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## Annual Survey of Virginia Law: Property Law

L. Charles Long Jr.

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## PROPERTY LAW

*L. Charles Long, Jr.\**

While the Supreme Court of Virginia handed down decisions of significance dealing with the ownership and operation of real property in the Commonwealth during the past year, in most cases the court was content to apply well-settled law in new fact situations, or to extend the boundaries of such law gently into new territory. The General Assembly, for its part, spent most of its energy clarifying existing legislation or repairing portions of statutes which, either in operation or in prospect, needed relatively minor modifications. The foregoing statements are not intended to belittle the cases which were decided and the legislation which was enacted during the past year, the most significant parts of which are discussed in this article.

### I. JUDICIAL DECISIONS

#### A. *Adverse Possession*

In two cases involving claims of adverse possession, the Supreme Court of Virginia declined to change well-settled law, and instead focused on complicated factual situations. In *Maynard v. Hibble*,<sup>1</sup> the disputed parcel of land passed by escheat sale to Maynard and Smith when the owner of record title died intestate without known heirs. However, in 1903 the owner of an adjacent parcel seemed to include the disputed parcel in a conveyance of thirty-five acres to Cooke. Upon Cooke's death, intestate, his land passed to Mary Catherine Cooke Wilson. In 1951, Hibble bought the parcel from Wilson in a deed describing some thirty acres (the land which Cooke had acquired from Joseph Cooke and his wife, less some out conveyances) on both sides of a road, which is now Route 631. The parcel south of the road was the disputed parcel. Hibble's ownership of the disputed parcel apparently was never challenged until after the escheat sale to Maynard and Smith.<sup>2</sup>

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\* Shareholder, Hirschler, Fleischer, Weinberg, Cox & Allen, a Professional Corporation, Richmond, Virginia; B.A., 1960 Princeton University; J.D., 1963 Harvard Law School.

1. 244 Va. 94, 418 S.E.2d 871 (1992).

2. *Id.* at 97, 418 S.E.2d at 873.

The Supreme Court of Virginia noted that, "intending to own what the deed called for,"<sup>3</sup> Hibble paid real estate taxes on the disputed parcel, posted it, gave third parties the right to hunt the land, harvested timber from it and, thus, proved the required "actual, hostile, exclusive, visible and continuous possession for the statutory period of 15 years."<sup>4</sup>

In another factually similar case, however, the Supreme Court of Virginia found that the facts did not demonstrate the requisite hostility. In *Mary Moody Northen, Inc. v. Bailey*,<sup>5</sup> Bailey claimed adverse possession to 100 acres which were part of a 2475-acre tract on which Mountain Lake Hotel is situated. The claimant's father lived on the disputed parcel for most of his seventy-one-year life. After his death, the claimant returned to the land periodically. The court noted that although it was undisputed that Bailey lived on the land openly and continuously during the relevant time period with the knowledge of the record owner, told his neighbors and children that he owned the land and gave others permission to hunt it, there was sufficient evidence to demonstrate he did so with the permission, or at least the sufferance, of the record land owner.<sup>6</sup> The supreme court noted a number of facts which it determined defeated the claim of adverse possession: the record owner had the disputed land surveyed as part of a larger survey of his land, with Bailey's knowledge and without Bailey's protest or interference; the record owner requested Bailey to stop cutting firewood and to rely instead on dead-fall, which Bailey did; and Bailey never communicated his assertion of title to the record owner. Furthermore, in one significant confrontation between the record owner and Bailey in the early 1950s involving a fence erected by the record owner and torn down by Bailey, the record owner threatened to put Bailey off the land if he interfered again with the fence.<sup>7</sup> The Supreme Court of Virginia determined Bailey's response<sup>8</sup> to be more indicative of occupancy by permission than an

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3. *Id.* at 96, 418 S.E.2d at 873.

4. *Id.* at 98, 418 S.E.2d at 874 (quoting *McIntosh v. Chincoteague Vol. Fire Co.*, 220 Va. 553, 556-57, 260 S.E.2d 457, 459-60 (1979)). Hibble's cultivation of the larger parcel across the road and his use of the disputed parcel of timber, cutting shad poles and the like distinguished the factual situation from that in *Craig-Giles Iron Co. v. Wickline*, 126 Va. 223, 101 S.E. 225 (1919), where the land was wild and uncultivated.

5. 244 Va. 118, 418 S.E.2d 882 (1992).

6. *Id.* at 120, 418 S.E.2d at 884.

7. *Id.* at 122, 418 S.E.2d at 884-85.

8. "You can't do that to me, you can't do that to me." And, with tears in his eyes, "I have a family." *Id.* 418 S.E.2d at 885.

affirmative statement of an adverse claim.<sup>9</sup> The court rejected the adverse possession claim since the facts failed to show that all of the requisite elements had been satisfied.<sup>10</sup>

### B. *Condemnation and Eminent Domain*

In *Commonwealth v. Fairbrook Business Park Associates*,<sup>11</sup> the Supreme Court of Virginia held that a property owner's master development plan can be used by the property owner to prove condemnation damages to the residue when the Virginia Department of Transportation relies upon the master plan in presenting its case.<sup>12</sup>

The supreme court noted the paucity of any testimony or facts to support an award for damage to the residue in striking such an award in *Town of Rocky Mount v. Hudson*.<sup>13</sup> The landowner's testimony that the taking "has hurt me \$20,000, at least,"<sup>14</sup> was unsubstantiated and held to be insufficient to establish value or support an award.<sup>15</sup>

### C. *Condominiums*

In *Grillo v. Montebello Condominium Unit Owners Ass'n*,<sup>16</sup> the Supreme Court of Virginia, interpreting Code of Virginia section 55-79.74:1, held that the association's refusal to let a condominium owner have access to salary information for the association's employees was improper. The court found that the language of the statute<sup>17</sup> surely intended to include salary information for employees of the association as "expenditures affecting the operation and

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9. *Id.*

10. *Id.*

11. 244 Va. 99, 418 S.E.2d 874 (1992).

12. *Id.* at 104-05, 418 S.E.2d at 878 (citing *Shockey v. Westcott*, 189 Va. 381, 388, 53 S.E.2d 17, 20 (1949)) (noting litigant's objection to adversary's version of conversation waived by his prior testimony of the same conversation), and distinguishing *Highway & Transp. Comm'r v. Lanier Farm*, 233 Va. 506, 509, 357 S.E.2d 531, 533 (1987) and *Staunton v. Aldhizer*, 211 Va. 658, 665, 179 S.E.2d 485, 490 (1971)).

13. 244 Va. 271, 421 S.E.2d 407 (1992).

14. *Id.* at 274, 421 S.E.2d at 409.

15. *Id.*

16. 243 Va. 475, 416 S.E.2d 444 (1992).

17. VA. CODE ANN. § 55-79.74:1 (Repl. Vol. 1986 & Cum. Supp. 1993) states in part:

The . . . unit owners' association, or the person specified in the bylaws of the association shall keep detailed records of the receipts and expenditures affecting the operation and administration of the condominium and specifying the maintenance and repair expenses of the common elements and any other expenses incurred by or on

administration of the condominium"<sup>18</sup> and rejected the association's additional arguments that an administrative resolution by the association defined "books and records" to exclude employee compensation;<sup>19</sup> and that compensation information falls within the exception afforded by Code of Virginia section 55-79.75.<sup>20</sup>

#### D. *Easements and Rights-of-Way*

The Supreme Court of Virginia took the opportunity afforded by a case involving an asserted prescriptive easement of ingress and egress over a railway to reiterate a long-standing rule that prescriptive rights cannot be acquired in property affected with a public use. In *Norfolk & Western Railway Co. v. Waselchalk*,<sup>21</sup> the claimant moved her mobile home onto a tract separated by a railroad track from another portion of her land. The land across the tracks from the mobile home had access to a public road, whereas the tract on which the home was previously located did not. The railroad right-of-way had been conveyed in 1851, at which time the railroad built (and its successor in title since maintained) a crossing between what was then two portions of a farm. Upon hearing of the complainant's proposed use of the tract as a residence, the railroad insisted she sign a residential crossing easement.<sup>22</sup> The claimant refused and asserted a prescriptive right to use the crossing. The Supreme Court of Virginia assumed, without deciding,

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behalf of the association. All such records . . . and any other records pertaining to the condominium, shall be available for examination by all the unit owners. . . .

The Supreme Court of Virginia applied the principle of statutory construction to this clear and unambiguous statute in observing that specific amounts of compensation paid to the association's employees clearly relate to the operation and administration of the condominium, should be part of the association's records, and are subject to inspection by the owners.

*Grillo v. Montebello Condominium Unit Assoc.*, 243 Va. 475, 477, 416 S.E.2d 444, 445 (1992) (citing *Barr v. Town & Country Properties*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) and quoting *Watkins v. Hall*, 161 Va. 924, 930, 172 S.E. 445, 447 (1934)).

18. *Grillo*, 243 Va. at 477, 416 S.E.2d at 445.

19. "It is without question that an administrative resolution adopted by a condominium unit owners' association cannot defeat a statutory right created by the General Assembly." *Id.* at 478, 416 S.E.2d at 445.

20. The court distinguished information which may have been discussed by the unit owner's board of directors in closed sessions, such as performance evaluations, from salary information, and found "nothing in Code § [sic] 55-79.75 which bars [the unit owner's] right to review 'detailed records of receipts and expenditures.'" *Id.*, 416 S.E.2d at 446.

21. 244 Va. 329, 421 S.E.2d 424 (1992).

22. The court noted that although under VA. CODE ANN. § 56-16 (Repl. Vol. 1986 & Cum. Supp. 1993) the railroad is obliged to pay the maintenance costs of farm crossings, residential crossings, which are presumably used more frequently, must be maintained at the expense of the residential user. *Waselchalk*, 244 Va. at 331, 421 S.E.2d at 425.

that the claimant had proved all the necessary elements of a prescriptive easement, but held that regardless, the railroad right-of-way was affected with a public interest<sup>23</sup> and that prescriptive rights cannot be acquired in land affected with a public interest or dedicated to a public use.<sup>24</sup>

The Supreme Court of Virginia considered a different question in *Ryder v. Petrea*.<sup>25</sup> Ryder owned two adjacent lots in a recorded subdivision which had always been conveyed as a unit since subdivision. The court permitted Ryder to use rights-of-way established by the subdivision plat although the lots abutted a public road and the recorded plat did not comply with the subdivision requirements in effect at the time it was recorded, failing to vest any rights to the streets and roads therein to the public.<sup>26</sup> The supreme court held that Ryder acquired a private right in and to the rights-of-way shown on the defective plat.<sup>27</sup> The court went on to note that since the two lots had always been conveyed together, "as a unit," both lots were entitled to such rights-of-way, even though only one of them actually fronted the rights-of-way.<sup>28</sup>

#### E. *Landlord and Tenant*

The Supreme Court of Virginia did not sympathize with a tenant who precipitously engaged in self-help to remedy an asserted breach of a lease, instead of giving the landlord notice of the default and an opportunity to cure it. In *Business Bank v. F.W. Woolworth Co.*,<sup>29</sup> the lessee bank occupied a building under a lease which did not require the lessor to repair or replace a broken air conditioning system, but which did require the lessor to furnish heating, ventilation and air conditioning services. The air conditioning system failed and the lessee arranged to have repairs costing more than \$25,000 made without notifying the lessor. The

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23. *Id.* at 331, 421 S.E.2d at 425 (noting that over 3000 railroad cars per day pass over the tracks).

24. *Id.* at 331, 421 S.E.2d at 425 (citing *Preshlock v. Brenner*, 234 Va. 407, 409, 362 S.E.2d 696, 697 (1987) and quoting *City of Lynchburg v. Chesapeake and Ohio Ry.*, 170 Va. 108, 116, 195 S.E. 510, 514 (1938)).

25. 243 Va. 421, 416 S.E.2d 686 (1992).

26. *Id.* at 423, 416 S.E.2d at 688.

27. *Id.* at 424, 416 S.E.2d at 688, (citing *Lindsay v. James*, 188 Va. 646, 51 S.E.2d 326 (1949)) (stating that the extent of an easement of this nature would be to those streets and alleys shown on the plat as are reasonably beneficial to the claimant).

28. *Id.*

29. 244 Va. 333, 421 S.E.2d 425 (1992).

court determined that the lessee had an obligation to furnish the lessor with notice of the asserted default and an opportunity to cure it before the lessee could remedy the problem.<sup>30</sup>

In *Virginia Dynamics Co. v. Payne*,<sup>31</sup> the supreme court addressed whether a landlord is entitled to split its cause of action and sue for rent remaining under the unexpired term of a lease subsequent to an unlawful detainer action. The court reversed a circuit court holding that the earlier district court decision which held judgment for unlawful detainer was *res judicata*. The court found Code of Virginia section 8.01-128 to control,<sup>32</sup> unambiguously giving the lessor an option to defer its claim for rent in an unlawful detainer case to a future action.<sup>33</sup> The court, likewise, rejected the lessee's assertion that lessor, by including a rent acceleration clause in the lease, contracted away its right to split its causes of action. The court observed that for the lessee to prevail in this argument, the lessor must have specifically waived its statutory right under Code of Virginia section 8.01-128, which lessor had not done.<sup>34</sup>

#### F. *Mechanics' Liens*

The Supreme Court of Virginia determined that a road and excavation contractor was entitled to perfect a mechanic's lien against a parcel of land, when its notice of lien described the land,

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30. *Id.* at 335, 421 S.E.2d at 427. The court noted the lessee's reliance on Restatement (Second) of Property as illustrative of remedies available to the lessee, but pointed to section 10.2 of the Restatement, which required prior notice and right to cure, as determinative and consistent with Virginia law, citing *Caudill v. Gibson Fuel Co.*, 185 Va. 233, 240-41, 38 S.E.2d 465, 469 (1946) and Code of Virginia § 52-248.23 (Repl. Vol. 1991) (governing essential services to leased residential real estate).

31. 244 Va. 314, 421 S.E.2d 421 (1992).

32. Code of Virginia section 8.01-128 states:

If it appear that the plaintiff was forcibly or unlawfully turned out of possession, or that it was unlawfully detained from him, the verdict or judgment shall be for the plaintiff for the premises, or such part thereof as may be found to have been so held or detained. The verdict or judgment shall also be for such damages as the plaintiff may prove to have been sustained by him by reason of such forcible or unlawful entry, or unlawful detention, of such premises, and such rent as he may prove to have been owing to him provided such damages rent claimed shall not exceed the jurisdictional amount of the court in which the action is tried. *No such verdict or judgment shall bar any separate concurrent or future action for any such damages or rent as may not be claimed.*

VA. CODE ANN. § 8.01-128 (Repl. Vol. 1992) (emphasis added).

33. *Virginia Dynamics*, 244 Va. at 317, 421 S.E.2d at 423.

34. *Id.* at 318, 421 S.E.2d at 423.

by metes and bounds, as a 45.6-acre parcel, notwithstanding the owner's contention that the description was overinclusive and thus, invalid. In *Blue Ridge Construction Corp. v. Stafford Development Group*,<sup>35</sup> the owner asserted that his division of the land into lots by an unrecorded subdivision plat, invalidated the metes and bounds description because many of the lots were not served or benefitted by the lienor's work.<sup>36</sup> The Supreme Court of Virginia disagreed, holding that the unrecorded subdivision plat did not effect a valid subdivision of the owner's land. The lienor was entitled to rely on the land records as he found them, which described the property as a single 45.6-acre parcel.<sup>37</sup>

In *George W. Kane, Inc. v. Nuscope, Inc.*,<sup>38</sup> a case of first impression, the Supreme Court of Virginia confronted an interesting question: whether the owner of real estate encumbered by a subcontractor's mechanic's lien and the trustees and noteholder under a deed of trust filed prior to the mechanic's lien against the real estate are necessary parties to the subcontractor's lawsuit to enforce its lien, when the mechanic's lien had been "bonded off" and released of record pursuant to Code of Virginia section 43.71.<sup>39</sup> The court noted that the statute specifically called for the release of the lien from the real property upon receipt of permission from the circuit court to "bond off" and the posting of the payment bond.<sup>40</sup> The supreme court reaffirmed its holdings in two cases cited by the

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35. 244 Va. 361, 421 S.E.2d 199 (1992).

36. *Id.* at 363-64, 421 S.E.2d at 200.

37. The court distinguished two cases cited by the owner. In *Woodington Elec. v. Lincoln Sav. & Loan Ass'n*, 238 Va. 623, 385 S.E.2d 872 (1989), the court had ruled that a mechanic's lien could not be enforced where the lienor sought to include in its notice parcels on which it had not performed work. In *Rosser v. Cole*, 237 Va. 572, 379 S.E.2d 323 (1989), the court invalidated liens against lots in a recorded subdivision where the lienor had only worked on the streets and roads, but not the lots. Here the court found that there was only one parcel, and work performed on any part thereof entitled the contractor to lien the entire parcel.

38. 243 Va. 503, 416 S.E.2d 701 (1992).

39. *Id.* at 504, 416 S.E.2d at 702.

40. Code of Virginia section 43-71 provides:

At any time after the perfecting of any such [mechanic's] lien and before a suit be brought for the enforcement thereof, the owner of the property affected thereby, the general contractor or other parties in interest may . . . apply to the court . . . for permission . . . to file such bond, as prescribed in [§ 43-70]. . . . Upon the granting of such permission, and . . . the filing of such bond . . . the property affected thereby shall stand released from such lien. . . . The sureties on any such bond, which may be involved in any suit or action brought under the provisions of this section, shall be made party to such suit or action.

VA. CODE ANN. § 43-71 (Cum. Supp. 1993).



landowner,<sup>41</sup> but distinguished the instant case by noting that the bond had been posted prior to bringing the lawsuit to enforce the lien and holding that when the owner posted the bond, "[t]he mechanic's lien would cease to exist, leaving the bond as the mechanic's sole recourse."<sup>42</sup> The court cited language from earlier decisions:

Where an individual is in the actual enjoyment of the subject matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claim, in such case he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit.<sup>43</sup>

The court concluded that once the mechanic's lien had been removed from the land and attached to the payment bond, the landowner and the trustees and noteholder had no interest in the bond per se and were no longer necessary parties to the subcontractor's suit to enforce its lien.<sup>44</sup>

In an analogous case, *Air Power, Inc. v. Thompson*,<sup>45</sup> a subcontractor sought to enforce its lien against property constituting the res of a land trust.<sup>46</sup> The issue was whether the beneficiaries of the land trust were necessary parties. The Supreme Court of Virginia held they were not, noting that land trust beneficiaries do not hold interests in real estate, but in personal property.<sup>47</sup>

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41. *Mendenhall v. Cooper*, 239 Va. 71, 387 S.E.2d 468 (1990) (extending the *Robbins* rule to include the owner of the land); *Walt Robbins, Inc. v. Damon Corp.*, 232 Va. 43, 348 S.E.2d 223 (1986) (holding that the beneficiary and the trustees of a deed of trust recorded against land prior to the commencement of construction of improvements are necessary parties to a lawsuit brought to enforce a mechanic's lien because the beneficiary has a property right entitling him to notice and the trustee has title to the property which could not be divested if he were not before the court).

42. *Kane*, 243 Va. at 509, 416 S.E.2d at 704.

43. *Mendenhall*, 239 Va. at 75, 387 S.E.2d at 470; *Raney v. Four Thirty Seven Land Co.*, 223 Va. 513, 519-20, 357 S.E.2d 733, 736 (1987); *Gaddess v. Norris*, 102 Va. 625, 630, 46 S.E. 905, 907 (1904).

44. *Kane*, 243 Va. at 509-10, 416 S.E.2d at 705.

45. 244 Va. 534, 422 S.E.2d 768 (1992).

46. *Id.* at 535, 422 S.E.2d at 769.

47. *Id.* at 537, 422 S.E.2d at 770.

### G. Leases

The Supreme Court of Virginia addressed the ambiguity of termination language in a lease and the unconscionability of a release of the lease rights by a lessee in *Management Enterprises, Inc. v. The Thorncroft Co., Inc.*<sup>48</sup> Thorncroft, the lessor, entered into a hunting lease (or license agreement) with Management Enterprises, the lessee, giving Management Enterprises the right to hunt, fish and trap 619 acres of Thorncroft's property in Northumberland County for a thirty-two-year term ending in 2013, for a rent of \$49,520 payable in annual installments of \$1,547.50.<sup>49</sup> Thorncroft subsequently contracted to sell part of the property subject to the lease to a third-party purchaser. The purchaser examined the title and discovered the recorded lease. The lease constituted a cloud on title to the property.<sup>50</sup> After negotiations with lessee, Thorncroft secured a release of the lease from Management in consideration for a payment of \$15,000.<sup>51</sup>

Three years later, Thorncroft filed a petition seeking rescission of the lease alleging the following: unconscionability and breach of the lease by Management; an adjudication that the lease provided for a three-month notice of termination; an adjudication that the release was void and unenforceable because of fraud, misrepresentation and duress; refund of the \$15,000 release fee; and other relief.<sup>52</sup> The chancellor found that the lease could be terminated at any time upon three months notice and that Management must return the \$15,000 release fee as unconscionable.<sup>53</sup>

The Supreme Court of Virginia applied the "plain meaning" rule to paragraph two of the lease.<sup>54</sup> The court held that the language plainly and unequivocally required the lessor to give written notice three months before the termination date, February 28, 2013, and required the lessor to give like notice three months before the desired termination date.<sup>55</sup> Thus, no right to terminate the lease ex-

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48. 243 Va. 469, 416 S.E.2d 229 (1992).

49. *Id.* at 470-71, 416 S.E.2d at 230.

50. *Id.* at 471, 416 S.E.2d at 230.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 472, 416 S.E.2d at 231. The plain meaning rule is articulated in *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983) (quoting *Globe Co. v. Bank of Boston*, 205 Va. 841, 848, 140 S.E.2d 629, 633 (1965)).

55. 243 Va. at 472, 416 S.E.2d at 231.

isted prior to the termination date.<sup>56</sup> The court then dismissed lessor's claim that the \$15,000 payment was unconscionable by applying the rule that an inequality, if any, must be so gross as to shock the conscience.<sup>57</sup> Having concluded that the lessor could not have terminated the lease before the year 2013, it was not surprising for the supreme court to conclude that the lessee had a substantial interest in the property and that \$15,000 to release that interest was not so gross an amount as to shock the conscience.<sup>58</sup>

#### H. *Restrictive Covenants*

*Foods First, Inc. v. Gables Associates*,<sup>59</sup> gave the Supreme Court of Virginia the opportunity to confirm previously enunciated law relative to enforcing restrictive covenants. Foods First operated a 15,000-square-foot supermarket under a lease from Gables Associates, the center's developer. The lease contained a restrictive covenant prohibiting the developer from erecting another building designed for a supermarket or food store:

It is further agreed that in the event of such development [expansion of the center to a certain size, a development which had occurred] Lessor will not erect such other building to be occupied by super market, grocery store, meat market or produce store in excess of the number of square feet in the building occupied by [lessee].<sup>60</sup>

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56. Paragraph two of the lease states:

A WRITTEN NOTICE OF THREE MONTHS shall be given by the Lessee should he desire to vacate at the termination of the lease; and should the lessor desire possession a like notice shall be required; in the event no such notice is given by either party, then the lease shall continue in force from year to year at the same rent and subject to all the conditions and covenants herein contained. But, if such notice shall have been given by either party, the Lessor, his agents or assigns, may advertise the premises for rent in one or more conspicuous places and may show the premises to any person desiring to rent the same for the purposes of game management.

*Id.* at 471, 416 S.E.2d at 231. The court apparently concluded that the phrase "a like notice" was not ambiguous, and meant not only that it be written, but also that it be given only at the termination date of the lease.

57. *Id.* at 473, 416 S.E.2d at 231-32 (quoting *Smyth Bros. v. Beresford*, 128 Va. 137, 140, 104 S.E. 371, 382 (1920)).

58. *Id.*, 416 S.E.2d at 232.

59. 244 Va. 180, 418 S.E.2d 888 (1992).

60. *Id.*, 418 S.E.2d at 889.

The lessor contracted to renovate a former department store building in the center, containing 29,500 square feet, to be used by a third party as a grocery store.<sup>61</sup>

Foods First filed a bill of complaint seeking an injunction and damages against the lessor and the third party, claiming that the plain meaning of the restriction was to prevent a grocery store larger than Foods First from occupying any building in the center and that "erect" should be read to include remodeling an existing building for another use.<sup>62</sup>

The supreme court conducted a two-step analysis. First, it noted that restrictive covenants are not favored at law and will be construed against the party seeking enforcement<sup>63</sup> and that the party seeking enforcement has the burden of proving the covenant's applicability to the act about which the party is complaining.<sup>64</sup> Secondly, citing a line of cases,<sup>65</sup> the Supreme Court of Virginia observed that where the terms of a written document are clear, the court must construe them as written and the language used by the parties will be interpreted according to its plain meaning.<sup>66</sup> In the instant case, occupancy of a store larger than Foods First was prohibited only where Gables *erected* a building for such use containing more square feet than the Foods First building.<sup>67</sup> In interpreting the meaning of the word "erect," the supreme court pointed to an earlier decision in which "erect" was held to mean "to build."<sup>68</sup> The court held that interior remodeling of an existing building was not equivalent to building or erecting a building and, hence, not prohibited by the restrictive covenant.<sup>69</sup>

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61. *Id.*

62. *Id.* at 182, 418 S.E.2d at 889.

63. *Id.* (citing *Hening v. Maynard*, 227 Va. 113, 117, 313 S.E.2d 379, 381 (1984)).

64. *Id.* (citing *Mid-States Equip. Co. v. Bell*, 217 Va. 133, 140, 225 S.E.2d 877, 884 (1976)).

65. *Greater Richmond Civic Recreation, Inc. v. A.H. Ewing's Sons, Inc.*, 200 Va. 593, 596, 106 S.E.2d 595, 597 (1959); *Krikorian v. Dailey*, 171 Va. 16, 24, 197 S.E. 442, 446 (1938).

66. 244 Va. at 182, 418 S.E.2d at 889-90 (citing *Amos v. Coffey*, 228 Va. 88, 92, 320 S.E.2d 335, 337 (1984) and *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983)).

67. *Id.* at 183, 418 S.E.2d at 890.

68. *Id.* at 183, 418 S.E.2d at 890 (citing *Carroll v. City of Lynchburg*, 84 Va. 803, 804, 6 S.E. 133, 134 (1888)).

69. *Id.* at 183, 418 S.E.2d at 890.

## I. *Specific Performance*

In a case with complex facts, *Yamada v. McLeod*,<sup>70</sup> the Supreme Court of Virginia considered a case involving dower, marketable title and the remedy of specific performance. The Yamadas had contracted to purchase an expensive residence from McLeod and others, the sellers. The sellers obtained the title from three daughters of the decedent who held record title.<sup>71</sup> The daughters executed the deed of conveyance to the sellers solely in their capacity as executors of the decedent.<sup>72</sup> The daughters had qualified as executors under a duly probated will which specifically granted the executors full power to sell real property of the decedent's estate.

I grant unto my Executor . . . the full power and authority to sell . . . any real property which I may own at the time of my death, at such price and upon such terms and conditions as my Executor in his sole discretion may determine; and to the end, my Executor may execute, acknowledge and deliver any and all necessary or appropriate . . . deeds . . . for the effective . . . conveyance thereof, and no purchaser . . . shall be required to see to the proper application of any funds, property, money or proceeds thereto.<sup>73</sup>

Purchasers' title attorney advised them that the sellers had defective title because the executors had only deeded the property to the sellers in their capacity as executors and had failed to execute the deed in their capacity as beneficiaries, along with their respective spouses who needed to convey their inchoate curtesy interests.<sup>74</sup> This "defect" was reported to the sellers, whose attorney and title insurance company advised the purchasers' attorney that his assertion was incorrect.<sup>75</sup> The sellers advised the purchasers that they would attempt to enforce the contract.<sup>76</sup> The purchasers, meanwhile, contracted to purchase another residence.<sup>77</sup>

The sellers brought a multi-count suit against the purchasers in which they alleged the title to be marketable and asked the court

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70. 243 Va. 426, 416 S.E.2d 222 (1992).

71. *Id.* at 428, 416 S.E.2d at 223.

72. *Id.*

73. *Id.*

74. *Id.* at 429, 416 S.E.2d at 224.

75. *Id.*

76. *Id.* at 430, 416 S.E.2d at 224.

77. *Id.*

to compel the purchasers by means of specific performance to close on the property under the contract.

The Supreme Court of Virginia first addressed the title issue, holding that the executors possessed a “naked” power of sale under the will.<sup>78</sup> Upon the executors exercising this power, title to the land is “divested” from the devisees.<sup>79</sup> The court reasoned that if the devisees were divested of whatever rights they had in the property, there was no interest to which their husbands’ derivative curtesy rights could have attached.<sup>80</sup> It follows that the deed from the executors divested the daughters and their husbands, of any interest in the property and conveyed good and marketable title to the sellers.

The supreme court then held that the purchasers’ attorney’s contrary opinion as to title did not justify the purchasers’ failure to close.<sup>81</sup> The purchasers’ attorney’s knowledge that other attorneys and the sellers’ title company disagreed with his opinion was imputed to the purchasers.<sup>82</sup> The court closed by discussing whether the trial court abused its discretion in awarding the sellers specific performance and, after citing relevant Virginia authority,<sup>83</sup> found that under the circumstances of the case, the trial court had not.

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78. *Id.* at 431, 416 S.E.2d at 225 (citing *Stark v. City of Norfolk*, 183 Va. 282, 288, 32 S.E.2d 59, 61 (1944)).

79. *Id.* (citing *Coles v. Jamerson*, 112 Va. 311, 316, 71 S.E. 618, 619-20 (1911)).

80. *Id.* (citing George L. Haskins, *The Defeasibility of Dower*, 98 U. PA. L. REV. 826, 833 (1950)). Compare L. C. Warden, Annotation, *Dower or Curtesy in Estate of Inheritance Subject to Condition, Defeasance, Termination, or Expiration*, 25 A.L.R.2d 333, 336, 351-52 (1952) (stating that no dower or curtesy in spouse’s fee simple defeasible estate subject to condition subsequent when terminating condition occurred *during* spouse’s lifetime) with *Snidow v. Snidow*, 192 Va. 60, 64-65, 63 S.E.2d 620, 623 (1951) (applying the contrary rule when terminating condition occurred *upon spouse’s death*). Note that dower and curtesy have been abolished as to those interests not vested prior to January 1, 1991. VA. CODE ANN. § 64.1-19.2 (Cum. Supp. 1993).

81. *Id.* at 432, 416 S.E.2d at 225 (citing *Lyle v. Andrews*, 217 Va. 192, 194, 227 S.E.2d 686, 688 (1976)).

82. *Id.* at 433, 416 S.E.2d at 226 (citing *Allen Realty Corp. v. Holbert*, 227 Va. 441, 446, 318 S.E.2d 592, 594 (1984) (stating that knowledge of agent is generally imputed to principal) and *Minneapolis, St. P. & S. Ste M. R.R. v. Saint Paul Mercury-Indem. Co.*, 268 Minn. 390, 405, 129 N.W.2d 777, 787 (1964) (stating that knowledge of attorney is imputed to client)).

83. *Id.* at 432-33, 416 S.E.2d at 226 (citing *Allen v. Lindstrom*, 237 Va. 489, 497, 379 S.E.2d 450, 455 (1989); *Dunsmore v. Lyle*, 87 Va. 391, 392-93, 12 S.E. 610, 611 (1891); *Ayers v. Robins*, 71 Va. (30 Gratt.) 105, 115-16 (1878)).

### J. *Zoning and Land Use*

The Supreme Court of Virginia underscored the proposition that a governing body may not apply unwritten "practice" concerning informally filed grandfather applications under a prior zoning law to a newer law by the standards of the older law, unless the newer law specifically countenanced the same. In *Parker v. County of Madison*,<sup>84</sup> a developer purchased seventy-nine acres in Madison County and thereafter filed a preliminary plat with the county administrator, applying to subdivide the land into eleven residential lots. The Parkers owned a contiguous farm.<sup>85</sup> Both tracts were zoned for agricultural use. Subsequently, Madison County's Board of Supervisors amended the zoning ordinance, prohibiting the subdivision of agricultural parcels into more than four lots in any four-year period.<sup>86</sup>

The developer reduced the number of lots from eleven to eight and a public hearing was held by the county planning commission on the developer's proposal. The Parkers objected to the proposed subdivision at the hearing. Some months later, the developer submitted a final plat for eight lots, with some revisions from the previous submission. The planning commission recommended approval and the board of supervisors approved the plat.<sup>87</sup> The Parkers brought a declaratory judgment action against the developer and the county to void the approval. The chancellor ruled in favor of the county and developer, finding that the county acted consistently with a long-standing practice that applicants were entitled to rely upon the ordinance *in effect* when the subdivision plat was first submitted.<sup>88</sup>

The supreme court reversed. It interpreted Code of Virginia section 1-16 to mean that proceedings under an amendment to a former law "shall conform, so far as practicable, to the laws in force at the time of such proceedings."<sup>89</sup> The court further noted that this rule applies to amendments of local ordinances.<sup>90</sup> If the Madison County ordinance, as opposed to unwritten custom, had

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84. 244 Va. 39, 418 S.E.2d 855 (1992).

85. *Id.* at 40, 418 S.E.2d at 855.

86. *Id.*

87. *Id.* at 41, 418 S.E.2d at 856.

88. *Id.*

89. *Id.*

90. *Chesterfield Civic Ass'n v. Board of Zoning Appeals*, 215 Va. 399, 402, 209 S.E.2d 925, 927 (1974).

countenanced permitting the developer to rely upon the prior ordinance, notwithstanding the amendment to that ordinance, the court indicated that it would have sustained the finding.<sup>91</sup> However, the ordinance did not permit such reliance.

In *Dick Kelly Enterprises, Virginia Partnership, #11 v. City of Norfolk*,<sup>92</sup> the Supreme Court of Virginia confronted a bitter appellant whose apartment project had been closed by the city. In 1983, Kelly applied for and received a certificate of occupancy from the City of Norfolk for a three-story, forty-two-unit motel in the Ocean View section of the city. However, instead of operating the building as a motel, Kelly operated it as an apartment building. In August 1990, the city notified the partnership of alleged zoning and building code violations at the property. Kelly neither complied with the directives contained in the notice, nor appealed to the Norfolk Board of Zoning Appeals.<sup>93</sup>

The city brought suit seeking a permanent injunction to prohibit Kelly from using the property as an apartment complex and from occupying the premises in any fashion until the appropriate certificate of occupancy for an authorized use had been issued. Notwithstanding Kelly's demurrer and other asserted defenses, the trial court granted the city its requested relief.

The court first noted that Kelly's failure to "[p]ursue an available administrative remedy, an appeal to the Board of Zoning Appeals from the zoning administrator's decision, pervades the entire case."<sup>94</sup> The court also noted the well-settled principle that "exhaustion of administrative remedies where zoning ordinances are involved is essential before a judicial attack may be mounted against the interpretation of such ordinances."<sup>95</sup> The court went on to reject each of Kelly's arguments: the city was estopped by its prior consent to Kelly's use of the facilities as an apartment,<sup>96</sup>

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91. *Parker*, 244 Va. at 43, 418 S.E.2d at 857.

92. 243 Va. 373, 416 S.E.2d 680 (1992).

93. *Id.* at 376, 416 S.E.2d at 682.

94. *Id.* at 377, 416 S.E.2d at 683 (noting that the Board of Zoning Appeals is empowered: "[t]o hear and decide appeals from the decision of the zoning administrator" (citing VA. CODE ANN. § 15.1-495 37 (Cum. Supp. 1993))). The court also refers to Code of Virginia section 15.1-496(1) which states that an appeal should be taken within thirty days after decision appealed from.

95. *Dick Kelly*, 243 Va. at 378, 416 S.E.2d at 683.

96. "Estoppel does not apply to the government in the discharge of governmental functions." *Gwinn v. Alward*, 235 Va. 616, 621, 369 S.E.2d 410, 413 (1988).



Kelly's equitable defense in the nature of "dirty hands,"<sup>97</sup> and the city's failure to enforce the ordinance consistently in the past had waived the city's right to do so against Kelly.<sup>98</sup> Finally, the court found that Kelly's assertion of "retaliatory prosecution"<sup>99</sup> failed because Kelly's use of the property was unlawful.<sup>100</sup>

In *Cook v. Board of Zoning Appeals*,<sup>101</sup> the Supreme Court of Virginia reversed a finding that a property purchased by a church had been constructed prior to 1910 and, under the applicable section of the zoning ordinance,<sup>102</sup> was deemed to be of historical significance and therefore could not be demolished unless the architectural review board approved the demolition permit. The court concluded that the plain language of the statute required designated structures to be listed in the Official Register of Protected Structures and Sites, with the designation then being recorded in the land records.<sup>103</sup> Therefore, deeming the residence historic was not enough; the structure needed to be listed in the register and recorded in the land records.<sup>104</sup>

In *Board of Supervisors v. Gaffney*,<sup>105</sup> the Supreme Court of Virginia had to interpret whether operating a nudist club was permitted by the applicable zoning classification.<sup>106</sup> A special use permit had originally been issued to the club owners, which would have mooted the question of compliance with the zoning classification, but the board of supervisors revoked the permit on the grounds that the owner had not disclosed the nudist activities in his permit application.<sup>107</sup> Various neighbors complained that the nudists' va-

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97. Kelly asserted that the city had encouraged Kelly to misstate its proposed use of the premises when first applying for the permit as part of a city scheme to relocate low-rent housing into this section of Ocean View. *Dick Kelly*, 243 Va. at 380, 416 S.E.2d at 684.

98. *Id.* at 382, 416 S.E.2d at 680 (citing *Commonwealth v. Washington Gas Light Co.*, 221 Va. 315, 323, 269 S.E.2d 820, 825 (1980)). The court noted that the zoning ordinance and building code had been legislatively enacted and, therefore, unless authority to waive enforcement thereof had also been legislatively enacted, which it had not in this instance, the city was powerless to waive compliance. *Id.*

99. Kelly asserted that the city was making an example of Kelly for challenging high tax assessments. *Id.* at 380, 416 S.E.2d at 684.

100. *Id.* at 383, 416 S.E.2d at 686.

101. 244 Va. 107, 418 S.E.2d 879 (1992).

102. FALLS CHURCH VA. CODE § 38-39(e) (Supp. No. 2 1988) (creating historic and cultural conservation districts).

103. *See id.* § 38-39(d).

104. *Cook*, 244 Va. at 111, 418 S.E.2d at 881.

105. 244 Va. 545, 422 S.E.2d 760 (1992).

106. *Id.* at 546, 422 S.E.2d at 761.

107. *Id.* at 547, 422 S.E.2d at 761.

rious sports activities were clearly visible from nearby properties and a nearby public road.

Seeking to determine the naked truth, the supreme court resolved the appeal in favor of the county, determining that operating a nudist club was not specifically listed as a permitted activity in the county's C-1 Conservation classification.<sup>108</sup> Any use not so listed or permitted by special use permit was not permitted by this "inclusive" ordinance.<sup>109</sup> The court then noted that the property owner has the burden to prove that its use of the land is permitted under the ordinance. The club failed to meet this burden.<sup>110</sup> In a compelling concurring opinion, Justice Keenan scolded the majority for focusing on the description "nudist club" and argued persuasively that "under the majority's view, a governmental entity can secure the exclusion of any land use simply by assigning it a label not found in the [inclusive] ordinance."<sup>111</sup>

## II. LEGISLATION

Within the past year the Virginia General Assembly enacted, and Governor Wilder signed into law, a number of bills relating to the ownership and operation of real property in Virginia. A brief summary of some of the more important pieces of legislation follows.

### A. *Aliens as Property Owners*

Code of Virginia section 55-1 previously permitted aliens to acquire, own and sell real estate by purchase or descent.<sup>112</sup> The section was amended to permit a Virginia court which finds that an alien's jurisdiction of residence denies Virginia residents the benefit, use or control of money or property, to direct that the alien's money or property in Virginia be paid into court for the benefit of the alien.<sup>113</sup> The money or property may be paid out only upon the

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108. *Id.* at 550, 422 S.E.2d at 762-63.

109. *Id.*, 422 S.E.2d at 763 (emphasis in original). The court differentiated "inclusive" zoning ordinances, those which specify only those uses which are permitted, with all other uses being prohibited, from "exclusive" ordinances which permit all uses except those specifically prohibited. *Id.*

110. *Id.*

111. *Id.* at 553, 422 S.E.2d at 765.

112. Act of Mar. 24, 1993, ch. 535, 1993 Va. Acts 659 (codified at VA. CODE ANN. § 55-1 (Cum. Supp. 1993)).

113. *Id.*

order of the impounding court or other court of competent jurisdiction and if money or property remains in court after three years have elapsed, the court may then distribute it as if the alien had predeceased the decedent.<sup>114</sup>

### B. *Clerk's Fees*

Code of Virginia section 55-66.6<sup>115</sup> was altered to clarify that the fee charged by the clerk for recording a certificate of satisfaction is payable by the lien debtor.

### C. *Comprehensive Plans*

The definitional sections of two code sections dealing with historic areas were slightly altered. Code of Virginia section 15.1-430(b)<sup>116</sup> now makes it clear that historic areas can include as few as one building and also adds "archaeological" to those notable features relating to the cultural or historic heritage of the community such as to warrant preservation. "Archaeological" was also added to the list of notable characteristics under Code of Virginia section 15.1-503.2,<sup>117</sup> entitling buildings or structures to be designated "historic" by the Virginia Board of Historic Resources.

The statute creating agricultural and forestal districts<sup>118</sup> was amended to require the local governing body to designate agricultural and forestal districts on the comprehensive plan map each time the comprehensive plan is updated.<sup>119</sup>

### D. *Condominium Act*

The large number of amended statutes relating to condominiums and their operation attests to the growing importance of this form of real property ownership in the Commonwealth. A few of the more wide-reaching changes are noted in this section.

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114. *Id.*

115. Act of Mar. 3, 1993, ch. 39, 1993 Va. Acts 38 (codified at VA. CODE ANN. § 55-66.6 (Cum. Supp. 1993)).

116. Act of Mar. 28, 1993, ch. 770, 1993 Va. Acts 1096 (codified at VA. CODE ANN. § 15.1-430(b) (Cum. Supp. 1993)).

117. *Id.* (codified at VA. CODE ANN. § 15.1-503.2 (Cum. Supp. 1993)).

118. Act of Mar. 28, 1993, ch. 745, 1993 Va. Acts 1056 (codified at VA. CODE ANN. § 15.1-1511(D) (Cum. Supp. 1993)).

119. *Id.*

Code of Virginia section 55-79.99<sup>120</sup> was amended to require the Real Estate Board to enforce the Condominium Act, removing the board's discretionary authority. Convertible lands can now be converted to condominium use for up to seven years instead of five years.<sup>121</sup> The definitions under Code of Virginia section 55-79.41<sup>122</sup> were amended to include within the definition of "declarant" institutional lenders "which may not have succeeded to or accepted any special declarant rights"<sup>123</sup> pursuant to Code of Virginia section 55-79.74:3. An individual who acquires title to a condominium unit at a foreclosure sale was excluded from the definition of "declarant."<sup>124</sup>

Unit owners' associations were specifically given the right to sue in their own name for claims relating to the common elements as provided for in Code of Virginia section 55-79.80(B).<sup>125</sup> Code of Virginia section 55-79.53(B) now enables condominium documents to provide for arbitration or other alternative dispute resolution.<sup>126</sup> The legislature amended Code of Virginia section 55-79.73,<sup>127</sup> providing that a majority of the remaining board members may fill a vacancy on the board of a unit owners' association, unless the condominium documents provide otherwise.

Further strengthening the hand of the unit owners' associations, a new subsection was added to Code of Virginia section 55-79.80<sup>128</sup> permitting an association to withhold non-essential services and the right to use common elements from a unit owner who is delinquent in paying his assessment, provided, however, that the association cannot deny access to the unit through the common elements. The association may also assess charges for violating the rules and regulations of the condominium instruments by the owner, his family members, tenants, guests and invitees.<sup>129</sup>

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120. Act of Mar. 15, 1993, ch. 198, 1993 Va. Acts 225 (codified at VA. CODE ANN. § 55-79.99(A) (Cum. Supp. 1993)).

121. Act of Mar. 3, 1993, ch. 45, 1993 Va. Acts 42 (codified at VA. CODE ANN. § 55-79.61 (Cum. Supp. 1993)).

122. Act of Mar. 28, 1993, ch. 667, 1993 Va. Acts 931 (codified at VA. CODE ANN. § 55-79.41 (Cum. Supp. 1993)).

123. *Id.*

124. *Id.*

125. Act of Mar. 28, 1993, ch. 667, 1993 Va. Acts 931 (codified at VA. CODE ANN. § 55-79.53(a) (Cum. Supp. 1993)).

126. *Id.* (codified at VA. CODE ANN. § 55-79.53(B) (Cum. Supp. 1993)).

127. *Id.*

128. *Id.* (codified at VA. CODE ANN. § 55-79.80:2 (Cum. Supp. 1993)).

129. *Id.*

A new provision was added to Code of Virginia section 55-79.73 stating that if a mortgagee's consent is required for the amendment of the condominium's bylaws, such consent shall be deemed given if the association mails the text of the proposed amendment to the mortgagee in the prescribed fashion and receives no objection within ninety days following receipt by the mortgagee.<sup>130</sup>

#### E. *Deeds of Trust and Trustees' Sales*

A new subsection was added to Code of Virginia section 55-59.1<sup>131</sup> providing that if the beneficiary of a deed of trust which is being foreclosed has lost the note, the beneficiary can nevertheless proceed with the sale and protect the trustee and the validity of the sale by sending written notice of the pending sale and the loss of the note to the maker of the note. The maker then has the option of requesting the beneficiary to obtain court permission to conduct the sale. The court may require the beneficiary to provide for adequate protection of the maker of the note against claims from a third person to enforce the note as a precondition to giving its permission to conduct the sale. Once the trustee proceeds to sale, the lost instrument shall not affect the trustee's authority or the validity of the sale.<sup>132</sup>

The legislature also amended two code sections dealing with substituted trustees. Code of Virginia section 26-49,<sup>133</sup> governing appointment of trustees, was amended to provide a "carve out" exception to section 55-59. Section 55-59 itself<sup>134</sup> was amended to prescribe the mechanics whereby substitute trustees can be appointed, regardless if such power is embodied in the deed of trust.<sup>135</sup>

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130. Act of Feb. 9, 1993, ch. 1, 1993 Va. Acts 1 (codified at VA CODE ANN. § 55-79.73:1 (Cum. Supp. 1993)).

131. Act of Mar. 26, 1993, ch. 597, 1993 Va. Acts 751 (codified at VA. CODE ANN. § 55-59.1(B) (Cum. Supp. 1993)).

132. *Id.*

133. Act of Mar. 22, 1993, ch. 426, 1993 Va. Acts 498 (codified at VA. CODE ANN. § 26-49 (Cum. Supp. 1993)).

134. *Id.* (codified at VA. CODE ANN. § 55-59 (Repl. Vol. 1986)).

135. The added provision calls for the entitled beneficiary to execute and acknowledge an instrument appointing the new trustee and recording it in the clerk's office where the deed of trust was recorded, whereupon the substitute trustee therein named will be vested with all the rights, powers, authority and duties vested in the original trustee under the deed of trust. *Id.*

## F. *Judgments and Liens*

To clarify that the beneficiary of a land trust holds an interest other than real estate, the General Assembly amended Code of Virginia section 55-17.1.<sup>136</sup> The section now specifies that neither judgments against a beneficiary of a land trust nor consensual liens against such beneficiary's real estate attach to the real estate subjected to a land trust unless the judgment is docketed or the lien is recorded before the deed creating the land trust is recorded and while the beneficiary retains record title to the real estate.<sup>137</sup>

An amendment to Code of Virginia section 58.1-1805<sup>138</sup> prohibits the Department of Taxation from filing a tax lien memorandum without giving the taxpayer ten days' notice, except in those situations where the Commissioner determines that prior notice will jeopardize the collection efforts, in which event concurrent notice is permitted.<sup>139</sup>

## G. *Leases, Rents or Profits*

Code of Virginia section 55-220.1<sup>140</sup> was amended to clarify that the recording in the proper clerk's office of a deed, deed of trust or other instrument assigning the interest of the grantor, assignor or transferor shall fully protect the interest of the grantees, assignees or transferees, without the necessity of other actions being undertaken, such as furnishing notice, taking possession, or impounding the rents.<sup>141</sup>

## H. *Property Owners' Association Act*

Various statutes outlining the rights and duties of Property Owners' Associations were amended or supplemented to address discrete issues. A new section was added to Code of Virginia sec-

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136. Act of Mar. 2, 1993, ch. 454, 1993 Va. Acts 537 (codified at VA. CODE ANN. § 55-17.1 (Cum. Supp. 1993)).

137. *Id.* See also *Air Power, Inc. v. Thompson*, 244 Va. 534, 422 S.E.2d 768 (1992).

138. Act of Mar. 19, 1993, ch. 384, 1993 Va. Acts 437 (codified at VA. CODE ANN. § 58.1-1805 (Cum. Supp. 1993)).

139. *Id.* Notice must be sent to the last known address of the taxpayer, i.e., the address shown on the last-filed tax return or any later correspondence indicating an address change.

140. Act of Mar. 22, 1993, ch. 427, 1993 Va. Acts 500 (codified at VA. CODE ANN. § 55-220.1 (Cum. Supp. 1993)).

141. *Id.* This amendment is effective as to all instruments of record before, on or after July 1, 1992. *Id.*

tion 55-509,<sup>142</sup> requiring the developer to pay all real estate taxes on open or common area through the date of transfer to the association. A related code section<sup>143</sup> prohibits localities from assessing real estate taxes against an association for open or common space except as provided by the section, obligates the locality to reassess such property concurrent with its transfer to the association, and mandates the developer to pay all real estate taxes attributable to such open or common spaces at the time of transfer as provided in Code of Virginia section 55-509.1.<sup>144</sup> Further, associations were given the power to deny a member delinquent in assessment payments for non-essential services or facilities, provided that access to the member's unit through the common areas is not precluded.<sup>145</sup> A new subsection was added to Code of Virginia section 55-515 permitting arbitration or other alternative dispute resolution.<sup>146</sup>

Property owners' associations were instructed to keep their financial books and records in accordance with generally accepted accounting practices.<sup>147</sup> Code of Virginia section 55.510(B)<sup>148</sup> now clarifies that salary information for employees of the association may be examined and copied by any member in good standing. A new provision was added to Code of Virginia section 55-512<sup>149</sup> requiring that associations disclose any restrictions, limitations or prohibition on the right of a lot owner to place for sale signs on his lot.

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142. Act of Apr. 7, 1993, ch. 956, 1993 Va. Acts 1546 (codified at VA. CODE ANN. § 55-509.1 (Cum. Supp. 1993)).

143. *Id.* (codified at VA. CODE ANN. § 58.1-3284.1(B) (Cum. Supp. 1993)).

144. VA. CODE ANN. § 55-509.1 (Cum. Supp. 1993).

145. Act of Apr. 7, 1993, ch. 956, 1993 Va. Acts 1546 (codified at VA. CODE ANN. § 55-509.1(B) (Cum. Supp. 1993)). *See also* Act of Mar. 28, 1993, ch. 667, 1993 Va. Acts 667 (codified at VA. CODE ANN. § 55-79.80 (Cum. Supp. 1993)) (providing a similar right to condominium associations).

146. Act of Apr. 7, 1993, ch. 956, 1993 Va. Acts 1546 (codified at VA. CODE ANN. § 55-515(B) (Cum. Supp. 1993)). *See also* Act of Mar. 28, 1993, ch. 1198, 1993 Va. Acts 667 (codified at VA. CODE ANN. § 55-79.53(B) (Cum. Supp. 1993)) (providing similar instruction to condominium associations).

147. Act of Mar. 29, 1993, ch. 827, 1993 Va. Acts 1198 (codified at VA. CODE ANN. § 55-510(A) (Cum. Supp. 1993)).

148. Act of Mar. 19, 1993, ch. 365, 1993 Va. Acts 318 (codified at VA. CODE ANN. § 55.510(B) (Cum. Supp. 1993)). *See also* Grillo v. Montebello Condominium Unit Owner's Ass'n, 243 Va. 475, 416 S.E.2d 444 (1992) (holding that a unit owner was entitled to access to salary information under a similar statute relating to condominium owners' associations, VA. CODE ANN. § 55-79.74:1 (Cum. Supp. 1992)).

149. Act of Mar. 10, 1993, ch. 96, 1993 Va. Acts 94 (codified at VA. CODE ANN. § 55-512(10) (Cum. Supp. 1993)).

## I. Residential Property Disclosure Act

On the eve of these statutes' effect, the General Assembly clarified and amended some of their provisions. An important change was made to Code of Virginia section 55-518.<sup>150</sup> The addition eliminates an exemption from disclosure by a builder for the initial sale of a new residence. Now, the builder is required to disclose in writing all known material defects which would constitute a violation of local building codes and, at the builder's election, on the form prescribed by Code of Virginia section 55-518.<sup>151</sup> The builder cannot satisfy this requirement by resorting to the disclaimer form described in Code of Virginia section 55-519.<sup>152</sup> Such disclosure does not void any warranty or other contractual obligation which the builder may otherwise have with the purchaser.

A statute of limitation provision was added to Code of Virginia section 55-524,<sup>153</sup> providing that single actions brought for both failure to deliver a disclosure statement and for misrepresenting information must be brought within one year of the date the purchaser received the disclosure statement. If a statement was not received, the action must be brought within one year of the date of settlement if by naked sale, or date of occupancy if by lease with an option to purchase.<sup>154</sup>

Code of Virginia section 55-525<sup>155</sup> directed the Virginia Real Estate Board to promulgate a disclosure form by January 1, 1993.<sup>156</sup> The amendment to this section empowers the board, by regulation, to amend the forms at any time the Board deems necessary or appropriate.<sup>157</sup>

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150. Act of Mar. 29, 1993, ch. 824, 1993 Va. Acts 1195 (codified at VA. CODE ANN. § 55-518(B) (Cum. Supp. 1993)).

151. *Id.* (codified at VA. CODE ANN. § 55-518 (Cum. Supp. 1993)).

152. VA. CODE ANN. § 55-519 (Cum. Supp. 1992).

153. Act of Mar. 29, 1993, ch. 847, 1993 Va. Acts 1223 (codified at VA. CODE ANN. § 55-524(C) (Cum. Supp. 1993)).

154. *Id.*

155. VA. CODE ANN. § 55-525 (Cum. Supp. 1993).

156. The board did so. See forms promulgated by the Virginia Beach Real Estate Board, January 29, 1993, (on file at the *University of Richmond Law Review* Office).

157. Act of Mar. 29, 1993, ch. 848, 1993 Va. Acts 1233 (codified at VA. CODE ANN. § 55-525 (Cum. Supp. 1993)).



## J. *Taxation*

Two code sections were amended by the General Assembly to provide further tax relief to elderly and handicapped persons. Code of Virginia section 58.1-3210 now specifically includes manufactured homes and also provides that a dwelling jointly held by a married couple may qualify if either owner is at least sixty-five years old or is permanently and totally disabled.<sup>158</sup>

Code of Virginia section 58.1-3211 was amended to eliminate income limits for relatives who live with an elderly or disabled incapacitated person for purposes of being qualified for tax relief. However, the elderly or disabled owner must not have transferred certain amounts of assets concurrently with the relative moving in, or during a three-year period prior to such move-in.<sup>159</sup>

## K. *Title Insurance*

Two important pieces of legislation governing title insurance in the Commonwealth were enacted by the General Assembly: Code of Virginia section 382-4601.1<sup>160</sup> and House Bill 2147.<sup>161</sup> House Bill 2147 was only provisionally enacted and, to be effective, must be re-enacted by the 1994 General Assembly.<sup>162</sup> Code of Virginia section 38.2-4601.1 amended two code sections: Code of Virginia section 38.2-4601 was amended by adding a new sub-section 38.2-4601.1,<sup>163</sup> which defines title insurance agencies or agents as individuals, corporations, partnerships or other legal entities licensed in the Commonwealth as a title insurance agent and appointed by a title insurance company licensed in the Commonwealth to do the following: evaluate title searches to ascertain insurability, determine whether underwriting risks have been removed, issue title insurance commitments, binders and endorsements, and policies and endorsements on behalf of the licensed title insurance company.<sup>164</sup>

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158. Act of Apr. 7, 1993, ch. 911, 1993 Va. Acts 1379 (codified at VA. CODE ANN. § 58.1-3210 (Cum. Supp. 1993)).

159. Act of Mar. 11, 1993, ch. 149, 1993 Va. Acts 155 (codified at VA. CODE ANN. § 58.1-3211 (Cum. Supp. 1993)).

160. Act of Mar. 11, 1993, ch. 147, 1993 Va. Acts 152 (codified at VA. CODE ANN. § 38.2-4601.1 (Cum. Supp. 1993)).

161. H.B. 2147 Va. Gen. Assembly (Reg. Sess. 1993).

162. *Id.*

163. VA. CODE ANN. § 38.2-4601.1 (Cum. Supp. 1993).

164. *Id.*

Code of Virginia section 38.2-4614<sup>165</sup> was amended to clarify that federally insured lenders, their holding companies and their subsidiaries were to be eligible to be so licensed and were permitted to receive commission from title insurance policies sales in their capacity as title insurance agencies.

If House Bill 2147<sup>166</sup> is reenacted, the amendment will define title insurance rates and mandate filing rates with the Virginia Insurance Commission, prohibit agents or agencies from charging rates different from those rates so filed and, finally, adding Code of Virginia section 38.2-4618, would empower the Commission, on its own or upon complaint by third parties, to investigate compliance with the rate structure.<sup>167</sup>

#### L. *Transfers for Religious Purposes*

The General Assembly restated Code of Virginia section 57-7<sup>168</sup> by adding new section 57-7.1<sup>169</sup> which provides: any *inter vivos* transfer or transfer by will made to or for the benefit of any church, diocese, religious congregation or religious society, by purchase or gift shall be valid, subject to the provisions of Code of Virginia section 57-12;<sup>170</sup> any such transfer or conveyance which fails to state a specific purpose shall be used by the recipient for its religious and benevolent purposes, as determined by the governing body of the church or institution having control of temporal matters; and no such transfer or conveyance shall fail or be voided where the beneficiary already has lawful trustees in place, is capable of putting them in place upon application as prescribed by statute,<sup>171</sup> or has ecclesiastical officers as statutorily provided and defined.<sup>172</sup>

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165. Act of Mar. 11, 1993, ch. 147, 1993 Va. Acts 271 (codified at VA. CODE ANN. § 38.2-4614 (Cum. Supp. 1993)).

166. H.B. 2147 Va. Gen. Assembly (Reg. Sess. 1993).

167. *Id.*

168. VA. CODE ANN. § 57-7 (Repl. Vol. 1986).

169. Act of Mar. 19, 1993, ch. 370, 1993 Va. Acts 535 (codified at VA. CODE ANN. § 57-7.1 (Cum. Supp. 1993)).

170. VA. CODE ANN. § 57-12 (Cum. Supp. 1993) (limiting amounts of land trustees may hold).

171. VA. CODE ANN. § 57-8 (Repl. Vol. 1986).

172. VA. CODE ANN. § 57-16 (Repl. Vol. 1986).

### M. *Wet Settlement Act*

The General Assembly amended two sections of the Wet Settlement Act.<sup>173</sup> Code of Virginia section 6.1-2.11<sup>174</sup> was altered to extend the act to cover all loans secured by first mortgages or deeds of trust on real estate containing no more than four residential units. Code of Virginia section 6.1-2.12<sup>175</sup> now provides that in loan refinancings and other loans where the borrower has a right of rescission, the lender must disburse loan proceeds within one business day following the expiration of the rescission period provided for in the United States Truth-in-Lending Act.<sup>176</sup>

### N. *Zoning, Land Use and Planning*

The code section governing adoption of comprehensive plans by all localities in the Commonwealth was amended to require the local commission to consider affordable housing "sufficient to meet the current and future needs of all levels of income in the locality while considering the current and future needs of the planning district within which the locality is situated."<sup>177</sup> Logically, Code of Virginia section 15.1-447,<sup>178</sup> governing surveys and studies to be made in preparation of a comprehensive plan, was amended to incorporate the concept of affordable housing suitable for meeting the needs of both the locality and its planning district. Code of Virginia section 15.1-489 was amended, adding the promotion and creation of affordable housing suitable for the current and future needs of the locality, and the reasonable proportioning of the current and future needs of the locality's planning district to the various other "purposes" for which zoning ordinances may be enacted.<sup>179</sup>

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173. VA. CODE ANN. § 6.1-2.10 to -2.15 (Repl. Vol. 1988).

174. Act of Mar. 24, 1993, ch. 530, 1993 Va. Acts 1113 (codified at VA. CODE ANN. § 6.1-2.11 (Interim Supp. 1993)).

175. Act of Mar. 24, 1993, ch. 530, 1993 Va. Acts 1113 (codified at VA. CODE ANN. § 6.1-2.12 (Cum. Supp. 1993)).

176. 15 U.S.C. § § 1601-93 (Supp. 1993).

177. Act of Mar. 28, 1993, ch. 758, 1993 Va. Acts 1703 (codified at VA. CODE ANN. § 15.1-466.1:7 (Cum. Supp. 1993)).

178. Act of Mar. 28, 1993, ch. 758, 1993 Va. Acts 1703 (codified at VA. CODE ANN. § 15.1-477(A)(1) (Cum. Supp. 1993)).

179. Act of Mar. 28, 1993, ch. 758, 1993 Va. Acts 1704 (codified at VA. CODE ANN. § 15.1-489 (Cum. Supp. 1993)).

Persons running afoul of zoning ordinances were provided procedural relief when the General Assembly revised Code of Virginia section 15.1-496.1.<sup>180</sup> The section now requires, notwithstanding any charter provision to the contrary, any written notice of a zoning violation or an order from the zoning administrator to include a statement informing the addressee that he may have a right to appeal within thirty days, and that the decision or order will be final and unappealable if not appealed within that time frame.

The General Assembly enlarged the power of zoning administrators. Code of Virginia section 15.1-491<sup>181</sup> now provides that, pursuant to his authority to enforce and administer the zoning ordinance, the administrator has "the authority to make conclusions of law and findings of fact, with concurrence of the attorney for the governing body, in connection with the administration, application and enforcement of the ordinance in specific cases, including determinations of rights accruing under § 15.1-492."<sup>182</sup>

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180. Act of Mar. 28, 1993, ch. 780, 1993 Va. Acts 1793 (codified at VA. CODE ANN. § 15.1-496.1 (Cum. Supp. 1993)).

181. Act of Mar. 28, 1993, ch. 672, 1993 Va. Acts 1594 (codified at VA. CODE ANN. § 15.1-491 (Cum. Supp. 1993)).

182. Act of Mar. 28, 1993, ch. 672, 1993 Va. Acts 1594 (codified at VA. CODE ANN. § 15.1-491(d) (Cum. Supp. 1993)). Code of Virginia section 15.1-492 concerns vested rights and non-conforming uses. VA. CODE ANN. § 15.1-492 (Repl. Vol. 1989).

