

1992

## Annual Survey of Virginia Law: Property Law

Charles H. Rothenberg

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

Charles H. Rothenberg, *Annual Survey of Virginia Law: Property Law*, 26 U. Rich. L. Rev. 825 (1992).

Available at: <http://scholarship.richmond.edu/lawreview/vol26/iss4/16>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

## PROPERTY LAW

*Charles H. Rothenberg\**

Both the Virginia Supreme Court and the General Assembly addressed important issues affecting property law in Virginia over the past year. For instance, the Virginia Supreme Court considered for the first time the extent to which dominant estate owners could improve rights of way benefiting their property. The General Assembly has gone a long way toward vitiating the long held caveat emptor rule predominant in Virginia by adopting a residential sales disclosure statute. These and other important cases and statutes are discussed below.

### I. JUDICIAL DECISIONS

#### A. *Contracts*

A party to a contract for the purchase of land may lose his right to rescind the contract for valid reasons if the party continues to treat the contract as an existing contract and misleads the other party to believe that the contract is still in effect. The Virginia Supreme Court applied this rule in *McLeskey v. Ocean Park Investors, Ltd.*<sup>1</sup> to estop a contract purchaser from rescinding a 1979 installment sales contract for the purchase of subdivided but unimproved lots after seeking earlier to specifically enforce the contract.<sup>2</sup>

In 1981, the purchaser filed suit to specifically enforce the contract. The court dismissed the suit in 1987 for failure to prosecute. In 1988, the purchaser brought suit against the seller seeking to rescind the contract.<sup>3</sup> The Virginia Supreme Court held that the 1981 suit constituted the purchaser's election to treat the contract

---

\* 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.

1. 242 Va. 51, 405 S.E.2d 846 (1991).

2. *Id.* at 55, 405 S.E.2d at 848.

3. *Id.* at 54, 405 S.E.2d at 848.

as valid and enforceable, thereby estopping the purchaser from adopting a position contrary to that election.<sup>4</sup>

### B. *Deeds of Trust*

In *Allen v. Chapman*,<sup>5</sup> a case of first impression, the Virginia Supreme Court was asked to determine whether a junior lienor should be characterized as a party in interest for purposes of the statute of limitations contained in section 8.01-242 of the Code of Virginia ("Code").<sup>6</sup> The facts were as follows. In 1969, Charles and Margaret Chapman acquired property in Norfolk from Billy and Bernadette Chapman. Charles and Margaret executed a \$90,000 demand note payable to Billy and Bernadette secured by a deed of trust recorded against the property. In 1973, Charles and Margaret conveyed the property to a subsequent purchaser. The purchaser executed an \$80,000 note payable to Charles and Margaret. In 1982, the Youngs acquired the property and assumed the \$80,000 note.<sup>7</sup>

Shortly after Charles Chapman's death in 1988, the Youngs discovered the deed of trust securing the \$90,000 note and sought a declaratory judgment finding the deed of trust invalid. Billy and Bernadette Chapman sued to enforce the deed of trust. The Youngs argued that the twenty-year limitations period set forth in section 8.01-242 barred the enforcement of the deed of trust.<sup>8</sup> However, Billy and Bernadette argued that the twenty-year period was extended one year because of Charles Chapman's death.<sup>9</sup>

---

4. *Id.* at 55, 405 S.E.2d at 848. The court acknowledged that a party may pray for both rescission and specific performance in the alternative. *Id.*; see VA. SUP. CT. R. 1:4(k). The court noted that the purchaser treated the contract as valid from 1981 to 1987 when the trial court dismissed the purchaser's first suit for specific performance. In addition, the purchaser sought neither to plead both remedies in the alternative nor to amend the specific performance suit. *Id.*

5. 242 Va. 94, 406 S.E.2d 186 (1991).

6. *Id.* at 96, 406 S.E.2d at 186. Section 8.01-242 provides as follows:

No deed of trust or mortgage given to secure the payment of money, and no lien reserved to secure the payment of unpaid purchase money, in which no date is fixed for the maturity of the debt secured by such deed of trust, mortgage, or lien, shall be enforced after twenty years from the date of the deed of trust, mortgage, or other lien; provided that the period of one year from the death of any party in interest shall be excluded from the computation of time.

VA. CODE ANN. § 8.01-242 (Repl. Vol. 1984).

7. *Allen*, 242 Va. at 96, 406 S.E.2d at 187.

8. *Id.* at 97, 406 S.E.2d at 187.

9. *Id.*

The Virginia Supreme Court agreed with Billy and Bernadette, finding that a foreclosure under the deed of trust securing the \$90,000 note would eliminate the security for the \$80,000 note payable to Charles and Margaret Chapman. Therefore, Charles Chapman, or his estate, was a party in interest for purposes of the one year extension to the statute of limitations.<sup>10</sup>

The court also determined that the purpose of section 8.01-242 is two-fold. First, the section provides the personal representative of the decedent time to analyze claims against the estate. The second purpose of the section is to give "creditors of the estate, with perhaps less reason but with just reciprocity, a corresponding extension of time."<sup>11</sup> Therefore, both Charles Chapman's estate and Billy and Bernadette Chapman, as creditors of the estate, were entitled to the one year extension.<sup>12</sup>

In *Garrison v. First Federal Savings and Loan Ass'n*,<sup>13</sup> the Virginia Supreme Court held that interest charged by a second deed of trust lienholder in excess of that permitted by Virginia's usury laws voids the loan. Landbank Equity Corporation originated a \$9,224.19 loan in 1984 and shortly thereafter sold the note to First Federal. Garrison defaulted on the loan in 1985 and First Federal began foreclosure proceedings. Garrison sought a judgment reforming the loan or declaring the loan void under Virginia's subordinate mortgage laws. The trial court, finding that voiding the loan would be inequitable, reformed the loan and Garrison appealed.<sup>14</sup>

The Virginia Supreme Court rejected all of First Federal's arguments supporting the trial court's reformation and declared the loan void.<sup>15</sup> The court first rejected First Federal's assertion that, since the savings and loan was neither an agent nor a principal of

---

10. *Id.* at 97-98, 406 S.E.2d at 187. The court analogized a party in interest under section 8.01-242 with a necessary party in a judicial foreclosure. *Id.*; see *Rector v. Tazewell Coal & Iron Co.*, 179 Va. 803, 20 S.E.2d 504 (1942) (administratrix of owner of property is a necessary party to a suit to enforce a vendor's lien securing repayment of notes even though statute of limitations bars personal liability on notes); 1 RALEIGH C. MINOR, *THE LAW OF REAL PROPERTY* § 606 (Frederick D.G. Ribble 2d ed. 1928) (all encumbrancers at the time of filing bill for judicial foreclosure should be made parties in order to avoid multiplicity of suits, make final distribution of sale proceeds, and give foreclosure purchaser clear title).

11. *Allen*, 242 Va. at 101, 406 S.E.2d at 189 (quoting *Boggs v. Fatherly*, 177 Va. 259, 264, 13 S.E.2d 298, 300 (1941)).

12. *Id.*

13. 241 Va. 335, 402 S.E.2d 25 (1991).

14. *Id.* at 338, 402 S.E.2d at 27.

15. *Id.* at 339, 402 S.E.2d at 27.

Landbank, the loan was free from application of Code section 6.1-330.47(A).<sup>16</sup> According to the court, First Federal's restrictive construction of section 6.1-330.47(A) would protect loans where the assignee was neither an agent nor a principal of the originating lender, even if the loan was otherwise void.<sup>17</sup>

The court next rejected First Federal's argument that the loan risk management fees and excess appraisal costs charged the Garrisons were not "interest" as that term is used in section 6.1-330.47(A), and, therefore were allowable.<sup>18</sup> The supreme court noted that "[i]t is well settled that any charge which cannot be attributed to either principal or to an allowed charge for collateral service is considered interest."<sup>19</sup> Therefore, the loan discount charge, risk management charge, and excess appraisal charge imposed by Landmark Equity all constituted interest under section 6.1-330.47(A).<sup>20</sup>

First Federal also unsuccessfully argued that while the loan discount charge exceeded that permitted under Virginia law, the charge was disclosed to the Garrisons on a federal truth-in-lending statement. First Federal reasoned that this disclosure brought the

---

16. *Id.* at 341, 402 S.E.2d at 28. Section 6.1-330.47(A) provides that:

Any contract, note, mortgage, or deed of trust made or received and providing for interest charges in excess of those permitted by §§ 6.1-330.16 and 6.1-330.24, except as hereinafter provided, shall be null and void and unenforceable by the lender or by his assignees, who are agents or principals of the lender.

The provisions of this section shall apply only to loans made under § 6.1-330.16 and shall not apply to any contract or note, or mortgage or deed of trust securing such obligation, which has been assigned to a person who is not the agent or principal of the lender, if such assignee has taken the note or obligation in good faith and in reasonable reliance upon the provisions of § 6.1-330.44.

VA. CODE ANN. § 6.1-330.47(A) (Repl. Vol. 1988).

17. *Id.* at 342, 402 S.E.2d at 28-29. Section 6.1-330.44 provides, in part that:

No person shall, by way of defense or otherwise, avail himself of the provisions of this chapter, or any other section relating to usury to avoid or defeat the payment of interest, or any other sum, when such loan is made to an individual or individuals or other entity by a financial institution as defined in § 6.1-2.1 or for the acquisition or conduct of business or investment as a sole proprietor, owner, or joint venturers or owners provided the initial amount of the loan is \$5,000 or more.

VA. CODE ANN. § 6.1-330.44, *repealed* by Act of Mar. 27, ch. 622, 1987 Va. Acts 1026.

18. *Garrison*, 241 Va. at 344, 402 S.E.2d at 29.

19. *Id.* at 342, 402 S.E.2d at 29 (citing *Chakales v. Djiovanides*, 161 Va. 48, 86-93, 170 S.E. 848, 861-64 (1933)).

20. *Id.* at 343, 402 S.E.2d at 28. The court noted that under Virginia Code sections 6.1-330.16(E) and -330.24 only the actual cost of an appraisal may be charged to the borrower and no provision is made for a risk management fee. *Id.*; see VA. CODE ANN. §§ 6.1-330.16(E), -330.24, *repealed* by Act of Mar. 27, ch. 622, 1987 Va. Acts 1026.

loan under the safe harbor of Code section 6.1-330.16(E).<sup>21</sup> The court disagreed, noting that First Federal's interpretation of section 6.1-330.16 would permit lenders to impose any charges as long as the charges were disclosed on truth-in-lending statements.<sup>22</sup>

### C. Deeds

In *Princess Anne Hills Civic League, Inc. v. Susan Constant Real Estate Trust*,<sup>23</sup> the Virginia Supreme Court considered the validity of a deed from a homeowners' association conveying property designated on a subdivision plat as reserved for the benefit of homeowners in the subdivision. A subdivision plat depicting a waterfront parcel included a notation to the effect that the waterfront parcel would be "transferred to Strattons Creek Club, a corporation, for recreation facilities."<sup>24</sup> The club was never formed, but the evidence indicated that the club was to have been reserved for the recreational and social benefit of all of the homeowners in the development.<sup>25</sup> The developer conveyed the waterfront parcel to the Princess Anne Hills Civic League, for the benefit of all of the homeowners in the development, in consideration of the civic league's assumption of the upkeep and real estate tax liability for the property.<sup>26</sup>

Hollenbeck, the owner of a lot in the development, obtained the signature of the new president of the association on a deed conveying the waterfront parcel to a trust. The deed, which the president executed without the approval of the association's board or members, provided that the trust would manage the waterfront parcel for all of the homeowners entitled to use the parcel.<sup>27</sup> However, the recorded declaration of trust provided that the trust would hold the parcel for the benefit of eight specified lots in the development for the purpose of "preserv[ing] the boat docking privileges and for

---

21. *Garrison*, 241 Va. at 343, 402 S.E.2d at 30.

22. *Id.* at 344, 402 S.E.2d at 30.

23. 243 Va. 53, 413 S.E.2d 599 (1992).

24. *Id.* at 56, 413 S.E.2d at 601.

25. *Id.* The evidence indicated further that even though the club was never formed, the developer did not change the notation on the plat or designate another beneficiary for the waterfront parcel. Therefore, all of the homeowners in the development took title to their lots subject to the notation. *Id.*

26. *Id.* at 57, 413 S.E.2d at 601.

27. *Id.*, 413 S.E.2d at 602.

the payment of taxes and expenses."<sup>28</sup> The association sought to set the deed aside.<sup>29</sup>

The Virginia Supreme Court disposed of two equitable arguments interposed by Hillenbrand and the trust to defeat the association's suit. First, the court determined that, notwithstanding the fact that Hollenbeck maintained the waterfront parcel for eight years after the trust took title to the parcel and that the trust paid the real estate taxes on the parcel during that time, the doctrine of laches did not bar the association from seeking to set aside the deed.<sup>30</sup> The court also refused to apply the doctrine of equitable estoppel as a defense to the association's action to set aside the deed.<sup>31</sup>

Moving on to the merits of the case, the court determined that the association clearly held title to the waterfront parcel for the benefit of all of the homeowners in the development. And since the president of the association executed the deed conveying the parcel to the trust without complying with the applicable statutory requirements for disposing of the association's sole asset, the deed was ultra vires and voidable.<sup>32</sup> The court found no evidence of ratification of the conveyance to the trust by the association. The association did not vote to ratify the conveyance at a meeting held shortly after the conveyance, even though the matter was discussed. The court also found no evidence in the record to support the trust's assertion that the membership acquiesced to the conveyance.<sup>33</sup>

---

28. *Id.*

29. *Id.*

30. *Id.*, 413 S.E.2d at 603. The court noted that the passage of time did not obscure evidence that was unavailable from alternative sources. *Id.*

31. *Id.* at 59, 413 S.E.2d at 603. The court found no evidence supporting the trust's estoppel defense. In fact, the trust conceded that no vote by the association's membership was taken to approve the transfer of the waterfront parcel to the trust. *Id.*

32. *Id.* at 60, 413 S.E.2d at 603; *see* VA. CODE ANN. § 13.1-246, *repealed by* Act of Mar. 24, 1985, ch. 522, 1985 Va. Acts 866. The court noted that the conveyance was voidable as opposed to void because the statute permitted the transfer of the association's property provided that certain conditions were satisfied. *Princess Anne*, 243 Va. at 60, 413 S.E.2d at 603. The distinction is important because, as the court noted, a voidable act may be ratified, while a void act is completely null. *Id.* at 61, 413 S.E.2d at 604 (citing *Crump v. Bronson*, 168 Va. 527, 537, 191 S.E. 663, 667 (1937)).

33. *Princess Anne*, 243 Va. at 62, 413 S.E.2d at 604.

#### D. *Division Fences*

A 1970 amendment to Virginia's division fence statutes survived a constitutional attack in *Holly Hill Farm Corp. v. Rowe*.<sup>34</sup> Holly Hill, the owner of a cattle farm in Caroline County, sought to recover from the adjoining landowners one-half of the cost of erecting a division fence along each owner's boundary with Holly Hill's property. The adjoining landowners questioned the constitutionality of the division fence statute, claiming that it constituted impermissible special legislation favoring agricultural landowners at the expense of owners of commercial lands and subdivided lots.<sup>35</sup>

The Virginia Supreme Court found that the adjoining landowners failed to meet their substantial burden of showing that the statute has no reasonable basis and is essentially arbitrary.<sup>36</sup> The court noted that in many cases agricultural properties are much larger than commercial properties and subdivided lots. Had the General Assembly vested owners of commercial lands or subdivided lots with control over the construction of division fences, one owner of a small property could elect not to install a fence and thereby destroy the continuity of the fence around the adjacent agricultural property.<sup>37</sup> Based on this scenario, the deferential treatment afforded agricultural land owners under the statute is reasonable, appropriate, and objective.<sup>38</sup>

---

34. 241 Va. 425, 404 S.E.2d 48 (1991). The statute in question, Code section 55-317, provides, in part, that

Adjoining landowners shall build and maintain, at their joint and equal expense, division fences between their lands, unless one of them shall choose to let his land lie open as hereinafter provided for, or unless they shall otherwise agree between themselves. No owner of land used for industrial or commercial purposes, or subdivided into lots or parcels, adjoining lands used for agricultural purposes, when given notice by the owner of such adjoining lands under § 55-318 shall have the option of choosing to let his land lie open, but shall build one-half of such fence or be liable therefor.

VA. CODE ANN. § 55-317 (Repl. Vol. 1986).

35. *Rowe*, 241 Va. at 428-29, 404 S.E.2d at 49.

36. *Id.* at 430-31, 404 S.E.2d at 50. The court found that the provisions of the division fence statute are "general" and not special in nature in that they favor all agricultural landowners over all commercial land owners and owners of subdivided lots. *Id.*

37. *Id.* at 431, 404 S.E.2d at 51.

38. *Id.* at 433, 404 S.E.2d at 52. Justice Lacy, citing major flaws in the majority's opinion, dissented. *See id.* at 433, 404 S.E.2d at 52 (Lacy, J. dissenting). Agricultural lands may not always be the largest tract in an area and the adjacent properties may not be commercial properties or subdivided lots. In Justice Lacy's opinion, section 55-317 is poorly drafted to accomplish the goal intended by the General Assembly. *Id.* at 434, 404 S.E.2d at 52.



### E. Easements

In *Hayes v. Aquia Marina, Inc.*,<sup>39</sup> the Virginia Supreme Court considered for the first time whether a dominant estate owner had the right to make improvements to a right of way. The case arose when the owner of the marina sought to pave a dirt and gravel road providing access to a marina. The court adopted the rule that "the owner of a dominant estate has the right to make reasonable improvements to an easement, so long as the improvement does not unreasonably increase the burden upon the servient estate."<sup>40</sup> The court also found nothing in the record indicating that the marina owner's expansion of the marina from eight-four boat slips to 240 boat slips would impose any additional burden upon the servient estate, even though the expansion could increase the degree of burden on the servient estate owner.<sup>41</sup>

The language in many declarations of covenants permitting encroachment onto one lot from another found an unexpected application in *Edmiston Homes, Ltd. v. McKinney Group*.<sup>42</sup> The case arose when Edmiston, a builder, sought to construct a zero lot line house on a subdivided lot in Henrico County. The county code required an eight foot easement on the adjacent lot for construction and maintenance of the house to be located on the zero lot line lot.<sup>43</sup> The easement was not designated on the plat or any document affecting title to the adjacent lot. However, a declaration of covenants affecting the adjacent lot provided that each lot in the subdivision would be subject to an easement for encroachments from adjacent lots.<sup>44</sup>

---

39. 243 Va. 255, 414 S.E.2d 820 (1992).

40. *Id.* at 261, 414 S.E.2d at 823. The court also considered whether the agreement creating the right of way placed any limitation on the scope of the use of the right of way. *Id.* The court agreed with the trial court that a reference in the agreement to "private roadway" merely distinguished the right of way area from another roadway that the parties to the agreement intended to dedicate to the state for perpetual maintenance. *Id.* at 259, 414 S.E.2d at 822.

41. *Id.* at 258, 414 S.E.2d at 822 (citing *Cushman Corp. v. Barnes*, 204 Va. 245, 253, 129 S.E.2d 633, 639 (1963) (unless instrument creating easement limits it to particular use, reasonable change in use of dominant estate does not affect easement)).

42. 241 Va. 263, 401 S.E.2d 875 (1991).

43. *Id.* at 265, 401 S.E.2d at 876.

44. *Id.* at 266, 401 S.E.2d at 877. The relevant part of the restrictive covenants provided that:

Each Owner is hereby declared to have an easement and the same is hereby granted by the Declarant over all adjoining parcels for the purpose of accomodating [sic] any encroachment due to engineering errors, errors in original construction, settlement or shifting of building, or any other cause. There shall be valid easements for the main-

The Virginia Supreme Court agreed with the trial court that, given the nature of zero lot line houses, a house could not be constructed on a lot without encroaching on the adjacent lot and that the "or any other cause" phrase of the encroachment easement language in the restrictive covenants applied to the facts before it. Therefore, the easement language accrued to the benefit of the owner of the zero lot line house.<sup>45</sup>

In *Davis v. Cleve Marsh Hunt Club*,<sup>46</sup> the Virginia Supreme Court was asked to determine whether the hunt club had obtained an enforceable access easement over Davis' property. The hunt club acquired certain marsh land from Davis for hunting purposes. The sales contract referenced certain access rights and a lease for other marsh land and access rights to the property.<sup>47</sup> Davis argued that the contract terms merged into the deed and lease leaving the hunt club without the most desirable right of access referenced in the sales contract.<sup>48</sup>

The court, relying on language in the sales contract indicative of a present intent to convey, held that the sales contract conveyed the access easement to the hunt club.<sup>49</sup> Since the contract actually effected the conveyance of the access easement, and therefore did

---

tenance of said encroachment, settlement or shifting; *provided however*, that in no event shall a valid easement for encroachment be created in favor of an Owner or Owners if said encroachment occurred due to the willful or wanton misconduct of said Owner or Owners. In the event that a structure on any Lot is partially or totally destroyed, and then repaired or rebuilt, the Owners of each Lot agree that minor encroachment over adjoining Lots shall be permitted and that there shall be valid easements for the maintenance of said encroachment so long as they shall exist.

*Id.* at 267, 401 S.E.2d at 877.

45. *Id.* at 268, 401 S.E.2d at 878. The court, noting that any attempt to comply with the county zero lot line provision would result in an encroachment, also agreed with the trial court's decision that the encroachment was not willful. *Id.*

46. 242 Va. 29, 405 S.E.2d 839 (1991).

47. *Id.* at 31, 405 S.E.2d at 840.

48. *Id.* at 33, 405 S.E.2d at 840.

49. *Id.*, 405 S.E.2d at 841. The pertinent part of the sales contract provided as follows:

It is further agreed between the parties that the [Davises] hereby give the [hunt club] right of ways to existing landings from state highway through Davis Farm property in Caroline County of Conway Davis and Genevieve Davis and their heirs or assigns who may later have an interest in this farm.

*Id.* at 31, 405 S.E.2d at 840. The court noted that had the contract stated that the Davises "hereby agree to convey," or used similar words, the contract, as to the access easement, would have been executory. However, the language used in the contract clearly evidenced the Davises' intent to create in the hunt club a present interest in the access easement. *Id.* at 34, 405 S.E.2d at 841.

not constitute an executory contract, the provision regarding the conveyance of the access easement did not merge with the deed.<sup>50</sup>

#### F. *Eminent Domain*

Lessees of property used for installing billboards are not entitled to a separate condemnation proceeding to determine just compensation upon a condemnation of the underlying leasehold property, according to the Virginia Supreme Court's decision in *Lamar Corp. v. City of Richmond*.<sup>51</sup> The lessees sought a separate condemnation action with respect to their interests in the property and refused to intervene in the city's eminent domain proceedings against the property. Notwithstanding this protest by the lessees, counsel for the owner of the property and the lessees endorsed an order setting just compensation for the property.<sup>52</sup> The lessees appealed on the grounds that the city's actions constituted a taking without just compensation for the lessees' leasehold interests in the property and ownership interests in the billboards.<sup>53</sup>

The Virginia Supreme Court noted that where a lessee has an interest in property, the proper course of action in a condemnation proceeding is to determine just compensation for the property as if owned by one party and then apportion that sum among the interested parties.<sup>54</sup> A lessee does not have an interest in the property separate from that of the owner.<sup>55</sup> The court also ruled that the billboards, which were firmly affixed to the realty, constituted realty, and that the lessees held a compensable interest in the billboards. However, the court further held that the compensation

---

50. *Id.* at 34, 405 S.E.2d at 841. "[W]here a deed has been executed and accepted as performance of an executory contract . . . [,] the rights of the parties rest thereafter solely on the deed." *Id.* at 33, 405 S.E.2d at 841 (citing *Charles v. McClanahan*, 130 Va. 682, 685, 108 S.E. 858, 859 (1921)).

51. 251 Va. 346, 402 S.E.2d 31 (1991).

52. *Id.* at 348-49, 402 S.E.2d at 32.

53. *Id.* at 349, 402 S.E.2d at 33. The leases provided that the lessees would be the exclusive owners of the billboards installed on the leasehold property. *Id.* at 348, 402 S.E.2d at 32.

54. *Id.* at 350, 402 S.E.2d at 33 (citing *Fonticello Mineral Springs Co. v. City of Richmond*, 147 Va. 355, 369, 137 S.E. 458, 463 (1927)). The lessees also contended that the city's condemnation was void because the city failed to give the lessees, as "tenants of the freehold," proper notice of the condemnation. The court found that the mere presence of the billboards was insufficient to make the lessees "tenants of the freehold." *Lamar*, 251 Va. at 350, 402 S.E.2d at 33 (following *Fonticello*, 147 Va. at 369, 137 S.E. at 462 (a tenant of the freehold is a tenant in possession appearing as the visible owner)).

55. *Lamar*, 251 Va. at 350, 402 S.E.2d at 33.

award for the freehold already included compensation for the billboards.<sup>56</sup> Unfortunately, the lessees, through their counsel, had already consented to the payment of the compensation to the freehold owner.<sup>57</sup>

### G. *Fraudulent Conveyances*

Intent to create a trust is not a condition precedent to establishing a constructive trust at law, the Virginia Supreme Court noted in *Richardson v. Richardson*.<sup>58</sup> In *Richardson*, the wife of a decedent sought to recover title to property conveyed to her husband by his mother as a gift. In anticipation of a divorce, the husband, without consideration, reconveyed the property to his mother in an effort to circumvent any rights his wife would have in the property. His mother, without consideration, conveyed the property to her other son, the decedent's brother. The decedent and his wife subsequently reconciled. The trial court, finding that the husband's brother would be unjustly enriched by the conveyance, imposed a constructive trust on the property in favor of the wife based on testimony of the decedent's wife and children that the decedent did not intend to relinquish his rights in the property.<sup>59</sup>

On appeal, the Virginia Supreme Court noted that the intent of the parties, while irrelevant to the creation of the constructive trust, did bear on the issue of unjust enrichment. The court found that the testimony of the decedent's children and wife to the effect that the husband did not intend completely to relinquish his rights in the property, and thereby enrich his mother or brother, was sufficient to support the trial court's imposition of a constructive trust.<sup>60</sup>

### H. *Joint Tenants*

In *Pitts v. United States*,<sup>61</sup> the Virginia Supreme Court, answering a question certified by the Fourth Circuit, held that promissory

---

56. *Id.* at 352, 402 S.E.2d at 34.

57. *Id.*

58. 242 Va. 242, 409 S.E.2d 148 (1991).

59. *Id.* at 244-45, 409 S.E.2d at 149-50.

60. *Id.* at 246-47, 409 S.E.2d at 151.

61. 242 Va. 254, 408 S.E.2d 901 (1991). Interestingly, the court determined that Code § 55-21 did not apply to the notes. That section provides that Code § 55-20, which converts joint tenancies to tenancies in common, "shall not apply . . . to an estate conveyed . . . to persons in their own right when it manifestly appears from the tenor of the instrument that

notes received in exchange for real property held as tenants by the entirety are similarly held, even though the notes do not include any survivorship language.

The Pittses owned a parcel of land as tenants by the entirety. In 1986, the Pittses conveyed the property to a partnership in exchange for two promissory notes secured by a deed of trust on the property.<sup>62</sup> In 1989, the Internal Revenue Service (IRS) filed a notice of income tax lien against Mr. Pitts and notified the partnership that all payments on the notes were to be made to the IRS. The Virginia Supreme Court agreed with Mrs. Pitts that the notes, like the real property conveyed to the partnership, were held by the couple as tenants by the entirety. Therefore, the notes were not subject to the rights of Mr. Pitts' individual creditors.<sup>63</sup>

In *Funches v. Funches*,<sup>64</sup> the Virginia Supreme Court considered whether the surviving spouse of a decedent held a dower interest in property which the decedent and the decedent's companion in a bigamous marriage purportedly held as tenants by the entirety. The court held that the deed conveying the property to the decedent and his companion created a joint tenancy with a right of survivorship and that, upon the decedent's death, title vested in his companion to the exclusion of the decedent's actual wife.<sup>65</sup> The court also noted that since the deed, and not the status of her relationship with the decedent, created the companion's interest in the

---

it was intended the part of the one dying should then belong to the others." VA. CODE ANN. § 55-21 (Repl. Vol. 1986). The notes, according to the court, did not qualify as an "instrument" as that term is used in § 55-21, but were a "memorial" of a chose in action. *Pitts*, 242 Va. at 260, 408 S.E.2d at 904.

Instead, the court followed its decision in *Oliver v. Givens*, 204 Va. 123, 129 S.E.2d 661 (1963) that proceeds from the sale of real property held as tenants by the entirety are also held as tenants by the entirety, regardless of the manner of payment. *Pitts*, 242 Va. at 261, 408 S.E.2d at 904-05.

62. 242 Va. at 257, 408 S.E.2d at 902.

63. *Id.* at 261-62, 408 S.E.2d at 905.

64. 243 Va. 26, 413 S.E.2d 44 (1992). It is important to note that the results of this case may have been very different under Virginia's Augmented Estate statute, set forth at Code § 64.1-16.1, which became effective on January 1, 1991. *See* VA. CODE ANN. § 64.1-16.1 (Repl. Vol. 1991). However, Code § 64.1-19.2 provides that the law in effect prior to that date will govern the procedures for determining the rights of parties whose dower or curtesy interests vested prior to that date. *Id.* § 64.1-19.2.

65. *Funches*, 243 Va. at 29, 413 S.E.2d at 46; *see Gant v. Gant*, 237 Va. 588, 379 S.E.2d 332 (1989)(conveyance of property as tenants by the entireties to husband and ex-wife after divorce created joint tenancy with right of survivorship precluding dower interest of subsequent wife).

property, the fact that the decedent and companion's marriage was legally void did not affect the companion's survivorship rights.<sup>66</sup>

### I. *Landlord and Tenant*

In *Sentara Enterprises, Inc. v. CCP Associates*,<sup>67</sup> the Virginia Supreme Court considered whether an equitable remedy would save a tenant from the termination of a lease. The relevant lease provision granted the tenant the right to extend the lease, provided that the tenant gave the landlord notice of the renewal at least thirty days prior to the expiration of the current term. The lease also specifically stated that failure to notify the landlord of intent to renew would result in the automatic termination of the lease.<sup>68</sup> The tenant provided the landlord with notice of renewal approximately ten days late.<sup>69</sup> The landlord executed a lease with another tenant and demanded that the tenant relinquish the premises.<sup>70</sup>

The Virginia Supreme Court rejected the tenant's argument that the landlord was estopped from treating the lease as terminated stating:

The law is established that time is of the essence of an option to renew a lease and the provision for notice of renewal is a condition precedent upon which the tenant's right to renew depends. Moreover, equity will deny relief to a tenant where failure to give the notice required by the agreement is due solely to the tenant's negligence, unaccompanied by fraud, accident, mistake or surprise, and unaffected by the landlord's conduct.<sup>71</sup>

---

66. *Funches*, 243 Va. at 30, 413 S.E.2d at 47.

67. 243 Va. 39, 413 S.E.2d 595 (1992).

68. *Id.* at 40, 413 S.E.2d at 595.

69. *Id.* at 41-42, 413 S.E.2d at 596. The tenant sent the landlord written notice of the tenant's intent to extend the lease only after the landlord notified the tenant that the lease had terminated and encouraged the tenant to contact the landlord if the tenant desired to enter into a new lease. *Id.* at 41, 413 S.E.2d at 596. Numerous letters from the landlord to the tenant after the expiration of the term consistently maintained the landlord's position that the lease had terminated and that the tenant occupied the premises under a month to month lease. *Id.* at 41-42, 413 S.E.2d at 596.

70. *Id.* at 42, 413 S.E.2d at 596.

71. *Id.* at 44, 413 S.E.2d at 597-98 (citing *McClellan v. Ashley*, 200 Va. 38, 43-44, 104 S.E.2d 55, 58-59 (1958)).

The court found nothing in the record assigning fault to the landlord for the tenant's failure to renew the lease, and therefore held that the tenant was not entitled to an equitable remedy.<sup>72</sup>

In *Walker v. Arrington*,<sup>73</sup> the Virginia Supreme Court considered whether a purported oral modification to a lease was supported by consideration. Arrington agreed to purchase property in Powhatan County from Hardraker. As a condition to the sale, Hardraker required Arrington to sign a lease with Walker, an existing tenant occupying the property.<sup>74</sup> On February 12, 1989, Arrington and Walker entered into a lease for three years at a rental of \$1,000 per year to be paid on March 1 of each lease year, beginning on March 1, 1989. The lease also granted Walker an option to purchase the property for \$15,000.<sup>75</sup> Arrington's acquisition of the property was delayed until April 19, 1989. Arrington and Walker discussed some modifications to the lease as a result of Arrington's late acquisition of the property, including postponing the due date of the first rental payment and increasing the price of the option to \$16,500. The modifications were reduced to a writing but never signed.<sup>76</sup>

Walker failed to pay the first installment of rent as required by the signed lease, but tendered payment in compliance with the oral modifications to the lease. Arrington refused to accept the rent, gave Walker notice of termination of the lease, and brought an unlawful detainer action to recover possession of the property. Walker argued that the parties had orally agreed to extend the due date of the rent payment. The trial court determined that even if Arrington and Walker had orally agreed to extend the due date for the first rent payment (which the court did not decide), the modification was not supported by consideration.<sup>77</sup>

The Virginia Supreme Court disagreed, finding that Walker's oral agreement to increase the price for the option constituted adequate consideration for Arrington's agreement to extend the due date for the first rental installment. The court remanded the case

---

72. *Id.* at 45, 413 S.E.2d at 598.

73. 241 Va. 451, 403 S.E.2d 693 (1991).

74. *Id.* at 452, 403 S.E.2d at 694.

75. *Id.* at 452-53, 403 S.E.2d at 694.

76. *Id.* at 453, 403 S.E.2d at 694.

77. *Id.* at 454-55, 403 S.E.2d at 695.

to the trial court to determine whether the parties had orally agreed to modify the lease.<sup>78</sup>

In *United States v. Southern Management Corp.*,<sup>79</sup> the Fourth Circuit Court of Appeals found that a recovering drug addict supervised under a local drug addiction program is a handicapped individual entitled to protection under the anti-discrimination provisions of the Federal Fair Housing Act. In reaching its decision, the court relied on both the legislative history of the Act and the regulations adopted pursuant to the Act by the Department of Housing and Urban Development.<sup>80</sup> A crucial factor to the court was the fact that the regulations characterize as "handicapped" those individuals whose major life activities were limited, not by the actual physical or mental limitations of the individual, but by the lack of opportunities afforded by other people because of their perception of the individual's prior drug use.<sup>81</sup>

A lease that provides the tenant with an option to extend the term for an additional five year term "at a mutually agreed rent" is unenforceable for indefiniteness according to the Virginia Supreme Court's decision in *Davis v. Cleve Marsh Hunt Club*.<sup>82</sup> *Davis* was a case of first impression for the court.<sup>83</sup> Tenants would be well advised to insist on the inclusion of fixed rentals, formulas, or other specific methods of determining rent for renewal periods in leases.

### J. *Mechanic's Liens*

In a suit to enforce a mechanic's lien, a beneficiary of a deed of trust inferior in lien to the mechanic's lien is a necessary party and failure to join the beneficiary in the suit within the six-month limitation period mandated by Code section 43-17<sup>84</sup> is fatal to the suit,

---

78. *Id.* at 455-56, 403 S.E.2d at 695-96.

79. 955 F.2d 914 (4th Cir. 1992). Under the Act, a handicap is "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance." 42 U.S.C. § 3602(h) (1990) (emphasis added).

80. 955 F.2d at 917-22; see 24 C.F.R. § 100.201 (c) and (d).

81. 955 F.2d at 919 (following *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987)).

82. 242 Va. 29, 405 S.E.2d 839 (1991).

83. *Id.* at 34, 405 S.E.2d at 842. The court noted, however, that its decision was consistent with previous holdings in *Boisseau v. Fuller*, 96 Va. 45, 30 S.E. 457 (1898) and *Taylor v. King Cole Theatres*, 183 Va. 117, 31 S.E.2d 260 (1944).

84. VA. CODE ANN. § 43-17 (Repl. Vol. 1990).



according to the Virginia Supreme Court in *James T. Bush Construction Co. v. Patel*.<sup>85</sup> The court explained that in its prior decisions it acknowledged that due process required joining the beneficiary of a deed of trust recorded prior to the recordation of a mechanic's lien because the beneficiary had an interest in whether or not the suit to enforce the mechanic's lien produced sufficient proceeds to satisfy both the deed of trust and the mechanic's lien.<sup>86</sup> The court found this reasoning even more compelling in *Patel* where, since the deed of trust was inferior to the mechanic's lien, the deed of trust may have been defeated by the suit to enforce the mechanic's lien.<sup>87</sup>

The failure of a roofing material supplier's lien to apportion the cost of the supplies among the units in a structure housing multiple townhouse units was fatal to the validity of the lien according to the Virginia Supreme Court's decision in *Addington-Beaman Lumber Co. v. Lincoln Savings and Loan Ass'n*.<sup>88</sup> In reaching its decision, the court emphasized that the roofing material supplier provided the materials on an open account basis and not under "a single interdependent contract requiring the general contractor to buy and the supplier to sell."<sup>89</sup> The court emphasized that the supplier's dealings with the general contractor involved a documented series of individual but related transactions that permitted the supplier to allocate the costs of the roofing materials among the various units.<sup>90</sup>

### K. Partition

A life tenant does not have the right to compel partition of the property against the owners of the remainder according to the

---

85. 243 Va. 84, 412 S.E.2d 703 (1992); see VA. CODE ANN. § 43-17 (Repl. Vol. 1990).

86. *Patel*, 243 Va. at 86-87, 412 S.E.2d at 704 (citing *Mendenhall v. Cooper*, 239 Va. 71, 387 S.E.2d 468 (1990) and *Walt Robbins, Inc. v. Damon Corp.*, 232 Va. 43, 348 S.E.2d 223 (1986)).

87. *Patel*, 243 Va. at 88, 412 S.E.2d at 705 (citing *Walt Robbins, Inc.*, 232 Va. at 47, 348 S.E.2d at 226).

88. 241 Va. 436, 403 S.E.2d 688 (1991).

89. *Id.* at 439, 403 S.E.2d at 689. Numerous individual invoices, delivery tickets and work orders evidenced the open account relationship. Had there been one contract for the entire project and no allocation of the purchase price to the several units, the supplier's blanket lien may very well have been upheld. *Id.* at 440, 403 S.E.2d at 690; see *Sergeant v. Denby*, 87 Va. 206, 12 S.E. 402 (1890) (upholding joint lien for materials supplied and work performed under single contract for an "entire work" consisting of two homes on two separate lots).

90. *Addington-Beaman*, 241 Va. at 440-41, 403 S.E.2d at 690.

court in *Whitby v. Overton*.<sup>91</sup> The court noted that Virginia Code section 8.01-81<sup>92</sup> only authorizes tenants in common, joint tenants, executors with the power to sell, and coparceners of real property to compel partition.<sup>93</sup> The life tenant could not qualify as a tenant in common with the remaindermen because the parties did not have coequal rights of occupancy.<sup>94</sup> Therefore, the life tenant could not compel partition of the property.<sup>95</sup>

#### L. Resulting Trust

In *Tiller v. Owen*,<sup>96</sup> the Virginia Supreme Court was asked to determine whether a resulting trust arose in favor of Owen, a person who contributed money toward another person's property purchase. Tiller executed a purchase contract for a residence and obtained a loan for the residence in her own name. Owen provided Tiller with approximately \$23,000 to purchase the residence and subsequently paid almost two years of the debt service on the loan until his relationship with Tiller terminated. Owen then sought to establish an interest in the property by way of a resulting trust.<sup>97</sup>

The court determined that the facts before it did not satisfy the elements of a resulting trust.<sup>98</sup> "In order for a resulting trust to arise, the would-be beneficiary must pay for the property, or assume payment of all or part of the purchase money prior to or at the time of purchase, and have legal title conveyed to another without any mention of a trust in the conveyance. In addition, he must have paid the purchase money as his own, and not as an agent of the title holder, nor as a loan to the latter."<sup>99</sup> Since Owen was not obligated either to buy the property or to repay the loan, no resulting trust arose in his favor upon Tiller's acquisition of the property.<sup>100</sup>

---

91. 243 Va. 20, 413 S.E.2d 42 (1992).

92. VA. CODE ANN. § 8.01-81 (Repl. Vol. 1992).

93. *Whitby*, 243 Va. at 22, 413 S.E.2d at 43.

94. *Id.* at 24, 413 S.E.2d at 44.

95. *Id.*

96. 243 Va. 176, 413 S.E.2d 51 (1992).

97. *Id.* at 178, 413 S.E.2d at 52-53.

98. *Id.* at 180, 413 S.E.2d at 54.

99. *Id.*, 413 S.E.2d at 53 (citing *Leonard v. Counts*, 221 Va. 582, 588, 272 S.E.2d 190, 194 (1980)).

100. *Tiller*, 243 Va. at 180, 413 S.E.2d at 54.

### M. *Roll-Back Taxes*

In *City of Virginia Beach v. ESG Enterprises, Inc.*,<sup>101</sup> the Virginia Supreme Court was asked to determine whether the city was permitted to impose roll-back taxes upon a change in the zoning of property to a more intensive use. The taxpayers, owners of approximately 120 acres of land, agreed to sell the land to the Virginia Beach Development Authority, a tax exempt entity.<sup>102</sup> The property, then zoned for agricultural use, was enrolled in the city's land use program.<sup>103</sup>

The Authority's obligation to purchase the property was contingent on successfully rezoning the property from agricultural to commercial uses. This contingency was satisfied and the authority purchased the property. Shortly thereafter, the city assessed roll-back taxes against the taxpayers even though the agricultural use of the property did not change from the time that the taxpayers owned it.<sup>104</sup> The supreme court, in construing Virginia Code section 58.1-3230, determined that rezoning the property to a non-qualifying classification subjected the property to roll-back taxes but that "the roll-back taxes cannot be assessed and collected until the non-qualifying use occurs."<sup>105</sup>

### N. *Zoning*

A zoning administrator has no authority to determine whether a land owner has vested rights in a land use, according to the Virginia Supreme Court in *Holland v. Johnson*.<sup>106</sup> "A vested right in a land use is a property right which is created and protected by law.

---

101. 243 Va. 149, 413 S.E.2d 642 (1992).

102. *Id.* at 154, 413 S.E.2d at 644.

103. *Id.* at 151, 413 S.E.2d at 643; *see* VA. CODE ANN. §§ 58.1-3230 to -3244 (Repl. Vol. 1991 & Cum. Supp. 1992) (permitting localities to establish reduced tax assessments for land preservation).

104. *ESG Enterprises, Inc.*, 243 Va. at 151, 413 S.E.2d at 643.

105. *Id.* at 154, 413 S.E.2d at 645. The court found the following language in a 1988 amendment to the land use statute dispositive: "[r]eal property rezoned to a more intensive use, at the request of the owner or his agent, shall be subject to the roll-back tax at the time the zoning is changed." *Id.* at 152, 413 S.E.2d at 644 (quoting VA CODE ANN. § 58.1-3237(D) (Repl. Vol. 1991)). According to the court, this provision does not entitle the locality to assess roll-back taxes at the time the rezoning occurs, as the city argued. Instead, the section requires the locality to calculate the roll-back taxes from the date of the rezoning, instead of from the date the actual use of the property changed. *Id.* at 154, 413 S.E.2d at 645.

106. 241 Va. 553, 403 S.E.2d 356 (1991).

An adjudication regarding the creation, existence, or termination of that right can be made only by a court of competent jurisdiction."<sup>107</sup>

In *Carmel v. City of Hampton*,<sup>108</sup> the court considered the validity of an amendment to the city's zoning ordinance. Carmel acquired title to a parcel of real property in 1981 for the purpose of developing multi-family housing. Carmel had previously determined from city officials and from examining the zoning map that the property was zoned R-M which permitted multi-family development.<sup>109</sup> In 1986, however, the city refused to issue a building permit to Carmel claiming that the property had not been properly rezoned from R-13 (single-family residential) to R-M. The city asserted that a 1961 amendment to the city zoning ordinance recharacterizing the property from R-13 to R-M was invalid because the amendment was not passed in strict compliance with the city code.<sup>110</sup>

The Virginia Supreme Court agreed with Carmel's position that even if the ordinance was not properly enacted, section 15.1-503 of the Virginia Code cured any defect in the adoption of the amended ordinance.<sup>111</sup> Therefore, Carmel was entitled to the multi-family zoning classification.<sup>112</sup>

Evidence more substantial than a landowner's conclusory statements about his inability to sell property must be presented to require a board of zoning appeals to issue a variance to a locality's minimum setback requirements. The Virginia Supreme Court in

---

107. *Id.* at 556, 403 S.E.2d at 358; see VA. CONST. art. VI, § 1.

108. 241 Va. 457, 403 S.E.2d 335 (1991).

109. *Id.* at 458, 403 S.E.2d at 336.

110. *Id.* at 459, 403 S.E.2d at 337. Section 1-13 of the City Code provides that "[a]ll ordinances passed by the council shall be in effect from and after the second reading and passage of the ordinances." *Id.* The first reading of the ordinance resulted in a request for a study on the construction of cooperative apartments. The ordinance was read a second time and adopted at the next city council meeting. *Id.*

111. *Carmel*, 241 Va. at 460, 403 S.E.2d at 337. Virginia Code § 15.1-503 provides that: All proceedings had in the preparation, certification and adoption of zoning ordinances by every . . . city . . . prior to January 1, 1971, which shall have been in substantial compliance with the provisions of [Chapter 11 of Title 15.1, entitled "Planning, Subdivision of Land and Zoning,"] are validated and confirmed, and all such zoning ordinances adopted or attempted to be adopted pursuant to the provisions of this chapter are declared to be validly adopted and enacted, notwithstanding any defects or irregularities in the adoption thereof.

VA. CODE ANN. § 15.1-503 (Repl. Vol. 1989).

112. *Carmel*, 241 Va. at 460, 403 S.E.2d at 337.

*Board of Zoning Appeals v. Glasser Brothers Corp.*<sup>113</sup> held that absent such evidence, the denial of a variance by the Board of Zoning Appeals was not erroneous or clearly wrong.

A suit brought under Virginia Code section 15.1-493(G)<sup>114</sup> need only be filed against the local governing body within thirty days following the challenged decision, according to the Virginia Supreme Court in *Friends of Clark Mountain Foundation v. Board of Supervisors of Orange County*.<sup>115</sup> In *Friends of Clark Mountain Foundation*, several landowners sought to overturn the Board's approval of an application to rezone approximately twenty-five acres of land from agricultural to industrial use. The landowners sought a declaratory judgment under section 15.1-493(G) within the thirty-day period, but only named the Board as a defendant. The trial court dismissed the suit for failure to name the owner of the twenty-five acre tract and the holder of an option to buy the land as necessary parties.<sup>116</sup>

Integral to the Virginia Supreme Court's decision to reinstate the landowners' section 15.1-493(G) action was the court's determination that the thirty-day period established by the statute merely imposed a statutory procedure for bringing the action and did not establish a statute of limitations.<sup>117</sup> Therefore, the landowners' failure to name all of the necessary parties within the thirty-day period was not fatal to the action. The court did warn, however, that "[a]fter the contesting action has been instituted and is pending . . . and the absence of a necessary party is noted of record, the trial court should not adjudicate the controversy until that party has intervened or has been brought into the proceeding."<sup>118</sup>

## II. LEGISLATION

The Virginia General Assembly recently passed, and Governor Wilder approved, a number of important bills affecting property in Virginia. The following is a brief summary of the most significant legislation in the area of Virginia property law.

---

113. 242 Va. 197, 202, 408 S.E.2d 895, 898 (1991).

114. VA. CODE ANN. § 15.1-493(G) (Cum. Supp. 1991).

115. 242 Va. 16, 406 S.E.2d 19 (1991).

116. 242 Va. at 19, 406 S.E.2d at 20.

117. *Id.* at 19-20, 406 S.E.2d at 22. Unlike a special statute of limitations, a statute of repose or a pure statute of limitations, the court determined that the thirty-day period in § 15.1-493(G) was not jurisdictional in nature. *Id.*

118. *Id.* at 21, 406 S.E.2d at 22.

### A. *Assignment of Leases and Rents*

New Virginia Code section 55-220.1<sup>119</sup> provides that, upon recordation of a deed or other instrument assigning the assignor's interest in leases, rents or profits, the assignee's interest is fully perfected as to the assignor and all third parties without the necessity of (i) furnishing notice to the assignor or tenant, (ii) obtaining possession of the real property, (iii) impounding the rents, (iv) securing the appointment of a receiver, or (v) taking any other affirmative action. The tenant is authorized to pay the assignor until the tenant receives written notice that rents due or to become due have been assigned and that payment is to be made to the assignee.<sup>120</sup>

### B. *Augmented Estates*

The General Assembly made several amendments to the augmented estates legislation which became effective in 1992. The first important amendment is the addition of a much needed definition of "bona fide purchaser" in new Virginia Code section 64.1-01.<sup>121</sup> Knowledge of the seller's marital status, or the existence of a premarital or marital agreement, does not affect a purchaser's characterization as a bona fide purchaser.<sup>122</sup> In addition, the new section establishes a safe harbor for lenders by providing that a commitment to make a loan or the satisfaction of a pre-existing debt is sufficient consideration to qualify a purchaser as a bona fide purchaser for augmented estate purposes.<sup>123</sup>

Amended Virginia Code section 64.1-16.1(3)(d) now limits the reach-back provision of a decedent's augmented estate to the five years preceding the year of the decedent's death.<sup>124</sup> As originally adopted, the augmented estate statute placed no limitation on how

---

119. VA. CODE ANN. § 55-220.1 (Cum. Supp. 1992).

120. *Id.*

121. *Id.* § 64.1-01 (Cum. Supp. 1992). Section 64.1-01 defines a bona fide purchaser as "a purchaser of property for value who has acted in the transaction in good faith." *Id.* A purchaser is defined as "one who acquires property by sale, lease, discount, negotiation, mortgage, pledge, or lien or who otherwise deals with property in a voluntary transaction, other than a gift." *Id.*

122. *Id.*

123. *Id.* "[A]ny other consideration sufficient to support a simple contract" is sufficient consideration to qualify a purchaser as a bona fide purchaser under the augmented estate statute. *Id.*

124. *Id.* § 64.1-16.1(3)(d) (Cum. Supp. 1992).

far back in time the augmented estate could reach to capture the value of transferred property.<sup>125</sup>

The General Assembly also modified Virginia Code section 55-41 to make it clear that a spouse's execution of a deed or other conveyancing instrument constitutes the spouse's consent to the conveyance and joinder as provided in Virginia Code section 64.1-16.1.<sup>126</sup>

### C. *Commercial Real Estate Broker's Lien Act*

New Virginia Code sections 55-517 and 55-518 create lien rights in favor of a commercial real estate broker on rent paid by a tenant procured by the broker upon terms provided in a written agreement signed by the owner.<sup>127</sup> The amount of the lien is limited to the rent payable during the term of the lease or the first sixty months of the term, whichever is less.<sup>128</sup>

---

125. The General Assembly also narrowed the class of persons liable to make up the elective share of the survivor to certain fiduciaries given notice of the surviving spouse's claim of an elective share in the decedent's estate, original transferees from the decedent, subsequent recipients of gifts of the property from original transferees and persons claiming by testate or intestate succession from original transferees to the extent that such transferees or subsequent recipients have the property or its proceeds. *Id.* § 64.1-16.2(C) (Cum. Supp. 1992).

126. *Id.* § 55-41 (Cum. Supp. 1992).

127. *Id.* §§ 55-517 and -518 (Cum. Supp. 1992). The broker's lien rights do not apply to one to four unit improved residential properties, unimproved land, single family units leased in condominiums, townhouses or apartment complexes, or real property enrolled in the land use real estate tax program established pursuant to Virginia Code section 58.1-3230 to -3244 (Repl. Vol. 1991 & Cum. Supp. 1992). *Id.* § 55-517.

128. *Id.* § 55-518(A). The lien rights established by §§ 55-517 and -518 should be of special concern to owners of rent-producing commercial properties and the owners' lenders. Notwithstanding that Virginia Code § 55-518(A) provides that the owner of the property must agree, as evidenced by a signed writing, to the broker's provision of services as a condition to the broker's lien arising, § 55-518(B) provides that the broker may unilaterally record a memorandum of lien to perfect his lien rights. *Id.* § 55-518(B) (Cum. Supp. 1992). The memorandum of lien, especially if inaccurate, could adversely affect the owner's financing on the property. The owner's agreement with the broker should provide the owner with control over the content and recordation of the memorandum of lien and, perhaps, provide that the broker's lien will be subordinate to any financing obtained by the owner on the property.

The owner should also consider the broker's lien rights when arranging financing for the project. For instance, the lender's deed of trust will likely restrict further encumbrances on the property. The owner may want to obtain an exception from the lender for the broker's lien. If that exception cannot be obtained, the owner may need to have the broker waive the lien rights. Lenders may resist a request to permit the broker's lien even though the broker's efforts contribute to the production of income from the property. Issues as to the priority of the lender's deed of trust and other security instruments over the broker's memorandum of lien should also be addressed with the broker at the time that the broker is retained.

#### D. *Condominium Act*

The Virginia Condominium Act underwent three amendments of note. First, the records which a condominium association may withhold from inspection by its members have been expanded.<sup>129</sup> Second, section 55-79.83(B) now expressly provides that the association may charge reasonable user fees for limited common elements. Finally, the time in which suit must be brought by a condominium association to enforce a lien for assessments has been increased from six months to twenty-four months after the date that the memorandum of lien is filed.<sup>130</sup>

#### E. *Deeds of Trust*

Lenders should find comfort in two additions to Virginia Code section 55-59. New Virginia Code section 55-59(9)<sup>131</sup> provides that a secured lender under a deed of trust or the holders of more than fifty percent of the monetary obligations secured by the deed of trust have the right to appoint a substitute trustee with the same effect and under the same terms as provided in Virginia Code section 26-49,<sup>132</sup> even if that right is not expressly granted in the deed of trust.<sup>133</sup>

An addition to section 55-59(5) provides that, in the absence of a contrary provision in a deed of trust, a grantor is deemed to covenant that if a secured lender makes advances with respect to a prior lien in order to protect the lender's deed of trust or the lender's lien, the advances, together with interest thereon, are added to the amounts secured by the lender's deed of trust.<sup>134</sup>

---

129. *Id.* § 55-79.74:1(B). The records which may be so withheld are basically the same as those which may be withheld by a homeowners' association. *See infra* notes 162, 163 and accompanying text.

130. *Id.* § 55-79.84(D).

131. *Id.* § 55-59(9) (Cum. Supp. 1992).

132. *Id.* § 26-49 (Repl. Vol. 1992).

133. The new section would seem to eliminate the need to obtain court approval for the appointment of a trustee in those cases where the deed of trust does not provide a power of appointment exercisable by the lender in situations where a trustee resigns, dies or becomes incompetent to act as trustee. However, it is unclear whether the lender's right to appoint a substitute trustee extends to the right to substitute a trustee at the sole discretion of the lender and without cause.

134. *Id.* § 55-59(5) (Cum. Supp. 1992).



## F. *Easements*

An addition to Virginia Code section 55-50 provides that the owner of land subject to an easement for ingress and egress may relocate the easement on the servient estate by recording, in the clerk's office of the circuit court of the county or city in which the easement is located, a written agreement evidencing the consent of all affected persons and setting forth the new location of the easement.<sup>135</sup> In the absence of such an agreement, the owner of the servient estate may seek relocation of the easement upon petition to the circuit court and notice to all parties in interest. The court must grant the petition if, after a hearing, the court finds that (1) the relocation will not result in economic damage to the parties in interest, (2) there will be no undue hardship created by the relocation, and (3) the easement has been in existence for not less than ten years.<sup>136</sup>

## G. *Foreclosure*

The General Assembly modified the notice requirements for non-judicial foreclosures contained in Virginia Code section 55-59.1.<sup>137</sup> Foreclosure notices must now be sent to both the present owner of the property and to subordinate lienholders, provided that the subordinate lienholder's deed of trust was recorded at least thirty days prior to the proposed foreclosure and the lienholder's address is recorded with the deed of trust.<sup>138</sup> A new provision in the section protects the trustee and secured party from liability arising from the inadvertent failure to give notice as required by the section.<sup>139</sup>

New Virginia Code section 55-59.2(E) provides that "failure to comply with the requirements for advertisement contained in [Section 55-59] . . . shall, upon petition, render a sale of the property voidable by the court."<sup>140</sup> Formerly, it was unclear whether failure

---

135. *Id.* § 55-50 (Cum. Supp. 1992). The section does not define "affected persons." However, it probably includes the owner of the dominant estate.

136. *Id.*

137. *Id.* § 55-59.1 (Cum. Supp. 1992).

138. *Id.* § 55-59.1. The right to notice also applies to the assignee of a note secured by a subordinate deed of trust, provided that the assignment and address of the assignee are likewise recorded at least thirty days prior to the proposed foreclosure. *Id.* Notices to subordinate lienholders may be given by regular mail, instead of certified mail. *Id.*

139. *Id.*

140. *Id.* § 55-59.2(2)(E) (Cum. Supp. 1992).

to comply with the advertisement requirements rendered the sale void or voidable.

#### H. *Implied Warranties on New Homes*

Home purchasers now enjoy a five year warranty on foundations of new homes purchased from builders.<sup>141</sup>

#### I. *Landlord and Tenant*

A tenant may avoid losing possession of a residence at any time prior to the first court return date in an unlawful detainer action by tendering to the landlord all arrearages, interest, reasonable attorney's fees and late charges provided for in the lease.<sup>142</sup> However, the tenant may invoke this right only once during any year.<sup>143</sup>

Section 55-248.11:1 of the Virginia Residential Landlord and Tenant Act has been amended regarding the preparation of reports itemizing existing damages to units upon a new tenant's occupancy.<sup>144</sup>

---

141. *Id.* § 55-70.1 (Cum. Supp. 1992).

142. *Id.* § 55-243. In an action for ejectment, the tenant has the same right to tender the arrearages, late charges, interest, and reasonable attorney's fees contracted for in the lease and terminate the ejectment action. However, tender of funds to cure the default must be made prior to trial on the ejectment action. *Id.*

143. *Id.* § 55-243(B). Section 55-243(B) provides that "[i]n cases of unlawful detainer, the tenant may invoke the rights granted by this section no more than one time during any twelve-month period of continuous residency in the rental dwelling unit." It appears that this limitation only applies to unlawful detainer actions and not ejectment actions.

144. *Id.* § 55-248.11:1. A landlord may allow a new tenant to prepare and submit the existing damage report to the landlord in which case the report will be binding on the landlord unless objected to within five days after receipt. However, the landlord must establish this policy in writing. *Id.* The landlord may also establish a written policy requiring the landlord and tenant to prepare the report jointly. *Id.*

## J. *Mechanics' Liens*

Amendments to Virginia Code section 43-1<sup>145</sup> and new sections 36-98.01,<sup>146</sup> 43-4.01<sup>147</sup> and 43-13.2<sup>148</sup> establish a procedure for com-

---

145. *Id.* § 43-1 (Cum. Supp. 1992). Section 43-1 defines a mechanics lien agent as: a person (i) designated in writing by the owner of the real estate or a person authorized to act on behalf of the owner of such real estate and (ii) who consents in writing to act as the owner's designee for purposes of receiving notice pursuant to § 43-4.01. Such person shall be an attorney at law licensed to practice in the Commonwealth, a title insurance company authorized to write title insurance in the Commonwealth or one of its subsidiaries or licensed title insurance agents, or a financial institution authorized to accept deposits and to hold itself out to the public as engaged in the banking or savings institution business in the Commonwealth or a service corporation, subsidiary or affiliate of such financial institution.

*Id.*

146. *Id.* § 36-98.01 (Cum. Supp. 1992). Section 36-98.01 provides that, in addition to any information required by the Uniform Statewide Building Code, a building permit issued for any one- or two-family residential dwelling unit shall at the time of issuance contain, at the request of the applicant, the name, mailing address, and telephone number of a MLA as defined in § 43-1. If the applicant does not designate an MLA, the building permit will indicate that fact by stating "None Designated." *Id.*

147. *Id.* § 43-4.01 (Cum. Supp. 1992). Section 43-4.01 contains the following procedures for notifying potential mechanic's lien claimants of the MLA's identity and the steps that the potential claimants must take to preserve their lien right:

A. The building permit for any one- or two-family residential dwelling unit issued pursuant to the Uniform Statewide Building Code shall be continuously posted on the property for which the permit is issued until all work is completed on the property. The permit shall be posted on the property before any labor is performed or any material is furnished on the property for which the building permit is issued.

B. If, at the time of issuance, the building permit contains the name, mailing address, and telephone number of the [MLA] . . . any person entitled to claim a lien under this title may notify the [MLA] . . . that he seeks payment for labor performed or material furnished by registered or certified mail or by physical delivery. Such notice shall contain (i) the name, mailing address, and telephone number of the person sending such notice, (ii) the building permit number on the building permit, (iii) a description of the property as shown on the building permit, and (iv) a statement that the person filing such notice seeks payment for labor performed or material furnished. A return receipt or other receipt showing delivery of the notice to the addressee or written evidence that such notice was delivered by the postal service or other carrier to but not accepted by the addressee shall be prima facie evidence of receipt. An inaccuracy in the notice as to the description of the property shall not bar a person from claiming a lien under this title or filing a memorandum or otherwise perfecting or enforcing a lien as provided in subsection C if the property can otherwise be reasonably identified from the description.

C. Except as provided otherwise in this subsection, no person other than a person claiming a lien under § 43-3(b) may claim a lien under this title or file a memorandum or otherwise perfect and enforce a lien under this title with respect to a one- or two-family residential dwelling unit if such person fails to notify any [MLA] . . . identified on the building permit in accordance with subsection B above (i) within thirty days of the first date that he performs labor or furnished material to or for the building or structure or (ii) within thirty days of the date such permit is issued, if such labor or materials are first performed or furnished by such person prior to the

municating information about suppliers and laborers who may have a right to file liens against residential property to a mechanics' lien agent (MLA), a central repository for this information, and a procedure that suppliers and laborers must comply with to preserve their rights to file liens against the property. Basically, a supplier or laborer must give the mechanics' lien agent, whose identity and address is disclosed on the posted building permit for the residence, notice that the supplier or laborer is working on the project

---

issuance of a building permit. However, the failure to give any such notices within the appropriate thirty-day period as required by the previous sentence shall not bar a person from claiming a lien under this title, provided that such lien is limited to labor performed or materials furnished on or after the date a notice is given by such person to the [MLA] . . . in accordance with subsection B above. A person performing labor or furnishing materials with respect to a one- or two-family residential dwelling unit on which a building permit is not posted at the time he first performs his labor or first furnishes his material shall determine from appropriate authorities whether a permit of the type described in subsection B above has been issued and the date on which it is issued. No person shall be required to comply with this subsection as to any memorandum of lien which is recorded prior to the issuance of a building permit nor shall any person be required to comply with this subsection when the building permit does not designate a [MLA] . . . .

D. Unless otherwise agreed in writing, the only duties of the [MLA] . . . shall be to receive notices delivered to him pursuant to subsection B and to provide any notice upon request to a settlement agent, as defined in § 6.1-2.10, involved in a transaction relating to the residential dwelling unit.

E. [MLAs] . . . are authorized to enter into written agreements with third parties with regard to funds to be advanced to them for disbursement, and the transfer, disbursement, return and other handling of such funds shall be governed by the terms of such written agreements.

F. An [MLA] . . . may charge a reasonable fee for services rendered in connection with administration of notice authorized herein and the disbursement of funds for payment of labor and materials for the construction or repair of improvements on real estate.

148. *Id.* § 43-13.2 (Cum. Supp. 1992). Section 43-13.2 provides that:

A person who is both the owner of a one- or two-family residential dwelling unit and either a developer of such property, a contractor in connection with the development or improvement of such property or a contractor or subcontractor furnishing labor or material in connection with the development or improvement of such property shall, at the time of settlement on the sale of such property, provide the purchaser with an affidavit stating either (i) that all persons performing labor or furnishing materials in connection with the improvements on such property and with whom such owner is in privity of contract have been paid in full or (ii) the name, address and amount payable or claimed to be payable to any person so performing labor or furnishing materials and with whom such owner is in privity of contract. Willful failure to provide such statement or any willful material misrepresentation with respect to such a statement which causes a monetary loss to a financial institution, title company, contractor, subcontractor, supplier, owner, [MLA] . . . or any other person or institution shall be punishable as a Class 5 felony.

*Id.* The penalty described in § 43-13.2 is the same one prescribed for presenting a forged lien waiver under Code § 43-13.1. See VA. CODE ANN. § 43-13.2 (Repl. Vol. 1990).

as a condition to the supplier or laborer filing a mechanics' lien against the residence.

An amendment to section 43-3<sup>149</sup> expands the scope of work for which mechanic's liens may be filed. The broader provision would permit architects, engineers and other designers to file valid liens for planning and design work.

#### K. *Recordation and Filing Fees*

The filing fee charged by clerks of the circuit courts for financing statements, continuation statements and assignments of financing statements is now ten dollars for the first ten names and one dollar for each name in excess of ten.<sup>150</sup> In addition, the cost of recording a partnership certificate pursuant to Virginia Code section 50-75<sup>151</sup> is ten dollars plus one dollar for each name after the first two and ten dollars for recording an assumed name certificate pursuant to section 59.1-74.<sup>152</sup>

#### L. *Residential Sales Contract Disclosures*

Beginning on July 1, 1993, home sellers will need to comply with the new disclosure and disclaimer requirements imposed by Virginia Code section 54.1-2105<sup>153</sup> and sections 55-517 through 55-525.<sup>154</sup> These sections require the owners of residential property to make full disclosure of the physical condition of the property being

149. *Id.* § 43-3 (Cum. Supp. 1992). Section 43-3 adds labor or materials for site development improvements and for stormwater facilities to the list of items for which mechanics' liens may be filed against individual lots in a development or condominium for a pro rata share of the cost of providing access or service to the individual lots or units. *Id.* § 43-3(b). "Site development improvements" are defined as "improvements which are provided for the development, such as project site grading, rather than for an individual lot." *Id.*

150. *Id.* §§ 8.9-403(5) and -405(2) (Cum. Supp. 1992).

151. *Id.* § 50-75 (Cum. Supp. 1992).

152. *Id.* § 59.1-74 (Cum. Supp. 1992).

153. *Id.* § 54.1-2105 (Cum. Supp. 1992). Section 54.1-2105 directs the Virginia Real Estate Board to "develop a residential property disclaimer statement form and a residential property disclosure statement form for use in accordance with the provisions of § 55-519." *Id.*

154. *Id.* §§ 55-517 to -525 (Cum. Supp. 1992). In addition to sales, exchanges and installment sales contracts, the disclosure requirements contained in § 55-518 apply to leases with options to buy one to four residential unit properties. *Id.* § 55-517.

Section 55-518 lists the various transactions that are exempt from the disclosure requirements, some of which include foreclosure sales, conveyances by deeds in lieu of foreclosure, sales by deed of trust beneficiaries who have acquired the property by foreclosure or deed in lieu of foreclosure, transfers between co-owners, transfers between certain family members and the first sale of new dwellings. *Id.* § 55-518.

sold or a full disclaimer of the condition of property being sold "as is."<sup>155</sup>

The owner is required to make the disclosure (not the agent or broker) based on the owner's actual knowledge and is not obligated to undertake any independent investigation.<sup>156</sup> The disclosure must be provided by the seller to the purchaser prior to the execution of a contract by all of the parties.<sup>157</sup> Otherwise, the purchaser has the right to cancel the contract, without penalty, until settlement or an earlier date as set forth in section 55-520.<sup>158</sup> The owner is also obligated to disclose any additional or changed information brought to the owner's attention prior to settlement.<sup>159</sup>

In the event of a misrepresentation or omission in the disclosure, the purchaser's remedy is actual damages resulting from the error or nondisclosure.<sup>160</sup> However, there are no limitations on the remedies that a purchaser may pursue if the owner's misrepresentation as to the condition of the property is intentional or willful.<sup>161</sup>

New Virginia Code section 11-2.4<sup>162</sup> requires that every contract for the purchase of residential real property made on or after July 1, 1992, must include a warning notice regarding the possibility of unfiled mechanics' liens against the property. However, failure to

---

155. *Id.* § 55-519 (Cum. Supp. 1992).

156. *Id.* § 55-519(2).

157. *Id.* § 55-520(A).

158. *Id.* § 55-520(B).

159. *Id.* § 55-522.

160. *Id.* § 55-524(B); *see id.* § 55-521 (owner not liable for error, inaccuracy or omission if not within the actual knowledge of the owner, supplied to owner by governmental agencies or professional engineer or inspector, or owner not grossly negligent in obtaining the information).

161. *Id.* § 55-524(2).

162. *Id.* § 11-2.4 (Cum. Supp. 1992). The disclosure required is as follows:

NOTICE:

Virginia law (§ 43-1 et seq.) permits persons who have performed labor or furnished materials for the construction, removal, repair or improvement of any building or structure to file a lien against the property. This lien may be filed at any time after the work is commenced or the material is furnished, but not later than the earlier of (i) 90 days from the last day of the month in which the lienor last performed work or furnished materials or (ii) 90 days from the time the construction, removal, repair or improvement is terminated.

AN EFFECTIVE LIEN FOR WORK PERFORMED PRIOR TO THE DATE OF SETTLEMENT MAY BE FILED AFTER SETTLEMENT. LEGAL COUNSEL SHOULD BE CONSULTED.

*Id.*

include the notice required by section 11-2.4 will not render the contract void.

#### M. *Subdivision Plats*

Amended Virginia Code section 15.1-475<sup>163</sup> provides, among other things, that an approved final subdivision plat which has been recorded or an approved final site plan shall be valid for a period of not less than five years from the date of approval or for such longer period as the local commission or other agency may, at the time of approval, determine to be reasonable, taking into consideration the size and phasing of the proposed development.

#### N. *Title Insurance Disclosure*

In an effort to promote the education of home purchasers about the availability of title insurance, the General Assembly added Virginia Code section 38.2-4616 which requires a settlement agent to inform the purchaser of the benefits of title insurance and that the purchaser may wish to obtain title insurance and obtain a statement from the purchaser that the disclosure was made.<sup>164</sup>

#### O. *Virginia Property Owners' Association Act*

The General Assembly clarified the applicability of the Virginia Property Owners' Association Act<sup>165</sup> by amending section 55-508(A). That section now provides that the Act applies to property owners' associations organized after January 1, 1959.<sup>166</sup> Section 55-508(B) now expressly provides that the act does not apply to "any nonstock, nonprofit, taxable corporation with nonmandatory membership which, as its primary function, makes available golf, ski and other recreational facilities both to its members and the general public."<sup>167</sup>

Section 55-510 now provides that a homeowners' association member in good standing may inspect and copy the association's

---

163. *Id.* § 15.1-475 (Cum. Supp. 1992).

164. *Id.* § 38.2-4616 (Cum. Supp. 1992). The settlement agent must also notify the purchaser that title insurance will not cover the value of subsequent improvements to the property. The statement must be obtained prior to the time that any funds are disbursed. *Id.*

165. *Id.* §§ 55-508 to -516 (Cum. Supp. 1992).

166. *Id.* § 55-508(A).

167. *Id.* § 55-508(B).

membership list, except for commercial purposes.<sup>168</sup> However, the list of records which may be withheld from inspection have been expanded and clarified.<sup>169</sup> New section 55-510(E) lists the topics which may be addressed by the association's board of directors in closed session and establishes a procedure by which the board may convene in closed session and effect decisions made by the board in closed session.<sup>170</sup>

Section 55-514 has been clarified by providing that a majority of the association's membership may reduce a special assessment approved by the board of directors, as well as rescind the assessment.<sup>171</sup>

### III. CONCLUSION

The Virginia Supreme Court has addressed a number of interesting issues over the past year, including the extent to which easements may be improved, the proper characterization of promissory notes received by a husband and wife in exchange for property held as tenants by the entirety, and the rights of a life tenant to compel the partition of property against the owners of the remainder.

The many statutes recently enacted and amended by the Virginia General Assembly will have a significant impact on Virginia practitioners. Amendments to the augmented estate statute help to clarify the scope of the statute and may help to quell some of the grumbling coming from attorneys engaged in closing real estate transactions.

With the passage of the residential sales contract disclosure statutes, the General Assembly has taken a significant step away from Virginia's "buyer beware" rule. However, sellers may escape providing the disclosure by agreeing to sell residential property without any form of representation regarding the condition of the property. The disclosure statute becomes effective on July 1, 1993. However, attorneys involved with residential real estate closings

---

168. *Id.* § 55-510.

169. *See id.* § 55-510(C). New items to the list of items which may be withheld from inspection include records concerning agreements containing confidentiality requirements, pending litigation, disclosure of information in violation of law, and minutes of executive session board meetings. *Id.*

170. *Id.* § 55-510(E).

171. *Id.* § 55-514.



should devote some attention to the statute and the disclosure forms and disclaimer language being prepared by the Virginia Real Estate Board.