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Annual Survey of Virginia Law: Property Law

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PROPERTY LAW

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I. INTRODUCTION

This article reviews selected judicial decisions and legislation affecting real property law in Virginia during the past year. Part I discusses some of the more significant cases decided by the Supreme Court of Virginia. Part II discusses some of this year's most significant legislation enacted by the Virginia General Assembly.

II. JUDICIAL DECISIONS

A. Agency

In *Reistroffer v. Person*,¹ the Supreme Court of Virginia examined the question of agency *vel nom* in connection with an alleged breach of a real estate sales contract. Jon and Linda Reistroffer (Sellers) owned property in Prince William County which was subject to the Virginia Property Owners' Association Act.² After retaining John Ehlinger, a realtor, to sell the property for them, the Sellers and Lyndia Person (Buyer) executed a contract which, among other things, confirmed that Ehlinger

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1. 247 Va. 45, 439 S.E.2d 376 (1994).

2. See VA. CODE ANN. §§ 55-508 to -516.2 (Repl. Vol. 1994).

was the Sellers' agent.³ The Buyer directed in writing that the homeowners' association disclosure packet be delivered to Ehlinger on her behalf.⁴ Upon Ehlinger's timely receipt of the documents, he informed the Buyer that the packet was available; however, the Buyer did not pick up the documents for three months.⁵ Two days after having picked up the package, the Buyer notified the Sellers that she was cancelling the contract.⁶

The Sellers argued that, since the Buyer designated Ehlinger as her agent for purposes of receiving the packet, the statutory three-day period for reviewing the packet had long since expired when the Buyer gave notice of cancellation.⁷ The Buyer argued that Ehlinger was not her agent and, therefore, her notice of cancellation was timely.⁸ The Supreme Court of Virginia concluded that the issue of whether an agency relationship exists is one of fact to be resolved by the fact finder.⁹ As such, the court reversed the trial court's judgment and remanded the case for an evidentiary hearing on the agency issue.¹⁰

B. *Dedication*

In *E.S. Chappell & Son, Inc. v. Brooks*,¹¹ the Supreme Court of Virginia was asked to determine whether the Commonwealth effectively accepted the dedication of land for public-road purposes. In 1966, William W. and Mary B. Campbell, Jay and Judson T. Vaughan, Jr., and Hugh and Sally P. Campbell (col-

3. 247 Va. at 46-47, 439 S.E.2d at 377.

4. *Id.* at 47, 439 S.E.2d at 378.

5. *Id.*

6. *Id.* The court stated that "Paragraph 14 [of the Contract] is consistent with Code § 55-511 (C), which provides, in pertinent part, that '[t]he purchaser may cancel the contract . . . (ii) within three days after receiving the association disclosure packet if the association packet . . . is hand delivered.'" *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 48, 439 S.E.2d at 378.

10. *Id.* at 48-49, 439 S.E.2d at 378-79. The Court further rejected the Sellers' contention that they should be granted relief because the Buyer cancelled the contract for a "non-HOA related reason". *Id.* In addition, the Court opined that it was clear that the parties intended that the provision regarding attorney's fees would be severable and would remain in effect if the Buyer was successful in the litigation. *Id.* at 49, 439 S.E.2d at 379.

11. 248 Va. 571, 450 S.E.2d 156 (1994).

lectively, the "Campbells" and the "Vaughans") deeded and dedicated to the Commonwealth one Fifty-Foot Strip of land adjacent to U.S. Route 301 (the North-South Strip) and a second Fifty-Foot Strip of land which ran east and west between two lots (the Fifty-Foot Strip).¹² The Campbells and the Vaughans subsequently conveyed the Fifty-Foot Strip to Virginia Tractor Company, Inc. and granted a non-exclusive easement over the private road constructed on the North-South Strip.¹³ The deed recited, however, that if the Commonwealth accepted either the North-South Strip or the Fifty-Foot Strip as a public road, Virginia Tractor would execute any instruments necessary to effect the transfer.¹⁴

Although the Commonwealth took the North-South Strip into the secondary road system, the Fifty-Foot Strip was never made a public road.¹⁵ In 1983, E.S. Chappell & Son, Inc. (Chappell) purchased several acres of land from Virginia Tractor, which included the Fifty-Foot Strip.¹⁶ After an adjacent property owner took control of the Fifty-Foot Strip, Chappell filed a motion for judgment seeking to eject the adjacent property owner.¹⁷ The trial court dismissed Chappell's suit, however, holding that the Commonwealth had legal title to the Fifty-Foot Strip under the doctrine of implied acceptance.¹⁸

The Supreme Court of Virginia found the trial court's reliance on the implied acceptance doctrine erroneous for two reasons. First, until public acceptance, dedication is merely an offer to dedicate, revocable at the will of the landowner.¹⁹ Sec-

12. *Id.* at 572, 450 S.E.2d at 157.

13. *Id.*

14. *Id.* at 572-73, 450 S.E.2d at 157.

15. *Id.* at 573, 450 S.E.2d at 157.

16. *Id.* The adjacent property owner undertook control over the strip by acts not specified in the record. *Id.*

17. *Id.*

18. *Id.* The doctrine of implied acceptance provides that

[W]here a governing body has accepted part of the streets appearing on a recorded plat and no intention to limit the acceptance is shown, such partial acceptance constitutes acceptance of all the streets, provided the part accepted is sufficiently substantial to evince an intent to accept the comprehensive scheme of public use reflected in the plat.

Ocean Island Inn v. City of Virginia Beach, 216 Va. 474, 479, 220 S.E.2d 247, 252 (1975).

19. *Chappell*, 248 Va. at 573, 450 S.E.2d at 157 (citing *Brown v. Tazewell County*

ond, the doctrine of implied acceptance only applies in urban areas, and since the record was silent as to the urban or rural nature of the Fifty-Foot Strip, the Commonwealth failed to meet the burden of proof necessary to support a finding of implied acceptance.²⁰

C. Deeds

*Carstensen v. Chrisland Corp.*²¹ involved a "dispute over whether a pipestem driveway shared by the owners of two adjacent lots and located on their land, is subject to an easement for the benefit of a third adjacent lot owner."²² In early 1988, Chrisland Corporation, a developer and builder, contracted to sell lots 25 and 26 of its Walnut Hill Subdivision to Alvin and Marie Carstensen and Shirley O'Neil, respectively.²³ Settlement on both lots occurred in June of 1989, with First American Title Insurance Company issuing title insurance policies to both purchasers.²⁴ A pipestem driveway was located on a portion of both lots 25 and 26 and was in front of and adjacent to lot 27, which was subsequently purchased by Patricia Kelly and David Daniel.²⁵ No easement had been recorded which permitted the owner of lot 27 access over the driveway, and O'Neil and the Carstensens refused Chrisland's request for an easement.²⁶ As a condition to First American issuing a policy insuring Kelly and Daniel's title to lot 27, First American required Kelly and Daniel to execute an acknowledgment stating that lot 27 might not have vehicular access to a public right-of-way.²⁷

Water and Sewer Auth., 226 Va. 125, 129, 306 S.E.2d 889, 891 (1983)).

20. *Id.* at 574, 450 S.E.2d at 158 (relying on *Burks Bros. v. Jones*, 232 Va. 238, 248, 349 S.E.2d 134, 141 (1986) (holding that a formal acceptance or express assertion of dominion over a road by a public authority is required before dedication of a rural road is complete)).

21. 247 Va. 433, 442 S.E.2d 660 (1994).

22. *Id.* at 436, 442 S.E.2d at 661.

23. *Id.* at 436, 442 S.E.2d at 662.

24. *Id.*

25. *Id.*

26. *Id.* As a result, Chrisland recorded a declaration of common driveway easement pursuant to Paragraph six of the Carstensen and O'Neil contracts, which reserved the right to create easements which benefit the property or the community of which it is a part. *Id.* at 437, 442 S.E.2d at 662.

27. *Id.*

Chrisland, Kelly and Daniel filed a bill of complaint seeking a judgment declaring that lots 25 and 26 were subject to an easement in favor of lot 27.²⁸ The trial court granted "Chrisland's summary judgment motion, found an easement by necessity and an easement by contract in favor of lot 27 over lots 25 and 26," and denied O'Neil and Carstensen's "motion for summary judgment seeking to vacate the easement recorded by Chrisland."²⁹ The Supreme Court of Virginia noted that a motion for summary judgment is appropriate where there are no material facts in dispute.³⁰ Because the record fell short of showing undisputed evidence of the elements required to establish an easement by necessity and material facts were in dispute, the court found that the trial court erred in sustaining Chrisland's motion for summary judgment and in finding an easement by necessity.³¹

The primary issue on appeal in *Langman v. Alumni Association of the University of Virginia*³² was whether a deed containing a mortgage assumption clause was repudiated by the grantee. In December 1986, Dr. Margaretha Langman and Caleb Stowe signed a deed as grantors conveying to the Alumni Association of the University of Virginia (the Alumni Association) property known as "Ferdinand's Arcade" and located in

28. *Id.* O'Neil and Carstensen filed a cross bill of complaint against Chrisland alleging a claim of intentional interference with their contracts with First American and a third party bill of complaint against First American charging that the company breached its fiduciary duty to them, breached the contracts of title insurance, refused to defend the litigation in bad faith, and engaged in legal malpractice. *Id.*

29. *Id.* at 437, 442 S.E.2d at 662-63. First American's motion for summary judgment responding to charges of breach of contract and bad faith denial of representation was also granted by the trial court. As to the issues of fiduciary duty and legal malpractice against First American and tortious interference with contract against Chrisland, the trial court granted First American and Chrisland's motions to strike and dismiss the case. *Id.*

30. *Id.* at 438, 442 S.E.2d at 663 (citing *Stone v. Alley*, 240 Va. 162, 163, 392 S.E.2d 486, 487 (1990)).

31. *Id.* at 439, 442 S.E.2d at 664. As to the claims against First American, the court held that whether an easement ultimately was established by contract or by necessity, the title insurance policies' exclusions would deny coverage for any losses sustained as a result of any easement established. There being no coverage, the court affirmed the trial court's holding that First American did not breach its contracts of title insurance when it denied coverage and refused to provide a defense to the claims. *Id.*

32. 247 Va. 491, 442 S.E.2d 669 (1994).

Allegheny County, Maryland.³³ The deed stated that the property was subject to a \$600,000 first deed of trust in favor of Dominion and Federal Savings & Loan Association (Dominion), and that "[t]he Grantee does hereby assume payment of such obligation and agrees to hold the Grantors harmless from further liability on such obligation."³⁴ The deed was not signed by a representative of the Alumni Association, nor was there a space for a grantee's signature.³⁵

Gilbert Sullivan, Director of the Alumni Association, wrote to Langman and Stowe acknowledging the gift represented by the deed.³⁶ An attorney for the Alumni Association, on Sullivan's instructions, had the deed recorded.³⁷ In addition, Alumni Association financial statements for the fiscal years ending June 30, 1987 and 1988 identified the Dominion mortgage as a liability and footnotes thereto stated that the Alumni Association had "assumed the mortgage on property donated."³⁸

The Alumni Association agreed to let Stowe collect the rents and manage the property.³⁹ The operating expenses and the mortgage debt were paid out of the property's income during 1987; however, the expenses soon exceeded the revenues, and Trustbank, the successor to Dominion, notified Langman that the \$600,000 note was in default.⁴⁰ Langman demanded that the Alumni Association make the payments, but the Alumni Association disclaimed any responsibility.⁴¹ Langman paid the amount demanded and filed suit against the Alumni Association.⁴²

The Supreme Court of Virginia determined that the "language in the deed providing that the Alumni Association, as grantee, does hereby assume payment of [the Dominion note] and agrees to hold the Grantors harmless from further liability

33. *Id.* at 494, 442 S.E.2d at 671-72.

34. *Id.* at 495, 442 S.E.2d at 672.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 495-96, 442 S.E.2d at 672-73.

39. *Id.* at 496, 442 S.E.2d at 673.

40. *Id.*

41. *Id.* at 497, 442 S.E.2d at 673.

42. *Id.*

on such obligation is clear, unambiguous, and explicit."⁴³ The court determined that in such a case one should not look further than the four corners of the instrument under review.⁴⁴ The court found no ambiguity in the deed, stating that the terms of the deed show that "the grantor intended to transfer her entire interest in the property to the Alumni Association."⁴⁵

On the issue of the acceptance of the deed, the court stated that "whether a grantee has accepted a deed is not determined by the presence or absence of the grantee's signature on the deed, but by factual evidence of the grantee's actions tending to prove either acceptance or renunciation of the conveyance."⁴⁶ The court determined that during the thirty-month period from the date of the deed until the controversy began, "the Alumni Association took no actions to resist the passage of title or to repudiate either the gift of the property or the debt connected with it."⁴⁷ The court held that the evidence did "not support the trial court's finding that the Alumni Association timely disavowed the deed;" therefore, having accepted the conveyance, the Alumni Association was bound by the terms of the deed.⁴⁸

D. Easements

The issues on appeal in *Fairfax County Park Authority v. Atkisson*⁴⁹ were whether, upon remand, the evidence supported the chancellor's finding that the plaintiffs owned an interest in a cemetery so as to be entitled to an access easement and whether the chancellor had the authority to require the Fairfax County Park Authority (the Authority) to relocate an express easement on land owned by the Authority that was never burdened by the easement.⁵⁰ George and Carlotta Atkisson filed a bill of complaint against the Authority, Wexford Associates,

43. *Id.* at 498, 442 S.E.2d at 674.

44. *Id.* at 498-99, 442 S.E.2d at 674 (citing *Trailsend Land Co. v. Virginia Holding Corp.*, 228 Va. 319, 325, 321 S.E.2d 667, 670 (1984)).

45. *Id.* at 499, 442 S.E.2d at 675.

46. *Id.*

47. *Id.* at 500, 442 S.E.2d at 675.

48. *Id.* at 501, 442 S.E.2d at 676.

49. 248 Va. 142, 445 S.E.2d 101 (1994).

50. *Id.* at 143, 445 S.E.2d at 102.

Inc., and fifty-six owners of lots located in the Wendover Subdivision, alleging ownership of a property interest in an easement that provided ingress and egress to their family cemetery.⁵¹

The trial court granted the defendants' demurrer to the bill of complaint.⁵² The Supreme Court of Virginia awarded the Atkissons an appeal and remanded the case to the trial court for further proceedings.⁵³ Upon remand, the chancellor held that the Atkissons had an express easement granting them access to the cemetery and ordered the Authority to construct a new easement on land owned by the Authority.⁵⁴ The Supreme Court of Virginia awarded the Authority an appeal.⁵⁵

The Authority argued that the Atkissons did not own an express easement since they "failed to establish at trial their ownership of the dominant estate to which the access easement was appurtenant."⁵⁶ The Atkissons argued that "the chancellor could infer that they had an ownership interest in the cemetery that is a part of the dominant estate."⁵⁷ The Supreme Court of Virginia rejected the Authority's argument, relying partly upon the language of a 1978 deed.⁵⁸ The court further held that the chancellor could not change the location of the easement and encumber Authority property that had never been part of the servient estate.⁵⁹

51. *Id.* at 143-44, 445 S.E.2d at 102.

52. *Id.* at 144, 445 S.E.2d at 102.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 146, 445 S.E.2d at 103.

57. *Id.* By deed in 1892, Mr. Atkisson's aunt conveyed a fifteen-acre parcel to Thomas Adams, Mr. Atkisson's grandfather. The deed created an express fifteen-foot right-of-way from the fifteen-acre parcel to a public road. As a result of an 1896 partition suit decree, Mr. Adams also owned other property that adjoined the fifteen-acre parcel. The cemetery lot is located on either or both of these properties. *Id.* at 145, 445 S.E.2d at 103. By deed dated March, 1978, the Adams' heirs conveyed their interest in the property to Harold Miller, trustee. Miller subsequently conveyed his interest in the land, without exception, to the land development company, which subsequently conveyed its interest in the property to the partnerships that subdivided the land and created the subdivision. *Id.*

58. The 1978 deed conveyed the entire parcel, except the cemetery, subject to all easements, restrictions and rights of way of record. *Id.* at 147, 445 S.E.2d at 104.

59. *Id.* at 148, 445 S.E.2d at 105; see *Eureka Land Co. v. Watts*, 119 Va. 506, 89 S.E.2d 968 (1916). In *Eureka Land Co.*, the court rejected Eureka's contention that there had never been a specific location of the right-of-way provided for in the deeds and held, "[w]hen a way is once located, it cannot be changed by either party without

The court remanded the case to the chancellor with directions to enter an order requiring the defendants to provide a mutually agreeable easement at their expense for the Atkissons or to remove any obstructions that interfere with the Atkissons' use of the original express easement.⁶⁰

In *Knewstep v. Jackson*,⁶¹ the Supreme Court of Virginia examined whether the trial court erred in establishing and locating a right-of-way easement. In 1977, George Holladay acquired a 176.38-acre tract of land known as Red Rock Farm and located in Orange County.⁶² In 1980, Holladay and his wife conveyed 4.976 acres of the tract to Russell and Frances Barbee.⁶³ A plat of survey attached to the deed showed a pipestem at the tract's northwest corner which did not touch any portion of State Route 673.⁶⁴ In 1984, the Barbees conveyed the tract and a .0474-acre parcel to Alan Knewstep, III and Judy Ann Knewstep, his wife.⁶⁵ The .0474-acre parcel provided a "bridge" from the northern end of the pipestem on the thirty-foot right-of-way to State Route 673.⁶⁶ In 1986, the Holladays conveyed three acres of Red Rock Farm with a "non-exclusive easement and right-of-way thirty (30) feet in width . . . to State Secondary Route 673" to Charles and Nancy Jackson and Henry Boston.⁶⁷ The plat attached to the deed showed that the thirty-foot right-of-way terminated at State Route 673; however, undisputed evidence established that the pipestem, including the thirty-foot right-of-way, did not touch any portion of State Route 673.⁶⁸

the consent of the other." *Id.* at 509, 89 S.E.2d at 970.

60. *Atkisson*, 248 Va. at 149, 445 S.E.2d at 105.

61. 248 Va. 300, 448 S.E.2d 609 (1994).

62. *Id.* at 301, 448 S.E.2d at 609.

63. *Id.*

64. The 1980 deed provided as follows:

The property conveyed hereby is conveyed subject to a non-exclusive 30' right-of-way leading from Virginia State Route 673 along the line of Grimsby and Peyton, as shown on said plat, which said non-exclusive right-of-way is hereby reserved for the benefit of the residue of the property retained by the [Holladays].

Id. at 301, 448 S.E.2d at 610.

65. *Id.* at 302, 448 S.E.2d at 610.

66. *Id.*

67. *Id.*

68. *Id.*

Notwithstanding a finding that the Holladays never had an easement of record to State Route 673, the commissioner in chancery held that the Holladays reserved a right-of-way "from Route 673."⁶⁹ The Supreme Court of Virginia reversed the trial court and entered a final judgment in favor of the Knewsteps, holding that the lower court's conclusion was contrary to established law and undisputed evidence.⁷⁰

In *Chesapeake & Potomac Telephone Co. of Va. v. Properties One, Inc.*,⁷¹ the Supreme Court of Virginia considered two issues regarding damage to telephone equipment owned by the Chesapeake & Potomac Telephone Company (C & P): "(i) Whether a 1904 agreement between C & P's predecessor in interest, Southern Bell Telephone and Telegraph Company ("Southern Bell") and I. Cohen and S. Cohen (collectively, "Cohen"), predecessors in interest to Properties One, Inc. ("Properties"), obligated Properties to pay for the damages to C & P's property; and (ii) whether the trial court erred in granting Properties' motion to strike C & P's evidence of negligence."⁷² In 1904, Cohen, wishing to extend an existing building in the City of Richmond over a public alley, beneath which ran cables owned by Southern Bell, entered into a written agreement with Southern Bell in which Cohen stipulated that, if its future use of the alley interfered with Southern Bell's equipment, Cohen would make Southern Bell whole.⁷³

After acquiring the property from Cohen in 1989, Properties hired two independent contractors to perform demolition and excavation work on the property which resulted in damage to C & P's cables.⁷⁴ C & P sued Properties under the 1904 agreement, alleging that Properties was liable for the contractors' negligence and that Properties, by virtue of its successor ownership, had agreed to indemnify C & P for any and all costs incurred as a result of damage to C & P's property.⁷⁵ The trial

69. The trial court concluded that the Holladays did not intend to reserve an easement of right-of-way to nowhere. *Id.*

70. *Id.* at 303, 448 S.E.2d at 611.

71. 247 Va. 136, 439 S.E.2d 369 (1994).

72. *Id.* at 137-38, 439 S.E.2d at 370.

73. *Id.* at 138, 439 S.E.2d at 370.

74. *Id.*

75. *Id.*

court granted Properties' motion for summary judgment on the indemnification issue and entered judgment on the negligence issue in favor of Properties.⁷⁶

The Supreme Court of Virginia, holding that an easement had not been created by the 1904 agreement, noted that "the intention to grant an easement must be so manifest on the face of the instrument that no other construction can be placed on it."⁷⁷ Because the 1904 agreement did not manifest a clear intent to create an easement for Cohen's benefit, the court concluded that the agreement imposed liability on Cohen and its successors in interest only for Cohen's acts, not for acts of Cohen's successors in interest.⁷⁸

Relying on the well-established rule of employer liability set forth in *Kesler v. Allen*,⁷⁹ the court also held that Properties could not be rendered vicariously liable for its contractors' failure to comply with the provisions of the "Miss Utility" notification statute.⁸⁰

In *Cooper v. Kolberg*⁸¹ the Supreme Court of Virginia considered the issue of encroachment on an easement. Benjamin Cooper, III and members of his family, owners of a one-acre tract abutting an easement, sued William and Martha Kolberg (the Kolbergs), owners of the adjoining 1.064 acres, seeking the following: (1) a mandatory injunction requiring the Kolbergs to remove a wire cable fence they had erected across a portion of the shore land abutting the Coopers' property; and (2) a per-

76. *Id.* at 138, 439 S.E.2d at 371.

77. *Id.* at 139, 439 S.E.2d at 370 (citing *Corbett v. Rueben*, 223 Va. 468, 471, 290 S.E.2d 847, 849 (1982)).

78. *Id.* at 140, 439 S.E.2d at 371.

79. 233 Va. 130, 353 S.E.2d 777 (1987). The *Kesler* court stated:

As a general rule, an owner who employs an independent contractor is not liable for injuries to third persons caused by the contractor's negligence. Exceptions exist, and the doctrine of respondeat superior may become applicable, if the independent contractor's torts arise directly out of his use of a dangerous instrumentality, arise out of work that is inherently dangerous, are wrongful per se, are a nuisance, or are such that it would in the natural course of events produce injury unless special precautions were taken.

Id. at 134, 353 S.E.2d at 780.

80. *Chesapeake & Potomac Tel. Co.*, 247 Va. at 141, 439 S.E.2d at 372.

81. 247 Va. 341, 442 S.E.2d 639 (1994).

manent injunction against the Kolbergs' future obstruction of the Coopers' access to the waters of Lake Anna.⁸²

In 1968, Virginia Electric and Power Company (VEPCO) acquired from Edna Broaddus Johnson and her children 142.36 acres of land on the north side of the North Anna River.⁸³ The Johnsons' deed to VEPCO reserved an easement over a strip of land of varying width between the water line of Lake Anna and the new line of the Johnsons' property (the shore land)⁸⁴ in the Johnsons' favor, subject to VEPCO's regulatory requirements.

In 1971, the Johnsons conveyed a 4.5315-acre tract to John and Stacie Zugschwert, from which the Coopers ultimately were conveyed a one-acre parcel with the exclusive right, except as provided in the conveyance of the shore land to VEPCO, to enter upon, occupy and use the shore land for recreation and agricultural purposes.⁸⁵ The Johnsons later conveyed to the Zugschwerts a second tract containing 5.936 acres, which tract the Zugschwerts conveyed to the Kolbergs in 1977.⁸⁶

The court stated that "[t]he successors to the possession of the divided parts will be entitled to benefits substantially proportional to the benefits the original possessor could realize from those parts while he held them all in a single possession."⁸⁷ Therefore, the Supreme Court of Virginia affirmed the following findings of the trial court: (1) the character and nature of the easement precluded nonexclusive use of the whole by all of the owners of the abutting land; (2) the instruments in the parties' chains of title indicated that a nonexclusive joint use of the shore land had not been contemplated; and, (3) ap-

82. *Id.* at 342-43, 442 S.E.2d at 640.

83. *Id.* at 343, 442 S.E.2d at 640.

84. *Id.*

85. *Id.* at 344, 442 S.E.2d at 641.

86. *Id.* The deed from the Zugschwerts to the Kolbergs contained the following provision:

The [Zugschwerts] specifically convey all rights, title and interest in the easement mentioned in the deed . . . between [the Johnsons and VEPCO]. . . . It is the intent of the [Zugschwerts] that the easement of the previously conveyed adjoining property be divided from the 734.6' iron pin found to the nearest point of water.

Id. at 345, 442 S.E.2d at 641.

87. *Id.* at 349, 442 S.E.2d at 644 (quoting RESTATEMENT OF PROPERTY § 488 cmt. d (1944)).

portionment was the "appropriate solution to the problem posed in this case."⁸⁸

E. *Eminent Domain*

In *Lynch v. Commonwealth Transportation Commissioner*,⁸⁹ the Supreme Court of Virginia decided "whether the trial court erred in excluding certain exhibits and testimony that, according to a landowner, would have demonstrated the highest and best use of his property for purposes of proving the value of [h]is land. . . ."⁹⁰ After an unsuccessful attempt to purchase a 9.358-acre tract from Edwin W. Lynch, Jr., the Commonwealth Transportation Commissioner (the Commissioner) recorded a certificate of take to acquire possession of the property.⁹¹ A panel of commissioners fixed the value of the land taken at \$740,000.00 and found that Lynch's remaining land was not damaged by the taking.⁹² Sixteen months prior to the taking, Lynch had filed a rezoning application seeking to have his land rezoned from residential to general industrial.⁹³ Since approval of the application was a virtual certainty, Lynch made plans to develop his land as an office/industrial park.⁹⁴

At trial, the lower court barred several of Lynch's exhibits, explaining that the exhibits sought to prove the frustration of speculative plans for future use of the property.⁹⁵ The court, likewise, barred the testimony of Lynch's expert real estate appraiser and professional engineer, both of whom would have testified about the impact of the taking on the residue of Lynch's land.⁹⁶

It is settled in Virginia that the measure of compensation for property taken is the fair market value of the property at the

88. *Id.* at 347, 442 S.E.2d at 642.

89. 247 Va. 388, 442 S.E.2d 388 (1994).

90. *Id.* at 389, 442 S.E.2d at 388.

91. *Id.* at 390, 442 S.E.2d at 389.

92. *Id.*

93. *Id.*

94. These plans were consistent with the recommendations of the Lorton-South Route 1 Area Citizens' Task Force established by the Board of Supervisors of Fairfax County. *Id.* at 390, 442 S.E.2d at 389.

95. *Id.*

96. *Id.* at 391, 442 S.E.2d at 389.

time of the taking, given the "property's adaptability and suitability for any legitimate purpose in light of conditions and circumstances that exist at the time of the take or that reasonably may be expected in the near future."⁹⁷ Damages to land remaining after a taking are "the difference in the residue's value immediately before and immediately after the taking."⁹⁸ "In determining such damages, consideration may be given to every circumstance, present or future, that affects the residue's value at the time of the take."⁹⁹ The Supreme Court of Virginia ultimately found that the trial court erred in not allowing Lynch's expert witnesses to testify and by disallowing the exhibits, as the proffered evidence demonstrated the property's potential, the adaptability and suitability of the property for its highest and best use, and the impact of the taking on the remaining property.¹⁰⁰

In *Fairfax County Park Authority v. Virginia Department of Transportation*,¹⁰¹ the Supreme Court of Virginia assessed the trial court's determination of the fair market value of condemned property which had use restrictions placed on it by a trust agreement. "The trust agreement name[d] Fairfax County Park Authority (FCPA) as the beneficiary in possession of the trust property so long as the property was used as a public park. . . ."¹⁰² If used for other purposes, ownership of the property was to vest in a church.¹⁰³ In 1988, the Virginia Department of Transportation (VDOT) filed a Certificate of Condemnation for several acres of the property to improve existing roadways.¹⁰⁴ VDOT's appraisal witness testified that the value

97. *Id.* at 391, 442 S.E.2d at 389-90.

98. *Id.* at 391, 442 S.E.2d at 390.

99. *Id.*; see, e.g., *Appalachian Elec. Power Co. v. Gorman*, 191 Va. 344, 353, 61 S.E.2d 33, 37-38 (1950). In *Gorman*, the court held that land adaptable and suitable for a "high-class" residential subdivision, platted into numerous lots and streets on a plat that was prepared, but not developed, was properly admitted into evidence by the trial court. The plat was determined "useful and material in illustrating how the taking of the easement and the construction and operation of the power line changed the present and immediate situation with respect to the development of the tract and, thereby, affected both the present and immediate future of the entire tract." *Id.* at 356-57, 61 S.E.2d at 39.

100. *Lynch*, 247 at 393-94, 442 S.E.2d at 391.

101. 247 Va. 259, 440 S.E.2d 610 (1994).

102. *Id.* at 260, 440 S.E.2d at 610.

103. *Id.*

104. *Id.* at 261, 440 S.E.2d at 611.

of the property, if used as a park or an open space, was \$2,125.00 per acre.¹⁰⁵ The appraisal witness presented by FCPA testified "that there was no market for park land and therefore the property, if restricted to use as a park, had no market value."¹⁰⁶ If used for residential purposes however, the condemned property was estimated to have a market value of \$125,000.00 per acre.¹⁰⁷

Having never determined whether use restrictions such as those present in this case should be applied in determining the amount of a condemnation award, the Supreme Court of Virginia examined a series of cases in which railroad tax assessments were challenged.¹⁰⁸ In those cases, the court held that the fair market value of the land, not the value of the land to the owner, is subject to taxation.¹⁰⁹ The court further opined that the market value of land is derived by considering the various uses to which the land is susceptible, not those uses to which a particular owner may be restricted.¹¹⁰ However, if land cannot be put to another use economically, it is appropriate to take its committed use into consideration when determining the market value of such land.¹¹¹ Applying the principles stated in the railroad cases, the court decided that the fair market value of the property condemned in this case should have been calculat-

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 261, 440 S.E.2d at 612; see *Richmond F. & P.R.R. v. State Corp. Comm'n*, 230 Va. 260, 336 S.E.2d 896 (1985); *Richmond F. & P.R.R. v. State Corp. Comm'n*, 219 Va. 301, 274 S.E.2d 408 (1978); *Richmond F. & P.R.R. v. Commonwealth*, 203 Va. 294, 124 S.E.2d 206 (1962). In these cases, R.F. & P. sought a reduction in the appraised value of land that could only be used as a railroad yard. As in the instant case, part of the land was subject to an indenture agreement that provided that if the land was used for purposes other than maintenance or construction of railroad tracks, ownership of the land would revert to the United States government. This court rejected R.F. & P.'s argument that restricted use as a railroad yard and the indenture agreement should be considered in determining the market value of the property.

109. *Fairfax County*, 247 Va. at 262, 440 S.E.2d at 612.

110. *Id.*

111. *Id.*; see also *Lake Monticello Serv. Co. v. Board of Supervisors*, 237 Va. 434, 440-41, 377 S.E.2d 446, 450 (1989); *Highway Comm'r v. Reynolds*, 206 Va. 785, 788, 146 S.E.2d 261, 263 (1966); *Richmond F. & P. R.R. v. Commonwealth*, 203 Va. 294, 300, 124 S.E.2d 206, 210 (1962) (noting that condemnation is an *in rem* proceeding and, while the land is valued from the point of view of an owner rather than the condemnor, the value established is not the value to the owner personally).

ed without regard to the use restrictions placed on it by the trust agreement.¹¹²

F. *Landlord and Tenant*

In 1994, the Supreme Court of Virginia wrestled with three cases involving landlord-tenant relationships.

In *Drysdale v. Barco*,¹¹³ the parties disputed whether a commercial lease had been automatically extended for another year at the "old" rental rate, or whether a writing from the landlord to the tenant, sent subsequent to the termination date prescribed in the lease but purporting to constitute a termination notice, operated to terminate the lease, thus abrogating the older, more favorable rental.¹¹⁴

In the earlier lease (the 1978 lease) the operative provision stated:

The term of this lease shall be five years, commencing on March 1, 1978, and terminating on February 28, 1983, unless sooner terminated as herein provided. This lease shall be deemed to be extended from the said termination for one (1) year until February 28, 1984, and thereafter from year to year unless and until either of the parties hereto notifies the other in writing, at least three (3) months prior to the expiration of this lease or of one of the subsequent annual renewal periods, of the desire of the party giving such notice to terminate the lease as of the expiration of the then current term.¹¹⁵

112. *Fairfax County*, 247 Va. at 263, 440 S.E.2d at 613.

113. 247 Va. 350, 442 S.E.2d 648 (1994).

114. *Id.*

115. *Id.* at 351-52, 442 S.E.2d at 649 (emphasis in original). The Supreme Court of Virginia then quoted from its decision in *Harmon v. Howe*, 68 Va. (27 Gratt.) 676 (1876):

Nothing is more common than the omission of words, and even most important words, in drawing written instruments; and yet those words can, generally, be as well understood from the context of the instrument as if they were expressed in it, and the instrument is construed accordingly. It would be a great defect in the law if this were not so.

Drysdale, 247 Va. at 354, 442 S.E.2d at 650.

The 1987 lease omitted the italicized language in the paragraph above and redefined the lease term.¹¹⁶

No termination notice was sent to Drysdale, the lessee, by the time the initial term of the 1987 lease expired on December 31, 1989, and he continued in possession, paying the rental specified for the initial term.¹¹⁷ In 1990, the landlord's interest in the property and lease were acquired by Barco, who notified Drysdale "that 'the month to month Lease of the premises' was 'terminated as of December 1, 1990' and that if Drysdale wished to remain in possession," he must agree to a new, increased rental.¹¹⁸ Drysdale contended that the lease had been automatically extended through the calendar year 1991.¹¹⁹

The Supreme Court of Virginia agreed with the lower court's finding that the italicized language in the 1978 lease was omitted inadvertently, as a scrivener's error, from the 1987 lease and the 1987 lease should have been interpreted as if such language were included.¹²⁰ The court then turned to the lower court's finding that the notice given by Barco to Drysdale was sufficient to terminate the lease and held that, had the lower court given proper effect to the missing language in the 1987 lease, it would have been apparent that the notice was deficient and ineffective to terminate the lease prior to the end of the 1991 calendar year.¹²¹

116. *Drysdale*, 247 Va. at 352, 442 S.E.2d at 649. The newer lease provided that: The term of this lease shall be three years, commencing on January 1, 1987, and terminating on December 31, 1989, unless and until either of the parties hereto notifies the other in writing at least three (3) months prior to the expiration of this lease of the desire of the party giving such notice to terminate the lease as of the expiration of the current term.

Id.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 352-54, 442 S.E.2d at 649-50 (citing *Peyton v. Harmon*, 63 Va. (22 Gratt.) 643 (1872), for the proposition that the law will not let contracts fail for ambiguities, but rather will construe them to express the intention of the parties). The Supreme Court of Virginia sanctioned the lower court's construction of the 1987 lease as if the italicized language in the 1978 lease had been included. *Id.* at 355, 442 S.E.2d at 651.

121. *Id.* at 355, 442 S.E.2d at 651.

In *Safeway, Inc. v. Plaza Co.*,¹²² Safeway's predecessor in interest had leased a store site from Plaza Company's predecessor in interest.¹²³ The lease between Plaza Company and Safeway provided, in pertinent part, that:

[the] Lessor further agrees that . . . following completion of construction of any portion of the shopping center, *the sizes and arrangements of . . . common areas (including parking areas and traffic circulation and flow patterns) will not be changed without lessee's written consent, and that . . . if said sizes or arrangements are changed without lessee's written consent, lessee may cancel this lease by notice to lessor.*¹²⁴

However, Safeway never opened a store there, but instead left the store unbuilt and paid the rent as required.¹²⁵

Three years after initial construction of the center, the lessor revealed to Safeway its plans to build an eight-screen movie theatre in the center.¹²⁶ Safeway objected, but the lessor built the theatre at a loss of approximately fifty parking spaces. Safeway then notified the lessor that it would pay no more rent.¹²⁷

The lower court ruled in favor of the lessor in a suit to collect rent, holding that the lease had not been cancellable as a result of the parking space loss, as the loss did not constitute a material breach of the lease.¹²⁸ The Supreme Court of Virginia reversed the lower court and entered final judgment for Safeway, stating that the facts spoke for themselves: the site plan called for parking and for no other use there whatsoever, and the parking was eliminated without Safeway's permission—indeed, in spite of Safeway's objection.¹²⁹

122. 248 Va. 1, 444 S.E.2d 544 (1994).

123. *Id.* at 2, 444 S.E.2d at 544.

124. *Id.* at 2-3, 444 S.E.2d at 544-45 (emphasis added).

125. *Id.* at 3, 444 S.E.2d at 545.

126. *Id.*

127. *Id.*

128. *Id.* at 4, 444 S.E.2d at 545. Safeway had argued that a showing of "material breach" was unnecessary and that all it had to show was that the parking area had been changed without its consent. *Id.*

129. *Id.* at 5, 444 S.E.2d at 546.

In a third case involving a commercial lease, the Supreme Court of Virginia decided the technical issue of whether a lessor's earlier actions to recover unpaid rent barred a later action to recover additional unpaid rent under the doctrine of *res judicata*.¹³⁰ In *Aiglon Associates, Ltd. v. Allan*,¹³¹ the lessor, Aiglon, had recovered damages in general district court for unpaid rent that accrued during the first three months of a lease, and later brought suit in circuit court to recover the balance of rent due after the first three months. The lessee, Allan, defended successfully below upon three claims: (1) the general district court action was dispositive of the issue of unpaid rent; (2) that the first suit should have disposed of all claims related to unpaid rent; and (3) that the latter suit constituted a "splitting" of Aiglon's causes of action respecting rent which was barred by the earlier action by the doctrine of *res judicata*.¹³²

The Supreme Court of Virginia disagreed, reversing the lower court. The court first cited relevant sections of the lease, which permitted the lessor, in the event of default, to reenter the premises and to relet them.¹³³ The court specifically stated that such actions by the lessor shall *not* be considered as an election on the part of the lessor to terminate the lease.¹³⁴ The court noted that acceleration of rent in this case was only mandatory upon termination of the lease, which had not occurred.¹³⁵ Finally, the court rejected the lessee's contention that the lessor's filing of the lawsuit in general district court somehow constituted a termination of the lease.¹³⁶

130. *Aiglon Assocs. v. Allan*, 248 Va. 150, 445 S.E.2d 138 (1994).

131. *Id.*

132. *Id.* at 151, 445 S.E.2d at 139.

133. *Id.* at 152, 445 S.E.2d at 139.

134. *Id.* at 152, 445 S.E.2d at 139-40. The Supreme Court of Virginia reasoned that the lessee's reliance on *Snyder v. Exum*, 227 Va. 373, 315 S.E.2d 216 (1984), was inappropriate, because in *Snyder* it was clear that there was a mandatory acceleration of rent upon the lessee's default, which is not true in the instant case. *Aiglon Assocs.*, 248 Va. at 152, 445 S.E.2d at 139-40.

135. *Aiglon Assocs.*, 248 Va. at 153, 445 S.E.2d at 140.

136. *Id.* at 153-54, 445 S.E.2d at 140.

G. *Purchases and Sales*

In *Firebaugh v. Hanback*,¹³⁷ the Supreme Court of Virginia examined a number of questions arising out of a contract to purchase and sell real estate in Augusta County. Firebaugh and Lunsford ("Buyers") were real estate agents who contracted to buy land for sale by their principals, Hanback and Richards, Trustees for Ye Old Hunters Club (the Sellers).¹³⁸ The Sellers told the Buyers that the sale was an "as is" sale and that whatever acreage was, in fact, owned by the Sellers was being sold. The Sellers further stated that any contract contingent upon there being a certain amount of acreage, or which contemplated a price reduction if acreage turned out to be substantially less than the approximately 126 acres that the Sellers thought they owned, would be rejected and, indeed, had been rejected by the Sellers.¹³⁹ The Buyers drafted an extension of the listing agreement which did not accurately reflect the Sellers' position on this point and inappropriately executed the extension on behalf of the Sellers, without the Sellers' permission.¹⁴⁰ When a survey of the property revealed a 36.5-acre deficiency, the Buyers sued to have the contract specifically enforced against the Sellers and the purchase price reduced due to the lesser acreage.¹⁴¹

A commissioner in chancery held that the Buyers had breached their fiduciary duties to the Sellers and, accordingly, were not entitled to specifically enforce the contract against the Sellers and that the Buyers were liable to the Sellers for the costs involved.¹⁴²

137. 247 Va. 519, 443 S.E.2d 134 (1994).

138. *Id.* at 522, 443 S.E.2d at 135.

139. *Id.* at 522-23, 443 S.E.2d at 135-36.

140. *Id.* at 523, 443 S.E.2d at 136. The executed real estate contract "defined the term real property as . . . the land and all improvements . . . 126 acres, more or less . . . in 'as is' condition. . . ." *Id.*

141. *Id.* at 524, 443 S.E.2d at 136. The Buyers interpreted the contract to mean that the acreage had to be close to what the contract described but admitted that they had not communicated their interpretation of the contract to the Sellers before the contract was executed. *Id.*

142. *Id.* at 524, 443 S.E.2d at 137.

After saluting a long line of cases for the proposition that, on appeal, a commissioner in chancery's findings will be affirmed unless plainly wrong,¹⁴³ the Supreme Court of Virginia likewise found that the Sellers intended to sell by the gross, not by the acre, and the Buyers knew of this intention—at the same time the Buyers were the Sellers' fiduciaries.¹⁴⁴

The court then noted that, although a Virginia court of equity generally would award purchasers specific performance of that portion of a contract that the seller was able to effectuate,¹⁴⁵ there are a number of exceptions to the general rule.¹⁴⁶ The Supreme Court of Virginia held: (1) the record clearly showed that the Buyers had breached their fiduciary duty to the Sellers, thus forfeiting their standing to obtain specific relief;¹⁴⁷ and (2) the award of costs to the Sellers was within the discretion of the trial court.¹⁴⁸

The Supreme Court of Virginia reviewed claims of fraud, misrepresentation and negligence related to the sale of a resi-

143. *Id.* at 525, 443 S.E.2d at 137 (citing *Hill v. Hill*, 227 Va. 569, 576-77, 318 S.E.2d 292, 296-97 (1984) (citations omitted); *accord Jarvis v. Tonkin*, 238 Va. 115, 121-22, 380 S.E.2d 900, 904 (1989); *Morris v. United Virginia Bank*, 237 Va. 331, 337-38, 377 S.E.2d 611, 614 (1989); *Spence v. Griffin*, 236 Va. 21, 27-28, 372 S.E.2d 595, 598 (1988); *Seemann v. Seemann*, 233 Va. 290, 293, 355 S.E.2d 884, 886 (1987); *Sprott v. Sprott*, 233 Va. 238, 240, 355 S.E.2d 881, 882 (1987); *Wells v. Weston*, 229 Va. 72, 75, 326 S.E.2d 672, 674 (1985); *Wiltshire v. Pollard*, 220 Va. 678, 680, 261 S.E.2d 542, 543 (1980); *Martinsville Bank v. Cobler*, 215 Va. 852, 854, 213 S.E.2d 800, 802 (1975).

144. *Firebaugh*, 247 Va. at 525-26, 443 S.E.2d at 137 (citing *H-B Partnership v. Wimmer*, 220 Va. 176, 179, 257 S.E.2d 770, 773 (1979)). The court stated that, as a fiduciary, "a broker owes his principal the duty to use utmost fidelity to him and must disclose to him all facts within the broker's knowledge which may be material to the transaction, or which might influence the principal in deciding upon a course of action." 247 Va. 519, 525-26, 443 S.E.2d 134, 137 (1994); *see also Burruss v. Green Auction Co.*, 228 Va. 6, 10, 319 S.E.2d 725, 727 (1984); *accord Van Deusen v. Snead*, 247 Va. 324, 330, 441 S.E.2d 207, 211 (1994); *Va. Real Estate Comm. v. Bias*, 226 Va. 264, 269, 308 S.E.2d 123, 125-26 (1983); *Metro Realty v. Wollard*, 223 Va. 92, 98, 286 S.E.2d 197, 200 (1982); *Owen v. Shelton*, 221 Va. 1051, 1054, 277 S.E.2d 189, 191 (1981); *Duncan v. Barbour*, 188 Va. 53, 61-62, 49 S.E.2d 260, 264 (1948); *Mitchell v. Hughes*, 143 Va. 393, 403, 130 S.E. 225, 228 (1925).

145. *Firebaugh*, 247 Va. at 526, 443 S.E.2d at 137 (1994) (citing *Hawks v. Sparks*, 204 Va. 717, 720, 133 S.E.2d 536, 539 (1963)).

146. *Id.* at 526, 443 S.E.2d at 138. One exception, articulated in *Walker v. Henderson*, 151 Va. 913, 927-28, 145 S.E. 311, 315 (1928), is that "he who asks equity must do equity, and he who comes into equity must come with clean hands."

147. *Firebaugh*, 247 Va. at 527, 443 S.E.2d at 138.

148. *Id.* (citing *McLean v. Hill*, 185 Va. 346, 351, 38 S.E.2d 583, 586 (1946)).

dence in the case of *Van Deusen v. Snead*.¹⁴⁹ In a contract executed fourteen days before the execution of the contract at issue, the Sneads had agreed to sell their residence to a Mr. and Mrs. Osmann.¹⁵⁰ However, when a house investigation revealed vertical deferential settlement, the Sneads released the Osmanns from their contract.¹⁵¹ A contract between the Van Deusens and the Sneads was executed a few weeks thereafter.¹⁵² When the Van Deusens discovered the settlement defects and the estimated cost of repairs, they filed a bill of complaint against the Sneads, the Sneads' real estate agent, and their own real estate agent.¹⁵³

As to the Van Deusens' fraud claim against the Sneads, the court stated that a party alleging fraud must prove each element of fraud by clear and convincing evidence.¹⁵⁴ Though the Sneads argued that they made no false representation, the court pointed out that concealment of a material fact may constitute the element of misrepresentation and held that a cause of action existed for fraud.¹⁵⁵

In considering the Sneads' demurrer to the negligence count, the Supreme Court of Virginia was persuaded by the argument that actual knowledge of the settlement problem raised no duty under Virginia law for the Sneads to disclose the defects. Absent such a duty, there can be no breach and no cause of action for negligence.¹⁵⁶ As to the demurrer filed by the listing agents, the court affirmed the chancellor's ruling sustaining the listing agent's demurrer to the four counts of the improper

149. 247 Va. 324, 441 S.E.2d 207 (1994).

150. *Id.* at 326, 441 S.E.2d at 208.

151. *Id.*

152. *Id.* at 327, 441 S.E.2d at 209.

153. *Id.*

154. *Id.* To prove fraud, one must show "(1) a false misrepresentation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party mislead, and (6) resulting damage to him." *Id.* (citing *Thompson v. Bacon*, 245 Va. 107, 111, 425 S.E.2d 512, 514 (1993)).

155. *Id.* at 328, 441 S.E.2d at 209 (citing *Spence v. Griffin*, 236 Va. 21, 28, 372 S.E.2d 595, 598-99 (1988)). The court further stated that "concealment is an affirmative act intended or known to be likely to keep another from learning of a fact of which he would otherwise have learned. Such affirmative action is always equivalent to a misrepresentation. . . ." *Id.* at 329, 441 S.E.2d at 210 (citing RESTATEMENT (SECOND) OF CONTRACTS § 160 (1979)).

156. *Id.* at 330, 441 S.E.2d at 210.

conduct set forth in the bill of complaint.¹⁵⁷ Finally, since there was no evidence of verbal misrepresentation or other action on behalf of the purchasers' agent, the court sustained the demurrer filed by the purchasers' agent as to the fraud count.¹⁵⁸

In *Long Signature Homes, Inc. v. Fairfield Woods, Inc.*,¹⁵⁹ Fairfield Woods and Long Signature Homes entered into a contract in which Fairfield agreed to develop and Long agreed to buy 382 building lots in Fairfield's subdivision. The contract provided that Long's obligation to proceed to closing was contingent upon the existence of water, sewer and electric facilities of adequate size and capacity to serve the 382 lots.¹⁶⁰ Long had the option to waive the contingency or delay the date of closing if Fairfield failed to satisfy the aforementioned contingency.¹⁶¹ The parties were notified by letter that the sewer plant serving the area was approaching its maximum treatment capacity and that the county would provide sewer service up to the plant's capacity on a "first-come-first-serve" basis.¹⁶² The parties closed on forty lots and were scheduled to close on ten more lots when Fairfield wrote Long advising that the contract was terminated for all lots beyond the ten lots scheduled to close due to Fairfield's inability to meet the sewer contingency.¹⁶³ Long advised Fairfield, by letter, that only Long had termination rights under the contract, and the parties closed on the ten lots.¹⁶⁴ When Long wrote to Fairfield a year later asking for a completion schedule for the development of the next lots in the subdivision, Fairfield responded negatively, alleging impossibility of performance.¹⁶⁵

Relying on established contract principles, the Supreme Court of Virginia noted that a supervening condition that renders a promisor's performance temporarily impossible will not release him from the duty of performing, but will only suspend that

157. *Id.* at 330, 441 S.E.2d at 210-11.

158. *Id.* at 332, 441 S.E.2d at 211.

159. 248 Va. 95, 445 S.E.2d 489 (1994).

160. *Id.* at 97, 445 S.E.2d at 490.

161. *Id.*

162. *Id.* at 97, 445 S.E.2d at 490-91.

163. *Id.* at 98, 445 S.E.2d at 491.

164. *Id.*

165. *Id.*

obligation.¹⁶⁶ This rule is generally inapplicable and a promisor's duty of performance is discharged rather than suspended if the delay will make the promisor's performance materially more burdensome.¹⁶⁷ In this case, the court concluded that Fairfield's duty to perform was not discharged by virtue of being burdensome since the contract required Fairfield to perform even after the expiration of what would otherwise be a reasonable time period.¹⁶⁸ However, since the contract affected the alienability of land and Fairfield was a corporation, the rule against perpetuities mandated that Fairfield's obligation to satisfy the contract contingencies and to convey the land cannot extend beyond twenty-one years from the date of the contract.¹⁶⁹

In *Brooks v. Bankson*,¹⁷⁰ the Supreme Court of Virginia examined the trial court's interpretation of a contract provision relating to the condition of a thirty-acre parcel. Rodney A. Bankson and Patricia N. Bankson (Buyer) agreed to purchase the parcel from Robert W. Brooks and Patricia M. Brooks (Seller).¹⁷¹ The property included a house constructed around 1895 which had been renovated in the early 1980's by the Seller.¹⁷²

The purchase price for the property was \$245,000, of which \$5000 was to be paid with the contract and the balance to be paid at closing. Paragraph 4 of the contract provided that the \$5000 deposit plus \$19,500, for a total of \$24,500, would be "forfeited in the event of Buyer default" and paid directly to the Seller.¹⁷³ Paragraph 8 of the contract consisted entirely of preprinted language and was entitled "Risk of Loss/Inspection/Walk Through."¹⁷⁴ Two days before the sched-

166. *Id.* at 99, 445 S.E.2d at 491 (relying on RESTATEMENT (SECOND) OF CONTRACTS § 269 (1981); 18 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1957 (3d ed. 1978)).

167. *Id.*

168. *Id.*

169. *Id.* at 100, 445 S.E.2d at 492 (citing *Ryland Group, Inc. v. Wills*, 229 Va. 459, 463, 331 S.E.2d 399, 402 (1985) (holding that although parties to real estate development contracts assume that their contracts will be performed within a commercially reasonable time, this assumption may be modified by contract)).

170. 248 Va. 197, 445 S.E.2d 473 (1994).

171. *Id.* at 199, 445 S.E.2d at 474.

172. *Id.*

173. *Id.*

174. Paragraph 8 provided in material part:

uled closing date, after conducting their “walk through” inspection of the property with an electrical engineer, the Buyer, through an attorney, notified the Seller that the Buyer would not purchase the property.¹⁷⁵ The Seller filed suit against the Buyer for breach of contract.¹⁷⁶

The trial court interpreted paragraph 8 of the contract “to give the Buyers the right to conduct a further inspection on the date of the ‘walk through’ before accepting the property.”¹⁷⁷ The Seller’s attorney argued that such interpretation was incorrect, stating that the “walk through” was to compare the condition of the property on the date of the contract with its condition on the date of the “walk through.”¹⁷⁸ Ultimately, the jury returned a verdict in favor of the Buyer.¹⁷⁹

The Supreme Court of Virginia agreed with the Seller that the trial court incorrectly construed paragraph 8 of the contract. Because the contract was not made contingent upon the Buyer’s satisfaction with the “walk through” inspection, the court concluded that the parties did not intend it to be a condition that could void the contract.¹⁸⁰

The Buyer argued that the trial court erred in failing to strike the Seller’s evidence on the ground that the contract provision for the payment of the \$24,500 by the defaulting party was unenforceable.¹⁸¹ However, the Supreme Court of Virginia agreed with the Seller that the provision for \$24,500 in damages did not constitute an unenforceable penalty since use of the word “forfeited” was not determinative.¹⁸² Observing the

All risk of loss or damage to the Property . . . is assumed by the Seller until settlement. . . . The Purchaser, by acknowledging this Contract, represents that a satisfactory inspection has been made of the Property and the Purchaser agrees to accept the Property in its present condition except as may be otherwise provided. The Purchaser further has the right to do a “walk through” inspection of the subject Property prior to settlement to inspect the condition of the premises.

Id. at 200, 445 S.E.2d at 475.

175. *Id.* at 201, 445 S.E.2d at 475.

176. *Id.*

177. *Id.* at 202, 445 S.E.2d at 476.

178. *Id.* at 203, 445 S.E.2d at 476.

179. *Id.*

180. *Id.* at 205, 445 S.E.2d 477.

181. *Id.* at 207, 445 S.E.2d at 479.

182. *Id.* at 208, 445 S.E.2d at 479 (citing *Taylor v. Sanders*, 233 Va. 73, 75, 353

difficulty in measuring the damages that might be sustained by the Seller, the court confirmed that the damages provision was intended as enforceable liquidated damages.¹⁸³

H. *Tenancies*

In *Hoover v. Smith*,¹⁸⁴ the Supreme Court of Virginia focused on the issue of whether a deed which conveyed a parcel of land to grantees as "joint tenants and not as tenants in common"¹⁸⁵ created an estate with survivorship between the joint tenants. The heirs of the first deceased of the two grantees and the heirs of the survivor were the parties to the case.

The trial court held that the following language created an estate with survivorship: "It is hereby mutually understood and agreed that the grantees herein named are to have and to hold the said land and tenements as joint tenants and not as tenants in common."¹⁸⁶ However, the Supreme Court of Virginia disagreed. The court noted that section 55-20¹⁸⁷ provides for the abolition of survivorship between joint tenants,¹⁸⁸ subject to the exception created by section 55-21¹⁸⁹ that "[S]ection 55-20 shall not apply to . . . an estate conveyed or devised to persons in their own right when it *manifestly appears* from the tenor of the instrument that it was intended that the part of the one dying should then belong to the others."¹⁹⁰ Applying the definition of "manifest" in Black's Law Dictionary,¹⁹¹ the court concluded that nothing in the language of the deed estab-

S.E.2d 745, 747 (1987)). The Supreme Court in *Taylor* stated that the amount agreed upon between the parties to a contract will be construed as enforceable liquidated damages when the actual damages contemplated at the time of the agreement are uncertain and difficult to determine. *Taylor*, 233 Va. at 75, 353 S.E.2d at 746-47.

183. *Brooks*, 248 Va. at 208, 445 S.E.2d at 479.

184. 248 Va. 6, 444 S.E.2d 546 (1994).

185. *Id.*

186. *Id.* at 7, 444 S.E.2d at 547.

187. VA. CODE ANN. § 55-20 (Repl. Vol. 1995).

188. *Hoover*, 248 Va. at 8, 444 S.E.2d at 547.

189. VA. CODE ANN. § 55-21 (Repl. Vol. 1995).

190. *Hoover*, 248 Va. at 9, 444 S.E.2d. at 548 (citing VA. CODE ANN. § 55-21 (Repl. Vol. 1995), (emphasis added)).

191. "[M]anifest means obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident and self-evident." *Id.* at 10, 444 S.E.2d at 548 (citing BLACK'S LAW DICTIONARY 962 (6th ed. 1990)).

lished an estate of survivorship and reversed the lower court's decision.¹⁹²

I. *Trespass; Damages*

In *Hamilton Development Co. v. Broad Rock Club, Inc.*,¹⁹³ the Supreme Court of Virginia reviewed a trespass for which significant damages had been awarded during the trial. In an effort to "round off" a subdivision lot in its development adjacent to land owned by Broad Rock Club, Hamilton Development intentionally cleared and graded land belonging to Broad Rock Club.¹⁹⁴ Compensatory damages of \$20,000 and \$200,000 in punitive damages were awarded to Broad Rock Club as a result of Hamilton's actions.¹⁹⁵ Evidence as to Hamilton Development's financial condition the year of the trespass was admitted and considered by the jury. Hamilton Development appealed the punitive damage award as excessive and also challenged the introduction of its financial records into evidence.¹⁹⁶

The Supreme Court of Virginia affirmed the lower court in every respect, including the admission of Hamilton Development's financial records.¹⁹⁷ The court then noted that there was credible evidence in the record that the defendant committed the trespass after receiving notice that Broad Rock Club owned the land in question, and in disregard to that

192. *Id.*

193. 248 Va. 40, 445 S.E.2d 140 (1994).

194. *Id.* at 41, 445 S.E.2d at 141.

195. *Id.*

196. This evidence showed Hamilton Development's revenues in the year of trespass to have been approximately \$1.2 million, with some \$679,160 having been distributed to its two principals. *Id.* at 46, 445 S.E.2d at 144.

197. *Id.* at 44, 445 S.E.2d at 143 (citing *Weatherford v. Birchett*, 158 Va. 741, 747, 164 S.E. 535, 537 (1932) (stating that evidence of the financial condition of a defendant is relevant on the issue of punitive damages)).

knowledge.¹⁹⁸ Thus, punitive damages were found to have been properly assessed.

J. Zoning

In *Gwinn v. Collier*,¹⁹⁹ the Supreme Court of Virginia considered whether Virginia Code section 15.1-496.1 requires a zoning administrator to appeal his or her own decision to the board of zoning appeals.²⁰⁰ Norville N. Collier owned approximately two acres of land in an area zoned for residential use. In 1981, the zoning administrator of Fairfax County issued a non-residential use permit to Collier permitting the operation of a "major vehicle establishment" as a non-conforming use on the property.²⁰¹ However, after nearly two years of operation, the issuing administrator revoked the permit it had previously issued because it had been erroneously issued and directed Collier to cease operation of his business.²⁰²

Collier neither appealed the decision of the zoning administrator nor ceased operation of the business. As a result, the

198. *Id.* at 45, 445 S.E.2d at 143. Punitive damages may only be recovered when the defendant acted with malice, misconduct, or such recklessness or negligence as to constitute conscious disregard of the rights of others. *Id.* (citing *Giant of Virginia, Inc. v. Pigg*, 207 Va. 679, 685, 152 S.E.2d 271, 277 (1967)); accord *Puente v. Dickens*, 245 Va. 217, 219, 427 S.E.2d 340, 342 (1993). The court also noted that the standard for judicial review of punitive damages—leaving punitive damage awards undisturbed in the absence of a conclusion that the award "shocked its conscience"—has been established in its holdings in *Philip Morris v. Emerson*, 235 Va. 380, 414, 368 S.E.2d 268, 287 (1988); *Modaber v. Kelley*, 232 Va. 60, 348 S.E.2d 243 (1986). *Hamilton Development Co.*, 248 Va. at 46, 445 S.E.2d at 144.

199. 247 Va. 479, 443 S.E.2d 161 (1994).

200. *Id.* at 480, 443 S.E.2d at 161. Virginia Code § 15.1-496.1(A) states, in relevant part:

an appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the county or municipality affected by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this article or any ordinance adopted pursuant thereto. . . . Such appeal shall be taken within thirty days after the decision appealed from by filing with the zoning administrator, and with the board, a notice of appeal specifying the grounds thereof. . . .

VA. CODE ANN. § 15.1-496.1(A) (Cum. Supp. 1995).

201. *Gwinn*, 247 Va. at 480, 443 S.E.2d at 161.

202. *Id.* at 480, 443 S.E.2d at 162.

zoning administrator filed a bill of complaint for declaratory judgment and injunctive relief against Collier. Collier, in turn, filed a motion for summary judgment asserting that he had obtained a non-residential use permit, and that the legality of his use was not subject to attack because the zoning administrator had not appealed her decision to issue the permit to the board of zoning appeals.²⁰³

Though the trial court sided with Collier and entered judgment on his behalf, the Supreme Court of Virginia disagreed.²⁰⁴ The court opined that the General Assembly did not intend for Virginia Code section 15.1-496.1 to require a zoning administrator to appeal his or her decision to the board of zoning appeals, describing such a construction of the code as creating "a manifest absurdity."²⁰⁵ The court further found no useful purpose in requiring a zoning administrator to exhaust administrative remedies or initiate proceedings that may result in a judicial attack upon his or her own decision.²⁰⁶ The court, therefore, concluded that Collier's purported entitlement to operate a major vehicle service establishment in a residential district was not an issue decided and could not be challenged.²⁰⁷

At issue on appeal in *Board of Supervisors of Chesterfield County v. Trollingwood Partnership*,²⁰⁸ was whether a property owner had acquired a vested right to develop his property before the amendment of a zoning ordinance prohibiting his proposed use of the property. Lloyd C. Journigan, Jr. purchased an option to buy approximately 160 acres of agricultural land with the intent of developing part of the land as a mobile home park; however, before exercising his option, Journigan applied to the Board of Supervisors of Chesterfield County (the Board)

203. *Id.* at 481, 443 S.E.2d at 162.

204. *Id.* at 482-83, 443 S.E.2d at 162-63.

205. *Id.* at 483, 443 S.E.2d at 163.

206. *Id.*

207. *Id.* at 484-85, 443 S.E.2d at 163-64; *see, e.g.,* *Gwinn v. Alward*, 235 Va. 616, 621, 369 S.E.2d 410, 412 (1988) (holding that the zoning administrator's decision that Alward operated a junk yard and parked operable trash trucks on his property in violation of the zoning ordinance "was a thing decided and was not subject to attack by [defendant] Alward . . . because [he] never appealed the various decisions in which he was declared in violation of the zoning ordinance").

208. 248 Va. 112, 445 S.E.2d 151 (1994).

for rezoning of the land from agricultural use to general business use.²⁰⁹ The property was subsequently rezoned to a general business classification. Journigan submitted to the board of zoning appeals a "first design proposal" of a 500-unit mobile home park,²¹⁰ upon which a special permit was granted "subject to the final site layout, landscaping and plans being approved by the planning director."²¹¹ In January 1971, Journigan exercised his option and submitted plans to the county for the first two phases of the park.²¹² However, the county zoning ordinance was amended in July of 1971 to preclude the establishment of mobile home parks in general business districts. In 1975, Journigan conveyed his interest in the property to Trollingwood, a developer which planned to complete the park by developing a third phase.²¹³ Thereafter, Trollingwood, having been informed that it had no vested right to expand the park, applied for an amendment to the zoning ordinance which was denied. However, in September 1988, the trial court held that Trollingwood's right to expand the park to its 500-unit capacity had vested under the May 1970 special use permit issued to Journigan.²¹⁴

The Supreme Court of Virginia overruled the lower court's decision that the issuance of a use permit for the 500-unit park created a vested right in Journigan and his successors to expand the park into the balance of the area shown on Journigan's "first design proposal."²¹⁵ The court noted that Trollingwood's argument overlooked the provisions of the county zoning ordinance which, at the time, required property owners to submit detailed plans for "trailer parks," and further pointed

209. *Id.* at 113, 445 S.E.2d at 151. At the time of his application, mobile home parks were permitted in general business districts subject to the grant of a special use permit by the Board of Zoning Appeals. *Id.*

210. *Id.* The application included a plat showing the general layout of a gravity flow sewage system and unscaled, schematic drawings of the proposed sewage treatment plant for the park. *Id.*

211. *Id.* at 113-14, 445 S.E.2d at 152.

212. Phase I covered 134 units of the park while Phase II covered 172 units. *Id.* at 114, 445 S.E.2d at 152.

213. *Id.* Journigan's detailed plans and the construction in progress on Phases I and II were sufficient to give Journigan a vested right to complete those Phases in 1975. *Id.*

214. *Id.*

215. *Id.* at 115-16, 445 S.E.2d at 152-53.

out that Journigan did submit such plans for Phases I and II in conformity with the ordinance.²¹⁶

Because neither Journigan nor Trollingwood had filed a detailed Phase III site plan as required by both the ordinance and the special use permit before the property was rezoned, the court ultimately found that Trollingwood had no right to expand the park.²¹⁷

The Supreme Court of Virginia also considered whether landowners had obtained a vested right to use their land in the manner described by the terms of a zoning variance in *Snow v. Amherst City Board of Zoning Appeals*.²¹⁸ James and Mary Snow sought to buy and develop for residential purposes a 3.76-acre parcel located adjacent to a county watershed lake and a conservation zone.²¹⁹ However, a zoning ordinance prohibited construction within 200 feet of the conservation zone, which effectively precluded construction of a house on the property.²²⁰ Before purchasing the property, the Snows applied to the Board of Zoning Appeals of Amherst County (the BZA) for a variance reducing the minimum setback requirements for the property, and the variance was granted in 1989.²²¹ The Snows, in reliance on the variance, purchased the parcel, surveyed the parcel, removed trees and undergrowth therefrom, and constructed a gravel road thereon.²²² In 1991, the Board of Supervisors amended the County's zoning and subdivision ordinances to effectively prohibit construction of a residence anywhere on the parcel.²²³ The Snows requested a variance from the 1991 zoning ordinance amendment, but the BZA denied the request.²²⁴

216. *Id.* at 115, 445 S.E.2d at 152-53. Journigan's detailed plans for Phases I and II of the park were drawn to scale to show the precise locations of the streets, curbs, gutters, and individual trailers. The plans also reflected detailed contours of the land for grading and drainage, water and sewer connections on each lot, and sewer profiles. *Id.*

217. *Id.*

218. 248 Va. 404, 448 S.E.2d 606 (1994).

219. *Id.* at 405, 448 S.E.2d at 607.

220. *Id.*

221. *Id.*

222. *Id.* at 406, 448 S.E.2d at 607.

223. *Id.*

224. *Id.*

The Supreme Court of Virginia rejected the Snows' contention that a landowner may acquire a vested property right in a particular land use merely by showing a significant official governmental act and reliance thereon.²²⁵ Contrary to the Snows' assertion, the court held that the grant of a variance is not a significant official governmental act within the meaning of its three-pronged test for determining vested rights.²²⁶ The court instead characterized a variance as "simply an authorized deviation from zoning requirements because of special characteristics of a particular property."²²⁷ "The grant of a variance cannot confer upon a landowner greater rights than could be afforded by the enactment of a zoning ordinance."²²⁸

The question presented to the Supreme Court of Virginia in *Kole v. City of Chesapeake*²²⁹ was whether the trial court erred in dismissing with prejudice several landowners' challenge of the validity of a city's rezoning ordinance.²³⁰ The

225. *Id.* at 407, 448 S.E.2d at 608. A landowner who seeks to establish a vested property right in a land use classification must show: 1) the issuance of a permit or other approval authorizing the landowner to conduct a use on his property that otherwise would not have been allowed, 2) the filing and diligent pursuit of a bona fide site plan, and 3) incurrence of substantial expense, in good faith, before a change in zoning. *Id.* (citing *Board of Supervisors v. Medical Structures, Inc.*, 213 Va. 255, 192 S.E.2d 799 (1972) (county board of zoning appeals issued a special use permit upon which successor to Medical Structures, Inc., expended \$247,500 in development and preparation of site plans)). This 3-pronged test has also been applied in *Holland v. Board of Supervisors*, 247 Va. 286, 290, 441 S.E.2d 20, 22 (1994); *Town of Stephens City v. Russell*, 241 Va. 160, 163, 399 S.E.2d 814, 815 (1991); *Notestein v. Board of Supervisors*, 240 Va. 146, 151, 393 S.E.2d 205, 208 (1990); and *Board of Supervisors v. Cities Service Oil Co.*, 213 Va. 359, 362, 193 S.E.2d 1, 3 (1972).

226. *Snow*, 248 Va. at 408, 448 S.E.2d at 608. Justice Stephenson entered a dissent stating that contrary to the majority's conclusion, he would hold that: 1) the granting of a variance is a significant official governmental act and that the record supports a finding, 2) the Snows diligently pursued the use authorized by the variance, and 3) the Snows incurred substantial expense in good faith prior to the zoning amendments. *Id.* at 409, 448 S.E.2d at 609.

227. *Id.* at 408, 448 S.E.2d at 608.

228. *Id.*

229. 247 Va. 51, 439 S.E.2d 405 (1994).

230. The landowners specifically alleged that: (1) the City Council's action in response to their application constituted unlawful "piecemeal down-zoning" and "spot zoning;" (2) the City Council did not initiate the rezoning as required by law; (3) the rezoning ordinance was void ab initio because the City Council failed to provide notice, advertisement, and public hearing as required by statute; and (4) even if the ordinance were valid, the City Council (a) violated the landowners' vested rights under existing law, (b) violated their right to statutory and constitutional due process and their constitutional right to equal protection, and (c) in effect, took their property

landowners' claim was dismissed because their complaint was not filed within thirty days of the enactment of the rezoning ordinance,²³¹ as required by Virginia Code section 15.1-493(G).²³² The landowners owned several tracts in the city that, prior to the contested rezoning, were zoned for residential use. On February 13, 1991, in response to the planning commission's recommendation, the city council voted to rezone the tracts to a conservation zoning district.²³³ The landowners contended that all viable economic uses for their property were effectively prohibited in the conservation district.²³⁴

In the City of Chesapeake, no ordinance can take effect or exist until the referendum process is finished.²³⁵ While the city council's decisions are subject to the process, "[t]he original zoning . . . remains in place."²³⁶ The Supreme Court of Virginia found that although the city council triggered the referendum process set forth in the city charter in July of 1991, no final zoning decision existed before the conclusion of such process.²³⁷ Therefore, the city council's decision did not become final and subject to judicial review until thirty days after the council's action.²³⁸

In *Foster v. Geller*,²³⁹ the Supreme Court of Virginia considered whether the trial court erred in holding that a board of zoning appeals (BZA) director should not have permitted an applicant to construct a residence on a substandard lot without first obtaining a special use permit. The controversy arose when

without just compensation in violation of the United States and Virginia constitutions. *Id.* at 53, 439 S.E.2d at 406.

231. *Id.* at 53-54, 439 S.E.2d at 406.

232. Virginia Code § 15.1-493(G) provides, in pertinent part, that "[e]very action contesting a decision of the local government body . . . a proposed zoning ordinance or amendment thereto . . . shall be filed within thirty days of such decision . . . [h]owever, nothing in this subsection shall be construed to create any new right to contest the action of a local governing body." VA. CODE ANN. § 15.1-493(G) (Cum. Supp. 1995).

233. *Kole*, 247 Va. at 55, 439 S.E.2d at 407-08. VA. CODE ANN. § 15.1-493(G) (Cum. Supp. 1995).

234. *Id.* at 55, 439 S.E.2d at 407.

235. *Id.* at 56, 439 S.E.2d at 408 (citing *R.G. Moore Bldg. v. Committee*, 239 Va. 484, 490, 391 S.E.2d 587, 590 (1990)).

236. *Id.* (citing *Moore*, 239 Va. at 490, 391 S.E.2d at 590).

237. *Id.*

238. *Id.*

239. 248 Va. 563, 449 S.E.2d 802 (1994).

Daniel D. Geller asked the Director of the Department of Planning and Community Development of the City of Alexandria (the Director) to confirm that a residence could be built on a 9,000 square foot lot on terrain described as a ravine or gulch. Applying the "fixed point measurement method"²⁴⁰ the Director determined that the undeveloped lot did not meet the lot width requirements at the building setback lines.²⁴¹ However, because the fixed point measurement method had not been consistently applied in the past, the Director stated that he would apply the fixed point measurement method prospectively only and that the lot could be developed.²⁴² As a result of this decision, several adjacent property owners appealed the Director's decision to the BZA, alleging that the lot could not be developed without a special use permit as required by the zoning ordinance of the City of Alexandria.²⁴³ The BZA sided with the adjacent property owners and reversed the decision of the Director.²⁴⁴ The trial court subsequently reversed the BZA.²⁴⁵

The Supreme Court of Virginia pointed out that the Director's conclusion that the lot did not meet the minimum lot width requirements using the fixed point measurement method brought the lot within the Ordinance provisions governing substandard lots.²⁴⁶ Therefore, by authorizing construction on the

240. The fixed point measurement method requires that the minimum lot width be met at both the minimum front yard setback line and the actual building line. *Id.* at 565, 449 S.E.2d at 804 n. 1. The more commonly used "floating location measurement method" allows compliance with the minimum lot width at any setback line where the building hypothetically could be built. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* Section 12-400 of the Ordinance sets out the procedure for obtaining a special use permit. Section 12-401 prohibits the development of substandard lots without first obtaining a special use permit. Substandard lots are those that do not meet the minimum width requirements. *Id.* at 567, 449 S.E.2d at 805.

244. *Id.* at 565, 449 S.E.2d at 804.

245. *Id.* at 566, 449 S.E.2d at 804.

246. *Id.* at 567-68, 449 S.E.2d at 805. Section 12-405 of the Ordinance provides that:

[f]rom and after September 16, 1989, the remedy and procedure provided in this Section 12-400 shall be [the] exclusive remedy and procedure for the use and development of substandard lots in the zones herein designated, and any use or development of such lots in a manner not herein provided for and authorized shall be conclusively presumed to be contrary to the public interest and contrary to the intended spirit and purpose of this ordinance.

lot, the Director allowed its development without following the required special use permit procedure required by the ordinance.²⁴⁷ The court further opined that the effect of the Director's decision to circumvent the special use permit process was to alter the provisions of the ordinance by imposing a new effective date for the special use permit requirement.²⁴⁸ Therefore, the BZA's determination that the Director could not take action contradicting another provision of the ordinance was correct. Accordingly, the court reversed the judgment of the trial court and entered final judgment in favor of the BZA and the adjacent property owners.²⁴⁹

III. LEGISLATION

A. *Certificates and Forms*

The form of a Certificate of Transfer and a Certificate of Assignment have been combined into a single Certificate of Transfer which accomplishes both purposes, pursuant to the newly amended and reenacted section 55-66.01.²⁵⁰ Upon recordation, the Certificate of Transfer shall also operate as notice of an assignment.²⁵¹ The permissible form for Certificates of Satisfaction and Partial Satisfaction have also been slightly modified, as set forth in Virginia Code section 55.66.4:1.²⁵²

B. *Costs*

The charge for remote access to court records will now be established by the county, city, or town agency which provides the computer support.²⁵³ The newly amended section 14.1-

Id. at 567, 449 S.E.2d at 805.

247. *Id.* at 568, 449 S.E.2d at 805.

248. *Id.* at 569-70, 449 S.E.2d at 806. *See id.* at 568 (stating that neither the BZA nor the director possesses the power to amend or repeal portions of zoning ordinances) (citing *Belle-Haven Citizens Association v. Schumann*, 201 Va. 36, 41-42, 109 S.E.2d 139, 143 (1959)).

249. *Id.* at 570, 449 S.E.2d at 807.

250. VA. CODE ANN. § 55-66.01 (Cum. Supp. 1995).

251. *Id.*

252. *Id.* § 55-66.4:1.

253. VA. CODE ANN. § 14.1-118.1 (Cum. Supp. 1995).

118.1 mandates, however, that such fees be used to cover the operational expenses of these computer systems.²⁵⁴ A user may also be charged a fee of up to \$25 per month for connect time.²⁵⁵

C. *Dedication*

Easements for storm water, domestic water and sewage may now be transferred to the county or municipality, or to such association or public authority as the county or municipality may provide, by the recordation of a plat rather than by deed of dedication.²⁵⁶ The county, municipality, association or authority to whom an easement is granted shall not be obligated to install or maintain such facilities, however, unless otherwise agreed to by the benefitted entity.²⁵⁷

D. *Deeds and Recordation*

The newly amended and reenacted section 58.1-811²⁵⁸ now provides that no recordation tax is required on deeds of gift between grantors and grantees, whether they are individuals or not, as was previously required to receive the exemption.²⁵⁹ However, future and contingent beneficiaries are now excluded from the recordation tax exemption for deeds conveying real estate to trustees of an irrevocable inter vivos trust when the grantor is also a beneficiary of the trust.²⁶⁰

Virginia Code section 14.1-112 now allows clerks of circuit courts to collect a thirteen dollar fee for filing plat sheets too large to file in the deed books.²⁶¹ This fee shall be in addition to the fee for recording a deed or other instrument recorded in conjunction with such plat sheet or sheets.²⁶² There shall be

254. *Id.*

255. *Id.*

256. VA. CODE ANN. § 15.1-478 (Cum. Supp. 1995).

257. *Id.*

258. VA. CODE ANN. § 58.1-811 (Cum. Supp. 1995).

259. However, this does not require that a consideration pass between the parties.

260. VA. CODE ANN. § 58.1-811(A)(12) (Cum. Supp. 1995).

261. VA. CODE ANN. § 14.1-112(2) (Cum. Supp. 1995).

262. *Id.*

no charge, however, to provide an attested copy of a court order or decree to a party other than a copying fee of fifty cents per page.²⁶³

The relevant comments reveal that all sections of the Code which deal with persons subject to the Uniform Code of Military Justice were amended to validate acknowledgments by such persons taken prior to July 1, 1995.²⁶⁴ These acknowledgments were last validated in 1989.

E. *Environmental*²⁶⁵

Two new sections related to voluntary environmental assessment have been added to Title 10.1 of the Virginia Code. First, section 10.1-1198 creates a privilege for information generated from a voluntary environmental assessment and accords immunity from administrative, criminal or civil penalties to those who voluntarily disclose a violation of an environmental statute, regulation, permit or administrative order.²⁶⁶

Additionally, three sections have been added to Title 10.1, which relate to voluntary remediation of hazardous substances. Section 10.1-1429.1 directs the Department of Environmental Quality (DEQ) to promulgate regulations allowing persons who own, operate, have a security interest in or enter into a contract for the purchase of contaminated property to voluntarily remediate releases of hazardous substances, hazardous waste, solid waste or petroleum.²⁶⁷ This section is applicable in those situations where remediation has not already been mandated by

263. *Id.* § 14.1-112(10).

264. VA. CODE ANN. §§ 55-114.1, -115, -123, -125, -125.1, -127, -129, -130, -131, -32, -134, -134.1, -134.2, -135, -137.1, 137.2 (Repl. Vol. 1995).

265. Further discussions of recent environmental law developments can be found in Brian L. Buniva & James R. Kibler, Jr., *Annual Survey of Virginia Law: Environmental Law*, 29 U. RICH L. REV. 1053 (1995).

266. VA. CODE ANN. § 10.1-1198 (Cum. Supp. 1995). Environmental assessment is defined in this section as “[a]n evaluation of activities or facilities . . . that is designed to identify non-compliance and promote compliance with environmental laws and regulations, or identify opportunities for improved efficiency or pollution prevention.” *Id.* § 10.1-1198(A). The definition of “document” privilege reveals that this does not extend to information demonstrating a clear, imminent and substantial danger to the public health or the environment or information otherwise required to be reported. *Id.*

267. *Id.* § 10.1-1429.1.

the DEQ, the Environmental Protection Agency or a court.²⁶⁸ The regulations, effective on July 1, 1997, will establish certain remediation standards and procedures, as well as certifications of satisfactory completion of remediation.²⁶⁹

The General Assembly also enacted legislation relating to the management of ungranted shores of the sea, marsh, and meadowlands of the Commonwealth, assigning the management responsibilities for same to the Virginia Marine Resources Commission (VMRC).²⁷⁰ The new legislation requires the VMRC to prepare a management plan for these lands and directs the VMRC to prepare and file inventories identifying these lands on the Eastern Shore that are owned by the Commonwealth.²⁷¹ A procedure has also been established for amending the inventories whenever any party to a land conveyance requests a determination of whether land to be transferred belongs to the Commonwealth.²⁷²

F. *Insurance*²⁷³

New Virginia Code section 6.1-2.9:6 prohibits any person from canceling an insurance policy protecting property at the time of a refinancing, solely to change the effective dates of coverage under the policy.²⁷⁴ However, the section does permit a lender to request a new policy when the coverage under the existing policy is inadequate, or there is reasonable concern over the soundness or the services of the insurer.²⁷⁵

G. *Landlord and Tenant*

Section 55-248.38:1 clarifies the statutory procedures to be followed by a landlord in cases where items of personal proper-

268. *Id.*

269. *Id.*

270. VA. CODE ANN. §§ 28.2-1500 to -1514 (Cum. Supp. 1995).

271. *Id.* § 28.2-1504.

272. *Id.* § 28.2-1506.

273. For further discussions of recent developments in insurance law in Virginia, see E. Lewis Kincer, Jr., *Annual Survey of Virginia Law: Insurance Law*, 29 U. RICH. L. REV. 1089 (1995).

274. VA. CODE ANN. § 6.1-2.9:6 (Cum. Supp. 1995).

275. *Id.*

ty have been abandoned by a tenant following the termination of a rental agreement.²⁷⁶ These procedures do not apply, however, if the landlord has been granted a writ of possession for the premises, and the execution of such writ has been completed in accordance with section 8.01-470.²⁷⁷ On a related note, landlords are now required to provide written notice to tenants forty-eight hours prior to applying a pesticide inside or outside of a tenant's dwelling unit unless the tenant has requested application of the pesticide.²⁷⁸

New section 8.01-127.1 of the Virginia Code provides for the removal of residential unlawful detainer actions to the circuit court under certain circumstances.²⁷⁹ Expedited hearings are provided for in section 55-248.31 where, under the Virginia Residential Landlord and Tenant Act, a breach of the tenant's obligations of the rental agreement involves a criminal or willful act which is not remediable, and which poses a threat to the health or safety of the particular tenant or any other tenants.²⁸⁰ If successful, the landlord may terminate the rental agreement immediately and proceed to obtain possession of the premises within fifteen days from service on the tenant in violation.²⁸¹

H. *Lending*

Section 6.1-330.72 provides that any lender making a loan secured by a subordinate mortgage or deed of trust may now require the borrower to pay the actual cost of a credit report in addition to costs for a title examination, title insurance, mortgage guaranty insurance, recording fees, surveys, attorneys' fees and appraisal fees.²⁸²

276. VA. CODE ANN. § 55-248.38:1 (Cum. Supp. 1995).

277. *Id.*

278. *Id.* § 55-248.18.

279. VA. CODE ANN. § 8.01-127.1 (Cum. Supp. 1995).

280. VA. CODE ANN. § 55-248.31 (Cum. Supp. 1995).

281. *Id.*

282. VA. CODE ANN. § 6.1-330.72 (Cum. Supp. 1995).

I. *Local Government*

Section 22.1-129 authorizes school boards to sell surplus real property and to retain all or a portion of the proceeds of such sales in capital improvement funds.²⁸³ Such sales must follow approval by the local governing body and a public hearing on the sale and retention of the proceeds.²⁸⁴ Any retained proceeds would be used for school renovations, major school maintenance projects, and new school construction.²⁸⁵ The authority granted by this section is permissive, allowing school boards also to convey such property to the local governing body.²⁸⁶

Section 15.1-458 of the Code gives localities the opportunity to acquire property designated on an official map for future construction of public works.²⁸⁷ It is important to note that an application for a building permit will not restrict a locality from condemning a piece of property.²⁸⁸

J. *Performance Guaranties*

Virginia Code section 15.1-466 has been amended to provide that the administrative costs that may be added to the construction cost to determine the total amount of a performance guaranty shall not exceed twenty-five percent of the estimated construction costs.²⁸⁹ In addition, all bonds, payments, cash escrows or other performance guarantees under section 15.1-466 of the Virginia Code must be returned, with interest, as a tax credit against the real estate taxes on the property, if construction of the facilities identified in the established water, sewer and drainage programs was not commenced within twelve years from the date of the posting of the performance guaranty.²⁹⁰ Furthermore, the cumulative partial releases of performance guarantees that localities must make have been increased from

283. VA. CODE ANN. § 22.1-129 (Cum. Supp. 1995).

284. *Id.*

285. *Id.*

286. *Id.*

287. VA. CODE ANN. 15.1-458 (Cum. Supp. 1995).

288. *Id.*

289. *Id.* § 15.1-466.

290. *Id.*

eighty percent to ninety percent with the recent amendment of section 15.1-466(A)(14).²⁹¹

Local governing bodies are now authorized to appoint administrative agencies to approve sureties and bonds required of land developers in regard to construction of roads and other public improvements, in place of the governing body's actual approval.²⁹²

K. *Streets and Highways*

The Commonwealth Transportation Board is now authorized under Virginia Code section 46.2-809.1 to develop a traffic policy and procedure for the control of residential cut-through traffic on designated secondary highways.²⁹³ Cut-through traffic shall include vehicular traffic passing through a residential area without stopping or without, at least, an origin or a destination within the area.²⁹⁴

L. *Taxation*

Local administrative officials are now entitled to correct local tax assessments by refunding a taxpayer up to \$2,500 for an erroneous assessment.²⁹⁵ In addition, section 58.1-3980 of the Virginia Code relating to the statute of limitations for the correction and voluntary extension of local taxes has been expanded.²⁹⁶

M. *Urban Blight*

Spot blight abatement authority has been extended to counties, cities and towns which do not have housing authorities pursuant to the amended and reenacted sections 36-49.1:1 and 36-105 of the Virginia Code.²⁹⁷ Furthermore, the requirement

291. *Id.* § 15.1-466(A)(14).

292. *Id.* § 15.1-466(A)(5).

293. VA. CODE ANN. § 46.2-809.1 (Cum. Supp. 1995).

294. *Id.*

295. VA. CODE ANN. § 58.1-3981 (Cum. Supp. 1995).

296. *Id.* § 58.1-3980.

297. VA. CODE ANN. §§ 36-49.1:1, 36-105 (Cum. Supp. 1995).

that a property be vacant before being declared blighted has been removed from the sections.²⁹⁸ If blighted property is occupied for personal residential purposes, the governing body, in approving a plan, shall not allow the acquisition of such property if it would result in a displacement of person or persons living on the premises.²⁹⁹

Furthermore, in an effort to locate absentee landlords whose properties fall into decay and disrepair, section 58.1-3301 now requires that all land books contain the names and street addresses of owners of real property in the local jurisdiction in which the book is kept.³⁰⁰ In cases where real property is owned by more than one person, the land book shall contain the name and street address of at least one of the owners.³⁰¹

N. *Virginia Property Owners' Association Act*

Provisions are made for the disbursement of an award when any portion of the common area is taken or damaged by eminent domain in new Virginia Code section 55-516.2.³⁰² The section also authorizes an association's board of directors to negotiate with the condemning authority and bind the association as to any award amount.³⁰³ Section 55-512 was amended to clarify that the disclosure requirements of the act apply only to a person buying a lot for his residence, not to sales of lots to builders or others purchasing lots for resale.³⁰⁴ A statement in the sales contract that the purchaser is not purchasing the lot for residential purposes shall be conclusive and may be relied upon by the seller of the lot.³⁰⁵

298. *Id.*

299. *Id.* § 36-49.1:1(G).

300. VA. CODE ANN. § 58.1-3301(C) (Cum. Supp. 1995).

301. *Id.*

302. VA. CODE ANN. § 55-516.2 (Cum. Supp. 1995).

303. *Id.*

304. *Id.* § 55-512.

305. *Id.*

O. Zoning

Virginia Code sections 15.1-430 and 15.1-491, pertaining to local government's regulation of land use and zoning, now provide that conditions imposed in granting special use permits for affordable housing will be consistent with the objective of providing affordable housing.³⁰⁶ Definitions are set forth which define "affordable housing", but each locality is authorized to use its own definition.³⁰⁷

The minimum width requirement for manufactured homes which may be placed in agricultural districts or districts having similar classifications was eliminated in Virginia Code section 15.1-486.4.³⁰⁸

Section 15.1-491 was amended to increase the powers and duties of a zoning administrator, as set forth in the zoning ordinance, to authorize the administrator, under certain conditions, to grant variances to zoning ordinances.³⁰⁹ In amending section 15.1-496.1 of the Code, the General Assembly provided that after a sixty-day period from a decision of the zoning administrator or other administrative officer, such decision will not be changed unless the decision was obtained through malfeasance or fraud.³¹⁰ However, if the attorney for the governing body concurs, the sixty-day period will not apply to correcting clerical or other non-discretionary errors.³¹¹

IV. CONCLUSION

Virginia practitioners should familiarize themselves with the cases decided over the past year. Recent decisions of the Supreme Court of Virginia reflect the court's tendency to rely upon established principles of law in reaching its decisions.

306. VA. CODE ANN. §§ 15.1-430, -491 (Cum. Supp. 1995).

307. *Id.*

308. *Id.* § 15.1-486.4.

309. *Id.* § 15.1-491.

310. *Id.* § 15.1-496.1.

311. *Id.*

Moreover, the General Assembly's activity in the areas of environmental remediation, spot blight abatement and zoning strongly suggests efforts to promote responsible development and enhancement of the quality of life of the Commonwealth's citizens.