VSB RPS

the FEE SIMPLE

The Journal of the
Virginia State Bar
Real Property Section

https://vsb.org/RP/groups/RP/home.aspx

Vol. XLIV, No. 1 SPRING 2023

JOHN DAVID EPPERLY, JR.

2023 Traver Award Recipient

TABLE OF CONTENTS

The FEE SIMPLE *is published semiannually by the Virginia State Bar, 1111 East Main Street, Suite 700, Richmond Virginia, 23219. It is distributed to members of the Real Property Section of the Bar.*

Anyone wishing to submit an article for publication should send it in Microsoft Word format to Tracy L. Byrd at tlbyrd@wm.edu. Authors are responsible for the accuracy of the content of their article(s) in the FEE SIMPLE *and the views expressed therein must be solely those of the author(s). Submission will also be deemed consent to the posting of the article on the Real Property Section website,* https://vsb.org/RP/groups/RP/rp-newsletters.aspx.

The FEE SIMPLE *reserves the right to edit materials submitted for publication.*

Co-Editor
Stephen C. Gregory, Esquire
1334 Morningside Drive
Charleston, WV 25314
(703) 850-1945 (mobile)
Email: 75cavalier@gmail.com

Co-Editor
Hayden-Anne Breedlove, Esquire
Old Republic Title
Old Republic Insurance Group
7960 Donegan Drive, Suite 247
Manassas, VA 20109
(804) 332-1907
Email: hbreedlove@oldrepublictitle.com

FALL 2023 SUBMISSION DEADLINE: FRIDAY, OCTOBER 6, 2023

THE NEXT MEETING OF THE BOARD OF GOVERNORS OF THE REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR WILL BE HELD ON

FRIDAY, JUNE 16, 2023, AT 11:45 AM

HILTON OCEANFRONT, VIRGINIA BEACH, VIRGINIA

Visit the section website

at

https://vsb.org/RP/groups/RP/home

and

for the Real Property Section *Fee Simple Journal*

https://vsb.org/RP/groups/RP/rp-newsletters.aspx

LETTER FROM THE CHAIR

By Karen L. Cohen

Karen L. Cohen is a Partner in Gentry Locke's Richmond office and is a member of the firm's Real Estate, Land Use & Zoning, Solar & Renewable Energy, and Outdoor Advertising practice groups. Karen serves as Chair of the Virginia State Bar Real Property Section Board of Governors and Co-Chair of the Land Use & Environmental Committee. Karen received a B.S. degree in Architecture from the University of Virginia, M.S. in Real Estate Development from George Mason University, and J.D. magna cum laude from Georgetown University Law Center.

As I approach the end of my term as Chair, I find myself wanting to begin this letter with the same opening sentence I wrote in the Fall Issue, changing only the tense of the verb to reflect my looking back on the past year . . . so, with nobody to stop me from doing just that, I will say (again): It *has been* a great honor for me to serve as Chair of the Real Property Section, to follow a long line of outstanding former chairs, and to lead the Section for the 2022-2023 year, along with my terrific colleagues, Vice Chair Sarah Louppe-Petcher and Secretary-Treasurer Robert Hawthorne.

In this issue, we honor the 2023 recipient of The Traver Scholar Award, John David Epperly, Jr. The award is named for Courtland L. Traver, whose outstanding legal ability and willingness to share his knowledge and experience was an inspiration to others. Throughout John David's career, from private practice at McGuireWoods to Virginia State Counsel for Fidelity National Title Group (retiring this past September), John David made significant contributions to the Real Property Section, generously sharing his knowledge with others as a Section member since the late '80s; as Chair of the Section from 2000 to 2001; and as a frequent presenter at seminars on a variety of real estate topics. Congratulations, John David, and thank you for all you have done for the Real Property Section.

Our Section leaders and Committee Members are also inspired to carry on our great tradition of generously sharing knowledge, demonstrated by a number of important initiatives this past year. Section members Rick Chess and Larry McElwaine have delivered on the mentorship and educational video project that I mentioned in the Fall Issue. The first two videos of "Topics in Real Estate – Litigation" will premiere at our upcoming annual meeting in June.

In these videos, Section members John Altmiller and Michael Derdeyn present the law clearly and concisely on a variety of real estate litigation topics, including: *What is a suit to quiet title? What is a partition suit? What is adverse possession? How do these types of lawsuits typically arise?* John and Michael deliver these "knowledge gems" in easily digestible, short videos that complement our Section's mentorship program, providing real value to Section members whether they are new lawyers or experienced practitioners looking to learn more about an area in which they are less experienced.

Another knowledge-sharing highlight of this past year was the introduction of our new quarterly(-ish) electronic publication, *The Fee Tail*. *The Fee Tail* is a short email update of recent developments in case law or legislation pertinent to the practice of real estate law in the Commonwealth. Within days of several major Virginia Supreme Court decisions, *The Fee Tail* landed in your email inbox to keep you up to date and informed.

Take this short quiz to test your *Fee Tail* knowledge and to make sure you are ready for cocktail reception conversations at the upcoming Annual Meeting. Match these legal principles to their corresponding cases: (A) The Wegman's Case; (B) The Fairfax Z-Mod Case; or (C) The Lake Barcroft Dock Case (answers below).

1. "The fact that prior owners of these lots were on friendly terms does not establish a permissive use. Failure to object is acquiescence. Acquiescence is not the same as granting permission."

2. The phrase "within thirty days of the decision" does not necessarily mean "within thirty days *after*" the decision.

3. "Permission does not extend beyond the ownership of the person who granted permission. Therefore, a permissive use terminates when the owner who granted permission sells the property."

4. This case demonstrates how you would plead "a specific set of particularized harms, not a broad-spectrum list of hypothesized harms" in order to be sure your complaint satisfies the standing requirement in *Friends of the Rappahannock*.

5. Even if the Governor has declared a state of emergency and the catastrophic nature of the declared emergency makes it impracticable or unsafe to meet in person, a governing body cannot hold a meeting electronically unless *the purpose of the meeting is to address the emergency*.

See Answers.[1] All Section members are encouraged to submit ideas for future *Fee Tail* emails to Heather Steele at hsteele@pesner.com.

It has been my pleasure to serve as Section Chair. I am looking forward to seeing everyone at the Virginia State Bar Annual Meeting in Virginia Beach, and to passing the gavel to the next Real Property Section Chair at our Board meeting on Friday, June 16.

[1] (1) C; (2) B; (3) C; (4) A; (5) B. Case Names: *Morgan v. Board of Supervisors of Hanover County* — Decided Feb. 3, 2023 (The Wegman's Case. On May 11, 2023, the Virginia Supreme Court denied Wegman's request for reconsideration of the February decision); *Berry v. Board of Supervisors of Fairfax County* — Decided March 23, 2023 (The Fairfax County Z-Mod Case); *Horn v. Webb* — Decided Feb. 9, 2023 (The Lake Barcroft Dock Case).

2023 RECIPIENT OF THE TRAVER AWARD

JOHN DAVID EPPERLY, JR., is the **2023 recipient of the Traver Award, conferred** by the Real Property Section of the Virginia State Bar and Virginia Continuing Legal Education upon men and women who embody the highest ideals and expertise in the practice of real estate law. Traver Scholars are Real Property Section members who have made significant contributions to the practice of real property law generally and the Section specifically and have generously shared their knowledge with others. The award is named for the "father" of Virginia real estate lawyers, Courtland L. Traver, whose outstanding legal ability and willingness to share his knowledge and experience was an inspiration to others.

John David is a native Virginian, a 1974 graduate of the University of Virginia with a B.A. in English, and a J.D. in 1984 from the Marshall Wythe School of Law at the College of William and Mary. In between undergraduate and law school, he spent a summer trout fishing in Montana (yes, he actually met Richard Brautigan), worked construction, and then wandered the country in a '65 Chevy van before taking a job at the Motion Picture Section of the Library of Congress in Washington, DC from 1976 to 1981. He was in private practice for seven years, including May 1987 to April 1991 at McGuire Woods in Tysons Corner, concentrating in commercial real estate transactions. He joined Commonwealth Land Title Insurance Company in May 1991 and was Virginia State Counsel in August 1999 when he left for a similar position with Fidelity National Title Insurance Company. After the merger of Fidelity and Chicago Title in 1999, followed by the merger with Lawyers Title and Commonwealth Land Title in 2008, John David served as Virginia State Counsel for the Fidelity National Title Group family of title insurers before retiring in September 2022. John David joined the Real Property Section of the Virginia State Bar in the late '80s and was Chair of the Real Property Section in 2000-2001. Before his retirement, John David was a frequent presenter at seminars on a variety of real estate topics. He is an avid fisherman, birder, and nature enthusiast, who on many days can be found enjoying the outdoors armed with a fishing rod or a pair of binoculars. John David is married to Laurie Duncan and they have two sons, Alex and Daniel.

John David Epperly responds:

I am honored and humbled to receive this award for many reasons, not least of which because it is named for my late friend and former mentor Courtland Traver. I had the privilege and good fortune to work with Court at McGuire Woods for four years and for many years after through the Real Property Section. Not only did we bond over a common love of the ancient principles of real property law, but also of trudging through woods and canoeing down rivers. He recruited me into the VSB Real Property Section, and I got to observe first-hand the enormous and inspiring effort he undertook each year to present the real estate law update at the annual Real Property seminar and at the annual meeting in Virginia Beach. He was completely dedicated to educating busy lawyers about the latest statutes and the courts' application of those sometimes arcane principles to real situations. After Court retired from that annual Herculean effort, in an ironic twist it fell to me as Chair of the Section in 2001 to find his replacement. I still remember the feeling of near panic. It took a small village to stand in for Court those first few years, including the late Doug Dewing and many others. The gauntlet has been taken up so capably by so many others since. I salute them all, and all others who spend such time and expend such effort in the cause of continuing legal education.

VIRGINIA LAWYERS WEEKLY 2023 HALL OF FAME INDUCTEES

Virginia Lawyers Weekly has announced the lawyers selected to the Class of 2023 Hall of Fame.

The Hall of Fame honors Virginia lawyers who are over the age of 60 or who have been in practice for 30 years.

Criteria for inclusion in the Hall of Fame include career accomplishments, contributions to the development of the law in Virginia, contributions to the bar and to the commonwealth at large and efforts to improve the quality of justice in Virginia.

Among the honorees are the following members of the Real Property Section:

Pamela S. (Pam) Belleman, Troutman Pepper, Richmond

John G. (Chip) Dicks, Gentry Locke, Richmond

Carol C. Honigberg, Reed Smith, Tysons Corner

Susan Tarley, Tarley Robinson, Williamsburg

THE FEE SIMPLE, on behalf of the section, extends congratulations to the 2023 inductees for their contributions to the practice of law in the Commonwealth.

A SOLUTION TO THE SILVER TSUNAMI

By Cynthia A. Nahorney
Chairperson, Title Insurance Committee

Cynthia A. Nahorney is Vice President/Agency Counsel for Fidelity National Title Group and Adjunct Professor of Law at Marshall-Wythe School of Law, College of William and Mary.

If you work in the real estate industry in Virginia, you have experienced the effects of the Silver Tsunami, otherwise known as the "aging out" of our experienced real estate professionals - especially our title examiners and title underwriters. A thorough title examination and well- underwritten title commitment are the foundation of every real estate transaction. The fact that we are experiencing a real shortage of people capable of producing these products is a growing concern that has been a topic of conversation for nearly a decade among the various Virginia Bar and real estate trade organizations. The title insurance subcommittee of the Virginia State Bar Real Property Section has chosen this as its focus for the upcoming year and, quite frankly, for as long as it takes to turn the tide.

In a recent title insurance subcommittee call, we realized that while none of us planned on a career in the title industry, we all had our own backstory of how we fell into it and why we each felt it was such a perfect fit. Without exception, each of us had the benefit of one or two very dedicated (and in my case extremely patient) people who recognized the value of passing on their knowledge and were willing to take the time to teach a skill that is only learned by observation, instruction, and hands-on experience. Over the next several issues of the Fee Simple, members of the title insurance subcommittee are going to share their stories of how they ended up in title and who helped them along the way. It is our hope that by telling our stories, it will remind you of your own story and why it is so important that we "pay it forward."

My title story starts in early summer of 1985. It was the summer following my first year of law school and while most of my classmates had plans for clerkships with law firms and various exciting adventures, I had no plans whatsoever. None. My Dad had passed away in May and for several months prior to that, he and my Mom had been my primary concern. In late May, though, I realized I had an entire summer to fill. Fortunately, the Virginia Beach Circuit Court judges were open to my proposal of a six-week judicial internship, for which I would earn law school credit. For the second half of the summer, I was going to work for a general practice law firm in Virginia Beach that did some real estate. The first six weeks flew by as I got a view of the courtroom from the bench and judges' chambers – researching issues that the judges took under advisement and generally learning the ropes. When I crossed the threshold that first day at the law firm I was ready to hit the ground running! I soon learned that I would not be working for the law firm but working primarily in the firm's title agency searching real estate titles. I was deflated. In utter fairness, I am quite sure I was not what the manager of the title agency was hoping for either…. another attorney wannabe with not the first clue of how to find the record room much less knowing what to do once I got there. Once my initial disappointment passed, I threw myself into learning this new skill and familiarizing myself with the idiosyncrasies of each Clerk's Office (and each Clerk) and the one golden rule at the time – <u>never ever</u> be caught chewing gum in the Chesapeake Circuit Court Record Room!! I loved the camaraderie amongst the title examiners and attorneys who frequented the record rooms – chatting about what had gone on over the weekend and helping one another with adversing and back titles. I also was amazed by the history that was available in the record rooms. I was fascinated by the ability of the title records to tell the story of the property being searched and the people who had lived there. Marriages, divorces, adoptions, deaths, lawsuits, wills, foreclosures - it was all there for the telling and who doesn't love a good story? At the risk of dating myself, I will tell you that I am a firm believer that we all have a little "Gladys Cravitts"[1] in us. Upon graduation from law school, I was fortunate to fall into not one but two successive associate positions with two excellent real estate attorneys who

[1] Gladys Cravitts (also spelled Kravits), played by the late Alice Pearce, was the nosy neighbor in the '60s TV show "Bewitched." –Ed.

carried me through those first years of finding my way into the practice of law. For me, a real estate practice checked all the boxes. It was transactional. It fed my love of history. It was people-oriented. It was NOT litigation based.

The next fifteen years flew by. I was closing commercial transactions for several national real estate developers. The work was interesting, the numbers were large, I was working with attorneys all over the country. Embassies, five-star hotels, shopping malls, amusement parks and historical landmarks were all part of the customary repertoire, and it was fun. But life has a way of adjusting our priorities. My adjustment came by way of Grace. Grace Ann Nahorney – who - true to form – arrived on her own schedule – three and a half weeks early. I was working on a refinance of two office towers in Nashville that had to close by September 30. It was the perfect plan. I would wrap up the closing on the 30th which gave me plenty of time before Grace's expected arrival on October 22nd. Grace's arrival in the early morning hours of September 29th changed "the plan". I don't know what was worse, the look on my husband's face when I told him our trip home from the hospital was going to involve a detour to the office so I could "close a deal" or the guilt I felt every time I passed the senior partner's office that day and saw my newborn in her infant carrier propped up on his work table with my husband standing guard nearby. Something had to change.

When the opportunity presented itself to work for Lawyers Title Insurance Corporation in the Norfolk Office, I realized this was the possible solution. I hoped the career change would allow me the freedom to be a better parent. There is no question the ability to control my work schedule and to be free from the pressure of billable hours did that. What I did not expect was the opportunity to become a better lawyer. The focus of my practice as a transactional attorney was to negotiate the documents and to complete the closing checklist to get the transaction to the finish line. As agency counsel for a title company, my responsibility is to have the knowledge when problems arise to provide solutions based upon the law and utilizing my transactional experience to get to that same finish line. Surprising as it might seem, I was never really called upon to know the law in the way that I am now. I am happily resigned to the fact that I am a lifetime learner. In 2009, Lawyers Title was purchased by Fidelity National Title Insurance Company, and with the absorption by a large national company comes many advantages. I have access to our counsel all over the country with expertise in a multitude of areas different from mine. I have become a teacher as well as a lifetime learner. And there is nothing that will convince you of how much you still have left to learn more than teaching!

So, to my point, we are looking for a few good men and women to join the title industry because it has so much to offer in the way of a career. But more than that, we are asking a few good men and women already in the real estate industry to remember how you got your start and to consider being a mentor or to consider offering an internship in your office. The Virginia Land Title Association has done an outstanding job with its certification programs for title examiners and title underwriters, but we all know this business requires on-the-job training. We can funnel good candidates through the certification process, but we have to be in a position to direct them to positions of employment once certified. I have heard the comment that because the market is slow right now it is not a good time to take on additional personnel. I have heard those same people say when the market was hot that they were just too busy to train. I think the truth is that there is no perfect time. We know that the market is cyclical. And we know that what we sow today we will reap tomorrow. If you are interested in furthering this discussion of investing in the future of our industry with a member of the title insurance committee, please feel free to reach out to any one of us. We look forward to speaking with you.

Title Insurance Committee Members:

Addison Barnhardt	*Hayden-Anne Breedlove*	*Jon Brodegard*	*Paula Caplinger*
Kay Creasman	*Pam Faber*	*Steve Gregory*	*Cynthia Nahorney*
Helen Spence	*Ed Waugaman*	*Ben Winn*	

HOW DID I GET INTO THE TITLE INSURANCE BUSINESS? TWICE?

By Pamela J. Faber

Pamela J. Faber is Vice President and Underwriting Counsel for Bridge Trust Title Group, a Division of Kensington Vanguard which provides title insurance, settlement, escrow, and 1031 like-exchange services throughout the U.S.. She has been a real estate practitioner for over 30 years and has alternated between the private practice of law and the title insurance industry. An honor graduate at both the Wharton School of Business at the University of Pennsylvania, and the Marshall Wythe School of Law at the College of William and Mary, Ms. Faber is a frequent speaker, lecturer, and expert witness, who is active in many local and national real estate related trade and legal organizations.

The first time I got into the title insurance business was in 2003, and it was all because of first grade homework. I had twins in 1997 and a third child fifteen months later. Though some never thought I would return to the private practice of law after having twins (and certainly not after that third one), I had in fact remained a partner in the real estate practice group of the large law firm I was with for seven years after becoming a mother. My husband was also practicing real estate law as a partner in a large firm. We were not from Virginia and had no family here, but we managed with three wee ones by cobbling together a precarious network of daycare and nannies. This was, keep in mind, in the dark ages before smart phones and constant connection. I may have had a Blackberry somewhere in there, and it was life altering. Nothing, however, prepared me for first grade.

Much to our dismay, my husband and I would come home from a long day at work only to find that our children, in essence, were swinging from the chandeliers. Homework wasn't done, they were eating Oreos for dinner, and somehow I was uninformed that one or the other of them needed a chicken costume by 7:45 a.m. the next day for the school performance that was not on my calendar. Life was chaotic, and I realized that a major change was in order. I still very much loved my work and did not want to retire after 14 years in private practice, but *I* needed and *WE* needed something to change. Lo and behold, at that moment along came an opportunity to work for a national title insurance company, right here in Hampton Roads, as claims and commercial underwriting counsel.

It was a wonderful opportunity. I was free from billing hours and enjoyed a "regular" schedule which addressed the issues at home. Professionally, it was a learning experience on many fronts. In addition to the ins and outs of every facet of title insurance, I learned to "run" a business; I cultivated business development and marketing skills dissimilar to those which attorneys typically employ. My technological skills increased. I met and worked with people all over the country; I traveled a bit, and joined professional and trade organizations which were new and different. Most enjoyable was the ability to really delve into a legal problem and spend as much time as I needed to without the worry of what those hours would cost the client. I became a far better lawyer. Rather than being limited to just matters of pure real estate law, in order to underwrite I had to brush up quickly on, and then master, topics I would never truly study as a real estate finance practitioner: bankruptcy, trusts and estates, federal law, pure insurance, civil procedure. Thankfully, I'm a pack rat and in those early days I pulled out my law school exam outlines on more than one occasion. I also got to teach quite a bit, and nothing makes you better at what you do than having to teach it to someone else.

Why then did I leave my career in title insurance? Frankly, it was a sexy skiing job! Another opportunity presented itself for me to stay in Virginia Beach but work for a Denver law firm developing ski resorts around the world. The job was remote in a time when remote jobs did not exist, and it was the first time I had ever heard of a VPN. As an avid skier, I could not resist the allure. So develop (and ski) I did…until 2008 when the bottom fell out and folks were just concerned about keeping a roof over their heads and food on the table and not so much about their fractional interest in the ski chalet in British Columbia. Back to local private practice I went until I found the position I am now in and have enjoyed since 2012.

I was very happy to return to title insurance, this time for a large agent, not a national carrier. An agency that I knew well both from being a customer, and from it being an agent of the national carrier for whom I had worked, was looking to replace its retiring in-house counsel. I took the job and since that time have been back enjoying all the things this industry had to offer me originally–and more. It was an exciting time for title and settlement agents with courthouses going online and title searches being able to be done completely remotely in many instances. Additionally, online recording has changed the way we do business. Title Insurance has always been technologically intensive but never so much as in the last four years since COVID. RON, or remote online notarization, gained popularity and acceptance and remains the next technological impetus that will drastically change the way real estate closings are done. The current state of affairs always makes this job interesting as well. Popular topics of late are insuring marijuana production and processing facilities, prohibition of foreign land ownership in militarily sensitive areas, cryptocurrency as "good" funds (?), reparations, and AI.

I think every commercial real estate finance practitioner at one time or another has an existential conversation with him or herself and asks: Does the world really need another office building? Is fighting over this waiver of jury trial provision in this deed of trust really the best use of my time and talents? Are tax credits and like-kind exchanges really fair? Some of the work I do as a title insurance professional has truly worthy impact on both individuals and society, and frankly, that makes me feel good. I very much enjoy assisting members of our armed forces rotate in and out of our military-laden area with comfort and ease as they buy and sell their homes with each new set of orders. The company I am with currently does much "green" and "antiquities" work and I genuinely feel I am benefiting society when I am part of a project that preserves green space or historical sites that would otherwise be lost. As I work on a complicated Federal project creating a levee along the waterfront in one of our local riparian communities furiously fighting sea-level rise, I realize that I am literally a part of changing the landscape for centuries to come.

There will not be a third re-entry into title insurance for me, if I have anything to say about it. Because our company just merged with a national agency and became one of the largest title insurance agents in the country, I find myself working in many states now, in addition to my beloved Virginia, all without having to take another Bar Examination. Funny, two of those are Montana and Colorado, and both projects involve ski resorts. Hmmm. If you are a real estate attorney considering a job switch or a newly minted, land-loving law school graduate perhaps not wanting to work in the law firm environment, I encourage you to explore the wonderful world of title insurance. Often and correctly referred to as a "graying" industry, career opportunities abound, and you too may find it to be a very satisfying legal career option.

DO SECURITY CAMERAS IN HOAS AND CONDOMINIUMS INFRINGE ON PRIVACY RIGHTS?

By John C. Cowherd

John C. Cowherd is a member of the Virginia State Bar's Real Property Section with a focus on Northern Virginia clients. He has over 15 years of experience litigating and arbitrating community association, neighbor, construction, and real property disputes. In his spare time, his family enjoys water-related activities in Virginia's Northern Neck.

Use of security cameras is widespread in HOAs and condominiums, but it can also be controversial. Cameras are often positioned to view both the owners' lot and nearby property. Residents install security cameras based on generalized fear or in reaction to a specific incident. Often, someone finds this objectionable because it records his or her lot or common area (or could easily be reconfigured to do so). Many associations install video cameras on common elements in response to security complaints. Video cameras allow property owners to easily monitor their property while doing other things. This can cause neighbors to feel a loss of useful value to the "open" portions of their property due to a sense of being surveilled.

When disputes arise, homeowners want the community to take their side. However, the legal obligations are oftent unclear. The developer constructs the community and files use restrictions in the land records. Thereafter, general law and technology evolve at separate paces.

The camera's owners may be concerned about a threat of wrongful behavior against them or their property, such as theft, assault, or trespassing. For many, the camera functions as a "guarantor" of a variety of property rights, including that of privacy. Sometimes the placement of the camera makes its purpose obvious. If the viewing range includes someone else's unit or lot, this raises a question of possible harassment or invasion of privacy. Use of video cameras relates to other controversies in society; for example, some groups are more likely to find a protective value in owning a properly-placed camera and may be more vulnerable to harassment by improperly placed cameras. A camera can undoubtedly be misused for "peeping tom" purposes. Camera disputes between neighbors can escalate into acrimony involving law enforcement or community managers.

Community associations law intersects with the social concept of etiquette. Restrictive covenants and governing associations proliferated alongside social changes brought on by the industrial revolution. These new developer-designed communities helped organize the lifestyle, investment, and spending practices of a new middle class. Emily Post, in her 1937 edition of her famous book on Etiquette, explained how privacy is a common concern:

> . . . no exaction of perfect behavior is more essential to all thoroughbred people than the right to privacy. . .. In its usual interpretation, the term exclusive society brings to mind an impression of arrogance, and it can of course mean that. But it can also mean the undisturbed companionship of family and chosen friends; the privilege of leading one's life in peace and tranquility. One of the greatest advantages that money grants is the boon of privacy to those who can live in a house guarded by servants, who can build high walls around their garden, who can devise a retreat of their own where they can work or dream or spend the precious hours as they choose. But this protected tranquility is within the reach of very few. In millions of homes, safety from interruption is granted only by the consideration of friends and neighbors. . . . We should never walk into the house of another (as though it were our own) unless such behavior is encouraged.[1]

[1] Post, Emily, Etiquette – The Blue Book of Social Usage, 621-22 (Funk & Wagnalls Co. 1937).

In places where homes are spaced apart and owners can install fences, neighbors rely less on a "social compact" to experience "quiet enjoyment" of property. Where the developer constructs homes close together and the only available open space is community space, individual privacy becomes a collective issue. Community association law reflects the idea that harmonious use requires binding rules because custom is insufficient. Neighbors are happier if they can be amicable, but as it is often said, "good fences make good neighbors" and some degree of separation is desirable to allow space for the private lives of each owner. HOAs can run amok with handbook revisions and fines, but it is difficult to imagine how one could have "safety from interruption" in a condominium or townhouse development without thoughtful community rules.

Many recorded bylaws reflect an earlier age when security cameras were not widely used. Most associations do not have recorded instruments that speak directly about cameras, primarily because individual residential doorbell cameras are a relatively recent product and had previously been prohibitively expensive. Some newer communities may have covenants that require HOA architectural approval for just about any structure or object that is visible from the common areas. In this sense, the association is regulating the way that the camera looks *to* the public, not how the camera looks *at* the public. Overall, HOAs tend to be permissive when it comes to video cameras. Sometimes a board or committee will conduct a vote on a neighbor's camera dispute, but often the association does not intervene. At least one attorney who represents HOA boards in Northern Virginia has taken the position that if a camera on one lot looks into the dwelling of the neighbor, then this may lead to a civil claim of trespass under Virginia law. However, there is not yet any published appellate authority for this position.

The operation of security cameras by community associations as equipment installed on common areas raises additional issues. Condominiums and HOAs ordinarily have significant latitude as to how to operate the common areas for their intended purposes.[2] The association's mandate with respect to the common areas may be limited by provisions in the recorded instruments. Perhaps the greater controversy surrounds the accumulated videos and photographs taken by the camera. The Property Owners Association Act ("POAA") and Virginia Condominium Act allow members to submit books and records requests for data kept by the association.[3] Those statutes contain specific categories of documents that the association may withhold from inspection requests.[4] The collection of security camera video footage or license plate images is not something that the POAA or Condominium Act address specifically in the statutes. Associations that keep such records but refuse to divulge them (or explain how the information is used) may find themselves in litigation, especially if the keeping of such records impacts a homeowner's rights or may contain information useful to someone's investigation.

If Virginia law does not provide a clear standard, it is useful to ask what the laws of neighboring states may require. Maryland, the District of Columbia, and some other states recognize a tort of intrusion upon solitude or seclusion, following, more or less, the Restatement of Torts approach:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[5]

[2] See, e.g., Va. Code § 55.1-1819(A) & Va. Code § 55.1-1956(A)(2).

[3] Va. Code § 55.1-1945(B) & Va. Code § 55.1-1815(B).

[4] Va. Code § 55.1-1945(C) & Va. Code § 55.1-1815(C).

[5] *Harleysville Preferred Ins. Co. v. Rams Head Savage Mill, LLC,* 237 Md. App. 705 (2018); *Wolf v. Regardie,* 553 A.2d 1213 (D.C. 1989); Rest. 2d. Torts § 652A.

This would forbid peering into a window behind which the occupants had secluded themselves.[6] A homeowner or tenant ought not to be forced to completely block her own window in order to avoid such intrusion, particularly for the second story or back of the house. The restatement rule extends to a variety of other activities unrelated to security cameras, such as wiretapping, unauthorized entry, opening of mails or searching of a wallet.[7] Some of these activities are also forbidden by other common law or statutory restrictions.

The laws restricting the undisclosed recording of "audio" conversations are statutory and vary by jurisdiction in ways that do not necessarily track the court's recognition of "visual" privacy torts. For example, D.C. and Maryland have adopted the restatement approach for intrusion upon seclusion, but Maryland is much more restrictive than D.C. when it comes to audio recordings.[8]

Casting a floodlight is not evaluated by the same legal standard as use of a video camera. This can be confusing - sometimes lights are used in tandem with security cameras. In Virginia, shining a floodlight onto the lot of another can be the basis of tort liability, particularly if it interferes with sleep.[9] In some instances, it may constitute a zoning violation.

Virginia law contains different privacy protections than some other states. In 2002, the Supreme Court of Virginia expressly declined to recognize a tort of the unreasonable intrusion of privacy. Because the General Assembly adopted legislation recognizing other privacy rights but not that one, the Supreme Court would not hold otherwise. In *WJLA-TV v. Levin*, Dr. Levin sued Channel 7[10] news for defamation after it aired the conclusions of an investigation.[11] The televised program alleged that Dr. Levin sexually assaulted patients.[12] Dr. Levin's claims included one for invasion of privacy. The jury returned a verdict in Dr. Levin's favor on the defamation and unauthorized use of image claims.[13] The Supreme Court affirmed the defamation part of the verdict. In a footnote, the Court observed that by only codifying the tort of misappropriation of name or likeness for commercial purposes, the General Assembly implicitly excluded the other privacy torts.[14] Based on this authority, trial-level courts in Virginia often disallow any claims for intrusion upon seclusion. However, in 2017, the General Assembly enacted Va. Code § 18.2-130.1:

> It is unlawful for any person to knowingly and intentionally cause an electronic device to enter the property of another to secretly or furtively peep or spy or attempt to peep or spy into or through a window, door other aperture of any building, structure, or other enclosure occupied or intended for occupancy as a dwelling, . . . without just cause, upon property owned by him . . under circumstances that would violate the occupant's reasonable expectation of privacy.[15]

---

[6] Rest. 2d. Torts § 652A, comment b.

[7] *Id*.

[8] Md. Code, Cts. & Jud. Proc. § 10-402 & D.C. Code § 23-542.

[9] *Willems v. Batcheller,* 109 Va. Cir. 319, 327-28 (Fairfax Co. Mar. 6, 2022), *discussing, Bowers v. Westvaco Corp.,* 244 Va. 139 (1992) *and Bellamy v. Husbands*, 13 Va. Cir. 433 (Arlington Co. 1972).

[10] WJLA-TV broadcasts over the air as Channel 7 in the Washington, DC and surrounding area. –Ed.

[11] *WJLA-TV v. Levin,* 264 Va. 140 (2002).

[12] *WJLA-TV*, 264 Va. at 146-47.

[13] *Id.,* 149-50.

[14] *Id.,* 160, fn. 5

[15] Va. Code § 18.2-130.1(tarting on July 1, 2023, this offence will start including use of drones as within the scope of the offense).

This criminal statute does not have a corresponding enactment making the prohibited conduct also a civil action.

Also in 2017, the General Assembly created a civil action corresponding to the criminal offense of creating an authorized image of someone in a state of undress.[16] That corresponding criminal statute outlawed creating a video or still image of a nonconsenting person who is nude, in their undergarments or in an exposing state of undress, etc. in a place like a dressing room, bathroom, or bedroom in situations where the victim had a reasonable expectation of privacy.[17]

These enactments raise questions as to whether the Virginia courts ought to recognize unreasonable intrusion upon seclusion as a tort, by the Restatement approach or some other formulation. The General Assembly's 2017 enactments do not seem to expressly overcome the implied non-enactment reasoning used by the Supreme Court in *WJLA-TV v. Levin*. That judicial analysis makes sense considering that the privacy rights at issue were not already recognized as coming down to contemporary Virginia through the English common law. In 2021, Justice Arthur Kelsey penned a dissent joined by two other justices that criticized a practice of following the Restatement Second of Torts in instances where it reflected academic views that deviated from the common law.[18] To ask Virginia courts today to innovate a protection in tort law against invasion upon seclusion would likely raise analogous controversies. But that's no reason to abandon exploration of potential solutions.

My opinion is that the development of privacy law in Virginia has not kept pace with urbanization or technological innovation. I think Virginia could recognize the restatement tort of intrusion upon seclusion without infringing upon a homeowner's right to use video cameras defensively or other legitimate purposes. The intrusion upon seclusion rule focuses on peering into windows and doors. Taking a photograph of someone in a public place, even in some instances when many people would consider it downright rude, does not subject the photographer to liability for invasion of privacy.[19] The Restatement approach still requires a case-by-case analysis. Recognizing this specific privacy right might discourage escalating acrimony among neighbors in use of video cameras. Of course, Restatement (Second) of Torts § 652B would create a civil action for other privacy rights not addressed in this article.

The controversies surrounding security cameras illustrate the inherent limitations of the community association model of residential development. Humans naturally crave privacy, order, convenience, and self-determination. Human emotions and conflicting interests run up against each other in the physical and legal structures of the association. Adoption of the restatement approach in Virginia of intrusion upon seclusion could restore the value of windows, doors, and open spaces in light of the developing technology and ever-increasing density of humanity. To do so would keep pace with the suburbanization of the Commonwealth.

[16] Va. Code § 8.01-40.4.

[17] Va. Code § 18.2-386.1.

[18] *Shoemaker v. Funkhouser,* 299 Va. 471, 489-514 (2021)(Kelsey, J. dissenting).

[19] *Deteresa v. American Broadcasting Cos. Inc.,* 121 F.3d 460 (9th Cir. 1997).

ANIMALS IN THE HOUSE!

By Kathryn N. Byler and Frank Clay

Kathryn N. Byler is the immediate Past Chair of the Real Property Section of the Virginia State Bar, Vice-Chair of the VSB Second District Committee, and a member of the Virginia Beach Planning Commission. She has practiced from the Virginia Beach office of Pender & Coward, PC since being admitted to the bar in 1998. As a licensed real estate broker and commercial property owner, Kathryn brings a heightened understanding of her clients' real estate and business needs. She holds a BSBA from Old Dominion University, an MBA from Golden Gate University and a JD from Regent University School of Law. Kathryn is an adjunct professor at Regent Law and Christopher Newport University, teaching Real Estate Transactions and Business Law.

Frank Clay is a law student at Regent University, expected to graduate in May 2024. In addition to his academic pursuits, he serves as a Sergeant in the U.S. Army Reserve, fulfilling the role of a Paralegal, thereby demonstrating his commitment to his country and the legal profession. Frank is also an intern for Judge April Wood on the North Carolina Court of Appeals and a Staff Editor for the Journal of Global Justice and Public Policy. He is an active Regent University Trial Advocacy Board member and a former intern for Justice D. Arthur Kelsey of the Supreme Court of Virginia. Frank intends to take the Virginia bar exam in July 2024 and pursue a judicial clerkship in Virginia as his next professional milestone. He intends to specialize in corporate and real estate law.

An apartment complex has a "no pets" policy but an applicant has a service animal.[1] What does that mean for the landlord? Some of the unusual emotional support animals ("support animal") under the Air Carrier Act include kangaroos, penguins, monkeys, pigs, ducks, and snakes. The act permits passengers to fly with a support animal if a licensed mental health professional has prescribed it. In other words, pigs *can* fly. But air travel is different from housing.

Consider the impact on apartment communities and homeowner associations ("HOA"), when a resident has an emotional support miniature horse or a pit bull service dog. Irrespective of their size or quantity, those animals are allowed. HOA rules and landlord-imposed regulations apply to pets but not to service and support animals. Gaining a comprehensive understanding of the distinctions among pets, service animals, and support animals is crucial to ensure that individuals deserving of special consideration are protected and that relevant laws are upheld.

INTRODUCTION

The primary authorities addressing service and support animals are the Americans with Disabilities Act (the "ADA") and the Fair Housing Act (the "FHA"). The ADA applies to public accommodations, while the FHA applies to virtually all housing, including apartments, condominiums, shelters, and other living spaces.[2] The ADA protects service animals but not support animals. The FHA protects both. Neither protects pets.

---

[1] *But see* 14 C.F.R. § 382.117(e) (2020) (revising the Air Carriers Act to prohibit emotional support animals unless the passenger provides documentation from a licensed medical professional).

[2] U.S. DEP'T OF HOUS. & URB. DEV., ASSESSING A PERSON'S REQUEST TO HAVE AN ANIMAL AS A REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT 2 n.1 (2020) [hereinafter HUD GUIDE] ("The Fair Housing Act covers virtually all types of housing, including privately owned housing and federally assisted housing, with a few limited exceptions."), https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf.

ADA: SERVICE ANIMALS AND REASONABLE ACCOMMODATIONS UNDER TITLE III

The ADA is designed to prohibit discrimination against physically and mentally disabled individuals.[3] To accomplish this goal, Congress divided the ADA into three main titles.[4] Title III prohibits discrimination based on disabilities by public programs, activities, and services.[5] Those who provide such services are commonly known as "public accommodations." However, Title III is also relevant for home providers because it helps define a service animal. Title III mandates that landlords offer reasonable accommodations for individuals with disabilities in one of the three designated categories: "[1] physical or mental impairment which substantially limits one or more . . . major life activities, [2] a record of having such an impairment, or [3] being regarded as having such an impairment."[6] Additionally, a service animal is strictly defined as "[1] a dog[7] [2] that is individually trained[8] [3] to do *work or perform tasks*, [4] for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability."[9]

Landlord's Guide Under the ADA

The landlord must first determine whether the individual is disabled, but may not inquire "about the nature or extent of a person's disability."[10] They are, however, allowed to "ask if the animal is required because of a disability and what work or task the animal has been trained to perform" when an individual's disability is not readily apparent.[11] For example, a person in a wheelchair is obviously disabled. But when the tenant's disability is not apparent, landlords may ask for the dog's training credentials as evidence of a disability. The ADA does not have a uniform standard for training dogs, nor does it issue training certifications, vests, or other indications of training.[12] The ADA allows "[p]eople with disabilities . . . to train the dog themselves and [they] are not required to use a professional service dog training program."[13] The ADA's only dog training requirement is to take a

---

[3] *See* 42 U.S.C. § 12101(b) (2023).

[4] *See id.* §§ 12111–12117 (Title I), 12131–12134, 12141–12150, 12161–12165 (Title II), 12181–12189 (Title III).

[5] *See id.* §§ 12181–12189.

[6] *Id.* § 3602(h)(1)–(3).

[7] Specifically, a public entity or private business must allow a person with a disability to bring a miniature horse on the premises if it has been individually trained to do work or perform tasks for the benefit of the individual with a disability, and as long as the facility can accommodate the miniature horse's type, size, and weight. *See* Anderson v. City of Blue Ash, 798 F.3d 338, 353 (6th Cir. 2015).

[8] *See* Bronk v. Ineichen, 54 F.3d 425, 430 (7th Cir. 1995) (stating that it is not discriminatory for a landlord to require a tenant to furnish training credentials from a school); Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua, 304 F. Supp. 2d 1245, 1256 (D. Haw. 2003) (holding that while there is no "federally-mandated animal training standard," the tenant must furnish some evidence of individual training), aff'd *Dubois v. Ass'n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175 (9th Cir. 2006).

[9] 28 C.F.R. 35.104(3) (emphasis added).

[10] AMERICANS WITH DISABILITIES ACT PRACTICE AND COMPLIANCE MANUAL § 2.107 (2023).

[11] *Id.*

[12] *Prindable*, 304 F. Supp. 2d at 1256.

[13] *Frequently Asked Questions About Service Animals and the ADA*, ADA, https://www.ada.gov/resources/service-animals-faqs/ (last updated Feb. 28, 2020).

specific action when needed to assist the disabled person.[14] A landlord can reasonably assume if the dog is able to perform physical tasks, it likely qualifies as a service animal under the ADA.[15]

Once the housing provider is aware of the person's disability by receiving proof of the service animal's training, however minimal that may be, they cannot discriminate against that disabled person. Furthermore, in states like Virginia, it's a misdemeanor for individuals to falsely claim their pet as a service animal.[16] Hence, to discourage misrepresentation, landlords are encouraged to display signage indicating the illegality of falsely claiming possession of a service animal.

No charge may be imposed for the service animal. Since most complexes have monthly pet fees, the temptation to designate a pet as a service animal to avoid the costs can be enticing for the tenant. Attempts to evade such fees are likely to prove ineffective under the ADA but may pass scrutiny under the FHA.

FHA: PROTECTIONS FOR EMOTIONAL SUPPORT ANIMALS & SERVICE ANIMALS

The Fair Housing Act was enacted as Title VIII of the Civil Rights Act of 1968. Initially, the FHA prohibited discrimination in the sale or rental of "dwellings" based on race, color, religion, or national origin, but Congress later added "sex," "familial status," and "handicap."[17] A dwelling is "any building, structure or any portion thereof which is occupied as, or designed or intended for occupancy as, a residence."[18] This broad definition applies where occupants remain for more than a brief stay. For example, the FHA applies to all residential buildings with four or more dwelling units but not to transient occupancies like hotels.[19]

Like the ADA, disabilities under the FHA are broadly defined to include (1) any physical or mental impairment that substantially limits one or more life activities, (2) a record of having such an impairment, or (3) regarded as having such an impairment.[20] The regulations implementing the FHA do not specifically define support animals or service animals. Instead, the Department of Housing and Urban Development (the "HUD") provides a blanket definition for all animals that provide medical assistance, defining them as assistance animals:

> Assistance animals are animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, *or animals that provide emotional support* that alleviates one or more identified symptoms or effects of a person's disability. . . . Some, but not all, animals that assist persons with disabilities are professionally trained. Other assistance animals are trained by the owners themselves and, in some cases, *no special training is required*. The question is whether or not the animal performs the assistance or provides the benefit needed as a reasonable accommodation by the person with the disability.[21]

---

[14] *Id.*

[15] *See* Rebecca Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37 PEPP. L. REV. 1163, 1212 (2010).

[16] VA. CODE ANN. § 51.5-44.1 (2016) (stating that misrepresentation of a service animal is a misdemeanor criminal offense).

[17] *See generally* 42 U.S.C. §§ 3601 (discussing the background and need for the Fair Housing Act).

[18] *Id.* § 3602(b).

[19] *See id.* § 3604.

[20] *Id.* § 3602(h).

[21] HUD GUIDE, *supra* note 2, at 1 (emphasis added).

As we will see, a housing provider must be far more lenient in accommodating tenants given the broader definitions of "dwelling" and "emotional support," and the removal of any training requirement in some cases.

Reasonable Accommodations for Assistance Animals under the FHA

What qualifies as a "reasonable accommodation" is a fact-specific question and must be determined case-by-case.[22] A one-size-fits-all approach for tenant policies will deny some disabled individuals the equal opportunity to use and enjoy a dwelling.[23] Therefore, a court will instead weigh the costs and benefits to determine whether a landlord satisfied the reasonableness requirement to accomplish the benefits more efficiently.[24] Most support animal accommodations are considered reasonable, limiting the housing provider's ability to control their property.[25] Furthermore, under the ADA and FHA, housing providers may not restrict the breed or size of a dog.[26] And the FHA's definition is not limited to using dogs as support animals.[27] Also, the standard justifications for a "no-pet" policy or additional fees do not survive under the reasonable accommodation analysis.[28]

Landlord's Guide Under the FHA: Distinguishing Service Animals, Support Animals, and Pets

The HUD provides that a support animal is not a pet.[29] However, the department fails to distinguish the two.[30] Instead, if the animal is not a service or support animal, it is a pet and is subject to regulation by the home provider.[31] Adding more confusion is the ADA and FHA's definitions of support animals, which directly contradict each other. The FHA's broad definition of support animals makes it almost impossible to differentiate them from regular pets.

---

[22] Scoggins v. Lee's Crossing Homeowners Ass'n, 718 F.3d 262, 272 (4th Cir. 2013) ("In determining whether a proposed accommodation is reasonable under the FHAA, we undertake a fact-specific inquiry . . . .").

[23] *See id.* § 3604(f)(3)(B).

[24] Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995) (holding that a reasonable accommodation does not entail an obligation to do everything humanly possible to accommodate a disabled person; cost to the defendant and benefit to the plaintiff merit consideration as well) (citation omitted).

[25] *Gudiance Document: Reasonable Accomodation Requests for Assistance Animals*, DEP'T OF PRO. & OCCUPATIONAL REGUL. (Mar. 1, 2017), https://www.townhall.virginia.gov/L/GetFile.cfm?File=C:%5C%5CTownHall%5C%5Cdocroot%5C%5CGuidanceDocs%5C%5C222%5C%5CGDoc_DPOR_6045_v2.pdf.

[26] HUD GUIDE, *supra* note 2, at 14.

[27] *Fair Housing and Assistance Animals*, DISABILITY L. CTR. OF VA., https://www.dlcv.org/wp-content/uploads/2021/01/Fair-Housing-and-Assistance-Animals-Fact-Sheet.pdf (last visited April 14, 2023).

[28] *See, e.g.*, *Bronk*, 54 F.3d at 429 ("Balanced against a landlord's economic or aesthetic concerns as expressed in a no-pets policy, a deaf individual's need for the accommodation afforded by a hearing dog is, we think, per se reasonable within the meaning of the statute."); Green v. Housing Auth. of Clackamas Cty., 994 F. Supp. 1253, 1256 (D. Ore. 1998) (waiving no-pets policy would not cause undue burden or fundamental alteration).

[29] HUD GUIDE, *supra* note 2, at 3.

[30] *Id.* ("An animal that does not qualify as a service animal or other type of assistance animal is a pet for purposes of the FHA and may be treated as a pet for purposes of the lease and the housing provider's rules and policies.").

[31] *Id.*

The confusion stems from the words "work," "task," and "emotional support." A service animal is easily distinguished because it must work or be capable of completing tasks under the ADA. If a service animal satisfies the ADA's criteria, it also satisfies the FHA's. But as previously noted, support animals are not afforded protection under the ADA as they do not perform tasks or work.[32] However, HUD provides that support animals are those animals that provide emotional support for individuals with disabilities.[33] If the animal's presence alone provides emotional support, does not work or perform a task, and does not need to satisfy a training requirement in some cases, what is the difference between a support animal and a pet? There is no difference. This opens the door for severe abuse of the housing provider's right to control his property.

Distinguishing Emotional Support Animals Under the FHA from Psychiatric Service Animals Under the ADA

The ADA prohibits emotional support dogs but protects psychiatric service dogs.[34] The American Kennel Club provides a helpful example:

> Psychiatric service dogs . . . have been trained to do certain jobs that help the handler cope with a mental illness. For example, the dog might remind a person to take prescribed medications, keep a disoriented person in a dissociative episode from wandering into a hazardous situation such as traffic or perform room searches for a person with post-traumatic stress disorder. If it is simply the dog's presence that helps the person cope, then the dog does not qualify as a psychiatric service dog.[35]

Therefore, Psychiatric service dogs are distinguished from emotional support animals because the former have been specially trained to help with a particular mental illness by performing physical tasks, while the latter provides a benefit just by being present.[36]

Certification Requirements

Like the ADA, the FHA does not require formal or professional training standards, but both require some indication of training.[37] Neither the ADA or the FHA require a certification card, vest, or other indicators that an animal is trained. This loose standard is troublesome for housing providers because of the rise of online emotional support animal certification services.[38] For example, websites like Threapypet.org assure users that landlords will accept its letters certifying their support animal.[39] These certification programs confuse public accommodations, housing providers, and tenants alike, leaving both parties unsure of their rights. Consider also, that in "some cases, no special training is

---

[32] *Frequently Asked Questions About Service Animals and the ADA*, *supra* note 13.

[33] HUD GUIDE, *supra* note 2, at 1.

[34] 28 C.F.R. 35.104(3) ("[E]motional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.").

[35] *Everything You Need to Know About Emotional Support Animals*, AM. KENNEL CLUB (Feb. 24, 2021), https://www.akc.org/expert-advice/news/everything-about-emotional-support-animals/ .

[36] *Id.*

[37] In re Kenna Homes Co-op. Corp, 210 W. Va. 380, 390 (2001).

[38] Kate Basalla, *Shortening the Leash: Emotional Support Animals Under the Fair Housing Act*, 89 CIN. L. REV. 140, 141 (2020).

[39] *Frequently Asked Questions About ESA's*, THERAPYPET, https://therapypet.org/faq ("A person who is prescribed an ESA must be offered reasonable accommodations. There are very few exceptions to this rule. The letter also allows you to bypass breed and size restrictions, and not be forced to pay additional rent and/or pet security deposits.") (last visited April 15, 2023).

required?"[40] What are those occasions? HUD does not provide a limiting principle. Luckily for housing providers in Virginia, a recent bill was enacted that penalizes any business that produces a fraudulent document asserting that an animal is a service or support animal.[41] However, a note from a person's health care professional that confirms a person's disability or needs for an animal when the provider has personal knowledge of the individual is presumably sufficient.[42]

CONCLUSION

Service animals are protected under the ADA and FHA regardless of homeowner's associations, apartment communities, or other housing and public accommodation regulations. Support animals do not have the same legal protections. Service animals must meet a higher, yet undefined, standard of training. Further, service animals only include dogs and miniature horses.[43] The FHA, however, allows for a variety of animals.[44] Under the ADA and FHA, a public accommodation and housing provider may ask if the animal is required because of a disability and what tasks the animal has been trained to perform. In short, public business entities and housing providers should be sensitive to the underlying objective of providing equal access to persons with disabilities. Housing providers can proactively mitigate legal disputes by acknowledging that under the FHA, there is minimal distinction between a pet and a support animal.

[40] HUD GUIDE, *supra* note 2, at 1.

[41] H.B. 1725, 439th Gen. Assemb., Reg. Sess (Va. 2023).

[42] *See id.*

[43] *Id.* at 144.

[44] *Fair Housing and Assistance Animals*, *supra* note 27.

CORSICAN CONTROVERSY — BE WARY OF WIRE TRANSFERS*

By E. Duffy Myrtetus

E. Duffy Myrtetus is a member of Eckert Seamans in its Richmond, Virginia, office, where he maintains a general practice in Virginia and Florida focused upon transactional and commercial litigation matters related to real estate and mortgage financing, and general business matters. He is a member of the Virginia and Florida Bar, and serves on The Florida Bar's Board of Governors and its Technology Committee.

An old friend from Miami now lives with his family in London, a renown international travel hub. They have made the most of their travel opportunities living there. Over the years, I have had to hear stories about trips they've made to a wide range of exotic destinations in Europe, the Mediterranean, Southeast Asia, etc. About eight years ago, he told me about a trip his family planned to Corsica. At the time, I knew little about Corsica but was intrigued. †

He researched and found a reputable, legitimate well known international travel agency with offices in Spain that handled rentals in Corsica. A beautiful villa was located to serve as a home base for a week-long trip traveling the island. Consistent with these types of transactions, half of the week's rental was due up front via wire transfer with the initial rental paperwork, passport information, etc. – the balance of the rental was due two weeks before arrival. He placed the initial wire, sent the paperwork and called to confirm receipt. A confirmation e-mail was sent from the travel agency acknowledging receipt. Two weeks before departure, he received an e-mail from the travel agency confirming the details of his rental and providing directions for the wire transfer of the final balance owed. He placed the final wire transfer and excitedly tackled final planning details for the trip.

Their flight arrived in Corsica, they rented a car and drove to the villa. When they arrived, the front door was locked; so, they called the rental agency who sent local representatives out to the property. "*Quale* si?" (Who are you?) the locals inquired in the local Corsu language. "*The renters for this week*" was the friend's response. "*No. The house is not rented this week*" was the reply; and, thus began negotiations of a major U.S.-Corsican international incident that culminated in a final (but expensive) solution for access to the villa.

Turns out the rental agency's e-mail system had been hacked. The hacker obtained the details of my friend's rental transaction, including his e-mail and the balance owed. It then provided fraudulent wire transfer instructions to my friend, which were later used for the transfer of the rental balanced owed. That wire transfer never reached the rental agency; and the owner assumed there was no rental. The renters did not learn about the fraud until they were locked out at arrival on the front door threshold of their rental villa. By the time the renters figured out what had happened, the wired funds had long been transferred out of legally trackable recipients.

This was my first personal exposure to wire transfer risk – and it was eight years ago! In the interim, fraudulent and criminal activity relating to wire transfers has exploded in the U.S. and internationally. The FBI's Internet Crime Report for 2021 includes these staggering statistics: (a) $6.9 billion victim losses in 2021; (b) 2,300+ average complaints received daily; and (c) 552,000+ average complaints received per year (last 5 years). (*see Internet Crime Report 2021*, FED. BUREAU OF INVESTIGATIONS (2021), https://www.ic3.gov/Media/PDF/AnnualReport/2021_IC3Report.pdf

---

* This Article was originally published in The Florida Bar Journal, Volume 97, No. 2 May/June 2023 and is reprinted with the permission of The Florida Bar.

† Corsica is the birthplace of Napoleon Bonaparte, who "was the second of eight children born to Carlo Buonaparte, a lawyer descended from Tuscan nobility." National Gallery of Victoria "Melbourne Winter Masterpieces" (*https://www.ngv.vic.gov.au/napoleon/napoleon-and-josephine/who-was-napoleon.html*).

Wire fraud is an evolving form of fraudulent action or enterprises that involves the use of, among other things, electronic communications, and/or the internet. It can in various forms include the use of phone communications, faxes, emails, text messaging, social media communications and other online platforms. It is difficult to quantify the varied ways in which criminal actors explore a victim's systemic vulnerabilities, and then capitalize upon them in furtherance of fraudulent activity. As in the Corsican Controversy above, hackers often penetrate systems and acquire data – or monitor communications or transactions — for periods of time (days, weeks, months, or years) in order to assess the most efficient means to steal money or information before taking action.

Real estate transactions are viewed as a target rich environment for fraudulent activity. The Florida Bar's Practice Resource Center© continues to receive reports of fraudulent activity targeting attorney trust accounts. The three most prevalent types of fraud are: (a) counterfeit bank checks; (b) compromised wire instructions; and (c) forged trust account checks. You can find a summary of each of the foregoing types of fraud at the Florida Bar's Legal Fuel/Practice Resource Center website: *Frauds Targeting Attorney Trust Accounts*, LEGALFUEL (March 5, 2020), https://www.legalfuel.com/frauds-targeting-attorney-trust-accounts/.

Hacked e-mails are one of the major sources of fraudulent activity. In real estate transactions, attorneys and title agents are increasingly reporting that their email communications have been compromised and that third-party hackers are using illegally acquired data and information from emails in order to communicate fraudulent wiring instructions or other information to buyers, settlement agents and others. Often, the emails or other communications appear to be legitimate. Consequently, when followed they result in lost funds that cannot be recovered. Unlike checks, wire transfers typically cannot be recovered once sent.

Many law firms and lay closing or settlement agents have begun using "old school" or law-tech practices to mitigate the risk of wire fraud. On the extreme end of that scale, some firms and agents require hardcopy/paper wire instructions that are signed and notarized by the issuing party. Few require an indemnity from the party providing the instructions. Others, require encrypted or secure e-mails only for receipt of wire instructions for use in a transaction; and, almost universally all make independent telephone calls (or take other steps to validate and verify) such instructions before utilizing them at a closing.

Increasingly, instructions like the following appear in pre-closing instructions, or in connection with requirements from closing agents in connection with wire transfers:

I. *WIRE FRAUD ALERT. If you receive an e-mail from this office requesting that you wire or otherwise transfer funds, you must confirm the request and any corresponding instructions by telephone with this office before you initiate any transfer. Email accounts of attorneys, other professionals and businesses are being targeted by hackers in an attempt to initiate fraudulent wire requests.*

II. *WARNING! WIRE FRAUD ADVISORY: Wire fraud and email hacking/phishing attacks are on the increase! If you have an escrow or closing transaction with us and you receive an email containing Wire Transfer Instructions, DO NOT RESPOND TO THE EMAIL! Instead, call your escrow officer/closer immediately, using previously known contact information and NOT information provided in the email, to verify the information prior to sending funds.*

III. *Wire transfer – security (sent via encrypted e-mail or letter):*

Attached please find wire transfer instructions for the transfer of funds to the [closing agent]. Since wire instructions are provided, we are required to send this message via secure e-mail. Please confirm receipt by responding with an acknowledgement that you received and accessed these instructions.

> *When you place the wire, your bank will issue a wire confirmation number. Please provide the wire confirmation number to my attention immediately when the transfer is placed, so that we can track it on our end for receipt and credit.*
>
> ***Given the prevalence of wire transfer fraud, under no circumstances should you accept any changes or request for changes to the wire transfer instructions I provide, or any directions to alter or change such wire transfer instructions or recipient, from any person or entity other than me directly.***

The American Land Title Association ("ALTA") provides a number of incredibly helpful resources for use in preparing for, verifying and using wire transfer instructions in real estate transactions (https://www.alta.org/business-tools/wirefraud.cfm). These materials include proposed checklists and suggested practices. In addition to outgoing wire transfer checklists, these ALTA materials also include suggested practices for a "Rapid Response Plan for Wire Fraud Incidents" available in Excel or .PDF formats (see https://www.alta.org/business-tools/wirefraud.cfm).

Here are some additional suggested practices from The Florida Bar's LegalFuel/Practice Resource Center (https://www.legalfuel.com/hacked-emails-can-lead-to-wire-transfer-fraud/) for protocols that might help mitigate or avoid risk for fraud from hackers. They require attorneys and law firms to engage and constantly emphasize these points to their attorneys and staff:

1. Immediately delete unsolicited email (spam) from unknown parties.
2. Do NOT open spam e-mail, click on links in the e-mail, or open attachments. These often contain malware that will give subjects access to your computer system.
3. Use strong passwords and frequently change passwords on all devices.
4. Never click on a link, open an attachment, or reply to a suspicious email.
5. Check your online bank account daily and change your banking passwords often.
6. When out of the office, avoid free Wi-Fi to protect against hackers capturing a password.
7. Never send wire transfers or any sensitive information by email, unless it is encrypted.
8. Install all the updates for your virus protection software and anti-spyware.

While these forms of fraud affect all types of businesses and professions, attorneys have a number of unique duties (see: https://www.legalfuel.com/ethical-obligations-what-must-lawyers-do-to-maintain-privileged-information-and-comply-with-applicable-regulations/) to, among other things, to protect client information as well as client funds. Arguably, the risk for the legal profession is greater than others. Cybersecurity insurance and software tools may help; but diligence in the office and with staff is likely one of the best defenses.

Resources:

Florida Bar / LegalFuel: https://www.legalfuel.com/

American Land Title Association: https://www.alta.org/business-tools/wirefraud.cfm

U.S. Federal Trade Commission: https://consumer.ftc.gov/articles/you-wire-money

Wells Fargo: The Ins and Outs of wire Transfers - https://www.wellsfargo.com/financial-education/basic-finances/manage-money/payments/ins-outs-transfers/

RENTERS WITH CRIMINAL HISTORY AS QUASI-PROTECTED CLASS: GUIDANCE FOR VIRGINIA ATTORNEYS

By Jessiah S. Hulle

Jessiah S. Hulle is a litigation and investigations associate at Gentry Locke Attorneys in Roanoke, Virginia.

Property owners and lessors understandably want to prevent crime in and around their private rental properties. Crime reduces property value, negatively affects resident health, restricts economic expansion, and often exposes vulnerable persons such as children to violence.[1]

A knee-jerk reaction to reducing crime on rental properties is to ban all applicants with criminal history. This practice is not expressly prohibited by fair housing laws. However, guidance from the United States Department of Housing and Urban Development and the Virginia Fair Housing Office suggests that such blanket bans violate fair housing laws by disparately impacting certain protected classes.

Accordingly, Virginia attorneys should advise clients on best practices when screening rental applicants for criminal history to avoid fair housing litigation.

1. Fair Housing Laws in Virginia

Since 1776, the Commonwealth of Virginia has considered the right to privately own and maintain real property to be a fundamental right.[2] At that time, the common law right was so expansive that Lord William Blackstone called it "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[3] Property owners therefore generally rented and sold housing to whomever they pleased.

That reality has changed in the past sixty years. Although the common law still "jealous[ly] protect[s]" private property rights, it also recognizes that the government has sovereign power to subordinate those rights to the "greater needs of the public."[4]

In the 1960s, the federal government identified a great public need for fair housing laws. According to the United States Department of Housing and Urban Development ("HUD"), Black and Hispanic soldiers who fought in the Vietnam War "could not purchase or rent homes in certain residential developments on account of [their] race or national origin."[5] This discriminatory housing shortage was nothing new. In the early Twentieth Century, it was commonplace for property to be affixed with "racial covenants," which restricted the owner from selling or renting to certain targeted racial and

[1] *Neighborhoods and Violent Crime*, U.S. DEP'T. OF HOUS. AND URBAN DEV. (2016), https://www.huduser.gov/portal/periodicals/em/summer16/highlight2.html

[2] VA. CONST. Art. I, Sec. 1 (1776); VA. CONST. Art. I, Sec. 11, cl. 6 (rev. 1971)

[3] *Barr v. Atl. Coast Pipeline, LLC*, 295 Va. 522, 541-42 (2018) (quoting 2 William Blackstone, *Commentaries on the Laws of England* *2 (1765-69)).

[4] *Id.* at 542

[5] *History of Fair Housing*, U.S. DEP'T. OF HOUS. AND URBAN DEV. (2023), https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history

ethnic groups.[6] After the civil rights movement spotlighted the problem, Congress enacted the Fair Housing Act ("FHA")[7] in 1968. The stated policy of the FHA is, unsurprisingly, to "provide, within constitutional limitations, for fair housing."[8]

A few years later, Virginia followed suit, enacting a state analogue called the Virginia Fair Housing Law ("Virginia FHL")[9] in 1972. The stated policy of the law is "the protection of the people of the Commonwealth."[10] Courts have noted that the Virginia FHL largely tracks the federal FHA and applies similar standards.[11]

Both the FHA and Virginia FHL (collectively "fair housing laws") apply to all private housing except, in very limited circumstances, single-family houses rented by the owner if the owner has less than three such homes,[12] houses with four or less independent units where the owner occupies one unit,[13] and certain houses operated by exclusive membership or religious organizations.[14]

The FHA prohibits discrimination in housing on the basis of race, color, national origin, religion, sex (including gender identity and sexual orientation), familial status, and disability.[15] The Virginia FHL is broader, but still prohibits discrimination only on the basis of race, color, religion, national origin, sex, elderliness, familial status, source of funds, sexual orientation, gender identity, military status, and disability.[16] These protected classes are exhaustive.

2. Criminal History as Quasi-Protected Class

Neither the FHA nor the Virginia FHL expressly protect applicants with criminal history from discrimination in renting housing. In fact, it is common practice in Virginia and elsewhere for lessors to refuse to rent to convicted felons. A simple search on Zillow.com, the most popular real estate

---

[6] *Restrictive Covenants to Be Removed from Virginia Land Records*, VA. RELATORS (July 24, 2020), https://virginiarealtors.org/2020/07/24/restrictive-covenants-to-be-removed-from-virginia-land-records/

[7] 42 U.S.C §§ 3601 et seq. ("Fair Housing Act")

[8] *Id*.

[9] Va. Code §§ 36-96.1 et seq. ("Virginia Fair Housing Law")

[10] Va. Code § 36.96.1(B)

[11] *Matarese v. Archstone Pentagon City,* 795 F. Supp. 2d 402, 412 n.3 (E.D. Va. 2011), *aff'd in part and vacated in part on other grounds*, 468 Fed. Appx. 283 (4th Cir. 2012); *Miller v. Towne Oaks E. Apts.*, 797 F. Supp. 557, 561 (E.D. Tex. 1992*);* Commonwealth v. Lotz Realty Co., 237 Va. 1, 8 (1989); *Commonwealth ex rel. Real Estate Bd. v. Tutt Taylor & Rankin Real Estate, LLC*, 102 Va. Cir. 125, 131 (Loudoun Cnty. Cir. Ct. 2019)

[12] Va. Code § 36-96.2(A); 42 U.S.C. § 3603(b)(1)

[13] Va. Code § 36-96.2(B); 42 U.S.C. § 3603(b)(2)

[14] Va. Code § 36-96.2(C); 42 U.S.C. § 3607

[15] 42 U.S.C. § 3604; Exec. Order No. 13988, 86 Fed. Reg. 7023 (2021) (citing *Bostick v. Clayton Cnty.*, 140 S. Ct. 1731 (2020)); *Housing Discrimination Under the Fair Housing Act*, U.S. DEP'T. OF HOUS. AND URBAN DEV. (2023), https://www.hud.gov/program_offices/ fair_housing_equal_opp/ fair_housing_act_overview#_Who_Is_Protected

[16] Va. Code §§ 36-96.1, 36-96.3

website in the United States in 2022,[17] returns thousands of apartment listings with the limitation "no felons" or "no criminal history."

Does this mean that lessors in Virginia can freely screen and refuse to rent to applicants with criminal history? The answer, like most answers in law, is "it depends."

In 2015, a fractured United States Supreme Court held that a housing policy can violate the FHA if it "disparately impacts" a protected class. This is referred to as "disparate impact discrimination."[18] In the aftermath of that decision, HUD issued guidance stating that "criminal history-based restrictions on housing opportunities violate the [FHA] if, without justification, their burden falls more often on renters . . . of one race or national origin over another."[19]

In June 2022, HUD officially adopted and reinforced its guidance in a published directive. The directive emphasizes that a criminal history restriction on a rental violates the FHA if it "actually or predictably results in a disparate impact on a protected class." The directive surveys national criminal enforcement statistics and bias studies and concludes that criminal-history restrictions on rentals "frequently result in discrimination against protected class groups, including Blacks, Hispanics, and individuals with disabilities."[20] Federal courts afford HUD guidance "great weight" in interpreting the FHA.[21]

On the state level, it appears that no state court in the Commonwealth has held that a housing policy can violate the Virginia FHL if it results in disparate impact discrimination.[22] However, the Virginia Fair Housing Office ("the Office") has provided similar, albeit less formal, guidance to the HUD directive on its website. The Office expressly allows property owners to "ask all applicants to provide . . . criminal history checks."[23] But it also warns that criminal record screening can result in disparate-

---

[17] *Most Popular Real Estate Websites in the United States in 2022 Based on Monthly Visits*, STATISTA (2022), https:// www.statista.com/ statistics/ 381468/ most-popular-real-estate-websites-by-monthly -visits-usa/

[18] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc.*, 576 U.S. 519, 545-46 (2015); *cf. Betsey v. Turtle Creek Assocs.,* 736 F.2d 983, 986 (4th Cir. 1984)

[19] *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, U.S. DEP'T OF HOUS. AND URBAN DEV. (Apr. 4, 2016), https://www.hud.gov/ sites/ documents/ HUD _OGCGUIDAPPFHASTANDCR.PDF (hereinafter "HUD Guidance 2016")

[20] *Implementation of the Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions,* U.S. DEP'T OF HOUS. AND URBAN DEV. (June 10, 2022), https:// www.hud.gov/ sites/ dfiles/FHEO/documents/Implementation%20of%20OGC%20Guidance%20on%20Application%20of%20FHA%20Standards%20to%20the%20Use%20of%20Criminal%20Records%20-%20June%2010%202022.pdf (hereinafter "HUD Directive 2022")

[21] *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 478 F. Supp. 3d 259, 287 (D. Conn. 2020)

[22] Olivia Seksinsky & Madelyn Bellew, *Eviction Crisis Not Averted: Challenging Disparate Impact in the Search for Housing Stability During the Virginia Rent Relief Program's Epilogue*, 26 RICH. PUB. INT. L. REV. 1, 11 (2023); *De Reyes v. Waples Mobile Home Park Ltd. P'ship*, 205 F. Supp. 3d 782, 795 n.16 (E.D. Va. 2016), *vacated on other grounds by De Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415 (4th Cir. 2018)

[23] *Virginia Fair Housing Office: Suggestions for Housing Providers*, VA. DEP'T OF PROF. AND OCCUPATIONAL REG. (2023), https://dpor.virginia.gov/FairHousing

impact discrimination against Black and Latino applicants under the Virginia FHL.[24] (It is unclear if the Office intentionally distinguishes "Latino" applicants from the "Hispanic" applicants referenced in the HUD directive.)[25]

Importantly, even narrow criminal history restrictions can potentially violate fair housing law. For instance, the United States Court of Appeals for the Fourth Circuit has held that applicants recovering from past drug abuse, even illicit drug abuse, can qualify as "disabled" under the FHA. The Court reasoned that Congress "intended to recognize that addiction is a disease from which, through rehabilitation efforts, a person may recover, and that an individual who makes the effort to recover should not be subject to housing discrimination based on society's 'accumulated fears and prejudices' associated with drug addiction."[26] Therefore, imposing a blanket ban on applicants with drug possession convictions can disparately impact a protected class of applicants with a drug addiction disability.

At bottom, a ban on renting to applicants with criminal history is not expressly illegal, but such a ban invites civil liability under the FHA and possibly the Virginia FHL if it disparately impacts a protected class. (In fact, it is generally easier for a rejected applicant to sue for disparate impact discrimination than to sue for intentional discrimination.)[27]

For example, in 2019, the American Civil Liberties Union ("ACLU") sued an apartment complex in Chesterfield County, Virginia, that operated with a "no felons" policy. The ACLU, on behalf of advocacy group Housing Opportunities Made Equal ("HOME"), argued that the policy was racially discriminatory because it had a "disproportionate effect on African Americans," who are more likely to have felony records from over-policing.[28] The apartment complex settled the lawsuit but paid damages, attorney's fees, and a $15,000 donation to HOME.

That same year, HOME also sued a commercial owner of 12,000 apartments in Northern Virginia that "categorically bar[red] persons with virtually any type of criminal record." HOME argued that this ban "disproportionately exclude[d] Black and Hispanic applicants from access to rental housing," and cited numerous criminal enforcement statistics in support.[29] After eight months of litigation, the case settled when the property owner agreed to adopt a new criminal history rental policy that conformed with HUD guidance.

---

[24] *Fair Housing for People with Criminal Records*, VA. DEPT. OF PROF. AND OCCUPATIONAL REG. (2015), https://dpor.virginia.gov/sites/default/files/Virginia%20Fair%20Housing/B463-CriminalRecord.pdf#:~:text=The%20Virginia%20Fair%20Housing%20Law%20prohibits%20housing%20discrimination,result%20in%20discrimination%20against%20Black%20and%20Latino%20people

[25] *What's the Difference Between Hispanic and Latino*?, ENCYCLOPEDIA BRITANNICA ONLINE (Sept. 15, 2017), https://www.britannica.com/story/whats-the-difference-between-hispanic-and-latino

[26] *United States v. S. Mgmt. Corp.,* 955 F.2d 914, 923 (4th Cir. 1992)

[27] *See, e.g., De Reyes*, 205 F. Supp. 3d at 787, 791

[28] Fredrick Kunkle, *ACLU Sues Virginia Housing Complex Over Ban on Felons*, THE WASH. POST (July 4, 2019), https://www.washingtonpost.com/ dc-md-va/2019/07/04/ aclu-sues-virginia housing-complex-over-ban-felons/; Jennifer Safstrom & Rachel Goodman, *Blanket Bans on People with Criminal Records from Housing Opportunities Are Discriminatory and Illegal. So We Sued.*, ACLU VIRGINIA (May 31, 2019), https://www.acluva.org/en/news/blanket-bans-people-criminal-records-housing-opportunities-are-discriminatory-and-illegal-so-we; *Complaint, HOME of Virginia, Inc. v. Wisely Properties, LLC et al.*, No. 3:19-CV-413 (E.D. Va. June 4, 2019)

[29] *Complaint, Kniaz et al. v. Kay Management Company et al.*, No. 1:19-CV-01343 (E.D. Va. Oct. 23, 2019)

3. Fair Housing Law Best Practices

To help prevent fair housing litigation, attorneys should advise clients to engage in specific best practices suggested by HUD and the Virginia Fair Housing Office.

Under the FHA, lessors can screen rental applicants with a criminal background check. But lessors must have a *legitimate, nondiscriminatory justification* for refusing to rent to applicants if a criminal record is uncovered. A justification is "legitimate" if it is genuine and not false or fabricated.[30] And it is "nondiscriminatory" if it is created for some purpose other than to discriminate against a protected class, in circumvention of the FHA. (It goes without saying that intentionally adopting a criminal history restriction to avoid renting to a protected class violates the FHA.)

The original HUD guidance suggested that "ensuring resident safety" and "protecting property" are both "often considered to be among the fundamental responsibilities of housing providers." Therefore, courts may consider either to be a substantial and legitimate justification for a criminal history restriction.[31]

The 2022 HUD directive concurs, with some caveats. The directive appears to agree that ensuring resident safety and protecting property are legitimate justifications for a criminal history restriction but clarifies that an applicant's criminal history must "indicate a *demonstrable* risk" to the safety of residents or the property. Thus, "policies or practices that fail to consider the *nature*, *severity*, and *recency* of an individual's conduct are unlikely to be necessary to serve a substantial, legitimate, nondiscriminatory interest."[32]

According to the HUD directive, to avoid triggering the FHA, lessors that use criminal history background checks and rental restrictions should also use a formal, written policy outlining the process for applicants. The policy should be available to all applicants and supported by "reliable evidence" showing that it actually assists in protecting residents and the rental property. To satisfy this latter requirement, the policy should expressly consider the nature (e.g. violent, nonviolent), severity (e.g. felony, misdemeanor), and recency of criminal conduct and allow an applicant to view and correct inaccurate criminal records or explain "extenuating circumstances" relating to a criminal record. In other words, a lessor should narrowly tailor a criminal history screening or rental restriction policy to legitimate safety concerns.[33]

If an applicant has a concerning criminal history, a lessor should conduct an "individualized assessment" of the applicant before denying housing. The assessment should consider relevant mitigating information, such as the facts and circumstances of the criminal conduct, the age of the applicant at the time of the conduct, how long ago the conduct occurred, the applicant's otherwise-good tenant history, and the applicant's rehabilitation efforts. Even if an applicant poses a threat to other residents or the property, the lessor should consider whether a reasonable accommodation can reduce or eliminate that threat. Lessors conducting these individualized assessments must tread carefully; HUD warns that they are prone to often-unconscious racial discrimination.[34]

---

[30] 78 Fed. Reg. 11460, 11470 (Feb. 15, 2013)

[31] *HUD Guidance 2016*, supra at 19

[32] *HUD Directive 2022*, supra at 20 (emphases added)

[33] *Id.*

[34] *HUD Directive 2022,* supra at 20 (citing Matthew Ciardullo et al., *Locked Out Criminal Background Checks as a Tool for Discrimination Greater New Orleans Fair Housing Action Center,* L.A. FAIR HOUS. (2015), https://lafairhousing.org/wp%content/ uploads/2021/12/ Criminal_Background_Audit _FINAL.pdf)

(Notably, none of this guidance prohibits a lessor from refusing to rent to an applicant who "has been convicted . . . of the illegal manufacture or distribution of a controlled substance,"[35] such as heroin, methamphetamine, ecstasy, or cocaine,[36] or who is an unmitigable "direct threat" to residents or the rental property.[37])

In the same fashion, the Virginia Fair Housing Office has provided guidance to avoid triggering the Virginia FHL.

Unlike HUD, the Virginia Office openly allows lessors to screen applicants with criminal background checks and "cho[o]se not to rent to an individual with a conviction that *might* present a safety issue for other residents" on the property. After all, even a lessor who has no criminal history policy is "not going to accept every applicant."[38]

Yet like HUD, the Office also advises lessors to adopt and "consistently" enforce a formal, written criminal history policy. A sample written policy is hosted on the Office's website.[39] The sample suggests limiting criminal history screening to crimes that ostensibly threaten resident and property safety — including property felonies, major drug felonies, fraud felonies, major violent felonies against persons, and non-victimless sex felonies — committed within the last five years. If a criminal history screen flags one of these crimes, the lessor should then conduct an individual assessment to "determine whether the applicant is able to fulfill the obligations of tenancy at the property." During this process, lessors should "keep excellent records" and allow the applicant to produce possibly mitigating information, such as rehabilitation efforts. If the lessor rejects the applicant, the reason should be documented in a letter.[40]

A good, balanced example of a tailored criminal history rental policy is the one agreed to in the settlement of the Northern Virginia lawsuit mentioned earlier. That policy, in line with the FHA and Virginia FHL, screens rental applicants *only* for the following crimes: felony offenses in the past five years; drug sale, distribution, and manufacturing offenses in the past ten years; homicide and felony sex offenses in the past twelve years; and registered sex offenses in the past twenty-five years.[41]

An even better example is the criminal history policy agreed to in the Chesterfield County lawsuit mentioned earlier, which mirrors the sample policy suggested by the Virginia Fair Housing Office. That policy screens rental applicants only for convictions of property felonies (e.g. theft, burglary, vandalism, arson), major drug felonies (e.g. distribution, manufacture, trafficking), fraud felonies, major violent felonies against persons, and non-victimless sex felonies *within the last five years*.[42] Notably, the policy disregards misdemeanors, probation and parole records, "arrests, charges, expunged convictions, convictions reversed on appeal, vacated convictions, offenses where

---

[35] 42 U.S.C. § 3607(b)(4)

[36] *Drug Scheduling*, DEA (2023), https://www.dea.gov/drug-information/drug-scheduling

[37] 42 U.S.C. § 3604(f)(9)

[38] *Suggestions for Housing Providers*, supra at 23 (emphasis added)

[39] *Model Policy for Tenant Screening*, VA. OFFICE OF ATT'Y GEN. (2021), https://oag.state.va.us/files/2021/Model-Policy-for-Tenant-Screening.pdf

[40] *Id.*

[41] Jeff South, *Virginia Apartment Manager Ends Screening Policy Barring Renters with Minor Convictions*, VA. MERCURY (July 28, 2020), https://www.virginiamercury.com/2020/07/28/nova-apartment-manager-ends-screening-policy-tied-to-racial-bias/; *Partial Judgment Against Defendants by Consent, Kniaz et al. v. Kay Management Company et al.,* No. 19-CV-01343 (E.D. Va. June 9, 2020)

[42] *Sterling Glen Criminal History Policy*, ACLU VIRGINIA (2019), https://www.acluva.org/sites/default/files/field_documents/2019.08.05_sterling_glen_criminal_background_policy.pdf

adjudication was withheld or deferred, pardoned convictions, or sealed juvenile records." Additionally, the policy allows rental applicants to correct criminal background check reports and provide mitigating information, such as rehabilitation efforts.[43]

The ACLU of Virginia has referred to this latter policy as "a model for the rental housing industry" because it is "narrowly tailored to consider only categories of offenses that are related to community or property safety."[44] This is a strong sign that lessors who adopt similar policies can preempt litigation by housing advocacy groups in Virginia like the ACLU and HOME.

As a reminder, though, a lessor who adopts a written criminal history policy must consistently abide by the policy for it to operate as a reliable safeguard.[45] Applying the policy only to some rental applicants, especially applicants of racial and ethnic minorities, defeats the purpose.

4. Inequity and Risk

Of course, the best practices proposed by HUD and the Virginia Fair Housing Office are, by definition, nonmandatory. That said, attorneys should encourage clients to follow these best practices for two reasons.

First, ignoring best practices exacerbates inequity in housing.

The FBI estimates that over 75 million United States citizens have criminal charge, arrest, or conviction records.[46] As of 2010, approximately 8% of the population, and 33% of the Black male population, have felony convictions.[47] Felonies range from the severe and violent, such as murder, to the mild and generally victimless, such as marijuana possession. Felons range too from current criminals to model citizens who made past mistakes. At least one academic study has concluded that, after seven years without reoffending, persons with a criminal history pose a comparable risk of committing a crime as persons with no criminal history.[48] Simply put, property lessors limit themselves and society by refusing to rent to anyone with a history of criminal conduct without regard to severity or recency.[49]

---

[43] Jennifer Safstrom & Tony Dunn, *Lawsuit Settlement Leads to Model Policy for Housing Providers*, ACLU VIRGINIA (Aug. 6, 2019), https://www.acluva.org/en/news/lawsuit-settlement-leads-model-policy-housing-providers

[44] *Id.*

[45] *Suggestions for Housing Providers*, supra at 23

[46] Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014), https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402; Dan Clark, *How Many U.S. Adults Have a Criminal Record? Depends on How You Define It*, POLITIFACT (Aug. 18, 2017), https://www.politifact.com/factchecks/2017/aug/18/andrew-cuomo/yes-one-three-us-adults-have-criminal-record/#:~:text=So%20by%20the%20FBI%E2%80%99s%20standard %2C%2073.5 %20million%20people,percent%20of%20adults%20to%20have%20a%20criminal%20record

[47] Alan Flurry, *Study Estimates U.S. Population with Felony Convictions*, U. GA. TODAY (Oct. 1, 2017), https://news.uga.edu/total-us-population-with-felony-convictions/

[48] Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY AND PUB. POL'Y 483 (2006)

[49] *See generally* Valerie Schneider, *The Contemporary Face of Housing Discrimination and the Fair Housing Act: Racism Knocking at the Door: The Use of Criminal Background Checks in Rental Housing,* 53 U. RICH. L. REV. 923 (2019)

Second, snubbing best practices exposes lessors to an uncomfortable amount of litigation risk.

A lessor without a formal criminal history policy can, obviously, screen an applicant for criminal history but then reject the applicant for other unproblematic reasons, such as bad credit. At first blush, this seems okay. But a closer look reveals significant risk.

Litigation initiated by a rejected applicant can reveal a pattern of denying rentals to applicants with criminal history on "other grounds." Consequently, a court may find that a proffered ground for denial, such as bad credit, is merely pretextual. In other words, screening applicants for criminal history but then denying rent on other grounds can look like disparate-impact or intentional discrimination cloaked in a thin veil.

Following best practices helps prevent this outcome. As the Virginia Fair Housing Office has advised, "[r]ejecting applicants for legitimate credit or income or character reasons should not invite a complaint *if [property owners] follow certain procedures*" recommended by the Office.[50]

Alternatively, a lessor without a formal criminal history policy can simply (and boldly) reject an applicant for having a criminal record, without further explanation. But this clearly carries substantial risk, because it directly flouts HUD and Virginia Fair Housing Office guidance. In fact, it directly invites exposure to litigation from rejected applicants and civil rights advocacy groups.

A representative example of this exposure is *Simmons v. T.M. Associates Management*, 287 F. Supp. 3d 600 (W.D. Va. 2018) from the U.S. District Court for the Western District of Virginia. In *Simmons*, an apartment complex owner refused to rent to a mother and son because the son had an indecent exposure conviction on his record. The mother and son sued, alleging that the indecent exposure occurred because of the son's mental illness (i.e. a disability) and therefore required a reasonable accommodation. The owner moved to dismiss.

The court first noted that the son was "not seeking an accommodation *of a conviction*, but rather an accommodation *of a disability* by mitigating its effects (i.e., disregarding the conviction)." Nevertheless, the property owner argued that the son posed a "direct threat" to residents of the apartment complex. The court disagreed, in part, because the owner failed to undertake an "individualized inquiry of the circumstances surrounding [the son's] conviction or his disability" that would have established his threat level. Accordingly, the court denied the motion to dismiss.[51]

Although conjecture, it is possible that if the property owner in *Simmons* had followed best practices, it could have established that the son was indeed a "direct threat" under a tailored criminal history policy, and prevailed on the motion to dismiss.

5. Conclusion

In short, private property owners and lessors have legitimate and justified concerns about renting to applicants with troubling criminal convictions. However, blanket restrictions on renting to applicants with criminal history have a disproportionate impact on certain protected classes. Therefore, attorneys should help rental housing clients in Virginia create formal criminal history policies that implement best practices, help propagate housing equity, and safeguard against allegations of discrimination under fair housing laws.

[50] *Suggestions for Housing Providers*, supra at 23

[51] *Id.* at 607

SO YOU THINK YOU KNOW PROPERTY

By Stephen C. Gregory

In the Fall issue of this Journal, we posed the following problem:

Alice, Bertrand, and Candace own property as joint tenants with rights of survivorship. (Alice ("A") and Bertrand ("B") are Candace's ("C") parents.) After A dies, B and C decide to restructure their ownership, intending to give fee simple to C with a life estate to B. However, when the deed is drafted, ***B and C*** convey a life estate to C with remainder to her heirs, reserving a life estate to B. Now B is deceased and C wants to sell the property. (The attorney who prepared the deed is also deceased.)

Q. What will it take for C to be able to convey the property?

Michael J. Overson, of Moyes & Associates in Leesburg, provided this analysis:

When A died, B and C continued to own the property between themselves as joint tenants with right of survivorship. As the surviving joint tenants, B and C were free to re-convey the property to whomever they wished. Although it was not their exact intention, the new deed executed by B and C had the effect of conveying a life estate in the property to C, with remainder to C's heirs, as well as a concurrent life estate to B. (Note: This would not have been the case at common law due to the Rule in Shelley's Case and/or the Doctrine of Worthier Title, but both of those doctrines have been abolished by statute in Virginia. So the deed B and C executed appears to have conveyed concurrent life estates in the property to B and C, with remainder to C's heirs).

While B and C were both alive, they were both life tenants and enjoyed concurrent life estates in the property. Once B died, C became the sole life tenant. C's heirs (determined as of the time of C's death) are the remaindermen, and they will inherit the property upon C's death. C has no power to convey the property during her life, even if all of the people who would be her heirs if she died right now consented to, and joined in, such conveyance. Only when C dies will the class of C's heirs be determined. Once C dies, and the class of C's heirs closes, those heirs would inherit the property and have the right to convey it. However, until C dies, no one has the authority to convey the property, because C only has a life estate and the class of remaindermen (C's heirs) will not be determined until C dies.

C (and the persons who are currently her heirs) could seek a declaratory judgment from the court confirming that they have the collective right to convey the property now, but it does not appear that they do. C has effectively locked the remainder interest in the property away for her heirs, and no one can convey it until C is dead and the class of heirs who will inherit the remainder interest is determined.

We (the Editors) agree with Mr. Overson. We would add, however, that C could also petition the court to close the class as of the date of her petition, which would allow her (and her heirs) to alienate the property. (If the heirs haven't already been alienated!)[1]

[1] We'll be here all week. Don't forget to tip your server.

2023 VIRGINIA GENERAL ASSEMBLY REPORT: REAL ESTATE LEGISLATION

By Erin Kormann

Erin graduated from the University of Mary Washington with bachelor's degrees in Psychology and Sociology. She went on to attend Brooklyn Law School where she graduated cum laude. After clerking in both the Second Circuit and the Fourth Circuit, Erin took some time off to start a real estate business and sold real estate for seven years. She then took a position with the Virginia REALTORS® Association first in the legal department as deputy general counsel and then the Government Affairs department where she currently serves as Legislative Counsel.

As has become the tradition of the Virginia State Bar Real Property Section, this annual compilation of legislation passed by the General Assembly includes those bills of interest to real estate practitioners in the Commonwealth.

The General Assembly continues to routinely address a wide range of real estate-related topics – from traditional real estate matters (e.g., deeds, landlord-tenant, taxation, and disclosure), to more tangentially-related fields (e.g., conservation and local government) to evolving areas of real estate practice (e.g., data centers and supportive housing).

2023 SESSION BY THE NUMBERS

The 2023 Session of the Virginia General Assembly lasted for 46 days, convening on January 11, 2023, and adjourning *sine die* on Saturday, February 25, 2023. This was a "short" session of the General Assembly. In even-numbered years, like 2022, the legislature convenes for sixty calendar days. In odd-numbered years, (2023), the legislature only convenes for thirty calendar days, with an option to extend the session for an additional thirty days.

The reconvene session, also referred to as the "veto session," was convened on April 12, 2023. Unlike last year, Governor Glenn Youngkin only vetoed three bills during the reconvene session.

In all, 2863 bills and resolutions were introduced during the 2023 session and 797 passed and will become law.

2023 SESSION AT A GLANCE

While the General Assembly focused on larger issues this year such as casinos, marijuana, and taxes, there was also a clear focus on maintaining and increasing the housing supply in the Commonwealth. There was much discussion at the Virginia Governor's Housing Conference in the Fall of 2022 about the Commonwealth's shrinking housing supply and the role that local government policies play in that log jam. However, no bills changing local government zoning or land use approval processes emerged as predicted during the General Assembly session. There were, however, plenty of bills introduced and passed that will collect development data from localities and study the Commonwealth's supply and demand for housing.

Also surprising was the low number of landlord-tenant bills introduced and debated this year relative to previous years. Instead, there seemed to be a larger number of bills relating to common interest communities.

2023 LEGISLATIVE SUMMARIES

Actual copies of the legislation, together with bill summaries and history of legislative action on those bills, may be viewed on the General Assembly website at http://leg1.state.va.us/lis.htm. The summaries below are heavily derived from abstracts prepared by the Virginia Division of Legislative

Services. Because of the nature of a legislative summary, individual pieces of legislation should be reviewed carefully to gain a complete understanding of the legislation's impact and implications.

Unless otherwise noted, measures that passed the General Assembly will become effective July 1, 2023. Legislation could include emergency clauses or delayed effective dates. Although this summary attempts to identify the bills that aren't effective July 1, careful attention should be given to the effective dates of specific legislation.

Legislation is organized first by topic area, then chronologically, then separated by House, then Senate, within each topic area.

CIVIL REMEDIES AND PROCEDURE

The General Assembly directed the court to consider certain factors when ordering a partition in kind of real property. The court must consider the collective duration of ownership or possession of the property, a party's sentimental attachment, the lawful use of the property and any degree of harm a party might suffer if that use could not continue, the degree to which a party has contributed to the improvement, maintenance, or upkeep of the property, and any other relevant factors. (*House Bill 1755- Jeffrey L. Campbell*).

Any executed writ of eviction must now be returned to the to the issuing clerk by the sheriff who executed that writ. The Supreme Court of Virginia must report to several committees of the General Assembly the number of executed writs returned between July 1, 2023, and June 30 2024 by September 1, 2024. The Virginia Housing Commission was also directed to study a more comprehensive data collection process to track the resolution of writs of unlawful detainer filed in the Commonwealth. (*House Bill 1836 – Clinton L. Jenkins; Senate Bill 1089 – Adam P. Ebbin*).

COMMISSION, BOARDS, AND INSTITUTIONS

The General Assembly adopted several bills directing the Department of Housing and Community Development (DHCD) to study housing supply and demand in the Commonwealth, while giving them more power over grants and financing for housing development. There were also several bills focused on the Governor's priority to lessen regulation and make it easier to work in the Commonwealth.

The General Assembly directed the Real Estate Appraiser Board to accept evidence of the successful completion of a Licensed Residential Practical Applications of Real Estate Appraisal ("PAREA") training program to satisfy the experience requirement for licensure as a residential real estate appraiser. The amount of credit applied will depend on the type of licensure sought. (*House Bill 1418 – R. Lee Ware*).

In addition, the Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals shall recognize, without an examination, licenses or certificates issued by other states as fulfillment of qualifications for licensure in the Commonwealth under certain conditions. (*House Bill 1940 – Chris S. Runion*).

The General Assembly directed the Virginia Marine Resources Commission to review and update its "Guidelines for Establishment, Use, and Operation of Tidal Wetland Mitigation Banks in Virginia" and its regulations by July 1, 2024. (*House Bill 1950 - Robert S. Bloxom, Jr.*).

DHCD must now conduct a statewide comprehensive housing needs assessment at least every five years. The assessment shall review housing cost burdens, supply and demand, and provide regional or local profiles of specific housing needs around the Commonwealth. DHCD must use that assessment to develop a statewide housing plan that is updated every five years and includes measurable goals. Finally, DHCD will also be responsible for collecting reports from localities[1], and

[1] These reports and their contents are mandated in *House Bill 2494 – R. Lee Ware*.

publish those reports on their website. (*House Bill 2046 – Betsy B. Carr; Senate Bill 839 – Mamie E. Locke*).

Another bill to ease the burdens on professionals moving to the Commonwealth was the Governor's universal licensing recognition initiative. The General Assembly mandated licensing boards in the Department of Professional and Occupational Regulation ("DPOR") to recognize licenses or certificates issued by another state as fulfillment of qualifications for licensure or certification in the Commonwealth if certain conditions are met. When an applicant is applying for a license in the Commonwealth, that is not regulated in their home state, then DPOR may recognize previous work experience. The regulatory boards located within DPOR may require applicants seeking universal license recognition from outside the Commonwealth to pass an exam specific to state laws and regulations if the same is exam is required of all other applicants. Professional services as defined in § 2.2-4301 are exempt from this new law. (*House Bill 2180 - James W. Morefield; Senate Bill 1213 – Ryan T. McDougle*).

If, during an appeal of the State Building Code Technical Review Board's decision regarding issuance of a stop work order by a local building official, the court finds in favor of the party that was issued the stop work order, that party shall now be entitled its actual costs of litigation from the locality. (*House Bill 2312 – Christopher T. Head; Senate Bill 1263 – T. Travis Hackworth*).

DHCD will now have to develop and operate a Virginia Residential Sites and Structures Locator database to assist localities with marketing structures and parcels determined by the locality to be suitable for future residential or mixed-use development or redevelopment. (*Senate Bill 1114 – William M. Stanley, Jr.*)

COMMON INTEREST COMMUNITIES

The General Assembly changed how management contracts with automatic renewal provisions could be terminated in both the Property Owners' Association Act (§ 55.1-1800 et seq.) and the Condominium Act (§ 55.1-1900 et seq.). A management contract that includes an automatic renewal provision can now be terminated by the association or the common interest community manager at any time, without cause, with 60-days notice. *(House Bill 1519 – Dawn M. Adams)*.

The General Assembly also changed how the common interest community ombudsman process will work. When a notice of adverse decision is forwarded to the ombudsman, she will have the option to review the notice or forward it to the common interest community board for further review. If it is determined that a conflict exists between the association decision and the laws or regulations governing common interest communities, notice must now be sent to the association board and any community manager. The decision of the ombudsman will be binding on the association. If the ombudsman's office receives a subsequent notice of final adverse action for the same violation within 365 days, that notice must be forwarded to the common interest community board for further review. (*House Bill 1627 – Carrie E. Coyner; Senate Bill 1042 – Jeremy S. McPike*).

Perhaps the largest change to common interest community law this session is the creation of the Resale Disclosure Act (§ 55.1-2307 et seq). This new chapter in the Code of Virginia consolidates resale disclosure law from the Property Owners' Association Act (§ 55.1-1800 et seq.), The Condominium Act Condominium Act (§ 55.1-1900 et seq.), and the Virginia Real Estate Cooperative Act (§ 55.1-2100 et seq.). The new resale certificate will have thirty disclosures that associations must make to buyers prior to the purchase of a home located in a common interest community. Disclosures will need to be made in a standard format on a form created by the common interest community board at DPOR. Other smaller changes in the law include a clarification that days refer to calendar days, some new association disclosures, an elimination of the distinction between professionally and non-professionally managed associations, requiring payment for the resale certificate at the time its ordered, and clearer liability provisions. (*House Bill 2235 – William C. Wampler III; Senate Bill 1222 – T. Montgomery "Monty" Mason*).

The allowable uses for grants from a local stormwater management fund was expanded by the General Assembly to include joint flooding mitigation projects of condominium owners (*Senate Bill 1091 – Adam P. Ebbin*).

CONSERVATION

Many of the bills focused on environmental conservation have a direct impact on real estate development.

The General Assembly permitted the Department of Environmental Quality ("DEQ") to use the Wetland and Stream Mitigation Fund for purposes other than the purchase of mitigation bank credits if they make the determination within two years of collection for a specific impact that such impact will not be available within three years. (*House Bill 1628 – Carrie E. Coyner*).

The General Assembly also authorized certain entities to purchase or use credits from a tidal wetland mitigation bank located in an adjacent river watershed when the bank contains the same plant type as the impacted wetlands. (*House Bill 1804 – Robert S. Bloxom, Jr.*).

The General Assembly directed the Department of Conservation and Recreation ("DCR") to establish state standards for development, including construction and rehabilitation of structures, in a flood plain for all agencies and departments in the Commonwealth by September 30, 2023. The standards must include, at minimum, compliance with the National Flood Insurance Program. Any development by a state agency or department on state-owned land in a special flood hazard area must be protected or flood-proofed against flooding and flood damage. (*House Bill 1807 - Robert S. Bloxom, Jr.; Senate Bill 1392 – Lynwood W. Lewis, Jr.*).

For any conveyance of land, or an interest in land made on or after January 1, 2017, the deadline for applying for land preservation tax credits will now be extended for any number of days exceeding 90 during which the application is being reviewed for conservation value by DCR. (*House Bill 1834 – Mike A. Cherry*)

Farm buildings, any buildings used for agritourism, and any related impervious surface (i.e. roads, driveways, and parking areas) are now added to the stormwater management and erosion and sediment control laws allowing for an agreement in lieu of a plan.[2] (*House Bill 1848 – H. Otto Wachsmann, Jr.; Senate Bill 1376 – Jill Holtzman Vogel*).

Finally, DEQ must, prior to assessing any civil penalty against a person for an alleged violation, to inform the person in writing of the alleged violation, the potential penalties, and the actions necessary to achieve compliance and remediation. DEQ may allow the person 30 days to take action and comply. (*Senate Bill 1501 – Richard H. Stuart*).

CONSUMER PROTECTION

Residential home sales between natural persons involving the seller's private residence are now excluded from the Virginia Consumer Protection Act § 59.1-199. (*Senate Bill 988 – Mark J. Peake*).

COUNTIES, CITIES, AND TOWNS

As always, there were a number of bills focusing on local governments, and residential development.

The Department of Taxation will now be required to publish annually on its website the current transient occupancy tax rates imposed in each locality. The tax-assessing officer for the locality will be responsible for the administration and enforcement of transient occupancy taxes from

[2] Current law only allowed for agreements in lieu of a plan for single-family residences. *See* § 62.1-44.15:24.

accommodations intermediaries. The General Assembly also specified filing dates and requirements for accommodations intermediaries. (*House Bill 1442 – Joseph P. McNamara*).

Any county, city, or town may now, by ordinance, establish a program to provide regulatory flexibility to encourage the preservation, restoration, or development of urban green space in a locality. This flexibility should be proportionate to the amount of green space and may include reduced permit fees or a streamlined approval process. (*House Bill 1510 – Dawn M. Adams*).

A locality is now encouraged to consider strategies to address resilience in their comprehensive plan. The law defines "resilience" as the capability to anticipate, prepare for, respond to, and recover from significant multi-hazard threats with minimum damage to social well-being, health, the economy, and the environment. (*House Bill 1634 – David L. Bulova; Senate Bill 1187 – Lynwood W. Lewis, Jr.*).

The General Assembly again extended the sunset provision for various local land use approvals that were valid as of July 1, 2020. The sunset date was extended from July 1, 2023, to July 1, 2025. (*House Bill 1665 – Daniel W. Marshall, III; Senate Bill 1205 – Lynwood W. Lewis, Jr.*).

Another new law looking to collect information from localities pertaining to development will now require localities with a population greater than 3500 to submit an annual report to DHCD noting the total fee revenue collected by the locality over the preceding year in connection with processing, reviewing, and permitting of applications for residential land development and construction activities. (*House Bill 1671 – Scott A. Wyatt*).

In another land use extension bill, the General Assembly also extended the sunset date for various land use approvals for solar photovoltaic projects that were valid and outstanding as of July 1, 2023. (*House Bill 1944 – M. Keith Hodges; Senate Bill 1390 – Lynwood W. Lewis, Jr.)*

The maximum duration of an installment agreement between a locality and a landowner to pay delinquent taxes will now be extended from 60 to 72 months. (*House Bill 2110 – Jeffrey M. Bourne*).

The General Assembly standardized the frequency and length of time that notices of certain meetings, hearings, and other local actions must be published in the newspaper. A descriptive summary of the proposed action will no longer be required in the publication for zoning ordinances and amendments. (*House Bill 2161 – Wren M. Williams*).

Unless the owner of a property objects, the maintenance code official of a locality will now be considered a person lawfully in charge of a derelict building, as defined in § 15.2-907.1 for the purpose of posting a sign(s) to prohibit trespassing. (*House Bill 2186 – Sam Rasoul*).

Localities with a population of more than 3500 will now be required to report annually to DHCD a summary of any local policies, ordinances, or processes, adopted or amended, that affect the development and construction of housing. Specific items to be reported are included and explained in the Bill. (*House Bill 2494 – R. Lee Ware*).

HOUSING

The Virginia Community Development Financial Institutions Fund and Program are now codified and will provide grants and loans to community development financial institutions and other entities for the purpose of providing financing to housing development and rehabilitation projects and community revitalization projects in the Commonwealth. DHCD will be in charge of overseeing the fund, including developing eligibility criteria. (*House Bill 1411 – Daniel W. Marshall, III; Senate Bill 1320 – Jennifer L. McClellan and David W. Marsden*).

The General Assembly added projects related to the production and preservation of housing, including housing for persons and families of low and moderate income to the legislative purpose of the Virginia Resources Authority ("VRA"), allowing them to finance such projects. DHCD is also

directed to assist the VRA in determining which local governments are to receive the grants for these projects. (*House Bill 1805 – Robert S. Bloxom, Jr.; Senate Bill 1401 – Lynwood W. Lewis, Jr.*)

Farm buildings and structures where the public is invited to enter and that are used for storage, handling, production, display, sampling, or the sale of various products produced on the farm and that are exempt from the building code will now be required to have portable fire extinguishers, a simple written plan in case of emergency, and a posted sign stating that the building is exempt from provisions of the building code. (*Senate Bill 1305 – Emmett W. Hanger, Jr.*).

LANDLORD/TENANT

As always, there were plenty of landlord tenant bills considered by the General Assembly this year.

The additional time period provided to landlords to return a tenant's security deposit in the event that damages to the premises exceed the amount of the security deposit and require the services of a third-party contractor was increased from 15 to 30 days. This change will sunset after one year meaning that it is only effective from July 1, 2023 to June 30, 2024. (*House Bill 1542 – Jeffrey L. Campbell; Senate Bill 891 – John J. Bell*).

Tenants who, at the beginning of the tenancy, find that a condition exists in their rental unit that constitutes a fire hazard or serious threat to life, health, or safety of the tenants or occupants can now terminate their lease and receive a full refund of all rent and monies paid to the landlord. The tenant must provide the landlord with written notice of the intent to terminate within seven days of the date he was supposed to take possession of the unit. The landlord must return the monies within fifteen business days of receiving the notice or give notice to the tenant of his refusal to accept the termination and why. A process to resolve the issue in court is laid out in the law. (*House Bill 1635 – David L. Bulova*).

A landlord who owns more than four rental dwelling units in the Commonwealth or more than ten percent interest in more than four rental dwelling units is now required to provide written notice to any tenant who has the option to renew a rental agreement (including automatic renewal provisions) of any increase in rent during the subsequent lease term no less than sixty days prior to the end of the current rental agreement. This new law does not apply to periodic tenancies. (*House Bill 1702 – Michelle Lopes Maldonado*).

Fair housing law will now prohibit therapeutic providers from providing fraudulent documentation evincing either the existence of a disability or a disability-related need for a person requesting a reasonable accommodation. A violation will now constitute a prohibited practice under the Virginia Consumer Protection Act (§ 59.1-196 et seq.). (*House Bill 1725 – Schuyler T. VanValkenburg*).

The General Assembly clarified the requirements of providing the tenants' rights and responsibilities form in both the Virginia Residential Landlord Tenant Act and the Manufactured Home Lot Rental Act. If the tenant receives the form and fails to sign it, the landlord shall record on the form the date(s) it was provided to the tenant and that the tenant failed to sign. There is no requirement to provide the form again subsequent to the effective date of the tenancy. Finally, the form is current as of the date of delivery to the tenant. If the tenant's rights and responsibilities form is never provided to the tenant, the landlord cannot file or maintain an action against the tenant in court, including an unlawful detainer. (*House Bill 1735 – Schuyler T. VanValkenburg*).

The Forms and Efiling Subcommittee of the Committee on Self-Represented Litigants of the Supreme Court of Virginia's Access to Justice Commission shall develop plain-English instructions that explain to defendants how to interpret the Summons for Unlawful Detainer/ Civil Claim for Eviction form (Form DC-421). Once approved, these instructions must be posted on the Virginia Courts website, made available to the public, and may be attached to the Summons for Unlawful Detainer at the direction of the chief judge of the general district court. Requirements for formatting and contents of the form are included in the new law. (*House Bill 1996 – Charniele L. Herring*).

Any owner of a multifamily premises that fails to renew the greater of either twenty or more month-to-month tenancies or fifty percent of the month-to-month tenancies within a consecutive thirty-day period in the same multifamily premises must serve written notice on each tenant at least sixty days prior to letting the tenancy expire. For purposes of this new law the sixty-day notice is not required if the tenant has failed to pay rent in accordance with the rental agreement. (*House Bill 2441 – Marcia S. "Cia" Price*).

Any landlord who owns more than two hundred rental dwelling units that are attached to the same real property in the Commonwealth must establish a policy requiring any applicant for employment in a position that will have access to keys for each rental dwelling unit to undergo a pre-employment criminal history records check. Such landlords must also have written policies and procedures regarding the storage, issuance, return, security of access, and usage and deactivation of any keys or electronic key codes. Financial institutions and real estate licensees are exempt from this new law. (*House Bill 2082 – Candi Mundon King*).

PROPERTY AND CONVEYANCES

In a further attempt to clarify what settlement agents may and may not do during a closing, the General Assembly passed a law prohibiting a settlement agent from collecting any fees from a represented seller payable to the settlement agent or its subsidiaries, affiliates, or subcontractors without first obtaining consent from the seller's counsel. Language to that effect must now be included in the disclosure language required in residential real estate sales contracts. (*House Bill 1888 – Richard C. "Rip" Sullivan, Jr.)*

The requirement that a time-share instrument state whether a time share developer reserves the right to add to or delete any alternative purchase is removed from the Virginia Real Estate Time-Share Act. Additionally, the public offering statement distributed to each prospective purchaser of a time-share must now disclose whether the developer will offer any alternative purchase. *(House Bill 1955 – Anne Ferrell Tata; Senate Bill 969 – T. Montgomery "Monty" Mason).*

A settlement agent will now be able to release property from a judgment lien if the settlement agent performs the steps for notice and due diligence laid out in the new provisions. Specific language and format of the notice of intent to release and the certificate of release and affidavit of settlement agent are included in the new provisions. This new law may be applied to judgment liens created prior to July 1, 2023. (*House Bill 2184 – Carrie E. Coyner*)

The General Assembly passed a law that will prohibit any foreign adversary from acquiring any interest in agricultural land in the Commonwealth on or after July 1, 2023. Any acquisition in violation of this law will be void and title will be deemed to be in the name of the Commonwealth. The foreign adversary will be barred from making a claim for restitution of the purchase price or anything related to their loss of interest in the land. If the foreign adversary has subsequently sold or transferred the property to a person or entity that is not a foreign adversary title shall be valid. (*House Bill 2325 – Robert S. Bloxom, Jr.; Senate Bill 1438 – Richard H. Stuart*).

The Commission of Revenue of a jurisdiction shall, upon receiving and reviewing a recordation receipt from the clerk of the circuit court, ensure the land book is updated to reflect each grantee and property address for the delivery of future tax bills. (*Senate Bill 1389 – Lynwood W. Lewis, Jr.*).

A property that formerly participated in and continues to meet the qualifications of a state or federal soil and water conservation program but is no longer receiving payments or other compensation under the program, may continue to be eligible for designation as real estate devoted to agricultural use and real estate devoted to horticultural use. Further, the presence of noxious weeds or woody growth cannot be the sole basis for denial of a property's designation as real estate devoted to agricultural use. (*Senate Bill 1511 – Emmett W. Hanger, Jr.*).

TAXATION

Localities that conduct an annual or biennial reassessment of real estate or where reassessment is conducted primarily by local employees and the locality has not yet established its real property tax rate are now required to include certain information in the notice to taxpayers after conducting a reassessment of real property. (*House Bill 1942 – Tara A. Durant*).

In the City of Newport News, persons who wish to challenge any assessment made by the real estate assessor must first apply for relief with the board of review before filing for relief in the circuit court. (*House Bill 1962 – Michael P. Mullin; Senate Bill 829 – Mamie E. Locke*).

The General Assembly increased the aggregate cap of tax credits allowed by the livable home tax credit in a fiscal year and the maximum amount an individual may claim in a tax year. The new law also increases the amount of credits allocated by DHCD to the purchase or construction of new homes and the retrofit and renovation of existing homes. (*House Bill 2099 – David L. Bulova*).

The General Assembly also amended the real property tax credit allowed to disabled veterans and their spouses. Applicants may now claim the exemption prior to purchasing a property by filing the required documentation and proof of a valid purchase agreement with the appropriate person in the locality. The locality will have 20 days to review the application and notify the applicant whether the tax exemption is granted, and the amount allowed. The actual exemption only becomes valid once the purchase transaction has closed. (*House Bill 2414 – Don L. Scott*).

CONCLUSION

While election reform, marijuana, and casino gambling continue to dominate the conversation at the General Assembly, there was a notable increase in bills this year, and laws passed, targeting the shrinking housing supply in the Commonwealth. A large number of bills that at first glance appear to be only tangentially related to real estate, were passed with the conversation that together, they will begin to make residential and commercial development easier and begin to chip away at complex and often arduous real estate and development practices across localities. I hope these summaries were helpful to your practices and ultimately your clients.

VIRGINIA REAL ESTATE CASE LAW UPDATE (SELECTED CASES)

By Michael E. Derdeyn and Christy L. Murphy*

Michael E. Derdeyn is a partner at the law firm of Flora Pettit PC. Mike's practice focuses on the areas of commercial and real estate litigation. Mike's real estate litigation practice focuses primarily on real estate contracts, title disputes, and access issues, including representing developers in establishing access necessary for their projects. Mike is a regular presenter for the Virginia CLE on topics including title disputes, real estate contracts, and water law.

Christy L. Murphy is a partner at the law firm of Bischoff Martingayle, PC. Christy represents clients in all types of real estate litigation including, but not limited to, forgery/fraud, easements, title issues, land-use issues, unlawful detainers and possession of real property, and partition. Christy represents clients in the state courts and in the Eastern District of Virginia. Christy represents clients in appeals in the Virginia Court of Appeals, the Virginia Supreme Court, and the Fourth Circuit Court of Appeals.

A. FEDERAL CASES

1. *First American Title Insurance Company v. Chesapeake Holdings GSG, LLC*, 2022 U.S. Dist. LEXIS 181138 (E.D. Va. 2022).

Facts: First American, subrogated to its insured, filed suit against Chesapeake Holdings because Chesapeake Holdings allegedly sold the same property to two different grantees under two separate deeds. First American claimed it was owed the money it expended to correct the title issue caused by this double conveyance by Chesapeake Holdings under a special warranty claim. Chesapeake Holdings filed a motion to dismiss and asked the court to consider it a motion for summary judgment.

Holding: There were genuine issues of material fact and First American properly pled a claim for relief, so the motions were denied.

Discussion: The court started by analyzing a claim for breach of the covenant of special warranty under Virginia law. The court recognized that for such claim, a covenant of special warranty is a promise that the grantor of the property will "warrant and defend such property . . . against the claims and demands of the grantor and all persons claiming or to claim by, through, or under him." A special warranty protects the grantee from defects in title. The court cautioned that the special warranty does not protect against theoretical clouds on title, only claims and demands. Considering this, the court found that First American had properly pled a claim for breach of the covenant of special warranty.

Nevertheless, Chesapeake Holdings claimed that the court should grant the motion and award it summary judgment for five different reasons. Among those reasons, Chesapeake Holdings claimed that First American via its insured, Parkway, could not recover because it was charged with full knowledge of the title defect. The court rejected this argument finding that under Virginia law, the doctrine of constructive notice "does not apply against a grantee in an action against his immediate grantor for a breach of covenant." The court found this because "the grantee is not required to examine the records, but may rely solely on the covenants in his deed for protection even though he

* Congratulations to Christy L. Murphy on being named a 2023 Influential Woman of Law by Virginia Lawyers Weekly.—Ed.

has actual notice of encumbrances." The court noted, citing a Virginia case, that "knowledge of the existence of an outstanding encumbrance may be the very reason for insisting on a covenant against it."

In analyzing the other claims made by Chesapeake Holdings, the court also noted that Virginia Code § 55.1-355, "Covenant of Special Warranty," requires an eviction to support a claim, but the eviction can be constructive. The rest of the claims failed mainly because the court said they could not be decided on a motion for summary judgement due to disputed facts.

2. *Landfall Trust LLC v. Fidelity National Title Insurance Company,* 2023 WL 2477737 (E.D. Va. 2023).

Facts: In 2002 developers recorded a Declaration of Covenants, Conditions, and Restrictions for the Henry's Island subdivision in Lancaster County. The Declaration included a subdivision plat for a 10-lot subdivision and provided for a variety of easements for roads and utilities. The Declaration also included a Drainfield Easement Plat depicting two different sets of drain fields, the "Primary Drainfield" and the "Reserve Drainfield" for use for the lots in the subdivision. The Declarant reserved the right to grant the surface use of those areas to the owners of lots 7 and 8.

In 2018, Landfall purchased Lots 9 and 10 and Fidelity issued a title insurance policy. The title policy insured title in lots 9 and 10, together with access easements for ingress and egress. The title policy made no reference to the drain fields.

In 2021, Landfall entered into a contract to sell Lots 9 and 10 to Crotty for 1.55M. Crotty sought a title insurance policy through Fidelity, which issued a binder identifying title as being vested in Landfall with respect to Lots 9 and 10 and in the HOA with respect to any drain field easement. Fidelity also required that the HOA join in the deed to convey the drain field easement.

Crotty terminated the contract and Landfall requested Fidelity to provide coverage. Fidelity then issued Landfall a check in the amount of $90,000 to represent the diminution in value of the because of the lack of clear access easements.

In April of 2022, Landfall filed suit against Fidelity for breach of contract seeking $285,000 in damages, representing the remaining amount of coverage under the policy. Landfall moved for summary judgment on the ground that Fidelity refused to recognize Landfall's ownership of the drain field easements.

Holding: The Court denied the motion for summary judgment.

Discussion: The Court determined that the "ownership" of the drainage easements was not sufficiently developed in the record to enable the court to grant summary judgment.

3. *Roper v. City of Norfolk*, 2022 U.S. Dist. LEXIS 141634 (E.D. Va. 2022).

Facts: This is the federal court opinion following a Norfolk Circuit Court case in a prior case law outline (2019) pertaining to the Granby House in the Norfolk historic district. The plaintiffs in the federal case filed a putative class action against the City of Norfolk claiming federal inverse condemnation, state inverse condemnation, and gross negligence due to the City's process and approval of the demolition of the Granby House years after a fire. The plaintiffs alleged that they had a negative easement and a protective covenant over the Granby House that was wrongfully taken by the City of Norfolk without notice.

Holding: The court dismissed the plaintiff's claims due to lack of standing.

Discussion: Judge Jackson adopted Judge Lannetti's opinion in the state court case finding that the plaintiff's did not have any ownership interest in the Granby House and therefore lacked standing to make the claims. *See Freemason St. Area Ass'n, et al. v. City of Norfolk, et al.*, 103 Va. Cir. 244

(2019). Judge Jackson also eventually granted a motion for sanctions filed by the City for attorney's fees.

4. *Walker v. Hill, et. al. 2023 WL 129436 (4th Cir. 2023*) (unpublished opinion).

Facts: Walker borrowed $350,000 from Hill to purchase a home. Walker executed a purchase money note and a deed of trust securing the note at a March 2019 closing. At closing, Hill was represented by the defendant law firm Dankos, Gordon & Tucker, P.C. Walker believed that he was executing documents for a conventional mortgage and the law firm made that representation to him.

At closing, the law firm presented Walker with a third document to sign that contained only two paragraphs, had no page numbers, and provided that the conveyance was made subject to a deed of trust and other matters of record. Walker alleged that, after closing, the law firm added a "first page" to the document he executed and that the combined document appeared to be a deed in lieu of foreclosure executed by Walker. The first page, which Walker had never seen, stated that the loan was in default and that Walker granted and conveyed the property to Hill.

Thereafter, Walker defaulted on the note and Hill's lawyers threatened to record the deed in lieu if Walker failed to pay in full.

Walker sued Hill and her lawyers seeking damages and attorneys fees for fraud, among other things.

Lower Court Holding: The district court granted Hill's motion to dismiss all counts against him and dismissed one of the two counts against the law firm (which subsequently settled with Walker). Walker only appealed the ruling on his fraud claim – which the district court dismissed for failure to alleged "reasonable reliance" because Walker did not describe how the single page document he signed was described or that he had made any inquiry as to its purpose.

Holding: The court vacated the ruling with respect to the fraud claim and remanded the case to the district court.

Discussion: The Court analyzed the factual allegations of the second amended complaint and determined that sufficient facts were alleged to establish the element of reasonable reliance. Notably, the Court determined that Walker's allegations that Hill and her agents (the law firm) represented that the documents were for a conventional mortgage loan was sufficient because, although the page Walker executed was odd, it "wouldn't necessarily appear out of place in the conventional mortgage documents Walker signed," it doesn't begin partway through a sentence or paragraph, it has no title, and lacks page numbers so it is not obviously part of a larger document. All of these allegations create an issue of fact as to whether an ordinarily prudent person would have been on notice to investigate the matter and, therefore, Walker sufficiently alleged reasonable reliance at the pleading stage.

B. VIRGINIA SUPREME COURT CASES

1. *Berry v. Board of Supervisors*, 2023 Va. LEXIS 12 (Va. 2023).

Facts: Resident taxpayers of Fairfax County filed suit requesting an injunction and a declaratory judgment that the County of Fairfax considering and passing a zoning ordinance via an electronic meeting was not permissible under the Virginia Freedom of Information Act (VFOIA). They asked that if done, the ordinance be ordered void *ab initio*. The trial court refused an injunction, denied a motion for reconsideration, and found that the County could pass the ordinance using an electronic meeting. The plaintiffs appealed.

Lower Court Holding: The trial court ruled in favor of the County and found that it could pass a zoning ordinance through an electronic meeting.

Appeal Court Holding: The Virginia Supreme Court reversed the trial court and found the passed ordinance void *ab initio*.

Discussion: After the trial court denied the injunction, the county adopted the ordinance via electronic meetings. The trial court ultimately denied the plaintiffs' all the relief requested because it deemed their requests moot, unripe, and not subject to a declaratory judgment. On mootness, the Virginia Supreme Court found that if one portion of the relief becomes moot, that does not render the whole case moot. It was without question the County's authority to take the action it took was not rendered moot by its adoption of the ordinance via electronic meeting. The Virginia Supreme Court addressed the ripeness argument similarly. In doing so, it considered Virginia Code § 15.2-2285(F) and found that the 30-day reference in that statute did not create a statute of limitations or a statute of repose.

Under VFOIA, Virginia Code § 2.2-3707(A) requires all meetings of public bodies to be open except as provided in other statutes. The County attempted to use COVID-19 as an emergency that allowed it to hold electronic meetings even for topics unrelated to COVID-19. The Virginia Supreme Court found that this was not permissible and noted that it was clear passage of the ordinance was not an emergency or time sensitive as it had been under consideration since 2016.

2. *Board of Supervisors v. Route 29, LLC*, 872 S.E.2d 872 (Va. 2022).

Facts: Route 29 was the owner of a development complex in Albemarle County. In 2007, the county adopted a conditional proffer that required the owner to pay $50,000 a year for ten years to the County after demand by the County after public transportation service is provided to the project. The owner signed the proffer. After a series of meetings, the County approved a commuter route that would go to the project, but the commuter route's purpose was for people to ride the bus to and from UVA and surrounding areas. It was not designed or put in place to help traffic to or from the project. In 2015, the owner wrote to the county objecting to its reliance on the proffer to demand payment from the owner stating that the proffer was not reasonable and lacked an essential nexus to the project.

Nonetheless, on May 20, 2016, and May 7, 2018, the County sent a demand to the owner for payment of $150,000 (three $50,000 payments) under the proffer. The owner did not pay them, and the County issued a zoning violation against the owner. The owner filed an appeal of the zoning violation and lost the appeal. The owner then filed suit in the circuit court and arguing that what the county had done was a taking without just compensation. The county tried to get the case dismissed and then twice at trial made a motion to strike the owner's case. The county's arguments relied on its position that the payment required under the proffer did not need an essential nexus to the project and did not need to be roughly proportional to the impact of the development to be enforceable.

Lower Court Holding: The trial court denied both motions to strike and found in favor of the owner.

Appeal Court Holding: The Virginia Supreme Court affirmed the trial court.

Discussion: The Virginia Supreme Court found that in the context of land-use cases, "the unconstitutional conditions doctrine prevents a municipality from conditioning the grant of a land-use permit on the applicants surrender of their right to just compensation for property expropriated for public use." The court found that the county could not "use this power as a cudgel to coerce concessions from a land-use applicant . . . " In finding this, the Virginia Supreme Court cited three United States Supreme Court cases that collectively hold (1) an essential nexus *must* exist between the condition placed on the land-use permit application and the original purpose of the restriction, (2) the degree of connection *must* satisfy a "rough proportionality" test where something like a "reasonable relationship" between the condition and the development must exist, and (3) "a municipality cannot evade the strictures of the unconstitutional conditions doctrine by framing the proffer as a condition precedent to the grant of the land permit, correspondingly denying the grant if the applicant refuses to acquiesce."

In consideration of the law, the Virginia Supreme Court affirmed the trial court in finding for the owner.

3. *Godlove v. Rothstein*, 867 S.E.2d 771 (Va. 2022).

Facts: The trial court heard this case where the issue was interpretation of a deed of dedication and whether it permitted Rothstein to extend a paved driveway within an easement running across Godlove's property to his property. Rothstein was successful at the trial. Godlove appealed. During the pendency of the appeal, Rothstein sold the property. He filed a motion to dismiss the appeal as moot and to vacate the trial court's judgment.

Lower Court Holding: Ruled in favor of Rothstein in that the deed of dedication permitted him to extend the driveway.

Appeal Court Holding: The Virginia Supreme Court granted the motion to dismiss, vacated the trial court's judgment, and denied fees to Godlove.

Discussion: The Supreme Court found that there was no longer a live controversy to be decided because Rothstein no longer owned the property. The Supreme Court found that vacatur was appropriate because the prevailing party voluntarily and unilaterally mooted the case. The court found that since the case was moot, it did not reach final decision on appeal, it should be vacated and could be heard again one day.

4. *Horn v. Webb,* 882 S.E. 2d 894 (Va. 2023).

Facts: This case involves lots 612, 613 and 615 in Lake Barcroft. Lot 612 is a waterfront lot, Lots 613 and 615 are not waterfront lots. In 1966, the owners of Lot 612 granted an easement to the owners of Lots 613 and 615 providing access to the lake. One of the recitals in the easement provided that the owners of Lots 613 and 615 had agreed to construct a retaining wall on the shore of the lake within the easement area. Once the retaining wall was completed, the owners of Lot 613 tied a pontoon boat to the retaining wall, where it remained until it sank in 2015. The same day it sank the Horns, who purchased Lot 615 in 2005, replaced the boat with another pontoon boat. The owners of Lot 612 who granted the easement sold their lot in 1970. There was no evidence that the subsequent owners of Lot 612 gave permission to tie a pontoon boat to the retaining wall.

In 2017, the Webbs acquired Lot 612, demolished the original house and built a new one. The Webbs then sent a letter to the Horns and to the owner of Lot 613, Rustgi, advising that the easement did not permit the right to dock a boat or store watercraft in the easement area and demanding the removal of the pontoon boat and smaller watercraft. The Horns and Rustgi refused, asserting a prescriptive right.

In 2019, Rustgi filed suit to establish his right to dock a boat at the retaining wall based on either the terms of the express easement or a prescriptive easement based on prior use. In *Rustgi v. Webb*, 105 Va. Cir. 199 (Fairfax County 2020), the Fairfax County Circuit ruled that Rustgi failed to establish either an express or a prescriptive right to dock a pontoon boat at the retaining wall. Following the ruling, Rustgi conveyed his one-half interest in the pontoon boat to the Horns, the Webbs demanded that the Horns remove the pontoon boat, the Horns refused, and this litigation followed.

The Webbs filed suit against the Horns for trespass and nuisance and the Horns counterclaimed asserting a prescriptive right to dock the boat.

Lower Court Holding: The circuit court ruled in favor of the Webbs, granting them $11,500 in compensatory and $45,000 in punitive damages. The court determined that there was no prescriptive right to store small watercraft because of insufficient evidence of continuous use. The court determined that there was no prescriptive right to dock the pontoon boat because the evidence

was that the use began with permission and there was no evidence that the Horns or their predecessors in title ever asserted a hostile claim to the use.

Supreme Court Holding: The Virginia Supreme Court reversed in part, affirmed in part, and remanded.

Discussion: The Virginia Supreme Court affirmed the ruling with respect to the small watercraft and reversed the ruling regarding docking the boat and the award of punitive damages.

With respect to small watercraft, the Horns' use of the easement to store watercraft began in 2005 so their testimony was insufficient to establish use for the 20-year period. Testimony regarding use by the previous owners was equivocal and insufficient to establish continuous use.

With respect to docking the boat, the principal issue was whether doing so was "hostile." The Court noted that when a use is open, visible, and continuous for the prescriptive period, the claimant is entitled to a presumption that the use arose adversely or under a claim of right. The burden is on the owner of the servient estate to rebut the presumption by showing that the use was permissive.

In this case, the Horns were entitled to the presumption and the Webbs failed to offer any evidence of permission – no witnesses or documents established any such permission. The trial court concluded that one of the recitals in the easement provided evidence of such permission, but the text of the recital was silent as to docking a boat and no witness testified that the then-owner of Lot 612 granted any such permission. The Court also noted that, even if the owner of Lot 612 gave permission in 1966 to dock a boat, that permission would have ended when the lot was sold in 1970. In doing so, the Court rejected the trial court's holding that, once permission is granted, it is presumed to continue indefinitely, even when the person who granted the permission sells the land. Specifically, the Court ruled that "*Permission does not extend beyond the ownership of the person who granted permission. Therefore, a permissive use terminates when the owner who granted the permission sells the property*."

Although the owners of the Lots were on friendly terms and the Owner of Lot 612 never objected, that merely established acquiescence – and acquiescence does not constitute a grant of permission.

5. *Morgan v. Board of Supervisors of Hanover County,* 883 S.E. 2d 131 (Va. 2023).

Facts: Homeowners filed suit for declaratory and injunctive relief challenging the decision of the Board of Supervisors approving a rezoning and special exceptions authorizing the construction of a Wegman's distribution and warehousing facility, which would consist of a 1.7 million square-foot facility including dry and refrigerated warehouses, a return center, a food manufacturing facility, offices, parking, staging areas for tractor trailers, and support buildings for fleet maintenance.

The property at issue was originally rezoned in 1995 to light industrial but the Wegman's site plan did not fully comply with the restrictions and proffered conditions required by that rezoning. As a result, the property owner filed applications with Hanover County to remove various proffered conditions and to add new proffers, and to allow an increase in maximum building heights from 45 feet to 62 feet.

Trial Court: The Circuit Court dismissed the case on demurrer, holding that the plaintiffs lacked standing as to both their original complaint and their amended complaint.

Supreme Court Holding: Reversed and remanded.

Discussion: The Court noted that the standing doctrine only asks whether the claimant truly "has a personal stake in the outcome of the controversy." The Court established a two-part test in In *Friends of the Rappahannock v. Caroline County Board of* Supervisors, 286 Va. 38 (2013) for determining whether plaintiffs who do not claim an ownership interest in the property that is the subject of the land use decision have such a personal stake (i) the plaintiff must own or occupy property in close

proximity to the property that is the subject of the land use decision and (ii) the plaintiff must allege facts demonstrating "particularized harm" to some personal or property right, or the imposition of a burden or obligation that is different than that suffered by the public generally. *Id*. at 48.

Here, the plaintiffs live in the neighborhood directly adjacent to the proposed development and claim particularized harm not suffered by the public generally in the form of increased traffic, including by tractor-trailer trucks, increased noise from truck back-up alarms, and light pollution. The plaintiffs have alleged harms specific to Wegman's intended expansion. Although the harm has not yet occurred, the Court has been clear that an "allegation of future injury may suffice if the threatened injury is certainly impending or there is a substantial risk that the harm will occur."

The Court rejected the Board's argument that the plaintiffs were actually damaged by the 1995 rezoning and not the Wegman's site plan. The Court concluded that the particularized harm alleged by the plaintiffs was "fairly traceable" to the 2020 ordinances.

6. *Seymour v. Roanoke County Board of Supervisors,* 873 S.E. 2d 73 (Va. 2022).

Facts: Neighboring property owners filed suit to challenge a locality's decision to grant a special use permit to the Southwest Virginia Wildlife Center of Roanoke ("SVWC") to construct a "large raptor building." The SVWC is located at the end of a shared private easement and traverses properties owned by some of the plaintiffs. The easement is an unpaved, single lane dirt drive.

When the SVWC applied for the special use permit, the zoning administrator discovered 12 unpermitted or improperly permitted accessory structures that would also need to be addressed by the special use permit. The permit was granted, authorizing both the existing structures and the new raptor building. Neighboring property owners file a complaint challenging the Board's decision.

Trial Court: The circuit court sustained the defendants' demurrer claiming that the plaintiffs lacked standing under the two-part test set forth in *Friends of the Rappahannock v. Caroline County Board of* Supervisors, 286 Va. 38 (2013). The plaintiffs then filed an amended complaint setting forth more specific allegations regarding the particularized harm caused by the grant of the permit, including alleging a decline in property values due to increased traffic. The trial court sustained the defendants' demurrer to the amended complaint on the same basis.

Supreme Court Holding: The Virginia Supreme Court reversed and remanded.

Discussion: In *Friends of the Rappahannock*, the Supreme Court established a two-part test for determining whether plaintiffs who do not claim an ownership interest in the property that is the subject of the land use decision have standing to challenge the decision: (i) the plaintiff must own or occupy property in close proximity to the property that is the subject of the land use decision and (ii) the plaintiff must allege facts demonstrating "particularized harm" to some personal or property right, or the imposition of a burden or obligation that is different than that suffered by the public generally. *Id*. at 48.

The issue in this case is whether the allegations of the second amended complaint are sufficient to establish particularized harm. The Court found that the allegations of the complaint were sufficient to establish that the grant of the permit would result in an increase in traffic on the easement causing particularized harm in the form of (i) additional maintenance costs, (ii) risks to the safety of those using the easement, (iii) dust, noise, and light pollution, and (iv) lowered property value.

7. *Wells v. Beville,* 2022 WL 974211 (Va. 2022) (unpublished opinion).

Facts: This case involves the enforceability of restrictive covenants. In 1964, the Yeatts subdivided their property on Smith Mountain Lake into 12 lots. In 1970, they sold Lots 1 and 2. The deed conveying the lots imposed eight restrictive covenants, including that: (i) "Lots 1 and 2 shall be considered one lot" and (ii) "Lot No. 1 herein conveyed shall not be sold unless Lot No. 2 is sold to

the same person at the same time." In 2016, the Bevilles purchased Lots 1 and 2. The Bevilles subsequently sold Lot 2 to the Wells. Several months later, the Bevilles entered into a contract to sell Lot 1 to Rodenbough.

On January 30, 2020, the Wells filed a declaratory judgment action against the Bevilles and Rodenbough contending that that the Bevilles violated the restrictive covenant when they contracted to sell Lot 1 separately from Lot 2 and seeking to set aside the contract to sell Lot 1 and order the conveyance of Lot 1 to the Wells.

Lower Court Holding: The circuit court held that the restrictive covenant was no longer enforceable after the separate sale of Lot 2 to the Wells.

Supreme Court Holding: Affirmed.

Discussion: The Virginia Supreme Court determined that the restrictive covenants were flawed because, while they required Lot 1 to be sold contemporaneously with Lot 2, they did not contain any reciprocal language requiring Lot 2 to be sold contemporaneously with Lot 1. After noting that restrictive covenants are disfavored and therefore "will not be aided or extended by implication," the Court concluded that Lot 2 could be sold separately from Lot 1. Accordingly, there was no violation of the restrictive covenant when the Bevilles sold Lot 2 to the Wells.

Because Lot 2 was sold separately from Lot 1, the essential purpose of the restrictive covenant was defeated – although the covenants contemplated that Lots 1 and 2 would be treated as "one lot" and would be owned by the same party, the separate sale of Lot 2 made that an impossibility. To enforce the restriction that Lot 1 "shall not be sold unless Lot No. 2 is sold to the same person at the same time," would substantially limit the alienability of Lot 1 – rendering it saleable only if the Wells decided to sell Lot 2 at some point in the future, and only if it could be sold to the same person. If that person chose not to purchase Lot 1, the property would remain inalienable for another indefinite period of time.

Thus, the Court concluded that (i) Lot 2 could be sold independent of Lot 1 and (ii) because that occurred, there was a change in circumstances rendering the restrictive covenant on the sale of Lot 1 unenforceable.

8. *Williams v. Janson*, 878 S.E.2d 714 (Va. 2022).

Facts: An auctioneer conducted an auction of real property where, before the auction, he was alleged to have made statements that differed from the written advertisement. The auctioneer did not expressly state whether the auction was with reserve or an absolute auction. Janson made what was determined to be the high bid, but prior to the close of the sale, the auctioneer announced that the property would not be sold at the $35,000 price Janson bid as it did not meet the reserve. Janson filed suit for specific performance claiming the auction did not have a reserve due to the auctioneer's oral comments prior to the sale.

Lower Court Holding: The trial court granted specific performance.

Appeal Court Holding: The Virginia Supreme Court reversed the trial court and entered judgment in favor of the auctioneer.

Discussion: The Virginia Supreme Court gave a thorough analysis of auctions in Virginia and found that there are two types: auctions with reserve and absolute auctions. Unless expressly stated, an auction is one with reserve. In an auction with reserve, either party can withdraw from the sale until the auction is complete. The supreme court found that nothing the auctioneer said prior to the sale expressly provided that the sale was absolute or without reserve and that no contract formed between the parties.

C. VIRGINIA COURT OF APPEALS CASES

1. *Burkholder v. Palisades Park Owners Association*, 882 S.E.2d 906 (Va. Ct. App. 2023).

Facts: Palisades was imposing assessments on the homeowners in the HOA to fund lot-compliance inspections of every member's property. The homeowners filed suit to enjoin Palisades from doing so as they alleged that doing so was in violation of the Virginia Property Owners' Association Act. Their claim was based on Virginia Code § 55.1-1805 that allows assessments only if expressly authorized in the associations' declaration. The homeowners' claimed the HOA's declaration lacked this specificity and asked the court to enjoin the association from continuing to do it.

Lower Court Holding: The case was tried and at the end of the plaintiff's case, the court struck their evidence and later awarded the association $67,481.68 in attorney fees based on Virginia Code § 55.1-1828.

Appeal Court Holding: The court of appeals reversed the trial court and remanded the case.

Discussion: The Court of Appeals stated that the case turned on the interpretation of Virginia Code § 55.1-1805. That section states:

§ 55.1-1805. Association charges.

Except as expressly authorized in this chapter, in the declaration, or otherwise provided by law, no association shall (i) make an assessment or impose a charge against a lot or a lot owner unless the charge is a fee for services provided or related to use of the common area or (ii) charge a fee related to the provisions set out in § 55.1-1810 or 55.1-1811 that is not expressly authorized in those sections. Nothing in this chapter shall be construed to authorize an association or common interest community manager to charge an inspection fee for an unimproved or improved lot except as provided in § 55.1-1810 or 55.1-1811. The Common Interest Community Board may assess a monetary penalty for a violation of this section against any (a) association pursuant to § 54.1-2351 or (b) common interest community manager pursuant to § 54.1-2349, and may issue a cease and desist order pursuant to § 54.1-2352.

The court of appeals rejected the association's position that that statute only applies to prevent assessments if one lot owner was assessed and did not apply where the entire community was assessed. The court of appeals found that would "gut the protection the statute affords to a purchaser's normal investment expectations." The court of appeals found that the statute requires the imposition of assessments that are not for common areas to be stated expressly in the declaration. The Court of appeals then analyzed the association's declaration and noted that assessments for lot-compliance inspections might have been impliedly permitted, but absent express provision on them, the Association could not assess the owners for lot-compliance inspections.

Interestingly, the court of appeals did not remand for a new trial or impose an injunction. Instead, it remanded for the trial court to "fashion the appropriate remedy . . ." It also found that the association was not entitled to any of its fees, but the plaintiff was as she was the successful party.

2. *Mueller v. HSBC Bank US, N.A.*, 2023 Va. App. LEXIS 90 (Va. Ct. App. Feb 14, 2023).

Facts: As with many cases challenging foreclosure, this case went through various forms of litigation for a very long time with multiple lawsuits, scheduled and cancelled foreclosures due to bankruptcies, and an eventual foreclosure sale. The plaintiff claimed that her signature on the deed of trust was a forgery and that the loan terms were not what she agreed to. In this version of her case, she made claims for declaratory judgment to have the court declare that her deed of trust was void and unenforceable, for intentional infliction of emotional distress, for conversion, and for trespass. This

opinion focused almost exclusively on the request for declaratory judgment as the trial court's use of the statute of limitations for fraud was her only complaint on appeal.

Lower Court Holding: The trial court sustained the demurrer to the declaratory judgment claim finding that a declaratory judgment is not appropriate because it cannot be used to correct past wrongs and alternatively held that her claim was for forgery, based in fraud, and was barred by the statute of limitations.

Appeal Court Holding: The court of appeals affirmed the trial court.

Discussion: In affirming the trial court, the court of appeals did not have to address the statute of limitations and the fraud claim. Instead, the court of appeals found that where there is more than one alternative reason for a holding, the appeals court can look to either in deciding whether to affirm the trial court. The court of appeals held that the trial court was correct in its holding that declaratory judgments are not available where rights have already been allegedly violated so it did not need to consider the fraud and statute of limitations issues.

3. *The Manors LLC and Darrick Harris v. Board of Supervisors of Albemarle County*, 76 Va. App. 737 (Ct. App. 2023).

Facts: Homeowners made substantial improvements to two-acre property and then applied for a homestay special exception to allow them to rent out five guest rooms in the main house on the property. The Board of Supervisors denied the request and plaintiffs appealed to the circuit court, which affirmed the Board's decision. The plaintiffs then appealed to the Court of Appeals, contending that the homestay special exception ordinance was unconstitutionally vague and the circuit court erred when interpreting the ordinance.

The homestay ordinance permits an owner to rent out two guestrooms by right and permits the Board to grant a special exception for three additional guest rooms provided that there is no detriment to any abutting lot and there is no harm to the public health, safety, or welfare.

Trial Court: The Circuit Court ruled in favor of the Board after a trial on the merits. Testimony at trial established that the Board's decision to deny the request was based on concerns about how granting the special exception would impact the character of the area.

Court of Appeals Holding: Affirmed.

Discussion: Plaintiffs argued that the Board's reliance on the "character of the area" was too broad and was not a component of the "public welfare." The Court rejected this argument, finding that the "character of the area" is properly considered as part of the public welfare. The Court also rejected the claim that the ordinance was unconstitutionally vague because the ordinance met all three factors set forth by the Supreme Court in *Byrum v. Board of Supervisors of Orange* County, 217 Va. 37 (1976): (i) the Board is prohibited from acting in an arbitrary, capricious, or unreasonable matter and its decisions are subject to judicial review, (ii) the County Code and the Virginia Code provide purposes that guide the Board's decision, and (iii) the Board did not attempt to delegate its legislative powers to an administrative agency so there was no need to promulgate rules for considering permits.

Finally, the Court rejected the plaintiffs' claims that the Board's decision was unsupported by the evidence. The Court noted that granting or denying a special exception is legislative action reviewed under the "fairly debatable" standard pursuant to which a court presumes that all legislative acts are reasonable but, if the plaintiff establishes "probative evidence of unreasonableness" he defeats the presumption. The burden then shifts to the board to present evidence of reasonableness and if that evidence shows that the decision was at least "fairly debatable" then the act is valid. A decision is "fairly debatable" if "the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." In undertaking this exercise, the Board is

entitled to weigh the evidence before it, including public comments, and is not required to hear expert testimony on the impact of a proposed use on property value or on the character of the neighborhood. Rather, the Board is entitled to exercise its judgment and consider public comments as it sees fit. In this case, the public comment included sufficient evidence about concerns about noise, traffic, and the character of the neighborhood.

4. *Wintergreen Homestead, LLC et al. v. Pennington, et al.*, 76 Va. App. 69 (Ct. App. 2022).

Facts: For over 200 years members of the Harris and Coleman families were buried in what they called the Wintergreen Family Cemetery, which occupied a 59-acre parcel of land. Traditionally, visitors would access the cemetery by using the driveway to the old family home on the property and then would travel along the rear of the house to the cemetery, which was located some distance away.

The 59-acre tract was partitioned into two parcels in 1993, pursuant to which a 12-acre tract, which included the old family home, was allotted to Bettie Pennington and the remaining 47-acre tract was allotted to other family members. The 47-acre tract is now titled in the name of Wintergreen Homestead, LLC and contains the family cemetery. The 12-acre tract was later subdivided into two smaller parcels and have been sold outside the family.

Until 2013, family members used the traditional access to visit the cemetery – via the old family home driveway and then along the rear of the home. This required visitors to cross the two parcels no longer owned by family members before reaching the 47-acre tract. Around 2013, the owners of the smaller parcels began refusing access over their property and family members began using another route to access the cemetery, which route does not cross over the smaller parcels.

Trial Court: The Circuit Court ruled that, although the historical access to the cemetery included using the driveway to the old home, the cemetery access statute only imposes obligations on owners of property on which a cemetery is located – not on owners of adjoining parcels. As a result, the trial court declined to grant relief to provide access across the two smaller parcels.

Court of Appeals Holding: Affirmed.

Discussion: The current version of § 57-27.1 provides in relevant part that "[o]wners of private property on which a cemetery or graves are located shall have a duty to allow ingress and egress to the cemetery or graves . . . The landowner may designate . . . the access route if no traditional access route is obviously visible by a view of the property."

The Court of Appeals determined that the trial court properly interpreted the statute to impose obligations only on owners of property that contain a cemetery. In response to the argument that limiting the statute's application to cemetery parcels could lead to an absurd result, i.e. a landowner selling all of the land surrounding a cemetery and thereby landlocking the cemetery, the Court noted that common law doctrines of easements by prescription, prior use or necessity could provide the necessary access.

D. VIRGINIA CIRCUIT COURT CASES

1. *5900 Lake Wright Drive, LLC v. U.S. Bank, NA, et al.*, 2022 Va. Cir. LEXIS 212 (City of Norfolk 2022).

Facts: This case arose from cross-motions for summary judgment on the issue of which party was entitled to payment in the amount of $450,000 from money a tenant paid to the prior owner. 5900 Lake Wright purchased the property in a foreclosure. Prior to the foreclosure, a tenant had made a pre-foreclosure payment in the amount of $450,000 to the prior owner to enable the prior owner, when the lease ended, to restore the property and remove fixtures. 5900 Lake Wright claimed entitlement to the $450,000. US Bank also claimed entitlement to the $450,000 due to an

assignment of leases and rents that was a matter of public record since 2007. The foreclosure occurred many years later in 2021.

Lower Court Holding: The Norfolk circuit court granted summary judgment to US Bank finding that 5900 Lake Wright had constructive notice of the bank's rights to all payments related to the property.

Discussion: US Bank argued that the property was sold "as-is" and "where-is" and that 5900 Lake Wright was on notice that it was entitled to all money from the property. 5900 Lake Wright argued that the demolition payment of $450,000 was not part of what US Bank should receive and that once it became the owner, it had the right to receive the funds because it, not US Bank, had to do the demolition. The Norfolk Circuit Court found that the contracts between the prior owner and US Bank were clear and unambiguous. It encompassed all money flowing from the property including the demolition payment. The court found that 5900 Lake Wright had constructive notice and that US Bank could apply the payment to the defaulted loan balance.

2. *Alves v. Stanojevic,* 2022 Va. Cir. LEXIS 183 (Alexandria County 2022).

Facts: Plaintiff filed a complaint seeking an injunction to require defendant to remove a post he erected, as well as any other encroachments, from a "Driveway Easement." Plaintiff also asserted claims for tortious interference with her easement rights, slander of title, and trespass.

Defendant owns lot 503 and plaintiff owns lot 504 in a subdivision. In 1999, the developer recorded a Deed of Subdivision and Dedication, which included a subdivision plat creating Lots 501-505 of the subdivision. On May 18, 2001 at 2:52 p.m., the developer recorded a Declaration of Easements along with a plat showing two driveway easements on lot 503 for the benefit of lots 501 and 504. The Declaration was dated May 15, 2021. The Declaration states that the Declarant (i) is the owner of Lots 501, 502, 503, 504, and 505 and "desires to create two Driveway Easements on Lot 503 for the benefit of Lots 501 and 504 . . . to provide off-street parking . . ." On May 18 at 2:54 p.m. a deed conveying Lot 503 was recorded. Both the Declaration and the Deed were executed on May 17, 2001.

The issue before the Court was whether the Developer actually owned Lot 503 when the Declaration was recorded and, therefore, whether the Developer had the power to create the parking easements on that lot.

Holding: The Court found that the Developer owned Lot 503 at the time the Declaration was recorded and therefore created a parking easement on Lot 503.

Discussion: Virginia Code § 8.01-389(C) proves that "[R]ecitals of any fact in a deed . . . conveying any interest in real property shall be prima facie evidence of that fact." The Supreme Court has also held that "The date of a deed is prima facie the date of delivery, but only prima facie. The 'question of delivery' of a deed 'is one of intention, and the rule is that delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed."

The Court accepted that the Deed was delivered on May 17, 2021, but the issue of when on the 17th the Deed was delivered was unclear and was to be determined by the intention of the grantor. Because the grantor executed the Declaration having stated that it was the owner of Lots 501-505, and declared an intention to create driveway easements to create off-street parking on Lot 503 for the benefit of other lots, the Court determined that the Developer owned Lot 503 at the time the Declaration was executed and did not intend to make the Deed his deed of conveyance until after the Declaration was both executed and recorded.

The Court also found that the easement was properly created by reference to the plat attached to the Declaration showing the bounds of the parking easements. The Court relied on *Lindsay v. James*, 188 Va. 645 (1949) and *Ryder v. Petrea*, 243 Va. 421 (1992), where the Supreme Court determined that an easement is created where "lands are laid off into lots, streets, and alleys and a map or plat

thereof is made and recorded, and all lots sold and conveyed by reference thereto, without reservation, carry with them, as appurtenant thereto, the right to the use of the easement in such streets and alleys necessary for the enjoyment and value of said lots."

Remarkably, the Court also determined that a cause of action for tortious interference with an easement exists under Virginia, finding that mere restoration of the right to use the easement will not compensate the plaintiff for the interruption in use, so the law of tort should provide a remedy. The law of tort does provide a remedy in trespass and nuisance, so a claim for tortious interference, which would appear to be flawed in this context because both the dominant and servient estate holders are effectively parties to the easement, is unnecessary.

3. *Carlson v. Newton*, 2022 Va. Cir. LEXIS 77 (City of Norfolk 2022).

Facts: The court analyzed claims for breach of contract and specific performance where a seller terminated the contract when closing did not occur as contracted. The contract had standard language pertaining to an inspection. The contract stated closing would occur before January 12, 2022 and could be extended ten days to complete financial requirements or cure title defects. The inspection occurred on December 7, 2021. As a result of the inspection revealing issues with the floor joists, the parties entered into a PICRA requiring seller to hire a licensed and insured general contractor or structural engineer to repair the joists. On January 21, 2022, one day before the extended closing date, the lender required a licensed engineer to inspect and certify the work for the first time. Closing did not occur on January 22, 2022. On January 24, 2022, the buyer asked the seller to sign an addendum extending the closing date. The seller refused and terminated the contract.

Lower Court Holding: The circuit court sustained the demurrer finding the plaintiff failed to state a claim for breach of contract and for specific performance.

Discussion: The court held that the plaintiff failed to state a claim for relief because the plaintiff failed to plead that the seller had actually breached the contract. The court found that the seller did all that was required of him under the contract. The alleged breach took place after the extended closing date and was not actionable. The court also held that there was no claim for specific performance because the contract was terminated before a non-contractual extension the buyer asked for and did not receive.

4. *Edwin C. Hall Associates v. Samantha-Barie, LLC* (City of Salem 2023).

Facts: Real estate broker brought suit as a third-party beneficiary against lessor of commercial property for failure to pay commissions due under a lease. The lease agreement at issue included a clause that provided that the lessor would pay plaintiff "a monthly leasing commission of 6% of the Base Rent . . . on monthly rents received." That same paragraph also provided that "lessor agrees to pay [plaintiff] a one time sales commission of 3% of the sale price should Lessee purchase the building, at which time monthly leasing commission would cease."

In 2018, the defendant lessor and the tenant entered into a Lease Termination Agreement pursuant to which the tenant paid the lessor a one-time termination fee of $3,788,733. The issue before the court was whether plaintiff was owed a commission on the termination fee because that fee necessarily included rents to be paid under the lease.

Holding: The Court granted summary judgment to the defendant, finding that the lease agreement simply did not address this particular situation.

Discussion: Because "[c]ourts may not rewrite contracts nor add terms that were not included by the parties" and because an "omission of a contractual term evidences an intent to exclude it," the Court determined that no commission payment was due. The plain language of the lease only afforded

the plaintiff a commission on (i) monthly lease payments and (ii) the sales price in the event of a sale. The paragraph at issue did not address a commission on a termination fee.

5. *Joshua Britt Homes, LLC v. Sloop*, 2022 Va. Cir. LEXIS 107 (City of Norfolk 2022).

Facts: The court analyzed claims of specific performance, to quiet title, for partition, and for breach of contract in consideration of the following facts: Britt Homes entered into three separate contracts for the purchase of three parcels with Max Sloop. Sloop had been married and divorced and his separation agreement provided he would own the three parcels as his sole and separate property if he refinanced them in his sole name, prepared deeds to transfer them from he and wife to him and presented the deeds to her within 30 days. There was no allegation any of this was ever done. After the three contracts were signed, Britt Homes conducted a title search that revealed that Max Sloop's wife was never removed from title. She had passed away and left one heir, her son. The title insurance company would not insure title unless the son signed the deeds. He would not. As a result, Britt Homes filed suit against Max Sloop and the son asking for specific performance of the contract, to quiet title to remove the son's claim, for partition, and for breach of contract. Max Sloop filed a demurrer to all counts and the son filed to be dismissed as an improper party to the case.

Lower Court Holding: The circuit court granted the demurrer filed by the Sloop and dismissed the son from the case.

Discussion: The court found first that there was a mutual mistake of fact in that both Max Sloop and Britt Homes believed he had full title to the properties when the contract was signed and only later learned he did not. The court held that because there was a mutual mistake of fact underlying the contracts, the court could not order specific performance. For anyone looking for a great analysis of the law in Virginia on specific performance of a real estate contract, please review this opinion. Judge Lannetti did a wonderful job on this analysis and the law in Virginia on this topic.

The court found that the son was not a proper party to the suit because he had no contractual relationship with Britt Homes. The court denied any claim to quiet title and for partition as the son was not a proper party to the contracts and because Max Sloop had not met the conditions precedent to becoming sole owner of the parcels. Importantly, Britt Homes did not allege that he had. The court found in ruling on these claims that equitable conversion did not apply because that claim pertains only to real estate contracts and not to separation agreements in a divorce.

The court also sustained the demurrer on the breach of contract claims because the mutual mistake of fact precluded the parties from having an enforceable contract. Without an enforceable contract, a party cannot state a claim for breach of contract. The court also noted, even if the contracts were enforceable, a real estate purchaser cannot recover damages for breach of contract beyond the return of the purchase money already paid unless there is bad faith, the seller voluntarily rendered themselves unable to complete the conveyance, or they were able to make the conveyance, but did not.

6. *Willems v. Batcheller*, 106 Va. Cir. 319(A) (Fairfax County 2022).

Facts: Plaintiffs sued for trespass and nuisance due to encroachment of Defendants' bamboo into Plaintiffs' property and for nuisance relating to a landscape spotlight that was directed at Plaintiffs bedroom window and relating to Christmas lights hung from a fence between the properties.

In 2002, Defendants bought their property and installed a split rail fence in 2003. In 2005, Defendants planted bamboo in the corner of their lot for privacy and screening. The bamboo was planted next to the split rail fence and near a shed on what is now Plaintiffs' property.

In 2015, Plaintiffs bought their property, which adjoins Defendants' property.

In 2020, Plaintiffs filed suit. The issues in the case were (i) whether the bamboo is a nuisance or trespassory, (ii) whether the spotlight and christmas lights constitute a nuisance, and (iii) whether Plaintiff's claims are barred by the statute of limitations or laches. Defendants also asserted as an affirmative defense their claim to ownership of property up to the fence line they installed by virtue of adverse possession.

The court held that (i) the spread of bamboo into Plaintiffs' property was both a nuisance and a trespass, (ii) the spotlight constituted a nuisance, (iii) the christmas lights were not a nuisance, and (iii) the statute of limitations did not apply because the relief sought was only equitable and laches did not bar the continuing trespasses and nuisances.

The Court also held that the split rail fence installed by Defendants in 2003 – which fence encroached onto Plaintiffs' property in several areas, established the boundary line between the properties by virtue of adverse possession. On motion for reconsideration, Plaintiffs argued that their shed roof eave, which hung over parts of the split rail fence, interrupted the exclusivity or continuity of the fence installed by Defendants to defeat their adverse possession claim. The court rejected that argument, finding that Plaintiffs would have had to take action to interfere with how Defendants used the land to disrupt the adverse possession claim. Because of the location and height of the shed eave, it did not disturb or restricted Defendants' normal use of the disputed ground.

[NOTE: at the request of the authors, the following is being published unedited.]

Legal Ethics Opinions of Particular Interest to the Real Estate Attorney
Summary Compiled by
Christina Meier and Kay M. Creasman

During 2018-2019 approximately 70 Area Representatives and members of the Board of Governor members of the Real Property Section of the Virginia State Bar reviewed all existing Legal Ethics Opinions (LEO's) to identify those which specifically related to Real Estate. Existing LEO's reviewed included those from LEO #183 (issued on 10/31/1980) through LEO #1891 (approved 1/9/2020)[1]. Approximately 130 LEO's were identified as specific to the real estate practice.

In the second phase of the project in 2020 and 2021 about a dozen attorneys did a more in-depth review to determine which LEOs were still viable, which had been superseded by statute or regulation, and which may no longer provide guidance. The goal of the second phase is to highlight the most significant LEOs that relate to real estate and have a searchable database on the Real Property website for use by the Bar.

The final phase will be to present the results to the Bar's ethics division to determine if the LEOs can be consolidated into a few functional, reliable rules.

Complete LEOs can be found at the following site: www.vsb.org/site/regulation/leos

Tom Spahn, a partner with McGuireWoods, has an excellent summary of LEOs with a link on the Bar's website (see link above). His summary has a topical index, but the LEOs were not reviewed specifically by real estate practitioners.

Summaries of the real estate related LEOs are listed in numerical/ chronological order with the issues presented summarized broadly and labeled by general categories and effective dates. The intent is to provide a starting point for the practitioner to quickly identify LEO's that might be responsive to a particular question. The source material should be consulted for more detailed guidance.

The general categories used with applicable LEOs are below. The **bold LEOs** are ones the reviewers found particularly significant. Many have been overturned by statute, Supreme Court of Virginia rules or subsequent LEOs. Those highlighted in yellow have been adopted by the Supreme Court of Virginia: LEOs 1329, 1515, 1606, 1742,1791, 1890, and 1897.

[1] LEOs were subsequently updated through 9/19/2022, LEO 1897.

Fraud LEO **1840**

Litigation/ Good Faith LEO 224

Mechanic's Lien Agent LEO **1474**, **1521**

Multiple Representation LEO **414**, 424, 437, 457, 627, **656**, 692, **1000**, 1301, **1435**, 1436, 1494, 1609, **1806**

Notary LEO **618**

Partition LEO 714, **1013**

Property Owner's Association LEO 1168

Real Estate Agency LEO 209, 267, 281, 302, **539**, 627, **751**, **1131**, **1373**, **1398**, 1588,

Release of Trust LEO 982

Settlement Services LEO **1329**, **1469 (see 1564)**, 1491, 1535, **1742**

Solicitation LEO 904, **1107**, 1437, **1698**

Title Insurance LEO 532, 548, 603, 747, 1072, 1097, 1436, 1509, **1564** (see LEO 187, 392, 545, 591, 603, 690, 712, 754, 831, 886, 939, 1072, 1097, 1152, 1170, 1198, 1311, 1318, 1345, 1402, 1405, 1469, and 1515), 1647,

Trade Name LEO 589

Trust Account LEO 183, 280, 281, 315, 331, 383 (include also 55.1-903 and LEO 663, 751 and 813), 392, 415, 454, 455, 548, 565, 753, 818, 831,832, 898, 900, 1116, 1170 (see 1564), 1187, **1255**, 1265, 1373, 1466, 1469 (see 1564), 1510, **1644**, **1797**

Trustee LEO 336, 359, 515, 528, 659, 679, 744, 800, 824, 912, **1022**, **1153**, 1277, 1301, 1335, 1391, 1494, 1515 (see 1564)

Unauthorized Practice of Law LEO 197, **1329**, **1742**

Unit Owner's Association LEO 310, 692

Unrepresented Party LEO 238, 437, 747, **1149**, 1216, **1401**, **1436**, 1645, **1742**

LEO 183 Fiduciary Responsibilities, Trust Account, Wet Settlement Act: DISBURSEMENT OF FUNDS BY ATTORNEY IN CONNECTION WITH PURCHASE OR MORTGAGE FINANCING OF REAL ESTATE. (October 31, 1980) Regarding the timing of disbursal of funds from the attorney's escrow account in a residential real estate settlement. *Va. Code § 55.1-903* now controls in residential real estate transactions: Disburse within 2 business days of recordation.

LEO 187 Affiliated Entity, Conflict of Interest, Title Insurance: CONDUCTING OF TITLE SEARCH AND OBTAINING OF TITLE INSURANCE FOR CLIENT THROUGH AGENCY OR COMPANY IN WHICH ATTORNEY HAS OWNERSHIP INTEREST OR FROM COMPANY FOR WHICH ATTORNEY IS AGENT. (October 29, 1982) Whether an attorney may conduct a title search on property for a client and then place the title coverage through an entity in which the attorney has an ownership interest. Note*: See LEO 1564*, compendium opinion.

LEO 196 Conflict of Interest: REAL ESTATE – LENDER'S ATTORNEY. (September 27, 1968) Whether it is improper for a real estate lender's attorney to designate an officer or employee of lender as trustee on the real estate deed of trust.

LEO 197 Unauthorized Practice of Law: REAL ESTATE – NON-VIRGINIA ATTORNEY AS TITLE EXAMINER. (1980) Whether a law firm may employ a non-Virginia attorney to conduct title searches.

LEO 207 Fee Sharing: REAL ESTATE – SHARING FEES WITH DEVELOPER. (July 28, 1970) Whether an attorney may refund to a developer a portion of the attorney's fee for title examinations for the developer each time the developer refers a purchaser to the attorney.

LEO 208 Conflict of Interest: ATTORNEY MEMBER OF CITY COUNCIL – CONFLICT. (November 5, 1970) Whether an attorney member of city council may preside over, or participate in, a hearing before the council in a zoning matter in which the attorney had represented a party before the council, prior his election thereto.

LEO 209 Conflict of Interest, Fees, Real Estate Agency: REAL ESTATE – NON-LEGAL FEE. (February 3, 1971) Whether a seller's attorney may receive a portion of the real estate commission on his client's real estate purchase so long as the client consents after full disclosure.

LEO 224 Litigation, Good Faith: FILING APPEAL WHERE EFFECT IS TO SUBVERT TRIAL (April 27, 1973) Whether it is improper for an attorney to appeal an adverse unlawful detainer warrant for a client (tenant), when the filing of the appeal will necessarily defeat the intent of the lower court judgment.

LEO 228 Conflict of Interest, Condemnation: EMINENT DOMAIN – CONFLICT. (September 20, 1973) Whether it is improper for a local attorney for the State Highway Department to prepare the deed and close the transaction for acquisition of private property for highway use.

LEO 234 Conflict of Interest, Condemnation: REAL ESTATE – CONDEMNATION – CONFLICT OF INTEREST. (January 3, 1974) Whether it is improper for a law firm which regularly represents the Highway Department in condemnation proceedings to represent the owner of condemned land in purchasing new property under the Relocation Assistance Act.

LEO 238 Unrepresented Party: REAL ESTATE – SELLER'S ATTORNEY OMITTING TITLE EXAMINATION. (January 3, 1974) Whether it is improper for seller's attorney to prepare a general warranty deed and a purchase money deed of trust for his client without examining the title thereto even if the buyer is not represented by an attorney.

LEO 267 Conflict of Interest, Real Estate Agency: REAL ESTATE – REPRESENTATION OF REALTOR AND PURCHASER BY SAME ATTORNEY – CONFLICT. (August 13, 1975) Whether it is improper for an attorney to continue to represent a realtor against a seller where the prospective purchaser does not continue to be otherwise involved and consents to such Attorney/Client

LEO 280 Conflict of Interest, Trust Account: CLIENTS' FUNDS – INTEREST. (March 2, 1976) Whether it is improper for a law firm to receive the interest earned on clients' funds in trust or escrow savings accounts.

LEO 281 Real Estate Agency, Trust Account: REAL ESTATE – COMMISSION. (March 25, 1976) Whether it is improper for an attorney to "let it be known" to real estate brokers that he will disburse their commissions to them at the time of settlement and prior title bringdown and recording.

LEO 302 Conflict of Interest, Real Estate Agency: REAL ESTATE – ATTORNEY -DUEAL PRACTICE. (September 21, 1978) Whether it is improper for an attorney who is a partner in a real estate firm to represent the seller and/or purchaser in a legal capacity, where the property has been sold by either the attorney or his real estate firm

LEO 310 Unit owner's Association, Conflict of Interest: CONFLICTS OF INTEREST. (December 13, 1978) Whether an attorney may represent a fourth party in an action against a homeowner's association, when that attorney has previously represented and currently represents unit owners in other actions.

LEO 315 Conflict of Interest, Trust Account: CLIENT'S FUNDS - INTEREST. (April 4, 1979) Whether it is improper for an attorney to earn interest for the attorney's benefit on a client's funds held in the attorney's trustee or escrow account.

LEO 331 Fees, Trust Account: ESCROW FUNDS – REAL ESTATE. (July 30, 1979) Whether it is improper for an attorney who receives real estate funds in escrow, from an individual, not his client, to set off against those escrow funds, amounts owing to the attorney from a separate obligation, even though the separate obligation may be incidental to the real estate transaction

LEO 332 Conflict of Interest: CONFLICT OF INTEREST – REAL ESTATE. (November 26, 1979) Whether an attorney performing real estate closings for a contractor can intervene in subsequent disputes over the issuance of a warranty policies for those closing.

LEO 336 Conflict of Interest, Trustee: TRUSTEE ON DEED OF TRUST. (September 20, 1979) Whether the buyer's attorney who is named as a Trustee on a seller held deed of trust must resign as Trustee upon request of seller.

LEO 339 Advertising: ADVERTISING – LAW LISTS – DIRECTORY. (October 19, 1979) Whether it is ethically improper for an attorney to have his name listed within a category designated "Attorneys" in the membership roster of Virginia Association of Home Builders Directory

LEO 359 Conflict of Interest, Trustee: ATTORNEY AS COUNSEL FOR NOTE HOLDER AND TRUSTEE UNDER A DEED OF TRUST – CONFLICT OF INTERESTS (March 10, 1980) Circumstances under which an attorney may serve as counsel for a note holder and as trustee under a deed of trust if the maker of the note. *Note: See LEO 824 and others; see also 359, 528, 659 and 679*

LEO 372 Conflict of Interest, Escrow Agent: REAL ESTATE – ESCROW AGENT (May 15, 1980) Circumstances under which an attorney acting as attorney for purchasers in a real estate transaction may act as joint escrow agent in connection with the seller's attorney.

LEO 383 Fiduciary Duty, Trust Account: REAL ESTATE – TABLE FUNDING (July 29, 1980) Circumstances under which an attorney may ethically deliver the proceeds of a real estate settlement to seller at the final closing but prior to actual recording of the deed. *Note: this decision is from 1980, consider VA Code §55.1-903, and see also LEO 663, 751 and 813.*

LEO 392 Trust Account: TRUST ACCOUNT INTEREST (December 15, 1980) Whether it is improper for an attorney to earn interest for the attorney's benefit on client's funds held in the attorney's trust account. *Note: See LEO 1564.*

LEO 414 Conflict of Interest, Multiple Representation: ATTORNEY AS COUNSEL FOR BUYER AND SELLER – CONFLICT OF INTEREST (May 20, 1981) Whether an attorney (or member of the same firm as such attorney) who undertakes to represent both buyer and seller in a real estate closing may subsequently represent the seller in a breach of contract action.

LEO 415 Trust Account: TRUST ACCOUNT – LOST CHECK (May 20, 1981) Circumstances under which it is proper for an attorney to withdraw the funds represented by a lost check and deposit those funds in a separate interest-bearing certificate, pending the possible resolution of the lost check.

LEO 424 Conflict of Interest, Multiple Representation: CONFLICT OF INTEREST – REAL ESTATE. (August 14, 1981) Whether an attorney may represent both the seller's real estate agent and the purchaser of property in a suit against the seller of the property

for breach of contract.

LEO 425 Fees/Non-client: REAL ESTATE CLOSIGN FEE TO SETTLEMENT ATTORNEY FOR PREPARTION OF SETTLEMENT STATEMETN AND DISBURSEMETN OF FUNDS (August 14, 1981) Whether it is improper for a closing attorney engaged by the purchaser to impose a fee upon the seller in a real estate transaction.

LEO 437 Multiple Representation, Unrepresented Party: REAL ESTATE – ATTORNEY REPRESENTING MULTIPLE PARTIES (November 17, 1981) Obligations of a builder's attorney toward a seller in a dry closing.

LEO 454 Trust Account: DISBURSEMENT OF FUNDS (April 12, 1982) Whether an attorney in in compliance with LEO 183 if the attorney immediately disburses a certified check after depositing it into a trust account.

LEO 455 Co nflict of Interest, Trustee: CONFLICT OF INTEREST – TRUSTEE UNDER A DEED OF TRUST (April 12, 1982) Whether it is ethically permissible for a law firm to represent a bank in litigation where the bank is a party, and where the trustees under a deed of trust are also parties and are members of the same firm.

LEO 457 Conflict of Interest, Attorney as a Witness: CONFLICT OF INTEREST – LAWYER AS WITNESS (April 16, 1982) Multiple Representation: Whether a Attorney who had represented both Buyer and Seller in drafting an easement could later represent just one party in litigation over that easement.

LEO 464 Duty to Disclose, Dry Closing: "DRY CLOSING" (September 20, 1982) Circumstances under which an attorney can conduct a Dry Closing.

LEO 471 Duty to Disclose, Fiduciary Duty: VIOLATION OF TERMS OF DEED OF TRUST/DUTY TO DISCLOSE. (September 20, 1982) Whether an attorney must disclose a violation of the terms of a deed of trust to a lender and/or the attorney's client during a subsequent closing involving that deed of trust.

LEO 489 Conflict of Interest, Duty to Disclose: CONFLICT OF INTERESTS/NECESSITY OF DISLCOING ATTORNEY'S FINANCIAL INTEREST (September 3, 1982) Circumstances under which an attorney may receive an originator's fee from a lender for referring clients to the lender; disclosure required.

LEO 515 Fees, Trustee: FEES – TRUSTEE OF A DEED OF TRUST (May 2, 1983) Addressing whether a trustee's commission in foreclosure is a legal fee and whether an attorney-trustee may charge less than the statutory fee in a foreclosure.

LEO 528 Conflict of Interest, Fees, Trustee: CONFLICT OF INTERESTS/REAL ESTATE/ATTORNEY-TRUSTEE (September 13, 1983) Whether an attorney representing both buyer and seller in a transaction may later represent the creditor against the debtor in an action or foreclose against the property. The opinion also cautions that "the fact that a fee is stated and agreed to in a contract is not dispositive of whether it is reasonable under the Code of Professional Responsibility." *Note: See LEO 824.*

LEO 532 Title Insurance: REAL ESTATE/TITLE INSURANCE AGENCIES OR COMPANIES (December 16, 1983) Whether the form of entity (e.g. sole proprietorship) is within the language "agency or company" as used in LEO 187.

LEO 539 Advertising, Conflict of Interest, Real Estate Agency: ADVERTISING-SOLICITATION/REAL ESTATE/ATTORNEY RECOMMENDED BY REAL ESTATE FIRM (January 18, 1984) Measures to be taken where real estate agency is referring business to an attorney as the agency's "preferred settlement agent."

LEO 545 Title Insurance: TITLE INSURANCE – ATTORNEY PARTICIPATION IN A COMPANY. (March 1, 1984) Circumstances under which an attorney may participate in a title insurance agency as a shareholder. *Note: See LEO 1564.*

LEO 548 Trust Account: ESCROW ACCOUNTS – DISPOSAL OF UNIDENTIFIED FUNDS (March 1, 1984) How an attorney may disburse funds from a trust account where the ownership is not readily accountable, including disbursal to the attorney's own account.

LEO 565 Trust Account: ESCROW ACCOUNTS – FOREIGN BANKS – DISCLOSURE. (May 2, 1984) Addressing the ethical obligation of the attorneys to maintain trust accounts in banks which report overdrafts to the Virginia State Bar.

LEO 589 Trade Name: TRADE NAMES – PROFESSIONAL LAW CORPORATION. (July 5, 1984) Unethical nature of a law firm using a trade name " _____ Closing Company, P.C."

LEO 591 Title Insurance: ATTORNEY STOCKHOLDER – TITLE INSURANCE AGENCY (July 5, 1984) Circumstances under which an attorney may receive dividends for ownership in a title company. *Note: See LEO 1564.*

LEO 603 Title Insurance: TITLE INSURANCE BUSINESS – PARTICIPATION BY ATTORNEYS. (June 24, 1985) Circumstances under which a law firm may process applications for title insurance on behalf of its clients through a title insurance business in which the law firm or members of the law firm have a business interest. (Additional fact patterns are addressed.) *Note: See LEO 1564.*

LEO 618 Notary: NOTARY/ATTORNEY – NOTARIZING AFFIDAVITS OR SWORN PLEADINGS (October 15, 1984) It is improper for an attorney who is qualified as a notary public in Virginia to notarize affidavits or sworn pleadings for a client of the attorney/notary.

LEO 627 Conflict of Interest, Multiple Representation, Real Estate Agency: IN-HOUSE CUNSEL – REPRESENTATION OF BROKER/EMPLOYER AND CUSTOMER. (November 13, 1984) Whether an attorney employed by a real estate broker as a full-time employee may ethically represent the interests of his employer when the employer buys and sells real estate in his own name, and whether the attorney may represent other parties to the transaction.

LEO #647 Fees/Non-client: CONFLICT OF INTEREST -REAL ESTATE – BUYER'S ATTORNEY CHARGIN SELLER A FEE – PRIOR AGREEMENT (January 14, 1985) Whether it is improper for a closing attorney engaged by the purchaser to impose a fee upon the seller in a real estate transaction.

LEO 656 Conflict of Interest, Multiple Representation: CONFLICT OF INTEREST – MULTIPLE CLIENTS -REAL ESTATE – SUBSTANTIALLY RELATED MATTER (January 21, 1985) Circumstances under which an attorney) who represented both buyer and seller in a real estate closing may subsequently represent the seller in a breach of contract action against the buyer.

LEO 659 Conflict of Interest, Trustee: CONFLICT OF INTEREST- TRUSTEE FORECLOSING AGAINST FORMER CLIENT. (February 1, 1985) Circumstances under which an attorney can foreclose as trustee of a deed of trust where the debtor is the attorney's former client. Note: *See LEO 824.*

LEO 663 Fiduciary Duty, Trust Account: ESCROW ACCOUNT – DISBURSEMENT OF FUNDS – VESTIONG OF TITLE – PERFECTED LIENS (February 27, 1985) Conditions required before an attorney can disburse escrow funds.

LEO 679 Conflict of Interest, Duty to Disclose, Trustee: CONFLICT OF INTEREST – REAL ESTATE – ATTORNEY AS COUNSEL FOR MAKER OF NOTE AND TRUSTEE UNDER DEED OF TRUST. (April 5, 1985) Required disclosures to be made before attorney represents maker of note and acts as Trustee on the underlying deed of trust. *Note: See LEO 824.*

LEO 690 Conflict of Interest, Title insurance: CONFLICT OF INTEREST – ATTORNEY AS TITLE INSURANCE AGENT. (May 10, 1985) Limiting the attorney's actions in underwriting title insurance for settlements conducted by the attorney. *Note: See LEO 1564.*

LEO 692 Adverse Party, Multiple Representation, Unit Owner's Association: SIMULTANEOUS REPRESENTATION OF ADVERSE PARTIES IN UNRELATED SUITS. (May 10, 1985) Addressing the attorney's ability to represent a unit owner's association in collections, as well as unit owners in an unrelated matter.

LEO 712 Title Insurance: TITLE INSURANCE BUSINESS – PARTICIPATION BY ATTORNEYS. (August 30, 1985) Affirming LEO 603 and the ability for attorneys to have an interest in a title insurance agency under specific circumstances. *Note: See LEO 1564.*

LEO 714 Confidences, Conflict of Interest, Partition: CONFIDENCES AND SECRETS. (August 20, 1985) Addressing whether an attorney in a partition suit could participate in a public auction of the property in question.

LEO 744 Conflict of Interest, Fiduciary Duty, Trustee: ATTORNEY/CLIENT RELATIONSHIP – SUBSTITUTION OF TRUSTEE (April 17, 1986) Issues related to a buyer's attorney acting as Trustee and addressing the Fiduciary Duty to the noteholder.

LEO 747 Duty to Disclose, Title Insurance, Unrepresented Party: REAL ESTATE CLOSING - DISCLOSURE OF REPRESENTATION TO BUYER. (December 4, 1985) Addressing the disclosures required to an unrepresented buyer where seller's attorney is conducting the closing, and the obligation to advise buyers of the nature, benefits and availability of title insurance.

LEO 751 Real Estate Agency, Trust Account, Wet Settlement Act: DISBURSEMENT OF REAL ESTATE SETTLEMETN FUNDS PRIOR TO DEPOSIT (December 4, 1985) Whether it is improper for an attorney to deliver sales proceeds or commission checks at closing prior to the bank deposit of the disbursable funds when the disbursement checks are dated the following business day, or when the checks are dated the date of closing and delivered with the instruction not to negotiate the check until the disbursable funds are deposited by the attorney.

LEO 753 Trust, Wet Settlement Act: DISBURSEMENT OF LOAN FUNDS (February 13, 1986) Whether it is improper for an attorney to make disbursements from a trust account in accordance with § 6.1-2.10 of the Virginia Code (the Wet Settlement Act) when said disbursements are based upon deposits of financial instruments in the forms, and/or issued by entities, listed in the 1984 amendment to the Wet Settlement Act.

LEO 783 Conflict of interest: REAL ESATE – CONFLICT OF INTEREST. (April 22, 1986) Circumstances under which an attorney who initially intended to represent a buyer of property may buy the property after the buyer failed to purchase and seller fell into default on the existing debt.

LEO 800 Conflict of interest, Trustee: CONFLICT OF INTEREST. (May 27, 1986) Whether an attorney may foreclose on a property as Trustee and defend through independent counsel an action by a third-party endorser and guarantor who has previously been represented by a partner of the attorney.

LEO 813 Trust Account: ESCROW ACCOUNT – DISBURSEMENT OF FUNDS. (October 14, 1986) Addressing the attorney's obligation to retain funds in the trust account until the proper

preconditions have been satisfied, when the satisfaction of the pre-conditions is delayed by circumstances outside the attorney's control (e.g. clerk's office is not able to record promptly.)

LEO 818 Confidences, Trust Account: ATTORNEY-CLIENT PRIVILEGE – CONFIDENTIALITY (September 3, 1986) Whether it is improper for an attorney to identify clients with unclaimed trust account funds and to turn the monies over to the Department of Treasury.

LEO 824 Conflict of Interest, Trustee: CONFLICT OF INTEREST – ATTORNEY AS TRUSTEE (October 9, 1986) Addressing when an attorney who represented the maker of a Note and was named as Trustee in the underlying Deed of Trust may subsequently act as Trustee in a foreclosure.

LEO 831 Trust Account: CLIENTS' FUNDS – INTEREST (October 8, 1986) Whether it is improper for a law firm to place funds in an interest-bearing account which will result in the firm receiving an automatic administrative fee equal to 15 percent of the funds, even though the interest earned by the funds will be credited against the administrative overhead fee charged by the firm to its clients. *Note: See LEO 1564.*

LEO 832 Trust Account: ESCROW ACCOUNT FUNDS – UNLOCATED CLIENT. (September 23, 1986) Whether it is improper for an attorney, who has for some time maintained in his trust account minimal funds for three separate clients with whom the attorney has had no contact recently and has no means of contacting, to dispose of such funds pursuant to § 55-210.1 *et seq.* of the Virginia Code.

LEO 836 Conflict of Interest, Attorney as Witness: CONFLICT OF INTEREST – REAL ESTATE (October 9, 1986) Whether it is improper for an attorney to continue representing a defendant when the attorney's law partner prepared the defendant's deed which is the subject matter of the suit, and when the attorney's partner may be called as a witness.

LEO 863 Conflict of Interest, Attorney as Witness: REAL ESTATE – ATTORNEY AS ESCHEAROR – POSITION ADVERSE TO ESCHEAT PURCHASER (April 1, 1987) Whether an attorney who served as escheator may subsequently bring a suit to quiet title against the party who purchased the property subject to the escheat sale, when there is a strong possibility that the attorney/escheator will be called as a witness.

LEO 878 Fees/Non-client: REAL ESTATE – BUYER'S ATTORNEY CHARGING SELLER A FEE. (March 11, 1987) Whether it is proper for buyer's attorney in a residential real estate transaction to impose a charge upon the sellers for the release of deeds of trust on the property to be sold absent any prior agreement or recitation that the charge would be imposed.

LEO 886 Title Insurance: REAL ESTATE -TITLE INSURANCE (April 1, 1987) Addressing whether an attorney may process applications for title insurance on behalf of the attorney's clients through a title insurance business in which the attorney has a business interest. *Note: See LEO 1564.*

LEO 898 Trust Account: REAL ESTATE – DISBURSEMENT OF TRUST FUNDS (April 1, 1987) Addressing whether an attorney can deposit a cashier's check outside of banking hours and immediately write a check on those funds.

LEO 900 Trust Account, Wet Settlement Act: REAL ESTATE – WET SETTLEMENT ACT (March 17, 1987) Providing guidance to the attorney when the Wet Settlement Act may require disbursal of funds prior to the actual recordation of documents (due to recording delays,) and enumerating safeguards to be taken.

LEO 904 Solicitation: SOLICITATION LETTER. (April 1, 1987) Circumstances under which an attorney may solicit by mail individuals whose homes are subject to foreclosure.

LEO 906 Confidences: REAL ESTATE – DISCLOSING INFORMATION. (April 1, 1987) Whether it is improper for an attorney to disclose the I.R.S. required information to an outside organization to produce the 1099B forms on the required tapes.

LEO 911 Fees/Non-client: REAL ESTATE – BUYERS ATTORNEY CHARGING SELLER A FEE. (June 11, 1987) Whether it is improper for buyer's attorney in a real estate transaction to charge seller a reasonable fee for proper compliance with the requirements of new IRS Form 1099, when the seller is notified of the amount of the charge and the basis for making the charge. *Note, withdrawn by the language of LEO 1228.*

LEO 912 Trustee: TRUSTEE'S FEE – FORECLOSURE ON DEED OF TRUST. (June 11, 1987) Whether the trustee in foreclosure may negotiate higher fees with the noteholder, to be paid by noteholder, than those called for in the deed of trust.

LEO 922 Fees/Non-client: REAL ESTATE – BUYER'S ATTORNEY CHARGING SELLER A FEE (June 11, 1987) Whether it is improper for buyer's attorney to charge the seller for the release of deeds of trust on the property to be sold and for filing the IRS required 1099 information, providing the attorney forewarns the seller that such a charge can be made and the amount.

LEO 927 Fees/Non-client: REAL ESTATE – BUYER'S ATTORNEY CHARGING SELLER A FEE. (June 11, 1987) Whether it is improper for buyer's attorney to charge seller for the release of deeds of trust on the property to be sold, provided seller is forewarned of the charge and the amount in enough time to avoid the charge. It is not improper for buyer's attorney to charge seller for compliance with IRS requirements involving Form 1099.

LEO 939 Title Insurance: REAL ESTATE – TITLE INSURANCE. (June 11, 1987) Whether it is improper for an attorney to place his clients' title insurance needs through a title insurance agency in which the attorney has an ownership interest after full disclosure is made to the client. *Note: See LEO 1564.*

LEO 966 Duty to Disclose: REAL ESTATE – DUTY TO DISCLOSE FAILURE TO OBTAIN EXTENSION. (September 30, 1987) Addressing the obligations of a law firm in a tax fee exchange on advising the client on the need to apply for an extension in the event of a delay.

LEO 980 Conflict of Interest: ATTORNEY/CLIENT – PERSONAL INTEREST WHICH MAY AFFECT PROFESSIONAL JUDGMENT. (October 12, 1987) Circumstances under which an attorney residing in a community with a homeowner's association may represent that association.

LEO 982 Release of Trust: REAL ESTATE – RELEASE OF TRUST (October 14, 1987) Whether an attorney who closed a real estate transaction and caused a loan secured by a deed of trust to be paid off can later ethically release the lien of that deed of trust and assert that the original note is lost or destroyed.

LEO 1000 Conflict of Interest, Duty to Disclose, Multiple Representation: REAL ESTATE – REPRESENTATION OF BUYER AND SELLER. (November 12, 1987) Citing LEO 414 and reminding an attorney who represents both buyer and seller in a real estate transaction of the obligation to advise them that the attorney can represent neither party in the event of a dispute.

LEO 1013 Conflict of Interest, Partition: CONFLICT OF INTEREST – MULTIPLE CLIENTS (December 10, 1987) Addressing the circumstances under which an attorney may represent the plaintiff and defendant in a partition suit, where the interests of the parties are substantially the same, full disclosure is made and consent it obtained.

LEO 1022 Conflict of Interest, Trustee: REAL ESTATE – ATTORNEY AS TRUSTEE. (March 8, 1988 and May 24, 1988) Whether a trustee who formerly represented the borrower may also foreclose without first obtaining the borrower's consent. Whether, once foreclosure has taken place, it is improper for the firm to bring a suit on behalf of the noteholders for any deficiency.

LEO 1072 Duty to Disclose, Title Insurance: TITLE INSURANCE. (May 31, 1988) Whether there are per *se* prohibitions in obtaining title insurance policies for clients pursuant to DR:5-101(A) and standards on how to determine the adequacy of disclosure, referencing LEO 187. *Note: See LEO 1564.*

LEO 1095 Confidences, Fees: ATTORNEY CLIENT PRIVILEGE/ COLLECTION OF UNPAID FEES – REVEALING CONFIDENCES AND SECRETS TO ESTABLISH REASONABLENESS OF

FEES. (June 14, 1988) Whether an attorney can disclose privileged or confidential information in response to a discovery motion in a suit to collect fees.

LEO 1097 Duty to Disclose, Title Insurance: DUAL PRACTICE – TITLE INSURANCE – ATTORNEY CLIENT – DISCLOSURE. (July 11, 1988) Circumstances under which an attorney may issue title opinions to a title company on a policy being issued for the attorney's client. *Note: See LEO 1564.*

LEO 1107 Advertising, Solicitation: ADVERTISING – REAL ESTATE BROCHURES. (August 1, 1988) Whether it is unethical for an attorney to advertise that he specializes in a certain area of law in advertising material sent to real estate companies, including a statement of the attorney's fees.

LEO 1116 Trust Account: REAL ESTATE: DISBURSEMENT OF PROCEEDS PRIOR TO RECORDATION OF LENDER'S DEED OF TRUST. (July 6 1988) Whether an attorney may disburse funds prior to recordation of a deed of trust with approval of all parties, citing Virginia Code §6.1-2.13.

LEO 1120 Fees: REAL ESTATE: LENDER APPROVAL OF BORROWER'S CLOSING ATTORNEY. (September 9, 1988) Whether a bank may require lender counsel at borrower's expense on a large transaction and declining to address whether the bank may require approval of borrower's counsel.

LEO 1123 Conflict of Interest: CONFLICT OF INTEREST - SPOUSES. (November 16, 1988) Whether and how one spouse member of a firm may represent clients before a zoning board when the other spouse/member of the firm is a member of that board.

LEO 1131 Conflict of Interest, Real Estate Agency: BUSINESS ACTIVITIES – CONFLICT OF INTEREST – DISCLOSURE – PROFESSIONAL CORPORATION: LAW FIRM STOCKHOLDERS OF REALTY CORPORATION AND ASSISTING WITH CLOSINGS AND LOANS. (September, 1988) Addressing the concerns of an attorney handling closings and other matters for a real estate agency in which the attorney has an ownership interest.

LEO 1138 Title Insurance: BUSINESS ACTIVITIES – TILE COMPANY: FINANCIAL ARRANGEMENTS IN BEHALF OF ATTORNEYS/SHAREHOLDERS OF TITLE COMPANY-NONLAWYERS: ATTORNEY ENGAGED IN BUSINESS WITH A NONLAWYER. (August 18, 1988) Addressing appropriate arrangements for an attorney to join with other attorneys and a non-attorney in a title insurance business. *Note: See LEO 1402 which vacates.*

LEO 1148 Fees/Non-Client: FEES – DISCLOSURE – REAL ESTATE: IMPROPER CHARGES TO SELLER BY PURCHASER'S ATTORNEY. (October 18, 1988) Whether the buyer's attorney may charge the seller a fee without a prior agreement or forewarning of the imposition of fees.

LEO 1149 Adverse Party, Conflict of Interest, Unrepresented Party: COMMUNICATION WITH ADVERSE PARTY – CONFLICT OF INTEREST/MULTIPLE REPRESENTATION – REAL ESTATE: PURCHASER'S ATTORNEY OBTAINING A POWER OF ATTORNEY FROM SELLER. (December 19, 1988) Whether presenting a power of attorney to a seller who is represented by counsel is improper, and whether presenting a power of attorney to an unrepresented seller is improper. *Note: See Leo 1401.*

LEO 1152 Title Insurance: TITLE AGENCY: ISSUING TITLE POLICIES TO REAL ESTATE CLIENTS. (November 16, 1988) Whether and how an attorney may issue title policies to clients from an attorney owned agency and referencing LEO 886 and 939. *Note:* See *LEO 1564.*

LEO 1153 Conflict of interest, Duty to Disclose, Trustee: REAL ESTATE TRANSACTIONS: LAW FIRM ACTING AS SETTLEMENT ATTORNEY AND DESIGNATING FIRM MEMBERS AS TRUSTEES. (January 4, 1989) Disclosure required where an attorney acts as borrower's settlement agent while another member of the firm is named as Trustee on the Deed of Trust.

LEO 1168 Conflict of Interest, Homeowner's Association: ATTORNEY-CLIENT RELATIONSHIP – CONFLICT OF INTEREST: ATTORNEY REPRESENTING DIRECTORS OF A HOME OWNERS ASSOCIATION WHICH NAMES AS DEFENDANTS MEMBERS OF THE ASSOCIATION. (November 16, 1988) Whether an attorney or law firm which represents a homeowners' association as an entity may ethically initiate a declaratory judgment action which names as defendants members of the association when the firm does not otherwise represent these members of the association.

LEO 1170 Conflict of Interest, Trust Account: DUAL PRACTICE – MISCONDUCT – REAL ESTATE TRANSACTION – TRUST ACCOUNT: ATTORNEYS REFERRING CLIENTS TO THEIR OWN SETTLEMENT SERVICE COMPANY AND RETAINING THE INTEREST ON THE TRUST ACCOUNTS. (January 30, 1989) Whether it is unethical for an attorney or a law firm to steer a client to a separate lay corporation owned by the attorney or law firm for the purpose of doing something which the attorney may not do directly, i.e., earn interest on clients' funds; and whether such referral may be done when the purpose is not for circumventing the rules. *Note: See LEO 1564.*

LEO 1177 Fees/Non-Client: FEES – REAL ESTATE TRANSACTION: SETTLEMENT ATTORNEY ADVISING ATTORNEYS IN SURROUNDING AREA OF FEE ARRANGEMENT TO SELLERS FOR PERFORMING CERTAIN SERVICES. (December 9, 1988) Addressing the ethics of sending a letter to other attorneys, advising them that the attorney when acting as buyer's attorney will charge fees to seller for provision of services such as HUD-1 preparation, 1099 filing and obtaining released.

LEO 1187 Trust Account: TRUST ACCOUNT: DEDUCTING THE AMOUNT OWED TO THE LAW FIRM FROM THE DISBURSEMENT DUE THE CLIENT. (January 4, 1989) Addressing when and

how an attorney may disburse funds due to the attorney from a trust account.

LEO 1204 Fees/Non-client: FEES – REAL ESTATE RANSACTIONS: SELLER'S ATTORNEY CHARGING FEE TO PURCHASER ABSENT PRIOR CONSENT WHEN PURCHASER IS REPRESENTED BY SEPARATE COUNSEL. (March 11, 1989) Whether a seller's attorney (designated as the settlement agent in the opinion) who prepared private financing documents on seller's behalf may charge a fee to the buyer.

LEO 1216 Conflict of Interest, Unrepresented Party: ATTORNEY-CLIENT RELATIONSHIP: BUSINESS TRANSACTION – MISCONDUCT – MULTIPLE REPRESENTATION – REAL ESTATE PRACTICE: ATTORNEY/SETTLEMENT AGENT REPRESENTING TO SELLERS TO BE PURCHASER AND LATER LISTING DIFFERENT PURCHASERS ON THE DEED. (May 8, 1989) Multiple issues are addressed, including whether the designation of the place of settlement or of a settlement attorney automatically creates an attorney/client relationship between that attorney and the opposing parties to a real estate transaction, and whether the mere tendering of a deed on behalf of a party necessarily creates an attorney/client relationship with the other party. *Note: The opinion does not fully resolve the question presented, which included a fact pattern in which the attorney wore multiple hats as real estate agent, buyer, settlement agent, and assignor, stating that the facts are in dispute.*

LEO 1228 Fees/Non-client: FEES – REAL ESTATE PRACTICE: PROPRIETY OF SETTLEMENT ATTORNEY IMPOSING FEE ON SELLERS. (May 12, 1989) Whether the buyer's attorney may charge the seller a fee without a prior agreement or forewarning of the imposition of fees, including a
discussion of the impropriety of charging a fee for the preparation of the 1099.

LEO 1255 Trust Account, Wet Settlement Act: REPRESENTATION WITHIN THE BOUNDS OF THE LAW – TRUST ACCOUNTS – WET SETTLEMENT ACT: AGREEMENT BETWEEN ATTORNEY AND LENDER TO WAIVE ALL FUTURE RIGHTS TO LENDER'S CERTIFIED FUNDS. (July 25, 1989) Whether a specific request from a mortgage corporation to waive all future rights to certified funds on closings is permissible, requiring the attorney to advise the lender that settlement proceeds must, nevertheless, be in one of the other acceptable forms enumerated under Virginia Code Section 6.1-2.10 in order to comply with the Wet Settlement Act.

LEO 1265 Trust Account: TRUST ACCOUNTS: INVESTING THE CLIENT'S ESCROW FUNDS IN REPURCHASE AGREEMENTS. (August 14, 1989) Whether trust account funds can be held in higher yield/riskier accounts which are not insured by an agency of the Federal Government.

LEO 1277 Fees/Non-client, Trustee: FEES: ATTORNEY – SUBSTITUTE TRUSTEE IMPOSING CHARGES ON PURCHASER AT FORECLOSURE SALE. (September 21, 1989) Whether an attorney acting as Trustee in a foreclosure sale may ethically charge fees to a buyer at such sale.

LEO 1284 Confidences: CLIENT'S IDENTITY – CONFIDENTIALITY: PROPRIETY OF WITHHOLDING A CLIENT'S IDENTITY. (October 19, 1989) Whether a client's identity may be construed to be a confidence or secret, even when such information is a matter of public record, where the client has specifically requested that such information be kept secret or held inviolate.

LEO 1291 Conflict of Interest: SPOUSES/LAW PARTNERS: APPEARANCE BEFORE A TRIBUNAL UPON WHICH SPOUSE/PARTNER IS A MEMBER. (October 19, 1989) Re-visiting LEO 1123 (Whether and how one spouse/ member of a firm may represent clients before a zoning board when the other spouse/member of the firm is a member of that board) and advising an attorney who has concerns about the propriety of another attorney's actions to report to the Disciplinary Committee the possible violation of disciplinary rules.

LEO 1301 Attorney as Witness, Conflict of Interest, Duty to Disclose, Multiple Representation, Trustee: ATTORNEY AS WITNESS – FIDUCIARY RELATIONSHIPS – PRO SE REPRESENTATION: TRUSTEE'S PRO SE REPRESENTATION WHEN IT IS OBVIOUS THAT TRUSTEE/ATTORNEY WILL HAVE TO TESTIFY IN PROCEEDING. (January 4, 1990) Whether a trustee in a foreclosure action who is expected to be a witness in a contested matter related to the foreclosure may act *pro se* in the matter.

LEO 1329 Fee Sharing, Settlement Services, Unauthorized Practice of Law: AIDING A NON-LAWYER IN THE UNAUTHORIZED PRACTICE OF LAW – REAL ESTATE/TITLE SERVICES: ATTORNEY RETAINED BY CLIENT/TITLE AGENCY TO ASSIST IT IN PREPARATION OF DOCUMENTS INCIDENT TO CONDUCTING A REAL ESTATE CLOSING (Committee Opinion April 20, 1990) Addressing the relationship of an attorney employed by a Settlement Service, including what services may be provided, how fees may be collected, disclosures required and requirements of referring business. **Approved by Supreme Court of Virginia November 2, 2016.**

LEO 1335 Fiduciary Duty, Trustee: REAL ESTATE PRACTICE – CONFLICT OF INTERESTS – MULTIPLE REPRESENTATION: ATTORNEY/TRUSTEE'S DUTY TO EXECUTE DEED OF RELEASE WHEN NOTE HAS BEEN PAID IN FULL. (April 20, 1990) Whether an attorney who served as settlement attorney and as trustee on the deed of trust may ethically sign a deed of release in his capacity as trustee if the trustee determines that the noteholder is unjustified in refusing to release the lien based on a separate dispute with the debtor and is doing so merely to harass or maliciously injure the debtor.

LEO 1346 Conflict of Interest, Fees/Non-client: REAL ESTATE TRANSACTION – FEES – ZEALOUS REPRESENTATION: BUYER'S ATTORNEY DELAYING CLOSING; SELLER NOT WILLING TO PAY FEES FOR BUYER'S ATTORNEY FEE FOR RELEASING THE MORTGAGE LIEN (May 24, 1990) Whether a buyer's attorney may refuse to conduct a real estate settlement when the seller refuses to pay a disclosed fee for obtaining a release of a mortgage, considering

both the right to charge the seller a fee and the attorney's obligations to the buyer and the title company in conducting the settlement and obtaining the release. Also advising an attorney who has concerns about the propriety of another attorney's actions to report to the Disciplinary Committee the possible violation of disciplinary rules.

LEO 1351 Conflict of Interest: REAL ESTATE TRANSACTION – DUTY TO CLIENT – NEGLIGENCE: ATTORNEY'S INADVERTENT ERROR; PURCHASING JUDGMENT WHICH IS SUBJECT OF ATTORNEY'S ERROR; ENFORCING AND COLLECTING JUDGMENT AGAINST CLIENT (May 24, 1990) Whether an attorney who overlooked a judgment at the time of a real estate closing in which the attorney represented buyer and seller, and then purchased that judgment at a discount and attempted to collect the judgment in full against the sellers, acted ethically. Also advising an attorney who has concerns about the propriety of another attorney's actions to report to the Disciplinary Committee the possible violation of disciplinary rules.

LEO 1373 Trust Account, Real Estate Agency: REAL ESTATE PROCTICE CONTRACTS: SETTLEMENT ATTORNEY ESCROWING REAL ESTATE COMMISSION AT CLOSING DUE TO DISPUTE BETWEEN SELLER AND BROKER/SELLER'S AGENT. (July 31, 1990) The committee declined to opine on whether a settlement agent could escrow a real estate commission at the seller's direction when the real estate broker did not consent.

LEO 1375 Adverse Party, Landlord/Tenant: COMMUNICATION WITH ONE OF ADVERSE INTEREST – LANDLORD/TENANT DISPUTES: ATTORNEY FORWARDING A DEFAULT NOTICE DIRECTLY TO LESSEE WHEN LEASE AGREEMENT PERMITS SUCH NOTICE. (October 1, 1990) Where a tenant and a landlord were each represented by counsel during the drafting of a lease agreement which provided that required notices to be sent directly to the parties, whether there is implied consent for the landlord's attorney to communicate directly with the tenant, and whether the provision of legal notices constitutes the communication envisioned by the proscriptions of DR 7-103.

LEO 1391 Conflict of Interest, Trustee: REAL ESTATE TRANSACTIONS/ PRACTICE - CONFLICT OF INTERESTS - FORMER CLIENT: ATTORNEY/ SUBSTITUTE TRUSTEE FORECLOSING ON DEED OF TRUST ON REAL ESTATE WHICH IS ASSET OF THE ESTATE OF FORMER CLIENT. (January 14, 1991) Whether an attorney may act as Trustee in foreclosure on property where he previously represented the (now deceased) debtor and the estate of that debtor.

LEO 1398 Conflict of Interest, Duty to Disclose, Real Estate Agency: REAL ESTATE TRANSACTIONS/ PRACTICE - PERSONAL INTEREST AFFECTING REPRESENTATION: SETTLEMENT ATTORNEY SPOUSE OF REAL ESTATE AGENT FOR SELLER AND/OR PURCHASER. (February 15, 1991) Addressing when and how an attorney can represent a buyer and/or seller in transactions where the attorney's spouse is acting as real estate agent.

LEO 1401 Adverse Party, Conflict of Interest, Unrepresented Party: COMMUNICATION WITH

ADVERSE PARTY — CONFLICT OF INTEREST — MULTIPLE REPRESENTATION — REAL ESTATE: PURCHASER'S ATTORNEY REQUESTING A SPECIFIC POWER OF ATTORNEY NAMING PURCHASER'S ATTORNEY AS ATTORNEY IN FACT. (March 12, 1991) Whether presenting a power of attorney to a seller who is represented by counsel would be improper, and whether presenting a power of attorney to an unrepresented seller is improper.

LEO 1402 Title Insurance. BUSINESS ACTIVITIES — TITLE COMPANY: FINANCIAL ARRANGEMENT IN BEHALF OF ATTORNEYS/SHAREHOLDERS OF TITLE COMPANY. (October 21, 1991) Vacating LEO 1138 and stating that no advisory opinion is now in force which specifically permits an attorney/title insurance company stockholder to receive consulting fees the amount of which is tied to the number of policies obtained for his clients through the title insurance company. *Note: See LEO 1564.*

LEO 1405 Conflict of Interest, Title Insurance: TITLE AGENCY: DIRECTLY PAYING LAW FIRM EMPLOYEES AND INVOICES FOR GOODS, SERVICES AND ADVERTISEMENTS RENDERED TO THE LAW FIRM. (September 17, 1991) Where an attorney owns both a law firm and a title company, whether the payment of a law firm's salaries and expenses by the title company is appropriate, and whether that violates anti-kickback provisions. *Note: See LEO 1564.*

LEO 1435 Confidences, Attorney as Witness, Multiple Representation: CONFIDENCES AND SECRETS: ATTORNEY AS A WITNESS FOLLOWING MULTIPLE REAL ESTATE REPRESENTATION. (November 18, 1991) Whether an attorney who represented both buyer and seller in a real estate transaction can later testify as a witness for one party in a dispute with the other over that transaction, and duties of confidentiality.

LEO 1436 Duty to Disclose, Multiple Representation, Title Insurance, Unrepresented Party: REAL ESTATE REPRESENTATION – CONFLICT OF INTEREST - MULTIPLE REPRESENTATION: LENDER'S ATTORNEY ADVISING UNREPRESENTED BORROWER. (November 1, 1991) When a lender's attorney is conducting a loan closing, whether that attorney represents the lender only or may represent the borrower, too, and what obligations the lender's attorney has to the borrower regarding issuance of a title policy under the different models of Attorney/Client.

LEO 1437 Advertising, Solicitation: ADVERTISING AND SOLICITATION: ATTORNEY RESPONDING TO INQUIRIES OF DECEASED ATTORNEY'S CLIENTS. (October 21, 1991) Addressing a situation where an attorney took over the phone lines and files of another attorney who was incapacitated or deceased.

LEO 1442 Fees/Non-Client, Fiduciary Duty: REAL ESTATE PRACTICE - FEES – PERSONAL INTEREST AFFECTING REPRESENTATION - COMPETENCE – ZEALOUS REPRESENTATION: LENDER'S ATTORNEY CHARGING RELEASE FEE TO DEBTOR AND HOLDING DOCUMENTS FROM RECORDATION UNTIL DEBTOR PAYS RELEASE FEE. (November 27, 1991) Whether a settlement attorney may refuse to record a release of mortgage when the seller refuses to pay a

disclosed fee for obtaining the release of a mortgage. Also citing LEO #1325, for the premise that it is unethical for an attorney acting in a fiduciary capacity to violate his or her duty in a manner that would justify disciplinary action if the relationship were that of attorney-client.

LEO 1466 Fees/Non-Client, Trust Account, Wet Settlement Act: REAL ESTATE REPRESENTATION: APPLICATION OF THE WET SETTLEMENT ACT TO REAL ESTATE CLOSING HANDLED BY SEPARATE ATTORNEYS FOR PURCHASER AND SELLER. (June 22, 1992) Addressing whether funds transferred from a buyer's attorney to a seller's attorney for disbursing payoff, commissions, and other fees, may be by attorney escrow account check, and whether a fee for obtaining a cashier's or certified check may be passed on to the seller.

LEO 1469 Attorney/Client, Settlement Services, Trust Account: TRUST ACCOUNTS: EARNING INTEREST ON ESCROW FUNDS OF REAL ESTATE SETTLEMENT SERVICE OWNED BY AN ATTORNEY. (June 22, 1992) Whether an attorney affiliated with a real estate settlement service who prepares deeds and notes for the service's customers is thereby acting as attorney for the customers, and whether any interest may be earned on the real estate settlement service's trust account under these circumstances. *Note: See LEO 1564.*

LEO 1474 Attorney as Witness, Mechanic's Lien Agent: ATTORNEY AS WITNESS: ATTORNEY/MECHANICS' LIEN AGENT REPRESENTING CONTRACTOR AND TESTIFYING AS TO CLAIMS AND DISBURSEMENTS. (October 19, 1992) Whether an attorney who is a Mechanic's Lien Agent may represent a client in a matter where the attorney may be called to testify as MLA.

LEO 1491 Attorney/Client, Settlement Services: AIDING UNAUTHORIZED PRACTICE OF LAW: EMPLOYMENT OF SUSPENDED ATTORNEY BY REAL ESTATE SETTLEMENT SERVICE OWNED BY ATTORNEYS FROM WHOM SUSPENDED ATTORNEY SUBLET OFFICE SPACE. (November 20, 1992) Whether an attorney who sublet space and acted independently of a law firm is an associate of that law firm, and whether that attorney could be hired as a non-attorney employee of a lay settlement agency owned by the law firm.

LEO 1494 Conflict of Interest, Fiduciary Duty, Multiple Representation, Trustee: CONFLICT OF INTEREST: REPRESENTING LENDER AND TRUSTEE WHILE LENDER AND BORROWER ARE ENGAGED IN ADVERSARY PROCEEDING. (December 14, 1992) Whether an attorney can represent both noteholder and trustee in a foreclosure action, where there is an actual conflict between the noteholder and the borrower, given that the trustee has a fiduciary duty to the borrower. Also see *Crosby v. ALG Trustee, LLC*, 296 Va. 561 (2018).

LEO 1509 Duty to Disclose, Title Insurance: MISCONDUCT - FEES - COMPETENCE AND NEGLECT - CLIENT FUNDS: DISCLOSURE TO CLIENT OF ATTORNEY'S DELEGATION TO NONLAWYER OF TITLE SEARCH. (February 9, 1993) Addressing the obligations of an attorney to disclose the use of third-party title examiners, and fees paid for title services.

LEO 1510 Trust Account: TRUST ACCOUNTS: DEPOSIT OF LAWYER'S FUNDS TO PAY TRUST ACCOUNT BANK CHARGES. (February 9, 1993) Whether an attorney may deposit the attorney's own funds into an escrow account to cover bank charges, and what amount would be appropriate.

LEO 1515 Duty to Disclose, Fiduciary Duty, Trustee: ATTORNEY DRAFTING INSTRUMENT WHICH NAMES SELF EITHER AS PERSONAL REPRESENTATIVE OR TRUSTEE OR WHICH DIRECTS SUCH OTHER DESIGNEE TO EMPLOY ATTORNEY AS FIDUCIARY ADMINISTRATOR. Addresses the issues to consider when an attorney drafts documents naming the attorney as personal representative, fiduciary or trustee. *Note: Issue is presented in the context of a trust and estates practice, not real estate; See LEO 1564.* **Approved by Supreme Court of Virginia February 1, 1994.**

LEO 1521 Attorney as Witness, Mechanic's Lien Agent: CONFLICT OF INTEREST — PERSONAL INTEREST AFFECTING REPRESENTATION: ATTORNEY REPRESENTING BUILDER WHEN TITLE COMPANY IN WHICH ATTORNEY HAS OWNERSHIP INTEREST SERVES AS MECHANICS' LIEN AGENT FOR BUILDER. (May 11, 1991) Whether an attorney may ethically represent the builder while a title company owned by the attorney acts as Mechanic's Lien Agent, and whether LEO 1474 would apply, given that the MLA who might be called upon as a witness in the future is the title company, not the attorney.

LEO 1535 Conflict of Interest, Settlement Services: CONFLICT OF INTEREST: ATTORNEY REPRESENTING SELLER VS. BUYER AFTER TITLE COMPANY, IN WHICH ATTORNEY HAS OWNERSHIP INTEREST, CONDUCTS SETTLEMENT. Whether an attorney may represent a builder/seller in a post-closing lawsuit brought by a buyer, when the buyer's closing was conducted by a title company owned by the attorney and operating out of the same office space as the attorney.

LEO 1564 Conflict of Interest, Duty to Disclose, Attorney/Client, Title insurance: ATTORNEY RELATIONSHIPS WITH TITLE INSURANCE AGENCIES (COMPENDIUM OPINION). (December 8, 1994 Revised February 15, 1995) A compendium opinion on attorney ownership in a title company, addressing how an attorney can be compensated, Attorney/Client issues, and disclosure requirements. The opinion cites the following opinions and specifies that this LEO controls in the case of any inconsistencies: LEO 187, 392, 545, 591, 603, 690, 712, 754, 831, 886, 939, 1072, 1097, 1152, 1170, 1198, 1311, 1318, 1345, 1402, 1405, 1469, and 1515. *Note: Not all of these opinions are real estate specific.*

LEO 1565 Conflict of Interest, Wet Settlement Act: ATTORNEY'S COMPLIANCE WITH LENDER'S INSTRUCTIONS WHICH MAY CONTRADICT WET SETTLEMENT ACT AND FEDERAL CONSUMER LAW. (December 14, 1993) No opinion issued to the question of the ethical obligations of an attorney when the lender provides instructions which the attorney believes to be contrary to Virginia law.

LEO 1588 Conflict of Interest, Duty to Disclose, Fees, Real Estate Agency: CONFLICT OF

INTEREST – COMPENSATION FROM THIRD PARTIES: ATTORNEY RECEIVING COMMISSION FOR ASSISTING CLIENT IN PURCHASE OF RESIDENTIAL REAL ESTATE. (June 14, 1994) Whether an attorney who is not a licensed sales agent may nonetheless act as the buyer's agent in a real estate transaction and claim the selling commission. Also questions whether the real estate commission expressed as a percentage of the sales price constitutes a reasonable fee.

LEO 1606 Fees, a compendium: FEES (COMPENDIUM OPINION). Addresses retainers, advance legal fees, minimum/non-refundable fees, fixed fees and contingent fees. **Approved by Supreme Court of Virginia November 2, 2016.**

LEO 1609 Confidences, Conflict of interest: CONFLICT OF INTEREST - MULTIPLE CLIENTS: SIMULTANEOUSLY REPRESENTING CLIENT/PROPERTY OWNER AND CLIENT/POTENTIAL PURCHASER/CREDITOR OF THIRD PARTY. (September 14, 1994) Multiple Representation Addresses a situation where an attorney has multiple roles in real estate settlement and litigation, and whether those roles are incompatible requiring the attorney to withdraw.

LEO 1644 Fees, Trust Account: UNCLAIMED TRUST ACCOUNT FUNDS; DISPOSING OF UNCLAIMED FUNDS; WHAT CONSTITUTES DUE DILIGENCE TO LOCATE OWNER OF FUNDS. (June 9, 1995) Examines an attorney's obligations in disbursing unclaimed funds in the attorney's trust account, including a discussion of what may constitute reasonable efforts to locate parties having an interest, and whether the attorney may charge for efforts made in locating the parties and disbursing.

LEO 1645 Fees, Fees/Non-client, Unrepresented Party: OBLIGATION OF ATTORNEY TO PROVIDE ITEMIZED STATEMENT OF FEES DUE WHEN PERSON RESPONSIBLE FOR PAYMENT IS NOT THE ATTORNEY'S ACTUAL CLIENT. (September 8, 1995) Whether bank's attorney must respond to a request from a borrower not represented by the attorney to itemize the attorney's fees which loan documents require the borrower to pay.

LEO 1647 Title Insurance: ATTORNEY-OWNED TITLE INSURANCE AGENCY WITH ISSUANCE OF STOCK BASED ON SIZE OF ATTORNEY'S REAL ESTATE PRACTICE. (December 15, 1995) Whether multiple attorneys may jointly own a title company and receive compensation in shares proportional to their practices.

LEO 1681 Confidences, Conflict of Interest: CONFLICT OF INTEREST; MULTIPLE CLIENTS. (May 16, 1996) Whether an attorney who represents a lender and holds funds in escrow for multiple buyers which funds are payable to a builder, may represent one buyer against the builder in a lawsuit.

LEO 1698 Conflict of Interest Duty to Disclose, Solicitation: ATTORNEY HANDLING ZONING CASE AFTER HAVING SERVED ON COUNTY PLANNING COMMISSION AND AS CAMPAIGN

TREASURER FOR A COUNTY SUPERVISOR. (June 24, 1997) Whether an attorney who was formerly on the zoning board may represent clients before that board, a caution about the attorney holding himself out as having special connections, and whether that attorney can also appear before the zoning board if the attorney was a campaign treasurer for a county supervisor.

LEO 1705 Fees: CONTINGENCY FEE IN LITIGATION; HOURLY RATES PLUS LUMP SUM TO BE PAID BY CLIENT FOR ATTORNEY'S AGREEMENT TO CARRY FEES INDEFINITELY. (November 21, 1997) Whether an attorney may charge a contingent fee in litigation involving clearing a cloud on the title to real property, whether it is proper to charge a lump sum in addition to hourly rates in return for carrying fees indefinitely, and whether a fee agreement can be modified during the Attorney/Client.

LEO 1742 Settlement Services, Unauthorized Practice of Law, Unrepresented Party: ACTIVITIES OF CLOSING ATTORNEY IN CONNECTION WITH REAL ESTATE TRANSACTION WHEN TITLE COMPANY IS REPRESENTING SELLER. (Committee Opinion June 26, 2000) In a settlement where the attorney is representing the buyer and the seller has hired the services of a lay settlement agent, whether the seller is an unrepresented party, what actions by the buyer's attorney working in cooperation with the lay settlement agency might constitute assisting the agency in the unauthorized practice of law, and whether the lay settlement agency's attorney is deemed to be the seller's attorney. **Approved by Supreme Court of Virginia November 2, 2016.**

LEO 1783 Fee Sharing: IN CONTEXT OF (A) FORECLOSURE SALE OR (B) A COMMERCIAL CLOSING, MAY ATTORNEY DISBURSE TO LENDER COLLECTED ATTORNEYS FEES IN EXCESS OF THOSE NECESSARY TO REIMBURSE LENDER FOR PAYMENT MADE TO LENDER AT ATTORNEY'S HOURLY RATE? (December 22, 2003) Whether an attorney may ethically share an award of attorney's fees in a foreclosure sale or commercial sale, where the awarded attorney's fees are collected based on provisions in the contract and exceed the actual billing of the attorney based on the retainer agreement between attorney and client.

LEO 1791 Attorney/Client: VIRTUAL LAW OFFICE AND USE OF EXECUTIVE OFFICE SUITES. Whether an attorney may provide legal services to clients via electronic communication so long as the content and caliber of those services otherwise comport with the duties of competence and communication. *Note: presented in the context of a bankruptcy matter.* **Approved by Supreme Court of Virginia October 2, 2019.**

LEO 1797 Trust Account: IS IT UNETHICAL FOR AN ATTORNEY TO DISBURSE PROCEEDS FROM A TRUST ACCOUNT THE BANK HAS TEMPORARILY FROZEN? (June 30, 2004) Where bank policy is to put a hold on the funds of multiple clients in an account while checks related to one client are clearing, whether an attorney can continue to disburse checks for the clients whose funds are not being held.

LEO 1806 Conflict of Interest, Multiple Representation: CONFLICT OF INTEREST IN LITIGATION INVOLVING REAL ESTATE THAT IS OWNED BY TRUSTEES. (September 20, 2004) Whether a conflict of interest exists where an attorney represented property owners 19 years earlier and his new law partner now intends to represent a third-party claimant regarding a possible right of way on that property.

LEO 1840 Confidences, Fraud: CAN A LAWYER REPRESENTING A SETTLEMENT COMPANY FACILITATE THAT COMPANY'S PRACTICE OF RE-DEEDING PROEPRTY THROUGH A RELOCATION INTERMEDIARY WITHOUT PROPER RECORDATION? (September 25, 2007) Whether an attorney following instructions of a relocation company to accept a deed from a seller to the company, fail to record that deed, and then substitute a revised first page with the eventual buyer's name on it, constitutes fraud on the attorney's part, whether a buyer's attorney knowingly accepting such a deed is committing fraud, and what obligation the buyer's attorney may have to report the attorney who is acting on the company's behalf.

LEO 1890 Concerning communications with represented persons: Rule 4.2 of the Virginia Rules of Professional Conduct states that: [i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. **Adopted by the Supreme Court of Virginia, January 6, 2021**

LEO 1897 Email reply all when opposing party is copied: The question presented is whether a lawyer who receives an email from opposing counsel, with the opposing party copied, violates Rule 4.2 if he replies all to the email, sending the response to both the sending lawyer and her client. **Adopted by the Supreme Court of Virginia, September 19, 2022 .**

Real Property Section of the Virginia State Bar

Winter Meeting of the Board of Governors and Area Representatives

Williamsburg Inn, East Lounge
136 Francis Street East, Williamsburg, VA 23185
(Live Attendance and Virtual Meeting via Microsoft Teams)

January 20, 2023 Winter Meeting Minutes

Welcome and meeting called to order by Karen Cohen, Section Chair, at 1:00 p.m.

I. WELCOME AND ATTENDANCE. Please see the attached list. Please contact the Section Secretary, Robert E. Hawthorne, Jr., at the following email address with any corrections, additions, or amendments to the attendance record: robert@hawthorne.law.

Karen Cohen reviewed the ground rules for participating live or via remote access, and indicated where the hard copy meeting agenda and mileage vouchers could be picked up.

II. SPECIAL ELECTION FOR NEW MEMBERS OF THE BOARD OF GOVERNORS. Karen explained the need for the election of three new Board members that would have normally been elected at the 2022 Summer meeting. Dolly Shaffner had previously sent an email to the Section membership at large after the Fall meeting to solicit nominations to fill the vacancies. Susan Pesner, Chair of the Nominations Committee, reported that the committee recommended three new members: John E. Rinaldi, of Walsh Colucci Lubeley & Walsh in Prince William, VA; George A. Hawkins, of Dunlap Bennett & Ludwig in Vienna, VA; and Kevin T. Pogoda, First VP & Virginia State Manager, Northern Division, Old Republic National Title Insurance Company in Manassas, VA. No other nominations were presented from the floor.

Motion to adopt the slate of nominees was made by Rick Chess, and seconded by Sarah Louppe-Petcher. The slate was unanimously adopted.

III. ADOPTION OF MINUTES OF FALL MEETING. No comments, questions, or edits. Rick Chess moved to approve. Minutes were approved unanimously and adopted.

IV. FINANCIAL REPORT AND BUDGET UPDATE. Report presented by Robert Hawthorne, Jr. Attention was called to the topic of vouchers and reimbursements for hotel and mileage. In very recent years, because of remote participation, those costs have dropped, but are expected to rise again with the proliferation of live attendance. All other budget items appear to be within normal parameters. Robert alluded to an agenda item further down the list regarding dues increases.

V. STANDING COMMITTEES.

1. Membership committee - Rick Chess reports that the Membership Committee is working on several fronts:

a. Trying to establish relationships and connections with the law schools to explore new membership opportunities; and

b. Continuing to determine which Area Representatives want to remain active as well as which Committee chairs will be active and can revive the more inactive groups, versus which Committees are remaining active carrying out their objectives (Kay Creasman is heading up this effort with Robert to assist); and

c. Reports that the Mentee/Mentor Program (headed up by Larry McElwain) to search for aspiring real property lawyers and offer them training is forming up and progressing. Larry is looking for help on this program.

Katherine Byler introduced Liberty Melendez (first year law at Regent) as an example of aspiring real property students at Regent and wanted to know how to get them involved. Rick suggested ways of approaching all law schools.

2. Fee Simple Committee - Steve Gregory and Hayden-Anne Breedlove. Steve reported that the issue deadline for the Spring issue is the first Friday in April (as usual). This issue will include statutory changes and case law updates. Several articles are in the works. Always looking for content. No meeting held prior to Winter meeting since Fall issue had just come out. Steve says they could always use more committee members to help brainstorm topics and authors. Will have update at the Advanced meeting in March.

Hayden-Anne reported on specific articles in the works (Real estate brokers' liability to purchasers in residential real estate transactions). Is hoping to receive some more articles and looks forward to hearing from everyone.

3. Programs Committee - Sarah Louppe-Petcher and Heather Steele. Heather says the committee met on January 11. All topics are finalized for the Advanced Seminar on March 3rd and 4th. Registration is open. Annual seminar topics finalized for the Annual Seminar in May, to be held in multiple places (Richmond and Roanoke live on the 9th) and May 17th in Fairfax. Also, the committee has coordinated with the Criminal Law and Litigation Sections on cannabis issues, featuring a real estate speaker, Augustin Rodriguez, for the annual bar meeting.

General topics to discuss include preserving Fee Simple past issues, with possible funding set aside for Bar staff to digitize the past issues and use them as a resource available to real estate attorneys. Susan reports that she has the box of old issues that were previously in Gardener De Mallie's compilation, recalling for example an issue from a long time ago when Rick Richmond was chair. She would like to see our budget be used to scan them into the website. Karen commented that the Fee Simple and Programs Committees study the task to see what is involved. Ed Waugaman and Susan reminisced and recalled Gardener De Mallie with

fondness, who passed away suddenly and unexpectedly, serving as CLE liaison. Dolly thinks no budget item would be necessary and that State Bar staff may be able to assist with the scanning. Bill Nusbaum also was interested in how the issues would be indexed as well. Steve says more recent issues are currently indexed back to the 1990s (but not clickable). Lewis Biggs would like to make that resource more widely available, and not limit it to real property section members.

Heather also mentioned the Fee Tail project, an email blast from time to time on latest real estate developments to keep section members updated. Dolly said she could send out the blasts on the state bar platform. Kay endorsed the idea, as did Karen. Sarah and Heather said Programs Committee could head this up without stepping on the Fee Simple domain.

VI. SUBSTANTIVE COMMITTEE REPORTS.

1. Commercial Real Estate - no report.

2. Common Interest Communities - no report.

3. Creditors' Rights - no report.

4. Eminent Domain - Chuck Lollar, Vice-Chair, reports that the committee formed a bipartisan group to assist with redrafting the Model Jury Instructions associated with eminent domain cases.

5. Ethics - Blake Hegeman and Ed Waugaman. No report but meeting first week of February and ask if anyone wants to be on the committee to let Ed know.

6. Land Use - Karen Cohen and Lori Schweller. The committee submitted a written report. Reports interesting cases and an interesting endangered species issue, a chemical arena issue (Max Wiegard gave a mini-update on the CLE seminar involved with this topic), as well as solar developments.

7. Residential Real Estate - Ben Winn remotely reported a Wednesday meeting, focusing on split settlements. Committee is looking at the issue and aspires to post as a resource the regulations and law governing the topic (with its own steering committee). Asked for questions, comments, or approval from the Section. Susan said the Bar Ethics Committee declined to address the issue. She thinks we need Executive Committee Bar approval to undertake the task ourselves if the effort will be joint with the Bureau of Insurance. Sarah said an update is badly needed to the guidelines and statutes. Kay thinks we need to open the discussion ourselves and push for website updates, especially in reference to current statutes.

8. Title Insurance - Cynthia Nahorney. The committee met on November 11. Report is attached. Steve gave an update on an adverse possession case in Fairfax and Kay gave an update on notary fraud problems. Working on a title insurance tutorial on the website with Jon Brodegard's help. Major project the committee is working involves trying to recruit people to the title insurance and underwriting field.

9. Virginia Bar Association - Outgoing Chair Jeremy Root introduced the incoming Chair, Shane M. Murphy of Miles & Stockbridge, Herndon, VA. Jeremy reiterated the differences between VBA and VSB. Real property membership in VBA has dropped and Jeremy made an appeal for crossover membership. Jeremy highlighted several bills involving partition suit changes and other civil statutory changes, and a movement toward localities from the state level on land use issues, etc. Involvement and ideas are welcomed.

VI. NEW BUSINESS.

1. Three Area Representatives presented for nomination:
    a. Cynthia presented Helen Spence with Fidelity National Title Insurance counsel.
    b. Sarah presented Santiago Montalvo with the Virginia Realtors Association.
    c. Susan presented Aubrey M. Cross.
    d. Susan presented Steve Gregory.

Rick Chess moved to close the nominations and Sarah seconded. All four were elected unanimously.

2. Larry McElwain reported on the Doug Dewing book purchases and the Video Library project as it related to the Mentorship Program under the Membership Committee umbrella. He is looking for substantive input from Section members and establishing sub-committees.

3. Karen Cohen reported on the upcoming Heirs Property meeting in late March at the University of Virginia Law School.

4. Membership dues increase - Karen proposes a possible increase from $25 per year to $35 annually for the 1,927 current members and future members. Rick Chess moved to increase the dues accordingly and Sarah seconded. Motion approved unanimously.

VII. MISCELLANEOUS AND CLOSING:

Participants introduced themselves (see separate list).

Sarah Louppe-Petcher announced her intention to establish a strategic planning committee to assist her in her upcoming year of service as Section Chair.

Katherine Byler moved to adjourn.

Next meeting (Spring meeting) will be in Williamsburg at the Williamsburg Lodge on March 3, 2023 at 11:00 a.m. More details to come.

Meeting adjourned by the Chair at 2:40 PM.

Real Property Section of the Virginia State Bar

Fall Meeting of the Board of Governors and Area Representatives

Bobzien-Gaither Education Center
4801 Cox Road, Suite 108 (Richmond/Innsbrook) Glen Allen, VA 23060
(Live Attendance and Virtual Meeting via Microsoft Teams)

September 9, 2022 Fall Meeting Minutes

Welcome and meeting called to order by Karen Cohen, Section Chair at 11:00 a.m.

I. ATTENDANCE. Please see the attached list. Please contact the Section Secretary, Robert E. Hawthorne, Jr., at the following email address with any corrections, additions, or amendments to the attendance record: robert@hawthorne.law.

Karen Cohen reviewed the ground rules for participating live or via remote access. She then added to the agenda under Old Business Items (a new Section IV on the agenda) regarding the Doug Dewing book purchase (Item 4.a.) and added the vacant Board of Governors openings (Item 4.b.). Karen further added to the agenda New Business Items (8.a.) a review of the area representatives list and bylaws discussion and (8.b.) to address the idea of a real estate listserve, to be presented by Vanessa S. Carter, and (8.c.) electronic meeting policy to be presented by Susan Pesner as a Virginia Bar Council member.

II. ADOPTION OF MINUTES OF SUMMER MEETING. No comments, questions, or edits. Rick Chess moved to approve, seconded by Heather Steele. Minutes were approved unanimously and adopted.

III. FINANCIAL REPORT AND BUDGET UPDATE. Report presented by Dolly Shaffner of the Virginia State Bar. The budget began in July. Some annual expenses were entered in time to be paid out of last year's budget.

No questions or comments presented by the membership.

IV. OLD BUSINESS.

a. Douglas Dewing (Virginia Title Examiner's Manual) and Linda Butler (Tidal and Coastal Law) book purchases. The Section's request from the June meeting to purchase the books with unused funds from last year's budget could not be accommodated by VSB because it was past the deadline for using those funds. Karen recapped the discussion and proposed action from the June 2022 meeting regarding the book purchases, specifically that we had unused funds, and the Board voted to use them for these purposes, specifically that the Section shall spend "x" funds on this book and "y" funds on that book, and that we still need to make that decision, but using current funds. Karen prepared a resolution as follows: "Whereas the Board of Governors of the Real Property Section voted at the annual meeting on June 17, 2022 to use the current funds to purchase a to-be-determined number of copies of Douglas W. Dewing's Virginia Title Examiners Manual and Linda Butler's Virginia Tidal and Coastal Law, now out of print, if possibly available, to be used as gifts to section speakers, section officers, and others as the board from time to time determines as appropriate recipients; now therefore, be it resolved that ___ copies of the Virginia Title Examiners Manual at a cost of ___ and Virginia Tidal and Coastal Law at the cost of ___ be purchased by the section using the current funds with total purchases not exceeding $5,000 in accordance with the June 17, 2022 resolution of the board."

Discussion was opened for further decision. Heather reported that Doug Dewing's Fifth Edition costs $125 per copy after looking online, and that the Coastal Law book published in 1988 does not appear to be available for purchase.

Karen suggested to approve purchasing a reasonable number of the Doug Dewing books, and that we can, at a later time, purchase more books, especially if we do not spend the allotted $5,000 immediately.

Heather commented that $5,000 is not too much to spend out of the remaining budget funds of over $22,000. Karen noted that one reason we have had such a large surplus in the last couple of years is because there have been fewer in person expenditures and reimbursements for attendance of meetings. Steinhilber's was the biggest expenditure of this nature so far at $4,394, followed by some other reimbursements, and the newsletter expense. Dolly confirmed that these same type of expenses for the upcoming annual summer meeting will likely come out of the 2023 new budget starting in July of next year.

Susan Pesner asked Professor Carol Brown if she had any book suggestions that we could use for purposes of enhancing our gifts to our speakers. Professor Brown said that she liked a second edition book on housing law, but that it is a casebook and probably not as well-suited for those purposes. Professor Brown mentioned several other real property works and treatises. Susan suggested that, for future speaker presentations, we could consult with Professor Brown as to whether she knows of an appropriate book on topic that would make a good gift.

Karen suggested that a committee determine the allocation of the $5,000 budget item amount, making sure that a portion of the books purchases would be for Doug Dewing's book. Heather suggested the Programs Committee. Heather moved that we set a budget of $5,000 out of our total budget to be used for the purchase of some hornbooks or other types of books for speaker gifts and gifts to others, and of that $5,000 budget use a portion of it to go ahead right now and

buy twenty (20) of Doug Dewing's Fifth Edition of the Virginia Title Examiners Manual, and have the Programs Committee decide how to expand the rest of the funds on any future book purchases. Rick Chess seconded the motion.

Further discussion was had. Dolly confirmed that Karen would need to sign an impact statement to make the purchases. Bill Nusbaum said Ben Winn suggested we ask about a volume discount for the purchase of Doug Dewing's books. Steve Gregory offered to check with Linda Butler to see if her book was still in publication and available for purchase somewhere and report back to the Programs Committee.

Motion was voted on and passed without opposition.

b. Board of Governors composition issue. Karen explained that pursuant to Article 3, Section 2 of our bylaws, at the annual meeting, we must elect not fewer than three (nor more than four) new Board members. However, through inadvertence, we did not do that at our annual meeting in June. Karen noted that the Bylaw requirement appears to contemplate a continual filling of slots that would be created by staggered terms, the idea being to bring in new members every year by filling slots of those who are rotating off the Board. Under the current Bylaws, Board members can serve up to three, three-year terms. Our bylaws state that the Board should be comprised of not less than nine (9) and no more than twelve (12) members at any time. We currently have eight members on the Board.

Karen suggested that we have a special meeting for the purpose of electing new Board members, and those members will be deemed as having been elected to start their terms as of the summer of 2022 annual meeting, to achieve compliance with the Section's current bylaws. The task will be to communicate with the entire section since the Section's Members elect the Board. Karen indicated she would send an email through Dolly to the entire section asking section members to make suggestions to the Chair of the Nominating Committee, Susan Pesner, to fill the three vacant Board positions. The Nominating Committee would then proceed to prepare a slate of members to consider, and then could conduct a special meeting with an electronic vote or hold the election in person at the next meeting. Only ten days notice would be required for a special meeting, so the idea is to get this done sooner rather than later.

Bill Nusbaum asked if the three new members had to be brand new members, or did it include reelecting the other existing members serving current terms. Karen read the relevant section of the bylaws, which states: "At each Annual Meeting of the Section following adoption of these revised bylaws, not fewer than three (3), nor more than four (4), Active Members shall be elected to serve on the Board of Governors for terms of three (3) years each expiring June 30 of the third year following election or until their successors shall have been duly elected and qualified." There was consensus that the language appears to require adding not fewer than 3 nor more than 4 new members every year. Existing members who are up for re-election also are to be elected at the annual meeting in June (and under the current Bylaws, three terms is the maximum number of successive three-year terms).

Further discussion was had by various members on the issue. Technically, the members rotating off serve until their replacements our appointed. Some members have declined to serve for three, three-year successive terms, and resigned early to make room for others to get involved.

Karen reiterated that the call for nominations would go out as soon as possible.

V. STANDING COMMITTEES.

1. Membership committee - Rick Chess reports that Pam Fairchild has dropped off as a committee chair and that he will work with Dolly to find a replacement.

The committee has been active and came up with six suggestions or recommendations for consideration:

A) Treasurer should be removed from the bylaws since we do not need one.

B) Area Representative list needs to be refreshed and updated and action taken based on the prior Chair's letter to the Area Representatives to gauge their interest in participating in the future. Once the list has been firmed up, we should communicate with those members and ask for their active participation. This should become the responsibility of the Secretary, as Sarah's efforts last year and Robert's efforts this year should be continued.

C) Request to Karen as Chair and Sarah as future Chair to find out early on which committee chairs want to remain as chair positions and reiterate their responsibility for chairs and vice chairs to remain active.

D) Listserve idea for Virginia real estate attorneys. Vanessa Carter gave an overview of the idea. She reported what other bar associations or groups, like the Dirt ListServe, which covers real estate issues nationwide, are doing. She finds a listserve to be valuable for Virginia specific issues that could yield quick answers or directions to resources. She also pointed out that this might help get younger members involved as well. She recalled that the Virginia State Bar put up roadblocks to the idea in the past regarding hosting or paying for the costs. Dale Whitman, moderator of the Dirt ListServe, reports that New York has a state specific group. Vanessa suggested running the idea again by the Virginia State Bar, or just picking up the effort on our own. Rick seeks support from the group to move forward with the idea.

E) Living Library as part of the mentoring program, and Rick had proposed a budget of $10,000 for this purpose, but was not sure if we had taken any action on this. The committee is officially asking for the $10,000 for this library effort. Rick and Larry McElwain would give regular meetings to mentees, and mentors would be matched up with mentees. This mentor / mentee program would embrace new real estate attorneys, help train them up, and give them resources for inquiries or issues that they encounter.

F) The possibility of limiting Board participation to two, three-year terms, except for officers, who would continue to serve up to three, three-year terms. Just an idea to discuss.

As an aside, the committee concluded that reaching out directly to third-year law students was not an idea that they recommended pursuing at this time.

Rick sought a second on his motion to pass on the six recommendations at once and then have discussion on the ideas.

Dolly remarked that it would be very difficult to allot that kind of sum from the budget and we would have to figure out where to cut from the other budget categories. The budget is comprised of four categories of expenditures: travel and subsistence, printing, communications, and "other" (but we have to spell out item by item any "other" expenditures). Rick suggested that he could write up an impact statement if the group passed on the budget item for the mentee / mentor program.

Karen suggested looking at each recommendation as a separate issue instead of a blanket motion. As to the motion to remove the Treasurer from our bylaws, Sarah Louppe-Petcher seconded of the motion for discussion and commented that we still need a Treasurer as a liaison with the Virginia State Bar. She does not advocate for the change in the bylaws. Karen pointed out that the article for the bylaws on Officers says we have to have a Secretary/Treasurer, and since we are not going to do away with the Secretary position, that we should keep the position as a joint office. Dolly says that, according to the bar, it is the Chair that communicates with the Virginia State Bar on the budget. Reports from the Virginia State Bar will go to the Chair and the Vice-Chair.

For the sake of time, Karen asked if we could move on from the motion to drop the Treasurer and move forward with the discussion for all of the other recommendations. Rick stated that he would prefer to focus on the budget request in the time available. After discussion, Rick withdrew that particular motion as to eliminating the Treasurer position.

With regard to the money issue, Rick requested that the Section work with the Virginia State Bar to find the money to fund the program. Karen asked what the money would be for, and Rick responded that he and Larry would use it primarily for video production costs. Sarah asked if we have an idea of the itemization of the costs and sought more detail. Rick says Larry has requested that we just get a number in the budget. Rick and Larry can't get started without some funding. Rick preliminarily estimated that each video would require 5 to 10 hours of video production time, and the committee anticipates producing 25 to 30 videos. He further estimates that video production fees would run around $40 per hour. A video might cost around $200 each. Rick says that the concern is to have individuals lined up to produce the videos and then not have money at the end to pay for them.

Sarah suggested that this particular program was more important than buying books, and although we had already voted on the book budget, we might want to reconsider the amount of money we have allocated for the books so that we may reallocate some of that to this particular project for the video library. Karen concurred.

Heather suggested a collective $10,000 budget item for books and the video library. She made a motion to create a $10,000 budget item for buying books and for producing the videos. Dolly said we would have to cut out something from the current budget to accommodate that motion. Sarah suggested making it a $5,000 cap budget item so that we would not have to worry about shifting money around in the budget right now. Karen suggested this would provide a prudent financial course of conduct, while also allowing both the book purchases and the video production to proceed in the meantime.

Susan Pesner suggested we also consider raising our section dues from $25 to $35. Dolly confirmed that the section had the authority to raise the dues to $35 annually. Currently, our dues are $25 annually and have remained at that amount for many years.

Rick asked if the motion was to instruct the Treasurer to work with the Bar to find the money so that we can move on, and Karen suggested framing the motion so that we amend the prior motion to not exceed $5,000 for the purposes of having the Programs Committee directed to consider how to use or allot the funds to 1) purchase books for speakers to include at least some of Doug Dewing's books and other books as may be recommended by the committee; and 2) to allocate a portion of that money for production of videos. The Programs Committee could then report in detail in the future as to line-by-line costs incurred.

Robert Hawthorne suggested revisiting the budget item in case there is a large amount of money that would be turned in at the end of the fiscal year, to supplement the program rather than give money back to the general State Bar fund. Dolly said that the line item change would need to be done in the Fall for any budget changes, and any request for spending excess funds would need to be turned in by mid-May at the latest.

Bill Nusbaum pointed out as an observation that the Doug Dewing book purchase would be more like a one-time capital expenditure as opposed to an ongoing budget item, whereas the living library concept would hopefully be something that would continue from year to year, and that it will take time to launch the living library. Perhaps in the next fiscal year they will be hitting their stride. While the book purchases may take up most of the allotted budget item for this year, we may be able to spend more money on the living library in future years as it gets rolling in subsequent years.

Heather amended her earlier motion to conform to Karen's suggestion for the line item of $5,000 to be used to purchase books and fund the video library. Rick seconded the motion. No further discussion was had. The motion passed without opposition.

2. Fee Simple Committee - Steve Gregory and Hayden-Anne Breedlove. Steve reported that the issue deadline for the Fall issue is the first Friday in October, and that additional material is needed for the upcoming Fall issue.

This will be Felicia Burton's last issue as staff assistant. She has been primarily responsible for getting this publication out during her tenure going back twenty-five years to when Linda Butler first took over. Steve wondered if we could do something to honor her many years of service,

considering what she has meant to the publication and the committee. Karen said $100 was the top monetary expenditure permitted by VSB, confirmed by Dolly. Steve suggested a plaque and recognition in the upcoming issue. Linda Butler agreed to write something as well.

Hayden-Anne reported that an article on cyber security was being published, and an article on the abandonment of the Atlantic Coast pipeline project, and an article recognizing Felicia's years of service, and Professor Brown introduced the committee to a student who is going to publish another article in this issue (topic still in the works), after having published one in the Spring issue as well.

Discussion was had on possible other article ideas by Steve, Christina Lollar Savage, Robert, and Karen.

3. Programs Committee - Sarah Louppe-Petcher and Heather Steele.

Heather says the committee continues to solicit topics, so that if anyone has an idea for the annual general seminar or the annual advanced seminar, please send an email to either Sarah or Heather. Heather welcomed Jim Windsor to the committee. She looked forward to working with the Membership Committee for the book purchases and the video library production.

VI. SUBSTANTIVE COMMITTEE REPORTS.

1. Commercial Real Estate - no report.

2. Common Interest Communities - no report.

3. Creditors' Rights - no report.

4. Eminent Domain - Christina Lollar Savage reports an upcoming meeting in the next week, with an email to Karen thereafter.

5. Ethics - Blake Hegeman and Ed Waugaman reporting remotely, with Kay Creasman providing live report that she continues to work on the legal ethics opinion compendium project.

6. Land Use - Karen Cohen. The committee submitted a written report. Karen introduced two new real property section members from her firm (Gentry Locke), D. Scott Foster, Jr., and Lindsey N. Rhoten. Scott introduced himself to the group. Karen reviewed in her written report several case law updates and developments, and possible articles. Karen further expounded on the importance of bringing the heirs property movement to the younger members of the legal community as an example of how getting involved in real property can have a positive impact to the community at large.

7. Residential Real Estate - Ben Winn discussed that the committee would work on reviewing developments in the hot topic area of split settlements since the Board of Insurance guidelines were released. Susan Pesner asked Ben to call her for her input. Sarah said the issue

would be discussed soon by the Northern Virginia attorney roundtable, so there might be more to report from that region after that meeting.

8. Title Insurance - Cynthia Nahorney. The committee met recently to discuss how it can be active going forward and directions to take, including ways to involve entry of new, energetic professionals into the real estate law and title industry field. The committee of eight members plans to reconvene in thirty days to take further steps in that regard.

9. Virginia Bar Association - Current Chair Jeremy Root extended a renewed invitation to join, especially since VBA is an organization that can engage in legislative and lobbying activity. He reports to areas of interest: One, recording fee discrepancies across jurisdictions involving combined instruments (and whether separate recording fees are implemented for each type of instrument within one document); and Two, possibly amending the Virginia doctrine of merger and the Virginia Property Owners Association Act slight modification to the doctrine. Will provide updates at the next meeting. Jeremy invited group members to call individually to provide their input on these two topics or other legislative topics of interest.

VI. NEW BUSINESS.

a. and b. New business about Area Representatives and the ListServe for Virginia attorneys was already covered in prior discussions.

c. Susan Pesner gave a Bar Council update regarding attendance issues at State Bar meetings as we emerge from the pandemic protocols previously implemented. Bar Council made a recommendation for all State Bar committees and organizations to the Supreme Court. Susan also appealed to the group to get involved as much as possible with Bar Council as the group needs representation from a real estate perspective. Susan will send a report to Karen.

Thanks were extended to Karen, Dolly, Kim Villio, Robert, and Rick for working out a smooth method of remote participation for this meeting.

Next meeting (Winter meeting) will be in Williamsburg on January 20, 2023 at 1:00 p.m. More details to come.

Meeting adjourned by the Chair at 12:47 PM.

BOARD OF GOVERNORS
REAL PROPERTY SECTION
VIRGINIA STATE BAR
(2023-2024)

Full Name	Position	Address of Record	Term Start	Term End
Karen Cohen	Chair	Gentry Locke Attorneys PO Box 780 Richmond, VA 23218-0780	7/1/2022	6/30/2023
Sarah Louppe Petcher	Vice Chair	S&T Law Group 6641 Locust St Falls Church, VA 22046	7/1/2022	6/30/2023
Robert Hawthorne, Jr.	Secretary	Hawthorne & Hawthorne, P.C. 1805 Main Street PO Box 931 Victoria, VA 23974	7/1/2022	6/30/2023
Kathryn Byler	Immediate Past Chair	Pender & Coward A Professional Corporation 222 Central Park Ave Ste 400 Virginia Beach, VA 23462-3026	7/1/2022	6/30/2023
Jeremy Root	Ex-Officio	Blankingship & Keith, P.C. Suite 300 4020 University Drive Fairfax, VA 22030	7/1/2021	6/30/2023
Richard (Rick) Chess	Board of Governors	Chess Law Firm, PLC 3821 Darby Drive Midlothian, VA 23113	7/1/2020	6/30/2023
Mark Graybeal	Board of Governors	11223 Handlebar Road Reston, VA 20191	7/1/2020	6/30/2023
George Hawkins	Board of Governors	Dunlap Bennett & Ludwig, PLLC 8300 Boone Boulevard, #550 Vienna, VA 22182	7/1/2022	6/30/2025
Robert Hawthorne, Jr.	Board of Governors	Hawthorne & Hawthorne, P.C. 1805 Main Street PO Box 931 Victoria, VA 23974	7/1/2021	6/30/2024
Blake Hegeman	Board of Governors	Long & Foster Real Estate, Inc. 8804 Patterson Avenue Richmond, VA 23229	7/1/2021	6/30/2024
Kevin Pogoda	Board of Governors	Old Republic National Title Insurance Co 7960 Donegan Dr Ste 247 Manassas, VA 20109	7/1/2022	6/30/2025
John Rinaldi	Board of Governors	Walsh, Colucci, Lubeley & Walsh, P.C Glen Park I, Suite 300 4310 Prince William Parkway Prince William, VA 22192	7/1/2022	6/30/2025
Heather Steele	Board of Governors	Pesner Altmiller Melnick & DeMers PLC 8000 Westpark Dr Ste 600 Tysons, VA 22102	7/1/2021	6/30/2024
Carol Brown	Academic Liaison	The University of Richmond Law School 203 Richmond Way Richmond, VA 23173	3/29/2021	6/30/2023
Dolly C. Shaffner	Liaison	Virginia State Bar 1111 E Main St Ste 700 Richmond, VA 23219-0026	7/1/2006	6/30/2023
Stephen Gregory	Newsletter Editor	1334 Morningside Dr Charleston, WV 25314	7/1/2019	6/30/2023

This list and additional information about the Board of Governors can be found at:
https://vsb.org/RP/groups/RP/rp-board.aspx

REAL PROPERTY SECTION
VIRGINIA STATE BAR
AREA REPRESENTATIVES
(2023-2024)

[Note: as used herein, a Nathan[1] (*) denotes a past Chair of the Section, and a dagger (†) denotes a past recipient of the Courtland Traver Scholar Award]

AREA REPRESENTATIVES

Area Representatives are categorized by six (6) regions: Northern (covering generally Loudoun County in the west to Prince William County in the east); Tidewater (covering generally the coastal jurisdictions from Northumberland County to Chesapeake); Central (covering generally the area east of the Blue Ridge Mountains, south of the Northern region, west of the Tidewater region and north of the Southside region); Southside (covering generally the jurisdictions west of the Tidewater region and south of the Central region which are not a part of the Western region); Valley (covering generally the jurisdictions south of the Northern region, west of the Central region and north of Botetourt County); and Western (covering generally the jurisdictions south of Rockbridge County and west of the Blue Ridge Mountains).

Central Region

Ross Allen
Owen & Owens
15521 Midlothian Turnpike #300
Midlothian, VA 23113
(804) 594-1911
email: rallen@owenowens.com

F. Lewis Biggs* (2016-2017)
Kepley, Broscious & Biggs, P.L.C.
2211 Pump Road
Richmond, VA 23233
(804) 741-0400
email: FLBiggs@kbbplc.com

Tara R. Boyd
Boyd & Sipe, PLC
105 N 1st Street, Suite 202 / POB 237
Charlottesville, VA 22902
(804) 248-8713
email: tara@boydandsipe.com

Michele R. Freemyers
Leggett, Simon, Freemyers & Lyon, P.L.C.
Counsel to: Ekko Title, L.C.
1931 Plank Road, Suite 208
Fredericksburg, VA 22401
(540) 899-1992
email: mfreemyers@ekkotitle.com

Brooke S. Barden
Smith, Barden & Wells, P.C.
1330 Alverser Plaza
Midlothian, VA 23113
(804) 794-8070
email: bsbarden@smithbardenwells.com

Steven W. Blaine
WoodsRogers
123 East Main Street, 5th Floor
Charlottesville, Va. 22902
(434) 220-6831
email: Sblaine@woodsrogers.com

Hayden-Anne Breedlove
Old Republic Title
Old Republic Insurance Group
7960 Donegan Drive, Suite 247
Manassas, VA 20109
(804) 332-1907
email: hbreedlove@oldrepublictitle.com

Barbara Wright Goshorn
Barbara Wright Goshorn, P.C.
203 Main Street
P.O. Box 177
Palmyra, VA 22963
(434) 589-2694
email: bgoshorn@goshornlaw.com

[1] Named after Nathan Hale, who said "I only regret that I have but one asterisk for my country." –Ed.

J. Philip Hart* (2012-2013)
Vice President & Investment Counsel
Legal Department
Genworth
6620 West Broad Street, Building #1
Richmond, VA 23230
(804) 922-5161
email: philip.hart@genworth.com

Randy C. Howard* (2008-2009)
11437 Barrington Bridge Court
Richmond, VA 23233
cell: (804) 337-1878
email: randychoward@msn.com

Neil S. Kessler* (1990-1991)
Neil S. Kessler Law Office, P.L.L.C.
1501 Hearthglow Court
Richmond, VA 23238
(804) 307-8248
email: neilkessler1@gmail.com

Michael P. Lafayette
Lafayette, Ayers & Whitlock, P.L.C.
10160 Staples Mill Road, Suite 105
Glen Allen, VA 23060
main: (804) 545-6250 direct: (804) 545-6253
email: MLafayette@lawplc.com

Hope V. Payne
Scott Kroner, P.L.C.
418 East Water Street
Charlottesville, VA 22902-2737
(434) 296-2161
email: hpayne@scottkroner.com

Collison F. Royer
Royer Caramanis & McDonough
200-C Garrett Street
Charlottesville, VA 22902
(434) 260-8767
email: croyer@rcmplc.com

John W. Steele
Hirschler Fleischer
The Edgeworth Building
2100 East Cary Street
Richmond, VA 23223
or
P. O. Box 500
Richmond, VA 23218-0500
(804) 771-9565
email: jsteele@hf-law.com

William G. Homiller
Troutman Pepper Hamilton Sanders LLP
1001 Haxall Point, 15th Floor
Richmond, VA 23219
(804) 697-1288
email: will.homiller@troutman.com

Timothy I. Kelsey
Wood Rogers, P.L.C.
P.O. Box 2496
Charlottesville, VA 22902
(434) 220-6830
email: tkelsey@woodsrogers.com

Otto W. Konrad
Williams Mullen
200 South 10th Street, Suite 1600
Richmond, VA 23219
(804) 420-6093
email: okonrad@williamsmullen.com

Larry J. McElwain*† (2004-2005)
Larry J. McElwain, PLLC
941 Glenwood Station Lane, Suite 103
Charlottesville, VA 22901
(434) 284-8020
email: Lmcelwain@larrylawva.com

Justin A. Ritter
Ritter Law PLLC
600 E. Water Street, Suite F
Charlottesville, VA 22902
(434) 218-1172
email: jr@ritterlawpllc.com

Susan H. Siegfried* (1999-2000)
5701 Sandstone Ridge Terrace
Midlothian, VA 23112
(804) 818-5940
email: shs5701@comcast.net

Brian Thornton Wesley
Thornton Wesley, PLLC
P.O. Box 27963
Richmond, VA 23261
(804) 874-3008
email: bwesley@thorntonwesley.com

Ronald D. Wiley, Jr.*
Underwriting Counsel
Old Republic Title
400 Locust Avenue, Suite 4
Charlottesville, VA 22902
(804) 281-7497
email: rwiley@oldrepublictitle.com

J. Page Williams
Flora Pettit P.C.
530 East Main Street
P.O. Box 2057
Charlottesville, VA 22902-2057
(434) 817-7973
email: jpw@fplegal.com

Stephen Bryce Wood
The Wood Law Firm, P.L.C.
6720 Patterson Avenue, Suite D
Richmond, VA 23226
(804) 873-0088
email: Steve.wood@woodlawrva.com

Northern Region

Dianne Boyle
Senior Vice President and Commercial Counsel
Chicago Title Insurance Company | National Commercial Services
Fidelity National Title Insurance Company
1901 Pennsylvania Avenue, Suite 201
Washington, DC 20006
direct: (202) 263-4745; cell: (703) 472-7674
email: boyled@ctt.com

Sandra (Sandy) Buchko
Asmar, Schor & McKenna
5335 Wisconsin Avenue, N.W., Suite 400
Washington, DC 20015
(202) 244-4264
email: SBuchko@asm-law.com

Todd E. Condron
Ekko Title
410 Pine Street, S.E., Suite 220
Vienna, VA 22180
(703) 537-0800
email: tcondron@ekkotitle.com

Michael Coughlin
Walsh Colucci
4310 Prince William Parkway, Suite 300
Prince William, VA 22192
(703) 680-4664 ext. 5113
email: mcoughlin@thelandlawyers.com

Matson Coxe
Wilson Elser Moskowitz Edelman & Dicker LLP
8444 Westpark Drive, Suite 510
McLean, VA 22102-5102
(703) 852-7787
email: matson.coxe@wilsonelser.com

Lawrence A. Daughtrey
Kelly & Daughtrey
10605 Judicial Drive, Suite A-3
Fairfax, VA 22030
(703) 273-1950
email: ldaught@aol.com

Pamela B. Fairchild
Attorney at Law
Fairchild Law, PLC
526 Kings Street, Suite 201
Alexandria, VA 22314
(571) 249-1300
email: pam@fairchild-law.com

David C. Hannah
Hirschler
8270 Greensboro Drive, Suite 700
Tysons, VA 22102
(703) 584-8900
email: DHannah@hirschlerlaw.com

Jack C. Hanssen
Moyes & Associates, P.L.L.C.
21 North King Street
Leesburg, VA 20176-2819
(703) 777-6800
email: jack@moyeslaw.com

John H. Hawthorne
SVP, Legal/Associate General Counsel
Comstock Companies
1886 Metro Center Drive
Fourth Floor
Reston, VA 20190
(703) 230-1985
email: jhawthorne@comstockcompanies.com

Ralph E. Kipp
The Law Offices of Ralph E. Kipp, P.L.C.
10615 Judicial Drive, Suite 501
Fairfax, VA 22030
(703) 352-8080
email: rkipp@kipp-law.com

Paul H. Melnick* (2011-2012)
Pesner, Altmiller, Melnick & DeMers, PLC
8000 Westpark Drive, Suite 600
Tysons, VA 22102
(703) 506-9440
email: pmelnick@pesner.com

Andrew A. Painter
Walsh, Colucci, Lubeley & Walsh, P.C.
One East Market Street, Suite 300
Leesburg, VA 20176-3014
(703) 737-3633 ext. 5775
email: apainter@thelandlawyers.com

Michelle A. Rosati
Holland & Knight
1650 Tysons Boulevard, Suite 1700
Tysons, VA 22102
(703) 720-8079
email: michelle.rosati@hklaw.com

Jordan M. Samuel
Asmar, Schor & McKenna, P.L.L.C.
5335 Wisconsin Avenue, N.W., Suite 400
Washington, D.C. 20015
(202) 244-4264
email: jsamuel@asm-law.com

George A. Hawkins
Dunlap, Bennett & Ludwig
8300 Boone Boulevard, #550
Vienna, VA 22182
main: (703) 777-7319; direct: (571) 252-8521
email: ghawkins@dbllawyers.com

Tracy Bryan Horstkamp
The Law Office of Tracy Bryan Horstkamp
1184 Hawling Place, SW
Leesburg, VA 20175
(703) 669-4935
email: tbh@horstkamplaw.com

Benjamin D. Leigh†
Atwill, Troxell & Leigh, P.C.
50 Catoctin Circle, N.E., Suite 303
Leesburg, VA 20176
(703) 777-4000
email: bleigh@atandlpc.com

Regina Petruzzi Neumann
Regina Petruzzi Neumann
Attorney at Law, PLLC
19415 Deerfield Avenue, #316 Suite A
Leesburg, VA 20176
(703) 777-7371
email: regina@rpnlawfirm.com

Susan M. Pesner*† (1996-1997)
Pesner Altmiller Melnick & DeMers PLC
8000 Westpark Drive, Suite 600
Tysons, VA 22102
(703) 506-9440
email: spesner@pesner.com

Amanda Hayes Rudolph
Redmon, Peyton & Braswell, LLP
510 King Street, Suite 301
Alexandria, VA 22314
(703) 684-2000
email: arudolph@rpb-law.com

Lawrence M. Schonberger* (2001-2002)
Sevila, Saunders, Huddleston & White, PC
30 North King Street
Leesburg, VA 20176
(703) 777-5700
email: LSchonberger@sshw.com

Theodora Stringham
Offit Kurman, P.A.
8000 Towers Crescent Drive, Suite 1500
Tysons Corner, VA 22182
(703) 745-1849
email: tstringham@offitkurman.com

Lucia Anna Trigiani†
MercerTrigiani
112 South Alfred Street
Alexandria, VA 22314
(703) 837-5000; direct: (703) 837-5008
email: Pia.Trigiani@MercerTrigiani.com

Eric V. Zimmerman
Rogan Miller Zimmerman, P.L.L.C.
50 Catoctin Circle, N.E., Suite 300
Leesburg, VA 20176
(703) 777-8850
email: ezimmerman@rmzlawfirm.com

David W. Stroh
2204 Golf Course Drive
Reston, VA 20191
(703) 716-4573
email: davidwstroh@gmail.com

Benjamin C. Winn, Jr.
Benjamin C. Winn, Jr, Esquire P.L.C.
3701 Pender Drive, Suite 300
Fairfax, VA 22030
(703) 652-9719
email: bwinn@nvrinc.com

Southside Region

Thomson Lipscomb
Attorney at Law
89 Bank Street
P.O. Box 310
Boydton, VA 23917
(434) 738-0440
email: janersl@kerrlake.com

Tidewater Region

Robert C. Barclay, IV
Cooper, Spong & Davis, P.C.
P.O. Box 1475
Portsmouth, VA 23705
(757) 397-3481
email: rbarclay@portslaw.com

Jon W. Brodegard
Old Republic Title
Old Republic Insurance Group
7960 Donegan Drive, Suite 247
Manassas, VA 20109
tel/cell: (757) 577-2606
email: jbrodegard@oldrepublictitle.com

Michael E. Barney* (1987-1988)
Kaufman & Canoles, P.C.
P.O. Box 626
Virginia Beach, VA 23451-0626
(757) 491-4040
email: mebarney@kaufcan.com

Richard B. Campbell
Richard B. Campbell, P.L.C.
129 N. Saratoga Street, Suite 3
Suffolk, VA 23434
(757) 809-5900
email: rcampbell@law757.com

Paula S. Caplinger*† (2003-2004)
Vice President and Tidewater Agency Counsel
Chicago Title Insurance Company
Fidelity National Title Group
P.O. Box 6500
Newport News, VA 23606
(757) 508-8889
email: caplingerP@ctt.com

Brian O. Dolan
DolanReid PLLC
12610 Patrick Henry Drive, Suite C
Newport News, VA 23602
(757) 320-0257
email: bdolan@dolanreid.com

Pamela J. Faber
BridgeTrust Title Group
One Columbus Center, Suite 200
Virginia Beach, VA 23462
office: (757) 605-2015; cell: (757) 469-6990
email: pfaber@bridgetrusttitle.com

Howard E. Gordon*† (1982-1983)
Williams Mullen
999 Waterside Drive, Suite 1700
Norfolk, VA 23510
(757) 629-0607
email: hgordon@williamsmullen.com

Joshua M. Johnson
Managing Attorney
Property Law Group, P.L.L.C.
(757) 206-2945
email: jmjohnson@propertylawgroupllc.com

Naveed Kalantar
Garriott Maurer, PLLC
5041 Corporate Woods Drive, Suite G180
Virginia Beach, VA 23462
(757) 530-9593
email: Nkalantar@garriottmaurer.com

Charles (Chip) E. Land* (1997-1998)
Kaufman & Canoles, P.C.
150 W. Main Street, Suite 2100
P.O. Box 3037
Norfolk, VA 23510-1665
(757) 624-3131
email: celand@kaufcan.com

Vanessa S. Carter
Vandeventer Black LLP
101 West Main Street
500 World Trade Center
Norfolk, VA 23510
(757) 446-8505
email: vcarter@vanblacklaw.com

Alyssa C. Embree
Williams Mullen
999 Waterside Drive, Suite 1700
Norfolk, VA 23510
(757) 629-0631
email: aembree@williamsmullen.com

Thomas Gladin
Flora Pettit, P.C.
90 North Main Street, Suite 201
Harrisonburg, VA 22803
(540) 437-3109
email: tbg@fplegal.com

Ann A. Gourdine
115 High Street
Portsmouth, VA 23704
(757) 397-6000
email: aagourdine@gmail.com

Kristen R. Jurjevich
Pender & Coward, P.C.
222 Central Park Avenue, Suite 400
Virginia Beach, VA 23462
(757) 490-6261
email: krj@pendercoward.com

Ray W. King
Vandeventer Black LLP
101 W. Main Street
500 World Trade Center
Norfolk, VA 23510
direct: (757) 446-8527
email: rking@vanblacklaw.com

Charles M. Lollar* (1992-1993)
Lollar Law, PLLC
109 E. Main Street, Suite 501
Norfolk, VA 23510
office: (757) 644-4657; cell: (757) 735-0777
email: chuck@lollarlaw.com

Christy L. Murphy
Bischoff & Martingayle
Monticello Arcade
208 East Plume Street, Suite 247
Norfolk, VA 23510
(757) 965-2793
email: clmurphy@bischoffmartingayle.com

William L. Nusbaum* (2013-2014)
Williams Mullen
1700 Dominion Tower
999 Waterside Drive
Norfolk, VA 23510-3303
(757) 629-0612
email: wnusbaum@williamsmullen.com

Cartwright R. Reilly
Williams Mullen
222 Central Park Avenue, Suite 1700
Virginia Beach, VA 23462
(757) 473-5312
email: creilly@williamsmullen.com

Tyler J. Rosá
Williams Mullen
222 Central Park Avenue, Suite 1700
Virginia Beach, VA 23462
(757) 282-5052
email: trosa@williamsmullen.com

Allen C. Tanner, Jr.
701 Town Center Drive, Suite 800
Newport News, VA 23606
(757) 595-9000
email: atanner@jbwk.com

Benjamin P. Titter
Richmond Redevelopment and Housing Authority
901 Chamberlayne Parkway
Richmond, VA 23220
(804) 489-7256
email: ben.titter@rrha.com

Susan S. Walker* (2015-2016)
Jones, Walker & Lake
128 S. Lynnhaven Road
Virginia Beach, VA 23452
(757) 486-0333
email: swalker@jwlpc.com

Cynthia A. Nahorney
Fidelity National Title Insurance Corporation
Commonwealth Land Title Insurance Company
150 West Main Street, Suite 1615
Norfolk, VA 23510
(757) 216-0491
email: cynthia.nahorney@fnf.com

Harry R. Purkey, Jr.
Harry R. Purkey, Jr., P.C.
303 34th Street, Suite 5
Virginia Beach, VA 23451
(757) 428-6443
email: hpurkey@hrpjrpc.com

Stephen R. Romine* (2002-2003)
Williams Mullen
222 Central Park Avenue, Suite 1700
Virginia Beach, VA 23462-3035
(757) 473-5301
email: sromine@williamsmullen.com

William W. Sleeth, III
Gordon & Rees, LLP
5425 Discovery Park Boulevard, Suite 200
Williamsburg, VA 23188
(757) 903-0869
email: wsleeth@grsm.com

Susan B. Tarley
Tarley Robinson, P.L.C.
4801 Courthouse Street, Suite 122
Williamsburg, VA 23188
(757) 229-4281
email: starley@tarleyrobinson.com

Andrae J. Via
Associate General Counsel
Ferguson Enterprises, LLC
751 Lakefront Commons
Newport News, VA 23606
(757) 969-4170
email: andrae.via@ferguson.com

Edward R. Waugaman†
1114 Patrick Lane
Newport News, VA 23608
(757) 897-6581
email: EdWaugamanJD@gmail.com

Mark D. Williamson
McGuireWoods, L.L.P.
World Trade Center, Suite 9000
101 W. Main Street
Norfolk, VA 23510
(757) 640-3713
email: mwilliamson@mcguirewoods.com

Valley Region

K. Wayne Glass
Poindexter Hill, P.C.
P.O. Box 353
Staunton, VA 24402-0353
(540) 943-1118
email: kwg24402@gmail.com

James L. Johnson
Wharton, Aldhizer & Weaver, P.L.C.
100 South Mason Street
P.O. Box 20028
Harrisonburg, VA 22801
(540) 434-0316
email: jjohnson@wawlaw.com

Whitney Jackson Levin* (2017-2018)
Miller Levin, P.C.
128 West Beverley Street
Staunton, VA 24401
(540) 885-8146
email: whitney@millerlevin.com

Mark N. Reed
President/CEO
Pioneer Bank
P.O. Box 10
Stanley, VA 22851
(540) 778-6301
email: mnreed@pioneerbks.com

Western Region

Stephen C. Gregory
1334 Morningside Drive
Charleston, WV 25314
cell: (703) 850-1945
email: 75cavalier@gmail.com

David C. Helscher*† (1986-1987)
OPN Law
3140 Chaparral Drive, Suite 200 C
Roanoke, VA 24018
(540) 725-8182
email: dhelscher@opnlaw.com

Jean D. Mumm* (2007-2008)
Gentry Locke
10 Franklin Road SE, Suite 900
Roanoke, VA 24011
540-983-9323
Email: Mumm@gentrylocke.com

Maxwell H. Wiegard
Gentry Locke
SunTrust Plaza
10 Franklin Road, S.E., Suite 900
Roanoke, VA 24011
(540) 983-9350
email: mwiegard@gentrylocke.com

C. Cooper Youell, IV* (2014-2015)
Whitlow & Youell, P.L.C.
28A Kirk Avenue, SW
Roanoke, VA 24011
(540) 904-7836
email: cyouell@whitlowyouell.com

HONORARY AREA REPRESENTATIVES (INACTIVE)

Joseph M. Cochran* (2009-2010)
177 Oak Hill Circle
Sewanee, TN 37375

Robert E. Hawthorne* (1993-1994)
Hawthorne & Hawthorne
P.O. Box 603
Kenbridge, VA 23944
Kenbridge Office: (434) 676-3275
Victoria Office: (434) 696-2139
email: rehawthorne@hawthorne-hawthorne.com

Edward B. Kidd* (1988-1989)
Troutman Sanders Building
1001 Haxall Point
Richmond, VA 23219
(804) 697-1445
email: ed.kidd@troutmansanders.com

Michael M. Mannix* (1994-1995)
Holland & Knight, L.L.P.
1600 Tysons Boulevard, Suite 700
McLean, VA 22102
(703) 720-8024
email: michael.mannix@hklaw.com

R. Hunter Manson*
R. Hunter Manson, P.L.C.
P.O. Box 539
Reedville, VA 22539
(804) 453-5600

G. Michael Pace, Jr.* (1991-1992)
General Counsel
Roanoke College
Office of the President
221 College Lane
Salem, VA 24153
(540) 375-2047
email: gpace@roanoke.edu

Joseph W. Richmond, Jr.*† (1985-1986)
McCallum & Kudravetz, P.C.
250 East High Street
Charlottesville, VA 22902
main: (434) 293-8191 direct: (434) 220-5999
email: jwr@mkpc.com

Michael K. Smeltzer* (1998-1999)
Woods, Rogers & Hazlegrove, L.C.
P.O. Box 14125
Roanoke, VA 24038
(540) 983-7652
email: smeltzer@woodsrogers.com

COMMITTEE CHAIRPERSONS AND OTHER SECTION CONTACTS

Standing Committees

FEE SIMPLE
Co-Chairs
Stephen C. Gregory
1334 Morningside Drive
Charleston, WV 25314
cell: (703) 850-1945
email: 75cavalier@gmail.com

Hayden-Anne Breedlove
Old Republic Title
Old Republic Insurance Group
7960 Donegan Drive, Suite 247
Manassas, VA 20109
(804) 332-1907
email: hbreedlove@oldrepublictitle.com

Publication Committee members: Michelle A. Rosati
Shafeek Seddiq
Benjamin P. Titter

Membership
Chair
Richard B. "Rick" Chess
Chess Law Firm, P.L.C.
9211 Forest Hills Avenue, Suite 201
Richmond, VA 23235
cell: (804) 241-9999
email: rick@chesslawfirm.com

Committee members: F. Lewis Biggs*
Kay M. Creasman*†
Pamela J. Faber
J. Philip Hart*
Randy C. Howard*
Larry J. McElwain*†
Harry R. Purkey, Jr.
Susan H. Siegfried*

Programs
Chair
Sarah Louppe Petcher
S&T Law Group P.L.L.C.
8116 Arlington Boulevard, Suite 249
Falls Church, VA 22042
(703) 665-3584
email: sarah@SandTlawgroup.com

Committee members: Kathryn N. Byler†
Kay M. Creasman*†
Howard E. Gordon*†
Neil S. Kessler*
Jean D. Mumm*
Susan M. Pesner*†
Michele Rosati
Edward R. Waugaman

Technology
Chair
Matson Coxe
Wilson Elser Moskowitz Edelman & Dicker LLP
8444 Westpark Drive, Suite 510
McLean, VA 22102-5102
(703) 852-7787
email: matson.coxe@wilsonelser.com

Committee members: F. Lewis Biggs*
Kay M. Creasman*†
Christopher A. Glaser
Garland Gray
Joshua M. Johnson

Substantive Committees

Commercial Real Estate
Chair
John H. Hawthorne
SVP, Legal/Associate General Counsel
Comstock Companies
1886 Metro Center Drive
Fourth Floor
Reston, VA 20190
(703) 230-1985
email: jhawthorne@comstockcompanies.com

Committee members: Michael E. Barney*
F. Lewis Biggs*
Dianne Boyle
Richard B. "Rick" Chess
Connor J. Childress
Robert Deal
Mazin Elias
K. Wayne Glass
David C. Hannah
Alyson Harter
Will Homiller
Randy C. Howard*
James L. Johnson
Kristen R. Jurjevich
Ralph E. Kipp
Benjamin D. Leigh†
Whitney Jackson Levin*
James B. Lonergan*
Rick Melnick
David Miller
Jean D. Mumm*
William L. Nusbaum*
Stephen R. Romine*
Shafeek Seddiq
Olaun Simmons
Theodora Stringham
J. Page Williams
C. Cooper Youell, IV*

Common Interest Community
Chair
William W. Sleeth, III
Partner
Gordon Rees Scully Mansukhani
5425 Discovery Park Blvd.
Suite 200
Williamsburg, Virginia 23188
(757) 903-0869
email: wsleeth@grsm.com

Committee members: Deborah M. Casey
John C. Cowherd
David C. Helscher*†
Brett Herbert
William A. Marr, Jr
Susan Bradford Tarley
Andrew Terrell
Lucia Anna Trigiana
Jerry M. Wright, Jr.

Creditors' Rights and Bankruptcy
Chair
F. Lewis Biggs* (2016-2017)
Kepley, Broscious & Biggs, P.L.C.
2211 Pump Road
Richmond, VA 23233
(804) 741-0400
email: FLBiggs@kbbplc.com

Committee members: Paul K. Campsen
Vanessa S. Carter
Brian O. Dolan
J. Philip Hart*
Hannah W. Hutman
John H. Maddock, III
Richard C. Maxwell
Christy Murphy
Lynn L. Tavenner
Stephen B. Wood
Peter G. Zemanian

Eminent Domain
Chair
Charles M. Lollar* (1992-1993)
Lollar Law, PLLC
109 E. Main Street, Suite 501
Norfolk, VA 23510
office: (757) 644-4657; cell: (757) 735-0777
email: chuck@lollarlaw.com

Committee members:

Nancy C. Auth
Josh E. Baker
James E. Barnett
Robert J. Beagan
Lynda L. Butler
Michael S. J. Chernau
Francis A. Cherry, Jr.
Stephen J. Clarke
Charles R. Cranwell
Joseph M. DuRant
Matthew D. Fender
Gifford R. Hampshire
Henry E. Howell
Thomas M. Jackson, Jr.
James W. Jones
James J. Knicely
Brian G. Kunze
Sharon E. Pandak
Rebecca B. Randolph
Kelly L. Daniels Sheeran
Mark A. Short
Olaun Simmons
Bruce R. Smith
Theodora Stringham
Paul B. Terpak
Joseph T. Waldo

Ethics
Co-Chairs
Edward R. Waugaman
1114 Patrick Lane
Newport News, VA 23608
(757) 897-6581
email: EdWaugamanJD@gmail.com

Blake Hegeman
Long & Foster Real Estate, Inc.
8411 Patterson Avenue
Richmond, VA 23229
Tel: 804-349-3228
email: blake.hegeman@longandfoster.com

Committee members: David B. Bullington
Richard B. Campbell
Todd E. Condron
Kay M. Creasman*†
Lawrence A. Daughtrey
James M. McCauley
Susan M. Pesner*†
Lawrence M. Schonberger*
Benjamin P. Titter
J. Page Williams
Eric V. Zimmerman

Residential Real Estate
Co-Chairs
Benjamin C. Winn, Jr.
Benjamin C. Winn, Jr, Esquire P.L.C.
3701 Pender Drive, Suite 300
Fairfax, VA 22030
(703) 652-9719
email: bwinn@nvrinc.com

Susan S. Walker* (2015-2016)
Jones, Walker & Lake
128 S. Lynnhaven Road
Virginia Beach, VA 23452
(757) 486-0333
email: swalker@jwlpc.com

Committee members:

Brooke Barden
David B. Bullington
Todd E. Condron
Henry Matson Coxe, IV
Kay M. Creasman*†
Mazin Elias
Pamela B. Fairchild
Michele R. Freemyers
K. Wayne Glass
Barbara Wright Goshorn
Mark W. Graybeal
George A. Hawkins
Blake B. Hegeman
David C. Helscher*†
Tracy Bryan Horstkamp
Jack Kendall
Michael P. Lafayette
Thomson Lipscomb
Paul H. Melnick*
Sarah Louppe Petcher
Harry R. Purkey
Karen W. Ramey
Mark N. Reed
Trevor B. Reid
Collison F. Royer
Jordon M. Samuel
Shafeek Seddiq
Allen C. Tanner, Jr.
Benjamin P. Titter
Eric V. Zimmerman

Land Use and Environmental
Co-Chairs
Karen L. Cohen
Gentry Locke
P.O. Box 780
Richmond, VA 23218-0780
(804) 956-2065; cell: (804) 205-4926
email: Cohen@gentrylocke.com

Lori H. Schweller
Williams Mullen
321 East Main Street, Suite 400
Charlottesville, VA 22902-3200
(434) 951-5728; cell: (804) 248-8700
email: lschweller@williamsmullen.com

Committee members: D. Scott Foster
Preston Lloyd
Valerie Long
Lindsey Rhoten
Stephen R. Romine*
Tyler Rosa
Olaun Simmons
Maxwell H. Wiegard

Title Insurance
Chair
Cynthia A. Nahorney, Esquire
Vice President/Area Agency Counsel
Fidelity National Title Group
4525 Main Street, Suite 810
Virginia Beach, VA 23462
main: (757) 216-0491; cell: (757) 406-7977
email: cynthia.nahorney@fnf.com

Committee members:

Addison Barnhardt
Hayden-Anne Breedlove
Jon W. Brodegard
Paula S. Caplinger*†
Kay M. Creasman*†
Pamela J. Faber
Stephen C. Gregory
Cynthia Nahorney
Helen Spence
Edward R. Waugaman
Benjamin C. Winn, Jr.

Virginia State Bar Real Property Section
Membership Application

1. Contact Information

Please provide contact information where you wish to receive the section's newsletter and notices of section events.

Name: .....

VSB Member Number: .....

Firm Name/Employer: .....

Official Address of Record: .....

.....

.....

Telephone Number: .....

Fax Number: .....

E-mail Address: .....

2. Dues

Please make check payable to the Virginia State Bar. Your membership will be effective until June 30 of next year.

l $35.00 enclosed

3. Subcommittee Selection

Please indicate any subcommittee on which you would like to serve.

Standing Committees

- l Fee Simple Newsletter
- l Programs
- l Membership
- l Technology

Substantive Committees

- l Commercial Real Estate
- l Creditors Rights and Bankruptcy
- l Residential Real Estate
- l Land Use and Environmental
- l Ethics
- l Title Insurance
- l Eminent Domain
- l Common Interest Community
- l Law School Liaison

4. Print and return this application with dues to

Dolly C. Shaffner, Section Liaison Real Property Section
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-0026