneficiaries of a trust or any lawful combination of natural persons permitted by law come within the definition of natural person.<sup>288</sup>

#### L. *Subdivisions*

Section 15.1-466 of the Code,<sup>289</sup> which outlines the requirements for local subdivision ordinances, now provides that subdivision ordinances in certain high growth localities may provide for the division of a lot or parcel for the purpose of sale or gift to a family member. Such divisions are subject to all state and local requirements.

In addition, the section now authorizes a subdivision ordinance to permit the conveyance of shared easements to public service corporations who provide cable television, gas, telephone and electric service to proposed subdivisions.<sup>290</sup> The common easements may be conveyed by reference on the final plat to a declaration of the terms and conditions agreed upon by the public service corporations and recorded in the county or city land records.<sup>291</sup>

Also, section 15.1-466 of the Code now authorizes local governments to transfer the assets contributed by developers on identified sewer, water and drainage projects in pro-rata programs to a fund for a general sewer and drainage improvement program.<sup>292</sup> The subdividers and developers who met the terms of the agreements under the previous pro-rata programs would receive outstanding interest and be released from any further obligation. Payments made on pro-rata programs prior to the effective date of the act will continue to be held in separate, interest bearing accounts for the projects for which they were collected.<sup>293</sup>

Section 15.1-482<sup>294</sup> has been amended to provide that where a governing body wishes to vacate, by written instrument, a plat or part of a plat on a lot that has been sold, it is only required to obtain the signatures of the lot owners adjacent to the vacated

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288. *Id.*

289. VA. CODE ANN. § 15.1-466 (Supp. 1990).

290. *Id.* § 15.1-466(f1).

291. *Id.*

292. *Id.* § 15.1-466(j), (j1).

293. *Id.*

294. *Id.* § 15.1-482(a).

area. This procedure applies only to those cases involving drainage easements or street rights-of-way where the vacation does not impede or alter drainage or access for any landowners other than the adjacent landowners.<sup>295</sup>

### M. *Taxation of Real Estate*

Two sections have been added to the Code which require that non-residents who receive rent or proceeds of sale from Virginia real property must register with the Virginia Department of Taxation on prescribed forms. Section 58.1-316 of the Code<sup>296</sup> provides that any non-resident who receives \$600 or more in a calendar year from Virginia rental property must complete a registration form. Any broker who makes rental payments to a non-resident must keep a copy of the registration form in his files and is obligated to file the original registration with the Department of Taxation or incur a \$50 a month penalty. The broker must file the registration by the fifteenth of the month following receipt of the form from the payee.<sup>297</sup>

Section 58.1-317<sup>298</sup> imposes a similar registration requirement upon non-residents who receive payments from the transfer of title of Virginia real property. Registration must be concurrent with the transfer of title. The real estate reporting person, as defined by section 6045(e) of the Internal Revenue Code<sup>299</sup>, must file the original registration and retain a copy for his files.<sup>300</sup> If a payee provides a certificate that the payment is not subject to corporation or individual income tax, then the payee will be excused from registering. Failure to file the registration subjects the real estate reporting person to a fifty dollar a month penalty.<sup>301</sup>

For both sections, the statute broadly defines "non-resident payee" to include every non-resident individual, estate, trust and every partnership and S corporation which has non-resident partners or shareholders, and all foreign corporations.<sup>302</sup>

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295. *Id.*

296. VA. CODE ANN. § 58.1-316(A) (Cum. Supp. 1990).

297. *Id.* § 58.1-316(B).

298. *Id.* § 58.1-317(A).

299. I.R.C. § 6045(e) (West Supp. 1990). Virginia's new reporting requirement is similar to the reporting requirement imposed by the Internal Revenue Service Form 1099-S.

300. VA. CODE ANN. § 58.1-317(B) (Cum. Supp. 1990).

301. *Id.* § 58.1-317(C).

302. *Id.* § 58.1-316(E), -317(E).

An amendment to section 58.1-3967<sup>303</sup> provides that in proceedings where real estate is sold for delinquent taxes any person not otherwise served shall be served by publication. A person served by publication may petition to have the case reheard within one year of the entry of the final decree and upon a showing of good cause.<sup>304</sup>

Section 58.1-3237 of the Code,<sup>305</sup> as amended, provides that if real property which qualified for assessment and taxation on the basis of use, but was rezoned later, at the owner's request, to a more intensive use prior to 1980, may be eligible for land use taxation if the owner applies for rezoning to agricultural, horticultural open-space or forest use. Such property would be eligible for assessment and taxation on the basis of the qualifying use for the tax year following the effective date of the rezoning. If such property is then subsequently rezoned to a more intensive use, at the owner's request, within five years of being rezoned to a qualifying use, then the owner will be liable for roll-back taxes when the property is rezoned to a more intensive use.<sup>306</sup> In addition to owing the roll-back taxes, the owner would be subject to a penalty equal to fifty percent of the amount of the roll-back taxes due.<sup>307</sup>

Amended section 58.1-3233<sup>308</sup> provides that localities may pass ordinances which prescribe a minimum acreage greater than five acres in order for real estate devoted to open-space use to qualify for land use taxation. The minimum acreage requirement is determined by adding the total area of contiguous parcels excluding subdivision lots recorded after July 1, 1983.<sup>309</sup>

#### N. *Vacation and Abandonment of Public's Interest in Property*

Section 15.1-480.1 of the Code,<sup>310</sup> as amended, provides two methods whereby a local governing body can vacate the public interests in streets, alleys and easements granted as a condition of site plan approval. First, the public interests may be vacated by a written, recorded instrument of the owner of the land, provided

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303. *Id.* § 58.1-3967.

304. *Id.*

305. *Id.* § 58.1-3237.

306. *Id.*

307. *Id.*

308. *Id.* § 58.1-3233.

309. *Id.*

310. VA. CODE ANN. § 15.1-480.1 (Supp. 1990).



the governing body consents to the vacation.<sup>311</sup> In the alternative, the local governing body may pass an ordinance which vacates the public interests.<sup>312</sup> Notice and a public hearing are required before the adoption of such an ordinance. The owner of the land may appeal the adoption of the ordinance. If the court finds the owner will be irreparably damaged, it may void the ordinance. If the ordinance is upheld on appeal or not challenged, a certified copy may then be recorded and will serve to vacate the governing body's interests.<sup>313</sup>

An amendment to section 33.1-151<sup>314</sup> of the Code clarifies that only landowners whose property abuts the road, landing or crossing proposed to be abandoned may petition for a public hearing. Under amended section 33.1-152,<sup>315</sup> only landowners whose property abuts the parcel proposed to be abandoned have the right to appeal the decision on abandonment. The right to appeal an abandonment decision is also limited to those landowners who were among those who had previously petitioned for a public hearing. Section 33.1-152 now requires that notice of appeal of an abandonment must be served upon each member of the governing body rather than the Commonwealth's attorney. The section further provides that such appeals will be decided based upon the record and evidence presented by the parties instead of a *de novo* hearing.<sup>316</sup>

#### O. *Zoning and Land Use*

The General Assembly amended section 15.1-466 of the Code<sup>317</sup> to clarify that site plans or plans of development required by ordinance pursuant to section 15.1-491(h)<sup>318</sup> will be subject to the general procedures required for subdivision plats and plans of development under section 15.1-466.<sup>319</sup>

The General Assembly expanded the scope of zoning ordinances and comprehensive plans through several amendments. For in-

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311. *Id.* § 15.1-480.1(1).

312. *Id.* § 15.1-480.1(2).

313. *Id.*

314. *Id.* § 33.1-151 (Cum. Supp. 1990).

315. *Id.* § 33.1-152.

316. *Id.*

317. VA. CODE ANN. § 15.1-466 (Supp. 1990).

318. *Id.* § 15.1-491(h).

319. *Id.* § 15.1-466.

stance, an amendment to section 15.1-447 of the Code<sup>320</sup> provides that the need for affordable housing may be one of the items studied in the preparation of a comprehensive plan.

Also, section 15.1-489 of the Code<sup>321</sup> now provides that comprehensive plans may designate areas for and include measures to promote the construction and maintenance of affordable housing as provided by amended section 15.1-446.<sup>322</sup> Section 15.1-489<sup>323</sup> has also been amended to add the preservation of other lands of significance for the protection of the natural environment as a purpose of zoning ordinances.

The definition of a mixed use development was changed in the amendment of section 15.1-430<sup>324</sup> so that it no longer needs to be under a single ownership or legal description.

The General Assembly added section 15.1-486.3<sup>325</sup> and repealed section 15.1-486.2<sup>326</sup> relating to local zoning ordinances applicable to residential facilities for the disabled. Licensed residential facilities which house no more than eight mentally ill, mentally handicapped or developmentally disabled persons, with one or more resident staff persons, shall be considered residential occupancy by a single family.<sup>327</sup> No conditions more restrictive than those imposed on other single family residences may be imposed on such facilities. The definitions of mental illness and developmental disability do not include current illegal use of or addiction to a controlled substance.<sup>328</sup>

Section 15.1-486.4 of the Code<sup>329</sup> provides that in all agricultural zoning districts, manufactured houses which are nineteen feet or more in width, on a permanent foundation and on individual lots are to be treated as equivalent to conventional, site-built single family dwellings. Zoning regulations must apply to all residences in agricultural zoning districts and may not exclude manufactured housing.<sup>330</sup>

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320. *Id.* § 15.1-447(a).

321. *Id.* § 15.1-489(10).

322. *Id.* § 15.1-446.1.

323. *Id.* § 15.1-489(8).

324. *Id.* § 15.1-430(r).

325. *Id.* § 15.1-486.3.

326. *Id.* § 15.1-486.2 (Repl. Vol. 1989).

327. *Id.* § 15.1-486.3 (Supp. 1990).

328. *Id.*

329. *Id.* § 15.1-486.4(A).

330. *Id.* § 15.1-486.4(B).

Section 15.1-493<sup>331</sup> now provides that where an amendment to a zoning map is proposed, the public notice must state the general usage and density range of the amendment compared to that of the comprehensive plan.

Section 15.1-499.1 of the Code<sup>332</sup> has been amended to increase the civil penalty for a single zoning violation in a ten-day period from fifty to one hundred dollars. A series of violations which arise from the same operative set of facts may not result in penalties which exceed \$3,000.<sup>333</sup>

Sections 15.1-491,<sup>334</sup> 15.1-491.2<sup>335</sup> and 15.1-491.2:1<sup>336</sup> all relate to protecting the zoning of property from amendment after proffered conditions have been accepted by the local governing body. Once the governing body has accepted proffered conditions in a rezoning case, the zoning will continue unless the property owner agrees to a change or it can be established that there has been a mistake, fraud or a change in circumstances which substantially affects the public health, safety or welfare. Such proffered conditions must include dedications of real property of substantial value or substantial cash payments for or construction of substantial public improvements which were not necessitated by the rezoning alone.<sup>337</sup>

For the first time the General Assembly has reversed a local zoning decision by virtue of its amendments to various sections of the Code which relate to transportation service districts. The Route 28 Primary Highway Transportation Improvement District was created when landowners agreed to special taxes in order to finance the cost of improving Route 28.<sup>338</sup> The Fairfax County Board of Supervisors later restricted office use in some commercial and industrial districts along the Route 28 corridor. The General Assembly then enacted amendments which address the creation, operation, financing, scope and termination of transportation service districts.

For example, section 15.1-1372.3<sup>339</sup> provides that resolutions

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331. *Id.* § 15.1-493(C).

332. *Id.* § 15.1-499.1.

333. *Id.*

334. *Id.* § 15.1-491.

335. *Id.* § 15.1-491.2.

336. *Id.* § 15.1-491.2:1.

337. *See id.* § 15.1-491(a), (al).

338. *See id.* § 15.1-1372.5.

339. *Id.* § 15.1-1372.3.

which propose transportation districts must state that the terms and conditions of commercial and industrial zoning classifications must be in force for a term of years not to exceed twenty years without elimination, reduction, or restriction. Uses within a transportation district could be changed upon the written request or approval of an owner of any property affected by a change or as required to comply with state law, or regulations pursuant to the Chesapeake Bay Preservation Act.<sup>340</sup>

The statute further provides that all commercial and industrial transportation zoning classifications and zoning regulations relating thereto in districts created prior to July 1, 1989, are deemed to be part of the ordinance creating the district.<sup>341</sup> As such, the terms and conditions shall remain in effect without limitation, reduction, or restriction for a period of fifteen years. The Board of Supervisors may reduce or restrict commercial and industrial uses if the action is part of an overall revision to the comprehensive plan and the changes are unanimously approved by all the members of the district advisory board representing the properties in the transportation district.<sup>342</sup> The effect of the General Assembly's amendments is to restore the development rights of certain landowners in commercial and industrial districts along the Route 28 corridor and to restrict the powers of local government to change zoning in transportation districts.

### III. CONCLUSION

Virginia practitioners should become familiar with a number of important cases decided by the courts over the past year. Recent decisions of the Supreme Court of Virginia reflect the court's efforts to uphold and enforce contracts and leases pursuant to the intent of the parties. The court generally relied upon established principles of law in reaching its decisions. Several of the cases had strong dissents. These dissents, however, did not establish any consistent division in the court's thinking.

The General Assembly was very active in the field of zoning. The newly enacted zoning legislation strongly suggests efforts to allocate the costs of growth and development between developers and

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340. *Id.*

341. *Id.* at § 15.1-1372.3(C).

342. *Id.*

localities. It will be interesting to see if the General Assembly will be as active in zoning matters during the next session.