

2000

Annual Survey of Virginia Law: Property Law

Michael V. Hernandez

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



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

Recommended Citation

Michael V. Hernandez, *Annual Survey of Virginia Law: Property Law*, 34 U. Rich. L. Rev. 981 (2000).

Available at: <http://scholarship.richmond.edu/lawreview/vol34/iss3/12>

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

PROPERTY LAW

*Michael V. Hernandez**

I. INTRODUCTION

This article surveys judicial and legislative developments in Virginia property law since the last Survey article on this topic was published,¹ with primary emphasis on developments from June 1, 1998 to June 1, 2000. Although there were interesting developments in several areas of property law, the most important developments arose in the Supreme Court of Virginia's decisions involving covenants, servitudes, and easements. A significant portion of this article will explain and analyze those decisions.

II. JUDICIAL DECISIONS

A. *Covenants, Servitudes and Easements*

1. Overview of Virginia's Unique Approach

The Supreme Court of Virginia's recent opinions regarding covenants, servitudes and easements make this inherently difficult area of law more complex and are somewhat inconsistent with generally accepted principles in most jurisdictions. Attorneys practicing in this area of law should avoid relying on general property law sources without being familiar with the unique features of Virginia law.

* Associate Professor, Regent University School of Law. B.A., with High Distinction, University of Virginia; J.D., University of Virginia School of Law. I am very grateful for the editorial assistance provided by my wife, Laura Hernandez, Esquire, the research and drafting assistance provided by Grady Palmer, and the secretarial assistance provided by Kendra Jarrell.

1. Susan M. Pesner & Martin C. Conway, *Annual Survey of Virginia Law: Property Law*, 31 U. RICH. L. REV. 1145 (1997).

a. Covenants Running with the Land

The Supreme Court of Virginia recently addressed the two distinct restrictive covenants recognized by Virginia law, "the common law doctrine of covenants running with the land and restrictive covenants in equity known as equitable easements and servitudes."² Regarding covenants running with the land at law, the court has required that the party seeking to enforce the covenant show:

- (1) privity between the original parties to the covenant (horizontal privity); (2) privity between the original parties and their successors in interest (vertical privity); (3) an intent by the original covenanting parties that the benefits and the burdens of the covenant will run with the land; (4) that the covenant "touches and concerns" the land; and (5) the covenant . . . be in writing.³

These requirements track the traditionally accepted elements for a *real covenant*, which is a covenant enforceable at law, typically by the imposition of money damages.⁴ By contrast, an *equitable servitude* involves slightly different criteria and is traditionally considered a covenant that is enforceable at equity, generally by injunction.⁵

2. *Sonoma Dev. Inc. v. Miller*, 258 Va. 163, 167, 515 S.E.2d 577, 579 (1999) (quoting *Sloan v. Johnson*, 254 Va. 271, 274-75, 491 S.E.2d 725, 727 (1997)).

3. *Id.* (citing *Sloan*, 254 Va. at 276, 491 S.E.2d at 728).

4. See generally ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 8.21 (2d ed. 1993).

5. Real covenants and equitable servitudes share two requirements, *intent* and *touch and concern*. *Id.* §§ 8.15 to -.16, 8.24 to -.25. The original covenanting parties must intend for the covenant to run with the land and bind successors in interest, and the covenant must affect the use and enjoyment of land on both the benefit and burden side and thus may not affect the parties solely in their private interests. *Id.* Real covenants and equitable servitudes historically have had different requirements regarding *privity of estate* and *writing*. *Id.* §§ 8.13 to -.31. Under the traditional approach to real covenants, two forms of privity are required. *Id.* §§ 8.17 to -.18. The original covenanting parties must be in *horizontal privity*, which means that the covenant must be created as part of a transaction involving a conveyance of an estate in land between the same parties. *Id.* § 8.18. Moreover, all successors in interest must be in *vertical privity* with an original party to the covenant, which at law means that the successor must receive his predecessor's full interest in the subject land and be able to trace his chain of title back to an original covenanting party. *Id.* § 8.17. The modern trend has been to eliminate the horizontal privity requirement and thus require only vertical privity. See, e.g., *Gallagher v. Bell*, 516 A.2d 1028, 1037 (Md. Ct. Spec. App. 1986); see generally CUNNINGHAM ET AL., *supra* note 4, § 8.18. However, Virginia law still requires both horizontal and vertical privity. *Sloan*, 254 Va. at 276, 491 S.E.2d at 728. For an equitable servitude to exist and be enforceable against a successor in interest, horizontal privity traditionally is not required. The successor must simply take a portion of the predecessor's estate and thus does not have to receive the predecessor's full

Because the elements the supreme court has required for covenants running with the land at law track those traditionally required for real covenants, it might be assumed that this type of covenant is simply a traditional real covenant. However, three recent cases demonstrate otherwise.

In each of these cases, the Supreme Court of Virginia applied the law of covenants running with the land at law even though equitable relief alone was sought and ultimately granted.⁶ The court also required the party seeking equitable relief to show that horizontal privity exists between the original covenanting parties,⁷ a requirement traditionally not imposed for covenants to run in equity.⁸

In two of these cases, the court referred broadly to the concept at issue as “covenants running with the land at law,”⁹ while in the most recent case, the court, for the first time, used the phrase “restrictive covenant,” despite the fact that the case arose solely in equity.¹⁰ Therefore, it appears that the Supreme Court of Virginia uses “covenants running with the land at law” and “restrictive covenant” to encompass the traditional concepts of both real covenants and equitable servitudes.

b. Equitable Servitudes

The above interpretation of the Supreme Court of Virginia’s decisions may seem inconsistent with the court’s reference to the second type of restrictive covenants, those “in equity known as equitable easements and servitudes.”¹¹ Upon close review, however, it appears that the court’s use of this second category does not refer to the common definition of an equitable servitude, but

interest to meet the vertical privity requirement. CUNNINGHAM ET AL., *supra* note 4, § 8.26.

6. *Sonoma Dev.*, 258 Va. at 165-70, 515 S.E.2d at 578-81; *Waynesboro Vill., L.L.C. v. BMC Props.*, 255 Va. 75, 78-84, 496 S.E.2d 64, 67-70 (1998); *Sloan*, 254 Va. at 274-77, 491 S.E.2d at 727-29.

7. *Sonoma Dev.*, 258 Va. at 167, 515 S.E.2d at 579; *Waynesboro Vill.*, 255 Va. at 81, 496 S.E.2d at 68; *Sloan*, 254 Va. at 276-77, 491 S.E.2d at 728.

8. CUNNINGHAM, ET AL., *supra* note 4, § 8.26.

9. *Waynesboro Vill.*, 255 Va. at 81, 496 S.E.2d at 68; *Sloan*, 254 Va. at 274-75, 491 S.E.2d at 727.

10. *Sonoma Dev.*, 258 Va. at 167, 515 S.E.2d at 579.

11. *Id.* at 167, 515 S.E.2d at 579 (quoting *Sloan*, 254 Va. at 274-75, 491 S.E.2d at 727).

rather to a more narrow concept that is similar to what is commonly known as an *implied equitable servitude* or *reciprocal negative easement*. Although most jurisdictions do not enforce implied covenants at law,¹² most jurisdictions recognize implied covenants in equity.¹³ This implied equitable servitude or reciprocal negative easement exists when a common grantor or subdivider begins to implement a scheme of development upon which a purchaser relies, but the grantor neglects or refuses to impose a restriction on one or more lots encompassed within the scheme. An implied servitude can be imposed against all lots within the scheme, even those that have no restrictions in their chain of title.¹⁴

The Supreme Court of Virginia's opinion in *Sloan v. Johnson*¹⁵ demonstrates that the second type of restrictive covenant recognized in Virginia is not synonymous with the traditional concept of an equitable servitude. In *Sloan*, the supreme court indicated that equitable easements or servitudes apply only in cases involving a common grantor who develops parcels of land with a general scheme.¹⁶ Although the court in *Sloan* did not specifically address whether servitudes can be implied, its limitation of equitable servitudes to cases involving schemes is similar to the concept of an implied equitable servitude or implied reciprocal negative easement recognized in most jurisdictions.¹⁷

12. CUNNINGHAM ET AL., *supra* note 4, § 8.31.

13. *Id.* A leading case establishing implied reciprocal negative easements is *Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925). In *Sanborn*, the defendant began construction of a gasoline station on property he owned because there were no restrictions in his deed or chain of title. *Id.* at 496-97. The Supreme Court of Michigan enjoined the construction of the station because the defendant "could not [have] avoid[ed] noticing the strictly uniform residence character given the lots by the expensive dwellings, thereon, and the least inquiry would have quickly developed the fact that [the lot] was subjected to a reciprocal negative easement." *Id.* at 498. *But see* *Sprague v. Kimball*, 100 N.E. 622 (Mass. 1913) (holding that a burden cannot be imposed by implication and must be in writing).

14. CUNNINGHAM ET AL., *supra* note 4, § 8.32. The courts that have rejected this theory have done so based on a strict application of the Statute of Frauds and the notion that it is not fair to burden a party who obtained a deed conveying an unrestricted fee. *See, e.g., Sprague*, 100 N.E. at 624.

15. 254 Va. 271, 491 S.E.2d 725 (1997).

16. *Id.* at 275-76, 491 S.E.2d at 727-28 (citing *Mid-State Equip. Co. v. Bell*, 217 Va. 133, 140-41, 225 S.E.2d 877, 884 (1976)). The court specifically held that it need not consider whether a general scheme existed to establish an equitable servitude if it was first shown that a covenant running with the land was present. *Id.* at 276, 491 S.E.2d at 728. This was so even though the plaintiff was seeking equitable relief and not damages. *Id.* at 274-77, 491 S.E.2d at 727-29.

17. *See supra* notes 12-13 and accompanying text.

Similarly, in *Sonoma Development, Inc. v. Miller*,¹⁸ the Supreme Court of Virginia noted without explanation that the doctrine of equitable servitudes does not apply to a case involving a restriction on one lot.¹⁹ Apparently, the majority assumed that a case involving a restriction on only one lot could not, by definition, involve a scheme for development of a residential neighborhood. Therefore, the case did not fit within the traditional understanding of an implied equitable servitude or reciprocal negative easement. Because *Sonoma Development* involved a claim to enforce a covenant against a successor in interest in equity, the traditional approach to equitable servitudes would have governed had the court applied it.²⁰ Nevertheless, the court held that the Virginia doctrine of equitable servitude did not apply and resolved the case solely on the law of covenants running with the land or real covenants.²¹

c. Implied Easements

The Supreme Court of Virginia recently held in *Prospect Development Co. v. Bershader*²² that a purchaser's detrimental reliance on representations that the builder preserve land adjacent to the purchaser's lot gave rise to an implied easement by estoppel.²³ Although this approach is consistent with the traditional view of negative easements, it is inconsistent with the modern trend that considers such an interest to be an implied equitable servitude. Historically, easements have included both the right to use the land of another and the right to insist that the owner of another tract not engage in certain activities on his land.²⁴ The latter form, commonly known as a *negative easement*, frequently involves such rights as unobstructed scenic views or the preservation of adjacent land in its natural state.²⁵ Because a negative easement is virtually identical to a restrictive covenant, modern courts and commentators have increasingly classified negative easements as restrictive covenants and thus used "easement"

18. 258 Va. 163, 515 S.E.2d 577 (1999).

19. *Id.* at 165-67, 515 S.E.2d at 578-79.

20. *See supra* notes 11-13 and accompanying text.

21. *Sonoma Dev.*, 258 Va. at 167, 515 S.E.2d at 579.

22. 258 Va. 75, 515 S.E.2d 291 (1999).

23. *Id.* at 87-90, 515 S.E.2d at 297-300.

24. CUNNINGHAM ET AL., *supra* note 4, § 8.1.

25. *Id.* § 8.1.

only to refer to a right of use on another's land.²⁶ Thus, most jurisdictions consider the interest that arises where purchasers rely on representations later dishonored by the sellers as an implied servitude, rather than an implied easement.²⁷ Indeed, in *Prospect Development Co.*, three justices noted in a partial dissent that the oral promises technically involved a restrictive covenant rather than an easement.²⁸

2. Restrictive Covenant Cases

In *Sloan v. Johnson*,²⁹ the Supreme Court of Virginia enforced a restrictive covenant against a property owner who claimed the covenant was unenforceable because it was not part of a general neighborhood scheme.³⁰ *Sloan* involved three adjoining lots in Arlington County which each had a restriction in its chain of title restricting the lot to one residence.³¹ The primary defendants, the Johnsons, owned a lot located between the two plaintiffs' lots.³² When the Johnsons made plans to subdivide their lot to include two residences, the adjacent landowners sued to enforce the one-residence restriction.³³ The Johnsons argued that the original restrictions, which were limited to three lots, were not part of a general neighborhood scheme and thus were not enforceable as an equitable servitude.³⁴ Never reaching the Johnsons' argument, the court instead held that the restriction in the Johnsons' deed met the five-part test for a covenant running with the land and was, therefore, enforceable in equity regardless of whether it constituted an equitable servitude.³⁵

Although the holding in *Sloan* might be correct under the doctrine of covenants running with the land, the court failed to recite sufficient facts to support its conclusion that one plaintiff was en-

26. *Id.*; see also JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 387 (3d ed. 1989).

27. 25 AM. JUR. 2D *Easements and Licenses* § 5 (1996).

28. *Prospect Dev. Co.*, 258 Va. at 96 n.5, 515 S.E.2d at 303 n.5 (Carrico, C.J., Kinser & Lacy, JJ., concurring in part and dissenting in part).

29. 254 Va. 271, 491 S.E.2d 725 (1997).

30. *Id.* at 274, 491 S.E.2d at 727.

31. *Id.* at 273-74, 491 S.E.2d at 726-27.

32. *Id.*

33. *Id.*

34. *Id.* at 274-76, 491 S.E.2d at 727-28.

35. *Id.* at 276-77, 491 S.E.2d at 728-29.

titled to the relief granted. To enforce a covenant against a landowner, the plaintiff must be either an original party to the covenant or a successor in interest to an original covenanting party.³⁶

By definition, a party who owns a lot that was sold prior to the creation of the covenant in interest cannot be a successor in interest to that covenant.³⁷ In *Sloan*, the first lot, currently owned by the plaintiffs Abel and Taylor as trustees, was initially conveyed in 1934 with the restriction.³⁸ The Johnsons' lot was initially conveyed, with the same restriction, on an unspecified date in 1934.³⁹ The third lot, currently owned by the Sloans, was initially conveyed with the same restriction in 1936.⁴⁰ The court did not disclose whether the Johnsons' lot was conveyed before or after the Abel/Taylor lot. If the Johnsons' lot was initially conveyed later in 1934 than the lot conveyed to the predecessor of Abel and Taylor, then Abel and Taylor technically were not in vertical privity with regard to the Johnsons' covenant and thus would not be entitled to enforce the covenant.

To illustrate, assume O owns a tract of land that he subdivides into three lots and sells to A, B and C, respectively. When O sells the first lot to A, the transaction can be diagrammed horizontally, like this:

$$O \rightarrow A$$

When O later conveys his interest in the last two lots to B and C, their relationship to the transaction between O and A can be diagrammed vertically, like this:

$$\begin{array}{c} O \rightarrow A \\ \downarrow \\ B \ \& \ C \\ \text{(one lot each)} \end{array}$$

Similar diagrams can be made for the transactions between O and B and O and C. When O conveys the second lot to B, O only retains title to the third lot, since he has already conveyed the

36. CUNNINGHAM ET AL., *supra* note 4, §§ 8.13 to -18.

37. *Id.*

38. *Sloan*, 254 Va. at 273-74, 491 S.E.2d at 726-27.

39. *Id.*

40. *Id.*

first lot to A. Thus, the transactions regarding B's lot can be diagrammed like this:

$$O \rightarrow B$$

$$\downarrow$$

$$C$$

When O conveys the third and final lot to C, he retains no land and thus has no successor in interest. Thus, the transaction regarding the third lot can be diagrammed like this:

$$O \rightarrow C$$

As these diagrams illustrate, both B and C are in vertical privity with an original party to the covenant restricting A's lot. However, only C is in vertical privity with an original party to the covenant restricting B's lot, and no one is in vertical privity with an original party to C's covenant. Most importantly, A is not in vertical privity with regard to the covenants restricting either of his neighbors' lots.

Likewise, in *Sloan*, if the lot owned by Abel and Taylor was initially conveyed earlier in 1934 than the lot owned by Johnson, then Abel and Taylor were not in vertical privity regarding the covenant binding the Johnsons' lot and thus technically could not sue to enforce it. Other jurisdictions have avoided this problem by allowing all lot owners within a scheme to enforce the covenant against each other without regard to the technical existence of vertical privity.⁴¹ This issue ultimately would not have affected the outcome in *Sloan*. The lot owned by the other plaintiffs, the Sloans, was initially conveyed after the lot currently owned by the Johnsons was initially conveyed. Accordingly, the Sloans were in vertical privity with regard to the Johnsons' covenant and thus could enforce the covenant in equity. Nonetheless, this issue could be dispositive in a future case that involves only one plaintiff who owns a lot that was initially conveyed before the defendant's lot was initially conveyed. If this issue arises in the future, the court should clarify the law regarding vertical privity in such cases.

41. See, e.g., *Snow v. Van Dam*, 197 N.E. 224, 228 (Mass. 1935); see generally CUNNINGHAM ET AL., *supra* note 4, § 8.33; CRIBBET & JOHNSON, *supra* note 26, at 383. Interestingly, in *Snow*, the Supreme Judicial Court of Massachusetts imposed an implied beneficiary theory despite previously rejecting the notion of an implied reciprocal negative easement. *Sprague v. Kimball*, 100 N.E. 622, 624 (Mass. 1913).

Another covenant case, *Waynesboro Village, L.L.C. v. BMC Properties*,⁴² involved reciprocal covenants not to compete in deeds involving two commercial tracts.⁴³ The original covenanting parties were BMC and Waynesboro Village's ("Waynesboro") predecessor, Shenandoah Village ("Shenandoah").⁴⁴ Shenandoah contracted to sell a lot to BMC.⁴⁵ Because BMC planned to build a motel on its lot, it insisted that Shenandoah agree not to use its adjacent lot for competitive purposes.⁴⁶ In consideration for this covenant, BMC reciprocally agreed not to use its lot to compete with the businesses Shenandoah maintained on its adjacent property.⁴⁷ The Federal Deposit Insurance Corporation ("FDIC") later obtained title to Shenandoah's property and conveyed it to Waynesboro.⁴⁸ Waynesboro sought a declaration that the covenant not to compete was unenforceable against it for several reasons.⁴⁹ First, Waynesboro argued that the covenant was ambiguous and thus unenforceable because it could restrict Waynesboro's use of its property even if BMC never built a motel on the lot.⁵⁰ The Supreme Court of Virginia rejected this contention, holding that the covenant unambiguously imposed reciprocal obligations not to compete with businesses on the other lot.⁵¹ Second, Waynesboro argued that BMC should be equitably estopped from enforcing the covenant because BMC had not yet built the motel even though more than seven years had elapsed since the covenant was imposed.⁵² The court also rejected this argument, noting that Waynesboro could not reasonably rely on BMC's inaction because the covenants were a matter of public record, and BMC had not engaged in any fraudulent or deceptive conduct that harmed Waynesboro.⁵³

42. 255 Va. 75, 496 S.E.2d 64 (1998).

43. *Id.* at 77, 496 S.E.2d at 66.

44. *Id.*

45. *Id.*

46. *Id.* at 77-78, 496 S.E.2d at 66.

47. *Id.*

48. *Id.* at 78, 496 S.E.2d at 66.

49. *Id.* at 78-79, 496 S.E.2d at 66-67.

50. *Id.* BMC had not built a motel on the lot in the more than seven years since the covenant was imposed. *Id.* at 81, 496 S.E.2d at 68. However, BMC had spent \$350,000 to purchase its lot and more than \$93,000 on plans for construction. *Id.* at 78, 496 S.E.2d at 67.

51. *Id.* at 79-80, 496 S.E.2d at 67-68.

52. *Id.* at 81-82, 496 S.E.2d at 68.

53. *Id.* The court similarly rejected Waynesboro's reliance on a federal doctrine de-

In *Sonoma Development, Inc. v. Miller*,⁵⁴ the Supreme Court of Virginia held that the horizontal privity requirement was met even though an original party was not named in the document that created the covenant.⁵⁵ Rather than including the covenant in the deed of conveyance, the grantor drafted the documents separately, and the grantee was not named in the covenant agreement.⁵⁶ The party burdened by the covenant argued that the horizontal privity requirement was not met because horizontal privity was not demonstrated by the deed of conveyance.⁵⁷ The court rejected this argument, holding that horizontal privity is present whenever the covenant is made in connection with a conveyance of an estate, even if the transaction is not completed in one document.⁵⁸

3. Implied Easement Cases

In *Carter v. County of Hanover*,⁵⁹ the Supreme Court of Virginia held that a landowner was entitled to an implied easement by prior use, or a quasi-easement, even though the easement was not strictly necessary to support the land.⁶⁰ The County of Hanover, which owned the purported servient tract, argued that the Carters were not entitled to an implied easement by prior use because the right of way was not strictly necessary.⁶¹ The court disagreed, holding that the strict necessity test is applicable only when determining if an implied easement by necessity exists to support a landlocked tract.⁶² Instead, the necessity test for implied easements by prior use is a subjective standard somewhere

signed to protect the FDIC (the "D'Oench, Duhme doctrine") because that doctrine only applies to cases involving conduct that misleads the FDIC. The court concluded that BMC had not engaged in such conduct. *Id.* at 82-84, 496 S.E.2d at 69.

54. 258 Va. 163, 515 S.E.2d 577 (1999).

55. *Id.* at 168, 515 S.E.2d at 580.

56. *Id.* at 166, 515 S.E.2d at 578.

57. *Id.* at 167, 515 S.E.2d at 579.

58. *Id.* at 168-70, 515 S.E.2d at 580-81.

59. 255 Va. 160, 496 S.E.2d 42 (1998).

60. *Id.* at 169, 496 S.E.2d at 47. An implied easement by prior use arises when three elements are met: "(1) the dominant and servient tracts originated from a common grantor, (2) the use was in existence at the time of the severance [of the two tracts], and that (3) the use is apparent, continuous and reasonably necessary for the enjoyment of the dominant tract." *Id.* at 167, 496 S.E.2d at 46 (internal citations omitted).

61. *Id.* at 168, 496 S.E.2d at 46.

62. *Id.* at 168-69, 496 S.E.2d at 46.

between strict necessity and mere convenience.⁶³ Moreover, the court explained that the necessity inquiry focuses on whether the easement is necessary for the severed, not the original, dominant estate.⁶⁴ Because the dominant tenants demonstrated that the easement was still reasonably necessary to support farming operations on their land, the easement that existed at severance continued by implication.⁶⁵ However, the court limited the scope of the easement to the use that was made of the right of way at the time of severance.⁶⁶

In *Prospect Development Co. v. Bershader*,⁶⁷ a majority of the Supreme Court of Virginia held that a purchaser's reliance on various representations made by the seller's agents gave rise to a negative easement by estoppel.⁶⁸ The seller was well aware that the purchasers, the Bershaders, wanted to live near undeveloped land.⁶⁹ Although at least one of the seller's agents knew that the statements were not true, the seller's agents repeatedly represented that tests conducted by Fairfax County showed that the lot adjacent to the parcel the Bershaders ultimately purchased could not be developed.⁷⁰ These representations induced the Ber-

63. *Id.* at 169, 496 S.E.2d at 46. In *Carter*, the party claiming the right to the quasi-easement was the grantee at severance. *Id.* at 164, 496 S.E.2d at 44. Although the issue was not implicated in *Carter*, some jurisdictions have held that a strict necessity standard should apply when the grantor or his successor claims to have an implied easement by prior use. See, e.g., *Mitchell v. Castellaw*, 246 S.W.2d 163, 168 (Tex. 1952). This approach is based on the theory that the grantor's failure to create an easement expressly by reservation or exception should not be lightly excused because the grantor has control over the deed. *Id.* at 167. Other jurisdictions disagree and, while acknowledging a grantor must make a stronger showing of necessity than a grantee, apply a flexible subjective standard similar to the one adopted in *Carter* to all cases, regardless of the identity of the purported dominant tenant. See, e.g., *Granite Props. Ltd. v. Manns*, 512 N.E.2d 1230 (Ill. 1987). In *Granite Properties*, the Supreme Court of Illinois stated:

While the degree of necessity required to reserve an easement by implication in favor of the conveyer is greater than that required in the case of the conveyee . . . , even in the case of the conveyer, the implication from necessity will be aided by a previous use made apparent by to the physical adaptation of the premises to it. . . . Thus, when circumstances such as an apparent prior use of the land support the inference of the parties' intention, the required extent of the claimed easement's necessity is the only circumstance from which the inference of intention will be drawn.

Id. at 1238.

64. *Carter*, 255 Va. at 169, 496 S.E.2d at 47.

65. *Id.*

66. *Id.* at 170, 496 S.E.2d at 47.

67. 258 Va. 75, 515 S.E.2d 291 (1999).

68. *Id.* at 89, 515 S.E.2d at 299.

69. *Id.* at 80, 515 S.E.2d at 294.

70. *Id.* at 82, 515 S.E.2d at 295.

shaders to purchase the lot for a \$15,000 premium.⁷¹ Four years later, after the Bershadars had spent almost \$185,000 on improvements to naturalize their surroundings, the developer began building a house on the adjacent lot that the Bershadars had been told could not be developed.⁷² The court held that the developer's misrepresentations created an implied negative easement appurtenant that required the developer to preserve the adjacent tract in its natural state.⁷³ The court specifically rejected the developer's argument that no easement could exist because no writing, including the Bershadars' deed, explicitly created such an interest.⁷⁴

In a vigorous partial dissent, Justice Lacy, joined by Chief Justice Carrico and Justice Kinser, argued that the Bershadars' remedy should be entirely in contract and tort and not through the imposition of an implied easement appurtenant.⁷⁵ Justice Lacy noted that the representations made to the Bershadars were based solely on alleged technological assessments that could change.⁷⁶ Therefore, the Bershadars had no more reason to expect to receive a perpetual right to live next to undeveloped land than they would have the right to have a particular zoning classification maintained.⁷⁷

There are two problems with the dissenters' analysis. First, the developer's fraudulent misrepresentations suggested that the developer would never develop the property because the property was inherently unsuitable for development. The developer never suggested that the problem was temporary or correctable.⁷⁸ Second, if the Bershadars did not receive an appurtenant easement, their property would be potentially less valuable at resale because prospective purchasers would have no guarantee that the adjacent lot would never be developed. As the majority opinion implicitly recognized, the Bershadars should receive the full bene-

71. *Id.* at 83, 515 S.E.2d at 295.

72. *Id.*

73. *Id.* at 89, 515 S.E.2d at 299.

74. *Id.* at 90, 515 S.E.2d at 299 (rejecting defendants' Statute of Frauds defense because "the object of the statute is to prevent frauds").

75. *Id.* at 94, 515 S.E.2d at 302 (Lacy, J., concurring in part and dissenting in part).

76. *Id.* at 95-96, 515 S.E.2d at 302-03 (Lacy, J., concurring in part and dissenting in part).

77. *Id.* (Lacy, J., concurring in part and dissenting in part).

78. *Id.* at 80-83, 515 S.E.2d at 294-96 (discussing the representations made to the Bershadars).

fit of the representations upon which they relied, both during their ownership of the property and at resale.⁷⁹

B. *Contracts and Deeds*

1. Construction

In *Bershader*, the Supreme Court of Virginia unanimously held that the developer breached its contract with the Bershaders by attempting to build on the adjacent lot.⁸⁰ The developer argued that it did not breach the contract because the agreement did not promise that the adjacent lot would be left in its natural state.⁸¹ The court, however, held that the contract phrase “premium lot” was ambiguous, and extrinsic evidence showed that the lot was offered at a premium because it was next to land that would not be developed.⁸² Interestingly, the court never addressed whether the contract was still in force or merged into the deed. Generally, once a purchaser accepts a deed, the contract is extinguished and any available remedy is in the deed alone.⁸³ Virginia law, however, recognizes exceptions for cases that involve fraud or matters collateral to title issues.⁸⁴ Although the court did not address the issue, both exceptions apply to the facts of this case. The easement in dispute did not implicate matters affecting the Bershaders’ title, and the court specifically held that the developer committed actual and constructive fraud.⁸⁵

In *Moorman v. Shin*,⁸⁶ the Fairfax County Circuit Court enforced a ten-year and four-month commercial lease notwith-

79. See *id.* at 89, 515 S.E.2d at 299 (stating that “it would be manifestly unjust” to allow the developer to build a house on the lot when the purchasers of the adjacent lot relied on representations that one could not be built).

80. *Id.* at 83-85, 515 S.E.2d at 296. The three partial dissenting justices all agreed with this portion of the majority opinion. *Id.* at 94, 515 S.E.2d at 302 (Lacy, J., concurring in part and dissenting in part).

81. *Id.* at 84, 515 S.E.2d at 296 (arguing that the contract did not reference the adjacent lot and contained an integration clause).

82. *Id.*

83. *Miller v. Reynolds*, 216 Va. 852, 854, 223 S.E.2d 883, 885 (1976); *Woodson v. Smith*, 128 Va. 652, 656, 104 S.E. 794, 795 (1920).

84. *Sale v. Figg*, 164 Va. 402, 410, 180 S.E. 173, 176 (1935) (matters collateral to title issues); *Woodson*, 128 Va. at 656, 104 S.E. at 795 (fraud).

85. *Bershader*, 258 Va. at 85-86, 515 S.E.2d at 296-97.

86. No. 173483, 1999 WL 797197 (Va. Cir. Ct. June 3, 1999) (Fairfax County) (unpublished decision).

standing Virginia Code section 55-2,⁸⁷ which requires a deed or will to create an estate for a term of more than five years.⁸⁸ Although the lease agreement was neither a deed nor a will, the court held that it was enforceable pursuant to section 55-51,⁸⁹ under which "[a]ny deed, or a part of a deed, which shall fail to take effect . . . shall, nevertheless, be as valid and effectual and as binding upon the parties thereto, so far as the rules of law and equity will permit"⁹⁰ Relying on a previous opinion by the Fairfax County Circuit Court in *McCue v. Hamel Health, Inc.*,⁹¹ the court held that section 55-51 applies even where the parties did not intend to create a deed so long as they intended to grant an estate in land, such as the leasehold in *Moorman*.⁹² This decision essentially eviscerates the five year limitation in section 55-2 in cases where the intent to create a longer lease is clear and extends section 55-51 beyond its plain meaning to apply to documents that are not deeds.

2. Reservation of Interest for Third Party/Common Law "Stranger Rule"

In *Shirley v. Shirley*,⁹³ the Supreme Court of Virginia reaffirmed the common law "stranger rule," which provides that a grantor cannot reserve an estate for "a stranger to the deed."⁹⁴ In *Shirley*, the grantor attempted to reserve a life estate in favor of her daughter.⁹⁵ Although the daughter conceded that the common law proscribed reservations in favor of a stranger to the deed, she urged the court to modify the common law rule to further the general policy of enforcing the grantor's intent.⁹⁶ The court refused to follow the trend in most states, which is to allow reservations for the benefit of third parties.⁹⁷ The court noted that modi-

87. *Id.* at *3.

88. VA. CODE ANN. § 55-2 (Repl. Vol. 1995).

89. *Moorman*, 1999 WL 797191 at *3.

90. VA. CODE ANN. § 55-51 (Repl. Vol. 1995).

91. 17 Va. Cir. 331 (Cir. Ct. 1989) (Fairfax County).

92. *Moorman*, 1999 WL 797197 at *2-3.

93. 259 Va. 513, 525 S.E.2d 274 (2000).

94. *Id.* at 517, 525 S.E.2d at 276. For a thorough discussion of the "stranger rule," see 9 THOMPSON ON REAL PROPERTY § 82.09(c)(2) (David A. Thomas ed., 1999).

95. *Shirley*, 259 Va. at 515, 525 S.E.2d at 275.

96. *Id.* at 516-17, 525 S.E.2d at 275-76.

97. See *id.* at 520 n.7, 525 S.E.2d at 277 n.7 (listing the jurisdictions that still adhere to the "stranger rule").

fication should be done, if at all, by the legislature because judicial modification would upset the policy favoring certainty of title.⁹⁸

3. Execution

In *Lim v. Choi*,⁹⁹ the Supreme Court of Virginia concluded that a poorly drafted memorandum did not convey a property interest.¹⁰⁰ The memorandum provided:

I purchased the above property . . . with Mr. Soo-Myung Choi as a co-owner. However, I hereby state that the ownership of the above property is not a nature of thing for which I assume responsibility in paying mortgage.

In the event that Mr. Soo-Myung Choi sells or rents the above house and needs my signature for the release, I will gladly and without delay respond to the occasion.

I hereby make it clear . . . that all rights belong to Mr. Soo-Myung Choi alone.¹⁰¹

The court reaffirmed that while the writing need not be in any particular form to constitute a deed,¹⁰² it must contain operative words that manifest the intent to transfer an interest.¹⁰³ The court also noted that Virginia Code section 55-48,¹⁰⁴ which prescribes a particular form for deeds, does not require deeds to include the word "transfer" to be effective.¹⁰⁵ The court nevertheless held that the memorandum was ineffective because it did not include words of conveyance or those that otherwise manifest an intent to transfer an interest.¹⁰⁶

98. *Id.* at 519, 525 S.E.2d at 277.

99. 256 Va. 167, 501 S.E.2d 141 (1998).

100. *Id.* at 172, 501 S.E.2d at 144.

101. *Id.* at 169, 501 S.E.2d at 142.

102. *Id.* at 171, 501 S.E.2d at 143-44 (citing *Albert v. Holt*, 137 Va. 5, 8, 119 S.E.2d 120, 121 (1923)).

103. *Id.* (citing *Morison v. Am. Ass'n*, 110 Va. 91, 92-93, 65 S.E.2d 469, 470 (1909)).

104. VA. CODE ANN. § 55-48 (Repl. Vol. 1995).

105. *Lim*, 256 Va. at 171-72, 501 S.E.2d at 144.

106. *Id.* at 172, 501 S.E.2d at 144.

C. *Fraudulent Sales*

In the ubiquitous *Bershader* opinion, the Supreme Court of Virginia held that the developer's repeated misrepresentations that a lot adjacent to the purchasers' land would never be developed constituted actual and constructive fraud.¹⁰⁷ The court rejected the developer's argument that the misrepresentations related to future events or matters of mere opinion.¹⁰⁸

In *Tate v. Colony House Builders Inc.*,¹⁰⁹ the sellers of real estate told the buyers that the house was free from structural defects, constructed in a workmanlike manner, and fit for habitation.¹¹⁰ The Supreme Court of Virginia held that these statements supported an action for constructive fraud because they constituted statements of fact and not just expressions of opinion.¹¹¹ The court, however, held that other statements regarding quiet possession without the need for significant restoration, rebuilding or repair were not actionable because they concerned future events.¹¹² Furthermore, statements that the house was worth the sales price were "mere puffery" and not fraudulent.¹¹³

D. *Zoning*

1. The Dillon Rule

The Dillon Rule limits municipal corporations to the powers "that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable."¹¹⁴ In three recent cases, the supreme court considered whether local zoning ordinances were permissible under the Dillon Rule, upholding two exercises of local authority and striking down another.

107. *Prospect Dev. Co. v. Bershader*, 258 Va. 75, 85-86, 515 S.E.2d 291, 296-97 (1999).

108. *Id.* at 86, 515 S.E.2d at 297.

109. 257 Va. 78, 508 S.E.2d 597 (1999).

110. *Id.* at 80, 508 S.E.2d at 598.

111. *Id.* at 83-84, 508 S.E.2d at 600.

112. *Id.* at 84, 508 S.E.2d at 600.

113. *Id.*

114. *Tabler v. Fairfax County*, 221 Va. 200, 202, 269 S.E.2d 358, 359 (1980) (citing *Hilton Enter., Inc. v. Bd. of Supervisors*, 220 Va. 435, 440, 258 S.E.2d 577, 581 (1979); *Fairfax Zoning Bd. v. Cedar Knoll*, 217 Va. 740, 743, 232 S.E.2d 767, 769 (1977); *Bd. of Supervisors v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975)).

The Supreme Court of Virginia held in *City Council of Alexandria v. The Lindsey Trusts*¹¹⁵ that the City of Alexandria did not violate the Dillon Rule when it required a special use permit for the enlargement of restaurant premises.¹¹⁶ Although the City of Alexandria previously amended its zoning ordinance to require a special use permit for the operation of restaurants, the subject property was grandfathered out of the new requirement.¹¹⁷ Later, the city amended its zoning ordinance to require a special use permit for any change, enlargement, extension or increase in the nature of any existing use, even if a permit had not been required previously.¹¹⁸ The property owners leased the premises to a different restaurant and modified the property to accommodate the new lessees.¹¹⁹ The court held that the city did not violate the Dillon Rule by determining that it had the authority to require the owners to acquire a special use permit for an intensification of an existing use.¹²⁰ The court reasoned that the city necessarily had the power to regulate non-conforming uses because the city's charter authorized the termination of such uses.¹²¹

*Board of Supervisors v. Washington, D.C. SMSA L.P.*¹²² involved a lease agreement in which the Virginia Department of Transportation ("VDOT") authorized wireless telecommunications companies to construct observation and telecommunications towers on rights of way owned by VDOT in Fairfax County.¹²³ Fairfax County sought a declaration that the companies' activities were subject to the county's zoning authority.¹²⁴ The Supreme Court of Virginia held that Virginia Code section 15.2-2232¹²⁵ explicitly gave localities zoning authority over, among other things, the construction of public utility facilities, including the towers at issue.¹²⁶ The court rejected the argument that the Dillon Rule was violated, noting that the fact that the towers would be built on

115. 258 Va. 424, 520 S.E.2d 181 (1999).

116. *Id.* at 429, 520 S.E.2d at 183-84.

117. *Id.* at 426, 520 S.E.2d at 182.

118. *Id.*

119. *Id.* at 427, 520 S.E.2d at 182.

120. *Id.* at 429, 520 S.E.2d at 183.

121. *Id.* at 428-29, 520 S.E.2d at 183.

122. 258 Va. 558, 522 S.E.2d 876 (1999).

123. *Id.* at 560-61, 522 S.E.2d at 877-78.

124. *Id.* at 562, 522 S.E.2d at 878.

125. VA. CODE ANN. § 15.2-2232 (Cum. Supp. 2000).

126. *Washington, D.C. SMSA L.P.*, 258 Va. at 566, 522 S.E.2d at 881.

state-owned land was irrelevant under section 15.2-2232.¹²⁷

By contrast, in *Board of Supervisors v. Countryside Investment Co.*,¹²⁸ the court held that provisions of the Augusta County Subdivision Ordinance which asserted authority to specify the sizes and shapes of lots and to prohibit subdivisions that did not maintain a rural environment violated the Dillon Rule.¹²⁹ The court held that neither section 15.2-2241, which prescribes the mandatory provisions that must be included in a subdivision ordinance,¹³⁰ nor section 15.2-2242, which prescribes optional provisions that may be included in a subdivision ordinance,¹³¹ authorized the provisions adopted by Augusta County.¹³²

2. Vested Rights

In *Board of Zoning Appeals v. CaseLin Systems Inc.*,¹³³ the Supreme Court of Virginia further clarified its decisions concerning when a property owner acquires a vested right in a land use classification. The property owner in *CaseLin* proposed a plan to the Bland County Board of Supervisors to build a medical waste incinerator on property zoned for agricultural use.¹³⁴ CaseLin received extensive support from the Board, including letters, certification to state officials that the facility would comply with all local ordinances, and a deed from the County which expressly and "irrevocably" acknowledged and confirmed CaseLin's right to use the land as a medical waste incinerator facility.¹³⁵ Armed with these assurances, CaseLin incurred significant expenses while beginning construction.¹³⁶ However, when public opposition to the project subsequently arose, the Board rescinded its support.¹³⁷

The supreme court had to interpret its previous opinion in

127. *Id.* at 564-65, 522 S.E.2d at 880.

128. 258 Va. 497, 522 S.E.2d 610 (1999).

129. *Id.* at 504-05, 522 S.E.2d at 613-14.

130. VA. CODE ANN. § 15.2-2241 (Repl. Vol. 1997).

131. *Id.* § 15.2-2242 (Repl. Vol. 1997).

132. *Countryside Inv. Co.*, 258 Va. at 504, 522 S.E.2d at 613.

133. 256 Va. 206, 501 S.E.2d 397 (1998).

134. *Id.* at 208, 501 S.E.2d at 399.

135. *Id.* at 208-09, 501 S.E.2d at 399.

136. *Id.* at 209, 501 S.E.2d at 399.

137. *Id.*

Snow v. Board of Zoning Appeals,¹³⁸ which held that a landowner who claims a vested right in a land use classification must, among other things, “identify a significant official governmental act that is manifested by 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.”¹³⁹ In *CaseLin*, the court held that “other approval” refers to an act of the same character and formality as a permit.¹⁴⁰ The prior actions of the Board were not as formal as a permit but rather “were simply statements of the Board’s general support of the plan, not a specific authorization of the project.”¹⁴¹ Thus, *CaseLin* had no vested right to construct and operate the incinerator.¹⁴²

3. Variances

In *Tolman v. Board of Zoning Appeals*,¹⁴³ a commercial property owner that, after a fire, attempted to rebuild a three-story apartment building in a residential area zoned for single and double family homes encountered opposition from neighbors.¹⁴⁴ Before the fire, the apartment building was authorized to include three apartments as a lawful nonconforming use but had, in fact, included seven apartments.¹⁴⁵ To complete reconstruction, the owner obtained a variance that allowed the owner to continue to have seven apartments.¹⁴⁶ The Richmond Circuit Court rejected the neighbors’ challenge, noting that the variance allowed only an increase in the number of dwellings and not a change in use.¹⁴⁷

4. Cash Proffers

In *Gregory v. Board of Supervisors*,¹⁴⁸ the Supreme Court of

138. 248 Va. 404, 448 S.E.2d 606 (1994).

139. *Id.* at 407, 448 S.E.2d at 608.

140. *CaseLin*, 256 Va. at 212, 501 S.E.2d at 401.

141. *Id.*

142. *See id.* at 213, 501 S.E.2d at 402.

143. 46 Va. Cir. 359 (Cir. Ct. 1998) (Richmond City).

144. *Id.* at 360.

145. *Id.* at 359-60.

146. *Id.* at 360.

147. *Id.* at 361.

148. 257 Va. 530, 514 S.E.2d 350 (1999).

Virginia rejected a challenge to a denial of an application for rezoning where the applicant submitted cash proffers that were substantially lower than those recommended by Chesterfield County.¹⁴⁹ In a previous decision, the court upheld a similar challenge in which the denial was based solely on the failure to make requested cash proffers.¹⁵⁰ In *Gregory*, the court rejected the challenge because Chesterfield County showed that its denial of the application was based on health, safety and welfare concerns, and not on the amount of the proffers.¹⁵¹

E. *Exercise of Eminent Domain Power by Public Utility*

In *VYVX, Inc. v. Cassell*,¹⁵² a public utility attempted to exercise eminent domain to acquire easements.¹⁵³ The State Corporation Commission ("SCC") ordered VYVX to cease all eminent domain activity until it obtained a certificate of public convenience and necessity.¹⁵⁴ The SCC subsequently denied the application and imposed a fine.¹⁵⁵ On appeal, the Supreme Court of Virginia held that Virginia Code section 56-35,¹⁵⁶ which generally empowers the SCC to supervise, regulate and control public service utilities, authorized the SCC to determine whether VYVX was properly exercising eminent domain power.¹⁵⁷ The court also held that VYVX's exercise of the power of eminent domain violated Virginia Code section 56-49(2),¹⁵⁸ which requires a public service corporation that has not been allotted territory by the SCC to obtain all required certificates of public convenience and necessity before it exercises eminent domain power for electric lines, facilities, works or purposes.¹⁵⁹ The court rejected VYVX's reliance on *Peck*

149. *Id.* at 539, 514 S.E.2d at 355.

150. *Bd. of Supervisors v. Reed's Landing Corp.*, 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995) (holding that "the proffer constituted a condition precedent and was not voluntary within the meaning of the statute").

151. *Gregory*, 257 Va. at 537-38, 514 S.E.2d at 354.

152. 258 Va. 276, 519 S.E.2d 124 (1999).

153. *Id.* at 284-85, 519 S.E.2d at 126-27.

154. *Id.* at 284-85, 519 S.E.2d at 127-28.

155. *Id.* at 285-86, 519 S.E.2d at 127-28.

156. VA. CODE ANN. § 56-35 (Repl. Vol. 1995).

157. *Cassell*, 258 Va. at 290-91, 519 S.E.2d at 131.

158. *Id.* at 292, 519 S.E.2d at 131-32.

159. VA. CODE ANN. § 56-49(2) (Cum. Supp. 2000). For a description of a recent amendment to this code provision, see *infra* notes 290-91 and accompanying text.

Iron & Metal Co. v. Colonial Pipeline Co.,¹⁶⁰ which held that a public service corporation need not obtain a certificate of public convenience and necessity before exercising eminent domain.¹⁶¹ The supreme court distinguished *Peck Iron* on the grounds that VYVX was a public utility, not a public service corporation, and thus was subject to Virginia Code section 56-265.2.¹⁶²

F. Leaseholds

1. Liabilities of Assignees

In *Pollard & Bagby, Inc. v. Pierce Arrow, L.L.C.*,¹⁶³ the Supreme Court of Virginia considered whether a landlord's assignee assumed the responsibility for paying commissions to a leasing agent.¹⁶⁴ The assignee paid commissions through the end of existing lease terms but refused to pay further commissions after it renewed leases with tenants whom the agent had procured for the prior owner.¹⁶⁵ The new owner argued that it was liable only for obligations it expressly assumed in its purchase agreement.¹⁶⁶ The court rejected this argument and held that the assignee stepped into the prior owner's shoes and was bound by the contract between the original owner and the agent.¹⁶⁷

2. Landlord's Common Law Duty to Maintain Premises

In *Wohlford v. Quesenberry*,¹⁶⁸ the Supreme Court of Virginia

160. 206 Va. 711, 146 S.E.2d 169 (1966).

161. *Id.* at 717-18, 146 S.E.2d at 173.

162. *Cassell*, 258 Va. at 293, 519 S.E.2d at 132. Virginia Code section 56-265.2 states:

It shall be unlawful for any public utility to construct, enlarge or acquire, by lease or otherwise, any facilities for use in public utility service, except ordinary extensions or improvements in the usual course of business, without first having obtained a certificate from the Commission that the public convenience and necessity require the exercise of such right or privilege. Any certificate required by this section shall be issued by the Commission only after opportunity for a hearing and after due notice to interested parties.

VA. CODE ANN. § 56-265.2 (Cum. Supp. 2000).

163. 258 Va. 524, 521 S.E.2d 761 (1999).

164. *Id.* at 526, 521 S.E.2d at 761.

165. *Id.* at 526, 521 S.E.2d at 762.

166. *Id.* at 527, 521 S.E.2d at 762.

167. *Id.* at 529, 521 S.E.2d at 763-64.

168. 259 Va. 259, 523 S.E.2d 821 (2000).

held that the Uniform Statewide Building Code ("BOCA")¹⁶⁹ did not modify the common law rule that a tenant who has exclusive possession and control of a premises is responsible for maintenance and repair.¹⁷⁰ The court held that the term "owner" in BOCA included a tenant who controlled the leased premises.¹⁷¹ Because the tenant was obligated to maintain and repair the premises, the landlord was not liable for the tenant's damaged personal property or personal injuries caused by alleged defects in the premises.¹⁷²

3. Virginia Fair Housing Law/ Sexual Harrassment

In *Allen v. Seventy-Seven Acres*,¹⁷³ a case of first impression, the Rockingham County Circuit Court held that a landlord's sexual harassment of a tenant violated section 36-96.3 of the Virginia Fair Housing Law.¹⁷⁴ The managing partner of the complex requested sexual favors in exchange for favorable lease terms.¹⁷⁵ The circuit court held that sexual quid pro quo requests constitute sexual discrimination.¹⁷⁶ Although the Fair Housing Law does not expressly refer to such behavior, the circuit court broadly construed the Act's policy and the phrase "sexual discrimina-

169. VA. CODE ANN. § 36.97 (Cum. Supp. 2000).

170. *Wohlford*, 259 Va. at 262, 523 S.E.2d at 822; see also *Willis v. Wrenn's Ex'x*, 141 Va. 385, 389, 127 S.E. 312, 313 (1925). In *Willis*, the court held:

It is the well-settled common-law rule that a tenant's general covenant to repair the demised premises binds him under all circumstances, even though the injury proceeds from an act of God, from the elements, or from the act of a stranger, and, if he desires to relieve himself from liability for injuries resulting from any of the causes above enumerated, or from any other cause whatever, he must take care to except them from the operations of his covenant.

Willis, 141 Va. at 389, 127 S.E. at 313 (quoting 16 R.C.L. § 605, at 1088 (1929)).

171. *Wohlford*, 259 Va. at 262, 523 S.E.2d at 822. Virginia Code section 36-97 provides: "As used in this chapter, unless the context or subject matter requires otherwise, the following words or terms shall have the meaning herein ascribed to them, respectively: . . . 'Owner' means . . . lessee in control of a building or structure." VA. CODE ANN. § 36-97 (Cum. Supp. 2000).

172. *Wohlford*, 259 Va. at 262, 523 S.E.2d at 822.

173. 48 Va. Cir. 318 (Cir. Ct. 1999) (Rockingham County).

174. *Id.* at 325. Section 36-96.3 of the Virginia Fair Housing Law makes it an unlawful discriminatory housing practice to represent that housing is unavailable to purchase, rent, or inspect because of sex. VA. CODE ANN. § 36-96.3 (Repl. Vol. 1996).

175. *Seventy-Seven Acres*, 48 Va. Cir. at 318.

176. *Id.* at 325.

tion.”¹⁷⁷ The court was not persuaded by a decision of the Martinsville City Circuit Court which held that sexual harassment does not constitute sexual discrimination under Virginia employment law.¹⁷⁸

4. Tenant Right of Action Under the VRLTA

In *Thompson v. Springer Manor Apartments*,¹⁷⁹ the Richmond City Circuit Court held that the Virginia Residential Landlord and Tenant Act¹⁸⁰ provides tenants a private right of action for any breach by a landlord of any duty imposed by the Act.¹⁸¹ The court based its decision on Virginia Code section 8.01-221, which provides that “[a]ny person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation”¹⁸²

5. Landlord’s Recovery of Fees and Costs

In *Plantation House, L.P. v. Anderson & Strudwick, Inc.*,¹⁸³ the Richmond City Circuit Court held that a landlord was entitled, pursuant to a cost of collection provision in a commercial lease, to recover attorney’s fees and costs incurred in defending against a counterclaim for breach of contract and constructive eviction.¹⁸⁴ The court held that the provision entitled the landlord to recover because the landlord’s defense of the counterclaim was necessary to prevail on his primary claim for rent.¹⁸⁵

G. Premises Liability

In *Amos v. NationsBank*,¹⁸⁶ the plaintiff, while on the bank’s

177. *Id.* at 324.

178. *Stallings v. Leeds, Inc.*, 37 Va. Cir. 469 (Cir. Ct. 1996) (Martinsville City).

179. 46 Va. Cir. 408 (Cir. Ct. 1998) (Richmond City).

180. VA. CODE ANN. § 55-248.2 to -.40 (Repl. Vol. 1995).

181. *Thompson*, 46 Va. Cir. at 408.

182. VA. CODE ANN. § 8.01-221 (Repl. Vol. 2000).

183. 45 Va. Cir. 556 (Cir. Ct. 1998) (Richmond City).

184. *Id.* at 557-58.

185. *Id.* at 558.

186. 256 Va. 344, 504 S.E.2d 365 (1998).

premises, slipped on ice from an ongoing ice storm.¹⁸⁷ The supreme court held that, although the bank had a duty to exercise ordinary care to maintain safe premises, it was not liable because it had no duty to remove the ice until the storm ceased and a reasonable time passed.¹⁸⁸

In *Wood v. Woolfolk Properties, Inc.*,¹⁸⁹ the plaintiff tripped over a curb while visiting a steak house in a shopping center.¹⁹⁰ The CEO of the property management firm had previously recommended that the same curb be painted white for safety reasons.¹⁹¹ The defendants persuaded the trial court to allow rebuttal testimony that there were no prior accidents at the curb.¹⁹² On appeal, the plaintiff argued that the trial court erred in admitting the testimony.¹⁹³ The defendants argued that this rebuttal evidence was admissible under *Sykes v. Norfolk and Western Railway Co.*¹⁹⁴ In *Sykes*, the Supreme Court of Virginia held that evidence pertaining to prior accidents at a railway crossing was admissible to rebut the inference that the railway company's failure to install recommended safety devices at the crossing constituted negligence.¹⁹⁵ Employing reasoning that is somewhat difficult to follow, the Supreme Court of Virginia held that the *Sykes* exception was inapplicable and that the evidence of no prior accidents at the site was improperly admitted.¹⁹⁶ The court distinguished *Sykes* by suggesting that the testimony in *Wood* was relevant only to the issue of notice of the unsafe condition and not to rebut the inference of negligence.¹⁹⁷ Justice Compton, dissenting from this portion of the opinion, argued that *Sykes* controlled.¹⁹⁸

In *Virginia Electric and Power Co. v. Dungee*,¹⁹⁹ the Supreme Court of Virginia upheld a \$20,000,000 jury award against Virginia Power in favor of a ten-year-old child who was severely

187. *Id.* at 346, 504 S.E.2d at 366.

188. *Id.* at 349, 504 S.E.2d at 368.

189. 258 Va. 133, 515 S.E.2d 304 (1999).

190. *Id.* at 135, 515 S.E.2d at 305.

191. *Id.* at 135-36, 515 S.E.2d at 305.

192. *Id.* at 136, 515 S.E.2d at 305.

193. *Id.* at 136, 515 S.E.2d at 305-06.

194. 200 Va. 559, 106 S.E.2d 746 (1959).

195. *Id.* at 565, 106 S.E.2d at 751.

196. *Wood*, 258 Va. at 139, 515 S.E.2d at 307.

197. *Id.* at 138, 515 S.E.2d at 307.

198. *Id.* at 139, 515 S.E.2d at 307 (Compton, J., dissenting in part).

199. 258 Va. 235, 520 S.E.2d 164 (1999).

burned while trespassing on Virginia Power's electric substation.²⁰⁰ The court upheld the trial court's jury instruction that Virginia Power "was required to 'use a high degree of care commensurate with the danger involved to prevent injury to others.'"²⁰¹ The court followed its previous decision in *Daugherty v. Hippchen*,²⁰² which held that the owner of a dangerous instrumentality who knows or should know that children might play in the area of the instrumentality has a duty to use a high degree of care to protect even trespassing children.²⁰³

H. Nuisance

In *Breeding v. Hensley*,²⁰⁴ the Supreme Court of Virginia held that Virginia Code section 8.01-222,²⁰⁵ which requires a plaintiff bringing a negligence action against a municipality to give written notice of the claim within six months after the cause of action accrues, applied to a public nuisance action.²⁰⁶ Although nuisance and negligence are distinct concepts, the court held that the notice provision in Virginia Code section 8.01-222 applied because negligence is an essential element of a nuisance action.²⁰⁷

I. Mechanics' Liens

In *Carolina Builders Corp. v. Cenit Equity Co.*,²⁰⁸ the Supreme Court of Virginia invalidated a mechanic's lien because some of the materials listed in the lien memorandum were furnished beyond the 150-day "look back" period provided by Virginia Code section 43-4.²⁰⁹ The builder, Carolina Builders, filed a memorandum of mechanic's lien against real estate in York County for the amount owed for materials that Carolina provided for the con-

200. *Id.* at 241-42, 520 S.E.2d at 168-69.

201. *Id.* at 256-57, 520 S.E.2d at 176.

202. 175 Va. 62, 7 S.E.2d 119 (1940).

203. *Dungee*, 258 Va. at 256, 520 S.E.2d at 176.

204. 258 Va. 207, 519 S.E.2d 369 (1999).

205. VA. CODE ANN. § 8.01-222 (Repl. Vol. 2000).

206. *Breeding*, 258 Va. at 214-15, 519 S.E.2d at 372-73.

207. *Id.* at 215, 519 S.E.2d at 373.

208. 257 Va. 405, 512 S.E.2d 550 (1999).

209. *Id.* at 409-10, 512 S.E.2d at 552-53; VA. CODE ANN. § 43-4 (Repl. Vol. 1999).

struction of a house on the property.²¹⁰ Although the memorandum indicated that the lien covered amounts within a 150-day period, Carolina continued to provide material for longer than 150 days.²¹¹ The court held that Virginia Code section 43-4 clearly provides that no lien can secure any amount owed beyond 150 days from the last day that materials were furnished, rather than from the last date listed on the lien.²¹² The court further held that the entire lien was unenforceable because the 150-day limitation is a prerequisite to perfection of the lien.²¹³

In *Davenport Insulation, Inc., v. Aliff*,²¹⁴ the Harrisonburg City Circuit Court, relying in part on *Carolina Builders*, held that Virginia Code section 43-4 requires that the lien memorandum properly record the names of the parties as a prerequisite to perfection.²¹⁵ Because the memorandum referred to a Virginia corporation that was not the party in interest, the plaintiff's lien was unperfected.²¹⁶

In *York Federal Savings & Loan Ass'n v. William A. Hazel, Inc.*,²¹⁷ a subcontractor suing to enforce a mechanic's lien that was bonded off pursuant to Virginia Code section 43-70²¹⁸ argued that it had no duty to prove the relative priority of the lien because the holders of the deed of trust stipulated to the lien's enforceability.²¹⁹ Rejecting this argument, the Supreme Court of Virginia noted that the holder of the deed of trust did not stipulate to the subcontractor's right to collect from the real estate and that the

210. *Carolina Builders Corp.*, 257 Va. at 407-08, 512 S.E.2d at 550-51.

211. *Id.*

212. *Id.* at 409-10, 512 S.E.2d at 552.

213. *Id.* at 411, 512 S.E.2d at 553.

214. No. 16918, 1999 WL 1114672 (Va. Cir. Ct. Oct. 12, 1999) (Harrisonburg City).

215. *Id.* at *2.

216. *Id.* at *3.

217. 256 Va. 598, 506 S.E.2d 315 (1998).

218. VA. CODE ANN. § 43.70 (Repl. Vol. 1999).

219. *York Fed. Sav.*, 256 Va. at 599-600, 506 S.E.2d at 316. Virginia Code section 43-70 provides:

In any suit brought [to enforce a mechanic's lien], the owner of the building and premises to which the lien, or liens, sought to be enforced shall have attached, the general contractor for such building or other parties in interest may . . . apply to the court in which such suit shall be pending . . . for permission to . . . file a bond . . . conditioned for the payment of such judgment adjudicating the lien or liens to be valid and determining the amount for which the same would have been enforceable against the real estate as may be rendered by the court upon the hearing of the case on its merits

VA. CODE ANN. § 43-70 (Repl. Vol. 1999).

holder consistently took the position that the subcontractor's recovery was precluded by the priority of the holder's lien.²²⁰

J. Real Estate Taxes

In *City of Richmond v. Virginia United Methodist Homes Inc.*,²²¹ the Supreme Court of Virginia held that a group home for the aging had to pay real estate taxes because it did not qualify for Virginia Code section 58.1-3606(A)(5)'s²²² exemption for asylums.²²³ The Virginia Constitution requires that tax exemptions be strictly construed.²²⁴ Although the home was once tax-exempt, the court held that it no longer qualified as an asylum because it only generally catered to the aged and not specifically to the infirm or destitute.²²⁵

In *Tidewater Psychiatric Institute, Inc. v. City of Virginia Beach*,²²⁶ the Supreme Court of Virginia rejected a challenge to the City of Virginia Beach's use of the depreciated reproduction cost method in assessing real estate taxes.²²⁷ The court held that the city's use of this method was presumptively valid because the city had properly considered and rejected other methods of calculation.²²⁸ By contrast, the Fairfax County Circuit Court recently upheld a challenge to the use of this same method where the taxpayer showed that the County ignored other more taxpayer-friendly, viable assessment methods.²²⁹

K. Condominiums/Utility Taxes

In *Board of Directors of the Tuckahoe Ass'n, Inc. v. City of*

220. *York Fed. Sav.*, 256 Va. at 601-02, 506 S.E.2d at 317.

221. 257 Va. 146, 509 S.E.2d 504 (1999).

222. VA. CODE ANN. § 58.1-3606(A)(5) (Repl. Vol. 1997). Section 58.1-3606(A)(5) provides an exemption for "[p]roperty belonging to and actually and exclusively occupied and used by the Young Men's Christian Associations and similar religious associations, including religious mission boards and associations, orphan or other asylums, reformatories, hospitals and nunneries, conducted not for profit but exclusively as charities." *Id.*

223. *Va. United Methodist Homes, Inc.*, 257 Va. at 159, 509 S.E.2d at 509-10.

224. VA. CONST. art. X, § 6(f).

225. *Va. United Methodist Homes Inc.*, 257 Va. at 158-59, 509 S.E.2d at 509.

226. 256 Va. 136, 501 S.E.2d 761 (1998).

227. *Id.* at 142-43, 501 S.E.2d at 765.

228. *Id.* at 142, 501 S.E.2d at 764-65.

229. *HCA Health Servs. of Va., Inc. v. Bd. of Supervisors*, No. 157943, 1999 WL 795664 (Va. Cir. Ct. June 29, 1999) (Fairfax County) (unpublished decision).

Richmond,²³⁰ a condominium association purchased electricity and natural gas at commercial rates and distributed the services to individual condominium owners.²³¹ When the City of Richmond imposed higher tax rates on commercial utility users, the association argued that it should only be required to pay the residential rate because the utilities were distributed to individual condominium owners.²³² The Supreme Court of Virginia upheld the city's tax classifications because the association was not a "residential customer" of the utility providers" since "it d[id] not purchase residential service from those providers" and because the classifications were not unreasonable or arbitrary.²³³

III. LEGISLATION²³⁴

A. *Virginia Residential Landlord and Tenant Act*

1. General Provisions

In 2000, the Virginia General Assembly enacted numerous revisions to the Virginia Residential Landlord and Tenant Act ("VRLTA").²³⁵ The amendments range from relatively minor word changes to fairly extensive restructuring of existing provisions. For example, the General Assembly changed "lease" to "rental agreement" and "apartment" to "dwelling unit."²³⁶ The General Assembly also relocated provisions governing security deposits, notice of pesticide use, abuse of access, and conditions for relief, orders and proceedings of court regarding a tenant's assertions of a landlord's noncompliance with a lease or the law.²³⁷

The General Assembly also enacted several important substantive amendments. The VRLTA now proscribes unilateral changes by either party to a rental agreement without notice and written

230. 257 Va. 110, 510 S.E.2d 238 (1999).

231. *Id.* at 113, 510 S.E.2d at 239.

232. *Id.* at 114, 510 S.E.2d at 239-40.

233. *Id.* at 117, 510 S.E.2d at 242-43.

234. To view summaries of all legislative changes to Virginia property law, see *Legislative Information System* at <http://leg1.state.va.us> (last visited July 26, 2000).

235. VA. CODE ANN. §§ 55-248.2 to .40 (Cum. Supp. 2000).

236. *Id.*

237. *Id.*

consent.²³⁸ Landlords must, with limited exceptions, maintain the confidentiality of all, not just financial, records regarding the tenant that are not explicitly subject to disclosure.²³⁹ Under Virginia Code section 55-248.17, any regulation the landlord changes or provides to the tenant after the tenant enters into the rental agreement is enforceable provided reasonable notice is given and the provision either does not substantially modify the agreement or the tenant consents to it.²⁴⁰ Finally, the security deposit provision, which was moved from Virginia Code section 55-248.11 to section 55-248.15:1, provides that if damage to the premises exceeds the amount of the security deposit and requires the work of a third party, the landlord must give the tenant notice of that fact within thirty days.²⁴¹ If such notice is given, the landlord has an additional fifteen days to itemize the damages and costs of repair.²⁴²

2. Barring Disruptive Guests or Invitees

In 1999, the Assembly amended Virginia Code section 55-248.4 to define "guest or invitee of a tenant" as "a person, other than the tenant or person authorized by the landlord to occupy the premises, who has the permission of the tenant to visit but not occupy the premises."²⁴³ Virginia Code section 55-248.31:01 authorizes a landlord to bar guests and invitees from the premises by delivering a written notice to the invitee or guest if that person's conduct violates a term of the lease, a local ordinance, or a state or federal law.²⁴⁴ The notice must describe the conduct that prompts the landlord to act.²⁴⁵ If the landlord has personally served notice, he may also apply to a magistrate to obtain a warrant for trespass.²⁴⁶ "The tenant may file a tenant's assertion . . . requesting that the general district court review the landlord's action to bar the guest or invitee."²⁴⁷

238. *Id.* § 55-248.7(G) (Cum. Supp. 2000).

239. *Id.* § 55-248.9:1 (Cum. Supp. 2000).

240. *Id.* § 55-248.17(B) (Cum. Supp. 2000). This provision, formerly subsection (b), previously applied only to regulations that were adopted by the landlord after the tenant signed the rental agreement.

241. *Id.* §§ 55-248.11, -248.15:1(A) (Repl. Vol. 1995 & Cum. Supp. 2000).

242. *Id.* § 55-248.15:1(A) (Cum. Supp. 2000).

243. *Id.* § 55-248.4 (Cum. Supp. 2000).

244. *Id.* § 55-248.31:01(A) (Cum. Supp. 2000).

245. *Id.*

246. *Id.* § 55-248.31:01(B) (Cum. Supp. 2000).

247. *Id.* § 55-248.31:01(C) (Cum. Supp. 2000).

3. Unlawful Detainer Actions

In 2000, the General Assembly amended the statute that governs summons for unlawful detainer.²⁴⁸ In all unlawful detainer actions, the time for serving the summons has been increased from five to ten days before the return date.²⁴⁹ If the summons is filed pursuant to the VRLTA to terminate a tenancy, the initial hearing must occur within twenty-one calendar days of the filing, subject to only two exceptions.²⁵⁰ If a judge is not available to hold court, the hearing must take place "as soon as practicable."²⁵¹ If the plaintiff requests that the hearing take place later, then the hearing must be set on a date that is available for both the plaintiff and the court.²⁵²

In 1999, the General Assembly amended Virginia Code section 55-248.25:1 to provide that a court shall, upon a landlord's request, require a tenant who seeks a continuance or to set a contested trial date in an unlawful detainer action to pay into a court escrow account the rent due as of the continuance or contested trial date.²⁵³ The court, however, does not have to require the rent to be escrowed if the tenant has pled a good faith defense or if the landlord requests a continuance or contested trial.²⁵⁴ The court has the discretion to grant the tenant an additional week to pay the rent into the court escrow account.²⁵⁵ If the tenant fails to make required payments into the court escrow account, the court shall, upon the landlord's request, enter judgment for the landlord, including an order of possession.²⁵⁶ Also, upon the landlord's motion, "the court may disburse [the escrow funds] to the landlord for payment of the mortgage or other expenses related to the dwelling unit."²⁵⁷

248. *Id.* § 8.01-126 (Repl. Vol. 2000).

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* § 55-248.25:1(A), (B) (Cum. Supp. 1999).

254. *Id.* § 55-248.25:1(A) (Cum. Supp. 1999).

255. *Id.* § 55-248.25:1(B) (Cum. Supp. 1999).

256. *Id.* § 55-248.25:1(B), (C) (Cum. Supp. 1999).

257. *Id.* § 55-248.25:1(D) (Cum. Supp. 1999).

B. *Virginia Fair Housing Law*

In 2000, the General Assembly amended Virginia Code section 36-96.7 of the Virginia Fair Housing Law²⁵⁸ to conform to the federal Fair Housing Law provision governing housing for older persons.²⁵⁹ The General Assembly repealed the requirement that, to qualify as housing for older persons, the property must have significant facilities and services specifically designed for older persons or provide important housing opportunities for older persons.²⁶⁰ The General Assembly also reduced the occupied unit requirement from eighty percent of *all* units being occupied by persons fifty-five years or older to eighty percent of *all occupied* units being occupied by persons of that age group.²⁶¹

C. *Liability for Lead Poisoning in a Residential Dwelling*

During its 2000 session, the General Assembly enacted a new law that, under certain circumstances, provides immunity to owners and selling, leasing, or maintenance agents from civil liability for lead poisoning in a residential dwelling.²⁶² The owner or agent must comply with the federal Lead-based Paint Poisoning Prevention Act²⁶³ and, before the signing of the contract or lease, provide the purchaser or lessee with specified literature and notice of any known lead hazards.²⁶⁴ The purchaser or tenant must acknowledge receipt of this information in writing.²⁶⁵ If the agent is a public housing authority, it must also comply with all applicable federal laws and regulations.²⁶⁶ Additionally, to avoid liability for lead-based paint hazards, an owner or maintenance agent must maintain the property in a fit and habitable condition and in compliance with all applicable laws and regulations.²⁶⁷

258. *Id.* § 36-96.7 (Cum. Supp. 2000).

259. 42 U.S.C. § 3607(b) (1994).

260. VA. CODE ANN. § 36-96.7(A)(1) (Cum. Supp. 2000).

261. *Id.* § 36-96.7(A)(2) (Cum. Supp. 2000).

262. *Id.* § 8.01-226.7 (Repl. Vol. 2000).

263. 42 U.S.C. §§ 4821-4846 (1994).

264. VA. CODE ANN. § 8.01-226.7 (Repl. Vol. 2000).

265. *Id.*

266. *Id.* § 8.01-226.7(B)(4) (Repl. Vol. 2000).

267. *Id.* § 8.01-226.7(C)(4) (Repl. Vol. 2000).

D. *Uniform Statutory Rule Against Perpetuities*

In 2000, the General Assembly enacted a statutory rule against perpetuities that is uniform with the rule adopted in most other states.²⁶⁸ While retaining the rule requiring a property interest to vest within twenty-one years of a life in being, the law now also provides that any interest that might fail under the existing rule has ninety years to vest.²⁶⁹ If the interest does not vest after ninety years, a court may reform it to create a valid interest that implements the transferor's original intent.²⁷⁰

E. *Condominium Act*

In 1999, the General Assembly adopted several amendments to the Condominium Act.²⁷¹ An individual unit owner who desires to sell a condominium unit must disclose in the sales contract that:

(i) the unit is located in a development which is subject to the Condominium Act; (ii) the Act requires the seller to obtain from the unit owners' association a resale certificate and provide it to the purchaser; (iii) the purchaser may cancel the contract within three days after receiving the resale certificate; and (iv) the right to receive the resale certificate and the right to cancel the contract are waived conclusively if not exercised before settlement.²⁷²

If the seller does not disclose these items, the prospective purchaser's exclusive remedy is to cancel the contract before settlement.²⁷³ Virginia Code section 55-79.97 further provides:

The information contained in the resale certificate shall be current as of a specified date within thirty days of the date of the contract. The purchaser may cancel the contract (i) within three days after the date of the contract, if the purchaser receives the resale certificate on or before the date that the prospective purchaser signs the contract; (ii) within three days after receiving the resale certificate if the resale certificate is hand delivered; or (iii) within six days after the postmark date if the resale certificate is sent to the purchaser by United States mail. Notice of cancellation must be hand-delivered or

268. *Id.* §§ 55-12.1 to -12.6 (Cum. Supp. 2000).

269. *Id.* § 55-12.1(A) (Cum. Supp. 2000).

270. *Id.* § 55-12.3 (Cum. Supp. 2000).

271. *Id.* § 55-79.97 (Cum. Supp. 1999).

272. *Id.* § 55-79.97(A) (Cum. Supp. 1999).

273. *Id.* § 55-79.97(B) (Cum. Supp. 1999).

sent by United States mail, return receipt requested, to the unit owner selling the unit. Such a cancellation shall be without penalty, and the unit owner shall cause any deposit to be returned promptly to the purchaser.²⁷⁴

F. *Eminent Domain*

1. General Provisions

During its 2000 session, the General Assembly enacted two laws that affect all exercises of eminent domain power. The first involves fairly detailed amendments to the general eminent domain provisions of the Code.²⁷⁵ The condemnor must conduct a title search before making a purchase offer or filing a certificate to take and must provide a copy of its appraisal with the offer of purchase.²⁷⁶ Property owners may elect to have either a panel of commissioners or a jury determine the amount of just compensation.²⁷⁷ If the owner does not make this election, the petitioner may do so.²⁷⁸ The General Assembly increased the limit on compensation for a survey that the condemnee conducted from \$100 to \$1,000.²⁷⁹ Finally, any tenant for a term of twelve months or longer may intervene in an eminent domain proceeding that affects the leased premises.²⁸⁰

The Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1972 now applies to all condemnation acts of state agencies that cause displacement.²⁸¹ The Assembly removed

274. *Id.* § 55-79.97(C) (Cum. Supp. 1999).

275. *Id.* § 25-46.5 (Repl. Vol. 2000). For a comprehensive review of all changes see *Legislative Information System* at <http://leg1.state.va.us> (last visited July 26, 2000).

276. VA. CODE ANN. § 25-46.5(B), (C) (Repl. Vol. 2000).

277. *Id.* § 25-46.5 (Repl. Vol. 2000).

278. *Id.* § 25-46.9 (Repl. Vol. 2000). The extensive provisions regarding proceedings by jury can be found in Virginia Code section 25-46.20(B). *Id.* § 25-46.20(B) (Repl. Vol. 2000).

279. *Id.* § 25-46.32 (Repl. Vol. 2000).

280. *Id.* § 25-46.21:1 (Repl. Vol. 2000).

281. *Id.* § 25-236 (Repl. Vol. 2000). The statute applies to acts of condemnation committed by a state agency, which is defined as any

(i) department, agency or instrumentality of the Commonwealth; (ii) public authority, municipal corporation, local governmental unit or political subdivision of the Commonwealth or any department, agency or instrumentality thereof; (iii) person who has the authority to acquire property by eminent domain under state law; or (iv) two or more of the aforementioned, which carries out projects that cause people to be displaced.

Id. § 25-238(4) (Repl. Vol. 2000).

the former restriction that limited the Act's application to projects or programs in which federal or state funds are used.²⁸² The Assembly added a new provision that eliminates the requirement for an appraisal if, based on assessment records or other objective evidence, the property is valued at less than \$10,000.²⁸³

2. Transportation Commissioner

Virginia Code section 33.1-89 provides eminent domain power to the Commonwealth Transportation Commissioner to acquire interests in municipal property for specific purposes.²⁸⁴ Under the previous version of the law, whenever the Commissioner acquired property at the request of a municipality, the Commissioner could convey title to the municipality only according to the terms of any agreement between the Commonwealth and the municipality. In 1999, the General Assembly amended Virginia Code section 33.1-89 to require that the Commissioner convey title to the municipality in these cases, subject to limited exceptions.²⁸⁵

In 2000, the General Assembly also added a new provision that requires the Transportation Commissioner to notify the owner of a building, structure or improvement if the Commissioner intends to condemn the property in a manner resulting in a taking.²⁸⁶ The law permits the owner to present evidence of fair market value in the valuation proceeding.²⁸⁷ The Transportation Commissioner also may not exercise eminent domain power to acquire any portion of an existing commercial establishment if the acquisition is done to control or limit access to such establishments within 300 feet of an interstate highway.²⁸⁸ Under this same law, interstate exchanges are designated "urban" if the value of the land, buildings and improvements has a fair market value of at least one million dollars.²⁸⁹

282. *Id.* § 25-236(A) (Repl. Vol. 2000).

283. *Id.* § 25-248 (Repl. Vol. 2000).

284. *Id.* § 33.1-89 (Cum. Supp. 2000).

285. *Id.* (Cum. Supp. 1999).

286. *Id.* § 33.1-95.1(1) (Cum. Supp. 2000).

287. *Id.* § 33.1-95.1(2) (Cum. Supp. 2000).

288. S.B. 110, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 4, 2000, ch. 370, 2000 Va. Acts 517) (to be codified at VA. CODE ANN. § 33.1-1-49). This law goes into effect on July 1, 2001 unless the federal government notifies the Department of Transportation that the law will reduce or jeopardize federal funding. *Id.*

289. *Id.*

3. Public Corporations

The General Assembly amended Virginia Code section 56-49 to clarify that a public corporation that has not received a certificate to provide utility service may not exercise eminent domain power until it has obtained a certificate of public convenience and necessity.²⁹⁰ Virginia Code section 56-49 previously imposed this requirement only on public service corporations to which the State Corporation Commission had not allotted territory for public utility service.²⁹¹

G. Zoning

In 1999, the General Assembly amended Virginia Code section 15.2-2288.1 to prohibit municipalities from requiring residential developers to obtain, “as a condition of approval of a subdivision plat, site plan, or plan of development, or issuance of a building permit,” a special exception, special use or conditional use permit at the use, height and density permitted by right under the local zoning ordinance.²⁹² The statute provides exceptions for a cluster or town center, areas designated for steep slope mountain development, utility facilities, and numerous nonresidential uses.²⁹³

H. Real Estate Taxes

In 1999, the General Assembly amended Virginia Code section 58.1-3916 to replace section 58.1-3991.²⁹⁴ Under Virginia Code section 58.1-3991, a locality had discretion to determine the rate of interest to be paid on refunds of erroneously assessed taxes.²⁹⁵ Section 58.1-3916 now requires a locality to pay the same interest on erroneously assessed taxes that it charges for delinquent tax payments, even if the locality has not conformed its ordinance to this new standard.²⁹⁶

290. VA. CODE ANN. § 56-49 (Cum. Supp. 1999).

291. *Id.* § 56-49 (Repl. Vol. 1995).

292. *Id.* § 15.2-2288.1 (Cum. Supp. 1999).

293. *Id.*

294. *Id.* § 58.1-3991 (Repl. Vol. 1997); *id.* § 58.1-3916 (Cum. Supp. 2000).

295. *Id.* § 58.1-3991 (Repl. Vol. 1997).

296. *Id.* § 58.1-3916 (Cum. Supp. 2000).

Taxpayers no longer need to petition a circuit court to obtain a correction of an erroneous assessment of real estate tax caused by a factual error. As amended, Virginia Code sections 58.1-3980 and 58.1-3981 require the Commissioner of Revenue, either on his own initiative or upon petition by a taxpayer, to correct an erroneous assessment that the Commissioner finds was caused by a factual error made by a municipal employee who was working on general reassessments.²⁹⁷

In 1999, the General Assembly amended Virginia Code section 58.1-3965 to provide that certain property with an assessed value of \$20,000 or less may be deemed abandoned and sold to pay delinquent taxes.²⁹⁸ Such property can be deemed abandoned and sold on December 31 following the seventh anniversary of the due date of the taxes.²⁹⁹ Alternatively, property at this value can be deemed abandoned and sold on December 31 following the third anniversary of the due date if the property is a declared, unabated nuisance and is subject to an unpaid lien for the cost of abatement.³⁰⁰ Cities have been given even more flexibility in dealing with delinquent taxpayers. Cities may adopt ordinances to sell real estate, with proper notice, when taxes on that property are delinquent on December 31 following the first anniversary of the due date of the taxes.³⁰¹ The General Assembly also authorized localities to adopt ordinances releasing liens for delinquent taxes, provided the purchaser is not related to and has no business association with the owner, the purchaser owes no delinquent real estate taxes, and the property is valued at less than \$50,000.³⁰²

The General Assembly amended Virginia Code section 58.1-3231 to allow localities to provide a special assessment and tax rate on a sliding scale for property held for longer time periods within the classes of real estate established in section 58.1-3230, which includes property for agricultural, horticultural, forest, and open-space uses.³⁰³ If a locality provides such a sliding scale, Virginia Code section 58.1-3234(3) requires the property owner and

297. *Id.* § 58.1-3980 to -3981 (Cum. Supp. 1999).

298. *Id.* § 58.1-3965(A) (Cum. Supp. 1999).

299. *Id.*

300. *Id.*

301. *Id.* § 58.1-3965.1 (Cum. Supp. 1999). Counties, towns, and cities that do not adopt such an ordinance may only take such action on December 31 of the second year following the due date of the delinquent taxes. *Id.* § 58.1-3965(A) (Repl. Vol. 2000).

302. *Id.* § 58.1-3228 (Cum. Supp. 1999).

303. *Id.* § 58.1-3230 to -3231 (Cum. Supp. 1999).

the locality to execute a written agreement establishing the time period that the property must remain within the applicable class of real estate.³⁰⁴ The General Assembly also amended Virginia Code section 58.1-3237 to authorize localities that adopt a sliding scale ordinance to impose rollback taxes³⁰⁵ at a specified rate.³⁰⁶

304. *Id.* § 58.1-3234(3) (Cum. Supp. 1999).

305. Rollback taxes are additional taxes imposed on real estate that is changed to a nonqualified or more intensive use. *Id.* § 58.1-3237(A) (Cum. Supp. 1999).

306. *Id.* § 58.1-3237(C) (Cum. Supp. 1999).
