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REAL ESTATE AND LAND USE LAW

Brian R. Marron *

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. Winkelman*,¹ 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").² 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

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1. 267 Va. 7, 590 S.E.2d 358 (2004).

2. *Id.* at 8-9, 590 S.E.2d at 358. The Property Owners' Association Act is codified at Virginia Code sections 55-508 to -516.2 (Repl. Vol. 2003 & Supp. 2004).

the use, upkeep, and maintenance of the roads and other common facilities.³ DVCA adopted a special assessment applicable to all lots in the subdivision and notified all of the property owners of this obligation.⁴ One of the property owners, Winkelman, failed to pay the assessment on time.⁵ 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).⁶ The sale was conducted, and a third-party purchaser bid at the sale.⁷ Winkelman then filed an action in the Greene County Circuit Court to set aside the sale.⁸ 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 55-59.⁹

The Greene County Circuit Court found that DVCA was a property owners' association as defined in the POAA.¹⁰ 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."¹¹ The circuit court voided the sale, giving rise to an appeal.¹²

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.¹³ The declaration merely granted to the declarant and its successors the right to do so.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,"¹⁵ 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."¹⁶ This duty may not be "inferred or implied."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.¹⁸ The court also affirmed those portions of the circuit court's voiding the deeds purporting to sell Winkelman's lots.¹⁹

In the case of *Atrium Unit Owners Ass'n v. King*,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.²¹ The plaintiff, King, owned a condominium unit in the Atrium, a high rise condominium complex in Arlington County.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.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,²⁴ which King

13. *Id.* at 13–14, 590 S.E.2d at 361.

14. *Id.* at 14, 590 S.E.2d at 361.

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)).

16. *Id.*

17. *Id.* at 14, 590 S.E.2d at 361.

18. *Id.*

19. *Id.* at 14–15, 590 S.E.2d at 361–62.

20. 266 Va. 288, 585 S.E.2d 545 (2003).

21. *Id.* at 290, 585 S.E.2d at 596.

22. *Id.*

23. *Id.*

24. *Id.*

did before departing for California.²⁵ King's unit was burglarized while she was out of town.²⁶

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.²⁷ Testimony further indicated that the established procedures for logging keys in and out were not followed.²⁸ Both employees and non-employees of the management company had access to the box where convenience keys were stored.²⁹ The court denied the unit owners' association's motion to strike and sent the case to the jury.³⁰ The jury returned a verdict in favor of King.³¹

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]."³² 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.³³ "Proof of 'possibility' of causal connection is not sufficient" to carry the plaintiff's burden.³⁴

The court distinguished this case from the case of *Wooldridge v. Echelon Service Co.*,³⁵ wherein a woman had been fatally attacked in a building for which Echelon provided security services.³⁶ 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)).

35. 243 Va. 458, 416 S.E.2d 441 (1992).

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.³⁷ Shortly after the intruder entered the building, one of the occupants was killed.³⁸ At the time of the murder, the intruder was the only unauthorized person in the building.³⁹ There was sufficient evidence in the case that the intruder was indeed the perpetrator of the crime,⁴⁰ and the security guard's "inaction was a proximate cause of [the victim's] death."⁴¹

The case of *Klaiber v. Freemason Associates, Inc.*⁴² arose out of alleged defects in the roof, chimneys, fireplaces, and flues within a four-unit condominium.⁴³ Both the association and several of the unit owners filed claims against the developer.⁴⁴ The trial court severed the plaintiffs' individual claims from those of the association and directed that each case proceed independently.⁴⁵ Two of the unit owners sold their units at a profit during the pendency of the litigation.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."⁴⁷ Each plaintiff sought compensatory damages of \$380,000.⁴⁸ 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.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.⁵⁰ The unit owners argued that their damages were for future special as-

37. *Id.* at 461-62, 416 S.E.2d at 443.

38. *See id.*

39. *See id.*

40. *See id.*

41. *Id.* at 462, 416 S.E.2d at 443.

42. 266 Va. 478, 587 S.E.2d 555 (2003).

43. *Id.* at 482, 587 S.E.2d at 556.

44. *Id.*

45. *Id.*

46. *Id.*, 587 S.E.2d at 556-57.

47. *Id.*, 587 S.E.2d at 557.

48. *Id.*

49. *Id.* at 483, 587 S.E.2d at 557.

50. *Id.* at 482-83, 587 S.E.2d at 557.

assessments for roof replacement, attorney's fees, and repair and refurbishment of fireplaces and chimneys.⁵¹ 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.⁵² 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.⁵³

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.⁵⁴ Also, neither unit owner had alleged an injury with sufficient specificity to recover damages under the three fraud claims.⁵⁵ 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.⁵⁶

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.⁵⁷ 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;

51. *Id.*

52. *Id.* at 483, 587 S.E.2d at 557.

53. *Id.*

54. *Id.*

55. *Id.* at 484, 587 S.E.2d at 557.

56. *Id.*

57. *Id.* at 485, 587 S.E.2d at 558.

and resulting damage.”⁵⁸ This claim must not be made “in the abstract,” but rather “must be accompanied by [an] allegation and proof of damage.”⁵⁹ 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.”⁶⁰ 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.”⁶¹ 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.⁶² As such, the court refused to use repair or replacement costs as the proper measure of damages for fraud in these cases.⁶³ Consequently, the trial court did not err in granting summary judgment on the fraud claims.⁶⁴

The court also concluded that the unit owners’ claims under Virginia Code section 59.1-68.3⁶⁵ arising out of alleged “untrue, deceptive, and misleading statements in advertising” in violation of Virginia Code section 18.2-216⁶⁶ must also fail.⁶⁷ 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.⁶⁸

Unlike the fraud claims and the claims of false advertising for

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 558–59 (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.*

65. Virginia Code section 59.1-68.3 provides, in pertinent part, that “[a]ny person who suffers loss as the result of a violation of Article 8 (§ 18.2-214 et seq.) . . . shall be entitled to bring an individual action to recover damages, or \$100, whichever is greater.” VA. CODE ANN. § 59.1-68.3 (Repl. Vol. 2001 & Cum. Supp. 2004).

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.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,”⁷⁰ unless “the cost to repair would be grossly disproportionate to the results to be obtained, or would involve unreasonable economic waste.”⁷¹ The trial court undertook no analysis of whether the award of repair cost would constitute economic waste.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.⁷³

B. *Restrictive Covenants*

In *Richardson v. Amresco Residential Mortgage Corp.*,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”).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.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.⁷⁷ The child’s mother was appointed guardian of the estate in

69. *Id.*, 587 S.E.2d at 560.

70. *Id.* (citing *Lochaven Co. v. Master Pools by Schertle, Inc.*, 233 Va. 537, 543, 357 S.E.2d 534, 538 (1987)).

71. *Id.* at 488, 587 S.E.2d at 560 (quoting *Lochaven Co.*, 233 Va. at 543, 357 S.E.2d at 538).

72. *See id.*

73. *Id.*

74. 267 Va. 43, 592 S.E.2d 65 (2004).

75. *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).

76. *Id.* at 46, 592 S.E.2d at 66.

77. *Id.*

Kentucky and subsequently relocated to Virginia Beach.⁷⁸ 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.⁷⁹ The mother, in her capacity as custodian, then conveyed the property to herself through a quitclaim deed.⁸⁰ She did so without consideration and to use the property as security for a personal loan.⁸¹ The personal loan was secured by the mortgage that was the subject of the litigation and which, subsequently, fell into default.⁸² The mortgagee was not notified by counsel of the quitclaim deed in connection with the loan transaction.⁸³

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."⁸⁴ Notwithstanding this order, the mother entered into a contract to sell the property to a third party, which precipitated her removal as guardian.⁸⁵ 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.⁸⁶ The chancellor ordered the property sold to the third parties with the proceeds to be placed in trust, pending the outcome of the litigation.⁸⁷

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.⁸⁸ 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."⁸⁹ 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."⁹⁰ The Supreme Court of Virginia reversed the lower court, noting that:

[I]t 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.⁹¹

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."⁹²

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."⁹³ "[S]uch protections do not extend to those who merely rely on various acts of a custodian."⁹⁴ When the mother executed the mortgage in favor of the mortgagees, she was not purporting to act in the capacity of a custodian.⁹⁵ Rather, she was purporting to convey the property, to secure the mortgage, in her individual capacity.⁹⁶ 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.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.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.”⁹⁹ In this case, the quitclaim deed should have prompted an inquiry as to the mother’s self-dealing.¹⁰⁰

In the case of *Meliani v. Jade Dunn Loring Metro, L.L.C.*,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 *lis pendens* burdening property in other phases of the project in which he neither has nor asserts an interest.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 \$279,900.¹⁰³ During the pendency of the purchase contract, the condominium unit appreciated in value by approximately \$100,000.¹⁰⁴ 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.¹⁰⁵ Jade alleged that it became insolvent and subsequently lost phases one and two through foreclosure.¹⁰⁶ Jade conveyed phases three, four, and five of the project to Westbriar, a new entity which had been formed

97. *Id.*

98. *Id.* at 52, 592 S.E.2d at 70.

99. *Id.* (citing *Shaheen v. County of Mathews*, 265 Va. 462, 477, 579 S.E.2d 162, 171–72 (2003)).

100. *See id.*

101. 286 F. Supp. 2d 741 (E.D. Va. 2003).

102. *Id.* at 742.

103. *Id.* at 743.

104. *Id.*

105. *Id.*

106. *Id.*

by Jade's former principals.¹⁰⁷ 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.¹⁰⁸

Meliani filed a complaint alleging tortious interference with contract, conspiracy, voluntary and fraudulent conveyance, breach of contract, and conversion, which was supported by a *lis pendens* filed on all five phases of the project.¹⁰⁹ Westbriar filed a motion for a temporary restraining order, requiring the plaintiff to remove the *lis pendens* from phases three, four, and five.¹¹⁰ In holding that the *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 *lis pendens* on property unless the plaintiff seeks to establish an interest in the property against which the memorandum is filed.¹¹¹

The object of the [*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.¹¹²

The court further noted that the *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.¹¹³

Meliani also contended that, because the defendant fraudulently conveyed the condominium unit, Virginia Code section 55-82¹¹⁴ operated "to provide him with a lien on, and hence an inter-

107. *Id.*

108. *Id.*

109. *Id.* at 744.

110. *Id.*

111. *Id.* at 745 (citing VA. CODE ANN. § 8.01-268(B) (Repl. Vol. 2000 & Cum. Supp. 2004)).

112. *Id.* at 744-45 n.3 (quoting 12A MICHIE'S JUR. *Lis Pendens* § 2 (1989)).

113. *Id.* at 746.

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

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

on all the estate, real and personal, hereinbefore mentioned. . . .

Meliani, 286 F. Supp. 2d at 746 n.10.

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.¹²⁴ 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.¹²⁵

Certain lot owners filed a complaint for declaratory judgment, seeking a declaration favoring the enforceability of the restrictive covenants.¹²⁶ The developer demurred and later filed a motion to strike the evidence in the case.¹²⁷ 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.¹²⁸

In his first assignment of error, citing *City of Fairfax v. Shanklin*,¹²⁹ 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.¹³⁰ The developer alleged that "something more than mere speculation . . . is required [to] invoke the power of the Courts."¹³¹ 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.¹³² 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."¹³³ The dispute over the application of the covenant was also clearly defined in correspondence between the parties.¹³⁴

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

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.

129. 205 Va. 227, 135 S.E.2d 773 (1964).

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).

132. *Id.* (citing *Hoffman Family, L.L.C. v. Mill Two Assoc. P'ship*, 259 Va. 685, 529 S.E.2d 318 (2000); *Cupp v. Bd. of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984)).

133. *Id.* at 269, 591 S.E.2d at 687.

134. *Id.*

space, “resulting in a serious diminution in the value of the lots.”¹³⁵ 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.’”¹³⁶ 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.”¹³⁷

Finally, the developer alleged that a change of conditions in Route 29 had destroyed the essential object and purpose of the restriction.¹³⁸ 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*.¹³⁹ In his analysis, the developer looked myopically at how the radical change along the Route 29 corridor had affected only his parcels.¹⁴⁰ 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.¹⁴¹ In this case, it is clear that there had not been a radical change in the use of the balance of the subdivision.¹⁴² The restrictive covenant still served its intended purpose—to protect the lots in the particular subdivision from commercial uses.¹⁴³ The conditions existing within the subdivision must be examined along with those existing in the surrounding area in order to determine the issue fairly.¹⁴⁴

In *Barner v. Chappell*,¹⁴⁵ 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.¹⁴⁶ In this case, the original landowner, Governor John Pol-

135. *Id.* at 272, 591 S.E.2d at 689.

136. *Id.* (citing *Booker v. Old Dominion Land Co.*, 188 Va. 143, 152, 49 S.E.2d 314, 319 (1948)).

137. *Id.*

138. *Id.* at 273–74, 591 S.E.2d at 689.

139. 264 Va. 350, 568 S.E.2d 676 (2002).

140. *River Heights*, 267 Va. at 274–75, 591 S.E.2d at 690.

141. *Id.*

142. *Id.* at 275, 591 S.E.2d at 690.

143. *Id.*

144. *Id.*

145. 266 Va. 277, 585 S.E.2d 590 (2003).

146. *Id.* at 279, 585 S.E.2d at 591.

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 conveyances 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 covenant 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 Pollard-Craighill deed.¹⁶³ Consequently, they met the requirements for vertical privity.¹⁶⁴

Moving from the issue of vertical privity, the court next considered whether the purpose of the restriction no longer existed under the tests articulated in *Smith v. Chesterfield Meadows Shopping Center Associates, L.P.*¹⁶⁵ and *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. *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. *Id.* at 284, 585 S.E.2d at 594.

159. *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. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *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, *Annual Survey of Virginia Law: Real Estate Law*, 38 U. RICH. L. REV. 223, 238–39 (2003) (discussing 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. *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.¹⁶⁸

C. Title to Property

In *Harrison-Wyatt, L.L.C. v. Ratliff*,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.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.¹⁷¹ The lynchpin question in this case was whether CBM was a portion of the coal conveyed.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.¹⁷³ The trial court ruled that CBM "is simply a by-product of coal' and a severable estate."¹⁷⁴

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

168. *Id.* at 286, 585 S.E.2d at 595.

169. 267 Va. 549, 593 S.E.2d 234 (2004).

170. *Id.* at 550, 593 S.E.2d at 235.

171. *Id.* at 551, 593 S.E.2d at 235.

172. *Id.* at 551-52, 593 S.E.2d at 235-36.

173. *Id.* at 553, 593 S.E.2d at 236.

174. *Id.*

175. *Id.*

176. *United States Steel Corp. v. Hoge*, 468 A.2d 1380 (Pa. 1983).

177. *NCNB Texas Nat'l Bank, N.A. v. West*, 631 So.2d 212 (Ala. 1993).

178. *Carbon County v. Union Reserve Coal Co.*, 898 P.2d 680 (Mont. 1995).

179. *Newman v. RAG Wyoming Land Co.*, 53 P.3d 540, 542 (Wyo. 2002).

180. *Energy Dev. Corp. v. Moss*, 591 S.E.2d 135 (W. Va. 2003).

181. 526 U.S. 865 (1999).

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."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.¹⁸³ Relying upon the foregoing precedent, the Supreme Court of Virginia affirmed the lower court's ruling.¹⁸⁴

In the case of *Jones v. Hill*,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.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."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."¹⁸⁸ Among the children was Vaiden Jones,¹⁸⁹ who survived his father but predeceased his mother.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.¹⁹¹ Tammie Hill ("Hill") had previously obtained a

182. *Id.* at 871.

183. *See Harrison-Wyatt*, 267 Va. at 556, 593 S.E.2d at 238.

184. *Id.* at 557, 593 S.E.2d at 238.

185. 267 Va. 708, 594 S.E.2d 913 (2004).

186. *Id.* at 709, 594 S.E.2d at 913.

187. *Id.* at 710, 594 S.E.2d at 914.

188. *Id.* (alteration in original).

189. *Id.*

190. *Id.*

191. *Id.*

judgment in the amount of \$10,000 against Vaiden Jones, and “sought to enforce her lien against the proceeds of the sale.”¹⁹² 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.”¹⁹³

The Supreme Court of Virginia agreed with the trial court’s characterization of Vaiden Jones’ interest as a vested remainder subject to divestment.¹⁹⁴ 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.¹⁹⁵

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.¹⁹⁶ The court held that the interest vested and could have been divested by such an event, but was not.¹⁹⁷ 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.¹⁹⁸

In the case of *Maitland v. Allen*,¹⁹⁹ 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.”²⁰⁰ 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)).

199. 267 Va. 714, 594 S.E.2d 918 (2004).

200. *Id.* at 715–16, 594 S.E.2d at 919.

children.²⁰¹ Allen and the children argued that Maitland was barred from partitioning the parcels as a life tenant.²⁰² 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.²⁰³

The right to partition jointly held real property arises under Virginia Code section 8.01-81.²⁰⁴ The statute does not explicitly authorize a life tenant to compel partition.²⁰⁵ While Maitland was a tenant in common with Allen as to the life estate, she was not a tenant in common with the remaindermen.²⁰⁶ “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.”²⁰⁷ 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.”²⁰⁸ The court, therefore, affirmed the judgment of the trial court granting summary judgment to the children.²⁰⁹ 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.”²¹⁰

In *Perel v. Brannan*,²¹¹ the Richmond City Circuit Court was asked to construe a declaration of restrictions recorded against the River Locke subdivision (the “Declaration”).²¹² 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.*

211. 267 Va. 691, 594 S.E.2d 899 (2004).

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."²¹³ 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.²¹⁴ Shortly after the approval, the Brannans began to develop the lot by removing trees, excavating for foundations, and constructing a retaining wall.²¹⁵ 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.²¹⁶ Perel also asked the court to order the declarant under the Declaration, Locke Lane, to enforce the covenants against the Brannans.²¹⁷

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.²¹⁸ The court found, however, that the Brannans' excavation and construction of the retaining wall did not violate the covenants.²¹⁹ "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."²²⁰ The parties filed cross-appeals.²²¹

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.²²² 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."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.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.²²⁵ The court declared that

[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.²²⁶

The defendant must show, beyond simply the level of inconvenience, that the hardship or injustice is out of proportion to the relief sought.²²⁷ "Impossibility is also a defense to specific performance or injunctive relief requested even when the defendant 'intentionally rendered himself unable to perform.'"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.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.²³⁰ The ARC's discretion

223. *Id.*

224. *Id.* at 699, 594 S.E.2d at 904.

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)).

226. *Id.* at 700, 594 S.E.2d at 904–05 (citing *Harper v. Virginian Ry.*, 86 S.E. 919, 922 (W. Va. 1915)).

227. *Id.* at 701, 594 S.E.2d at 905.

228. *Id.* (quoting *Jones v. Tunis*, 99 Va. 220, 222, 37 S.E. 841, 841 (1901)).

229. *Id.* at 706–07, 594 S.E.2d at 908.

230. *Id.* at 702, 594 S.E.2d at 906.

did not extend to the express provisions of the Declaration forbidding such removal.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.²³²

The supreme court agreed with the lower court's determination that Perel's claim against the developer/declarant should be dismissed.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.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."²³⁵

D. *Easements and Rights-of-Way*

In *Virginia v. Hicks*,²³⁶ the Supreme Court of the United States considered certain constitutional issues relating to a trespassing policy adopted by the Richmond Redevelopment and Housing Authority ("RRHA") in the Whitcomb Court housing project.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."²³⁸ The purpose of this policy was to provide to the Richmond City Police an additional weapon in

231. *Id.*

232. *Id.* at 702-03, 594 S.E.2d at 906.

233. *Id.* at 703, 594 S.E.2d at 906.

234. *Id.*

235. *Id.*

236. 539 U.S. 113 (2003).

237. *Id.* at 115.

238. *Id.* at 116.

fighting the open-air drug market that had been prevalent in this housing project.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.²⁴⁰ The Court of Appeals of Virginia vacated his conviction, and the Supreme Court of Virginia affirmed.²⁴¹ The Supreme Court of Virginia found the trespass policy unconstitutionally overbroad and in violation of the First Amendment.²⁴²

The Supreme Court of the United States reversed the judgment of the Supreme Court of Virginia and remanded the case for further proceedings.²⁴³ The Supreme Court found it important that both the notice-barmment 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.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.”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.”²⁴⁶

In *Barter Foundation, Inc. v. Widener*,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

239. *See id.* at 115.

240. *Id.* at 117, 121.

241. *Id.* at 117–18.

242. *Id.* at 118.

243. *Id.* at 124.

244. *Id.* at 123.

245. *Id.* at 123–24.

246. *Id.* at 124.

247. 267 Va. 80, 592 S.E.2d 56 (2004).

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.

[b]ecause 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.²⁵⁸

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 use²⁶⁰

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)).

260. *Id.* (quoting *Brown v. Tazewell County Water & Sewerage Auth.*, 226 Va. 125, 129–30, 306 S.E.2d 889, 891 (1983)).

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.

dedication by the town.²⁶⁶ The court agreed that such right did exist.²⁶⁷ 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 dedicator.”²⁶⁸ 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.²⁶⁹

E. *Landlord and Tenant*

O'Neill v. Windshire-Copeland Associates, L.P.,²⁷⁰ the plaintiff brought an action for personal injuries sustained when she fell off the balcony of an apartment building owned by the defendant.²⁷¹ The protective railing on the balcony did not comply with height requirements of the local municipal building code.²⁷² The evidence also showed, however, that the plaintiff “was familiar with the balcony and that she had consumed alcohol prior to the accident.”²⁷³

The United States District Court for the Eastern District of Virginia held that the defendant was negligent per se because of the balcony deficiency.²⁷⁴ 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.²⁷⁵ 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.²⁷⁶ 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.

270. 267 Va. 605, 595 S.E.2d 281 (2004).

271. 267 Va. at 607, 595 S.E.2d at 282 (2004).

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 jurisdiction²⁷⁷ 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'Neill*, 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)).

282. *Carter Coal Co. v. Bates*, 127 Va. 586, 105 S.E.2d at 76 (1920).

283. *O'Neill*, 267 Va. at 608-09, 595 S.E.2d at 282-83.

284. *O'Neill*, 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

repeal of the act.

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

286. *O'Neill*, 267 Va. at 609-10, 595 S.E.2d at 283.

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.

291. 267 Va. 621, 594 S.E.2d 921 (2004).

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*.²⁹⁶ 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.²⁹⁷ 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."²⁹⁸ According to the court, "the [p]arties' 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."²⁹⁹ Because there was evidence to support the circuit court's factual findings concerning the parties' intent, the supreme court affirmed the allocation.³⁰⁰

F. *Eminent Domain*

In the case of *East Tennessee Natural Gas Company v. Sage*,³⁰¹ 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.³⁰² The NGA gives a gas company the power to acquire property by eminent domain, but the

296. *Id.* at 625, 594 S.E.2d at 923 (citing *Utsch v. Utsch*, 266 Va. 124, 129, 581 S.E.2d 507, 509 (2003); *Pyramid Dev., L.L.C. v. D & J Assocs.*, 262 Va. 750, 754, 553 S.E.2d 725, 727 (2001); *Pollard & Bagby, Inc. v. Pierce Arrow, L.L.C., III*, 258 Va. 524, 528, 521 S.E.2d 761, 763 (1999)).

297. *Video Zone*, 267 Va. at 625–26, 594 S.E.2d at 923–24 (citing *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 632, 561 S.E.2d 663, 668 (2002)).

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)).

299. *Id.* at 627, 594 S.E.2d at 924 (citing *Donnelly v. Donatelli & Klein, Inc.*, 258 Va. 171, 186, 519 S.E.2d 133, 142 (1999); *Federal Ins. Co. v. Starr Elec. Co.*, 242 Va. 459, 467, 410 S.E.2d 684, 688 (1991); *Dart Drug Corp. v. Nicholakos*, 221 Va. 989, 995, 277 S.E.2d 155, 158 (1981); *First Nat'l Exch. Bank of Roanoke v. Roanoke Oil Co.*, 169 Va. 99, 115, 192 S.E. 764, 771 (1937)).

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.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."³⁰⁴

In holding that a preliminary injunction was appropriate, the lower court found that the standards required for a preliminary injunction were met.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."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."³⁰⁷ The court also noted that the "expeditious completion of the pipeline [was] in the public interest."³⁰⁸ The court determined that, although equity may not be used to create a new substantive right,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."³¹⁰ The district court first considered "whether [the gas company] had a substantive right to condemn the landowners' property."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."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.³¹³ In this case, the company "was awarded pos-

303. *Id.* at 822.

304. *Id.* at 818.

305. *Id.* at 820 (citing *Blackwelder Furniture Co. v. Selig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977)).

306. *Id.*

307. *Id.*; see also *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890); *Wash. Metro. Area Transit Auth. v. One Parcel of Land*, 706 F.2d 1312, 1321 (4th Cir. 1983).

308. *Sage*, 361 F.3d at 820.

309. *Id.* at 823 (citing *Northwest Bank of Worthington v. Ahlers*, 485 U.S. 197, 206-07 (1988)).

310. *Id.* at 823; see also *Berdie v. Kurtz*, 88 F.2d 158, 159 (9th Cir. 1937); *Am. Brake Shoe & Foundry Co. v. N.Y. Rys. Co.*, 293 F. 633, 637-38 (2d Cir. 1923).

311. *Sage*, 361 F.3d at 823.

312. *Id.* (citing *Seymour v. Freer*, 75 U.S. 202, 213-14 (1868)).

313. *Id.* at 825.

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.³¹⁴ 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.’”³¹⁵ 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.”³¹⁶ 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.³¹⁷

In the case of *Richmeade, L.P. v. City of Richmond*,³¹⁸ 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.”³¹⁹ 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.³²⁰ On February 22, 1999, the City of Richmond adopted an ordinance vacating certain streets within a proposed development owned by Richmeade.³²¹ In April 1999, the city reconsidered the ordinance and denied the request to vacate the streets.³²² 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.”³²³ The City filed a plea arguing that the claim was time-barred under the statute of limitations for an implied contract.³²⁴ Richmeade, in reply, argued that the five-year limita-

314. *Id.*

315. *Id.* at 826 (quoting *Va. Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937)); *see also* *United States v. Morgan*, 307 U.S. 183, 194 (1939).

316. *Sage*, 361 F.3d at 827.

317. *Id.* at 830.

318. 267 Va. 598, 594 S.E.2d 606 (2004).

319. *Id.* at 600, 594 S.E.2d at 607.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*; *see* VA. CODE ANN. § 8.01-246 (Repl. Vol. 2000 & Cum. Supp. 2004).

tion for damage to property should apply.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.”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.”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.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.”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

325. *Richmeade*, 267 Va. at 600, 594 S.E.2d at 607–08; see VA. CODE ANN. § 8.01-243(B) (Repl. Vol. 2000 & Cum. Supp. 2004).

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)).

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)).

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)).

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.³³⁰

G. Zoning and Land Use Planning

In the case of *O'Brien v. Appomattox County*,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.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."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.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.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."³³⁶ Under the new Appomattox County ordinance, the use of biosolids would be prohibited other than within this new zoning district.³³⁷ To be included within the overlay district, a farmer would have to seek county approval.³³⁸ The Board subsequently adopted a second ordinance to establish procedures

330. *Richmeade*, 267 Va. 603, 594 S.E.2d at 609 (citing *Bd. of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 72, 481 S.E.2d 460, 467 (1997); *City of Lynchburg v. Peters*, 156 Va. 40, 48-49, 157 S.E. 769, 772 (1931); *Lambert v. City of Norfolk*, 108 Va. 259, 265, 61 S.E. 776, 778 (1908)).

331. 293 F. Supp. 2d 660 (W.D. Va. 2003).

332. *Id.* at 661.

333. *Id.*

334. *Id.*

335. *Id.*; see also VA. CODE ANN. § 32.1-164.5 (Repl. Vol. 2004); 12 VA. ADMIN. CODE § 5-585-620(A)(5) (2002). For a discussion of recent legislature developments regarding biosolids see Benjamin A. Thorp IV & William K. Taggart, *Annual Survey of Virginia Law: Environmental Law*, 39 U. RICH. L. REV. 203, 206 (2004).

336. *O'Brien*, 293 F. Supp. 2d at 661.

337. *Id.*

338. *Id.*

for monitoring biosolids.³³⁹ 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.³⁴⁰ The plaintiffs, therefore, argued that they should not be bound by the ordinance because it was preempted by state law.³⁴¹

"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."³⁴² 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."³⁴³ 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.³⁴⁴ 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.³⁴⁵

In the case of *Glazebrook v. Board of Supervisors of Spotsylvania County*,³⁴⁶ the Supreme Court of Virginia discussed the degree of specificity required in the published notice of a zoning case.³⁴⁷ 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.

342. *Id.* (quoting *Blanton v. Amelia County*, 261 Va. 55, 63, 540 S.E.2d 869, 873 (2001)); see also VA. CODE ANN. § 1-13.17 (Repl. Vol. 2001).

343. *O'Brien*, 293 F. Supp. 2d at 662-63 (citing *Blanton*, 261 Va. at 65, 540 S.E.2d at 874).

344. *Id.* at 663.

345. *Id.* at 664.

346. 266 Va. 550, 587 S.E.2d 589 (2003).

347. *Id.* at 552, 587 S.E.2d at 590.

years.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.”³⁴⁹ Plaintiff Glazebrook and others brought suit against the Board claiming that the Board had failed to publish adequate notice of its proposed amendments.³⁵⁰ Virginia Code section 15.2-2204(A) requires that an advertisement contain a descriptive summary of the proposed action.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 *ab initio*.”³⁵²

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

[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.³⁵⁵

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.³⁵⁶ Consequently, the notice was also inadequate and the ordinances

348. *Id.* at 552, 587 S.E.2d at 590.

349. *Id.* at 552–53, 587 S.E.2d at 590.

350. *Id.* at 553, 587 S.E.2d at 591.

351. *Id.* at 554, 587 S.E.2d at 591; VA. CODE ANN. § 15.2-2204(A) (Supp. 2004).

352. *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)).

353. *Id.* at 554–55, 587 S.E.2d at 591.

354. *Id.*

355. *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)).

356. *Id.* at 556–57, 587 S.E.2d at 593 (citing VA. CODE ANN. § 15.2-2204 (Supp. 2004); *Potomac Greens Assoc.*, 245 Va. at 378, 429 S.E.2d at 228)).

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.

358. 266 Va. 525, 587 S.E.2d 570 (2003).

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.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.³⁷⁰ According to the court, "[l]egislative action is reasonable if the matter at issue is fairly debatable."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."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.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.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.³⁷⁵

In the case of *Treacy v. Newdunn Associates, L.L.P.*,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.³⁷⁷ In this case, defendant Newdunn, without obtaining a permit from the Army Corps of Engineers (the "Corps") or the Virginia State Water Control

369. *Id.* at 532, 587 S.E.2d at 575 (citing *County of Lancaster v. Cowardin*, 239 Va. 522, 525, 391 S.E.2d 267, 269 (1990); *City of Richmond v. Randall*, 215 Va. 506, 511, 211 S.E.2d 56, 60 (1975)).

370. *Id.* (quoting *Bd. of Supervisors v. Lerner*, 221 Va. 30, 34–35, 267 S.E.2d 100, 103 (1980)).

371. *Id.* (quoting *Lerner*, 221 Va. at 34, 267 S.E.2d at 102).

372. *Id.* (quoting *Bd. of Supervisors v. Williams*, 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975)).

373. *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)).

374. *Id.* at 534–35, 587 S.E.2d at 576–77.

375. *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)).

376. 344 F.3d 407 (4th Cir. 2003). For further discussion of the case, see Thorp & Taggart, *supra* note 335, at 210–11, 214.

377. *Id.* at 409.

Board ("SWCB"), began ditching and draining wetlands on a forty-three-acre property near Newport News, Virginia.³⁷⁸ 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.³⁷⁹ 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.³⁸⁰ 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.³⁸¹

The court first turned to the jurisdictional issue of whether it could rule on the enforcement action premised on Virginia law.³⁸² 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."³⁸³ Both the Virginia state statute and the Federal Regulations share a scientific definition of wetlands.³⁸⁴ However, the lower court erred by confusing the scientific definition of wetlands and a jurisdictional wetland.³⁸⁵ That question turns not on the federal regulations, but rather the Virginia Wetland Resources Act of 2000.³⁸⁶ "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."³⁸⁷

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*.”³⁸⁸ 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.³⁸⁹ 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.”³⁹⁰ Under Virginia’s new wetlands regulations, impacts that may have been permissible to isolated wetlands under federal regulations will be limited in Virginia.³⁹¹ 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.”³⁹²

On the remaining question of federal law, the court cited *United States v. Deaton*³⁹³ in finding that the man-made drainage ditch could be classified as a “tributary” to invoke the jurisdiction of the Corps.³⁹⁴ 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.³⁹⁵ “That the I-64 ditch at issue in the present case was man-made rather than a natural watercourse is an irrelevant distinction.”³⁹⁶ Consequently, the ruling of the lower court was reversed.³⁹⁷

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*,³⁹⁸ 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.³⁹⁹ 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.⁴⁰⁰ It was undisputed that the petitioner could have constructed the new dwelling on the property by shifting the structure two feet to the south.⁴⁰¹ The petitioner argued, however, that such a configuration would provide less “curb appeal.”⁴⁰² 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.”⁴⁰³ The lower court affirmed the decision of the BZA and the adjacent property owners and the county appealed.⁴⁰⁴

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.⁴⁰⁵ Although the topography of the lot was difficult, the garage could have been constructed closer to the house without the need for a variance.⁴⁰⁶ However, this could only be done with additional expense.⁴⁰⁷ The BZA granted the petition, the lower court affirmed the decision, and the neighboring property owners appealed.⁴⁰⁸

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

398. 267 Va. 756, 594 S.E.2d 571 (2004).

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.*

rage.⁴⁰⁹ 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.⁴¹⁰ The applicants petitioned for a variance to allow an additional structure on the property, specifically a storage shed.⁴¹¹ 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.⁴¹² “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.”⁴¹³ 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.⁴¹⁴ The circuit court ruled that a hardship existed and granted the variance.⁴¹⁵ The BZA thereafter appealed to the Supreme Court of Virginia.⁴¹⁶

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.⁴¹⁷ 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.⁴¹⁸ 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.*”⁴¹⁹ Be-

409. *Id.* at 762–63, 594 S.E.2d at 575.

410. *Id.*

411. *Id.* at 763, 594 S.E.2d at 575.

412. *Id.*

413. *Id.*, 594 S.E.2d at 576.

414. *Id.*

415. *Id.* at 763–64, 594 S.E.2d at 576.

416. *Id.* at 764, 594 S.E.2d at 576.

417. *Id.*

418. *Id.* (citing *Packer v. Hornsby*, 221 Va. 117, 122, 267 S.E.2d 140, 142 (1980)).

419. *Id.* at 764, 594 S.E.2d at 576 (quoting *Packer*, 221 Va. at 122, 267 S.E.2d at 142) (alteration in original).

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."⁴²⁰ 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.⁴²¹ 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."⁴²² "Without any variances, each of the properties retained substantial beneficial uses and substantial value."⁴²³ 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*,⁴²⁴ 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.⁴²⁵ 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."⁴²⁶ 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 jurisdic-

420. *Id.* at 765, 594 S.E.2d at 576-77 (citing *Gayton Triangle v. Henrico County*, 216 Va. 764, 222 S.E.2d 570 (1976)).

421. *Id.* at 766, 594 S.E.2d at 577 (citing *Commonwealth v. County Utilities Corp.*, 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982)).

422. *Id.*

423. *Id.*

424. 343 F.3d 262 (4th Cir. 2003).

425. *Id.* at 265; see also Telecommunications Act of 1996, 47 U.S.C. §§ 332(c)(7)(B)(i), (c)(7)(B)(iii) (2000).

426. *USCOC of Va.*, 343 F.3d at 265.

tion.”⁴²⁷ In addition, the county’s comprehensive plan set forth a “hierarchy of lands on which to construct new towers.”⁴²⁸ 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.”⁴²⁹ 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.⁴³⁰ 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.⁴³¹

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.⁴³² 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.”⁴³³

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.⁴³⁴ The district court had concluded that the Board’s decision was based solely upon aesthetic conditions in violation of Virginia law.⁴³⁵ The Fourth Circuit disagreed with this analysis, distinguishing the case of *Board of Supervisors of James City County v. Rowe*.⁴³⁶ 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.

434. *USCOC of Va. RSA #3, Inc. v. Montgomery County Bd. of Supervisors*, 245 F. Supp. 2d 817, 832 (W.D. Va. 2003).

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).

eas.⁴³⁷ 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.⁴³⁸ The Fourth Circuit turned to the enabling legislation for zoning ordinances to conclude that:

[L]ocal 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.⁴³⁹

The Board's decision was based upon the proposed tower's inconsistencies with Montgomery County's zoning ordinances and land use guidelines.⁴⁴⁰ The Board argued that the location and design of the proposed tower did not conform to the county's comprehensive plan.⁴⁴¹ Consequently, the proposed tower's failure to adhere to the applicable zoning requirements provided substantial evidence to justify the rejection of the tower.⁴⁴²

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.*⁴⁴³ 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.⁴⁴⁴ 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.*

443. 278 F. Supp. 2d 744 (E.D. Va. 2003).

444. *Id.* at 745.

ment.⁴⁴⁵ The plaintiffs retained an environmental testing service consultant who concluded that there was “‘extensive’ mold contamination in the apartment.”⁴⁴⁶ Subsequent to leaving the apartment, various members of the Roche family, including Mr. Roche, complained of ailments ranging from memory loss to hypersensitivity.⁴⁴⁷ 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.⁴⁴⁸ Dr. Bernstein also found that the Roches were allergic to mold and other items, namely mites, cockroaches, cats, dust, most wheats, and grasses.⁴⁴⁹

At trial, Dr. Bernstein testified that the mold in the apartment was the source of the plaintiffs’ ailments.⁴⁵⁰ 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,⁴⁵¹ (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 plaintiff’s ailment,⁴⁵² and (iii) he relied solely on temporal relation of the Roches’ exposure to the onset of their symptoms to arrive at his conclusions.⁴⁵³ The court emphasized that “‘the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.’”⁴⁵⁴ “Conjecture or ‘subjective belief’ or ‘unsupported speculation’ will not suffice.”⁴⁵⁵ 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.⁴⁵⁶

In a separate opinion, the district court considered the plaintiffs' motion for summary judgment.⁴⁵⁷ This motion was based on the theory of negligence per se, alleging that the landlord violated "building codes."⁴⁵⁸ The court noted that the only relevant statute was the Virginia Residential Landlord Tenant Act ("VRLTA").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.⁴⁶⁰ Tests failed to sufficiently demonstrate the level or degree of toxic mold in the apartment.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.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.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-

rate of error of the method used; and (4) the degree of the method's or conclusion's acceptance within the relevant scientific community." *Id.* at 748; see *Daubert*, 509 U.S. at 593-94; *United States v. Dorsey*, 45 F.3d 809, 813 (4th Cir. 1995).

456. *Roche*, 278 F. Supp. 2d at 764-65.

457. *Roche v. Lincoln Property Co.*, No. 02-1390-A, 2003 U.S. Dist. LEXIS 23353, at *1 (E.D. Va. July 25, 2003).

458. *Id.* at *1-3, 10.

459. *Id.* at *10-11. Virginia Code section 55-248.13 articulates the standard for fitness of premises to include "(1) compl[iance] with the requirements of applicable building and housing codes materially affecting health and safety; (2) mak[ing] all repairs and do[ing] whatever is necessary to put and keep the premises in a fit and habitable condition . . . ; (4) maintain[ing] in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air conditioning . . . required to be supplied by the [landlord] . . ." VA. CODE ANN. § 55-248.13 (Supp. 2004).

460. *Roche*, 2003 Dist. LEXIS 23353, at *13.

461. *Id.* at *12.

462. *Id.* at *15. Expert testimony is required to prove that exposure to a certain substance caused a certain injury or illness. *Id.* at **15-16 (citing *Cavallo v. Star Enterprise*, 892 F. Supp. 756, 774 (E.D. Va. 1995), *rev'd in part on other grounds*, 100 F.3d 1150 (4th Cir. 1996); *Porter v. Whitehall Labs., Inc.*, 9 F.3d 607, 612 (7th Cir. 1993)).

463. *Id.* at *17.

toms and building code provisions or by some other defalcation.”⁴⁶⁴ The plaintiffs, however, failed to introduce any evidence in the case that the landlord had knowledge of a hazardous condition within the premises or that the defendant’s conduct violated customary industry standards.⁴⁶⁵ The court concluded that the defendant’s own policies on treatment of mold could not be used to establish an appropriate standard of care.⁴⁶⁶ For similar reasons, the court did not agree with the plaintiff’s contention that the landlord breached an implied warranty of habitability.⁴⁶⁷ The court granted summary judgment in favor of the defendants as to all counts.⁴⁶⁸

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.”⁴⁶⁹ 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 directly with the clerk of the court, unless the settlement agent provides to the lien creditor a written request to receive the certificate.⁴⁷⁰ The lien creditor must provide the settlement agent with a copy of the certificate, if filed directly by the lender.⁴⁷¹

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.

469. Act of Mar. 31, 2004, ch. 253, 2004 Va. Acts ____ (codified as amended at VA. CODE ANN. § 55-60(2) (Supp. 2004)).

470. Act of Apr. 12, 2004, ch. 596, 2004 Va. Acts ____ (codified as amended at VA. CODE 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.⁴⁷² 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."⁴⁷³

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.⁴⁷⁴

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.⁴⁷⁵ Previously, those provisions pertained only to deeds to or from the trustees or trustee of a church or religious body.⁴⁷⁶

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.⁴⁷⁷ These fees are to be distributed to the Foundation on a monthly basis.⁴⁷⁸

C. Landlord / Tenant

1. The General Assembly modified the Virginia Residential

472. Act of Apr. 12, 2004, ch. 597, 2004 Va. Acts __; Act of Apr. 8, 2004, ch. 336, 2004 Va. Acts __ (codified as amended at VA. CODE ANN. § 6.1-2.25 (Cum. Supp. 2004)).

473. Act of Apr. 12, 2004, ch. 597, 2004 Va. Acts __ (codified as amended at VA. CODE ANN. § 6.1-2.27 (Cum. Supp. 2004)).

474. Act of Apr. 12, 2004, ch. 626, 2004 Va. Acts __; Act of Apr. 12, 2004, ch. 492, 2004 Va. Acts __ (codified as amended at VA. CODE ANN. § 58.1-811(A) (Repl. Vol. 2004)).

475. VA. CODE ANN. § 58.1-811(A)-(B) (Repl. Vol. 2004).

476. Act of Apr. 12, 2004, ch. 626, 2004 Va. Acts __; Act of Apr. 12, 2004, ch. 492, 2004 Va. Acts __ (codified as amended at VA. CODE ANN. § 58.1-811(A)-(B) (Repl. Vol. 2004)).

477. Act of Apr. 12, 2004, ch. 990, 2004 Va. Acts __ (codified as amended at VA. CODE ANN. § 58.1-817 (Repl. Vol. 2004)).

478. *Id.*

Landlord and Tenant Act⁴⁷⁹ 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.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.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.⁴⁸²

2. The General Assembly modified the Virginia Residential Landlord and Tenant Act⁴⁸³ to obligate the landlord to note upon move-in whether there is any visible evidence of mold in the dwelling unit.⁴⁸⁴ The tenant has the option of objecting to the report within five days after receipt.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.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 Act⁴⁸⁷ to clarify and codify the interplay be-

479. VA. CODE ANN. § 55-248.2 (Repl. Vol. 2003 & Supp. 2004).

480. Act of Mar. 29, 2004, ch. 232, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-248.31 (Supp. 2004)).

481. Act of Mar. 31, 2004, ch. 307, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-248.18(B) (Supp. 2004)).

482. *Id.*

483. VA. CODE ANN. § 55-248.2 (Repl. Vol. 2003 & Supp. 2004).

484. Act of Mar. 29, 2004, ch. 226, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-248.11:2 (Supp. 2004)).

485. VA. CODE ANN. § 55-248.11:2 (Supp. 2004).

486. *Id.*

487. *Id.* § 55-288.2 (Repl. Vol. 2003 & Supp. 2004).

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-

488. Act of Mar. 15, 2004, ch. 123, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-248.7:2 (Supp. 2004)).

489. VA. CODE ANN. § 55-248.7:2(A) (Supp. 2004).

490. *Id.*

491. VA. CODE ANN. § 55-248.7:2(C) (Supp. 2004).

492. Act of Apr. 14, 2004, ch. 799, 2004 Va. Acts ___; Act of Apr. 12, 2004, ch. 539, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2204(B) (Supp. 2004)).

493. Act of Apr. 14, 2004, ch. 799, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2204(D) (Supp. 2004)).

494. Act of Apr. 15, 2004, ch. 952, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2241(6) (Supp. 2004)).

istrator to maintain a zoning map that provides ready cross-referencing between the parcels and any zoning conditions affecting such parcels.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.”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.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.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.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

495. VA. CODE ANN. § 15.2-2300 (Repl. Vol. 2003).

496. Act of Apr. 12, 2004, ch. 531, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2300 (Repl. Vol. 2003)).

497. Act of Mar. 29, 2004, ch. 240, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 43-3(A) (Cum. Supp. 2004)).

498. Act of Apr. 8, 2004, ch. 352, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 17.1-227 (Supp. 2004)).

499. Act of Apr. 14, 2004, ch. 804, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 33.1-132 (Cum. Supp. 2004)).

certificate filed with the court.⁵⁰⁰ 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.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 36.48.⁵⁰² In that section, owners are encouraged to redevelop blighted area pursuant to an overall development plan.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.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."⁵⁰⁵

2. The General Assembly deleted Virginia Code section 55-79.81(C).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

500. Act of Apr. 14, 2004, ch. 803, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 33.1-120(F) (Cum. Supp. 2004)).

501. VA. CODE ANN. § 33.1-120(F) (Cum. Supp. 2004).

502. Act of Apr. 12, 2004, ch. 540, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 25.1-107 (Supp. 2004)).

503. *Id.*

504. *Id.*

505. VA. CODE ANN. § 55-510(E) (Supp. 2004).

506. Act of Mar. 31, 2004, ch. 281, 2004 Va. Acts ___.

responsible for damage arising from activities within the unit.⁵⁰⁷

3. The General Assembly modified both the Virginia Condominium Act⁵⁰⁸ and the Property Owners' Association Act⁵⁰⁹ 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.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.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.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.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.⁵¹⁴ Modifications to

507. *Id.*

508. VA. CODE ANN. § 55-79.39 (Repl. Vol. 2003).

509. *Id.* § 55-508 (Repl. Vol. 2003 & Supp. 2004).

510. Act of Apr. 14, 2004, ch. 786, 2004 Va. Acts ___; Act of Apr. 14, 2004, ch. 779, 2004 Va. Acts ___; Act of Apr. 14, 2004, ch. 778, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-516(E), -79.84(D) (Supp. 2004)).

511. Act of Apr. 14, 2004, ch. 786, 2004 Va. Acts ___; Act of Apr. 14, 2004, ch. 779, 2004 Va. Acts ___; Act of Apr. 14, 2004, ch. 778, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-516(I), -79.84(I) (Supp. 2004)).

512. Act of Apr. 8, 2004, ch. 333, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-510.1(A) (Supp. 2004)).

513. VA. CODE ANN. § 55-376.1(B) (Supp. 2004).

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.⁵¹⁵

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.⁵¹⁶ 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.⁵¹⁷

515. *Id.* § 55-376.1(E) (Supp. 2004).

516. Act of Mar. 29, 2004, ch. 242, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-429(B) (Supp 2004)).

517. *Id.* § 55-429(C) (Supp. 2004).