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Annual Survey of Virginia Law: Property Law

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PROPERTY LAW

*Michael V. Hernandez**

I. INTRODUCTION

This article surveys judicial and legislative developments in Virginia property law from June 1, 2000, to June 1, 2001.

II. JUDICIAL DECISIONS

The Virginia courts decided an unusually large number of property cases during the past year. Some of the cases involved important issues, and several included questionable analysis. This article begins with a discussion of two cases that seem to reflect the adage “hard cases make bad law” (or equity, as the case may be).¹

A. *Contracts and Deeds*

1. Merger/Fraud

In *Beck v. Smith*,² the Supreme Court of Virginia considered whether the provisions of a contract were merged into the deed and whether the seller’s misrepresentations constituted fraud.³

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1. See *McClellan v. Ashley*, 200 Va. 38, 44, 104 S.E.2d 55, 60 (1958) (quoting *Moore v. Pierson*, 6 Iowa 278, 296 (1858) (“Hard cases must not be allowed to make bad equity any more than bad law.”)).

2. 260 Va. 452, 538 S.E.2d 312 (2000).

3. *Id.* at 454, 538 S.E.2d at 313.

Beck contracted to purchase property from Smith, who was aware that Beck planned to build a house on the lot.⁴ The contract obligated Smith to provide a general warranty deed subject to utility easements that did not "materially and adversely effect [sic] the Purchaser's intended use of the Property."⁵ Despite this provision, three days before closing Smith conveyed to an electric cooperative an easement across the portion of the land upon which Beck planned to build a house.⁶ Although Beck hired an attorney to do a title search, neither the attorney nor Smith told Beck about the easement prior to the settlement.⁷ The warranty deed Beck accepted at closing provided that the conveyance was made subject to any easements of record.⁸ When the electric cooperative subsequently began constructing a transmission line across the easement, Beck filed a motion for judgment against Smith alleging breach of contract and fraud.⁹

The Supreme Court of Virginia ruled for Beck on the contract claim but not on the fraud claim.¹⁰ Regarding the alleged breach of contract, the court held that the easement provision in the contract was collateral to the deed and thus not merged into it.¹¹ The court noted that, generally, real estate contracts are merged into, and thus do not survive, the deed.¹² However, a contract provision is collateral to the deed and thus still enforceable if it: (1) is a distinct agreement; (2) does not affect the title to the property; (3) is not addressed in the deed; and (4) does not conflict with the deed.¹³ Without analysis, the court asserted that the easement provision in the contract satisfied the collateral provision exception and concluded that Beck could sue Smith for breach of contract.¹⁴ The court held, however, that because Beck's attorney should have discovered the recorded easement, the attorney's actual or constructive knowledge was imputed to Beck.¹⁵ Thus, Beck

4. *Id.*

5. *Id.*

6. *Id.* at 454, 538 S.E.2d at 313-14.

7. *Id.* at 454, 538 S.E.2d at 314.

8. *Id.*

9. *Id.* at 454-55, 538 S.E.2d at 314.

10. *Id.* at 458, 538 S.E.2d at 316.

11. *Id.* at 456, 538 S.E.2d at 315.

12. *See id.*

13. *Id.*

14. *Id.*

15. *Id.* at 457, 538 S.E.2d at 315.

could not claim detrimental reliance on Smith's misrepresentations or recover damages for fraud.¹⁶

Although the court's analysis of the fraud issue may have been sound, its contract analysis was questionable. The easement provision was clearly not collateral to the deed and thus should have been considered merged into it. Because the four criteria for the collateral provision exception are written in the conjunctive "and," all four must be satisfied for the exception to apply.¹⁷ None of the four elements was truly met in this case.

First, the court erroneously asserted that the easement provision did not affect the title to the property. Although the lack of analysis in the opinion makes it impossible to know why the court reached this conclusion,¹⁸ the court apparently based its conclusion on the fact that Beck obtained a fee simple estate despite the existence of the easement.¹⁹ While it is true that an easement does not preclude the conveyance of title,²⁰ this does not mean that the easement has no bearing on the title conveyed. To the contrary, the court overlooked the fact that one of the English covenants of title is the covenant against encumbrances,²¹ and an easement is an encumbrance.²² The mere fact that the covenant against encumbrances is a covenant *of title* shows that the existence of the easement in *Beck* is related to the title at issue. Therefore, the first element for the collateral provision exception was not truly met.

Second, although the contract explicitly stated that no utility easements could be inconsistent with Beck's intended use of the land, the deed conversely obligated Beck to accept all easements

16. *Id.* at 457, 538 S.E.2d at 315-16.

17. *See id.* at 456, 538 S.E.2d at 315.

18. *See id.*

19. *See id.* at 454, 538 S.E.2d at 313-14.

20. *See, e.g.,* Greenan v. Solomon, 252 Va. 50, 54, 472 S.E.2d 54, 57 (1996) (holding that an easement does not change who has title to the land or prevent title from passing); Scott v. Albemarle Horse Show Ass'n, 128 Va. 517, 531, 104 S.E. 842, 846 (1920) (holding that an easement does not affect the freehold interest in the servient estate).

21. *See* VA. CODE ANN. § 55-70 (Repl. Vol. 1995 & Cum. Supp. 2001); §§ 55-72, 55-74 (Repl. Vol. 1995).

22. *See* Thompson v. Shaw Real Estate, Inc., 210 Va. 714, 716, 173 S.E.2d 812, 814 (1970). *See generally* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 11.13 (3d ed. 2000) (discussing the covenant against encumbrances and noting that an easement is a typical encumbrance).

of record.²³ Thus, the remaining three elements for the exception were not met because: (1) the easement provision in the contract did not address distinct subject matter; (2) the issue of easements was explicitly addressed in the deed; and (3) the contract and the deed were in direct conflict.²⁴ Although the court's sympathy for Beck was understandable, it should have held, as the trial court did, that the contract provision was merged into the deed and thus did not survive.²⁵ Moreover, the contract included a merger clause that explicitly stated that no contractual warranties would survive settlement.²⁶

2. Execution

In *Brooks v. Lum*,²⁷ the Winchester Circuit Court considered whether a notarized document conveyed property.²⁸ The owner of the property, Mrs. Rowe, was disabled.²⁹ For many years, Mrs. Rowe's brother, H.M. Brooks, took care of her and her only son, Henri Rowe.³⁰ Mrs. Rowe and her son were estranged during the last eight years of her life, and he did not attend her funeral.³¹ Brooks prepared a document that Mrs. Rowe executed six years before her death, which provided in pertinent part:

TO WHOM IT MAY CONCERN

Because of my sudden illness and I am not sure what I will have to face in the days to come, I want to make sure that my brother, H.M. Brooks, will be paid for what he has done for me over the long span of fifty years or more. . . . I hereby pay him for these services rendered in the form of all of my personal and real property regardless of where it may be located³²

When Mrs. Rowe executed this document, she referred to it as

23. See *id.* at 454, 538 S.E.2d at 313-14.

24. *Id.* at 456, 538 S.E.2d at 315.

25. See *id.* at 455, 538 S.E.2d at 314.

26. *Id.*

27. 52 Va. Cir. 390 (Cir. Ct. 2000) (Winchester City).

28. See *id.* at 392.

29. *Id.* at 391.

30. *Id.*

31. *Id.*

32. *Id.*

a letter.³³ Brooks first testified that when he prepared the document, he did not think it was a deed, but he later alleged during the course of litigation that it was a deed.³⁴ Brooks kept the document but never recorded it.³⁵ He also managed the property and paid all related bills and taxes.³⁶ After Mrs. Rowe died intestate, Henri claimed the property as her sole heir, and he later conveyed it to Lum.³⁷

Brooks filed suit, claiming that the document he prepared for Mrs. Rowe conveyed title to Brooks, even though it was not in the form of a deed and was never recorded.³⁸ The circuit court noted that deeds are to be liberally construed and need not be in any particular form so long as they manifest the intent to transfer a property interest.³⁹ The court held that the document conveyed title to Brooks.⁴⁰ The *Brooks* court distinguished the recent Supreme Court of Virginia opinion in *Lim v. Choi*,⁴¹ which held that a poorly drafted memorandum did not convey title because it did not include words of conveyance or otherwise manifest the intent to transfer an interest.⁴²

The holding in *Brooks* is difficult to justify in light of the facts of the case and the decision in *Lim*. While it is true that deeds should be liberally construed to effectuate the parties' intent to convey a property interest,⁴³ that rule presumes that the parties

33. *Id.* at 392.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 392–93.

38. *Id.* at 392.

39. *Id.* at 393–94.

40. *Id.* at 399.

41. 256 Va. 167, 501 S.E.2d 141 (1998); see also Michael V. Hernandez, *Annual Survey of Virginia Law: Property Law*, 34 U. RICH. L. REV. 981, 995 (2000) (analyzing *Lim*).

42. *Lim*, 256 Va. at 168, 501 S.E.2d at 142. The memorandum in *Lim* provided:

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

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

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

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

43. *Brooks*, 52 Va. Cir. at 393 (citing *Albert v. Holt*, 137 Va. 5, 9–10, 119 S.E. 120, 122

intended the document to be a deed and to pass a property interest.⁴⁴ In *Brooks*, although the parties may have intended to convey a property interest, neither party considered the document to be a deed.⁴⁵ Furthermore, Brooks never treated the document as an instrument of conveyance, as evidenced by his failure to record it.⁴⁶ Although the memorandum in *Lim* contained conflicting provisions,⁴⁷ the Supreme Court of Virginia held that the memorandum did not convey a property interest despite its statement that it was "clear" that "all rights" to the property "hereby" belong to the memorandum's recipient "alone."⁴⁸ The Winchester Circuit Court apparently based its decision on its view that Brooks was a worthier owner than Henri Rowe, who had forsaken his mother at the end of her life. The court concluded that Brooks was "a man of considerable accomplishment"⁴⁹ and heavily emphasized Brooks' provision for his sister and her son.⁵⁰

3. Condition of Premises/Termite Damage

In *Davis v. Relocation Properties Management*,⁵¹ the purchaser, Davis, sought compensation from the seller, Relocation Properties Management ("RPM"), for wood infestation damage.⁵² The contract contained preprinted, boilerplate language warranting that the property was free from visible termite damage, obligating the seller to provide a termite report and to pay for any extermination and repairs, and noting that the seller was buying the property "as is," except as otherwise provided.⁵³ One contract provision stated that any handwritten or typewritten additions would control over conflicting preprinted provisions.⁵⁴ The handwritten

(1923)).

44. *Id.* at 394.

45. *Id.* at 392.

46. *Id.*

47. See *Lim*, 256 Va. at 169, 501 S.E.2d at 142. In *Lim*, the memorandum indicated that the drafter only wanted to avoid responsibility for a mortgage, but it also indicated that the property belonged to the other party alone. *Id.*

48. *Id.* at 169, 172, 501 S.E.2d at 142, 144.

49. *Brooks*, 52 Va. Cir. at 390.

50. *Id.* at 391.

51. 53 Va. Cir. 215 (Cir. Ct. 2000) (Spotsylvania County).

52. *Id.* at 215.

53. *Id.* at 216.

54. *Id.*

provisions in the contract provided that RPM was a non-resident owner with no knowledge of the condition of the premises except that obtained through inspections and reports, and reiterated that the buyer was purchasing the property "as is."⁵⁵ Prior to closing, RPM provided Davis a report from a termite company certifying that the property was free of any visible evidence of infestation.⁵⁶ However, when Davis discovered extensive infestation shortly after the closing, he sued RPM, alleging violations of the Virginia Residential Property Disclosure Act⁵⁷ ("Disclosure Act"), the Virginia Consumer Protection Act,⁵⁸ and breach of contract.⁵⁹

The court rejected all three claims.⁶⁰ First, it held that there was no breach of contract because the handwritten provisions conflicted with, and thereby controlled over, the preprinted termite warranty provision.⁶¹ Second, it held that RPM did not violate the Disclosure Act because RPM made an appropriate disclaimer by noting in the contract that it was a non-resident owner dependent entirely on others' reports.⁶² The court further held that RPM did not violate the Disclosure Act because it delivered a report to Davis from a licensed termite expert.⁶³ Finally, the court dismissed Davis' claim under the Virginia Consumer Protection Act because there were no false promises or misrepresentations in the contract.⁶⁴

Although the court's statutory analysis was sound, its contractual analysis ran counter to the facts of the case. In the handwritten provision, RPM simply disavowed any actual knowledge of termite damage or any basis for constructive knowledge other than reports prepared by others.⁶⁵ Despite the court's assumption to the contrary, this provision did not directly contradict RPM's obligation to warrant against visible damage. If in fact such dam-

55. *Id.*

56. *Id.* at 218.

57. VA. CODE ANN. §§ 55-517 to -525 (Repl. Vol. 2001).

58. *Id.* §§ 59.1-196 to -207 (Repl. Vol. 2001).

59. *Davis*, 53 Va. Cir. at 215.

60. *Id.* at 219.

61. *Id.*

62. *Id.* at 216, 218.

63. *Id.* at 218.

64. *Id.* at 218-19.

65. *See id.* at 216.

age existed, then arguably RPM breached the contract, notwithstanding the termite company's obviously flawed inspection report.

B. *Landlord/Tenant*

1. Landlord's Liability for Criminal Assault by Third Party Against Tenant

In *Yuzefovsky v. St. John's Wood Apartments*,⁶⁶ a tenant who was assaulted on the landlord's property sued the landlord, asserting various tort claims.⁶⁷ Prior to leasing, Yuzefovsky had inquired about the safety of the complex, and complex employees made several misrepresentations that allegedly induced Yuzefovsky to sign a lease.⁶⁸ Twenty-one months later, Yuzefovsky was shot by an assailant, who then stole Yuzefovsky's car from the premises.⁶⁹ Yuzefovsky alleged that, contrary to the complex employees' representations, several hundred crimes had occurred both in the vicinity of and on the complex in recent years.⁷⁰ Yuzefovsky sued, alleging fraud, negligent failure to warn, and negligent failure to protect.⁷¹ He based his failure to warn and protect claims on his alleged special relationship with the landlord.⁷²

Regarding the fraud count, the court held that, although the employees' misstatements were fraudulent misrepresentations of fact, the assault by the third party was remote in time from the execution of the contract and, thus, the fraudulent inducement did not proximately cause Yuzefovsky's damages.⁷³ With respect to the claims of failure to warn and to protect, the court noted that generally an owner or occupier of land is not liable for injuries caused by the criminal act of a third party.⁷⁴ However, an exception applies where there is a special relationship either between the plaintiff and the defendant or between the defendant

66. 261 Va. 97, 540 S.E.2d 134 (2001).

67. *Id.* at 101, 540 S.E.2d at 136.

68. *Id.* at 102-03, 540 S.E.2d at 137.

69. *Id.* at 103, 540 S.E.2d at 137.

70. *Id.*

71. *Id.* at 101, 103-04, 540 S.E.2d at 136-38.

72. *Id.*

73. *Id.* at 110-12, 540 S.E.2d at 142-43.

74. *Id.* at 106, 540 S.E.2d at 139-40.

and the criminal actor, and where the risk of harm is so foreseeable that the defendant has a duty to warn or protect the plaintiff.⁷⁵ The court held that the typical landlord/tenant arrangement *alone* does not constitute such a special relationship, and, therefore, a landlord is generally not an insurer of a tenant's safety.⁷⁶ Without determining whether the facts gave rise to a special relationship between Yuzefovsky and St. John's Wood, the court held that St. John's Wood had no duty to warn or protect Yuzefovsky against the assault.⁷⁷ Generally, a business owner "does not have a duty to take measures to protect an invitee against criminal assault unless he knows that criminal assaults against persons are occurring, or are about to occur, on the premises which indicate an imminent probability of harm to an invitee."⁷⁸ The court determined that

[t]here are no express allegations . . . that St. John's Wood knew that criminal assaults against persons were occurring, or were about to occur, on the premises that would indicate *an imminent probability of harm* to Yuzefovsky. . . .

. . . Because Yuzefovsky had resided at the property of St. John's Wood for approximately one year and nine months before he was injured, we hold that there is no basis to impose a continuing duty to warn [or to protect] against a danger that was not imminent.⁷⁹

In *Miller v. Charles E. Smith Management, Inc.*,⁸⁰ a diversity action arising from the murder of a tenant in the parking lot of an apartment complex,⁸¹ the United States Court of Appeals for the Fourth Circuit recently applied the fraud analysis in *Yuzefovsky*.⁸² The tenant's estate alleged that the complex's employees made false representations about the safety of the premises, which induced the tenant to rent a unit and proximately caused her death four months later.⁸³ The Fourth Circuit held that *Yuzefovsky* mandated dismissal of Miller's fraud claim because the

75. *Id.* at 107–09, 540 S.E.2d at 139–41.

76. *Id.* at 108, 540 S.E.2d at 140.

77. *Id.* at 109, 540 S.E.2d at 140–41.

78. *Id.* at 109, 540 S.E.2d at 141 (quoting *Wright v. Webb*, 234 Va. 527, 533, 362 S.E.2d 919, 922 (1987)).

79. *Id.* at 109–10, 540 S.E.2d at 141 (emphasis added).

80. No. 00-1391, 2001 U.S. App. LEXIS 7977 (4th Cir. May 2, 2001) (unpublished decision).

81. *Id.* at *2.

82. *Id.* at *5.

83. *Id.* at *2.

misrepresentations were too remote from the criminal activity to give rise to a claim in tort.⁸⁴

Unfortunately, the Fourth Circuit's superficial analysis makes it difficult to determine whether the court properly interpreted and applied *Yuzefovsky*. The Fourth Circuit simply assumed that, if the twenty-one month gap between the misrepresentations and the assault in *Yuzefovsky* made the resulting damages too remote for recovery, then the four-month gap in *Miller* was likewise too remote.⁸⁵ However, in *Yuzefovsky*, the Supreme Court of Virginia held that the fraud must relate to a present or pre-existing fact.⁸⁶ It also emphasized the significance of the length of time that passed between the fraudulent statements and the assault.⁸⁷ The Fourth Circuit should have more thoroughly considered the nature and extent of the knowledge the apartment complex's agents had about criminal activity at the site, particularly any knowledge the agents may have had about the assailants. *Yuzefovsky* does not stand for the proposition that a four-month gap between fraudulent inducement and a criminal assault is presumptively too remote to give rise to liability in tort.

2. "Time is of the Essence" for Renewal

A recent Richmond Circuit Court decision, *HCA Health Services of Virginia, Inc. v. Bank of America*,⁸⁸ exposed ambiguities in Virginia law regarding whether time is of the essence in renewing a lease. In *Selden v. Camp*,⁸⁹ the Supreme Court of Virginia held that a lessee who did not give timely notice could nevertheless renew a ninety-nine year lease.⁹⁰ The lessee had otherwise complied with the lease, and the lease and the parties' course of dealing did not suggest that time was of the essence.⁹¹ Noting that equity generally does not consider time to be of the

84. *Id.* at *7.

85. *Id.*

86. *See Yuzefovsky*, 261 Va. at 110–11, 540 S.E.2d at 142.

87. *Id.*

88. No. HN-2230-4, 2001 WL 300594 (Va. Cir. Ct. Mar. 16, 2001) (Richmond City), *appeal denied*, No. 011310 (Va. Sept. 12, 2001).

89. 95 Va. 527, 28 S.E. 877 (1898).

90. *Id.* at 531, 28 S.E. at 878.

91. *Id.* at 529–31, 28 S.E. at 878.

essence for the renewal of a lease,⁹² the court in *Selden* summed up the controlling principle of law as follows:

In determining the right of the lessee to renew . . . the question to be considered is, has the party asking for relief been guilty of gross negligence, or is the default relied on the result of mere negligence. . . . "When the terms of an agreement have not been strictly complied with, . . . if there has not been gross negligence in the party, and it is conscientious that the agreement should be performed, and if compensation can be made for any injury occasioned by the non-compliance with the strict terms, in all such cases courts of equity will interfere, and decree specific performance; for the doctrine of courts of equity is not forfeiture but compensation, and nothing but such a decree will in such cases do entire justice between the parties."⁹³

In *Berkow v. Hammer*,⁹⁴ the Supreme Court of Virginia later cited *Selden* with approval, but held that its rationale did not apply to a short-term lease, such as Hammer's five-year lease with an option to renew.⁹⁵ In two subsequent cases, however, the court, without mentioning *Selden*, held that equity would deny relief to the lessee where the failure to give notice of the intent to renew is due solely to the lessee's negligence.⁹⁶

In *HCA Health Services*,⁹⁷ a case involving a late renewal of a thirty-year lease, the Richmond Circuit Court attempted to harmonize the supreme court's precedent. The lessee, HCA, argued that its renewal notice was effective because the lease did not specify that time was of the essence, and the lessor would be unjustly enriched by substantial improvements the lessee had made to the property.⁹⁸ The circuit court rejected HCA's argument for several reasons.⁹⁹ First, the court held that *Selden* did not stand for the proposition that time is never of the essence in long-term

92. *Id.* at 531, 28 S.E. at 878.

93. *Id.* at 531-32, 28 S.E. at 878 (citation omitted).

94. 189 Va. 489, 53 S.E.2d 1 (1949).

95. *See id.* at 496, 498, 500, 53 S.E.2d at 4, 6.

96. *See Sentara Enters. v. CCP Assocs.*, 243 Va. 39, 413 S.E.2d 595 (1992) (holding that time was of the essence in the case of an attempted renewal of a three-year lease); *McClellan v. Ashley*, 200 Va. 38, 104 S.E.2d 55 (1958) (holding the same in a case involving an original two-year lease).

97. No. HN-2230-4, 2001 WL 300594 (Va. Cir. Ct. Mar. 16, 2001) (Richmond City), *appeal denied*, No. 011310 (Va. Sept. 12, 2001).

98. *Id.* at *2.

99. *See id.* at *6-7.

leases.¹⁰⁰ Instead, the court limited the holding in *Selden* to its facts, specifically that the lessor routinely accepted late payments, and thus the parties' course of dealing established that time was generally not of the essence.¹⁰¹ This reading of *Selden* is, at best, curious. Although *Selden* was based in part on the parties' course of dealings,¹⁰² that opinion also stated:

Mere default in the payment of money at a stipulated time admits generally of compensation, and hence time of payment is seldom treated as essential in contracts in respect to real estate. That time was not of the essence of these contracts seems plain. *It is not usually so considered in equity*, and there is nothing in the leases to show that the parties so regarded it.¹⁰³

Selden, therefore, suggests that time is presumptively *not* of the essence for *any* lease or other real estate contract. According to this view, the lease must explicitly state that time is of the essence.¹⁰⁴

Second, the circuit court in *HCA Health Services* held that the more recent Supreme Court of Virginia decisions, consistent with the general trend in landlord/tenant law, did not recognize a distinction between a long-term and a short-term lease for determining whether time is of the essence in lease renewals.¹⁰⁵ Although the circuit court's premise is true, its conclusion is debatable. In its two most recent decisions, the Supreme Court of Virginia did not discuss the distinction between a long-term and a short-term lease.¹⁰⁶ However, the court did not have to address the law governing long-term leases because both cases clearly involved short-term leases.¹⁰⁷ Neither case repudiated the Supreme Court of Virginia's earlier distinction between a long-term and a short-term lease.¹⁰⁸ Indeed, the earlier case followed the previous opinion,

100. *Id.* at *6.

101. *Id.*

102. *Selden v. Camp*, 95 Va. 527, 531, 28 S.E. 877, 878 (1898).

103. *Id.* (emphasis added).

104. *See id.*

105. *HCA Health Servs.*, 2001 WL 300594, at *7.

106. *See generally Sentara Enters.*, 243 Va. 39, 413 S.E.2d 595 (1992); *McClellan*, 200 Va. 38, 104 S.E.2d 55 (1958).

107. *See Sentara Enters.*, 243 Va. at 41, 413 S.E.2d at 595 (original three-year lease); *McClellan*, 200 Va. at 39, 104 S.E.2d at 56 (original two-year lease).

108. *See Berkow v. Hammer*, 189 Va. 489, 498–99, 53 S.E.2d 1, 5–6 (1949) (distinguishing *Selden* in part because it did not address short-term leases). *See generally Sentara Enters.*, 243 Va. at 44–45, 413 S.E.2d at 597–98 (applying *McClellan*); *McClellan*, 200 Va. at

which distinguished long-term and short-term leases.¹⁰⁹ Because a court should not assume an opinion overrules prior precedent by implication,¹¹⁰ the circuit court arguably erred by assuming that the Supreme Court of Virginia implicitly rejected its previous distinction between different types of leases.

Third, the court held in *HCA Health Services* that, even if such a distinction did apply, the thirty-year lease with three ten-year renewal options was a short-term lease.¹¹¹ This holding is highly questionable because the Supreme Court of Virginia recently treated a fifteen-year commercial lease with two five-year renewal options as a long-term lease.¹¹² Finally, noting that these sophisticated parties had negotiated at arm's length, the court rejected HCA's assertion that a forfeiture would be inequitable in this case.¹¹³

Shortly before this article went to print, the Supreme Court of Virginia denied a petition for appeal in *HCA Health Services*.¹¹⁴ The interesting and important issues in this case, including the trial court's questionable reading of Virginia law, suggest the supreme court should have granted the petition. The supreme court should have taken the opportunity to clarify whether time is of the essence when exercising renewal options and whether a distinction should continue to be made between long and short-term leases. If the court reaffirms this distinction in a subsequent case,

42–44, 104 S.E.2d at 58–59 (applying *Berkow*).

109. See *McClellan*, 200 Va. at 42–44, 104 S.E.2d at 58–59 (citing *Berkow*, 189 Va. at 497–98, 53 S.E.2d at 5).

110. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (“We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent ‘[I]f a precedent of [a higher court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to [the higher court] the prerogative of overruling its own decisions.’”) (quoting *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989)); *In re Morrissey*, 168 F.3d 134, 139–40 (4th Cir. 1999) (“[A] precedent . . . overruled through a court’s silence is a disfavored enterprise.”), *cert. denied*, 527 U.S. 1036 (1999); *Jaekel v. Equifax Mktg. Decisions Sys., Inc.*, 797 F. Supp. 486, 491 (E.D. Va. 1992) (“Where two valid rules co-exist, it not [sic] the province of this Court, in the first instance, to exalt one over the other. Rather, the Court must first attempt to reconcile them in a meaningful and reasonable manner.”).

111. *HCA Health Servs.*, 2001 WL 300594, at *7.

112. See *Citgo Petroleum Corp. v. Hopper*, 245 Va. 363, 429 S.E.2d 6 (1993) (holding that the rule against perpetuities did not apply to the lease).

113. *HCA Health Servs.*, 2001 WL 300594, at *7.

114. *HCA Health Servs. of Va., Inc. v. Bank of Am.*, No. 011310 (Va. Sept. 12, 2001) (denying petition for appeal).

it must explain how to distinguish long and short-term leases. The trial court's questionable finding that a thirty-year lease with three ten-year renewal options was a short-term lease also should have warranted appellate review.

3. Tenant's Liability for Subtenant's Negligence

In *Wallace v. Dramberger*,¹¹⁵ the Roanoke Circuit Court held that a tenant was liable to the landlord for breach of contract, but not for negligence, due to a subtenant's actions that caused fire damage to the premises.¹¹⁶ The court based its negligence ruling on the fact that, absent a special relationship or statutorily imposed duty, the tenant could not be vicariously liable to the landlord for the negligence of the subtenant.¹¹⁷ Regarding the contract claim, the court, citing the Supreme Court of Virginia's decision in *Jones v. Dokos Enterprises*,¹¹⁸ held that, after the execution of the sublease, the tenant was in privity of contract but not in privity of possession with the landlord and thus could be sued only on the basis of privity of contract.¹¹⁹

Although the court reached the correct conclusion on the contract claim, it misread *Jones*, which involved an assignment, not a sublease.¹²⁰ When a tenant assigns a lease, the tenant remains in privity of contract with the landlord,¹²¹ but the assignee and the landlord are then in privity of estate.¹²² By contrast, when a tenant subleases the premises, the tenant remains in both privity of contract and estate with the landlord¹²³ because the tenant retains a reversion in the leasehold.¹²⁴ Given that *Wallace* involved a sublease, the court should have held that the tenant was liable based on both privity of contract and estate.

115. 53 Va. Cir. 383 (Cir. Ct. 2000) (Roanoke City).

116. *Id.* at 384–85.

117. *Id.*

118. 233 Va. 555, 357 S.E.2d 203 (1987).

119. *Wallace*, 53 Va. Cir. at 384 (citing *Jones*, 233 Va. 555, 357 S.E.2d 203).

120. *See Jones*, 233 Va. at 557, 357 S.E.2d at 204–05.

121. *Id.* at 557, 357 S.E.2d at 205; *cf. Pollard & Bagby, Inc. v. Pierce Arrow, L.L.C.*, 258 Va. 524, 529, 521 S.E.2d 761, 763–64 (1999) (holding that a landlord's assignee assumed all of the contractual obligations of the landlord to the tenant). For further discussion of *Pollard & Bagby*, see Hernandez, *supra* note 41, at 1001.

122. *Jones*, 233 Va. at 557, 357 S.E.2d at 205.

123. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 18.04 (2000).

124. STOEBUCK & WHITMAN, *supra* note 22, § 6.68.

C. Zoning

1. Discrimination

In *Board of Supervisors v. McDonald's Corp.*,¹²⁵ the Supreme Court of Virginia rejected a claim that the Fairfax County Board of Supervisors had illegally discriminated against McDonald's by denying it permission to build a drive-through facility even though the Board had simultaneously approved other drive-through restaurants nearby.¹²⁶ The court based its holding on the fact that a governing body can overcome evidence of disparate treatment of similar tracts of land by showing that there is a rational basis for the body's actions.¹²⁷ The court listed eight factors that distinguished the McDonald's property from the other sites.¹²⁸

Although the court's factual distinction of the properties at issue was extensive and arguably persuasive, it is not clear whether the standard the court adopted for discrimination cases will allow for many successful claims. This rational basis test is strikingly similar to the standard that Justice Blackmun of the United States Supreme Court advocated in his dissenting opinion in *Lucas v. South Carolina Coastal Council*.¹²⁹ According to Justice Blackmun, in a case where a regulation deprived the land of all value, the landowner would not be entitled to compensation for a taking if the governing body could simply articulate a harm-preventing rationale for its decision.¹³⁰ Writing for the majority, Justice Scalia criticized Justice Blackmun's harm-preventing test: "Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations."¹³¹

No two parcels of land are identical; indeed, the law's preference for specific performance in cases of breach of a real estate

125. 261 Va. 583, 544 S.E.2d 334 (2001).

126. *Id.* at 587-88, 544 S.E.2d at 336-37.

127. *Id.* at 591, 544 S.E.2d at 339.

128. *Id.* at 591-93, 544 S.E.2d at 339-40.

129. 505 U.S. 1003 (1992).

130. *Id.* at 1047-51 (Blackmun, J., dissenting).

131. *Id.* at 1025 n.12.

contract is premised on the uniqueness of realty.¹³² Therefore, it should not be difficult for local governing bodies to avoid claims of unlawful discrimination by drawing distinctions between similarly situated tracts. Only time will tell if this standard amounts to nothing more than a test of the creativity of local officials, their staff, and their counsel.

2. The Dillon Rule

"The Dillon Rule provides that municipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable."¹³³ In *Adams Outdoor Advertising, Inc. v. Board of Zoning Appeals*,¹³⁴ the Supreme Court of Virginia held that Virginia Code sections 15.2-2201¹³⁵ and 15.2-2309,¹³⁶ which only authorize variances from "provisions regulating the size . . . of a . . . parcel of land, or the size, area, bulk or location of a . . . structure," do not authorize variances from provisions regulating "the cost to repair nonconforming structures."¹³⁷

3. Timing of Appeal/Due Process

In *Tran v. Board of Zoning Appeals*,¹³⁸ the Supreme Court of Virginia held that Virginia Code section 15.2-2312,¹³⁹ which provides in part that "[t]he [zoning] board *shall* . . . make its decision within ninety days of the filing of the application or appeal,"¹⁴⁰ was directory and not mandatory.¹⁴¹ The court based its decision on the fact that the statute contains no prohibitory or limiting language concerning action after the passage of the ninety-day

132. STOEBCUK & WHITMAN, *supra* note 22, § 10.5.

133. *City of Richmond v. Confrere Club of Richmond, Va., Inc.*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990) (citations omitted).

134. 261 Va. 407, 544 S.E.2d 315 (2001).

135. VA. CODE ANN. § 15.2-2201 (Repl. Vol. 1997).

136. *Id.* § 15.2-2309 (Cum. Supp. 2001).

137. *Adams Outdoor Advertising*, 261 Va. at 415, 544 S.E.2d at 319.

138. 260 Va. 654, 536 S.E.2d 913 (2000).

139. VA. CODE ANN. § 15.2-2312 (Repl. Vol. 1997 & Cum. Supp. 2001).

140. *Id.* (emphasis added).

141. *Tran*, 260 Va. at 658, 536 S.E.2d at 915-16.

period.¹⁴² The court further held that the board in this case had not deprived the applicant of due process because the applicant presented no evidence of prejudice or harm and had not objected to any of the board's continuances.¹⁴³

Although the court's holding that the provisions of Virginia Code section 15.2-2312 are directory and not mandatory is consistent with some Virginia precedent,¹⁴⁴ it violates other canons of statutory construction. All terms of a statute must be interpreted to have independent meaning¹⁴⁵ and in accordance with their plain meaning.¹⁴⁶ The court's holding in *Tran* essentially eviscerates "shall" and rewrites the statute to require the board to make its decision within a reasonable time. Given that the General Assembly could have easily written the statute to make the ninety-day period discretionary rather than mandatory, it should be presumed that the legislature intended "shall" to mean what it says.

4. Grandfathering

In *Town of Front Royal v. Martin Media*,¹⁴⁷ the Supreme Court of Virginia rejected a landowner's contention that its billboard was subject to a grandfathering provision in Front Royal's zoning ordinance.¹⁴⁸ The court held that once a locality meets its burden of showing that a particular use violates a current zoning ordinance, the landowner must prove that the use is a lawful, nonconforming use.¹⁴⁹ In *Martin Media*, the billboard violated the ordinance that was in existence when the billboard was built decades earlier.¹⁵⁰ However, neither the landowner nor the town had any

142. *Id.* at 658, 536 S.E.2d at 916.

143. *Id.* at 659, 536 S.E.2d at 916.

144. *See id.* at 657–58, 536 S.E.2d at 915–16 (citing *Jamborsky v. Baskins*, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994); *Commonwealth v. Rafferty*, 241 Va. 319, 324–25, 402 S.E.2d 17, 20 (1991); *Fox v. Custis*, 236 Va. 69, 77, 372 S.E.2d 373, 377 (1988)).

145. *See Commonwealth v. Zamani*, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998) ("[E]very part [of a statute] is presumed to have some effect and is not to be disregarded unless absolutely necessary."). *See generally* NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06 (6th ed. 2000) (noting that terms in a statute should be interpreted to have independent meaning).

146. *Earley v. Landsidle*, 257 Va. 365, 370, 514 S.E.2d 153, 155 (1999).

147. 261 Va. 287, 542 S.E.2d 373 (2001).

148. *Id.* at 295, 542 S.E.2d at 377.

149. *Id.* at 294, 542 S.E.2d at 376.

150. *Id.* at 294, 542 S.E.2d at 377.

records showing whether the town had granted a variance or had given any other reason to allow the nonconforming billboard to stand for decades.¹⁵¹ Martin Media argued that it should not be required to locate apparently non-existent town records to validate its use.¹⁵² The court rejected this argument, holding that because the landowner must prove the lawfulness of its use, the landowner has a duty to maintain its own records that will assist in meeting that burden of proof.¹⁵³

5. Constitutionality of Proffered Conditions

In *Gwinn v. Jefferson Green Unit Owners Ass'n*,¹⁵⁴ the Fairfax Circuit Court struck down proffered conditions approved by Fairfax County requiring a town home community owners association to purchase one membership in a private off-site recreation organization for each unit in the development.¹⁵⁵ The court held that the conditions violated Article IV, section 14(18) of the Virginia Constitution, which provides: "The General Assembly shall not enact any local, special or private law . . . [g]ranteeing to any private corporation, association, or individual any special or exclusive right, privilege, or immunity."¹⁵⁶

Shortly before this article went to print, the Supreme Court of Virginia reversed the Fairfax County Circuit Court.¹⁵⁷ The Supreme Court rejected the association's argument, which the circuit court accepted,¹⁵⁸ that the conditions violated Article IV, section 14(18) simply because they benefited a private organization.¹⁵⁹ The court explained that the controlling test was whether the conditions bore a reasonable and substantial relation to the object of the legislation.¹⁶⁰ The court determined that the conditions reasonably and substantially related to the legitimate

151. *Id.* at 289–94, 542 S.E.2d at 374–77.

152. *Id.* at 293, 542 S.E.2d at 376.

153. *Id.* at 293–94, 542 S.E.2d at 376.

154. No. C162197, 2000 Va. Cir. LEXIS 131 (Cir. Ct. July 18, 2000) (Fairfax County) (unreported decision).

155. *Id.* at *15.

156. VA. CONST. art. IV, § 14(18); *Gwinn*, 2000 Va. Cir. LEXIS 131, at *7.

157. *Jefferson Green Unit Owners Ass'n v. Gwinn*, 551 S.E.2d 339 (Va. 2001).

158. *See Gwinn*, 2000 Va. Cir. LEXIS 131, at *7.

159. *Gwinn*, 551 S.E.2d at 345.

160. *Id.* at 344.

goal of providing recreational facilities to the residents of Jefferson Green.¹⁶¹ Although the court followed its earlier “reasonable and substantial relation” precedent,¹⁶² this decision is difficult to reconcile with the express language of Article IV, section 14(18), which does not allow the General Assembly or, by delegation, a locality to grant a special or exclusive right or privilege to any private association.¹⁶³

6. Standing, Delegation, and Waiver

In *Fuentes v. Board of Supervisors*,¹⁶⁴ the Fairfax County Board of Supervisors originally published a report recommending denial of an application for a special exception to build athletic fields and related structures on a parcel of land.¹⁶⁵ After the project was scaled down and subjected to numerous conditions, however, the Board approved the application.¹⁶⁶ Twenty-seven people who owned property near the parcel challenged the Board’s decision.¹⁶⁷ The Fairfax Circuit Court held that the plaintiffs established standing merely by alleging that they owned property near or adjacent to the parcel.¹⁶⁸ The court rejected, however, the plaintiffs’ allegation that the Board’s assignment of authority to the local Health Department to approve a proposed sewage treatment and disposal system for the site was an unlawful delegation of legislative power.¹⁶⁹ The court held that this assignment was an essential delegation of administrative authority.¹⁷⁰ Finally, the court rejected the plaintiffs’ contention that the approval of the project violated the county’s zoning ordinance, holding that the Board’s decision was presumptively correct and that the conditions placed

161. *Id.* at 345 (citing VA. CODE ANN. § 15.2-2200 (Repl. Vol. 1997 & Cum. Supp. 2001), which recognizes the need for recreational facilities).

162. *See id.* at 344 (citing *Benderson Dev. Co. v. Sciortino*, 236 Va. 136, 147, 372 S.E.2d 751, 757 (1988)).

163. VA. CONST. Art. IV, § 14(18).

164. No. 186364, 2000 WL 1210446 (Va. Cir. Ct. July 27, 2000) (Fairfax County).

165. *Id.* at *1.

166. *Id.*

167. *Id.* at *1–2.

168. *Id.* at *2.

169. *Id.* at *2–3.

170. *Id.* at *2.

on the project had been carefully crafted to ensure compliance with the ordinance.¹⁷¹

D. Easements

1. Abandonment

In *Hudson v. Pillow*,¹⁷² the Supreme Court of Virginia held that, to establish abandonment of an easement, the servient owner must prove, by clear and convincing evidence, nonuse of the easement in addition to acts which show an intent to abandon.¹⁷³ Nonuse alone is not sufficient to establish abandonment.¹⁷⁴ Moreover, evidence that the servient owner required the owner of the dominant estate to obtain permission to use the right of way may be relevant to establish abandonment.¹⁷⁵ Deferring to the chancellor's findings on disputed evidence, the court affirmed the holding that the prescriptive easement in *Hudson* had been abandoned.¹⁷⁶

2. Damages for Blocked Access/Breach of Easement Agreement

In *Westerra Reston, L.L.C. v. Walker*,¹⁷⁷ the Fairfax Circuit Court decided a case of first impression regarding the intentional deprivation of easement rights by a business competitor.¹⁷⁸ In clear violation of an easement agreement between the parties, the defendant deliberately landlocked the plaintiff in an attempt to force the plaintiff to sell the land to the defendant.¹⁷⁹ Due to the defendant's tactics, "the plaintiff was unable to develop or sell [the land] during a peak real estate market" and "incurred substantial damages fending off the Defendant's subversive actions."¹⁸⁰ Finding no reported Virginia case directly on point, the

171. *Id.* at *4.

172. 261 Va. 296, 541 S.E.2d 556 (2001).

173. *Id.* at 302, 541 S.E.2d at 560.

174. *Id.*

175. *Id.* at 303, 541 S.E.2d at 561.

176. *Id.* at 302-04, 541 S.E.2d at 560-61.

177. No. 164601, 2000 Va. Cir. LEXIS 158 (Cir. Ct. June 2, 2000) (Fairfax County).

178. *See id.* at *2.

179. *Id.*

180. *Id.* at *3.

court looked to basic principles of contract law to determine the appropriate measure of damages.¹⁸¹ The court awarded the plaintiff \$1,032,782 plus interest in damages for lost investment profits and for land maintenance expenses during the time of the defendant's interference.¹⁸²

E. *Restrictive Covenants*

In *Leeman v. Troutman Builds, Inc.*,¹⁸³ the Supreme Court of Virginia examined a restrictive covenant that limited a lot in a development to one dwelling unless the vendor agreed otherwise in writing.¹⁸⁴ The Supreme Court of Virginia held that the covenant was enforceable even though the vendor no longer existed and thus could not provide written permission to waive the dwelling restriction.¹⁸⁵ The court also held that summary judgment was inappropriate because there were genuine issues of material fact as to whether the covenant was intended to be a personal covenant or a restrictive covenant running with the land.¹⁸⁶

F. *Riparian Rights*

In *Smith Mountain Lake Yacht Club, Inc. v. Ramaker*,¹⁸⁷ the Supreme Court of Virginia considered whether the owner of property adjacent to Smith Mountain Lake had the riparian right to build a dock over partially submerged property.¹⁸⁸ The Smith Mountain Lake Yacht Club held a deed to the property at issue that was part of the land flooded to create the lake.¹⁸⁹ The property owners claimed that Virginia Code section 28.2-1200 vested title in the Commonwealth,¹⁹⁰ while the Yacht Club claimed it

181. *Id.* at *2-5.

182. *Id.* at *6-11.

183. 260 Va. 202, 530 S.E.2d 909 (2000).

184. *Id.* at 204, 530 S.E.2d at 910.

185. *Id.* at 206-07, 530 S.E.2d at 911-12.

186. *Id.* at 207-09, 530 S.E.2d at 912-13.

187. 261 Va. 240, 542 S.E.2d 392 (2001).

188. *Id.* at 242, 542 S.E.2d at 393.

189. *Id.* at 243, 542 S.E.2d at 394.

190. The Virginia Code provides:

All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact ac-

still owned the submerged land.¹⁹¹ The court held that, under the statutory construction principle *expressio unius est exclusio alterius*,¹⁹² Virginia Code section 28.2-1200¹⁹³ did not mention lakes and thus did not apply to them.¹⁹⁴ The court accordingly held that the property owners had no riparian rights in the lake and thus could not build the dock without the Yacht Club's permission.¹⁹⁵

In *Carr v. Kidd*,¹⁹⁶ the Supreme Court of Virginia held that an apportionment of riparian rights should be made based on the historic, rather than current, mean low water line.¹⁹⁷ The court based this ruling on the need to ensure that owners do not increase their riparian rights by developing their own shoreline.¹⁹⁸

The Allegheny Circuit Court also addressed the law of riparian rights during the last year. In *Wilson v. Dressler*,¹⁹⁹ "[a] spring creek . . . originate[d] on Wilson's property, flow[ed] onto Dressler's property where a containment pond was built for watering cattle . . . [and] then naturally flow[ed] back onto Wilson's property."²⁰⁰ When Dressler diverted most of the flow to his containment pond, Wilson sought an injunction requiring Dressler to return the flow to his riparian land downstream.²⁰¹ The court held that the water "qualifi[ed] as a stream and [was] subject to riparian rights."²⁰² The court rejected Dressler's contention that Wilson was not deprived of riparian rights because he had use of the stream before it entered Dressler's property, holding that Wilson

cording to law, shall remain the property of the Commonwealth and may be used as a common by all the people of the Commonwealth for the purpose of fishing, fowling, hunting, and taking and catching oysters and other shellfish.

VA. CODE ANN. § 28.2-1200 (Repl. Vol. 2001).

191. *Ramaker*, 261 Va. at 245, 542 S.E.2d at 395.

192. This principle establishes "that the mention of a specific item in a statute implies that other omitted items were not intended to be included within the scope of the statute." *Id.* at 246, 542 S.E.2d at 395 (citing *Commonwealth v. Brown*, 259 Va. 697, 704-05, 529 S.E.2d 96, 100 (2000); *Bd. of Supervisors v. Wilson*, 250 Va. 482, 485, 463 S.E.2d 650, 652 (1995); *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992)).

193. VA. CODE ANN. § 28.2-1200 (Repl. Vol. 2001).

194. *Ramaker*, 261 Va. at 246, 542 S.E.2d at 395.

195. *Id.* at 249, 542 S.E.2d at 397.

196. 261 Va. 81, 540 S.E.2d 884 (2001).

197. *See id.* at 93, 540 S.E.2d at 891-92.

198. *Id.* at 92, 540 S.E.2d at 891.

199. 52 Va. Cir. 410 (Cir. Ct. 2000) (Allegheny County).

200. *Id.* at 411.

201. *Id.*

202. *Id.* at 412.

had a right to have the water flow on all portions of his land that were riparian.²⁰³ Finally, the court held that the exception allowing a riparian owner to diminish the flow of a stream to water cattle did not apply because Dressler had other sources of water from which his cattle could drink.²⁰⁴

G. *Eminent Domain*

In *Russell v. Commissioner*,²⁰⁵ a sharply divided Supreme Court of Virginia held that an appraiser's prior tax evaluation could be used as a prior inconsistent statement to impeach the appraiser's testimony about the current fair market value of the property.²⁰⁶ Three justices dissented based on the different purposes and methodologies inherent in the two assessments.²⁰⁷ Specifically, the dissenters noted that the purpose of a tax assessment is to set uniform, rather than exact, values, while the purpose of determining fair market value in a condemnation proceeding is to provide full compensation for the property taken.²⁰⁸

In *Gray & Gregory v. GTE South, Inc.*,²⁰⁹ the Supreme Court of Virginia held that evidence of the rental income generated by taken property is a relevant factor in establishing the property's fair market value.²¹⁰

H. *Tax Assessments*

In *Board of Supervisors v. HCA Health Services of Virginia, Inc.*,²¹¹ the Supreme Court of Virginia held that the Fairfax County Board of Supervisors' tax assessment of a hospital was not presumptively correct because the Board relied solely on the depreciated reproduction cost method without first considering

203. *Id.* at 412–13.

204. *Id.* at 413.

205. 261 Va. 617, 544 S.E.2d 311 (2001).

206. *Id.* at 620–21, 544 S.E.2d at 313–14 (4–3 decision).

207. *Id.* at 621–24, 544 S.E.2d at 314–15 (Keenan, J., dissenting). Justices Hassell and Koontz joined Justice Keenan's dissent. *Id.* at 621, 544 S.E.2d at 314.

208. *Id.* at 622–23, 544 S.E.2d at 314 (Keenan, J., dissenting).

209. 261 Va. 67, 540 S.E.2d 498 (2001).

210. *Id.* at 71–72, 540 S.E.2d at 500–01.

211. 260 Va. 317, 535 S.E.2d 163 (2000).

and properly rejecting other methods.²¹² Because the assessment was not presumptively correct, the standard of proof that applied to the property owner was whether the assessment was erroneous, not the higher manifestly erroneous standard.²¹³ The court affirmed the trial court's conclusion that the board's assessment was erroneous due in part to the board's failure to consider current market value, including factors in the hospital market causing obsolescence.²¹⁴

I. *Condominium Fees*

In *Homeside Lending, Inc. v. Unit Owners Ass'n of Antietam Square Condominium*,²¹⁵ a condominium association filed a bill of complaint to enforce liens for unpaid condominium assessments.²¹⁶ The condominium was subject to "a note secured by a purchase money deed of trust."²¹⁷ The Supreme Court of Virginia held that Virginia Code section 55-79.84(A)²¹⁸ gives unpaid sums on first mortgages and deeds of trust priority over liens of a condominium owners' association for unpaid assessments.²¹⁹ However, the court ordered that the fees incurred by the special commissioner in chancery were to be paid from the proceeds of the sale before any distribution of funds to creditors.²²⁰

212. *Id.* at 330, 535 S.E.2d at 169–70.

213. *Id.* at 330, 535 S.E.2d at 170.

214. *Id.* at 330–33, 535 S.E.2d at 170–71.

215. 261 Va. 161, 540 S.E.2d 894 (2001).

216. *Id.* at 164, 540 S.E.2d at 894.

217. *Id.* at 164, 540 S.E.2d at 895.

218. VA. CODE ANN. § 55-79.84(A) (Cum. Supp. 2001).

219. *Homeside Lending, Inc.*, 261 Va. at 166–68, 540 S.E.2d at 896–97.

220. *Id.* at 168, 540 S.E.2d at 897.

III. LEGISLATION²²¹A. *Landlord and Tenant*1. Applicability of the VRLTA²²² to All Jurisdictions

During its 2001 session, the Virginia General Assembly made numerous significant changes to the code provisions governing landlord and tenant law. The Assembly amended Virginia Code section 55-248.3:1²²³ to state that all provisions of the Virginia Residential Landlord and Tenant Act apply in all the jurisdictions in the Commonwealth and cannot be waived or modified by local governments or by the courts.²²⁴

2. Duties of Landlord and Tenant

The General Assembly made substantial changes to provisions governing the duties of both landlords and tenants by adding sections 55-225.3²²⁵ and 55-225.4²²⁶ to the Virginia Code. Virginia Code section 55-225.3 requires the landlord to comply with the Housing codes, do whatever is necessary to keep the premises fit and habitable, maintain all facilities and appliances in good and safe order, and supply running water, hot water, heat, and air conditioning.²²⁷ The landlord and tenant may agree in good faith and in writing, however, that the tenant will perform all the landlord's above duties except for keeping the premises in compliance with all applicable codes.²²⁸

Virginia Code section 55-225.4 requires the tenant to comply with all code provisions applicable to tenants, as well as keep the

221. To view summaries of all changes to Virginia property law enacted during the 2001 General Assembly session, see generally Virginia Legislative Information System, at <http://leg1.state.va.us> (last visited Oct. 19, 2001).

222. Virginia Residential Landlord and Tenant Act, VA. CODE ANN. §§ 55-248.2 to -248.40 (Repl. Vol. 1995 & Cum. Supp. 2001).

223. *Id.* § 55-248.3:1 (Cum. Supp. 2001).

224. *Id.*

225. *Id.* § 55-225.3 (Cum. Supp. 2001).

226. *Id.* § 55-225.4 (Cum. Supp. 2001).

227. *Id.* § 55-225.3(A)(1)-(4) (Cum. Supp. 2001).

228. *Id.* § 55.225.3(C) (Cum. Supp. 2001).

premises clean and safe, remove all waste, keep all plumbing fixtures clean, and to use all appliances and facilities in a reasonable manner.²²⁹ Further, the tenant must not destroy, deface, damage, impair, or remove any part of the premises or permit anyone else to do so, must not tamper with or remove smoke detectors, must not disturb his neighbors' quiet enjoyment, and must abide by all reasonable rules imposed by the landlord.²³⁰

3. Security Deposits

The General Assembly amended Virginia Code section 55-248.15:1,²³¹ granting the landlord forty-five instead of thirty days to give the tenant written notice of itemized deductions, damages, and charges along with the remaining security deposit plus accrued interest after termination of the tenancy and delivery of possession.²³² The Assembly further amended Virginia Code section 55-248.15:1(A) to provide that if the landlord willfully fails to comply with any provision of this section, the court *shall*, rather than "may," order the return of the security deposit and interest to the tenant as well as damages and attorney's fees.²³³

4. Landlord Access to Premises, Removal of Safety Devices, and Disruption of Utility Services on Manufactured Home Lots

Landlords must now give twenty-four hour notice of routine maintenance not requested by the tenant, unless such notice is impractical.²³⁴ The tenant is responsible for any costs the landlord incurs at the end of the tenancy resulting from the removal of any safety devices the tenant installed.²³⁵ The Assembly also amended the Manufactured Home Lot Rental Act ("MHLRA")²³⁶ to require landlords to give written notice forty-eight hours before a planned disruption in electric, water, or sewage disposal services.²³⁷

229. *Id.* § 55.225.4(A)(1)-(9) (Cum. Supp. 2001).

230. *Id.*

231. *Id.* § 55.248.15:1 (Cum. Supp. 2001).

232. *Id.* § 55.248.15:1(A) (Cum. Supp. 2001).

233. *Id.*

234. *Id.* § 55-248.18(A) (Cum. Supp. 2001).

235. *Id.* § 55-248.18(C)(3) (Cum. Supp. 2001).

236. *Id.* §§ 55-248.41 to -248.52 (Repl. Vol. 1995 & Cum. Supp. 2001).

237. *Id.* § 55-248.43(5) (Cum. Supp. 2001).

5. Termination

The General Assembly abolished the prior requirement that, before seeking relief for the landlord's material noncompliance with the lease or the law, the tenant cannot have received a certain number of termination notices.²³⁸ In addition, section 55-248.35²³⁹ no longer allows a landlord who has regained possession of the premises to seek a judgment for accelerated rent through the end of the tenancy.²⁴⁰

The Assembly also amended Virginia Code section 55-248.34,²⁴¹ which governs the landlord's waiver of the right to terminate a periodic tenancy. In order for the landlord to preserve his right to terminate the tenancy for noncompliance after accepting rental payments, the landlord must, within five business days of the acceptance of the rental payment, give the tenant written notice of his reservation of the right to terminate.²⁴² The Assembly added a new provision, Virginia Code section 55-248.46:1,²⁴³ that codifies the same requirement under the MHLRA.²⁴⁴

The Assembly amended the MHLRA to require renewal of a rental agreement for a term of sixty days or more, unless termination or eviction would be justified, if the landlord and the seller of the manufactured home have common owners, immediate family members, or officers or directors.²⁴⁵

6. Removal of Tenant's Personalty by Sheriff or Landlord

The Assembly added new provisions to the Virginia Code regarding the authority of the sheriff and the landlord to sell and store the tenant's personalty removed from a residence following an ejectment or action of unlawful detainer.²⁴⁶ When the personal property is removed, the sheriff must put the property in the pub-

238. *Id.* § 55-248.27(B)(3) (Cum. Supp. 2001).

239. *Id.* § 55-248.35 (Cum. Supp. 2001).

240. *Id.*

241. *Id.* § 55-248.34 (Cum. Supp. 2001).

242. *Id.*

243. *Id.* § 55-248.46:1 (Cum. Supp. 2001).

244. *Id.*

245. *Id.* § 55-248.46(A) (Cum. Supp. 2001).

246. *See id.* §§ 55-237.1, -248.38:2 (Cum. Supp. 2001).

lic way or in a storage area designated by the landlord.²⁴⁷ The tenant then has twenty-four hours to remove the property.²⁴⁸ The tenant has the right to access the storage area at reasonable times during the twenty-four hour period, and he may seek injunctive relief if he is kept from his property during this time.²⁴⁹ Neither the landlord nor the sheriff can be held liable for any loss of the property.²⁵⁰ After the twenty-four hour period, the landlord may remove or dispose of any remaining property.²⁵¹ If the landlord receives any funds from the sale of the property, the landlord must apply that money to any amounts the tenant owes the landlord, including reasonable costs incurred by the landlord in the eviction process or in selling or storing the property.²⁵² Any notice of eviction posted by the sheriff must state the rights tenants have under these new provisions.²⁵³

B. *Condominium and Property Owners Association Acts*

1. Meetings, Notice, Direct Communication with Officers, and Charges for Copies

The Virginia General Assembly enacted numerous amendments to the Condominium²⁵⁴ and Property Owners Association²⁵⁵ Acts ("Acts"). "Meeting" is now explicitly defined as a formal gathering of the executive organ or board of directors where association business is discussed or transacted.²⁵⁶ Both Acts were amended to prevent the executive organ or board of directors from using work sessions or other informal gatherings to circumvent the open meeting requirements of the Acts.²⁵⁷ The executive organ or board of directors must publish notice of the time, date, and place of its meetings in a way reasonably calculated to be

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* §§ 55-79.39 to -79.103 (Repl. Vol. 1995 & Cum. Supp. 2001).

255. *Id.* §§ 55-508 to -516.2 (Repl. Vol. 1995 & Cum. Supp. 2001).

256. *Id.* §§ 55-79.41, -509 (Cum. Supp. 2001).

257. *Id.* § 55-79.75(B), -510.1(A) (Cum. Supp. 2001).

available to a majority of unit or lot owners, and to mail notice to any unit or lot owner who requests it.²⁵⁸ The executive organ or board of directors is also required to establish a reasonable, effective and free method of communication with the owners regarding any association matters.²⁵⁹ Both acts were amended to limit the actual cost incurred and the charge the association can assess an owner or member for copies of association records.²⁶⁰

2. Disclosure Packets

The General Assembly also amended the disclosure packet provisions of both Acts.²⁶¹ The purchaser now has the right to request an update of the condominium resale certificate²⁶² or of the property owners' disclosure packet.²⁶³ This right must be stated in the contract.²⁶⁴ Condominium and property owners associations must provide purchasers with a copy of the notice given to any unit or lot owner of any current or pending rule or architectural violation.²⁶⁵ The General Assembly also set forth the fees that condominium and property owners associations may charge for providing assurances and information.²⁶⁶

C. *Easements Conveyed to Public Service Corporations*

Under new Virginia Code section 56-259.1,²⁶⁷ no instrument executed after January 1, 2002, to convey an easement to a public service corporation shall be accepted for recording unless it contains the following provision:

“NOTICE TO LANDOWNER: You are conveying rights to a public service corporation. A public service corporation may have the right

258. *Id.* §§ 55-79.75(B), -510.1A(B) (Cum. Supp. 2001).

259. *Id.* § 55-79.75:1, -510.2 (Cum. Supp. 2001).

260. *Id.* §§ 55-79.74:1(D), -510(D) (Cum. Supp. 2001).

261. *See* H.B. 2515, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 23, 2001, ch. 556, 2001 Va. Acts 649) (codified as amended at VA. CODE ANN. §§ 55-79.97, -511, -512 (Cum. Supp. 2001)).

262. *Id.* § 55-79.97(A)(iv) (Cum. Supp. 2001).

263. *Id.* § 55-511(A)(iv) (Cum. Supp. 2001).

264. *Id.* §§ 55-79.97(A)(iv), -511(A)(iv) (Cum. Supp. 2001).

265. *Id.* § 55-79.97(C)(12), -512(A)(13) (Cum. Supp. 2001).

266. *Id.* § 55-79.97(D) & (F), -512(B) & (C) (Cum. Supp. 2001).

267. *Id.* § 56-259.1 (Cum. Supp. 2001).

to obtain some or all of these rights through exercise of eminent domain. To the extent that any of the rights being conveyed are not subject to eminent domain, you have the right to choose not to convey those rights and you could not be compelled to do so. You have the right to negotiate compensation for any rights that you are voluntarily conveying.”²⁶⁸

However, if the instrument does not contain this provision and is accepted for recording, the absence of the provision will not affect the validity or enforceability of the instrument.²⁶⁹

The General Assembly also amended Virginia Code section 56-259 to eliminate any implied distinction between easements and rights of way by changing “easement *or* right-of-way” to “easement *of* right-of-way.”²⁷⁰ A new paragraph was added to this section which allows a locality in which a gas pipeline or electrical transmission line would be located to direct the commission to consider directing a joint use of the right of way.²⁷¹

D. *Time-Share Act*

1. Exchange Programs and Incidental Benefits

The Assembly made numerous amendments to the Virginia Real Estate Time-Share Act.²⁷² Under the amended act, an exchange program may not involve either an incidental benefit or an exchange for another time-share within either the same project or another project owned in part by the developer.²⁷³ The definition of “incidental benefit” was amended to include “exchange rights, travel insurance, bonus weeks, upgrade entitlements, travel coupons, referral awards, and golf and tennis packages.”²⁷⁴

268. *Id.*

269. *Id.*

270. *Id.* § 56-259 editor’s note (Cum. Supp. 2001) (emphasis added).

271. *Id.* § 56-259(D) (Cum. Supp. 2001).

272. *Id.* §§ 55-360 to -400 (Repl. Vol. 1995 & Cum. Supp. 2001).

273. *Id.* § 55-362 (Cum. Supp. 2001).

274. *Id.*

2. Developer Control and Collection of Maintenance Fees

The developer control provision in Virginia Code section 55-369²⁷⁵ was amended to provide that while the property is in the developer control period, all costs belong to the developer unless the time share instrument requires that they be paid by the time-share estate owners.²⁷⁶ The definition of "time share estate occupancy expenses" was expanded to include the costs incurred in forming, organizing, and operating the time-share association, filing fees and annual registration charges, counsel and accountant fees, and reserves for any cost or expenses.²⁷⁷ The developer may collect an annual or specially assessed maintenance fee from each time-share owner.²⁷⁸ The board of directors may, on behalf of the developer or on its own account, collect this maintenance fee.²⁷⁹ An association has a lien on every time-share estate for unpaid and past due maintenance fees.²⁸⁰ An association also has four years, rather than one year, to perfect its liens.²⁸¹ The Assembly has required that certain technical information be included in the memorandum filed to perfect liens, such as other expenses or fees the owner owes and contact information for the association's trustee.²⁸²

E. Joint Tenancy

Virginia Code section 55-20.1²⁸³ was amended to provide for the ownership of real or personal property as joint tenants with or without a right of survivorship.²⁸⁴ Although the Assembly did not define "joint tenancy without a right of survivorship," its deletion of the right to own property as tenants in common from section 55-20.1 suggests that the "joint tenancy without right of survivorship" replaces the former tenancy in common. Section 55-20.1

275. *Id.* § 55-369 (Cum. Supp. 2001).

276. *Id.* § 55-369(A) (Cum. Supp. 2001).

277. *Id.*

278. *Id.*

279. *Id.* § 55-370(A) (Cum. Supp. 2001).

280. *Id.* § 55-370(B) (Cum. Supp. 2001).

281. *Id.*

282. *Id.*

283. *Id.* § 55-20.1 (Cum. Supp. 2001).

284. *Id.*

now does not apply to multiple party accounts under sections 6.1-125.1 through 6.1-125.16²⁸⁵ or to any other matter specifically governed by another code provision.²⁸⁶ Provisions governing tenancies by the entirety were removed from sections 55-20.1 and 55-21 and codified as new section 55-20.2.²⁸⁷

F. *Eminent Domain*

1. Municipalities' Extraterritorial Exercise of Eminent Domain Power

The General Assembly amended Virginia Code section 15.2-1901²⁸⁸ to provide that any locality may acquire property outside its boundaries by eminent domain only if a general law or special act has expressly conferred such authority.²⁸⁹ However, cities and towns are expressly given this authority for the purposes set forth in Virginia Code section 15.2-2109.²⁹⁰

2. Redevelopment and Housing Authorities/ADR

Virginia Code section 36-27,²⁹¹ which governs the eminent domain power of redevelopment and housing authorities, was amended to authorize, for the purpose of facilitating settlement, voluntary, non-binding alternative dispute resolution after an authority makes its price offer.²⁹² The Code contains two versions of section 36-27 that are slightly different; one is effective until July 1, 2002, and the other is effective thereafter.²⁹³ The version effec-

285. *Id.* §§ 6.1-125.1 to -125.16 (Cum. Supp. 2001).

286. *Id.* § 55-20.1 (Cum. Supp. 2001).

287. *See id.* § 55-20.2 (Cum. Supp. 2001).

288. *Id.* § 15.2-1901 (Cum. Supp. 2001).

289. *Id.* § 15.2-1901(B) (Cum. Supp. 2001).

290. Virginia Code section 15.2-2109 empowers a locality to acquire, establish, or control waterworks, sewerage, gas works, electric plants, public mass transportation systems, stormwater management systems, and other public utilities, including a limited right to exceed territorial boundaries to engage in these activities. *Id.* § 15.2-2109 (Cum. Supp. 2001).

291. *Id.* § 36-27 (Cum. Supp. 2001).

292. *Id.* § 36-27(C) (Cum. Supp. 2001).

293. Compare *id.* § 36-27 (Cum. Supp. 2001) (effective until July 1, 2002), with *id.* § 36-27 (Cum. Supp. 2001) (effective July 1, 2002).

tive until July 1, 2002, provides that the party requesting the alternative dispute resolution must pay the costs of the hearing, unless the parties agree to share the costs, while the version effective July 1, 2002, contains no provision regarding payment of costs.²⁹⁴ The earlier version requires that the ADR proceeding must be requested and occur at least thirty days prior to the just compensation trial, while the latter version inexplicably requires only that the proceeding occur, but not that it be requested, within those thirty days.²⁹⁵

3. Redevelopment Plans

The Assembly made extensive alterations to Virginia Code section 36-51,²⁹⁶ which governs redevelopment plans. Municipalities must reaffirm their approval of redevelopment plans by resolution between thirty and thirty-six months after approval.²⁹⁷ If the municipality does not reaffirm the plan, a property owner must consent to the taking of any property within the redevelopment plan that has not been acquired, or for which a condemnation petition has not been filed prior to the termination date of the plan.²⁹⁸ If, prior to the termination date, either party submits a mediation request pursuant to Virginia Code section 36-27,²⁹⁹ the authority's right to file a condemnation petition for that property shall extend for six months after the termination date.³⁰⁰

If, on the other hand, the redevelopment plan is reaffirmed, the municipality may exercise its eminent domain authority over land within the redevelopment plan until the fifth anniversary of the approval date.³⁰¹ A property owner must consent to the taking of any property within the redevelopment plan that has not been acquired or for which a condemnation petition has not been filed

294. Compare *id.* § 36-27(C) (Cum. Supp. 2001) (effective until July 1, 2002), with *id.* § 36-27(C) (Cum. Supp. 2001) (effective July 1, 2002).

295. Compare *id.* § 36-27(C) (Cum. Supp. 2001) (effective until July 1, 2002), with *id.* § 36-27 (Cum. Supp. 2001) (effective July 1, 2002).

296. *Id.* § 36-51 (Cum. Supp. 2001).

297. *Id.* § 36-51(B) (Cum. Supp. 2001).

298. *Id.*

299. See *supra* notes 291-95 and accompanying text.

300. VA. CODE ANN. § 36-51(B) (Cum. Supp. 2001).

301. *Id.* § 36-51(C) (Cum. Supp. 2001).

prior to the fifth anniversary of the approval date.³⁰² If, prior to the fifth anniversary of the approval date, either party submits a mediation request pursuant to Virginia Code section 36-27,³⁰³ the authority's right to file a petition in condemnation relating to that property shall extend for six months after the fifth anniversary of the approval date.³⁰⁴

Municipalities may adopt new redevelopment plans which designate a redevelopment area that includes property formerly situated in a previous redevelopment area in a prior plan.³⁰⁵ If the authority decides not to acquire property after making a purchase offer, it must reimburse the owner the reasonable expenses incurred in connection with the proposed acquisition, including attorney, appraiser, or expert fees.³⁰⁶ To be reimbursed for expenses, the owner must make a written request to the authority no later than one year after the date of the authority's written notice of its decision not to acquire the property.³⁰⁷

G. *Real Estate Taxes*

The House of Delegates resolved, with the concurrence of the Senate, that an amendment to the Virginia Constitution be referred to the General Assembly at the first regular session held after the next general election of members of the House.³⁰⁸ The proposed amendment is to Article X, section 6(a),³⁰⁹ which lists property that is exempt from state and local taxes. This section currently provides an exemption for property used for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes as provided by a three-fourths vote of the General Assembly.³¹⁰ The amendment would divest the Assembly of the authority to set this exemption and instead base it

302. *Id.*

303. *See supra* notes 291-95 and accompanying text.

304. VA. CODE ANN. § 36-51(C) (Cum. Supp. 2001).

305. *Id.* § 36-51(D) (Cum. Supp. 2001).

306. *Id.* § 36-51(E) (Cum. Supp. 2001).

307. *Id.*

308. H.J. Res. 503, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Feb. 22, 2001, ch. 786, 2001 Va. Acts 1074).

309. VA. CONST. art. X, § 6(a).

310. *Id.* art. X, § 6(a)(6).

on ordinances adopted by the local governing body, subject to restrictions provided by general law.³¹¹

The General Assembly also enacted several minor provisions regarding real estate taxes. If both a county and a town receive proceeds from a sale of real estate for delinquent taxes, they will divide the surplus pro rata, based on the relative amount of proceeds received by each.³¹² The Assembly limited the recordation tax on leases of outdoor advertisement signs to twenty-five dollars when the permit fees have been paid to the Virginia Department of Transportation.³¹³ Because the state recordation and grantor's taxes are based on the consideration paid for the property, the consideration must be stated on the deed, although failure to do so will not invalidate the deed or make it ineligible for recording.³¹⁴

H. *Voluntary Downzoning*

The Assembly amended Virginia Code section 15.2-2286³¹⁵ to authorize zoning ordinances that allow a locality and landowner to agree to downzone the landowner's undeveloped or underdeveloped property in exchange for a tax credit equal to the excess real estate taxes the owner has paid due to the higher zoning classification.³¹⁶

I. *Recording Fees*

The General Assembly changed the fees collected by circuit court clerks for recording deeds of ten or fewer pages to fifteen dollars; for recording deeds of eleven to thirty pages to thirty dollars; and for recording deeds of thirty-one or more pages to fifty

311. H.J. Res. 503, Va. Gen. Assembly (Reg. Sess. 2001).

312. VA. CODE ANN. § 58.1-3967 (Cum. Supp. 2001).

313. *Id.* § 58.1-807(E) (Cum. Supp. 2001).

314. *Id.* §§ 58.1-801(A), -802(A) (Cum. Supp. 2001).

315. *Id.* § 15.2-2286 (Cum. Supp. 2001).

316. *Id.* § 15.2-2286(A)(11) (Cum. Supp. 2001).

dollars.³¹⁷ One dollar and fifty cents of the fee collected will be used to preserve the permanent records of the circuit court.³¹⁸

J. Lien Creditor's Release

Virginia Code section 55-66.3(A)(1)³¹⁹ was amended to provide that a creditor who must record a certificate of partial or full satisfaction may do so by hand or by mailing the certificate by certified mail, return receipt requested, to the clerk's office.³²⁰

317. *Id.* § 17.1-275(A)(2) (Cum. Supp. 2001).

318. *Id.*

319. *Id.* § 55-66.3(A)(1) (Cum. Supp. 2001).

320. *Id.*