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REAL ESTATE LAW

Paul H. Davenport *

Lindsey H. Dobbs **

I. INTRODUCTION

This article surveys significant cases concerning real property law decided by the Supreme Court of Virginia between the spring of 2004 and the spring of 2006. This article also details significant legislative changes flowing from the 2005 and 2006 Virginia General Assembly sessions.

II. RECENT CASE LAW

A. *Easements*

In *United States v. Blackman*,¹ the Supreme Court of Virginia addressed the following certified question from the United States District Court for the Western District of Virginia: “In Virginia in 1973, would a conveyance of a negative easement in gross by a private property owner to a private party for the purpose of land conservation and historic preservation be valid?”² Peter Blackman was the owner of a manor home affected by said negative easement, which provided that his home was to be “maintained and preserved in its present state as nearly as practicable” so as not to “fundamentally alter its historic character.”³ Wanting to renovate and add on to his manor home, Blackman sought to in-

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1. 270 Va. 68, 613 S.E.2d 442 (2005).

2. *Id.* at 72, 613 S.E.2d at 443.

3. *Id.* at 74, 613 S.E.2d at 444.

validate the easement because, at the time of its purported creation, the easement would not have been recognized under Virginia law.⁴ The court stated that:

Underlying the issue is a degree of apparent conflict between the common law preference for unrestricted rights of ownership of real property and the public policy of this Commonwealth as expressed in Article XI of the Constitution of Virginia, ratified by the people of this Commonwealth in 1970, that "it shall be the policy of this Commonwealth to conserve . . . its historical sites and buildings."⁵

Reiterating its words from long ago, the court reminded us that:

An easement is "a privilege without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person; by reason whereof the latter is obligated to suffer, or refrain from doing something on his own tenement for the advantage of the former."⁶

Recognizing the significance of its answer to the certified question, the court noted the potential impact thereof on "other charitable entities [that] hold conservation or historic preservation easements."⁷ Ultimately reconciling the conflict in favor of the commonwealth's strong public policies, the Supreme Court of Virginia held that Virginia law did recognize negative easements in gross for land conservation and historic preservation in 1973.⁸ The court explained:

Virginia not only was committed to encouraging and supporting land conservation and the preservation of historic sites and buildings in the Commonwealth, as evidenced by the constitutional and statutory expressions of that public policy . . . but also recognized negative easements in gross created for these purposes as valid in 1973.⁹

In *Virginia Electric & Power Co. v. Northern Virginia Regional Park Authority*, the Supreme Court of Virginia considered whether a utility company held an exclusive easement in gross

4. *Id.* at 74–75, 613 S.E.2d at 444–45.

5. *Id.* at 76, 613 S.E.2d at 445 (alteration in original) (quoting VA. CONST. art. XI, § 1).

6. *Id.* (internal quotations omitted) (quoting *Amstutz v. Everett Jones Lumber Corp.*, 268 Va. 551, 559, 604 S.E.2d 437, 441 (2004)).

7. *Id.* at 75, 613 S.E.2d at 445.

8. *Id.* at 82, 613 S.E.2d at 449.

9. *Id.* at 81–82, 613 S.E.2d at 449.

over a bike trail in northern Virginia such that it could properly apportion use of the easement to third parties without the grant of a license by the servient landowner.¹⁰ The instrument reserving the easement to the power company included the following language: “[T]he Authority will not permit, assign or grant any other party any easements, rights, privileges or encroachments of any nature on the land hereby conveyed, without the written approval of [Virginia Power], provided such approval shall not be withheld unreasonably.”¹¹

The parties to the suit agreed that the easement was in gross, or an “easement with a servient estate but no dominant estate.”¹² However, the Park Authority argued the easement was non-exclusive, whereas the power company purported that it was exclusive.¹³ The court explained the difference by stating that “[a]n exclusive easement in gross is one which gives the owner the sole privilege of making the uses authorized by it”¹⁴ such that “the owner of the easement may have the right of apportionment, which is described as one of ‘so dividing [an easement in gross] as to produce independent uses or operations.’”¹⁵ In contrast, a non-exclusive easement in gross “is one which does not give, as against the owner of the servient tenement and others who may be privileged under him, the sole privilege of making the use authorized by the easement.”¹⁶

The Supreme Court of Virginia held that the easement in gross was non-exclusive and, therefore, its holder could not apportion the easement to third parties.¹⁷ “The clear language,” according to the court, “permitting the Park Authority to grant third party easements ‘of any nature’ subject to approval by Virginia Power, which shall not be unreasonably withheld, demonstrates the non-exclusivity of Virginia Power’s easement.”¹⁸

10. 270 Va. 309, 618 S.E.2d 323 (2005).

11. *Id.* at 313, 618 S.E.2d at 325.

12. *Id.* at 316, 618 S.E.2d at 327 (quoting *Corbett v. Ruben*, 223 Va. 468, 472, 290 S.E.2d 847, 849 (1982)).

13. *Id.* at 317, 618 S.E.2d at 327.

14. *Id.* (quoting RESTATEMENT (FIRST) OF PROPERTY § 493 cmt. c (1944)).

15. *Id.* (alteration in original) (quoting *Hise v. BARC Elec. Coop.*, 254 Va. 341, 344–45, 492 S.E.2d 154, 157 (1997)).

16. *Id.* (quoting RESTATEMENT (FIRST) OF PROPERTY § 493 cmt. d (1944)).

17. *Id.* at 321, 618 S.E.2d at 329.

18. *Id.* at 320–21, 618 S.E.2d at 329.

Justice Koontz, with whom Senior Justice Stephensen joined, dissented, reasoning that:

Virginia Power retained an easement in gross that permitted it to use its easement, among other things, expressly for communication purposes. The Park Authority, however, was expressly prohibited from granting "any easements, rights, privileges or encroachments of any nature on the property" without the approval of Virginia Power. And neither party disputes the fact that apportionability increases the value of the easement to its owner, Virginia Power. Under such circumstances, there is an inference in the usual case that the easement was intended in its creation to be apportionable. Nothing in the language of the various deeds under consideration refutes that inference here.¹⁹

B. *Adverse Possession and Prescription*

The element of hostility was at issue in the claim for adverse possession examined in the case of *Quatannens v. Tyrrell*.²⁰ The Supreme Court of Virginia had previously held that "[t]o establish title to real property by adverse possession, a claimant must prove actual, hostile, exclusive, visible, and continuous possession, under a claim of right, for the statutory period of 15 years" by clear and convincing evidence.²¹ In *Quatannens*, adjacent landowners disputed ownership of a strip of land between their homes which included a small portion of the claimant's home, brick walkway, paved parking area, and brick arch.²² The defendants argued that, because the plaintiffs testified that they did not intend to possess any property other than their own, their possession could not be deemed hostile.²³

The court found this fact "irrelevant," and stated:

The collateral question whether the possessor would have claimed title, claimed the land as his own, had he believed that the land involved did not belong to him, but to another, that is, had he not been mistaken as to the true boundary line called for in his chain of title,

19. *Id.* at 324, 618 S.E.2d at 331 (Koontz, J., dissenting) (citations omitted).

20. 268 Va. 360, 364-65, 601 S.E.2d 616, 618 (2004).

21. *Id.* at 368, 601 S.E.2d at 620 (quoting *Grappo v. Blanks*, 241 Va. 58, 61, 400 S.E.2d 168, 170-71 (1991)).

22. *Id.* at 364, 601 S.E.2d at 617.

23. *Id.* at 365, 601 S.E.2d at 618.

is not the proximate but an antecedent question, which is irrelevant and serves only to confuse ideas.²⁴

Furthermore, permission is a defense against adverse possession, and, thus, the defendant bears the burden of proof thereof.²⁵ Because the Tyrrells failed to carry this burden, and in fact provided no evidence of permission, and because the Quantannenses otherwise sufficiently established the elements of a claim for adverse possession, the supreme court held in favor of adverse possession.²⁶ “A claimant cannot be expected to prove the non-existence of permission by evidence,” noted the court.²⁷

In *Amstutz v. Everett Jones Lumber Corp.*,²⁸ the Supreme Court of Virginia considered whether certain timber growers had engaged in continuous use of a road such that they had acquired a prescriptive easement. Mary Ann and David Amstutz (“Amstutz”), the owners of the purportedly servient tenement, blocked the road, and a lumber company sought to have Amstutz enjoined from interfering with its use thereof.²⁹ Amstutz then sought a declaratory judgment that another neighboring landowner, Elizabeth Thomas, did not have the right to use the road; the two cases were combined by the circuit court.³⁰ The commissioner in chancery determined that the elements of a prescriptive easement had been met and that “each [of those claiming the prescriptive easement] had utilized the ‘road over the Amstutz parcel when needed’ to tend and harvest their respective tracts of timber.”³¹

The supreme court looked to the meaning of “continuous use” to determine if there was credible evidence to support the chancellor’s finding.³² The court explained that a continuous use does “not need to be ‘daily, weekly, or even monthly.’”³³ Further expanding upon the definition, the court continued:

24. *Id.* at 373, 601 S.E.2d at 622 (quoting *Christian v. Bulbeck*, 120 Va. 74, 111, 90 S.E. 661, 672 (1916)).

25. *Id.*, 601 S.E.2d at 623.

26. *Id.* at 374, 601 S.E.2d at 623.

27. *Id.*

28. 268 Va. 551, 604 S.E.2d 437 (2004).

29. *Id.* at 554, 604 S.E.2d at 438.

30. *Id.*

31. *Id.* at 555, 604 S.E.2d at 439.

32. *See id.* at 559, 604 S.E.2d at 441.

33. *Id.* at 560, 604 S.E.2d at 442 (quoting *Ward v. Harper*, 234 Va. 68, 72, 360 S.E.2d 179, 182 (1987)).

Instead, to determine continuity, “the nature of the easement and the land it serves, as well as the character of the activity must be considered.” The use must “be of such frequency and continuity as to give reasonable notice to the landowner that [such a] right is being exercised against him.”³⁴

Amstutz argued that no notice arose from “the infrequent use of the disputed road to access the . . . parcels for purposes of checking timber growth, preparing reports, and marking boundaries.”³⁵ On the other hand, those claiming prescription argued “that the road was used ‘as needed’ to facilitate the growth, management, and harvest of timber on their respective parcels” and that “there was no access to either parcel other than by traveling on the road in question.”³⁶ Holding that there was no credible evidence to support the finding of a prescriptive easement, but that there was only “sporadic use” of the road, the court reversed the commissioner’s finding.³⁷ The “law is jealous of a claim to an easement,”³⁸ remarked the court, and “[t]hat is so because ‘the imposition of a prescriptive easement is the taking of a property right of the servient owner without payment of compensation.’”³⁹

C. Real Property Taxation

In *Shoosmith Bros., Inc. v. County of Chesterfield*,⁴⁰ the plaintiff challenged Chesterfield County’s assessment of its real property. The Supreme Court of Virginia noted that in reviewing the case, it must presume the assessment correct.⁴¹ It is the taxpayer’s burden to rebut this presumption with clear and convincing evidence, if the property is assessed above its fair market value.⁴² In the instant case, the County’s valuation of the property was based in part on certain non-transferable landfill permits and the income generated as a result thereof.⁴³ The plaintiff

34. *Id.* (citations omitted).

35. *Id.*, 604 S.E.2d at 441.

36. *Id.*, 604 S.E.2d at 441–42.

37. *Id.* at 561, 604 S.E.2d at 442.

38. *Id.* at 562, 604 S.E.2d at 443 (quoting *Eagle Lodge, Inc. v. Hofmeyer*, 193 Va. 864, 877, 71 S.E.2d 195, 202 (1952)).

39. *Id.* (quoting *McNeil v. Kingrey*, 237 Va. 400, 406, 377 S.E.2d 430, 433 (1989)).

40. 268 Va. 241, 601 S.E.2d 641 (2004).

41. *Id.* at 245, 601 S.E.2d at 643.

42. *Id.*

43. *Id.* at 246, 601 S.E.2d at 643–44.

argued that in taking the permits into account, Chesterfield County, in essence, assessed the permits, as intangible assets, themselves; therefore, the property was improperly assessed at higher than its fair market value.⁴⁴ The supreme court disagreed, holding that “consideration of the use of the land in assessing fair market value, even if such use requires non-transferable governmental permits, is not the assessment of an intangible asset,” and affirmed the county’s assessment.⁴⁵ It is a “fundamental rule,” stated the court, “that in assessing all tangible properties for tax purposes such properties should be assessed at their highest and best use.”⁴⁶

In *City of Martinsville v. Commonwealth Boulevard Associates, LLC*,⁴⁷ the taxpayer fared better. At the trial court level, the taxpayer argued successfully for relief from an annual levy of taxes for a tract of land containing an industrial plant, which levy was based on a general reassessment conducted when the plant was active.⁴⁸ Since the assessment, the plant’s owner declared bankruptcy, the plant was “essentially gutted,” and the plaintiff owner purchased the plant for a mere fraction of its previously assessed value.⁴⁹ In addition, the City had conducted a new general reassessment, which valued the property at approximately one-third of the previous assessment, but continued to levy taxes on the plant based upon the previous assessment.⁵⁰

The new owner argued that the assessment was erroneous, while the City argued that “a taxpayer seeking relief from taxes levied in the interim must prove that the previous general reassessment was erroneous when originally made.”⁵¹ In this case, however, the Supreme Court of Virginia noted that no such contention was made by the taxpayer.⁵² The court set forth the following rule of law:

44. *See id.*, 601 S.E.2d at 643.

45. *Id.* at 247, 601 S.E.2d at 644.

46. *Id.* at 246, 601 S.E.2d at 644 (quoting *Norfolk & W. Ry. Co. v. Commonwealth*, 211 Va. 692, 699, 179 S.E.2d 623, 628 (1971)).

47. 268 Va. 697, 604 S.E.2d 69 (2004).

48. *Id.* at 698, 604 S.E.2d at 70.

49. *Id.* at 699, 604 S.E.2d at 70.

50. *See id.*

51. *Id.*

52. *Id.*

A taxpayer is entitled to relief under Code § 58.1-3984 if he carries his burden of proving that in either the general reassessment or in the annual levy of taxes “the property in question is valued at more than its fair market value or that the assessment is not uniform in its application, or that the assessment is otherwise invalid or illegal.”⁵³

Consequently, the court affirmed the trial court’s reduction of the assessment in accordance with the fair market value of the property.⁵⁴

D. *Contracts*

In *Cangiano v. LSH Building Co.*,⁵⁵ the Supreme Court of Virginia sought to determine whether the trial court’s grant of specific performance and award of attorney’s fees was proper. LSH Building and Salvatore Cangiano entered into an agreement for the purchase and sale of certain real property.⁵⁶ Cangiano, the seller, warranted and represented “to the best of his knowledge and belief” that he would obtain, and transfer at settlement, certain additional land and easements for offsite utilities and improvements, inter alia, necessary for LSH Building’s planned development of the property.⁵⁷ The agreement provided that, upon Cangiano’s default thereunder, LSH “shall be entitled to all remedies available to LSH at law or in equity, including specific performance, all of such remedies shall be cumulative and not exclusive of each other” and that any “defaulting party shall be liable for all costs incurred by the non-defaulting party in enforcing [the] Agreement through court action or otherwise, including a reasonable attorney’s fee.”⁵⁸ Of course, the “decision whether to award specific performance”⁵⁹ and the “amount of recoverable attorney’s fees” both rest within the sound discretion of the trial court, as the supreme court reminded us.⁶⁰

53. *Id.* at 700, 604 S.E.2d at 71 (quoting VA. CODE ANN. § 58.1-3984 (Repl. Vol. 2004 & Cum. Supp. 2006)).

54. *Id.*

55. 271 Va. 171, 623 S.E.2d 889 (2006).

56. *Id.* at 174, 623 S.E.2d at 891.

57. *Id.*

58. *Id.* at 175, 623 S.E.2d at 891–92.

59. *Id.* at 179, 623 S.E.2d at 894 (quoting *Shepherd v. Davis*, 265 Va. 108, 124, 574 S.E.2d 514, 523 (2003)).

60. *Id.* (citing *Coady v. Strategic Res., Inc.*, 258 Va. 12, 18, 515 S.E.2d 273, 276

Cangiano made numerous arguments against the imposition of specific performance, among them that he was only obligated to secure such easements as were necessary for the first phase of development and that the agreement was unenforceable "because there was neither a meeting of the minds nor an offer and acceptance."⁶¹ "In this concession," reasoned the court, "Cangiano implicitly agreed that the language is that of contractual obligation. He merely contested the scope of the obligation."⁶² The court held that "[a] party may not approbate and reprobate by taking successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory."⁶³ Affirming the trial court's judgment, the supreme court held that the award of specific performance in this instance did not constitute an abuse of discretion and that the parties' agreement "unambiguously impose[d]" the "affirmative obligation" on Cangiano to use best efforts to secure additional land and easements.⁶⁴

Cangiano also challenged the trial court's award of attorneys' fees because "they were 400% greater than those he incurred."⁶⁵ The court found this argument to be without merit, stating that:

In assessing the reasonableness of attorney's fees, the issue is not how the fees incurred by one party compare directly with those incurred by an opponent. Instead, the issue is "whether the fees incurred were consistent with those generally charged for similar services" and "whether the services were necessary and appropriate."⁶⁶

The supreme court found that Cangiano had not proven that the trial court abused its discretion, and it therefore affirmed the award, also remanding the case for determination of additional, reasonable attorneys' fees incurred by LSH Building in defending the judgment on appeal and remand.⁶⁷

Justice Koontz dissented. While he conceded that "[t]he majority correctly acknowledges 'that equity will not compel that which is impossible to perform,'" he went on to note that "in the applica-

(1999)).

61. *Id.* at 176, 623 S.E.2d at 892.

62. *Id.* at 181, 623 S.E.2d at 895.

63. *Id.*

64. *Id.*

65. *Id.* at 183, 623 S.E.2d at 896.

66. *Id.* (quoting *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998)).

67. *Id.* at 184, 623 S.E.2d at 897.

ble context of this case [this] is merely another way of saying that equity will not require a seller to convey land which he does not own.”⁶⁸ Justice Koontz believed that the majority’s resolution, requiring Cangiano to use his “best efforts” to secure the necessary easements, is no resolution at all, and that because it leaves “future litigation a probable expectation,” specific performance was not appropriate.⁶⁹ Justice Koontz perceived the problem as a deficiency of title that would have been better addressed through an abatement of the purchase price.⁷⁰

In *Forbes v. Rapp*,⁷¹ the Supreme Court of Virginia sought to determine whether the chancellor erred in “awarding damages to a property owner for breach of a contract for the sale of land offered at public auction.”⁷² Bruce Forbes was the highest bidder at an auction of Raymond Rapp’s land.⁷³ Following the bidding process, Forbes made a deposit on the property and signed a document acknowledging that he would purchase the land, with settlement occurring on or before a certain day, subject to penalties for the delay of settlement; he subsequently sought to withdraw his offer to purchase the property.⁷⁴ The supreme court quoted the chancellor’s finding that “Forbes’s conduct after the auction ‘was a continual pattern of acting in bad faith.’”⁷⁵

The chancellor awarded Rapp the difference between Forbes’s bid (the contract purchase price) and the fair market value of the property, plus interest.⁷⁶ Forbes argued on appeal that the chancellor’s damage award was improper because Rapp failed to mitigate damages by not holding another auction.⁷⁷ In response to his argument, the court laid out the applicable rules of law as follows:

We have long recognized the obligation of an injured party to mitigate damages. Thus, when a purchaser has breached a contract for the sale of real estate, the seller nonetheless has the duty of making reasonable efforts to mitigate damages resulting from the breach,

68. *Id.* at 185, 623 S.E.2d at 897 (Koontz, J., dissenting).

69. *Id.* at 186–87, 623 S.E.2d at 898 (Koontz, J., dissenting).

70. *Id.* at 186, 623 S.E.2d at 898 (Koontz, J., dissenting).

71. 269 Va. 374, 611 S.E.2d 592 (2005).

72. *Id.* at 376, 611 S.E.2d at 593.

73. *Id.* at 377, 611 S.E.2d at 593.

74. *Id.*, 611 S.E.2d at 594.

75. *Id.* at 379, 611 S.E.2d at 595.

76. *Id.*

77. *Id.*

and to the extent that the seller fails to do so, he may not recover the additional damages incurred.⁷⁸

As failure to mitigate damages is an affirmative defense, Forbes bore the burden of proof.⁷⁹ As a result of Forbes's failure "to present any evidence that marketing the property in the manner he advocated would have resulted in a higher purchase price for the property,"⁸⁰ the supreme court affirmed the chancellor's damage award.⁸¹

E. *Property Owners' Associations and Condominiums*

In *White v. Boundary Ass'n*,⁸² members of a property owners' association challenged their board of directors' assignment of parking spaces for exclusive use by certain designated units. The Whites lived in a nine-unit townhouse subdivision in Williamsburg.⁸³ The subdivision's eighteen parking spaces constituted common area under the applicable declaration of covenants, conditions, and restrictions.⁸⁴ The declaration provided every unit owner an appurtenant "right and easement of enjoyment in and to the Common Area," which were to "pass with the title to every lot."⁸⁵ The board of directors was empowered to adopt rules and regulations pursuant to the association's bylaws.⁸⁶ The Whites claimed the board exceeded its authority under the Virginia Property Owners' Association Act⁸⁷ and also expressly violated the declaration by designating the parking spaces, which in essence amounted to a licensing of common area.⁸⁸

The Supreme Court of Virginia determined that the declaration expressly granted an easement of enjoyment in the common area to each unit owner and that any rule or regulation which had the effect of divesting a unit owner of the aforesaid property right

78. *Id.* at 380, 611 S.E.2d at 595.

79. *Id.*, 611 S.E.2d at 596.

80. *Id.*

81. *Id.* at 382, 611 S.E.2d at 597.

82. 271 Va. 50, 624 S.E.2d 5 (2006).

83. *Id.* at 52, 624 S.E.2d at 6.

84. *Id.* at 52-53, 624 S.E.2d at 6-7.

85. *Id.*, 624 S.E.2d at 7.

86. *Id.* at 52, 624 S.E.2d at 7.

87. VA. CODE ANN. §§ 55-508 to -516 (Repl. Vol. 2003 & Cum. Supp. 2006).

88. *White*, 271 Va. at 53-54, 624 S.E.2d at 8.

was invalid.⁸⁹ Holding the board's parking designation to be invalid, the supreme court explained its reasoning as follows:

[T]he Board's parking policy confers a license on the individual unit owners, granting a special privilege permitting them to exclude others from using assigned portions of the common area. Because the Declaration does not authorize the Board to license portions of the common area, the Board was not permitted to obtain the same result by a rule or regulation that effectively divested the unit owners of access to certain portions of the common area included in their easement of enjoyment.⁹⁰

The court awarded the complaining unit owners attorneys' fees and costs as the prevailing party pursuant to Virginia Code section 55-515(A).⁹¹

*Westgate at Williamsburg Condominium Ass'n v. Philip Richardson Co.*⁹² presented the Supreme Court of Virginia with the opportunity to clarify the definition of a "scrivener's error" as that term appears in the Condominium Act.⁹³ Virginia Code section 55-79.71(A) provides, "If there is no unit owner other than the declarant, the declarant may unilaterally amend the condominium instruments," but pursuant to Virginia Code section 55-79.71(B), if "there is any unit owner other than the declarant, the condominium instruments shall be amended only by agreement of the unit owners" or by the declarant unilaterally to correct a scrivener's error under section 55-79.71(F).⁹⁴

When the developer acquired the property upon which the condominium was ultimately built, it purchased a larger tract than it needed for ease of securing subdivision approval and so as not to delay closing.⁹⁵ The developer and its seller fully intended that a smaller portion of the property would eventually be re-conveyed to the seller.⁹⁶ The metes and bounds description included in the declaration creating the condominium encompassed the smaller portion, contrary to the intention of the developer, who, upon realization of the oversight, unilaterally recorded a corrective

89. *Id.* at 55, 624 S.E.2d at 8.

90. *Id.* at 56, 624 S.E.2d at 9.

91. *Id.* at 57, 624 S.E.2d at 9.

92. 270 Va. 566, 621 S.E.2d 114 (2005).

93. VA. CODE ANN. §§ 55-79.39 to -79.103 (Repl. Vol. 2003 & Cum. Supp. 2006).

94. *Id.* § 55-79.71(A), (B), (F) (Repl. Vol. 2003 & Cum. Supp. 2006).

95. *Westgate*, 270 Va. at 569-70, 621 S.E.2d at 115.

96. *See id.* at 570, 621 S.E.2d at 115.

amendment to the declaration to remove the small parcel.⁹⁷ The association then sought to quiet title.⁹⁸

The court set out to determine whether a scrivener's error had occurred in this case, a question of law which the court reviewed *de novo*.⁹⁹ Though the court did not adopt a definition for the term "scrivener's error" as used in Virginia Code section 55-79.71(F), the court did determine that this particular set of facts did not give rise to a scrivener's error and held in favor of the owners' association, also awarding the association its attorneys' fees.¹⁰⁰ The court elaborated on its finding as follows:

The alleged error was neither typographical nor clerical. There was no finding that AES, the scrivener, had transposed a call in the metes and bounds description, recited an erroneous deed book reference or similar error commonly recognized as a scrivener's error. Instead, the trial court specifically found that there was no drafting error, but instead, based its judgment only on the LLC's intent that Parcel 1A should not have been included in the condominium property.¹⁰¹

F. Restrictive Covenants

Residents of a subdivision argued that the restrictive covenants encumbering the subdivision prohibited the pasturing of a horse in the subdivision property or, alternatively, that such pasturing constituted a nuisance per se in *Turner v. Caplan*.¹⁰² The covenants at issue expressly restricted the subdivision's lots to residential purposes and also prohibited the "raising or harboring of livestock or poultry;" however, they explicitly exempted certain lots, including the lots in question, from the livestock and poultry prohibition.¹⁰³ The trial court agreed the restrictive covenants prohibited the pasturing, found the potential exemption from the covenant to be void for unreasonableness, and held the pasturing constituted a nuisance per se.¹⁰⁴

97. *Id.* at 571, 621 S.E.2d at 116.

98. *Id.* at 572, 621 S.E.2d at 116-17.

99. *Id.* at 574, 621 S.E.2d at 118.

100. *Id.* at 579, 621 S.E.2d at 120-21.

101. *Id.* at 577, 621 S.E.2d at 120.

102. 268 Va. 122, 596 S.E.2d 525 (2004).

103. *Id.* at 126, 596 S.E.2d at 527.

104. *Id.* at 125-27, 596 S.E.2d at 527-28.

The Supreme Court of Virginia determined that the exemption from the covenant prohibiting livestock did apply, however, and held that the trial court committed plain error in finding said exemption to be void for unreasonableness.¹⁰⁵ The court stated that “while we are aware of case law holding that use of property may not be unreasonably restricted, counsel and the trial court cite no cases applying the concept of ‘unreasonability’ to the exemptions specifically allowing the use of restricted land for particular purposes.”¹⁰⁶

In addition, the supreme court reversed the trial court’s finding that the horse’s pasturing constituted a nuisance *per se*; the trial court’s interpretation of “nuisance *per se*” was “too broad.”¹⁰⁷ “[W]hile there is some confusion in the books as to the meaning of the term nuisance *per se*, the tendency of modern times is to restrict its use to such things as are nuisances at all times and under all circumstances,” clarified the supreme court.¹⁰⁸ According to the court, that the restrictive covenants prohibited livestock on other lots within the subdivision was irrelevant. The court added: “[L]aw of nuisance exists independently of restrictive covenants. The fact that a prohibition upon maintaining a nuisance is found in a covenant adds nothing to the analysis of whether facts presented constitute a nuisance.”¹⁰⁹ Instead, wrote the court:

In all such cases the question is whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable [persons], is naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and as, in view of the circumstances of the case, is [un]reasonable and in derogation of the rights of the complainant.¹¹⁰

The dispositive issue in *Barris v. Keswick Homes, L.L.C.*¹¹¹ was “whether the circuit court correctly ruled that a particular lot in a residential subdivision is no longer subject to a restrictive cove-

105. *Id.* at 126–27, 596 S.E.2d at 527–28.

106. *Id.*, 596 S.E.2d at 528 (citations omitted).

107. *Id.* at 128, 596 S.E.2d at 528–29.

108. *Id.*, 596 S.E.2d at 528 (quoting *Price v. Travis*, 149 Va. 536, 547, 140 S.E. 644, 647 (1927)).

109. *Id.* at 127, 596 S.E.2d at 528.

110. *Id.* (alteration in original) (quoting *Bragg v. Ives*, 149 Va. 482, 496–97, 140 S.E. 656, 660 (1927)).

111. 268 Va. 67, 597 S.E.2d 54 (2004).

nant prohibiting the resubdivision of lots in that subdivision.”¹¹² The covenants at issue, recorded in 1948, stated, “[t]here shall be no resubdivision of any of said lots, without the written consent of three-fourths of the then owners of lots in said subdivision.”¹¹³ In 1984, three-fourths of the then owners recorded an instrument which “vacated and released” Lot 7 from the subdivision restriction; the parcel Keswick Homes sought to subdivide was created following subdivision of Lot 7 pursuant to this instrument.¹¹⁴

“Generally,” explained the Supreme Court of Virginia, “a restrictive covenant cannot be modified or terminated except by agreement of all the parties entitled to enforce the covenant.”¹¹⁵ “However,” continued the court, “the covenant may provide for a mechanism by which the parties, or some number of them, may modify or terminate the restriction.”¹¹⁶ Keswick Homes argued that the covenant in the instant case allowed residents to exempt property from its restrictions in perpetuity and that the 1984 instrument did just that.¹¹⁷ Conversely, the other subdivision residents argued that the covenant permitted three-fourths of the then-owners to consent to a one-time waiver of the restriction.¹¹⁸ Following its *de novo* review of the covenants, the supreme court held that they did not provide “the authority to grant a perpetual release of a lot from the covenant.”¹¹⁹ Therefore, the subdivision residents were not estopped from enforcing the subdivision prohibition.¹²⁰

G. Land Use

In *Board of Supervisors v. Board of Zoning Appeals*,¹²¹ the Supreme Court of Virginia considered whether boards of supervisors have standing to challenge the decisions made by boards of zon-

112. *Id.* at 69, 597 S.E.2d at 55.

113. *Id.*

114. *Id.* at 69–70, 597 S.E.2d at 55–56.

115. *Id.* at 71, 597 S.E.2d at 57.

116. *Id.*

117. *Id.*

118. *Id.* at 71–72, 597 S.E.2d at 57.

119. *Id.* at 72–73, 597 S.E.2d at 57–58.

120. *See id.* at 73, 597 S.E.2d at 58.

121. 268 Va. 441, 604 S.E.2d 7 (2004).

ing appeals.¹²² The Board of Supervisors in this case challenged the Board of Zoning Appeals's grant of a variance for the subdivision of property when the resulting parcels would not comply with Fairfax County's minimum square footage and lot width requirements.¹²³ The Board of Supervisors claimed standing under Virginia Code section 15.2-2314, which states in pertinent part:

Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer or any officer, department, board or bureau of the locality, may file with the clerk of the circuit court for the county or city a petition specifying the grounds on which aggrieved.¹²⁴

The supreme court was compelled by the Board of Supervisors's "strong interest in the proper and uniform application of its zoning ordinances."¹²⁵ "Without question," worried the court, "improper decisions of a board of zoning appeals can impede the uniform and proper application of zoning ordinances and the grant of improper variances can undermine and even destroy the very goals that the zoning classifications were enacted to achieve."¹²⁶ The supreme court considered the implications of its holding in the following passage:

Code § 15.2-1404 grants a local governing board the broad power to institute actions in its own name with regard to "all matters connected with its duties." One legislative purpose manifested in this statutory grant is to enable the local governing body to ensure compliance with its legislative enactments, including its zoning ordinance. If the local governing body does not have such authority, that body's legislative acts could be effectively nullified by a BZA, and the governing body would be powerless to take action to require compliance with its own ordinances. Moreover, a holding that would preclude a board of supervisors from seeking judicial review of a decision of a board of zoning appeals would enable a board of zoning appeals to exercise power arbitrarily. Certainly, the General Assembly did not contemplate such an untenable result.¹²⁷

"[C]onsistent with the majority rule adopted by our sister states," the court ultimately held that a board of supervisors is an "ag-

122. *Id.* at 444, 604 S.E.2d at 8.

123. *Id.*

124. VA. CODE ANN. § 15.2-2314 (Cum. Supp. 2006).

125. *Bd. of Supervisors*, 268 Va. at 446, 604 S.E.2d at 9.

126. *Id.*

127. *Id.* (quoting VA. CODE ANN. § 15.2-1404 (Repl. Vol. 2003 & Cum. Supp. 2006)).

grieved person” under Virginia Code section 15.2-2314 and therefore has standing to challenge decisions of a board of zoning appeals.¹²⁸

Turning to the issue of whether the Board of Zoning Appeals properly granted the variance at issue, the supreme court reiterated a recent rule of law: “[A] board of zoning appeals has authority to grant variances only to avoid an unconstitutional result.”¹²⁹ The court found no undue hardship under the instant facts, and thus, no valid justification for the Board of Zoning Appeals’s grant of a variance.¹³⁰ The landowner merely sought the variance to “demolish the current structure on his property, subdivide his property into two lots, and erect new residential structures on each lot.”¹³¹ According to the supreme court, the landowner’s “inability to subdivide his property does not constitute hardship under the facts of this case.”¹³² The court added that “[t]he effect of the zoning ordinance does not interfere ‘with all reasonable beneficial uses of the property, taken as a whole.’”¹³³ As a result, the supreme court vacated the Board of Zoning Appeals’s grant of the variance and entered final judgment in the Board of Supervisors’s favor.¹³⁴

*Shilling v. Jimenez*¹³⁵ presented the Supreme Court of Virginia with the following issue: “[W]hether a landowner, aggrieved by the local governing body’s approval of a subdivision of neighboring lands, may attack that approval indirectly by suit against the subdividers and their successors in title.”¹³⁶ Neighbors filed a bill of complaint alleging that affidavits made by subdividers in connection with a subdivision application were false and intended to circumvent the application of certain zoning provisions, resulting in the “wrongful approval” of subdivision to their detriment.¹³⁷

128. *Id.*

129. *Id.* at 452, 604 S.E.2d at 12 (citing *Cochran v. Fairfax County Bd. of Zoning Appeals*, 267 Va. 756, 764, 594 S.E.2d 571, 576 (2004)).

130. *Id.* at 453, 604 S.E.2d at 13.

131. *Id.*

132. *Id.*

133. *Id.* (quoting *Cochran*, 267 Va. at 766, 594 S.E.2d at 578).

134. *Id.*

135. 268 Va. 202, 597 S.E.2d 206 (2004).

136. *Id.* at 204, 597 S.E.2d at 207.

137. *Id.* at 205–06, 597 S.E.2d at 208.

For the basis of their cause of action, the neighbors relied on a local ordinance, which provides, “Any person aggrieved by the interpretation, administration, or enforcement of these regulations as they apply to a subdivision . . . application may petition the Circuit Court of Loudoun County as provided by law,”¹³⁸ and on Virginia Code section 15.2-2255, which provides that the “administration and enforcement of subdivision regulations . . . shall be vested in the governing body of the locality,” and “[e]xcept as provided above, the governing body shall be responsible for administering and enforcing the provisions of the subdivision regulations through its local planning commission or otherwise.”¹³⁹ The neighbors argued that the phrase “or otherwise” in Virginia Code section 15.2-2255 implies a power on behalf of the local government to supply aggrieved persons the right to challenge subdivision approval in local circuit courts.¹⁴⁰

The supreme court disagreed, stating “[t]he phrase ‘or otherwise’ is not an express grant of power to the governing body to create a third-party right of action, and it does not give rise to such a grant by necessary implication.”¹⁴¹ The court seemed swayed by public policy considerations in making its decision, stating that: “Third-party suits challenging subdivisions long after their approval and recordation could have a profound effect on the vested property rights of innocent purchasers and lenders. We will not impute to the General Assembly an intent to create such an effect in the absence of express statutory language.”¹⁴²

H. *Mechanic’s Liens*

*Britt Construction, Inc. v. Magazzino Clean, LLC*¹⁴³ required the Supreme Court of Virginia to determine whether a mechanic’s lien had been properly perfected under the Virginia Code’s requirements for the same. Specifically, the dispositive issue was

138. *Id.* at 206, 597 S.E.2d at 209 (quoting LOUDOUN COUNTY, VA., CODIFIED ORDINANCES § 1242.04(1)(a) (2005), available at http://inetdocs.loudoun.gov/b&d/docs/landsubdivision_landsubdivision/landsubdivision.doc).

139. *Id.* at 207, 597 S.E.2d at 209 (quoting VA. CODE ANN. § 15.2-2255 (Repl. Vol. 2003 & Cum. Supp. 2006)).

140. *Id.*

141. *Id.* at 208, 597 S.E.2d at 210.

142. *Id.*

143. 271 Va. 58, 623 S.E.2d 886 (2006).

“whether Code § 43-4 requires that a general contractor, as a condition of perfecting a mechanic’s lien, contemporaneously file with the memorandum of lien a ‘certification’ that a copy of the memorandum has been mailed to the property owner.”¹⁴⁴ In pertinent part, this statute provides:

A general contractor . . . in order to perfect the lien given by § 43-3 . . . shall file a memorandum of lien at any time after the work is commenced or material furnished, but not later than 90 days from the last day of the month in which he last performs labor or furnishes material, and in no event later than 90 days from the time such building . . . is completed, or the work thereon otherwise terminated. . . . A lien claimant who is a general contractor shall also file along with the memorandum of lien, a certification of mailing of a copy of the memorandum of lien on the owner of the property at the owner’s last known address.¹⁴⁵

Britt Construction recorded twelve memoranda of mechanic’s liens, but failed to mail copies of the memoranda to Magazine Clean and to file certifications of mailing.¹⁴⁶ In Britt Construction’s view, perfection occurred as a result of the recordation, and the mailing and certification requirements did not affect recordation; instead, these latter requirements were merely notice provisions, compliance with which should be liberally construed by the courts.¹⁴⁷

Noting that mechanic’s lien statutes are in derogation of the common law and thus must be strictly construed,¹⁴⁸ the supreme court held that Virginia Code section 43-3 was plain and unambiguous and does in fact require that a general contractor file a certification that he has mailed a copy of the memorandum of lien to the property owner at the last known address.¹⁴⁹ As a result, Britt Construction’s purported mechanic’s lien was not properly perfected.¹⁵⁰

144. *Id.* at 60, 623 S.E.2d at 887.

145. VA. CODE ANN. § 43-4 (Cum. Supp. 2006) (emphasis added).

146. *Britt Constr., Inc.*, 271 Va. at 61, 623 S.E.2d at 887.

147. *See id.* at 62, 623 S.E.2d at 887–88.

148. *Id.* at 63, 623 S.E.2d at 888. The court added that a “mechanic’s lien must be perfected within the specific time frame and in the manner set forth in the statutes, or the lien will be lost.” *Id.*

149. *Id.*

150. *See id.* at 64, 623 S.E.2d at 889.

I. Annexation

In *Allfirst Trust Co. v. County of Loudoun*,¹⁵¹ the Supreme Court of Virginia examined the statutory elements of landowner initiated annexation proceedings. Virginia Code section 15.2-3203(A) allows fifty-one percent of the “owners of real estate in number and in land area in a designated area” adjacent to any city or town to petition the circuit court for annexation to any such city or town.¹⁵² The petitioners in this case sought annexation of their non-contiguous tracts into the Town of Leesburg, arguing that the Virginia Code did not require their parcels be contiguous and that they met the statutory requirement by treating certain non-contiguous parcels together as the “designated area.”¹⁵³

The supreme court adamantly disagreed, holding that “where landowners seek to initiate annexation proceedings under Code § 15.2-3203 that include non-contiguous territories, they must constitute 51% of the ‘owners of real estate in number and land area’ within each separate territory” and that the aforementioned statutory requirement is jurisdictional.¹⁵⁴ The “obvious purpose” of this requirement, wrote the court, is “to ensure that the annexation is favored by the majority of the landowners, both in numbers and in acreage, in the area affected by it,” and “a non-contiguous area, in which the majority may oppose the annexation, is not swept into it by the sheer force of numbers in the area in which it is favored.”¹⁵⁵

J. Landlord/Tenant

In *Carter v. Meadowgreen Associates*,¹⁵⁶ the Supreme Court of Virginia considered the issue of whether the family member of a tenant succeeds to such tenant’s rights and obligations upon the tenant’s death when that family member occupies the leased premises with the landlord’s consent. The plaintiff, the minor son

151. 268 Va. 428, 601 S.E.2d 612 (2004).

152. VA. CODE ANN. § 15.2-3203(A) (Repl. Vol. 2003 & Cum. Supp. 2006).

153. See *Allfirst Trust Co.*, 268 Va. at 433, 601 S.E.2d at 614.

154. *Id.* at 436, 601 S.E.2d at 616.

155. *Id.*

156. 268 Va. 215, 597 S.E.2d 82 (2004).

of the deceased tenant, continued to reside in his mother's leased apartment after her death, without paying rent, and the landlord continued to collect a subsidy for the rent from the federal Department of Housing and Urban Development's Section 8 housing program.¹⁵⁷ The plaintiff argued that he was entitled to succeed to his mother's rights to the month-to-month tenancy under the aforementioned program.¹⁵⁸

However, the supreme court disagreed, finding Congress to be silent as to the issue, and determined, therefore, that state law controlled.¹⁵⁹ "In Virginia, the death of a tenant for a fixed term does not terminate a lease in effect at the time of death," stated the court.¹⁶⁰ Instead, the "deceased tenant's interest passes to her estate, and her personal representative becomes liable for the rent until the end of the term."¹⁶¹ In light of the foregoing rule of law, the court held that the plaintiff did not succeed to the deceased tenant's rights under the lease upon her death, noting also that he failed to show any evidence of authority to retain the leased premises as a subtenant of the deceased's estate.¹⁶²

III. RECENT LEGISLATIVE CHANGES

A. *Eminent Domain*

Where condemned property becomes surplus within the fifteen years of condemnation, the condemner must offer to sell the property to the former owner or certain related parties.¹⁶³ Previously, under Virginia law, the former owner of condemned property could waive this right of offer of repurchase.¹⁶⁴ However, Virginia Code section 25.1-108 now provides that "[t]he right to the offer of

157. *Id.* at 217, 597 S.E.2d at 83.

158. *Id.* at 218-19, 597 S.E.2d at 83-84.

159. *Id.* at 219, 597 S.E.2d at 84.

160. *Id.*

161. *Id.* (citing *Hutchings v. Commercial Bank*, 91 Va. 68, 77, 20 S.E. 950, 953 (1895)).

162. *Id.*

163. VA. CODE ANN. § 25.1-108(A) (Repl. Vol. 2006).

164. Act of Jan. 31, 2005, ch. 2, 2005 Va. Acts 1 (codified at VA. CODE ANN. § 25.1-108(A) (Cum. Supp. 2005)).

repurchase cannot be waived and any contractual provision or agreement waiving such rights is void and unenforceable.”¹⁶⁵

In 2006, the General Assembly added Virginia Code section 25.1-205.1, which requires that a court refer the parties to condemnation proceedings to a mandatory dispute resolution orientation upon the filing of the petition initiating the condemnation.¹⁶⁶

The General Assembly also modified several sections of the Virginia Code to remove landowners’ rights to have eminent domain cases heard by commissioners.¹⁶⁷ As a result, eminent domain cases may only be heard by juries or courts.¹⁶⁸

B. *Virginia Condominium Act*

Revisions to Virginia Code section 55-79.43 of the Condominium Act convey authority to the condominium declarant “to execute, file, and process any subdivision, site plan, zoning, or other land use applications or disclosures, including conditional zoning proffers and agreements incidental thereto that do not create an affirmative obligation on the unit owners’ association without its consent” until the declarant control period expires, so long as the declarant has the right to create additional units or complete common elements.¹⁶⁹

Virginia Code section 55-79.79, which provides for certain minimum warranties of condominium declarants to unit owners, now prohibits any action for breach against a declarant:

[U]nless a written statement by the claimant or his agent, attorney or representative, of the nature of the alleged defect has been sent to the declarant . . . more than six months prior to the commencement of the action giving the declarant an opportunity to cure the alleged defect within a reasonable time.¹⁷⁰

165. VA. CODE ANN. § 25.1-108(A) (Repl. Vol. 2006).

166. Act of Mar. 31, 2006, ch. 415, 2006 Va. Acts ____ (codified at VA. CODE ANN. § 25.1-205.1 (Repl. Vol. 2006)).

167. Act of Apr. 5, 2006, ch. 586, 2006 Va. Acts ____ (codified as amended at VA. CODE ANN. §§ 25.1-100, -209, -213, -214, -219, -220, -228, -229, -235, -318, 62.1-98 (Repl. Vol. 2006) and VA. CODE ANN. § 36-27 (Supp. 2006)).

168. VA. CODE ANN. § 25.1-220 (Repl. Vol. 2006).

169. Act of Feb. 23, 2006, ch. 9, 2006 Va. Acts ____ (codified as amended at VA. CODE ANN. § 55-79.43(D) (Cum. Supp. 2006)).

170. VA. CODE ANN. § 55-79.79(C) (Cum. Supp. 2006).

C. Land Use

Virginia Code section 15.2-2209, relating to civil penalties for violations of zoning ordinances, was amended by the 2006 General Assembly to increase the fine for an initial summons from \$100 to \$200 and from not more than \$250 to not more than \$500 for each additional summons.¹⁷¹

New language in Virginia Code section 15.2-2314, relating to appeals of decisions of boards of zoning appeals, provides that courts are to hear arguments on questions of law *de novo*.¹⁷² Findings and conclusions of the board as to questions of fact, however, are still presumed correct.¹⁷³

The General Assembly added language to Virginia Code section 15.2-2307, which allows zoning ordinances to require that when certain improvements are damaged or destroyed by a natural disaster or an act of God, the improvements be repaired, rebuilt, or replaced in such a way as to “eliminate or reduce the nonconforming features to the extent possible.”¹⁷⁴

Virginia Code section 15.2-2309, relating to the powers and duties of boards of zoning appeals, now states that “the property upon which a property owner has been granted a variance shall be treated as conforming for all purposes under state law and local ordinance.”¹⁷⁵ However, it also now provides that “the use of the structure permitted by the variance may not be expanded.”¹⁷⁶

New Virginia Code section 15.2-2244.1 allows localities to include provisions in their subdivision zoning ordinances to permit “a single division of a lot or parcel for the purpose of sale or gift to a member of the immediate family” where (1) the property owner has owned the property for at least fifteen years, and (2) the property owner restricts the transfer of the property to a nonmember of the immediate family for fifteen years.¹⁷⁷

171. Act of Mar. 30, 2006, ch. 248, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2209 (Cum. Supp. 2006)).

172. VA. CODE ANN. § 15.2-2314 (Cum. Supp. 2006).

173. *Id.*

174. Act of Mar. 30, 2006, ch. 244, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 15.2-2307 (Cum. Supp. 2006)).

175. VA. CODE ANN. § 15.2-2309(2)(c) (Cum. Supp. 2006).

176. *Id.*

177. *Id.* § 15.2-2241 (Cum. Supp. 2006).

D. *Landlord/Tenant*

The 2005 General Assembly added subsection "C" to Virginia Code section 55-248.37, which addresses periodic tenancies and holdover remedies.¹⁷⁸ The new section provides that the terms of the terminated agreement remain in effect during the period of the hold-over tenancy "except that the amount of rent shall be either as provided in the terminated rental agreement or the amount set forth in a written notice to the tenant."¹⁷⁹

If a tenant who is the sole occupant of a residential apartment unit dies, and no person is authorized by the circuit court to handle the deceased tenant's probate matters, Virginia Code section 55-248.38:3 allows the landlord, upon ten days written notice to certain enumerated persons or to the tenant, to dispose of a deceased tenant's personal property located on the leased premises or in a landlord-provided storage area.¹⁸⁰

The 2006 General Assembly amended the Virginia Code to allow landlords to seek an award of attorneys' fees and other civil recovery as damages in an unlawful detainer action filed pursuant to Virginia Code section 8.01-126.¹⁸¹

E. *Miscellaneous*

Virginia Code section 55-20.2 addresses property held by a husband and wife as tenants by the entirety.¹⁸² Previously, this section allowed only the principal family residence held in this manner to be conveyed to a joint trust.¹⁸³ It has been amended to provide that "any property" held by a husband and wife as tenants by the entireties may be conveyed to a joint trust.¹⁸⁴

New Virginia Code section 55-50.2 deems all appurtenant and gross utility easements recorded on or after July 1, 2006 to "touch

178. Act of Mar. 26, 2005, ch. 805, 2005 Va. Acts 1340 (codified as amended at VA. CODE ANN. § 55-248.37(C) (Cum. Supp. 2006)).

179. VA. CODE ANN. § 55-248.37(C) (Cum. Supp. 2006).

180. *Id.* § 55-248.38:3 (Cum. Supp. 2006).

181. Act of Apr. 5, 2006, ch. 628, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-248.31(F) (Cum. Supp. 2006)).

182. VA. CODE ANN. § 55-20.2 (Cum. Supp. 2006).

183. *Id.* § 55-20.2(B) (Repl. Vol. 2003).

184. Act of Mar. 30, 2006, ch. 281, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 55-20.2(B) (Cum. Supp. 2006)).

and concern the servient tract, to run with the servient tract, its successors, and assigns for the benefit of the entity providing the utility services, its successors, and assigns.”¹⁸⁵

IV. CONCLUSION

In the past two years, Virginians have seen a number of important judicial decisions by the commonwealth’s highest court in the area of real estate law, including cases addressing easements, adverse possession, prescription, taxation, property owners’ associations, restrictive covenants, mechanics’ liens and landlord/tenant issues. Both the courts and the General Assembly devoted a great deal of attention to zoning matters as Virginians and their businesses sought further control over land use through the courts and through their legislative representatives. In addition, the Virginia Condominium Act¹⁸⁶ continues to be a fertile ground for legislative changes and judicial decisions in the wake of an increased number of condominium applications in recent years.

185. VA. CODE ANN. § 55-50.2 (Cum. Supp. 2006).

186. *Id.* §§ 55-79.39 to -79.103 (Repl. Vol. 2003 & Cum. Supp. 2006).
