Real Estate and Land Use Law

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I. INTRODUCTION

This article will consider recent cases decided by the Supreme Court of Virginia, as well as cases decided by federal courts applying Virginia law. It will also outline bills enacted by the 2004 General Assembly that will have an impact on real estate law.

II. RECENT CASE LAW

A. Condominiums/Property Owners’ Associations

In the case of *Dogwood Valley Citizens Ass’n, Inc. v. Winkelmann*, the Supreme Court of Virginia considered whether a non-stock Virginia corporation could be considered a property owners’ association within the meaning of the Property Owners’ Association Act (“POAA”). The Dogwood Valley Citizens Association (“DVCA”) received an assignment from the original developer of certain rights and remedies set forth in the original covenants recorded against the Dogwood Valley subdivision. The covenants afforded to the declarant and its successors the right to use, keep, and maintain all the roads and common facilities in the subdivision as well as the power to assess an annual fee for the use, upkeep, and maintenance of the roads and other common facilities in the subdivision as well as the power to assess an annual fee for
the use, upkeep, and maintenance of the roads and other common facilities. DVCA adopted a special assessment applicable to all lots in the subdivision and notified all of the property owners of this obligation. One of the property owners, Winkelman, failed to pay the assessment on time. DVCA filed a memorandum of lien against Winkelman's lots and began proceedings to sell the property as satisfaction of the unpaid assessments, pursuant to Virginia Code section 55-516(I). The sale was conducted, and a third-party purchaser bid at the sale. Winkelman then filed an action in the Greene County Circuit Court to set aside the sale. In seeking to set aside the sale, Winkelman argued that DVCA lacked the statutory authority to conduct a non-judicial sale because such authority can only be exercised by a property owners' association as defined in Virginia Code section 55-59.

The Greene County Circuit Court found that DVCA was a property owners' association as defined in the POAA. The court held, however, that a sale under the POAA could only apply to a "unit" as defined in Virginia Code section 55-516(I), and therefore the statute "did not confer authority upon DVCA to sell Winkelman's vacant lots." The circuit court voided the sale, giving rise to an appeal.

The Supreme Court of Virginia agreed that the sale should be voided, but on different grounds. The court determined that DVCA was not a property owners' association because the cove-

3. Id. at 11, 590 S.E.2d at 359.
4. Id.
5. Id.
6. Id., 590 S.E.2d at 359–60.
7. Id., 590 S.E.2d at 360.
8. Id.
9. Id. To support his argument, Winkelman cited the Supreme Court of Virginia's decision in Anderson v. Lake Arrowhead Civic Ass'n, Inc., 255 Va. 264, 483 S.E.2d 209 (1997). In Anderson, the court noted that
[I]t is clear that in order to qualify under the POAA, an association must possess both the power to collect a fixed assessment or to make variable assessments and a corresponding duty to maintain the common area. In addition, these conditions must be expressly stated in a recorded instrument in the land records of the jurisdiction where some portion of the development is located.
Anderson, 253 Va. at 271–72, 483 S.E.2d at 213.
10. Dogwood Valley Citizens Ass'n, 267 Va. at 9, 590 S.E.2d at 358.
11. Id.
12. Id.
nants did not impose upon the association maintenance or operational responsibilities for the common areas.\textsuperscript{13} The declaration merely granted to the declarant and its successors the right to do so.\textsuperscript{14} To qualify as a property owners' association under the Act, "an association must possess both the power to collect a fixed assessment or to make variable assessments and a corresponding duty to maintain the common area," both of which "must be expressly stated in a recorded instrument in the land records of the jurisdiction where some portion of the development is located."\textsuperscript{15} This duty may not be "inferred or implied."\textsuperscript{17} The supreme court ruled that the circuit court "erred when it concluded in its decree that DVCA [was] a property owners' association" and reversed that part of the lower court's ruling.\textsuperscript{18} The court also affirmed those portions of the circuit court's voiding the deeds purporting to sell Winkelman's lots.\textsuperscript{19}

In the case of Atrium Unit Owners Ass'n v. King,\textsuperscript{20} the Supreme Court of Virginia considered whether the unit owners' association could be liable for negligence arising out of a breach of security in one of the units.\textsuperscript{21} The plaintiff, King, owned a condominium unit in the Atrium, a high rise condominium complex in Arlington County.\textsuperscript{22} As required by the condominium association rules and regulations, King provided the general manager of the condominium with a key to her unit for use in case of an emergency.\textsuperscript{23} The rules also provided for the right of a unit owner to deposit an additional "convenience key" with the general manager for use by persons specifically authorized by the unit owner,\textsuperscript{24} which King

\textsuperscript{13} Id. at 13–14, 590 S.E.2d at 361.
\textsuperscript{14} Id. at 14, 590 S.E.2d at 361.
\textsuperscript{15} Id. at 13, 590 S.E.2d at 361 (quoting Anderson v. Lake Arrowhead Civic Ass'n, Inc., 253 Va. 264, 271–72, 483 S.E.2d at 813 (1997)).
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 14, 590 S.E.2d at 361.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 14–15, 590 S.E.2d at 361–62.
\textsuperscript{20} 266 Va. 288, 585 S.E.2d 545 (2003).
\textsuperscript{21} Id. at 290, 585 S.E.2d at 596.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
did before departing for California. King's unit was burglarized while she was out of town.

King filed a motion for judgment in the circuit court against the unit owners' association, as well as the management company, alleging that Atrium was negligent in its training of employees and in the management of her spare keys, arguing that the burglar either used a key or entered through an unsecured door or window. Testimony further indicated that the established procedures for logging keys in and out were not followed. Both employees and non-employees of the management company had access to the box where convenience keys were stored. The court denied the unit owners' association's motion to strike and sent the case to the jury. The jury returned a verdict in favor of King.

The Supreme Court of Virginia reversed the verdict, finding that King had failed to sustain her burden of establishing "a causal connection between the defendant's alleged negligence and the injury of which the plaintiff complain[ed]." Although access through the balcony would have been difficult, it was not impossible. There was no evidence presented at trial that the missing convenience key was used in the commission of the burglary. "Proof of 'possibility' of causal connection is not sufficient" to carry the plaintiff's burden.

The court distinguished this case from the case of Wooldridge v. Echelon Service Co., wherein a woman had been fatally attacked in a building for which Echelon provided security services. At

25. Id.
26. Id.
27. Id. at 291, 585 S.E.2d at 546. Testimony at trial also indicated that "the distance between balconies would make access 'from balcony to balcony' difficult." Id., 585 S.E.2d at 547.
28. Id. at 291–92, 585 S.E.2d at 547.
29. Id.
30. Id. at 292, 585 S.E.2d at 547.
31. Id.
32. Id. at 295, 585 S.E.2d at 549 (quoting Commercial Distribs., Inc. v. Blankenship, 240 Va. 382, 395, 397 S.E.2d 840, 847 (1990)).
33. Id. at 295–96, 585 S.E.2d at 549.
34. Id. at 296, 585 S.E.2d at 549 (quoting Wilkins v. Sibley, 205 Va. 171, 175, 135 S.E.2d 765, 767 (1964)).
36. Id. at 459–60, 416 S.E.2d at 442.
trial, the evidence showed that a security guard had not reacted to an unauthorized person gaining admittance to the building.\footnote{37} Shortly after the intruder entered the building, one of the occupants was killed.\footnote{38} At the time of the murder, the intruder was the only unauthorized person in the building.\footnote{39} There was sufficient evidence in the case that the intruder was indeed the perpetrator of the crime,\footnote{40} and the security guard's "inaction was a proximate cause of [the victim's] death."\footnote{41}

The case of \textit{Klaiber v. Freemason Associates, Inc.}\footnote{42} arose out of alleged defects in the roof, chimneys, fireplaces, and flues within a four-unit condominium.\footnote{43} Both the association and several of the unit owners filed claims against the developer.\footnote{44} The trial court severed the plaintiffs' individual claims from those of the association and directed that each case proceed independently.\footnote{45} Two of the unit owners sold their units at a profit during the pendency of the litigation.\footnote{46} The unit owners' claims against the developer were advanced under the theories of "actual fraud, fraudulent misrepresentation, constructive fraud, false advertising provided by Code § 59.1-68.3, breach of contract, and breach of the statutory warranty provided by Code § 55-79.79 of the Condominium Act."\footnote{47} Each plaintiff sought compensatory damages of $380,000.\footnote{48} During discovery, the plaintiffs established that the association had paid in excess of $37,000 to repair the roof for which the unit owners were assessed over $14,000 each.\footnote{49} Additionally, the unit owners paid for repairs to their own units arising from water damage and damage to fireplace fixtures, but expended well less than the $380,000 claim amount.\footnote{50} The unit owners argued that their damages were for future special as-

\begin{itemize}
\item \footnote{37} Id. at 461–62, 416 S.E.2d at 443.
\item \footnote{38} See id.
\item \footnote{39} See id.
\item \footnote{40} See id.
\item \footnote{41} Id. at 462, 416 S.E.2d at 443.
\item \footnote{42} 266 Va. 478, 587 S.E.2d 555 (2003).
\item \footnote{43} Id. at 482, 587 S.E.2d at 556.
\item \footnote{44} Id.
\item \footnote{45} Id.
\item \footnote{46} Id., 587 S.E.2d at 556-57.
\item \footnote{47} Id., 587 S.E.2d at 557.
\item \footnote{48} Id.
\item \footnote{49} Id. at 483, 587 S.E.2d at 557.
\item \footnote{50} Id. at 482–83, 587 S.E.2d at 557.
\end{itemize}
sessments for roof replacement, attorney's fees, and repair and refurbishment of fireplaces and chimneys. The developer filed a motion for summary judgment, claiming that neither unit owner could prove damages because both had sold their units at a profit and that they would have no liability with respect to repair of the defects in the roofs, chimneys, or fireplaces because they had sold their units and would no longer be liable for assessments arising from those repairs. The individual unit owners contended that they had alleged an adequate measure of their damages because they expressly reserved their rights in this litigation in their agreements with the unit purchasers, that they had been subjected to special assessments for prior repairs, and that the profit each had earned in the sale of their units should not affect their claims.

Finding for the developer, the lower court held that the individual unit owners should not be permitted to maintain their various claims with regard to the alleged defects in chimneys, fireplaces, and flues, which were common elements. Also, neither unit owner had alleged an injury with sufficient specificity to recover damages under the three fraud claims. The unit owners not only sold their units at a profit, but neither unit owner had suffered any "loss" as required by Virginia Code section 59.1-68.3, nor had the unit owners suffered injury sufficient to give rise to a breach of warranty claim.

Because the trial court ruled in favor of the developer on summary judgment, the Supreme Court of Virginia was charged with whether, as a matter of law, the unit owners would be unable to prove any injury or resulting damages arising from the acts of the developer under the claims of liability advanced. In order to sustain the fraud claims, the unit owners were required to plead "a false representation of material fact; made intentionally, in the case of actual fraud, or negligently, in the case of constructive fraud; reliance on that false representation to their detriment;
and resulting damage." This claim must not be made "in the abstract," but rather "must be accompanied by [an] allegation and proof of damage." There can be no successful claim for fraud in any case where "the position of the complaining party is no worse than it would be had the alleged fraud not been committed." Where the alleged fraud occurs in a real estate transaction, the measure of damages is "the difference between the actual value of the property at the time the contract was made and the value that the property would have possessed had the [fraudulent] representation been true." The unit owners could not allege sufficient facts to support a conclusion that the actual value of their units at the time they purchased them was less than the value those units would have had absent the fraudulent acts of the developer. As such, the court refused to use repair or replacement costs as the proper measure of damages for fraud in these cases. Consequently, the trial court did not err in granting summary judgment on the fraud claims.

The court also concluded that the unit owners' claims under Virginia Code section 59.1-68.3 arising out of alleged "untrue, deceptive, and misleading statements in advertising" in violation of Virginia Code section 18.2-216 must also fail. Again, the court concluded that, to be successful, a plaintiff must "suffer loss." Given that the units were sold at a profit, no loss could be proven as a matter of law.

Unlike the fraud claims and the claims of false advertising for

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58. Id. (citing Evaluation Research Corp. v. Alequin, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994)).
59. Id. (quoting Community Bank v. Wright, 221 Va. 172, 175, 267 S.E.2d 158, 160 (1980)).
60. Id. (quoting Community Bank, 221 Va. at 175, 267 S.E.2d at 160).
61. Id. at 486, 587 S.E.2d at 555-59 (quoting Prospect Dev. Co. v. Bershader, 258 Va. 75, 91, 515 S.E.2d 291, 300 (1999)).
62. Id. at 486, 587 S.E.2d at 559.
63. Id.
64. Id.
66. Advertising that is "untrue, deceptive or misleading" is punishable as a class 1 misdemeanor. VA. CODE ANN. § 18.2-216 (Repl. Vol. 2004).
67. Klaiber, 266 Va. at 487, 587 S.E.2d at 559.
68. Id.
which the claimant must show actual loss, the court ruled that a claim for breach of contract or breach of warranty is not necessarily limited to the same measure of damages.\textsuperscript{69} According to the court, "[u]nder certain circumstances, a party seeking to restore the benefit of a bargain or to enforce a warranty is permitted to show that the cost of remedying the breach is the appropriate measure of damages,"\textsuperscript{70} unless "the cost to repair would be grossly disproportionate to the results to be obtained, or would involve unreasonable economic waste."\textsuperscript{71} The trial court undertook no analysis of whether the award of repair cost would constitute economic waste.\textsuperscript{72} Consequently, the supreme court determined that the trial court erred in granting summary judgment on the breach of contract and the breach of warranty claims because the trial court could not have concluded as a matter of law that the unit owners could prove no loss merely because they sold the units for more than they paid for them.\textsuperscript{73}

B. 	extit{Restrictive Covenants}

In \textit{Richardson v. Amresco Residential Mortgage Corp.},\textsuperscript{74} the court considered "whether the chancellor erred in ruling that certain mortgagees were entitled to protections afforded third parties under the Uniform Transfers to Minors Act" ("UTMA").\textsuperscript{75} In this case, the chain of title to the property against which the mortgage lien was recorded contained a deed from a custodian in her representative capacity to the custodian individually.\textsuperscript{76} The custodian, the child's mother, had been appointed to oversee a $700,000 wrongful death settlement from the child's father's estate.\textsuperscript{77} The child's mother was appointed guardian of the estate in

\begin{itemize}
\item \textsuperscript{69} \textit{Id.}, 587 S.E.2d at 560.
\item \textsuperscript{70} \textit{Id.} (citing Lochaven Co. v. Master Pools by Schertle, Inc., 233 Va. 537, 543, 357 S.E.2d 534, 538 (1987)).
\item \textsuperscript{71} \textit{Id.} at 488, 587 S.E.2d at 560 (quoting \textit{Lochaven Co.}, 233 Va. at 543, 357 S.E.2d at 538).
\item \textsuperscript{72} See \textit{id.}
\item \textsuperscript{73} \textit{Id.}
\item \textsuperscript{74} 267 Va. 43, 592 S.E.2d 65 (2004).
\item \textsuperscript{75} \textit{Id.} at 45, 592 S.E.2d at 66. The Virginia Uniform Transfers to Minors Act is codified at Virginia Code sections §§ 31-37 to -59 (Repl. Vol. 2004).
\item \textsuperscript{76} \textit{Id.} at 46, 592 S.E.2d at 66.
\item \textsuperscript{77} \textit{Id.}
\end{itemize}
Kentucky and subsequently relocated to Virginia Beach. The mother used a portion of the estate to acquire real property, acting in her capacity as the custodian for the child's estate under Kentucky's version of the UTMA. The mother, in her capacity as custodian, then conveyed the property to herself through a quitclaim deed. She did so without consideration and to use the property as security for a personal loan. The personal loan was secured by the mortgage that was the subject of the litigation and which, subsequently, fell into default. The mortgagee was not notified by counsel of the quitclaim deed in connection with the loan transaction.

Subsequently, a guardian ad litem was appointed for the child, who obtained from the court an injunction against the mother from "selling, destroying, giving away, disposing of, changing, adjusting or causing to be diminished in value any assets of the guardianship." Notwithstanding this order, the mother entered into a contract to sell the property to a third party, which precipitated her removal as guardian. The newly appointed substitute guardian ad litem filed a quiet title action, seeking to expunge the quitclaim deed and all of the liens placed on the property by the mother, individually. The chancellor ordered the property sold to the third parties with the proceeds to be placed in trust, pending the outcome of the litigation.

The chancellor held that the mortgagees were entitled to the protections afforded third parties under the "safe harbor" provisions of both the Kentucky and Virginia UTMAs. Under both statutes, a third person in good faith, without actual knowledge of wrongdoing, may conduct a transaction with a custodian and is not responsible for determining: "1) The validity of the purported

78. Id.
79. Id.
80. Id.
81. Id. at 46–47, 592 S.E.2d at 66–67.
82. Id. at 47, 592 S.E.2d at 67.
83. Id.
84. Id.
85. Id.
86. Id. at 47–48, 592 S.E.2d at 67.
87. Id. at 48, 592 S.E.2d at 67–68.
88. Id., 592 S.E.2d at 68 (citing KY. REV. STAT. ANN. § 385.162 and VA. CODE ANN. § 31–52). The court noted that the Kentucky statute was substantially identical to the provisions found in the parallel Virginia Code sections. Id.
custodian's designation; 2) The propriety of ... any act of the purported custodian; 3) The validity or propriety ... of any instrument or any instructions ...; or 4) The propriety of the application of any property of the minor delivered to the purported custodian.  

The substitute guardian ad litem appealed this decision, asserting that the quitclaim deed should have provided actual knowledge to the mortgagees, removing them from the "safe harbor." The Supreme Court of Virginia reversed the lower court, noting that:

[It] is a settled principle of equity that trustees and all persons acting in a confidential character with respect to [a] subject of sale are disqualified from purchasing the property for themselves. ... The validity of a sale in such case does not depend upon its fairness, but the sale is voidable, and when attacked, must be set aside, although the price was fair, or the best to be had, and the motive pure.

Applying the equity principle to the fiduciary relationship, the court further noted that "[s]uch a sale by a person acting as a fiduciary constitutes a constructive fraud, and must be set aside when attacked.

The court also concluded that the mortgagees in this case were not the intended beneficiaries of the UTMA, noting that the UTMA provides protection to third parties who "deal with" a "person purporting to make a transfer or purporting to act in the capacity of a custodian." "[S]uch protections do not extend to those who merely rely on various acts of a custodian." When the mother executed the mortgage in favor of the mortgagees, she was not purporting to act in the capacity of a custodian. Rather, she was purporting to convey the property, to secure the mortgage, in her individual capacity. Therefore, the protections afforded by the UTMA did not apply to the mortgagees' transaction

89. *Id.* (citing KY. REV. STAT. ANN. § 385.162).
90. *Id* at 49-50, 592 S.E.2d at 68-69.
91. *Id.* at 49, 592 S.E.2d at 68. (quoting Smith v. Credico Indus. Loan Co., 234 Va. 514, 516, 362 S.E.2d 735, 736 (1987)).
92. *Id.* (citing Whitlow v. Mountain Trust Bank, 215 Va. 149, 152, 207 S.E.2d 837, 840 (1974)).
93. *Id.* at 50, 592 S.E.2d at 69; see also VA. CODE ANN. § 31-52 (Repl. Vol. 2004).
94. *Id.* at 50-51, 592 S.E.2d at 69.
95. *Id.* at 51, 592 S.E.2d at 69.
96. *Id.*
with the mother.\textsuperscript{97}

The court also concluded that the mortgagees were not bona-fide purchasers, because the mortgagees had constructive notice of the quitclaim deed which, on its face, was a voidable and impermissible act by a fiduciary.\textsuperscript{98} The court held that "a purchaser of real property has constructive notice not only of the facts appearing on the face of recorded documents in the chain of title, but also of such other facts of which the purchaser is placed on inquiry based on those recorded instruments."\textsuperscript{99} In this case, the quitclaim deed should have prompted an inquiry as to the mother's self-dealing.\textsuperscript{100}

In the case of \textit{Meliani v. Jade Dunn Loring Metro, L.L.C.},\textsuperscript{101} the United States District Court for the Eastern District of Virginia, applying Virginia law, considered the question of whether a plaintiff asserting fraud and breach of contract in connection with a contract for the sale of a single condominium unit in a multi-phase condominium project may file a memorandum of \textit{lis pendens} burdening property in other phases of the project in which he neither has nor asserts an interest.\textsuperscript{102} The plaintiff, Meliani, entered into a contract for the purchase of a condominium unit in phase two of the development for the purchase price of $279,900.\textsuperscript{103} During the pendency of the purchase contract, the condominium unit appreciated in value by approximately $100,000.\textsuperscript{104} The developer, Jade, also entered into several sales contracts with other buyers for the purchase of other units located in phases one and two of the complex.\textsuperscript{105} Jade alleged that it became insolvent and subsequently lost phases one and two through foreclosure.\textsuperscript{106} Jade conveyed phases three, four, and five of the project to Westbriar, a new entity which had been formed

\footnotesize{
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 52, 592 S.E.2d at 70.
\textsuperscript{99} Id. (citing Shaheen v. County of Mathews, 265 Va. 462, 477, 579 S.E.2d 162, 171-72 (2003)).
\textsuperscript{100} See id.
\textsuperscript{101} 286 F. Supp. 2d 741 (E.D. Va. 2003).
\textsuperscript{102} Id. at 742.
\textsuperscript{103} Id. at 743.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
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Meliani alleged that a related entity to Jade purchased phases one and two at foreclosure as part of a scheme to avoid the below-market purchase agreements for phases one and two.\footnote{107} Meliani filed a complaint alleging tortious interference with contract, conspiracy, voluntary and fraudulent conveyance, breach of contract, and conversion, which was supported by a \textit{lis pendens} filed on all five phases of the project.\footnote{108} Westbriar filed a motion for a temporary restraining order, requiring the plaintiff to remove the \textit{lis pendens} from phases three, four, and five.\footnote{109} In holding that the \textit{lis pendens} must be quashed as to phases three, four, and five, the court cited Virginia Code section 8.01-268(B), which provides that a plaintiff may not file a memorandum of \textit{lis pendens} on property unless the plaintiff seeks to establish an interest in the property against which the memorandum is filed.\footnote{110}

The object of the \textit{lis pendens} rule is to preserve the property which is the subject of litigation, so as to enable the court, when the questions involved in the suit are finally determined, to execute its judgment or decree and to prevent further suits for the same subjects.\footnote{111}

The court further noted that the \textit{lis pendens} statute is not intended as a pre-judgment attachment to assure that there is sufficient value available to satisfy a judgment for damages.\footnote{112}

Meliani also contended that, because the defendant fraudulently conveyed the condominium unit, Virginia Code section 55-82\footnote{113} operated "to provide him with a lien on, and hence an inter-

\begin{itemize}
\item \footnote{107}{\textit{Id.}}
\item \footnote{108}{\textit{Id.}}
\item \footnote{109}{\textit{Id.} at 744.}
\item \footnote{110}{\textit{Id.}}
\item \footnote{111}{\textit{Id.} at 745 (citing VA. CODE ANN. § 8.01-268(B) (Repl. Vol. 2000 & Cum. Supp. 2004)).}
\item \footnote{112}{\textit{Id.} at 744-45 n.3 (quoting 12A MICHIE'S JUR. \textit{Lis Pendens} § 2 (1989)).}
\item \footnote{113}{\textit{Id.} at 746.}
\item \footnote{114}{Virginia Code section § 55-82 provides:
A creditor before obtaining a judgment or decree for his claim may, whether such claim be due and payable or not, institute any suit which he might institute after obtaining such judgment or decree to avoid a gift, conveyance, assignment or transfer of, or charge upon, the estate of his debtor declared void by either § 55-80 or § 55-81; and he may in such suit have all the relief in respect to such estate to which he would be entitled after obtaining a judgment or decree for the claim which he may be entitled to recover. A creditor availing himself of this section shall have a lien from the time of bringing his suit.}
\end{itemize}
est in, all of Westbriar's property, including phases three, four, and five, thereby permitting him to file a memorandum of *lis pendens* on those phases."\(^{115}\) The court found that the plaintiff had misread Virginia Code section 55-82 because the plaintiff could not allege that Jade defrauded him when it conveyed phases three, four, and five to Westbriar because the plaintiff had no interest in phases three, four, and five.\(^{116}\) At most, his interest only extended to the unit he contracted for in phase two. Virginia Code section 55-82 states explicitly that it is subject to and thus limited by the *lis pendens* statutes.\(^{117}\)

In *River Heights Associates Ltd. Partnership v. Batten*,\(^{118}\) the Supreme Court of Virginia considered whether to allow enforcement of restrictive covenants prohibiting commercial use on four unimproved lots within the Carrsbrook subdivision in Albemarle County.\(^{119}\) In this case, the restrictive covenants were recorded against a forty-acre parcel which was subsequently developed for residential purposes, with the exception of the lots in question.\(^{120}\) Most notable among the restrictions contained in the declaration is that "[t]he property is to be used for residential purposes only and no rooming house, boarding house, tourist home, or any other type of commercial enterprise, or any church, hospital, asylum, or charitable institution shall be operated thereon."\(^{121}\)

The existing undeveloped lots provided a buffer between the existing residents and the Route 29 corridor in Charlottesville.\(^{122}\) Between the time the property was first platted and the time of suit, Route 29 had grown from a two-lane road to an eight- to ten-lane road that was highly developed on both sides.\(^{123}\) No residences had been located along Route 29 since 1959, and the lots in question were zoned to a depth of 200 feet from Route 29 in a B-1 classification, a commercial district in which residential use

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\(^{115}\) Id. at 747.

\(^{116}\) Id.

\(^{117}\) Id.

\(^{118}\) 267 Va. 262, 591 S.E.2d 683 (2004).

\(^{119}\) Id. at 265, 591 S.E.2d at 684.

\(^{120}\) Id. at 266, 591 S.E.2d at 685.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) Id. at 267, 591 S.E.2d at 685.
was prohibited. The owners of the lots in question had approached the residents in the subdivision with a proposed commercial development plan in an effort to obtain their support for certain land use permitting.

Certain lot owners filed a complaint for declaratory judgment, seeking a declaration favoring the enforceability of the restrictive covenants. The developer demurred and later filed a motion to strike the evidence in the case. At the conclusion of the hearing, the court determined that the covenants were enforceable and enjoined the use or operation of the lots in violation of the covenant.

In his first assignment of error, citing City of Fairfax v. Shanklin, the developer stated that his demurrer should have been granted and that there was no justiciable claim before the court upon which the court could award declaratory relief and an injunction. The developer alleged that "something more than mere speculation . . . is required [to] invoke the power of the Courts." In denying the developer's motion, the court distinguished the present case from Shanklin, reasoning that the developer need not have governmental approval to proceed with a project before a party adversely affected may seek relief via declaratory judgment. In this case, the plaintiff claimed that the developer had met with members of the subdivision and "indicated that he intended to commercially develop the properties at issue." The dispute over the application of the covenant was also clearly defined in correspondence between the parties.

The developer also argued that the result of the trial court's decision was to allow no use of the lots for anything other than open

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124. Id. at 266, 591 S.E.2d at 685.
125. Id. at 269, 591 S.E.2d at 687.
126. Id. at 265, 591 S.E.2d at 684.
127. Id. at 267, 591 S.E.2d at 686.
128. Id., 591 S.E.2d at 685.
130. River Heights, 267 Va. at 267, 591 S.E.2d at 686.
131. Id. at 268, 591 S.E.2d at 686 (alteration in original).
133. Id. at 269, 591 S.E.2d at 687.
134. Id.
space, "resulting in a serious diminution in the value of the lots." The court noted, however, that "the effect on the value of property resulting from the enforcement or a refusal to enforce a restrictive covenant 'is of slight if any consequence.'" The court held that the developer "had at least constructive notice from the record chain of title of both the restrictive covenant that prohibits commercial use of his property and the plat note that denies Lots 2C and 2D access to Route 29 if developed residentially."

Finally, the developer alleged that a change of conditions in Route 29 had destroyed the essential object and purpose of the restriction. However, this case is readily distinguishable from the Supreme Court of Virginia's recent decision in *Chesterfield Meadows Shopping Center Associates, L.P. v. Smith.* In his analysis, the developer looked myopically at how the radical change along the Route 29 corridor had affected only his parcels. The court reasoned that the appropriate analysis should be of the property in and around the neighborhood to determine whether the purpose of the restrictive covenant is destroyed. In this case, it is clear that there had not been a radical change in the use of the balance of the subdivision. The restrictive covenant still served its intended purpose—to protect the lots in the particular subdivision from commercial uses. The conditions existing within the subdivision must be examined along with those existing in the surrounding area in order to determine the issue fairly.

In *Barner v. Chappell,* the court considered whether the current owners of lots within a subdivision could enforce a restrictive covenant recorded by the original developer against one of the lots. In this case, the original landowner, Governor John Pol-
lard, had recorded a subdivision plat, creating lots designated by number or letter, access roads, a park, and an undivided, unnumbered remainder parcel. 147 In the deed from Governor Pollard to Craighill for Lot 8 of the subdivision, Governor Pollard inserted a restriction that Lot 8 was to be used in connection with the adjacent Lot A and that "no house, garage or structure of any kind shall be erected thereon." 148 At the time of the conveyance, Craighill also owned Lot A. 149 The deeds from Governor Pollard for the balance of the lots in the subdivision, as well as for the unnumbered, undivided parcel, indicated an intention to develop the property under like restrictions. 150

Following Governor Pollard's death, his estate subdivided the undivided parcel into two lots which were conveyed to third parties. 151 Some years later, the Barners acquired Lot 8 without the benefit of a title examination and unaware of the restriction against development. 152 When the Barners began construction of a single family residence on Lot 8, a number of residents within Pollard Park filed a bill of complaint, seeking to enforce the restrictions in the original Pollard-Craighill deed. 153 At trial, testimony given on behalf of the Barners indicated that the reason for the restriction was to assure that a proposed sanitary sewer line serving the subdivision could be run through Lot 8. 154 In response, the Barners testified that they were willing to re-route the sewer line around their proposed residence. 155 The neighboring landowners contended that Pollard could have just as easily routed the sewer line along the edge of Lot 8, suggesting that his true intent was to reserve Lot 8 as perpetual open space. 156

In considering this case on the enforceability of a restrictive covenant, the court stated that "[a] restrictive covenant is enforceable if a landowner establishes: (1) horizontal privity; (2) vertical privity; (3) intent for the restriction to run with the land;

147. Id. at 280, 585 S.E.2d at 591–92.
148. Id., 585 S.E.2d at 592.
149. Id.
150. Id. at 281, 585 S.E.2d at 592.
151. Id.
152. Id., 589 S.E.2d at 592–93.
153. Id. at 282, 585 S.E.2d at 593.
154. Id.
155. Id.
156. Id. at 282–83, 585 S.E.2d at 593.
(4) that the restriction touches and concerns the land; and (5) that
the covenant is in writing."\(^{157}\) The only requirement at issue in
the appeal to the supreme court was whether any of the neighboring
landowners could establish vertical privity and whether the
chancellor erred in finding that the purpose of the restrictive
covenant had not lapsed.\(^{158}\)

The court noted that "[v]ertical privity requires that the benefit
of a restrictive covenant extend only to ‘one who succeeds to some
interest of the beneficiary in the land respecting the use of which
the promise was made.’"\(^{159}\) Most of the owners within Pollard
Park traced their ownership through chains of title to convey-
ances from Pollard that predated the Pollard-Craighill deed.\(^{160}\)
Consequently, there was no vertical privity for these owners.\(^{161}\)
There was no express intention to extend the benefit of the cove-
nant directly to third parties.\(^{162}\) By contrast, some of the other
owners traced their ownership to original grantees from Governor
Pollard whose deeds were executed after the execution of the Pol-
lard-Craighill deed.\(^{163}\) Consequently, they met the requirements
for vertical privity.\(^{164}\)

Moving from the issue of vertical privity, the court next consid-
ered whether the purpose of the restriction no longer existed un-
der the tests articulated in \textit{Smith v. Chesterfield Meadows Shop-
ing Center Associates, L.P.} \(^{165}\) and \textit{Booker v. Old Dominion Land
Co.},\(^{166}\) both of which provided that a party seeking to establish
that the purpose of a restriction no longer exists bears a heavy
burden.\(^{167}\) The court went on to hold that the neighboring land-

\(^{157}\) \textit{Id.} at 283, 585 S.E.2d at 594 (citing Waynesboro Vill., L.L.C. v. BMC Props., 255
Va. 75, 81, 496 S.E.2d 64, 68 (1998); Sloan v. Johnson, 254 Va. 271, 276, 491 S.E.2d 725,
728 (1997)).

\(^{158}\) \textit{Id.} at 284, 585 S.E.2d at 594.

\(^{159}\) \textit{Id.} (quoting Old Dominion Iron & Steel Corp. v. Virginia Elec. & Power Co., 215
Va. 658, 663, 212 S.E.2d 715, 719–20 (1975)).

\(^{160}\) \textit{Id.}

\(^{161}\) \textit{Id.}

\(^{162}\) \textit{Id.}

\(^{163}\) \textit{Id.}

\(^{164}\) \textit{Id.}

\(^{165}\) 259 Va. 82, 84, 523 S.E.2d 834, 835 (2000). For a further discussion of the case and
the rules of law enunciated therein, see Brian R. Marron & Christopher M. Gill, \textit{Annual
ing the second appeal of the case to the Supreme Court of Virginia).

\(^{166}\) 188 Va. 143, 148, 49 S.E.2d 314, 317 (1948).

\(^{167}\) \textit{Barner}, 266 Va. at 285, 585 S.E.2d at 595.
owners presented sufficient evidence to support the theory that the covenant on Lot 8 was intended to assure that it would remain an open area within the subdivision.\textsuperscript{168}

C. Title to Property

In \textit{Harrison-Wyatt, L.L.C. v. Ratliff},\textsuperscript{169} the court considered whether the ownership of coal bed methane ("CBM") was the property of the owners of the surface land or the owners of the coal beneath the land's surface.\textsuperscript{170} In this case, the coal rights were conveyed by deed stating that the grantee would own all the coal in, upon, and underlying the tracts of land at issue.\textsuperscript{171} The lynchpin question in this case was whether CBM was a portion of the coal conveyed.\textsuperscript{172} After examining the plain language of the deed, the science of how coal and CBM are formed, and the lexicology of the term "coal," the lower court concluded that there was an insufficient bond or association between CBM and coal to conclude that they were one and the same.\textsuperscript{173} The trial court ruled that CBM "is simply a by-product of coal' and a severable estate."\textsuperscript{174}

On appeal, the Supreme Court of Virginia noted that this was a case of first impression in Virginia.\textsuperscript{175} In rendering its decision, the court reviewed cases on this subject from Pennsylvania,\textsuperscript{176} Alabama,\textsuperscript{177} Montana,\textsuperscript{178} Wyoming,\textsuperscript{179} and West Virginia.\textsuperscript{180} The court also considered \textit{Amoco Products Co. v. Southern Ute Indian Tribe},\textsuperscript{181} in which the Supreme Court of the United States considered this issue in the context of reservation lands restored to the

\begin{thebibliography}{9}
\bibitem{} Id. at 286, 585 S.E.2d at 595.
\bibitem{} Id. at 550, 593 S.E.2d at 235.
\bibitem{} Id. at 551, 593 S.E.2d at 235.
\bibitem{} Id. at 551–52, 593 S.E.2d at 235–36.
\bibitem{} Id. at 553, 593 S.E.2d at 236.
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} United States Steel Corp. v. Hoge, 468 A.2d 1380 (Pa. 1983).
\bibitem{} NCNB Texas Nat'l Bank, N.A. v. West, 631 So.2d 212 (Ala. 1993).
\bibitem{} Carbon County v. Union Reserve Coal Co., 898 P.2d 680 (Mont. 1995).
\bibitem{} 526 U.S. 865 (1999).
\end{thebibliography}
Ute Indian Tribes. In Amoco, the Court rejected the tribe's claim to the CBM, relying in part on the common conception of coal at the time of the litigation: that coal was the "solid rock substance' used as fuel."\textsuperscript{182} At that time, coal would not have encompassed CBM because it was a gas rather than a solid material and because it was understood as a distinct substance that escaped from coal as the coal was mined, rather than as a part of the coal itself.\textsuperscript{183} Relying upon the foregoing precedent, the Supreme Court of Virginia affirmed the lower court's ruling.\textsuperscript{184}

In the case of Jones v. Hill,\textsuperscript{185} the Supreme Court of Virginia considered

whether a lien may attach to the vested interest of a remainderman who takes from a life tenant with full power to dispose of the entire corpus of the estate, and whether a creditor may enforce the lien after the death of the life tenant, when the remainderman predeceases the life tenant.\textsuperscript{186}

In this case, the decedent, Thomas Jones, left to his wife, Annie Jones, "all of my real and personal estate for life, and, having full confidence in her, I authorize her to use and consume so much of the income, corpus and principle of my estate as she, in her sole discretion, deems necessary for her comfort, maintenance, welfare and support."\textsuperscript{187} The will further provided that, "[a]t my wife's death, I give, devise, and bequeath that all my property, real and personal, be equally divided between all my children."\textsuperscript{188} Among the children was Vaiden Jones,\textsuperscript{189} who survived his father but predeceased his mother.\textsuperscript{190}

When Annie Jones died, the surviving children of Annie and Thomas Jones sold a parcel of property in Brunswick County in order to divide the proceeds equally as instructed in the will of Thomas Jones.\textsuperscript{191} Tammie Hill ("Hill") had previously obtained a

\textsuperscript{182} Id. at 871.
\textsuperscript{183} See Harrison-Wyatt, 267 Va. at 556, 593 S.E.2d at 238.
\textsuperscript{184} Id. at 557, 593 S.E.2d at 238.
\textsuperscript{185} 267 Va. 708, 594 S.E.2d 913 (2004).
\textsuperscript{186} Id. at 709, 594 S.E.2d at 913.
\textsuperscript{187} Id. at 710, 594 S.E.2d at 914.
\textsuperscript{188} Id. (alteration in original).
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
judgment in the amount of $10,000 against Vaiden Jones, and "sought to enforce her lien against the proceeds of the sale." The trial court held that the interest of Vaiden Jones in the real property "was a vested interest against which the judgment lien of Tammie Hill attached and accordingly Tammie L. Hill is entitled to the funds in dispute." The Supreme Court of Virginia agreed with the trial court's characterization of Vaiden Jones' interest as a vested remainder subject to divestment. The court applied the "early vesting rule" by which, absent an expression of intent to the contrary, a remainderman will be held to be vested in interest immediately upon the death of the testator, rather than contingent upon future events.

The court was not persuaded by the Jones siblings' argument that the interest was not vested because the mother had the right to dispose of the property during her life. The court held that the interest vested and could have been divested by such an event, but was not. As stated by the court:

Vested interests in land may be sold or inherited. When Vaiden Jones died, his vested interest passed to Virginia Jones, his wife. However, her inheritance of Vaiden Jones's remainder interest in the parcel before the death of Annie Jones did not destroy Hill's lien because a lien attaches to property, not to the person against whom judgment is awarded.

In the case of Maitland v. Allen, Barbara Maitland ("Maitland"), formerly Barbara Allen, and her husband Wilbert C. Allen ("Allen") "executed five deeds of gift in 1997 conveying separate parcels of land to each of their five adult children" and "reserv[ing] a joint life estate for Maitland and Allen in the parcels conveyed." Maitland and Allen later divorced, and Maitland sought to compel partition of the land previously conveyed to the

192. Id.
193. Id.
194. Id. at 711, 594 S.E.2d at 914 (citing FREDERICK D.G. RIBBLE, THE LAW OF REAL PROPERTY § 713, at 932 (2d ed. 1928)).
195. Id. (citing French v. Logan, 108 Va. 67, 69, 60 S.E. 622, 623 (1908)).
196. See id.
197. Id. at 712, 594 S.E.2d at 915.
198. Id. (citing Hardy v. Norfolk Mfg. Co., 80 Va. 404, 418 (1885)).
200. Id. at 715-16, 594 S.E.2d at 919.
Allen and the children argued that Maitland was barred from partitioning the parcels as a life tenant. The Supreme Court of Virginia considered this case in two parts: first, whether the life tenant could partition the parcels as to the remaindermen; and second, whether the life estates could be partitioned.

The right to partition jointly held real property arises under Virginia Code section 8.01-81. The statute does not explicitly authorize a life tenant to compel partition. While Maitland was a tenant in common with Allen as to the life estate, she was not a tenant in common with the remaindermen. "In order for a life tenant to be a tenant in common with other owners of the property there must be coequal rights of occupancy." Such rights were not present in this case. "By definition, the holder of a present life estate and the holder of a future remainder interest do not own concurrent interests because each holder uses the property exclusively during her respective time of possession." The court, therefore, affirmed the judgment of the trial court granting summary judgment to the children. The case was remanded for "further proceedings as may be required to complete the cause with regard to the partition among the joint life tenants, Allen and Maitland."

In Perel v. Brannan, the Richmond City Circuit Court was asked to construe a declaration of restrictions recorded against the River Locke subdivision (the "Declaration"). The Declaration, among other things, placed restrictions on the permissible

201. Id.
202. Id.
203. Id. at 716, 718, 594 S.E.2d at 919–20.
204. Virginia Code section 8.01-81 states, in pertinent part, that "[t]enants in common, joint tenants, executors with the power to sell, and coparceners of real property... shall be compellable to make partition and may compel partition." VA. CODE ANN. § 8.01-81 (Repl. Vol. 2000).
205. Maitland, 267 Va. at 716, 594 S.E.2d at 919 (quoting Whitby v. Overton, 243 Va. 20, 22, 413 S.E.2d 42, 43 (1992)).
206. Id.
207. Id. (quoting Whitby, 243 Va. at 24, 413 S.E.2d at 44).
208. Id. at 718, 594 S.E.2d at 920 (quoting Beach v. Beach, 74 P.3d 1, 3 (Colo. 2003)).
209. Id. at 718–19, 594 S.E.2d at 920–21.
210. Id.
212. Id. at 697, 594 S.E.2d at 903.
location and type of buildings allowed in the subdivision, required that plans and specifications for improvements were to be reviewed by an architectural review committee ("ARC"), and further required that no construction could occur within buffers, setbacks, or "no building areas." The defendant, Brannan, purchased a lot in the subdivision and received approval from the ARC for the site and landscaping plans for his proposed improvements. Shortly after the approval, the Brannans began to develop the lot by removing trees, excavating for foundations, and constructing a retaining wall. Perel and others filed a bill of complaint alleging that the porch and retaining wall encroached in the setback area and that the excavation and removal of vegetation, including eight mature trees, violated the buffer sections of the covenants. Perel also asked the court to order the declarant under the Declaration, Locke Lane, to enforce the covenants against the Brannans.

Following a bench trial, the circuit court found that the Brannans had violated the covenants by removing the trees and vegetation in the buffer area and by building in the setback area. The court found, however, that the Brannans' excavation and construction of the retaining wall did not violate the covenants. The trial court denied both parties' requests for attorneys' fees; ordered the Brannans to replace the vegetation that had been removed, except for the eight large trees . . . ; and ordered the Brannans to remove the patio and any other improvements in the setback area. The parties filed cross-appeals.

The Supreme Court of Virginia first considered the issue of the retaining wall. The lower court held, essentially, that the necessity of the retaining wall to hold back the excavated soil was an exception to the restrictions prohibiting development in the setback area. The lower court also had noted that "there was no

213. Id. at 696, 594 S.E.2d at 902.
214. Id.
215. Id. at 697, 594 S.E.2d at 902.
216. Id., 594 S.E.2d at 903.
217. Id.
218. Id. at 698, 594 S.E.2d at 903.
219. Id.
220. Id.
221. Id.
222. Id. at 699, 594 S.E.2d at 904.
evidence on which the court could prepare an enforceable order that the excavated area be returned to its pre-excavation state' implying that even if the retaining wall was a violation of the covenants, the trial court would not order removal of the wall.\textsuperscript{223} The supreme court reviewed the Declaration and concluded that walls were absent from the list of permitted structures and improvements within the setback area and that the retaining wall clearly violated the covenants.\textsuperscript{224} The court noted, however, that the establishment of this breach of the covenants would not automatically entitle Perel to injunctive relief or specific performance.\textsuperscript{225} The court declared that

\begin{quote}
[a] defendant may avoid imposition of the remedy requested if such a remedy would create a hardship or injustice that is out of proportion to the relief sought . . . . However, on the questions of hardship, injustice, or impossibility, the defendant bears the burden of proving the elements of the defense.\textsuperscript{226}
\end{quote}

The defendant must show, beyond simply the level of inconvenience, that the hardship or injustice is out of proportion to the relief sought.\textsuperscript{227} "Impossibility is also a defense to specific performance or injunctive relief requested . . . . even when the defendant 'intentionally rendered himself unable to perform.'\textsuperscript{228} The court concluded that the retaining wall did violate the covenant and that the matter should be remanded to the trial court for further evidentiary proceedings in accordance with proof requirements to determine whether the Brannans were entitled to one of the foregoing defenses against the injunction.\textsuperscript{229}

On the issue of tree removal, the court undertook a similar analysis. The Brannans violated the covenants by removing the 80- to 100-foot trees from the buffer zone, notwithstanding the ARC's approval of the Brannans' plans.\textsuperscript{230} The ARC's discretion

\begin{footnotes}
\item[223] Id.
\item[224] Id. at 699, 594 S.E.2d at 904.
\item[225] Id. at 699-700, 594 S.E.2d at 904 (citing Sonoma Dev., Inc. v. Miller, 258 Va. 163, 167-69, 515 S.E.2d 577, 579-81 (1999); Mid-State Equip. Co. v. Bell, 217 Va. 133, 140, 225 S.E.2d 877, 884 (1976)).
\item[226] Id. at 700, 594 S.E.2d at 904-05 (citing Harper v. Virginian Ry., 86 S.E. 919, 922 (W. Va. 1915)).
\item[227] Id. at 701, 594 S.E.2d at 905.
\item[228] Id. (quoting Jones v. Tunis, 99 Va. 220, 222, 37 S.E. 841, 841 (1901)).
\item[229] Id. at 706-07, 594 S.E.2d at 908.
\item[230] Id. at 702, 594 S.E.2d at 906.
\end{footnotes}
did not extend to the express provisions of the Declaration forbid-
ding such removal.\textsuperscript{231} The court similarly remanded this portion of the decision to the trial court to determine whether the Brannans could show undue hardship, injustice, impossibility, or difficulty of replacing the trees.\textsuperscript{232}

The supreme court agreed with the lower court’s determination that Perel’s claim against the developer/declarant should be dis-
missed.\textsuperscript{233} Perel’s claim was rooted in language in the Declaration giving the developer “the power to levy assessments against a property owner for failure to clean and paint the exterior of the house; failure to maintain the landscape,” and other matters.\textsuperscript{234} The court reasoned that having the right to enforce these requirements “is not the equivalent of having a duty to enforce the covenants against a violator.”\textsuperscript{235}

D. Easements and Rights-of-Way

In \textit{Virginia v. Hicks},\textsuperscript{236} the Supreme Court of the United States considered certain constitutional issues relating to a trespassing policy adopted by the Richmond Redevelopment and Housing Au-
thority (“RRHA”) in the Whitcomb Court housing project.\textsuperscript{237} Specifically, the Richmond City Council conveyed the public streets within Whitcomb Court to RRHA, and RRHA “enacted a policy authorizing the Richmond Police ‘to serve notice . . . to any person who is found on [RRHA] property when such person . . . cannot demonstrate a legitimate business or social purpose for being on the premises’” and “‘to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to [RRHA] property.’”\textsuperscript{238} The purpose of this policy was to provide to the Richmond City Police an additional weapon in

\begin{itemize}
\item \textsuperscript{231} \textit{Id.}
\item \textsuperscript{232} \textit{Id.} at 702–03, 594 S.E.2d at 906.
\item \textsuperscript{233} \textit{Id.} at 703, 594 S.E.2d at 906.
\item \textsuperscript{234} \textit{Id.}
\item \textsuperscript{235} \textit{Id.}
\item \textsuperscript{236} 539 U.S. 113 (2003).
\item \textsuperscript{237} \textit{Id.} at 115.
\item \textsuperscript{238} \textit{Id.} at 116.
\end{itemize}
fighting the open-air drug market that had been prevalent in this housing project.\textsuperscript{239}

After being arrested and convicted for trespassing under this policy, the defendant, Hicks, attacked the arrest on constitutional grounds, claiming that the regulations violated free speech rights and could have a chilling effect on protected speech, such as leafleting and demonstrating.\textsuperscript{240} The Court of Appeals of Virginia vacated his conviction, and the Supreme Court of Virginia affirmed.\textsuperscript{241} The Supreme Court of Virginia found the trespass policy unconstitutionally overbroad and in violation of the First Amendment.\textsuperscript{242}

The Supreme Court of the United States reversed the judgment of the Supreme Court of Virginia and remanded the case for further proceedings.\textsuperscript{243} The Supreme Court found it important that both the notice-barment rule and legitimate purpose or social purpose rule apply to all persons using the streets of Whitcomb Court, not just those who seek to engage in expression.\textsuperscript{244} The court observed that "[e]ven assuming invalidity of the 'unwritten' rule that requires leafleters and demonstrators to obtain advance permission" from the manager, the defendant had not shown that the RRHA policy, "as a whole prohibits a 'substantial' amount of protected speech in relation to its many legitimate applications."\textsuperscript{245} The court also remarked that the enforcement of the RRHA policy in a manner that violates the First Amendment could still be remedied through case-by-case litigation, "but the Virginia Supreme Court should not have used the 'strong medicine' of overbreadth to invalidate the entire RRHA trespass policy."\textsuperscript{246}

In \textit{Barter Foundation, Inc. v. Widener},\textsuperscript{247} the Supreme Court of Virginia considered "the rights of owners of land with respect to an adjoining undeveloped parcel that was dedicated for use as a

\begin{itemize}
\item \textsuperscript{239} See \textit{id.} at 115.
\item \textsuperscript{240} \textit{Id.} at 117, 121.
\item \textsuperscript{241} \textit{Id.} at 117–18.
\item \textsuperscript{242} \textit{Id.} at 118.
\item \textsuperscript{243} \textit{Id.} at 124.
\item \textsuperscript{244} \textit{Id.} at 123.
\item \textsuperscript{245} \textit{Id.} at 123–24.
\item \textsuperscript{246} \textit{Id.} at 124.
\item \textsuperscript{247} 267 Va. 80, 592 S.E.2d 56 (2004).
\end{itemize}
public street in 1944, but which has never been formally accepted by the governing public authority. 248 In this case, the Barter Foundation, Inc. ("Barter") became the owner of property lying immediately to the west of the platted street, and Gordon L. Widener ("Widener") was the owner of a lot lying to the east of the platted street. 249 Various plats and deeds in the chain of title referred to this platted street as "25' street undeveloped" and referred to it as a public street. 250 At no time, however, had the local jurisdiction accepted this dedication. 251

Widener sought permission from the town to remove stumps and mow the right-of-way so that he could have access to his property through it. 252 Barter filed an amended bill of complaint against Widener and the town seeking a determination that the dedication of the right-of-way had been abrogated through lack of use by the public and, as a result, Barter, as successor to the dedicator, was "the owner of the real property free and clear of the proposed easement." 253 Widener answered the bill of complaint by alleging that "Barter could not claim ownership of the disputed property because it was estopped to do so by language in the deeds in its chain of title. 254

At trial, the chancellor found that the town had not accepted the dedication of the right-of-way. 255 The chancellor also found, however, that "a public right of way or easement ... exists separately and independently from whether the Town has accepted the dedication' and, thus, 'the Wideners and ... other members of the public have and own a right of way or easement to travel across and use the said 25 foot [wide] street as a public way." 256

The Supreme Court of Virginia analyzed this case by reiterating the law of dedication as it has evolved. 257 The court explained that

248. Id. at 83, 592 S.E.2d at 57.
249. Id.
250. Id.
251. Id. at 87–88, 592 S.E.2d at 59.
252. Id. at 86, 592 S.E.2d at 58–59.
253. Id. at 86–87, 592 S.E.2d at 59.
254. Id. at 87, 592 S.E.2d at 59.
255. Id. at 87–88, 592 S.E.2d at 59.
256. Id. (alteration in original).
257. Id. at 88–91, 592 S.E.2d at 60–62.
Because a definite and certain grantee was required in order to take land by conveyance or grant at common law, a landowner could not effectively convey or grant an interest in his land to the general public as grantee. However, in order to facilitate the creation of public streets and other public areas for the benefit of the general public, the doctrine of dedication evolved and recognized the rights acquired by the public by estopping the dedicator from disputing those rights.263

The court also cited the common law rule that "[u]ntil the public accepted the dedication, it was a mere offer to dedicate."259 The court further explained:

Prior to acceptance, the offer to dedicate imposed no responsibilities upon the public and was subject to unilateral withdrawal at any time by the landowner. Acceptance could be formal and express . . . or by implication arising from an exercise of dominion by the governing authority or from long continued public use . . . .

Later legislative schemes noted that the recordation of a properly approved subdivision plat "operated 'to create a public easement or right of passage over streets shown on the plat.'"261 "The rights of the public," however, "were merely inchoate, and . . . the dedication was not complete until accepted by competent public authority."262

The court agreed with the chancellor's finding that the town had not formally accepted the dedication of the street.263 The level of conduct that would rise to implied acceptance on the part of the governing body, such as paving streets or installing public utilities, had not been met.264 Consequently, there was no implied dedication by the town.265

The court next considered whether a right-of-way was created in favor of the public, even in the absence of the acceptance of

258. Id. at 88–89, 592 S.E.2d at 60 (citing Payne v. Godwin, 147 Va. 1019, 1024–25, 133 S.E. 481, 482–83 (1926)).
259. Id. at 89, 592 S.E.2d at 60 (quoting Brown v. Moore, 255 Va. 523, 529, 500 S.E.2d 797, 800 (1998)).
261. Id. (quoting Brown, 226 Va. At 130, 306 S.E.2d at 891).
262. Id.
263. Id. at 91, 592 S.E.2d at 61.
264. Id. at 90–91, 592 S.E.2d at 61.
265. Id. at 91, 592 S.E.2d at 61.
The court agreed that such right did exist. Although the town did not assume the obligation of maintenance or potential liability by accepting the dedication, under common law "the general public could accept the dedication by use of the right of passage granted by the dedicatory." Moreover, because the evidence in the case suggested that the public had used the right-of-way and that the town agreed with Widener that he could conduct the requested improvement and maintenance of the area, Barter could not meet its substantial burden of showing that the town had abandoned the right-of-way.

E. Landlord and Tenant

O'Neill v. Windshire-Copeland Associates, L.P., the plaintiff brought an action for personal injuries sustained when she fell off the balcony of an apartment building owned by the defendant. The protective railing on the balcony did not comply with height requirements of the local municipal building code. The evidence also showed, however, that the plaintiff "was familiar with the balcony and that she had consumed alcohol prior to the accident."

The United States District Court for the Eastern District of Virginia held that the defendant was negligent per se because of the balcony deficiency. The lower court, however, also held that the negligence per se finding "did not bar its defense of contributory negligence" arising out of the plaintiff's alcohol consumption. When the case was submitted to the jury, the jury found the plaintiff contributorily negligent, and the court entered a judgment in favor of the defendant. The plaintiff appealed the case to the United States Court of Appeals for the Fourth Circuit.

266. Id. at 91–92, 592 S.E.2d at 61–62.
267. Id. at 91, 592 S.E.2d at 61.
268. Id., 592 S.E.2d at 62.
269. Id. at 93, 592 S.E.2d at 63.
272. Id.
273. Id.
274. Id.
275. Id.
276. Id. at 607–08, 595 S.E.2d at 282.
Upon request of the Fourth Circuit, the Supreme Court of Virginia exercised its certification jurisdiction\(^{277}\) to answer the question of whether the defense of contributory negligence was still available, given the defendant's negligence per se.\(^{278}\)

The Supreme Court of Virginia analyzed this question by focusing first on whether Virginia had adopted section 483 of the Restatement (Second) of Torts, which provides that "when a defendant's negligence consists of a violation of a statute, a plaintiff's contributory negligence bars his recovery for injuries caused by the negligence of the defendant 'unless the effect of the statute is to place the entire responsibility for such harm as has occurred upon the defendant.'"\(^{279}\) This occurs when the statute "'is enacted in order to protect a certain class of persons against their own inability to protect themselves,'"\(^{280}\) even if such persons are "'fully able to protect themselves.'"\(^{281}\)

The plaintiff argued that the case of *Carter Coal Co. v. Bates*\(^{282}\) was the controlling authority in Virginia for rejecting the assumption of risk defense.\(^{283}\) The court observed that *Carter Coal* "involved a coal company's failure to provide for a 'conspicuous light' on the front and rear of coal hauling machinery as required by statute."\(^{284}\) The court's decision in that case was based on the principle that, "if the mining-safety legislation at issue had not abrogated this common law defense, the 'systematic violation' of the statute through the purported risk-assumption by the plaintiff would defeat the statute's purpose."\(^{285}\)

\(^{277}\) See VA. CONST. art. IV, § 1; VA. SUP. CT. R. 5.42 (Repl. Vol. 2004).

\(^{278}\) *O'Neil*, 267 Va. at 606-07, 595 S.E.2d at 281.

\(^{279}\) Id. at 608, 595 S.E.2d 282 (quoting RESTATEMENT (SECOND) OF TORTS § 483 (1965)).

\(^{280}\) Id. (quoting RESTATEMENT (SECOND) OF TORTS § 483 cmt. c (1965)).

\(^{281}\) Id. (quoting RESTATEMENT (SECOND) OF TORTS § 483 cmt. d (1965)).


\(^{283}\) *O'Neil*, 267 Va. at 608-09, 595 S.E.2d at 282-83.

\(^{284}\) *O'Neil*, 267 Va. at 609, 595 S.E.2d at 282.

\(^{285}\) Id. (construing *Carter Coal Co. v. Bates*, 127 Va. 586, 105 S.E. 76 (1920)). The court also cited *Atlantic Coast Line Ry. v. Bell*, 149 Va. 720, 141 S.E. 838 (1928) for the proposition that:

if the employer may avail himself of the defense that the employee agreed in advance that the statute should be disregarded, the court would be measuring the rights of the persons whom the law makers intended to protect by the common law standard of the reasonably prudent person, and not by the definite standard set up by the legislature. This would be practically a judicial
The court also found the assumption of risk analogy inapposite in this case. The court stated that assumption of risk and contributory negligence stand in a different legal relation to the violation of a statute.286 "Assumption of risk imports no delict on the part of an employe[e]... Contributory negligence... is a delict or neglect of duty by the employe[e], and hence he cannot recover for the delict of the employer,... if his own delict has contributed to his injury as a proximate cause."287 The court recognized that legislative intent may be to allocate liability specifically to defendants in some cases, such as in the case of common carriers.288 Nothing in the applicable building code, however, would suggest a legislative intent to fully allocate liability in the face of contributory negligence.289 Consequently, the supreme court determined that the finding of contributory negligence should stand and bar the plaintiff's recovery.290

In the case of Video Zone, Inc. v. KF&F Properties, L.C.,291 the Supreme Court of Virginia interpreted language in a lease to determine whether the landlord or tenant should bear the cost of maintaining and/or replacing heating ventilation and air conditioning ("HVAC") equipment.292 A portion of the HVAC equipment was installed within the premises with a "major component" of the system located outside the premises on the roof.293 The lease contained typical maintenance allocation language, requiring the tenant to maintain the interior of the premises and the landlord to maintain the roof, structure, and exterior.294 The lower court determined that the lease language was ambiguous and that the conduct of the parties surrounding the repair suggested that the tenant, Video Zone, had agreed to bear the cost of the repair.295

O'Neill, 267 Va. at 609, 595 S.E.2d at 283 (quoting Atlantic Coast, 149 Va. At 755, 141 S.E. at 842).

287. Id. at 610, 595 S.E.2d at 283 (quoting Pocahontas Consol. Collieries Co. v. Johnson, 244 F. 368, 372 (4th Cir. 1917) (alteration in original)).
288. Id., 595 S.E.2d at 283–84.
289. Id. at 610–11, 595 S.E.2d at 284.
290. Id. at 611, 595 S.E.2d at 284.
292. Id. at 625–28, 594 S.E.2d at 923-25.
293. Id. at 623, 594 S.E.2d at 922.
294. See id.
295. Id. at 624, 594 S.E.2d at 923.
Because the determination of ambiguity is one of law, the Supreme Court of Virginia examined this question de novo. In so doing, the supreme court agreed that the lease language was ambiguous, because it could be understood in more than one way when the words in the lease were interpreted in their usual, ordinary, and popular meaning. Given the ambiguity, the court agreed that parol evidence was relevant to discern the intent of the parties—"not to contradict or vary contract terms, but to establish the real contract between the parties." According to the court, "the parties' interpretation and dealings with regard to the contract terms are entitled to great weight and will be followed unless doing so would violate other legal principles." Because there was evidence to support the circuit court's factual findings concerning the parties' intent, the supreme court affirmed the allocation.

F. Eminent Domain

In the case of East Tennessee Natural Gas Company v. Sage, the United States Court of Appeals for the Fourth Circuit was asked to review a ruling by the United States District Court for the Western District of Virginia in which that court found that the plaintiffs could exercise the right of eminent domain to acquire necessary easements pursuant to the Natural Gas Act ("NGA") and should be granted an injunction, entitling the gas company to immediate possession. The NGA gives a gas company the power to acquire property by eminent domain, but the


298. Id. at 626, 594 S.E.2d at 924 (quoting Tuomala v. Regent Univ., 252 Va. 368, 374, 477 S.E.2d 501, 505 (1996)).


300. Id.

301. 361 F.3d 808 (4th Cir. 2004).

302. Id. at 820.
NGA does not provide for immediate possession, as in the so-called "quick take" provisions of some statutes.\textsuperscript{303} The central issue on appeal was "whether a gas company [could] obtain immediate possession," absent such a statutory grant, "through the equitable remedy of a preliminary injunction."\textsuperscript{304}

In holding that a preliminary injunction was appropriate, the lower court found that the standards required for a preliminary injunction were met.\textsuperscript{305} "Among other things, the court found that holding up 'the [gas line] project's completion until the compensation for the last parcel [was] determined' would result in an extended delay."\textsuperscript{306} While there would be financial harm to the gas company, the relative harm to the property owners would be slight "because they had the 'right to draw down the money [the gas company had] deposited with the Court.'"\textsuperscript{307} The court also noted that the "expeditious completion of the pipeline [was] in the public interest."\textsuperscript{308} The court determined that, although equity may not be used to create a new substantive right,\textsuperscript{309} "when a substantive right exists, an equitable remedy may be fashioned to give effect to that right if the prescribed legal remedies are inadequate."\textsuperscript{310} The district court first considered "whether [the gas company] had a substantive right to condemn the landowners' property."\textsuperscript{311} After reaching its conclusion, the court's order "gave [the company] an interest in the landowners' property that could be protected in equity if the conditions for granting equitable . . . relief were satisfied."\textsuperscript{312} The company had to demonstrate that it would have suffered irreparable harm without the remedy and that the harm would have been greater than that suffered by the property owners.\textsuperscript{313} In this case, the company "was awarded pos-
session only after it engaged in five months of intensive litigation that analyzed and determined its right to take and its right to equitable relief." The court added that "courts of equity may go to greater lengths to give ‘relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." The Federal Energy Regulatory Commission spent sixteen months evaluating the need for the project and ultimately concluded that it was "required by public convenience and necessity." It was, therefore, appropriate for the district court to weigh the public benefit of expeditious project construction in deciding that it could use its equitable power in this case.

In the case of Richmeade, L.P. v. City of Richmond, the Supreme Court of Virginia considered "whether this action for inverse condemnation is subject to the three-year statute of limitations for an implied contract, Code § 8.01-246, or the five-year limitations period for injury to property, Code § 8.01-243." The case arose out of damage incurred by an apartment developer because of a change in position over the vacation of streets between two separate parcels of land. On February 22, 1999, the City of Richmond adopted an ordinance vacating certain streets within a proposed development owned by Richmeade. In April 1999, the city reconsidered the ordinance and denied the request to vacate the streets. On September 10, 2002, Richmeade filed an action for inverse condemnation "seeking a declaration that the City’s actions constituted a ‘taking and/or damaging’ of its property and property rights." The City filed a plea arguing that the claim was time-barred under the statute of limitations for an implied contract. Richmeade, in reply, argued that the five-year limita-

314. Id.
316. Sage, 361 F.3d at 827.
317. Id. at 830.
319. Id. at 600, 594 S.E.2d at 607.
320. Id.
321. Id.
322. Id.
323. Id.
tion for damage to property should apply.\textsuperscript{325} The trial court concluded that "an action for inverse condemnation was subject to the three-year statute of limitations and entered an order dismissing Richmeade's motion for judgment."\textsuperscript{326}

Article 1, section 11 of the Virginia Constitution "confers on a property owner a right to just compensation from the government when the government takes or damages the owner's property."\textsuperscript{327}

The court has long held that:

[A] landowner could enforce this right under a tort or contract theory of recovery; however, because the sovereign was not liable for injuries based on negligence, a landowner could waive recovery under the tort theory and sue on the contract between the landowner and the government that Article 1, Section 11 implies.\textsuperscript{328}

The court further noted that:

[T]his Court has consistently held that when the government fail[s] to condemn private land taken for public purposes, the landowner's recourse [is] to file an action for inverse condemnation based on the implied contract between the government and the landowner. The terms of that implied contract require the government to pay the landowner "such amount as would have been awarded therefore, if the property had been condemned under the eminent domain statutes."\textsuperscript{329}

In denying Richmeade's theory that this was a taking or damaging of property by the government, the court stated that:

[A]n action for inverse condemnation is an action seeking redress for the government's action in limiting property rights the landowner holds. In that regard, the act giving rise to the breach of implied contract is not an act aimed at the property, but rather an act that limits the landowner's ability to exercise his property rights without paying the landowner for that limitation. The mere fact that the measurement of that compensation may be based on a decline in the


\textsuperscript{326} Richmeade, 267 Va. at 600, 594 S.E.2d at 608 (citing Prendergast v. N. Va. Reg'l Park Auth., 227 Va. 190, 313 S.E.2d 399 (1984)).

\textsuperscript{327} Id. at 600–01, 594 S.E.2d at 608 (citing VA. CONST. art. I, § 11; State Hwy. & Transp. Comm'r v. Linsly, 223 Va. 437, 443, 490, 290 S.E.2d 834, 838 (1982); Chesapeake & Ohio Ry. Co. v. Ricks, 146 Va. 10, 18, 135 S.E. 685, 688 (1926)).

\textsuperscript{328} Id. at 601, 594 S.E.2d at 608 (citing Nelson County v. Loving, 126 Va. 283, 299–300, 101 S.E. 406, 411 (1919)).

\textsuperscript{329} Id. (citing Burns v. Bd. of Supervisors, 218 Va. 625, 627, 238 S.E.2d 823, 825 (1977); Nelson County v. Coleman, 126 Va. 275, 279, 101 S.E. 413, 414 (1919)).
value of the subject property does not make the action one for injury to property.\textsuperscript{330}

G. Zoning and Land Use Planning

In the case of \textit{O'Brien v. Appomattox County},\textsuperscript{331} the United States District Court for the Western District of Virginia explored the extent to which a county zoning ordinance could regulate the use of biosolids on agriculturally zoned property.\textsuperscript{332} "Biosolids are the nutrient-rich organic materials resulting from the treatment of domestic sewage in a waste water treatment facility" and "can be applied to a farmer's field as a substitute for commercially available fertilizer."\textsuperscript{333} Despite complaints of odors and the possibility of harmful organic chemicals and pathogens in this material, the land application of sewage sludge has been practiced in the Commonwealth for many years.\textsuperscript{334} The Virginia Department of Health ("VDH"), in conjunction with the State Water Control Board ("SWCB"), administers a permitting process that controls the application of biosolids in the state.\textsuperscript{335}

The Board of Supervisors of Appomattox County enacted an ordinance creating an "Agricultural A-1 Intensive Farming Overlay District," in which the "application of biosolids would be tightly regulated."\textsuperscript{336} Under the new Appomattox County ordinance, the use of biosolids would be prohibited other than within this new zoning district.\textsuperscript{337} To be included within the overlay district, a farmer would have to seek county approval.\textsuperscript{338} The Board subsequently adopted a second ordinance to establish procedures


\textsuperscript{331} 293 F. Supp. 2d 660 (W.D. Va. 2003).

\textsuperscript{332} Id. at 661.

\textsuperscript{333} Id.

\textsuperscript{334} Id.


\textsuperscript{336} \textit{O'Brien}, 293 F. Supp. 2d at 661.

\textsuperscript{337} Id.

\textsuperscript{338} Id.
for monitoring biosolids. The ordinance provided that it was the intent of the Board to eliminate the application of biosolids if permitted by the General Assembly or the Supreme Court of Virginia. The plaintiffs, therefore, argued that they should not be bound by the ordinance because it was preempted by state law.

"It is a fundamental principle of Virginia state law that local ordinances must conform to and not be in conflict with the public policy of the State as embodied in its statutes." The court determined that the plaintiffs could prove their state law preemption claim if they could "show that the Appomattox ordinances preclude[d] the use of biosolids that [were] authorized by a valid VDH permit." Although the General Assembly did pass Virginia Code section 62.1-44.19:3 to allow a city or town to "adopt an ordinance that provides for testing and monitoring of the land application of sewage sludge" to determine compliance of applicable laws and regulations, this legislation did not authorize the local jurisdiction to ban such practices where the application of sludge would be authorized by a valid permit. The court found, therefore, based on the text of the local ordinance, that the standards for application of the biosolids were more restrictive than would be required under a VDH permit and were thus preempted by state law and void and unenforceable.

In the case of Glazebrook v. Board of Supervisors of Spotsylvania County, the Supreme Court of Virginia discussed the degree of specificity required in the published notice of a zoning case. The court examined the application of Virginia Code section 15.2-2204(A) in the context of proposed amendments to the Spotsylvania County Zoning Ordinance initiated by the county to stem the rapid growth that the county had been experiencing in recent

339. Id. at 661–62.
340. Id.
341. Id. at 662.
344. Id. at 663.
345. Id. at 664.
347. Id. at 552, 587 S.E.2d at 590.
years.\textsuperscript{348} The advertisements published in the local newspaper stated the time, date, and location of the hearing, listed the affected zoning districts and the zoning ordinance section numbers and titles, and stated that the hearing would "affect development standards."\textsuperscript{349} Plaintiff Glazebrook and others brought suit against the Board claiming that the Board had failed to publish adequate notice of its proposed amendments.\textsuperscript{350} Virginia Code section 15.2-2204(A) requires that an advertisement contain a descriptive summary of the proposed action.\textsuperscript{351} If the notice failed to meet the requirements of the code section, "the Board acted outside the authority granted by the General Assembly and the amendments [to the ordinance were] void \textit{ab initio}."\textsuperscript{352}

In this case, the supreme court considered the plain meaning of the phrase "descriptive summary."\textsuperscript{353} The court noted that the description should cover the main points of the proposed amendment and accurately describe the proposed amendment.\textsuperscript{354} The court reasoned that:

\begin{quote}
[T]he intent of the statute is to generate informed public participation by providing citizens with information about the content of the proposed amendments and the forum for debate concerning those amendments. There is no indication that the General Assembly expected affected citizens to engage in legal research in order to decide whether to participate in the hearing or to decide what their interests may be in a proposed amendment.\textsuperscript{355}
\end{quote}

While the court neither attempted to dictate exact language required of future notices, nor did it establish a bright-line rule, it instead held that the term "development standards" was inadequate to describe the proposed action by the Board.\textsuperscript{356} Consequently, the notice was also inadequate and the ordinances

\begin{flushleft}
\textsuperscript{348} \textit{Id.} at 552, 587 S.E.2d at 590.  \\
\textsuperscript{349} \textit{Id.} at 552-53, 587 S.E.2d at 590.  \\
\textsuperscript{350} \textit{Id.} at 553, 587 S.E.2d at 591.  \\
\textsuperscript{351} \textit{Id.} at 554, 587 S.E.2d at 591; \textit{Va. Code Ann.} § 15.2-2204(A) (Supp. 2004).  \\
\textsuperscript{352} \textit{Glazebrook}, 266 Va. at 554, 587 S.E.2d at 591 (citing City Council of the City of Alexandria v. Potomac Greens Assoc., 245 Va. 371, 378, 429 S.E.2d 225, 228 (1993)).  \\
\textsuperscript{353} \textit{Id.} at 554-55, 587 S.E.2d at 591.  \\
\textsuperscript{354} \textit{Id.}  \\
\textsuperscript{355} \textit{Id.} at 555, 587 S.E.2d at 592 (citing Lawrence Transfer & Storage Corp. v. Bd. of Zoning Appeals of Augusta, 229 Va. 568, 571, 331 S.E.2d 460, 462 (1985)).  \\
\textsuperscript{356} \textit{Id.} at 556-57, 587 S.E.2d at 593 (citing \textit{Va. Code Ann.} § 15.2-2204 (Supp. 2004); \textit{Potomac Greens Assoc.}, 245 Va. at 378, 429 S.E.2d at 228)).
\end{flushleft}
adopted were void ab initio.357

In the case of Board of Supervisors of Fairfax v. Robertson,358 the Supreme Court of Virginia considered the application of the “fairly debatable” test in the context of the county’s refusal to grant a special exception in exercise of its legislative authority.359 The plaintiff, Robertson, owned a parcel of land adjacent to the Dulles Airport Access Road (“DAAR”).360 Property within 200 feet of the DAAR is subject to a setback requirement limiting development.361 The setback ordinance allowed the Board of Supervisors to deviate from the setback requirements under certain circumstances.362 The underlying zoning of the property would have permitted three units per acre on the approximately 2.78-acre parcel.363 The parties agreed that without the deviation, Robertson could only build one single-family dwelling on the property.364 Robertson filed a proffered condition amendment application seeking a deviation to allow him to construct four single-family dwelling units.365 The deviation application was denied by the Planning Commission and by the Board of Supervisors of Fairfax County at separate public hearings.366 Robertson sought declaratory judgment and injunctive relief from the Fairfax County Circuit Court.367 The circuit court determined that “Robertson had met his ‘twin burden of proving the proffered use of the property was reasonable and the Board’s rejection of his application was unreasonable,’” holding that the Board’s denial of Robertson’s application was arbitrary and capricious.368

Upon review of the circuit court decision, the Supreme Court of Virginia noted that because the granting or denial of a special exception is a legislative function, a presumption of legislative va-

357. Id. at 557, 587 S.E.2d at 593.
359. Id. at 527, 557 S.E.2d at 572.
360. Id. at 528, 587 S.E.2d at 572.
361. Id., 587 S.E.2d at 573 (citing Fairfax County, Va., Zoning Ordinance § 2-414(1) (A)).
362. Id. (citing Fairfax County, Va., Zoning Ordinance § 2-414(4)).
363. Id., 587 S.E.2d at 572.
364. Id., 587 S.E.2d at 573.
365. Id.
366. Id. at 528–29, 587 S.E.2d at 573.
367. Id. at 529, 587 S.E.2d at 573.
368. Id. at 531, 587 S.E.2d at 574–75.
lidity attached to the Board's denial of Robertson's application.\textsuperscript{369} This presumption of validity remains with the legislative action on review by the supreme court and is not overcome by the lower court's determination of unreasonableness.\textsuperscript{370} According to the court, "[l]egislative action is reasonable if the matter at issue is fairly debatable."\textsuperscript{371} That is to say, legislative action is reasonable "when the evidence in support of the opposing views would lead objective and reasonable persons to reach different conclusions."\textsuperscript{372} The only issue on appeal, therefore, was whether the county had produced sufficient evidence of reasonableness to make the Board's rejection of Robertson's request for a deviation fairly debatable.\textsuperscript{373} Evidence elicited at trial indicated that it was reasonable to believe that noise levels at the property likely would exceed those levels articulated by the Fairfax County comprehensive plan.\textsuperscript{374} Litigation over a legislative determination by a Board of Supervisors is not a "battle of experts" in which the land owner need only be more believable than the county in his argument; rather, if there is any evidence presented in favor of the legislative action that is "sufficiently probative to make a fairly debatable issue of the . . . decision to deny," the county must prevail.\textsuperscript{375}

In the case of \textit{Treacy v. Newdunn Associates, L.L.P.},\textsuperscript{376} the United States Court of Appeals for the Fourth Circuit considered the application of state and federal wetlands laws to a man-made ditch under an interstate highway.\textsuperscript{377} In this case, defendant Newdunn, without obtaining a permit from the Army Corps of Engineers (the "Corps") or the Virginia State Water Control

\begin{itemize}
  \item \textsuperscript{369} \textit{Id.} at 532, 587 S.E.2d at 575 (citing \textit{County of Lancaster v. Cowardin}, 239 Va. 522, 525, 391 S.E.2d 267, 269 (1990); \textit{City of Richmond v. Randall}, 215 Va. 506, 511, 211 S.E.2d 56, 60 (1975)).
  \item \textsuperscript{370} \textit{Id.} (quoting Bd. of Supervisors v. Lerner, 221 Va. 30, 34–35, 267 S.E.2d 100, 103 (1980)).
  \item \textsuperscript{371} \textit{Id.} (quoting \textit{Lerner}, 221 Va. at 34, 267 S.E.2d at 102).
  \item \textsuperscript{372} \textit{Id.} (quoting Bd. of Supervisors v. Williams, 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975)).
  \item \textsuperscript{373} \textit{See id.} at 532–33, 587 S.E.2d at 575 (quoting Bd. of Supervisors v. Snell Constr. Corp., 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974)).
  \item \textsuperscript{374} \textit{Id.} at 534–35, 587 S.E.2d at 576–77.
  \item \textsuperscript{375} \textit{Id.} at 536, 587 S.E.2d at 577 (citing Bd. of Supervisors v. Stickley, 263 Va. 1, 11, 556 S.E.2d 748, 754 (2002)).
  \item \textsuperscript{376} 344 F.3d 407 (4th Cir. 2003). For further discussion of the case, see Thorp & Taggart, \textit{supra} note 335, at 210–11, 214.
  \item \textsuperscript{377} \textit{Id.} at 409.
\end{itemize}
Board ("SWCB"), began ditching and draining wetlands on a forty-three-acre property near Newport News, Virginia. The property contained wetlands, as defined by the Corps regulations. However, the natural hydrologic connection to the nearest navigable waterway had been cut off by the construction of Interstate 64; the only remaining connection was a man-made ditch. The Corps brought a civil enforcement action in federal district court, and the SWCB initiated its own enforcement action in state court which was removed to federal court. The lower court ruled for Newdunn in both cases, finding that the Corps lacked jurisdiction over wetlands on the Newdunn property under the Clean Water Act ("CWA") and that the jurisdictional reach of Virginia law was merely coextensive with federal law.

The court first turned to the jurisdictional issue of whether it could rule on the enforcement action premised on Virginia law. Such a ruling could only be had if "it appears that some substantial, disputed question of federal law is a necessary element of one of the . . . state claims." Both the Virginia state statute and the Federal Regulations share a scientific definition of wetlands. However, the lower court erred by confusing the scientific definition of wetlands and a jurisdictional wetland. That question turns not on the federal regulations, but rather the Virginia Wetland Resources Act of 2000. "The fact that a state law might mimic the wording of the federal law," the court noted "does not transform interpretation of the state statute into a federal question."

378. Id. at 409–10.
379. Id.; see 33 C.F.R. § 328.3(b) (2002).
380. Newdunn, 344 F.3d at 410.
381. Id.
382. Id.
383. Id. at 410–11 (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 13 (1983)).
384. Id. at 411 (citing 33 C.F.R. § 328.3(b) (2003); Va. CODE ANN. § 62.1-44.3 (Cum. Supp. 2004)).
385. Id. As the court noted, "the issue is not whether the Newdunn property contains wetlands, but whether those wetlands are within the jurisdiction of the State Water Control Board." Id.
386. Id. (citing Virginia Wetlands Resources Act of 2000, Va. CODE ANN. §§ 62.1-44.3, -44.5, -44.15, -44.15:5, -44.29 (Repl. Vol. 2001 & Cum Supp. 2004)).
387. Id. at 411 n.2.
The plain text of the Virginia Wetland Resources Act defines state waters broadly to include “all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction including wetlands.” The Fourth Circuit added that, “[n]othing in the Virginia Act refers to the CWA’s definition of ‘navigable waters’ or the ‘waters of the United States,’” upon which Federal jurisdiction rests. The plain language of the Virginia Act “makes it inconceivable that the term ‘wetlands,’ as it is used in the state legislation, could necessarily turn on the resolution of a question of federal law.” Under Virginia’s new wetlands regulations, impacts that may have been permissible to isolated wetlands under federal regulations will be limited in Virginia. Consequently, the Fourth Circuit reversed this portion of the lower court’s decision and remanded the state enforcement action to the Virginia court “from which it was improperly removed.”

On the remaining question of federal law, the court cited United States v. Deaton in finding that the man-made drainage ditch could be classified as a “tributary” to invoke the jurisdiction of the Corps. The court concluded that a broad interpretation of the term “tributary” by the Corps was justified because discharges into non-navigable tributaries and adjacent wetlands have a substantial effect on the water quality in navigable waters. “That the I-64 ditch at issue in the present case was man-made rather than a natural watercourse is an irrelevant distinction.” Consequently, the ruling of the lower court was reversed.

388. Id. at 412 (quoting VA. CODE ANN. § 62.1-44.3 (Cum. Supp. 2004)).
389. Id.
390. Id. at 412–13.
391. Id. at 414.
392. Id.
393. 332 F.3d 698, 711 (4th Cir. 2003). In Deaton, the Fourth Circuit observed that, through the Clean Water Act regulations, the Army Corps of Engineers intends to assert jurisdiction over “any branch of a tributary system that eventually flows into a navigable body of water.” Id.; see also Thorp & Taggart, supra note 335, at 213–14.
394. See Treacy, 344 F. 3d at 416.
395. Id. at 416–17.
396. Id. at 417.
397. Id.
In *Cochran v. Fairfax County Board of Zoning Appeals*, the Supreme Court of Virginia consolidated three variance cases from Fairfax County, Pulaski County, and the City of Virginia Beach to provide a comprehensive discussion of the principles applicable to the granting or denial of a variance. In the Fairfax County case, the petitioner, who had lived in a dwelling on the subject property for eight years, asked for four variances arising out of his desire to enlarge and relocate the dwelling. It was undisputed that the petitioner could have constructed the new dwelling on the property by shifting the structure two feet to the south. The petitioner argued, however, that such a configuration would provide less "curb appeal." Over the opposition of neighbors, the Board of Zoning Appeals ("BZA") granted all four variances, concluding that the denial of the variance "would result in practical difficulty or unnecessary hardship that would deprive the user of all reasonable use of the land and/or buildings involved." The lower court affirmed the decision of the BZA and the adjacent property owners and the county appealed.

In the Pulaski County case, the petitioners, owners of a corner lot, petitioned the BZA for a variance to reduce the side setback requirement on the property to allow for construction of a garage. Although the topography of the lot was difficult, the garage could have been constructed closer to the house without the need for a variance. However, this could only be done with additional expense. The BZA granted the petition, the lower court affirmed the decision, and the neighboring property owners appealed.

In the Virginia Beach case, the petitioners owned a parcel of land upon which was constructed a home with a detached ga-

399. Id. at 759, 594 S.E.2d at 573.
400. Id. at 759–60, 594 S.E.2d at 573.
401. Id. at 760, 594 S.E.2d at 574.
402. Id.
403. Id. at 761, 594 S.E.2d at 574.
404. Id.
405. Id., 594 S.E.2d at 574–75.
406. Id. at 761–62, 594 S.E.2d at 574–75.
407. Id. at 762, 594 S.E.2d at 575.
408. Id.
Due to a modification in the zoning ordinance limiting the total number of square feet of accessory structure, the garage was a non-conforming structure. The applicants petitioned for a variance to allow an additional structure on the property, specifically a storage shed. It is undisputed that the shed could have been built in conformity with the ordinance if attached to the house. Petitioners argued that their lot was so large that their application was in keeping with the "spirit" of the ordinance. "The BZA granted the variance to bring the garage into conformity, but denied the remainder of the . . . request on the ground that no 'hardship' existed." The case was appealed to the circuit court at which time the applicants all presented evidence of personal hardship, including that a family member had to move into the house due to illness and that the storage shed was needed for the storage of her belongings. The circuit court ruled that a hardship existed and granted the variance. The BZA thereafter appealed to the Supreme Court of Virginia.

In discussing the three cases together, the Supreme Court of Virginia emphasized the purpose of a variance—to soften the impact of broad zoning ordinances when the strict application of those ordinances, due to "the size, shape, topography or other conditions," would render the property relatively useless. The need for variances is borne of the constitutional argument that, while a zoning ordinance may be a valid exercise of police power on its face, it may be unconstitutional as applied to an individual parcel. According to the court, "the language used in Code § 15.1-495(b) [now § 15.2-2309(2)] to define "unnecessary hardship" clearly indicates that the General Assembly intended that variances be granted only in cases where application of zoning restrictions would appear to be constitutionally impermissible."
cause the BZA is acting in an administrative capacity in considering a variance, it may act "only in accordance with standards prescribed by the legislative branch of government." Consequently, before granting a variance, the BZA must find that the ordinance, strictly applied, would effectively prohibit or unreasonably restrict the utilization of property such that the ordinance would interfere with all reasonable beneficial uses of the property, taken as a whole. With those standards in mind, the court reasoned that "[t]he proposed house in Fairfax could have been reconfigured or moved" or the project abandoned and the current residence occupied; "[t]he proposed garage in Pulaski could have been moved to another location" or abandoned; and "[t]he shed in Virginia Beach could have been built as an addition to the existing house." Without any variances, each of the properties retained substantial beneficial uses and substantial value. While each of the owners presented compelling reasons, none was legally compelling.

In the case of USCOC of Virginia RSA No. 3 v. Montgomery County Board of Supervisors, the United States Court of Appeals for the Fourth Circuit reversed a ruling by the lower court that the denial of a special use permit by the Montgomery County Board of Supervisors was not based upon substantial evidence in violation of the Telecommunication Act. This case arose out of an effort by USCOC of Virginia RSA No. 3 ("U.S. Cellular") to erect a 240-foot telecommunications tower. "Because of its height and location... the tower would be visible along the ridge line, extending 170 feet above the tree canopy." The county's comprehensive plan provided guidelines for the county's consideration of new towers, for encouraging the use of preexisting towers, for the use of monopole stealth towers in lieu of lattice-structures, and for requiring that they be constructed in areas "that will provide the least negative impact to the citizens of each jurisdi-
In addition, the county's comprehensive plan set forth a "hierarchy of lands on which to construct new towers." The court noted that "[r]idge line property zoned as agricultural or conservation, such as the property at issue here, ranks as one of the least preferred categories of land for the construction of telecommunications towers." At the Board of Supervisors hearing, the Board denied the application and instead granted permission to construct a 195-foot tower that would not require lighting under federal regulations. According to a report conducted for the county by an independent service, the coverage achieved by the 240-foot tower could not be matched by a single 195-foot tower, but could be by several smaller towers.

The Court of Appeals for the Fourth Circuit agreed with the lower court that it was not the county's intent to prohibit service in general. Rather, the county's granting of a special use permit for the 195-foot tower that would provide wireless capabilities to a significant area indicated "that the Board was not hostile to the construction of new towers."

The district court determined that the Board's rejection of the 240-foot tower was not based upon substantial evidence in a written record as required by the Telecommunications Act. The district court had concluded that the Board's decision was based solely upon aesthetic conditions in violation of Virginia law. The Fourth Circuit disagreed with this analysis, distinguishing the case of Board of Supervisors of James City County v. Rowe.

In that case, the court considered the validity of a local ordinance that, among other things, required building applicants to submit their plans to an architectural design review board for determination as to whether the designs were in good taste and in reasonable harmony with the existing buildings in the surrounding ar-

427. Id. at 265–66.
428. Id. at 266.
429. Id.
430. Id.
431. Id. at 266–67.
432. See id. at 268.
433. Id. at 268–69.
435. USCOC of Va., 343 F.3d at 269 (citing Bd. of Supervisors of James City County v. Rowe, 216 Va. 128, 145, 216 S.E.2d 199, 213 (1975)).
436. Id. at 269–70 (citing Rowe, 216 Va. at 145, 216 S.E.2d at 213).
Because the Board’s discussion in this case was replete with references to the visual intrusiveness of the taller tower, the district court determined that the fundamental difference between the two towers was aesthetic in nature. The Fourth Circuit turned to the enabling legislation for zoning ordinances to conclude that:

[Local governments may regulate the “size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures.” ... No matter what zoning practices are actually prohibited because of an undue emphasis on aesthetic values, Virginia law specifically authorizes a consideration of factors such as size, height, and bulk. The Board’s consideration of the height of the proposed tower, therefore, is proper.]

The Board’s decision was based upon the proposed tower’s inconsistencies with Montgomery County’s zoning ordinances and land use guidelines. The Board argued that the location and design of the proposed tower did not conform to the county’s comprehensive plan. Consequently, the proposed tower’s failure to adhere to the applicable zoning requirements provided substantial evidence to justify the rejection of the tower.

H. Mold Cases

Mold cases, which were hailed as “the next asbestos,” may be a more difficult type of case for the plaintiffs’ bar to maintain as shown in the case of Roche v. Lincoln Property Co. In Roche, the United States District Court for the Eastern District of Virginia ruled on several questions important to this area. The first published opinion in this case relates to the disqualification of the plaintiff’s expert witness. The Roches claimed that their apartment was poorly maintained and that there were water leaks, holes in the wall, and mold growing within the apart-

437. See Id. at 269; Rowe, 216 Va. at 144–45, 266 S.E.2d at 212–13.
438. See USCOC of Va., 343 F.3d at 269.
439. Id. at 270.
440. Id. at 271.
441. Id.
442. Id.
444. Id. at 745.
The plaintiffs retained an environmental testing service consultant who concluded that there was "extensive" mold contamination in the apartment. Subsequent to leaving the apartment, various members of the Roche family, including Mr. Roche, complained of ailments ranging from memory loss to hypersensitivity. When the Roches visited Dr. Bernstein, an allergist, the doctor recommended that, among other things, Mr. Roche stop smoking, that the Roches find a new home for their cat, and that they start a low-sugar diet. Dr. Bernstein also found that the Roches were allergic to mold and other items, namely mites, cockroaches, cats, dust, most wheats, and grasses.

At trial, Dr. Bernstein testified that the mold in the apartment was the source of the plaintiffs' ailments. In ruling in favor of the defendant and excluding Dr. Bernstein's expert testimony, the court concluded that (i) Dr. Bernstein failed to adhere to the established methodology of differential diagnosis by not ruling in the suspected causes and by not ruling out other possible causes, (ii) he failed to establish how various reports and studies showing some correlation between exposure to mold and allergic reactions supported his conclusions and that the mold in the apartment was the proximate cause of the plaintiffs' ailment, and (iii) he relied solely on temporal relation of the Roches' exposure to the onset of their symptoms to arrive at his conclusions. The court emphasized that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." "Conjecture or 'subjective belief' or 'unsupported speculation' will not suffice." The lack of detail in the

445. Id. at 746.
446. Id.
447. Id.
448. Id. at 746–47.
449. Id. at 747.
450. Id.
451. Id. at 752–53.
452. Id. at 755.
453. Id. at 764.
454. Id. at 748 (quoting Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993)).
455. Id. (quoting Daubert, 509 U.S. at 593–94). Courts generally consider four factors in determining whether the theory or technique is scientifically valid: "(1) whether the theory or technique used by the expert can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential
expert's analysis and testimony was also telling. It appeared that most of the conclusions reached were based on the fact that the Roches were asymptomatic when they moved into the apartment and became ill while they were there.\textsuperscript{456}

In a separate opinion, the district court considered the plaintiffs' motion for summary judgment.\textsuperscript{457} This motion was based on the theory of negligence per se, alleging that the landlord violated "building codes."\textsuperscript{458} The court noted that the only relevant statute was the Virginia Residential Landlord Tenant Act ("VRLTA").\textsuperscript{459} Due to the failure of the plaintiff's expert testimony, the court could not reach the conclusion that the apartment was uninhabitable under the VRLTA.\textsuperscript{460} Tests failed to sufficiently demonstrate the level or degree of toxic mold in the apartment.\textsuperscript{461}

For the reasons set forth above, the plaintiffs could not establish that the presence of mold was the proximate cause of their health problems.\textsuperscript{462} The plaintiffs' own expert, however, gave testimony suggesting that other lifestyle choices could have been the root of the problem.

In addition to the negligence per se theory, the plaintiffs advanced a theory of simple negligence.\textsuperscript{463} The burden was upon the plaintiff to show that the defendants "deviated from the standard ordinary care, either by failing to observe applicable trade cus-
toms and building code provisions or by some other defalca-
tion." The plaintiffs, however, failed to introduce any evidence
in the case that the landlord had knowledge of a hazardous condi-
tion within the premises or that the defendant’s conduct violated
customary industry standards. The court concluded that the de-
fendant’s own policies on treatment of mold could not be used to
establish an appropriate standard of care. For similar reasons,
the court did not agree with the plaintiff’s contention that the
landlord breached an implied warranty of habitability. The
court granted summary judgment in favor of the defendants as to
all counts.

III. 2004 LEGISLATIVE SESSION

A. Deeds of Trust

1. The General Assembly amended Virginia Code section 55-
60(2) to provide that “[a]ny deed of trust securing a loan, proceeds
of which are used by the borrower to acquire the secured real
property, shall be deemed to be a purchase money deed of
trust." This revision provides a lender with the protections of a
purchase money deed of trust, regardless of whether the “magic
language” is inserted in the document.

2. The General Assembly amended Virginia Code section 55-
66.3 to allow a lien creditor to file a certificate of satisfaction di-
rectly with the clerk of the court, unless the settlement agent
provides to the lien creditor a written request to receive the cer-
tificate. The lien creditor must provide the settlement agent
with a copy of the certificate, if filed directly by the lender.

464. Id. at *18 (quoting Morrison-Knudsen Co. v. Wingate, 254 Va. 169, 173, 492 S.E.2d
122, 124 (1997)).
465. Id. at **19–21.
466. Id. at *21 (citing Pullen v. Nickens, 226 Va. 342, 350, 310 S.E.2d 452, 456 (1983)).
467. Id. at *22.
468. Id. at *30.
ANN. § 55-60(2) (Supp. 2004)).
ANN. § 55-66.3 (Supp. 2004)).
471. Id.
3. The General Assembly modified Virginia Code section 6.1-2.25, part of the Consumer Real Estate Settlement Protection Act ("CRESPA"), to provide licensing authorities the right to issue summonses and subpoenas and to issue orders restraining a person from acting contrary to CRESPA. CRESPA was also modified to provide that "[a] final order of the licensing authority imposing a penalty or ordering restitution may be recorded, enforced, and satisfied as orders or decrees of a circuit court upon certification of such order by the licensing authority."  

B. Recording Tax  

1. The General Assembly modified Virginia Code section 58.1-811(A) to make the outlined exceptions applicable to contracts and leases as well as deeds.  

2. Virginia Code sections 58.1-811(A)(2) and (B)(2) exempt from recording tax and the grantor's tax, deeds to an incorporated church or religious body. Previously, those provisions pertained only to deeds to or from the trustees or trustee of a church or religious body.  

3. The General Assembly also modified the recording taxes to provide for an additional $1.00 fee on every deed admitted to record in those jurisdictions in which open space easements are held by the Virginia Outdoors Foundation. These fees are to be distributed to the Foundation on a monthly basis.  

C. Landlord /Tenant  

1. The General Assembly modified the Virginia Residential
Landlord and Tenant Act\textsuperscript{479} to provide that if a rental agreement provides for the payment of reasonable attorney's fees in the event of a breach of the agreement, the court shall award those fees, unless the tenant proves by a preponderance of the evidence that the failure to pay rent or vacate was due to a breach of the lease by the landlord or unlawful actions on the part of the landlord.\textsuperscript{480} The Act was also modified to authorize the landlord, upon determination of the existence of a non-emergency property condition in the dwelling unit, to temporarily relocate the tenant from the unit in order to alleviate the condition under certain circumstances, with the landlord bearing all costs and risks of the move.\textsuperscript{481} The failure of the tenant to cooperate with the temporary removal is deemed a breach of the rental agreement unless the tenant agrees to vacate the unit and terminate the rental agreement.\textsuperscript{482}

2. The General Assembly modified the Virginia Residential Landlord and Tenant Act\textsuperscript{483} to obligate the landlord to note upon move-in whether there is any visible evidence of mold in the dwelling unit.\textsuperscript{484} The tenant has the option of objecting to the report within five days after receipt.\textsuperscript{485} If the report states that there is visible evidence of mold, the tenant has the option to terminate the tenancy or accept the dwelling unit in its as-is condition.\textsuperscript{486} These modifications appear to be geared toward placing a clear duty of disclosure and maintenance on the landlord and a duty on the tenant to timely object and report deficiencies of the unit to the landlord. With these new requirements in place, hopefully litigation of this issue will be reduced and these matters will be addressed like any other condition in need of repair.

3. The General Assembly modified the Virginia Residential Landlord and Tenant Act\textsuperscript{487} to clarify and codify the interplay be-
tween security deposits, damage insurance, and renters insurance. 488 Virginia Code section 55-248.7:2(A) allows the landlord to require as a condition of the lease that the tenant pay for the cost of commercial damage insurance and/or commercial property and casualty insurance as a rider to the landlord's policy. 489 The annual cost of the damage insurance, however, plus the renters insurance plus the amount of any security deposit held by the landlord may not exceed the amount of two months' periodic rent. 490 Any renters insurance obtained by the landlord must name the tenant as an additional insured, placing the tenant in privity with the insurer. 491

D. Zoning

1. The General Assembly modified Virginia Code section 15.2-2204, governing the advertisement of plans, ordinances, and zoning amendments, to obligate the local jurisdiction to provide written notice to a parcel owner of any proposed amendment to the zoning ordinance involving a change that would decrease the allowed dwelling unit density on such parcel. 492 The General Assembly also modified Virginia Code section 15.2-2204 to require the local governing authority to provide notice to the commanding officer of any military base installation or airport of any proposed changes in land use within 3,000 feet of such base. 493

2. The General Assembly clarified Virginia Code section 15.2-2241(6) to make mandatory the provisions of a subdivision ordinance pursuant to which the subdivider may be obligated to provide shared easements to cable operators, public service corporations, gas, telephone, and electric service for the subdivision. 494

3. Virginia Code section 15.2-2300 obligates the zoning admin-

490. Id.
491. VA. CODE ANN. § 55-248.7:2(C) (Supp. 2004).
istrator to maintain a zoning map that provides ready cross-referencing between the parcels and any zoning conditions affecting such parcels.\textsuperscript{495} The General Assembly modified this section to require that such index also provides "ready access to all proffered cash payments and expenditures disclosure reports prepared by the local governing body pursuant to [Virginia Code section] 15.2-2303.2."\textsuperscript{496}

4. The General Assembly modified Virginia Code section 43-3 regarding mechanic's liens to clarify that any mechanic's lien associated with work or materials furnished relative to an easement shall only attach to the easement and not to fee simple title to the real estate.\textsuperscript{497}

5. The General Assembly clarified Virginia Code section 17.1-227, governing the recording of documents among land records, so it is now the responsibility of the attorney or party who prepares or submits an instrument to ensure that social security numbers are removed from the instrument prior to the instrument being submitted for recordation.\textsuperscript{498}

E. Eminent Domain

1. The General Assembly modified Virginia Code section 33.1-132 to reduce from one year to 180 days the time by which Commissioners or a jury must be appointed to ascertain the amount of compensation to be paid when property is taken by the Commonwealth Transportation Commissioner without instituting condemnation proceedings.\textsuperscript{499} In addition, the General Assembly added Virginia Code section 33.1-120(F), forbidding the Commonwealth Transportation Commissioner from forcing a property owner to relocate from improved owner-occupied property until the owner is permitted to withdraw the funds represented by the

\textsuperscript{495} VA. CODE ANN. § 15.2-2300 (Repl. Vol. 2003).
If the owner refuses to withdraw the funds, however, or if the Commissioner reasonably believes that the owner does not possess clear title or that certain owners cannot be located, the Commissioner can petition the court to force relocation.\textsuperscript{501}

The General Assembly amended the method for calculating damage to condemned land that is the subject of a conservation or redevelopment plan pursuant to Virginia Code section 36.48.\textsuperscript{502} In that section, owners are encouraged to redevelop blighted area pursuant to an overall development plan.\textsuperscript{503} In the event that, after the adoption of such plan, the local jurisdiction downzones the property without the consent of a property owner and then seeks to condemn a portion of it, the valuation shall be made as of the date that the initial redevelopment plan was adopted, not as of the downzoning.\textsuperscript{504}

F. Property Owners' Association Act/Condominium Act

1. With the exception of meeting minutes or other confidential records of an executive session of the board of directors, the minutes of the board of directors of a property owners' association must be "open for inspection and copying (i) within 60 days from the conclusion of the meeting to which such minutes appertain or (ii) when such minutes are distributed to board members as part of an agenda package for the next meeting of the board of directors, whichever occurs first."\textsuperscript{505}

2. The General Assembly deleted Virginia Code section 55-79.81(C).\textsuperscript{506} This provision established, in the absence of language in the condominium instruments to the contrary, that the association was responsible for insurance deductibles for any casualty damage arising in the common elements and a unit owner was


\textsuperscript{503} Id.

\textsuperscript{504} Id.

\textsuperscript{505} VA. CODE ANN. § 55-510(E) (Supp. 2004).

responsible for damage arising from activities within the unit.  

3. The General Assembly modified both the Virginia Condominium Act\textsuperscript{508} and the Property Owners’ Association Act\textsuperscript{509} to clarify that an action to foreclose any liens that have been perfected under the provisions of either Act must be initiated within thirty-six months from the time the memorandum of lien was filed.\textsuperscript{510}

4. The General Assembly also modified both Acts to clarify the procedure for conducting a non-judicial foreclosure to sell a unit in satisfaction of an assessment lien, including notice requirements, the appointment of a trustee, the conduct of the sale, the priority of liens, the duty of the trustee to find an accounting, and a one-year time limitation on the purchaser’s right to seek an order of the court to overturn the sale.\textsuperscript{511}

5. The General Assembly amended Virginia Code section 55-510.1 to provide that the meetings of not only the board of directors, but also any subcommittee or other committee thereof, shall be open to all members of record of the association, and all information distributed therein shall similarly be open to scrutiny.\textsuperscript{512}

G. Real Estate Time-Share Act

This revision allows a time-share developer to use a reverter deed, automatically vesting the developer with title to the property, in lieu of a deed of trust in the event of a default by the time-share owner.\textsuperscript{513} In order to qualify for a “time-share estate subject to reverter,” the owner must not be entitled to occupy the unit for more than four weeks in any one-year period and must have put down less than a 20% down payment.\textsuperscript{514} Modifications to

\textsuperscript{507} Id.
\textsuperscript{513} VA. CODE ANN. § 55-376.1(B) (Supp. 2004).
\textsuperscript{514} Id. § 55-362 (Supp. 2004).
the Act also provide for significant disclosures at the time of sale and the procedure for divesting the owner of the time-share estate, including a sixty-day default period with a thirty-day right to cure after notice.  

H. Real Estate Cooperative Act

1. The General Assembly modified the Cooperative Act, generally, to allow for the cooperative type of ownership to exist without separate subdivision approval, provided that the improvements within the cooperative are the subject of an approved site plan. Phase lines will not be considered subdivision lines for purposes of the Subdivision Ordinance, unless the cooperative developer seeks to convey the phase off to another party, and such land will no longer be considered part of the cooperative.

515. Id. § 55-376.1(E) (Supp. 2004).
517. Id. § 55-429(C) (Supp. 2004).