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CHAIR'S MESSAGE

By Lori H. Schweller

Lori H. Schweller is the 2020-2021 Chair of the Real Property Section of the Virginia State Bar and Co-Chair of the Section's Land Use and Environmental Committee. She is a partner at Williams Mullen, based in its Charlottesville office. Lori's practice includes land use and transactional real estate matters. She is in her sixth year as a member of the Board of Directors of Greater Charlottesville Habitat for Humanity and serves on its Executive Committee.

In times of rapid societal and economic change, it becomes more evident our values and the prevailing concerns of the day shape how we buy and sell, develop and lease, and tax and leverage real property. During the past six months, we have experienced unprecedented disruption because of COVID-19 and the ensuing lockdown. From SBA loans to eviction forbearance, from breached contracts to cancelled planning commission meetings, the effects of the pandemic have dramatically shifted our focus. Many of us have reluctantly become expert in the nuances of the doctrine of impossibility and frustration of purpose. Some of us have revised, for the first time in memory, our trusty *force majeure* provisions. Among the many responsive actions from federal and state government, the General Assembly may consider extending the validity of land use entitlements just as it did in response to the finance and housing crisis in 2008.[1]

It is instructive and, in these unsettling times, reassuring to see how our day-to-day practice responds to the challenges of current events. Our Section members continually educate one another and share information and expertise through our invaluable CLE programs, quarterly meetings, committee discussions, and publications in The Fee Simple. Inevitably, we find that conversations in our professional lives reflect the broader world around us. During this time of widespread social justice movements, we are becoming more aware of the fraught history of African-American homeownership and the government-supported lending practices that helped to develop segregated suburbia. Pursuant to the new Va. Code Sec. 55.1-300.1, void archaic restrictive covenants purporting to restrict property ownership on the basis of race, color, religion, national origin, and other protected categories (See Va. Code § 36-96.6) may now be released by recordation of a certificate in the land records. Affordable housing has been an increasingly urgent topic of conversation at state and local levels. While some local governments revise their ordinances and development policies in order to increase their affordable housing stock, the General Assembly has adopted new enabling legislation to incentivize the development of affordable housing.[2]

As one might expect, social distancing has had a devastating impact on commercial real estate. Online shopping has increasingly displaced not only shopping malls, which were already failing before the health crisis, but all forms of brick-and-mortar retail. Similarly, office space rentals have suffered as many workers continue to stay home. In hard-hit urban areas such as New York City, not only has the return to the office been slow, but workers are leaving the city altogether– relocating to small towns and suburbs, which are experiencing a boom that would have been surprising only a few months ago. The lowest interest rates of all time are fueling the suburban home-buying spree. The desire to increase personal space raises land planning questions about the pre-COVID trend toward dense, urban, mixed-use neighborhood model development. It will be interesting to see if the trend toward open floorplans reverses course, replaced by more open-air spaces for study, work, and socializing.

Also affecting land use practice, Virginia has adopted the Clean Economy Act to reduce the Commonwealth's carbon emissions to zero by 2045. Among the new laws affecting our real estate

[1] SB 5106 (Va. Code § 15.2-2209.1:1. *Extension of approvals to address the COVID-19 pandemic*).

[2] Va. Code § 15.2-2305.1. *Affordable housing dwelling unit ordinances*.

practices are statutes allowing siting agreements between solar developers and local governments[3], special exception conditions[4], and streamlined comprehensive plan review[5]. These new laws will help utility-scale solar project developers to offer substantial benefits to localities in the form of property and funds as part of their entitlement negotiations.

Given the many uncertainties created by COVID-19, we do not know if our customary Section meetings this year will be the jovial in-person get-togethers that we have all come to look forward to, or if we'll continue to join in a virtual reality. Zoom, Microsoft Teams, and other Hollywood Squares-type platforms have made me, for one, feel an even greater appreciation for the camaraderie our Section enjoyed at seminars of past years.

On behalf of the Section, I would like to congratulate Ben Leigh, our 2020 recipient of the Traver Scholar Award. The Traver Scholar Award is granted by the Section of the VSB and Virginia Continuing Legal Education to recognize Real Property Section members who, in the words of past president Kay Creasman, "embody the highest ideals and expertise in the practice of real estate law and have generously shared their knowledge with others."

We thank those who commit enormous amounts of time to planning and preparing educational seminars for our members, particularly our Programs Committee Co-Chairs, Ben Leigh and Sarah Louppe Petcher, and its members. Thank you to Steve Gregory, who has long managed publication of this journal, and his assistant, Hayden-Anne Breedlove, and the co-chairs and members of the Publications Committee. Finally, thank you to all of our standing and substantive committee chairs and members, officers, directors, and area representative for the work they do and their commitment to keep our Section vital. I look forward to seeing you all soon.

[3] Va. Code § 15.2-2316.6 *et seq*.

[4] Va. Code § 15.2-2288.8.

[5] Va. Code § 2232.H.

DOMINION ENERGY CANCELS THE ATLANTIC COAST PIPELINE: WHAT DOES THIS MEAN FOR VIRGINIA LANDOWNERS?[1]

By Christina Lollar and Charles M. Lollar, Sr.

Christina Lollar is an attorney at Lollar Law PLLC in Norfolk, VA. Her legal practice focuses exclusively on representing private property owners, both commercial and residential, in eminent domain proceedings against municipal, state and federal condemning agencies. She and the firm have extensive experience in the litigation of natural gas pipeline easements. Most recently she has represented and obtained just compensation for 100+ landowners in both the Atlantic Coast Pipeline and Mountain Valley Pipeline projects.

Charles M. Lollar, Sr. is founder and managing member of Lollar Law, PLLC, which limits its practice to the representation of private property owners in eminent domain and property rights constitutional litigation throughout Virginia, North Carolina and West Virginia. Lollar Law, PLLC represented many large tract landowners in Virginia, North Carolina, and West Virginia federal courts gas pipeline projects including the Atlantic Coast Pipeline and Mountain Valley Pipeline and MVP Southgate projects. Mr. Lollar is past chair of the VSB Real Property Section, Conference of Local and Specialty Bar Associations and past member of the VSB's Executive Committee and Executive Council.

On October 13, 2017, the Federal Energy Regulatory Commission ("FERC") by Order[2] authorized Virginia-based Dominion Energy and North Carolina-based Duke Energy to construct and operate an underground pipeline for the transmission of natural gas spanning 600 miles from West Virginia through Virginia, crossing the Appalachian Trail and continuing into North Carolina. The Atlantic Coast Pipeline ("ACP") was estimated to be an $8 billion interstate project and pursuant to the FERC Order, was to be completed and made available for service by October 13, 2020.

In late 2018, Dominion filed condemnation actions against landowners in West Virginia, Virginia and North Carolina federal courts pursuant to the Natural Gas Act, 15 U.S.C. § 717 et seq., seeking to acquire easements for the construction and operation of the ACP. Although the ACP was met with substantial legal challenges from various environmental coalitions (resulting in significant delays), the project ultimately scored a victory in June of 2020 when the Supreme Court overruled the environmental groups and held that the pipeline could still be built under the Appalachian Trail. However, on July 5, 2020, due to "legal and regulatory uncertainty" and further anticipated delays, Dominion and Duke announced the "cancellation" of the ACP project. Although the announcement was followed by Berkshire Hathaway's $10 billion acquisition of Dominion's gas assets, the deal did not include acquisition of the 600-mile ACP.

At the time of the project's cancellation, Dominion and Duke confirmed that easements for 98% of the route had been secured, 50% of which were located in Virginia. It was also confirmed in a public statement by Dominion that landowners who already received settlement (just compensation) payments for the ACP's acquisition of easements would not be required to repay any portion of the funds. Although many may view the cancellation of the ACP as a major windfall for those landowners who have already received settlement funds, these landowners are still left with many questions and uncertainty about the encumbrance on their property and what their rights are to terminate the easements.

The discussion as to what the implications are of the ACP cancellation for those Virginia landowners whose properties are now encumbered by easements is varied. These landowners could petition the

[1] Lollar Law PLLC will continue to supplement this article as Dominion and Duke make future announcements regarding the pending lawsuits and its plan for easements already acquired along the ACP route.

[2] Atlantic Coast Pipeline, LLC & Dominion Energy Transmission, Inc. 161 FERC ¶ 61,042.

Court for termination of the easements; however, they would incur significant litigation costs in doing so, and it is unlikely that the Court would compel Dominion to release the easements inasmuch as just compensation was already paid. In large part, the implication of the ACP cancellation for these landowners will largely depend on the language in the easements. Landowners who signed generic easement language are most likely going to be stuck with the encumbrance regardless of whether the easement remains in non-use indefinitely or if Dominion sells the easements to another entity. However, those landowners who were represented by counsel most likely negotiated easement termination/abandonment provisions as an inducement for their execution of the easements; clauses likely required Dominion to stipulate that, in the event of complete non-use of the pipeline for a certain period of time (i.e. 3 - 4 years), the easements would terminate and automatically revert back to the landowners. Additionally, they may have required Dominion to stipulate that ACP, or any assignee, would also bear the cost to release/terminate the easements in the event of a period of continued non-use. Even if Dominion were to sell the easement rights to another entity or venture interested in constructing a pipeline, there is no feasible way the project would receive the necessary regulatory approval in order to be commenced or completed within a 3 to 4 year time period; hence, the non-use of the easement would trigger most abandonment/termination provisions protecting the landowners' real property interests.

The discussion regarding the implications of the ACP abandonment for those landowners who did not settle and whose cases remain pending centers on whether those landowners can recover their legal expenses, costs, and attorneys' fees spent litigating against ACP's condemnation action. Following the announcement of the project's cancellation, Dominion did promptly withdraw all outstanding settlement offers made to landowners who had not yet signed easements. To date, the federal lawsuits against these landowners remain pending; Dominion and Duke have not voluntary dismissed the actions. The majority of federal courts have held that these landowners are entitled to attorney's fees and costs even if Dominion and Duke dismiss the actions against the remaining landowners. *Tennessee Gas Pipeline Co. v. 104 Acres of Land, More…*, 828 F. Supp. 123 (1993) (holding that landowners were entitled to attorney's fees and costs where pipeline company changed its route and the condemnation action to obtain an easement was dismissed); Bison *Pipeline, LLC v. 102.84 Acres of Land*, 732 F.3d 1215 (10th Cir. 2013); *National Fuel Gas Supply v. 138 Acres of Land*, 84 F.Supp.2d 405 (W.D. N.Y. 2000).

Of particular note is also that ACP, in an apparent attempt to garner some positive press and public response, chose to call its action a "cancellation" as opposed to an "abandonment." The latter arguably triggers landowners' claims for compensation and expense reimbursement. The effect here is clear: landowners who have encumbered their properties with permanent easements (and received compensation in varying negotiated amounts) could have permanent encumbrances of 50' easement strips through their properties. Whether such easements are assigned for a new gas project remains an uncertainty. The gas pipeline easements cannot, based upon the language of even the template documents signed by unrepresented owners, be expanded in scope and use for other utilities such as oil or electricity. The economic feasibility of future natural gas pipelines is low due to ample domestic supply and lower global demand. Linear utility projects, including energy, ultimately must connect all the dots from source to market. New projects may be required to file new condemnation proceedings to expand the scope and use of existing easements. Before that occurs, encumbered landowners should be proactive in seeking relief in the courts from unused easements, especially those with negotiated termination-by-abandonment provisions.

LIABILITY ISSUES IN THE SHORT-TERM RENTAL INDUSTRY

By Kathleen M. McDermott

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Although all sectors of the travel industry have been adversely affected by the Covid-19 pandemic, the Short-Term Rental ("STR") sector appears to be holding its own, and, in many cases, actually faring better than more mainstream accommodation options such as motels and hotels.[1] Demonstrating the agility and resiliency of this relatively new industry built on the "sharing economy," Airbnb, after putting its plans on hold in early summer 2020, announced that it has revived its plans to go public.[2] Virginia localities, faced with a persistent proliferation of STRs, are continuing to consider and pass ordinances addressing the conditions under which STRs will be allowed to operate in their jurisdictions.[3]

While governmental regulations concerning STRs have been focused on zoning and tax issues, such laws[4] and ordinances[5] are not designed to address the myriad of liability issues created when, for a fee, a stranger takes temporary possession of part or all of someone's residence, often employing the services of a third-party peer-to-peer STR platform such as Airbnb, VRBO, FlipKey or HomeAway ("Platform").

In addressing these liability issues, Virginia courts must consider this newly created STR Host/guest relationship and decide disputes between and among the various parties to the STR transaction and the surrounding neighbors. In so doing, they apply a patchwork of sometimes antiquated property and tort liability doctrines. Common patterns emerge, however, chief of which are the threshold issues of whether the STR Host/guest relationship should be treated as that of a landlord-tenant, a business invitor-invitee or an innkeeper-guest.

Suggested approaches to some of the liability issues that might arise in the short-term rental context are addressed below.

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1 https://www.usatoday.com/story/travel/hotels/2020/08/26/airbnb-vrbo-more-popular-than-hotels-during-covid-19-pandemic/5607312002/

2 https://www.bloomberg.com/news/newsletters/2020-08-26/airbnb-ipo-why-it-s-going-public-during-coronavirus

3 For example, on June 22, 2020, the Richmond City Council adopted Ordinance No. 2019-343 to permit STRs, http://www.richmondgov.com/PlanningAndDevelopmentReview/ShortTermRentals.aspx; In July of 2020, Virginia Beach considered amendments to its STR ordinance.www.vbgov.com/government/departments/planning/Pages/Planning-Commission-Workshop.aspx

4 In 2017, the Virginia legislature enacted § 15.2-983 of the Virginia Code, entitled, "Creation of registry for short-term rental of property".

5 For example, in 2018, Fairfax County amended its zoning ordinance to allow STRs in Fairfax County under specific conditions. https://www.fairfaxcounty.gov/planning-development/ sites/ planning-development/files/assets/documents/zoning%20ordinance/adopted%20amendments/zo18473.pdf

A. PREMISES LIABILITY

The issue of premises liability concerns harm resulting to STR guests from an unsafe condition in the rental property. In actions by short-term renters against STR Hosts, the dispositive issue is the nature of the relationship between the STR Host and the guest (landlord-tenant or innkeeper-guest) and what standard of care applies as a consequence.

Ordinarily, under the provisions of the Virginia Residential Landlord and Tenant Act ("VRLTA"), landlords are under an obligation to maintain fit premises. Thus, among other things, Va. Code § 55.1-1220 requires landlords to:

- Comply with the requirements of applicable building and housing codes materially affecting health and safety;
- Do whatever is necessary to put and keep the premises in a fit and habitable condition;
- Maintain in good and safe working condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, supplied or required to be supplied by the landlord; and
- Supply running water and reasonable amounts of hot water at all times, and reasonable air conditioning if provided and heat in season except where heat, air conditioning, or hot water is generated by an installation within the exclusive control of the tenant.

However, the VRLTA specifically excludes "transient lodging," unless the transient lodging has been used as the occupant's "primary residence for more than 90 consecutive days or is subject to a written lease for more than 90 days."[6]).

Moreover, even in those limited instances in which the VRLTA applies to short-term rentals, tenants are limited to the contractual remedies provided by the VRLTA; the landlord's duties under the VRLTA do not give rise to a tort claim for damages for personal injury.[7]

In Virginia, the leading premises liability case is *Haynes-Garrett v. Dunn*, 296 Va. 191 (2018). There, a short-term renter sued the owner for damages resulting from a serious injury she sustained when she fell after stubbing her toe on the transition strip where the floor was raised between a carpeted area and a tiled hallway.[8] The Virginia Supreme Court undertook an extensive analysis of whether the owner should be held to the "elevated duty of care" required of an innkeeper, or to the standard of care applicable to a landlord. The court characterized the landlord at common law as having "no duty to maintain in a safe condition any part of the leased premises that is under the tenant's exclusive control."[9] On the other hand, the court stated that the "elevated" duty of an innkeeper is "to take every reasonable precaution to protect the person and property of their guests and boarders."[10] *Id*.

[6] § 55.1-1201(D)(4) Va. Code; *see also* §55.1-1201 (D)(2) (hotels, motels, and other transient lodging are exempt from the VRLTA if the person living there "does not reside in such lodging as his primary residence");§55.1-1201(D)(3) Va. Code (if a person resides in transient lodging as his or her primary residence for 90 consecutive days or less, such lodging is not subject to the VRLTA).

[7] *See Isbell v. Commercial Investment Associates, Inc.*, 273 Va. 605, 618 (2007).

[8] *Haynes-Garrett v. Dunn*, 296 Va. 197 (2018).

[9] *Id*. at 200.

[10] *Id.*

The court found that the owners should be considered as a landlord rather than innkeepers,[11] with the result that the lower standard of care that a landlord owes a tenant should apply. The court reached this conclusion based on the following factors:

- The house was used by the owners as a "second house" to spend time with family and was available for rental only during certain months.
- The house was not made available to the public generally based solely on the requirement that their stated rental price be paid, but rather the owners rented it only to families.
- The parties did not intend for the owners or their agent to maintain possession and control of the house during the time it was occupied by the renters.
- The owners provided no food service, room service, daily maid service or security. [12]

In view of the above factors, the court concluded that the owner was in the position of a landlord and owed the renter the duty of care that a landlord owes a tenant.[13] The *Haynes-Garrett* court characterized that duty as follows: "in the absence of concealment or fraud by the landlord as to some defect in the premises, known to him and unknown to the tenant, the tenant takes the premises in whatever condition they may be in, thus assuming all risk of personal injury from defects therein."[14] Under *Haynes-Garrett*, "[t]he proper inquiry . . . is not whether the parties intended a short-term stay, but whether parties to a short-term rental agreement intended that the occupants be entitled to exclusive possession and control of the premises during their stay."[15]

Still, there are some instances where the STR Host/guest relationship will be akin to an innkeeper-guest relationship, rather than a landlord-tenant relationship, such as when the guest does not have exclusive control over or possession of the premises in question. Indeed, many STR Hosts retain significant control over parts of the premises during the guest's stay, or monitor the guests via cameras. In those situations, a higher duty of care may apply to the STR Host with respect to conditions in and on the property.

In *Taboada v. Daly Seven, Inc.*,[16] the Virginia Supreme Court found that the relationship of innkeeper and guest is a special relationship like that of a common carrier and passenger. 271 Va. at 325. Although the *Taboada* case involved an innkeeper's liability for criminal acts committed by a third party, the fundamental holding of that case, finding a higher duty of care for innkeepers, is equally applicable to STR Hosts found to be acting as innkeepers.

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[11] The court did not analyze the facts in terms of the business invitor-invitee relationship. In Virginia, the business owner owes the business invitee a variety of duties including to exercise ordinary care toward its invitee. In carrying out this duty, it is required to keep the premises in a reasonably safe condition for the invitee's visit; to remove, within a reasonable time, foreign objects from its floors which it may have placed there or which it knew, or should have known, that other persons had placed there; and to warn the customer of the unsafe condition if it was unknown to the invitee, but is, or should have been, known to the owner. *Winn-Dixie Stores, Inc. v. Parker*, 240 Va. 180, 182, 396 S.E. 2d 649, 650 (1990). It should be noted that in Virginia, the defenses of assumption of the risk and contributory negligence operate as a complete bar to liability. *See, e.g.*, *Smith v. Virginia Elec. & Power Co*., 204 Va. 128, 133, 129 S.E.2d 655, 659 (1963) and *Thurmond v. Prince William Prof'l Baseball Club, 265 Va. 59*, 64, 574 S.E. 2d 246, 249 (2003).

[12] *Haynes-Garrett*, 296 Va. at 202.

[13] *Id*. at 202-203.

[14] *Id.* at 200 (*quoting Isbell v. Commercial Inv. Assocs.*, 273 Va. 605, 611 (2007) (citation omitted)).

[15] *Id*. at 201, n. 3.

[16] 271 Va. 313 (2006), *adhered to on rehearing, Taboada v. Daly*, 273 Va. 269 (2007).

As the court noted in *Taboada*, "unlike a landlord, an innkeeper is in direct and continued control of the property and usually maintains a presence on the property personally or through agents. Thus, 'while a lessee may be expected to do many things for his own protection,' an innkeeper's guest is not as well situated to do so."[17]

In *Powell v. Lili Gu,*[18] the California Court of Appeals considered whether the STR Host should be considered as a landlord in the context of an alleged nuisance caused by a succession of weekend short-term renters. The court found that the general rule that landlords are not liable for a nuisance created by their tenants would not be applied to this STR Host because she had not surrendered exclusive control and possession of the house to the guests. The court found that, on occasion, the owner had engaged in monitoring activities at the house through live-stream video cameras, and that she maintained possession over the wine cellar and utility closets in the house, which were not accessible to the guests. In addition, the court noted that the guests could access, but not use, the garage, which the STR Host continued to use for storage.[19]

In sum, the question whether an STR Host will be held liable for an undisclosed condition in the rental property rests on the intention of the parties and whether the owner can be said to have relinquished control and possession of the premises to the guest during the period of the short-term rental. When significant elements of control and possession have been retained by the owner, based upon the reasoning of the *Taboada* and the *Powell* cases, it is possible that the owner will be held to a standard of care higher than that which normally is owed by a landlord to a tenant.

B. PROPERTY DAMAGE ISSUES

STR Hosts have a variety of ways to obtain compensation for damage caused by STR guests, including through security deposits and insurance. They may also pursue legal action against guests who have damaged the host's home or personal property.

Among the possible causes of civil action are negligence and trespass to chattels.[20] If the STR Host is considered to be acting as a landlord, the STR guest has an obligation, as a tenant, not to commit waste.[21] Additionally, bailment might provide a theory of recovery. When a fire allegedly caused by the guests' cigarette smoking destroyed the possessions of a host, the circuit court found that the insurance company (standing in the shoes of the host) had successfully pled a cause of action for bailment: delivery of personal property in the unit to the defendant guest; acceptance of keys by the guest; a beneficial arrangement for both guest and host; intention on the part of the guest to exercise

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[17] 271 Va. at 324 (*quoting with approval, Crosswhite v. Shelby Operating Corp.*, 182 Va. 713, 715 (1944)). In *Crosswhite*, the court held that while "[a]n innkeeper is not an insurer of his guest's personal safety, …his liability does extend to injuries received by the guest from being placed in an unsafe room, because such a matter is peculiarly within the knowledge, control, and power of the innkeeper." *Id.* at 716 (*quoting with approval Crockett v. Troyk, 78 S.W.2d 1012 (Tex. Civ. App. 1935).*

[18] *Powell v. Lili Gu*, B292948 (Cal. Ct. App., Dec. 18, 2019), *unpublished.*

[19] *Id*. at 5–6.

[20] "Trespass to chattels" occurs when one party intentionally uses or intermeddles with personal property in rightful possession of another without authorization.'" *Hughes v. Robert Young Auto & Truck, Inc.*, 97 Va. Cir. 92, 93 (Roanoke Cir. Ct. 2017) (citations and footnote omitted). "One who commits a trespass to a chattel is liable to its rightful possessor for actual damages suffered by reason of loss of its use." *Vines v. Branch*, 244 Va. 185, 190 (1992).

[21] "Waste" is the destruction, material alteration, or deterioration beyond normal wear and tear caused by the tenant of the landlord's premises. *Instruction No. 24.040, Tenant's Liability for Waste, Virginia Model Jury Instructions – Civil* (Release 20, March 2020).

control over the personal property (furnishings); and failure to return the property to the host. Under a bailment theory, the plaintiff does not have to prove negligence.[22]

Statutory provisions also may be relevant. For example, § 8.01-42.2 Va. Code provides for the civil liability of a registered guest in a hotel, motel, inn or other place offering to the public transitory lodging of sleeping accommodations for compensation who damages the accommodation or its furnishings.[23] And § 18.2-137 Va. Code, provides criminal penalties for any person who "unlawfully destroys, defaces, damages or removes without the intent to steal, any property, real or personal, not his own . . ."

C. THEFT ISSUES

Liability for theft of the STR Host's or the guest's property might rest with the STR Host, with the guest, or with the Platform itself depending upon the circumstances. Although the subject of insurance is beyond the scope of this article, as a practical matter, prior to instituting any kind of lawsuit, depending upon the factual circumstances surrounding the theft, the affected party should explore the possibility of reimbursement via insurance. There are three potential sources of insurance in the STR/Host guest transaction: 1) the insurance or other types of guarantee programs provided by the Platform, if one is involved in the transaction, 2) the guest's homeowner's policy; and 3) the STR Host's insurance policy.[24]

Liability of the STR Host to Guest

With respect to sources of liability, irrespective of applicable insurance coverage, the guest who experiences a third-party theft while staying in a short-term rental might try to pursue the theory that the host has a duty to that guest because that host is either an innkeeper or a landlord. If the thief is known (for instance, if it is the Host), the guest could sue the thief using the common-law tort theory of conversion.

It does not appear that any reported Virginia Supreme Court case directly addresses the issue of an innkeeper's liability to the guest for third-party theft. The Virginia Code, does, however, impose on an innkeeper a duty "to exercise due care and diligence in providing honest and competent employees

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[22] *See Occidental Fire and Casualty Co. v. AREVA Inc.*, 102 Va. Cir. 34, 35 (Nelson Cir. Ct. 2019).

[23] That statutory section provides as follows:

§ 8.01-42.2. Liability of guest for hotel damage.

> Any registered guest in a hotel, motel, inn or other place offering to the public transitory lodging or sleeping accommodations for compensation shall be civilly liable to the innkeeper for all property damage to such accommodation or its furnishings which occurs during the period of such person's occupancy when such damage results (i) from the negligence of the guest or of any person for whom he is legally responsible or (ii) from the failure of the guest to comply with reasonable rules and regulations of which he is given actual notice by the innkeeper.

[24] Some local STR Ordinances impose insurance requirements on their registered hosts. *See, e.g.*, Virginia Beach https://www.vbgov.com/residents/homes-neighborhoods/Documents/STR%20Adopted%20Ordinance-%20Summary.pdf.

and to take reasonable precautions to protect the persons and property of the guests of the hotel."[25] However, the statute limits on the dollar amount of recovery on items taken from the guest's room and provides that if the hotel conspicuously posts in the guest's room a "notice stating that jewelry, money, and other valuables of like nature must be deposited in the office of the hotel," the hotel has no liability for such items that are kept in the room. The statute also provides that the "hotel shall not be obligated to receive from any one guest for deposit in such office any property hereinbefore described exceeding a total value of $500."

The Virginia Supreme Court has never directly addressed the landlord's liability to tenants for third-party theft. However, the court has stated in *Klingbeil Management Group Co. v. Vito*:[26]

> Traditionally, a landlord owes the duty to his tenants to exercise ordinary care to maintain areas over which he has control in a reasonably safe condition, rather than the duty to act as a policeman. In other words, "[a]s a general rule, a landlord does not owe a duty to protect his tenant from a criminal act by a third person." [citing *Gulf Reston, Inc. v. Rogers*, 215 Va. 155, 157, 207 S.E.2d 841, 844 (1974).]

Although the claim in *Klingbeil* was for damages resulting from an assault, not theft, the *Klingbeil* language may be broad enough to rule out a guest's claim of third-party theft liability against the STR Host.

As noted above, if the STR Host (or other known person) stole from the guest, the common law cause of action for conversion would lie. The elements of the tort of conversion are: any wrongful exercise or assumption of authority over another's goods, depriving him of the possession of the goods, and any act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it.[27]

Liability of the STR Guest to Host

Although the host or a third party might steal from the guest, in the STR Host/guest transaction, it is more likely that the guest will be the thief. The following cautionary vignette is quoted from a reader's post on an STR advice website:

> I rented my home through VRBO last weekend and was horrified to discover that the renters vandalized and stole EVERYTHING except my furniture. They broke into my locked closet and stole ALL of my belongings including my clothes, shoes, towels, sheets, pillows, comforters, vacuum, paintings, coats, dishes, bike, electronics … They even took down my light fixtures! It is really upsetting that VRBO does not seem very

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[25] The Virginia Code, in part, provides: "§ 35.1-28. Liability. A. It shall be the duty of any person owning or operating a hotel to exercise due care and diligence in providing honest and competent employees and to take reasonable precautions to protect the persons and property of the guests of the hotel. No hotel shall be held liable in a sum greater than $300 for the loss of any wearing apparel, baggage, or other property not hereinafter mentioned belonging to a guest when such loss takes place from the room or rooms occupied by the guest. Unless the loss shall take place from the office of the hotel after the valuables are deposited there, no hotel shall be liable for any loss by any guest of jewelry, money, or other valuables of like nature belonging to any guest if the hotel shall have posted in the room or rooms of the guest in a conspicuous place, and in the office of the hotel, a notice stating that jewelry, money, and other valuables of like nature must be deposited in the office of the hotel. The hotel shall not be obligated to receive from any one guest for deposit in such office any property hereinbefore described exceeding a total value of $500." § 35.1-28(A).

[26] *Klingbeil Management Group Co. v. Vito*, 233 Va. 445, 448, 357 S.E. 2d 200, 201 (1987).

[27] *Handberg v. Goldberg*, 831 S.E.2d 700, 709 (Va. 2019), citing *United Leasing Corp. v. Thrift Ins. Corp.*, 247 Va. 299, 305, 440 S.E.2d 902 (1994).

> surprised or apologetic and their insurance only covers $5k in damages....This experience truly makes me SICK!!![28]

Horror stories of "guests" stealing from STR Hosts abound on short-term rental blog sites. Some thefts, like the incident recounted above, are particularly egregious and underscore the need for STR Hosts to undertake diligent loss-prevention measures, including: thoroughly screening their guests; developing an inventory of items in the unit; storing valuables offsite; requiring an adequate security deposit; entering into a written contract with the guests; obtaining adequate insurance coverage (including scope of coverage and policy limits); and installing security cameras (in areas other than bathrooms and bedrooms)[29]

In the case of a guest-related theft, in the absence of coverage by an insurance policy, or the willingness of the Platform to pay for all or part of the damages sustained, there is little the STR Host can do except report the theft to the police. While the tort of conversion would theoretically be available to the STR Host, pursuing that kind of lawsuit against an out-of-town defendant presents its own set of challenges. If, on the other hand, the guest resides nearby, suing the "guest" on the theory of conversion may be a viable option.

D. CRIMINAL ACTS

In December of 2019, the *Wall Street Journal* examined data from several cities that require STR licenses, then cross-checked those addresses against police records. They found that "There were hundreds of instances of crimes at licensed short-term rental properties on platforms such as Airbnb, including burglaries, sexual assaults and murders. Some occurred at properties that had been subject to previous police activity, or involved individuals with prior police records."[30] Thus, although the issue of violent crimes may not affect the majority of STRs, it can sometimes be a serious issue in an STR transaction. If the guest of an STR Host does become a victim of a violent crime on the premises, the question arises as to the Host's (and possibly the Platform's) liability.

The general rule in Virginia is that there is no common law duty for an owner or occupier of land either to warn or to protect an invitee on his property from the criminal act of a third party.[31] There are narrow exceptions to this rule, but they are always fact specific and those facts must establish that there is a "special relationship" either between the owner of the land and the invitee or between the third-party criminal actor and the owner of the land.[32]

With respect to the innkeeper-guest relationship, the Virginia Supreme Court has found that it "has long been recognized by the common law as constituting just such special relationship."[33] Similarly, as a matter of law, the court has ruled that a business invitor-invitee is one of these "special relationships."[34] In *Thompson* and in its companion case, *Yuzefovsky v. St. John's Wood*

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[28] https://www.vacationrentalformula.com/10-mistakes-vrbos-often-make-5-will-kill-your-business-before-it-gets-started/ (Comment of "Cher").

[29] See for example, https://www.lodgify.com/blog/airbnb-theft/; https://www.investopedia.com/articles/personal-finance/090915/5-things-airbnb-hosts-can-be-liable.asp; https://www.consumerreports.org/vacations/how-to-avoid-vacation-rental-nightmares/

[30] https://www.wsj.com/articles/shooting-sex-crime-and-theft-airbnb-takes-halting-steps-to-police-its-platform-11577374845 (Dec. 26, 2019).

[31] *Taboada v. Daly Seven Inc.,* 271 Va. 313, 322, 626 S.E.2d 428, 432 (2006), *adhered to on rehearing, Taboada v. Daly*, 273 Va. 269, 641 SE 2d 68 (2007).

[32] *Id.* at 322-23.

[33] *Id.* at 323.

[34] *Thompson v. Skate America*, 261 Va. 121, 129, 540 S.E.2d 123, 127 (2001).

Apartments,[35] the Virginia Supreme Court addressed the liability for third-party criminal activity in the context of the business invitor-invitee relationship (*Thompson*) and in the context of the landlord-tenant relationship (*Yuzefovsky).* Therefore, under Virginia case law, an STR Host/guest relationship could give rise to liability for criminal acts of third parties under one of these three theories, given the right set of facts.

Virginia courts hold the innkeeper to the standard of **"utmost care and diligence**" to protect the guest against "**reasonably foreseeable injury from the criminal conduct of a third party."** In *Taboada*, the Virginia Supreme Court compared the innkeeper's guest to a passenger of a common carrier. Although the court said that an innkeeper is not the "absolute insurer" of a guest's personal safety, nonetheless the court found that "[g]iven the nature of the special relationship between an innkeeper and a guest, we hold that it imposes on the innkeeper the same potential elevated [common carrier] duty of "utmost care and diligence" to protect a guest from the danger of injury caused by criminal conduct of a third person on the innkeeper's property."[36] The court went on to elaborate that this duty is to protect the guest against "reasonably foreseeable injury from the criminal conduct of a third party."[37]

Even if a court were to find that an STR Host was an "innkeeper," the liability imposed would turn on the specific facts of the case. In *Taboada*, the guest sued the innkeeper seeking $5 million in damages for injuries sustained when he was shot in the hotel's parking lot at 2 a.m.[38] The guest alleged that the innkeeper's employees had contacted the police 96 times over a three-year period to report criminal conduct (robberies, malicious woundings, shootings and other "criminally assaultive acts"), that the police had advised the innkeeper that its property was in a high-crime area, and that the innkeeper was on notice that its guests were in danger of injury.[39] The court held that these allegations were sufficient to support "a reasonable conclusion that [the innkeeper] knew its property was located in a high crime area and that [it] was on notice that its guests were in danger of injury caused by similar criminal acts of third parties….and sufficiently support the further conclusion that the injury to [the guest] from the criminal act of the third party was reasonably foreseeable."[40]

If instead of an innkeeper, the STR Host were to be considered a business invitor or a landlord, the guest would likely have to meet a higher burden in order for a Virginia court to impose liability on that STR Host: that of "**imminent probability of harm.**" The test for business invitors and landlords was established in the case of *Wright v. Webb*, 234 Va. 527, 362 S.E. 2d 919 (1987). The *Wright* court held that a business invitee who was assaulted in a parking lot was owed only the duty of

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[35] 261 Va. 97, 540 S.E.2d 134 (2001).

[36] *Taboada,* 271 Va. at 326.

[37] *Id*. at 327.

[38] Although the court allowed the guest to proceed to trial on the common law negligence claim, the court dismissed the guests statutory claim under § 35.1-28 of the Virginia Code which provides that "It shall be the duty of any person owning or operating a hotel to exercise due care and diligence in providing honest and competent employees and to take reasonable precautions to protect the persons and property of the guests of the hotel."§ 35.1-28 (A), and under subsection (E), which further provides: "Nothing contained in this section shall be construed so as to change or alter the principles of law concerning a hotel's liability to a guest or other person for personal injury, nor to exempt in anywise the owner or operator of a hotel from being liable for the value of any property of guests taken or stolen from any room therein by any employee or agent of the hotel." The court found that this statute is "principally directed to the prevention of loss of personal property of the guest," not to the personal injury issue then before the court. *Taboada,* 271 Va. at 322.

[39] *Id*. at 318-19.

[40] *Id*. at 327.

ordinary care to maintain the parking lot in a reasonably safe condition and that the business owner's knowledge of prior property crimes in the lot did not create a duty to anticipate assaults upon their invitees. The court found that two prior isolated acts of violence were not enough to impose liability on the owner.[41]

In W*right*, the court looked at the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the business invitor. The court reasoned that "in ordinary circumstances, it would be difficult to anticipate when, where, and how a criminal might attack a business invitee." *Wright, 234 Va.* at 531. Accordingly, the court held that a business owner "does not have a duty to take measures to protect an invitee against criminal assault unless he knows that criminal assaults against persons are occurring, or are about to occur, on the premises which indicate an **imminent probability** of harm to an invitee."[42] (emphasis added).

In 2001, in the *Thompson*[43] and *Yuzefovsky*[44] cases, the Virginia Supreme Court contrasted two cases in an attempt to define the required level of "imminence" of the harm.

In *Thompson*, the business invitee of a roller rink was a teenager (Thompson) who alleged that he was struck in the head with a roller skate by another teenage patron (Bateman), fracturing his skull and causing severe and permanent damage.[45] The injured invitee also alleged that the rink owner had banned Bateman from the premises before, and that the owner knew Bateman had committed other assaults on the premises in the recent past. *Id.* at 130. Unlike in other cases, such as *Wright*, where the court had declined to impose liability for negligence solely on a background of prior criminal activity on the business premises or in the vicinity committed by unknown persons, the court, found the allegations sufficient to survive a demurrer and proceed to trial:

> Skate America had specific knowledge of Bateman's propensity to assault its other invitees, had intervened to inhibit that behavior in the past, and had taken steps to avoid a reoccurrence of that behavior in the future. Thus, taking these allegations as true on demurrer, we are of opinion that the allegations as to Bateman's presence on Skate America's premises were sufficient to state a claim that Skate America was on notice specifically that Thompson was in danger of being injured by Bateman in a criminal assault. **The "imminent probability" of that harm, as characterized in *Wright*, is merely a heightened degree of the "foreseeability"** of that harm and here we are of opinion that the specific allegations concerning the knowledge Skate America had of Bateman's prior violent conduct satisfied the necessary degree of foreseeability.[46] [emphasis added]

Thus, for the business invitee, the court required more than just the "reasonable foreseeability of harm" that it required of the innkeeper in *Taboada*. It held that for a business invitor to be liable, the "imminent probably of harm" could be demonstrated by the business owners' knowledge of the assailant's prior violent conduct.

In the *Yuzefovsky* case, decided the same day as *Thompson,* the court applied the standard articulated in *Thompson* to a landlord-tenant relationship and found that the tenant's allegations did <u>not</u> rise to the level of an "imminent probability of harm" necessary to impose liability on the

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[41] *See Wright* at 533.

[42] *Wright,* at 533.

[43] Thompson ex. rel. Thompson v. Skate America, Inc., 261 Va. 121 (2001).

[44] Yuzefovsky v. St. John's Wood Apartments, 261 Va. 97 (2001).

[45] *Thompson,* at 125.

[46] *Thompson*, at 130, citing *Wright,* 234 Va. at 533, 362 S.E. 2d at 922.

landlord.[47] In *Yuzefovsky*, when the tenant was applying for the apartment, he inquired about safety of the building. The landlord's staff told the tenant there had been no crimes on the property, that it was safe, that police officers lived there, and that the police patrolled the property. The tenant alleged that he relied on those statements and signed the lease. Over a year later, the tenant was shot by an assailant who took his keys and fled in the tenant's vehicle.[48]

The tenant sued the landlord claiming, *inter alia*, the landlord had a duty that arose out of the "special relationship" of landlord-tenant. The tenant alleged that the landlord knew the statements regarding safety were not true. The court noted that while it frequently recognized that there are "narrow" exceptions to the general rule that there is no common law duty for the landowner to protect an invitee on his property from the criminal act of a third party, "we have rarely found the circumstances of the cases under review to warrant application of the exceptions."[49] Accordingly, the court found that:

> Yuzefovsky's allegations, if proven, **do not establish an imminent probability of injury** to him from a criminal assault by a third party on the premises. **There is no allegation that would support the conclusion that on or near the date when Yuzefovsky was injured such assaults or other crimes against persons were occurring, or about to occur,** on the premises of St. John's Wood. Thus, we need not consider whether foreseeable harm at the heightened degree of probability established in *Wright* existed at some other time during this landlord-tenant relationship. *Cf. Thompson v. Skate America, 261 Va. 121, 540 S.E.2d 123* (2001)(decided today, holding that imminent probability of harm is a heightened degree of foreseeable harm). Accordingly, we hold that the allegations... are insufficient to establish that St. John's Wood had a duty to protect Yuzefovsky under the facts of this case.[50] [emphasis added].

The court went on to state that given the tenant had resided at the property for a year and nine months before he was assaulted, "we hold that there is no basis to impose a continuing duty to warn against a danger that was not imminent."[51]

In *Thompson*, the knowledge of the background of the particular third-party assailant was highly relevant to the court. To the extent that a platform such as Airbnb does a background check or otherwise screens guests,[52] and fails to uncover someone who has a background of violent crime, or warn the STR Host of such a background, it is possible that an STR Host who is assaulted by a guest

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[47] *Id.* at 97, 109-110.

[48] *Yuzefovsky,* at 102-103.

[49] *Id.* at 106.

[50] *Id.* at 109.

[51] *Id*. at 110. In the *Dudas* case, another case decided the same day as *Thompson* and *Yuzefovsky,* unknown male trespassers robbed and shot a business invitee while he was playing golf on business invitor's golf course. The invitee alleged that the golf course owner owed him a duty to warn and to protect him from the criminal assaults. The court held that the "level of criminal activity would not have led a reasonable business owner to conclude that its invitees were in *imminent danger* of criminal assault." Thus, the facts did not establish that there was an imminent probability of harm to appellant from a criminal assault by an unknown third party. *Dudas v. Glenwood Golf Club*, 261 Va. 133, 140, 540 S.E.2d 129, 133 (2001)(emphasis in original).

[52] For example, the Airbnb website indicates that the platform does some background checking on hosts as well as guests. https://www.airbnb.com/help/article/1308/does-airbnb-perform-background-checks-on-members. It is also possible the Platform might come into possession of information, based upon a guest's or host's prior conduct reported to the Platform that the guest or host is violent.

might use the use the rationale of *Thompson*, to sue the Platform, in a particular egregious case. Similarly, if the background check extends to hosts, and the guest is assaulted by the STR Host, the Platform may have some liability to that guest.

E. NUISANCE

The term "nuisance" "includes everything that endangers life or health or obstructs the reasonable and comfortable use of property."[53] A nuisance "may diminish the value of realty."[54] A nuisance:

> ...also may interfere with some right incident to the to the ownership or possession of real property. Such interference may be accomplished by substantially impairing the occupant's comfort convenience, and enjoyment of the property, causing a material disturbance or annoyance in use of the realty. [55]

In the context of an STR, the nuisance issue typically arises when a neighbor complains of noise or other disruptive activity of guests at a nearby STR property.[56] Because preserving neighborhood character and stability are within the purview of the local zoning authorities, many Virginia STR ordinances attempt to address quality of life issues that give rise to nuisance complaints. For example, some ordinances require dedicated parking to alleviate the impact on the surrounding neighbors.[57] Some ordinances prohibit parties, banquets, and gatherings for charity and commercial purposes[58]. However, other jurisdictions simply provide for an STR registry and do not address these types of nuisance issues.[59]

In recognition of these potential problems, Airbnb, pre-pandemic, set up a "Neighborhood Support" web page where neighbors can report problems with nearby Airbnb properties: https://www.airbnb.com/neighbors. In late 2019, after a shooting spree at a Halloween party held in a North Carolina Airbnb left five dead, the Platform began a crackdown on so called "open invite" parties, *i.e.*, parties without a fixed guest list.[60] During the spring and summer of 2020, due to the pandemic-related closing of bars and restaurants and similar venues, the STR industry experienced a sharp uptick in guests using STR rentals as a party venues, with a resultant increase in nuisance-

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[53] *Barnes v. Quarries, Inc.,* 204 Va. 414, 417 (1963).

[54] *National Energy Corp. v. O'Quinn*, 223 Va. 83, 85 (1982).

[55] *Id.* at 85 (*citing to Virginian Railway Co. v. London,* 114 Va. 334, 344-45 (1912).

[56] See, e.g., "When Airbnb rentals turn into nuisance neighbors," (Laura Williams, Sept. 18, 2016) *The Guardian*. https://www.theguardian.com/technology/2016/sep/17/airbnb-nuisance-neighbours-tribunal-ruling; "What it's really like living next door to an Airbnb," (Nicole Kobie, December 18, 2016), *Wired;* https://www.wired.co.uk/article/living-next-to-airbnb-sharing-economy-problems.

[57] See the Fairfax County ordinance. https://www.fairfaxcounty.gov/planning-development/sites/planning-development/files/assets/documents/zoning%20ordinance/adopted%20amendments/zo18473.pdf and also see the Virginia Beach ordinance: https://www.vbgov.com/residents/homes-neighborhoods/Documents/STR%20Adopted%20Ordinance-%20Summary.pdf

[58] See, Arlington https://newsroom.arlingtonva.us/release/arlington-county-to-allow-and-regulate-short-term-rentals/; see also, Fairfax and Richmond. https://www.fairfaxcounty.gov/planning-development/sites/planning-development/files/assets/documents/zoning%20ordinance/adopted%20amendments/zo18473.pdf

[59] See, e.g., the City of Alexandria ordinance: https://www.alexandriava.gov/uploadedFiles/finance/info/Sfinrev0218101913370.pdf

[60] https://www.usatoday.com/story/news/nation/2019/11/02/california-halloween-shooting-5-killed-airbnb-bans-party-houses/4140691002/

related complaints to law enforcement. Accordingly, as of August 20, 2020, Airbnb has banned parties altogether for the foreseeable future and has capped occupancy at 16 guests.[61]

In addition to complaining to the STR Platforms, neighbors also have resorted to legal actions based on nuisance theories in an attempt to stop or control the neighborhood disruptions resulting from STR guests.

Possible Defendants

There are three possible types of defendants in legal actions for nuisance: the Platform; the short-term renters themselves; and the owners of the STR.

The Platform

Although platforms like Airbnb have the "deepest pockets" of the possible defendants, they are largely immune from court actions for nuisance. First, there is the issue of causality. In *Gamache v. Airbnb, Inc*., the court rejected a claim of nuisance against Airbnb for noise, safety, and other problems allegedly caused by short-term rentals in an apartment building.[62] The court found that there were no allegations that "Airbnb operated its online platform in a manner that encouraged the nuisance activity in any way." Moreover, as the court stated, "Airbnb's facilitation of some number of short-term rentals in Plaintiffs' building, which may or may not have involved renters who smoked more or made more noise than long-term tenants, does not render Airbnb a proximate cause of the alleged harms."

In addition, Airbnb has been held to be not responsible for tenant violations of restrictions on subletting, and resulting nuisances, by virtue of the "safe harbor" provision of the Communications Decency Act, 47 U.S.C. § 230.[63] Section 230(c)(1) of Title 47 provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id*. at 1103. And Section 230(e)(3) states that [n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id*. The court found that Airbnb was not an "information content provider," since it was simply publishing the content provided by Airbnb hosts who use Airbnb's website and, on that basis, granted Airbnb's motion to dismiss. *Id.* at 1105.

Short-Term Renters

The short-term renters themselves are, in some ways, the most logical defendants because they are the ones who actually cause the problem. In practical terms, though, they are also the most difficult to sue. They occupy the property for only a short period of time, they are difficult for the neighbors to identify, and, by the time necessary legal papers have been prepared, they have left the neighborhood. Moreover, even if they could be identified, establishing legal jurisdiction over them is likely to prove difficult or impossible—they may well be from out of state or even from another country.

However, notwithstanding the low likelihood of successfully bringing a lawsuit against such short-term renters, it is extremely likely that affected neighbors may summon local law enforcement officials or, in an appropriate case, the locality's code compliance office in an attempt to stop the

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[61] https://www.airbnb.com/help/article/2704/what-are-airbnbs-rules-for-parties-and-events-at-listings; https://www.usatoday.com/story/travel/hotels/2020/08/20/airbnb-bans-parties-and-events-worldwide-caps-occupancy-16-guests/5615033002/

[62] *Gamache v. Airbnb, Inc*. A146179, (Cal. Ct. App., Aug. 10, 2017), *unpublished,* Casetext, p. 3.

[63] *See La Park La Brea A LLC v. Airbnb, Inc.* 283 F. Supp. 3d 1097 (C.D. Cal. 2017).

noise or other offending conduct, as well as to assist in establishing an evidentiary record of such conduct to use when pursuing a claim against the STR Host.

The Owners of the STR

The final possibility for the aggrieved neighbors is to seek to hold the owner of an STR responsible for any noise or disruption (*i.e.,* the nuisance) caused by short-term renters of that property. In determining whether the owner will be held liable for nuisances caused by the STR guests, the key issue is whether the owner will be treated as a landlord or as something else, such as an innkeeper – because different standards of care apply, depending on how the owner-guest relationship is categorized.

As previously discussed, the distinction between the landlord-tenant relationship and the innkeeper-guest relationship "is based on the extent to which the owner of the premises maintains possession of and control over the premises during its occupancy." *Haynes-Garret*, 296 Va. at 201. Unlike a landlord, an innkeeper "is in direct and continued control of the property and usually maintains a presence on the property personally or through agents." *Id*. (*quoting Taboada v. Daly Seven, Inc.*, 271 Va. 313, 324 (2006). It is the innkeeper's continued presence on and control over the property that is the basis for the higher duty of care owed the guests. *Id.*

In contrast, the lessee enjoys "'the right of possession and enjoyment of the leased premises,'" *Id*. (*quoting Isbell v. Commercial Inv. Assocs.*, 273 Va. at 611)), with the result that the landlord owes the lessee a lower duty of care. The proper inquiry, according to the Virginia Supreme Court is "whether parties to a short-term rental agreement intended that the occupants be entitled to exclusive possession and control of the premises during their stay." *Haynes-Garret*, 296 Va. at 201, n. 3.

Applying the same kind of test as articulated by the Virginia Supreme Court, the California Court of Appeals considered a complaint for nuisance against the owner of a home that was offered for short-term rentals on Airbnb. In *Powell v. Lili Gu*, B292948 (Cal. Ct. App. Dec. 18, 2019), *unpublished,* the court considered the neighbors' complaint against Ms. Gu because a succession of short-term tenants had loud, obnoxious, and boisterous parties on multiple occasions. *Id.,* Casetext, p. 2.

The court rejected the homeowner's defense that she was only a landlord and that, as such, she was not liable for a nuisance created by her tenants. The court found that she was not a landlord because she was able to monitor what happened at the house through live-stream video cameras and because she maintained possession over certain portions of the house, the wine cellar and utility closets, which were not accessible to the guests. Moreover, the guests could access but not use the garage, which Ms. Gu used for storage. *Id.*, Casetext, pp. 5 – 6. Accordingly, the court held her to a higher standard of care than a landlord and found that she was liable for the nuisance created by the short-term renters. The court reasoned that even though she included party restrictions and noise curfews in her Airbnb listing, she advertised her home as being "great for events and gathering [*sic*]" and failed to take steps to abate the nuisance or prevent parties from occurring – even after becoming aware of the parties and the resulting noise. *Id.*, Casetext p. 5.

In sum, even though owners of short-term rental properties are treated as landlords when the renters are in exclusive control and possession of the premises during the rental period (thus effectively immunizing the owners from nuisance actions), where such exclusive control and possession is absent, the owners may be held to a higher standard of care. In such a case, they may be held liable for nuisances caused by their short-term renters, particularly when they have knowledge that such nuisances are being repeatedly caused by their short-term guests.

CONCLUSION

The burgeoning STR industry in Virginia has been made possible, in part, by the regulatory environment set in motion by the General Assembly in 2017 and the subsequent wave of local STR

ordinances popping up all over the Commonwealth that permit this form of commercial land use in many residentially zoned areas. The "sharing" economy opportunities created thereby have enabled virtually anyone who has a spare room and an internet connection to become a hospitality industry entrepreneur. Clients seeking a seemingly simple means of making extra money may find that becoming an STR Host comes with its own unexpected liabilities. They should be counselled to enter in this industry with open eyes, adequate insurance coverage, and a business plan geared toward minimizing the potential liabilities, including those discussed in this article. Clients should be advised that an STR guest is not a houseguest, but the gray lines between what the STR guest actually is (a tenant, a business invitee, or the guest of an innkeeper), will continue to present challenges in litigation for years to come. Thus, the STR industry has provided Virginia real estate practitioners a means to capitalize on the "sharing" economy, without ever having to rent out a spare room.

CLOSING REAL ESTATE TRANSACTIONS DURING A PANDEMIC

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An "unprecedented global health crisis" is a common phrase we have sadly grown accustomed to hearing as the world grapples with the impact of COVID-19. Unsurprisingly, the pandemic has presented unique and novel challenges across a spectrum of industries with real estate being no exception. From legal to practical impediments to performance, the real estate industry has faced a plethora of challenges in the recent months. Force majeure, frustration of purpose and impossibility of performance have certainly become much talked about legal doctrines with parties trying to assess and limit their legal risk exposure during the pandemic. Legal challenges aside, the realities of working remotely have also presented logistical barriers for real estate law practitioners and their clients. Parties ready and willing to perform under their contract must tackle another COVID-19 related question – what does performance look like in this new, physically-distanced world of ours? Can we leverage technological advancements to get parties to the proverbial "closing table"? The answer is yes, but not without first considering the fast-moving legal framework that in a short period of time has made virtual closings possible.

REAL ESTATE'S OWN SPINOFF ON "A TALE OF TWO CITIES"

Before discussing the legal framework supporting remote, virtual closings, it is worth noting the major impact COVID-19 has had on the volume of real estate transactions in general.

There is no denying the coronavirus has had a clear, negative impact on commercial transactions across the nation, with urban areas taking the biggest hit[1]. The rapid pace at which the pandemic spread earlier this year forced a number of companies to pivot toward the work-from-home model[2]. As many workers, who previously commuted to the office, have been forced to adapt to virtual meetings, commercial landlords are left wondering whether COVID-19 has set in motion long-lasting trends with significant impact to their real estate portfolio[3]. As a result, commercial sales volume during the second quarter of 2020 declined by 5%, while sales volume for properties valued at $2.5 million or above were down by 68% year-over-year[4]. According to recent studies, sales prices are down by 3%, and leasing volume has fallen 4% as a direct response to the pandemic.[5] U.S.

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[1] Jim Berry, *COVID-19 Implications For Commercial Real Estate, Preparing for the "Next Normal"*, Deloitte Insights (May 1, 2020), https://www2.deloitte.com/us/en/insights/economy/covid-19/covid-19-implications-for-commercial-real-estate-cre.html.

[2] Vaibhav Gujral, Robert Palter, Aditya Sanghvi & Brian Vickery, *Commercial Real Estate Must Do More Than Merely Adapt to Coronavirus*, McKinsey & Company (April 9, 20202), https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/commercial-real-estate-must-do-more-than-merely-adapt-to-coronavirus.

[3] Kenan Institute of Private Enterprise, *How Will COVID-19 Affect Commercial Real Estate*, Kenan Insights (April 2020), https://kenaninstitute.unc.edu/kenan-insight/how-will-covid-19-affect-commercial-real-estate/.

[4] National Association of Realtors Research Group, *Commercial Real Estate Trends & Outlook, July 2020 Report*, National Association of Realtors (July 2020).

[5] *Id.*

commercial lending figures for the second quarter (Q2) of 2020 paint an equally dim picture[6] as commercial lenders turned toward temporary lending freezes and conservative underwriting[7]. These measures resulted in fewer than originally anticipated loan closings for Q2 2020[8] and have prompted industry leaders to project a continued downward trend through the end of the year[9].

By contrast, residential real estate appears to be performing at much better rates than its commercial counterpart. Statistics consistently show this sector is booming despite the ongoing pandemic. According to a recent report issued jointly by the U.S. Census Bureau and the Department of Housing and Urban Development, sales of new single-family houses rose by 4.8% in August when compared to July 2020 rates, and by a startling 43.2% when compared to August 2019[10]. Residential closings in Virginia seem to support this national trend toward growth; according to the Virginia Realtors Report[11], Virginia's housing market bounced back quite strongly in July with significant increases in sales activity throughout the Commonwealth[12]. Statewide July 2020 sales were up 13.2% compared to sales in July 2019, and up 10.7% over June 2020 sales[13].

THE LEGAL FRAMEWORK FOR REMOTE CLOSINGS

When considering the historic low mortgage rates we are currently experiencing, it is hardly a surprise to see the boom in residential real estate. But as that growth continues, buyers and sellers ready to proceed with their transactions continue to face logistical roadblocks to closing. Traditionally, real estate transactions involved execution of written instruments in the presence of a notary public, with the executed originals then being delivered to the settlement agent for closing. Pre-COVID, "wet" signing in the presence of a notary public was the prevailing method for executing closing documents. Federal and state laws permitting electronic signature and remote online notarizations, while available, were rarely relied upon to facilitate closings.

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[6] A recent study performed by Promontory Interfinancial Network, LLC indicates that surveyed executives rank commercial real estate and business lending among the major impacts of COVID-19, with nearly a quarter of all surveyed respondents ranking commercial and industrial lending as their top concern during COVID times. Promontory Interfinancial Network, LLC, *Bankers Fear Impact of COVID-19 on Commercial Real Estate*, *C&I Lending*, CISION PR Newswire (August 18, 2020), https://www.prnewswire.com/news-releases/bankers-fear-impact-of-covid-19-on-commercial-real-estate-ci-lending-301114235.html. *See also* Bill Hughes*, Initial Impact of COVID-19 on Commercial Real Estate Operations*, Applied Research Initiative, Bergstrom Real Estate Center (September 22, 2020), https://news.warrington.ufl.edu/faculty-and-research/initial-impact-of-covid-19-on-us-commercial-real-estate-operations/.

[7] Richard Barkham, Spencer G. Levy and Mark Gallagher, Q2 U.S. Lending Figures, CBRE (2020), http://cbre.vo.llnwd.net/grgservices/secure/US%20Lending%20FiguresQ2%202020.pdf?e=1601148648&h=c8dab43579f396192cbf3d0c1c89d060.

[8] *Id.* at 3.

[9] National Association of Realtors Research Group, *supra* note 4.

[10] U.S. Census Bureau, *Monthly New Residential Sales, August 2020*, Release Number CB20-148 (September 24, 2020).

[11] Virginia Realtors, *Homes Sales Reports*, (July 2020), https://virginiarealtors.org/research-statistics/home-sales-reports/.

[12] *Id*.

[13] *Id.* It should be noted that during the initial stages of the pandemic, Virginia homes sales indicate a decrease in transactions volume with the biggest decline felt in May when home sales were down 31.88% compared to May 2019 numbers. Virginia Realtors, *Homes Sales Reports*, (March – June 2020), https://virginiarealtors.org/research-statistics/home-sales-reports/.

Over the course of the last two decades, a number of laws and statutes have addressed the permissibility of digitals tools to facilitate the execution and notarization of instruments. In 1999, the Uniform Electronic Transactions Act (UETA) established a legal foundation for the use of electronic communications and signatures in certain transactions[14]. A year later, the Electronic Signature in Global and National Commerce (ESIGN) Act[15] was passed to permit the use of electronic records and signatures in interstate and foreign commerce. Both UETA and ESIGN provide the general legal framework for electronic signatures in the United States and ensure that electronic signatures remain on the same legal footing as original "wet" signatures. In one form or another, 47 states, Washington, D.C. and U.S. Virgin Islands have all adopted UETA and ESIGN, while the three remaining states (Illinois, New York and Washington) have passed their own versions of electronic signature laws which are more or less consistent with UETA and ESIGN[16].

In addition to electronic signature laws, over the past few years an increasing number of states have also passed Remote Online Notarization (RON) laws enabling a notary to take acknowledgment of signatures from remote parties using electronic means (i.e. Zoom video, Skype, etc.). In 2011, Virginia became the first state to pass a RON statute allowing for remote online notarizations[17]. Following Virginia, 23 other states have passed RON statutes recognizing the legal validity and enforceability of remote online notarizations[18]. RON laws vary state by state and it is important to refer to the state-specific RON statute in order to determine the requirements for remote online notarizations. In addition to RON laws, states have also adopted electronic notarization statutes, which by contrast allow the notary to use an electronic seal while the signatory executes an instrument electronically (i.e. via DocuSign). Many states without RON legislation (or whose RON legislation is temporary) have electronic notarization statutes instead.

Prior to the onset of COVID-19, approximately 55% of states had yet to pass legislation regarding the acceptability of RONs[19]. However, recognizing the challenges presented by COVID-19 and in an effort to clear the path for business continuity during the pandemic, states have increasingly issued emergency executive orders or passed legislation, which among other items, address the legality of electronic signatures and remote online notarizations[20]. These orders permit remote online notarizations either on a temporary or permanent basis, and while intended to clear any logistical barriers to real estate closings, a number of these orders present their own challenges for out-of-state parties. Executive orders in several states recognize the validity of remote online notarizations as long as both the signatory and the notary public are physically located in that state, with the added condition that the notary public must be a duly licensed attorney in that state. For out-of-state buyers and sellers unable to travel during the pandemic, such requirement can become a difficult logistical

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[14] Frank E. Arado and Adam J. Engel, *The COVID-19 Pandemic: Impacts on Real Estate Transactions*, National Law Review Vol. X, No. 206 (July 24, 2020). UETA does not apply to wills, codicils or testamentary trusts, transactions governed by UCITA, certain provisions of the UCC or transactions states explicitly carve-out as exceptions. *Id.*

[15] 15 U.S.C. § 96 (2000).

[16] Frank E. Arado and Adam J. Engel, *supra* note 14.

[17] *Id*.

[18] *Id.*

[19] *Id. See also* Stephen Connolly and Christine DiBiase, *How COVID-19 Can Impact Upcoming Real Estate Transactions and What Buyers and Sellers Can Do to Avoid Default*, The AP&S Business Law (March 17,2020).

[20] Fannie Mae has also recently issued a letter approving the use of RON statutes for certain residential mortgage loans subject to its guidelines and required title insurance. Fannie Mae, *Lender Letter (LL-2020-03)* (March 23, 2020).

barrier to overcome causing many parties to either delay closing or find a way to revert back to the traditional "wet" signature method of executing closing documents.

Recognizing the need for consistent RON standards, federal bipartisan efforts are underway to pass federal legislation addressing remote and electronic notarization. The Securing and Enabling Commerce Using Remote and Electronic (SECURE) Notarization Act of 2020 was introduced to the U.S. Senate on March 18th and has thus far been endorsed by the American Land Title Association, the Mortgage Bankers Association and the National Association of Realtors. The bill is currently sitting with the Committee on the Judiciary, but if adopted, the SECURE Notarization Act would authorize every notary in the United States to perform remote online notarizations and establish minimum standards for electronic and remote notarizations.

Moreover, an important facet of digitized instruments is their acceptability by local recording offices. Many states have adopted legislation derived from the Uniform Real Property Electronic Recording Act[21], which authorizes the recording of instruments executed and notarized via electronic means. On a national basis, we are seeing more and more recording offices accept documents for electronic recording. However, each jurisdiction varies in its permissibility of electronic recordings and it is important to check on specific local rules before proceeding with electronic signatures and remote online notarization.

COVID-19 has challenged us to re-think the conventional real estate closing methods. Recent legal changes addressing the validity of electronic signatures and remote notarizations have, to a degree, facilitated the path toward full virtual closings. Nonetheless, it remains to be seen whether COVID-19 has pushed the real estate closing process toward long-term changes or whether the industry will revert to its pre-COVID practices once the pandemic is over. One thing is certain: COVID-19 is forcing real estate practitioners to leverage RON laws and all they have to offer.

[21] Frank E. Arado and Adam J. Engel, *supra* note 14.

THE LANGUAGE OF VESTED RIGHTS – IRONING OUT THE CONFUSION

By Karen L. Cohen

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Whether or not land use law is your main practice area, no doubt you have heard someone, somewhere, talk about a parcel of land, or a building, or the use of the land or building, in terms such as this: "Oh, yes, that junkyard is there only because the city *grandfathered* it in" or, "Current zoning wouldn't allow it, but the owner's rights had *vested*." Or perhaps you have heard a zoning official refer to a certain lot or building that seems to violate the current zoning as being allowed to be there because it is "lawfully nonconforming." Sometimes, this vocabulary is used without sufficient precision. While these are related concepts, casually conflating the terminology can lead to misunderstandings about precisely what rights are associated with the property in question. This article provides a basic overview of the terminology and discusses some relevant case law that sheds light on the subject.

Property owners are often surprised (and disappointed) to learn that they are not allowed to use their property or build upon it in the manner they expected. That disappointment is even greater when owners feel they have made a proper inquiry and believe they were given the "green light" to do what they want to do with their land. When they find they cannot, owners and their counsel may claim the landowner's rights are "vested" because the government approved the very thing the landowner wants to do. Or there may be an argument that the owners' use (or their building, or the land) is "lawfully nonconforming" and therefore, permitted to continue even if no longer allowed by current zoning laws. However, local governments are entitled to put limitations and conditions on lawfully nonconforming uses, lots and buildings, such that, depending on the circumstances, "vested" rights acquired in that manner can be limited or lost altogether.

Determining whether a landowner has vested rights under Virginia law is highly fact-dependent. Indeed, local boards of zoning appeals, circuit courts, and the state's highest court often reach conflicting results in vested rights cases, as indicated by the outcomes of court decisions (discussed below).

It is helpful to begin by separately examining the sources and usage of these three terms – so-called "grandfathering"; nonconforming; and vesting. Generally, in the land use context, "grandfathering" refers to when someone is permitted to follow old rules or laws that once allowed their activity instead of following newly implemented rules or laws that would presently apply to prohibit or limit that same activity. Those exempt from the new rule or law are sometimes said to have been "grandfathered in"; those who are not "grandfathered in" must abide by the new rules. Here is an example of such a clause, permitting subdivision applications filed before a certain date to be reviewed under pre-existing requirements (*i.e.*, the rules that existed before the county adopted new rules):

> Complete applications for final subdivision approval which have been filed before the close of business on October 9, 1996, which were in compliance with all substantive zoning and subdivision ordinance requirements in effect on that date shall be reviewed in accordance with those requirements.

Bertozzi v. Hanover County, 261 Va. 608, 610 (2001) (holding that, "under the grandfather clause," subdivider was entitled to have his applications reviewed in accordance with the pre-existing ordinance requirements as the county had previously interpreted such requirements).

In a recent zoning case in Massachusetts, the court specifically declined to use the term "grandfathering," acknowledging its racist origins.[1] Virginia's enabling laws do not necessitate using that term to describe the legal concept it embodies in the context of land use and zoning.[2] However, Virginia's enabling laws specifically provide for: (1) how and when a landowner acquires "vested rights";[3] and (2) how localities may allow the continuance of "land, buildings, and structures and the uses thereof which *do not conform* to the zoning prescribed for the district in which they are situated[.]"[4] Thus, when referring to "vested rights," or to land, buildings, or uses that do not conform to current zoning (*i.e.*, "nonconformities"), those terms should be used in a manner consistent with the meaning given to them by state law.

VESTED RIGHTS: SAGA VESTING AND NONCONFORMITIES

"Vested rights [ ] protect a landowner's right to develop a specific project under existing zoning conditions and allow continuation of the non-conforming use when that zoning designation is amended or changed." *Bragg Hill Corporation v. City of Fredericksburg*, 297 Va. 566 (2019) (*quoting Board of Supervisors v. Greengael, L.L.C.*, 271 Va. 266, 282 (2006)). Thus, vested rights "shall not be affected by a subsequent amendment to a zoning ordinance." *Id*. (*quoting* Code § 15.2-2307(A)).

Code §15.2-2307 sets forth more than one type of vesting. The first three subsections of the statute refer to two types of vesting, which can be referred to in shorthand as: (1) SAGA; and (2) lawful nonconformance. In "SAGA vesting," landowners can acquire vested rights because they are the beneficiary of a significant affirmative governmental action (SAGA), and the SAGA specifically allows the very thing that they are claiming they are entitled to do. If they can show that they have relied in good faith on the SAGA and incurred extensive obligations or substantial expenses in diligent pursuit of a *specific* project in reliance on the SAGA, then they have a vested right to do *that* project under Va. Code § 15.2-2307(A), even if there is a subsequent amendment to the zoning ordinance that

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[1] Referring to the protection given to structures that predated the zoning restrictions at issue in *Comstock v. Zoning Bd. of Appeals of Gloucester, et al.*, No. 19-P-1163 (Aug. 3, 2020), the Massachusetts Appeals Court said:

> Providing such protection commonly is known – in the case law and otherwise – as "grandfathering." We decline to use that term, however, because we acknowledge that it has racist origins. Specifically, the phrase "grandfather clause" originally referred to provisions adopted by some States after the Civil War in an effort to disenfranchise African-American voters by requiring voters to pass literacy tests or meet other significant qualifications, while exempting from such requirements those who were descendants of men who were eligible to vote prior to 1867. See Webster's Third New International Dictionary 987 (2002) (definition of "grandfather clause"); Benno C. Schmidt, Jr., Principle and Prejudice: The Supreme Court and Race in the Progressive Era, 82 Colum. L. Rev. 835 (1982).

[2] The term "grandfathering" is nowhere to be found in the state enabling legislation for local regulation of *land use*, except for a reference to the "grandfathering" provisions of the Virginia stormwater regulations in the State Water Control Law, *see* Va. Code § 62.1-44.15:52(A). The only other places in the entire Code that the term is used appear to be references to "grandfathered [health insurance] plans" in the insurance title of the Code and a reference to a "grandfathering period" in the Virginia Electric Utility Regulation Act.

[3] Va. Code § 15.2-2307(A).

[4] Va. Code § 15.2-2307(C) (emphasis added).

would prohibit it.[5] Code § 15.2-2307(B) lists examples of actions that may be considered significant affirmative governmental acts.[6]

For example, say a landowner applied for and received approval to rezone a parcel of land to build a 100-unit townhome project. The project is depicted in the generalized development plan (GDP) that was required with the application, and it has been approved by the governing body. If the owner has relied in good faith on that approval and incurred extensive obligations in diligent pursuit of the project, then the owner's right to do the particular 100-unit townhome project shown on the GDP is vested, because an approved rezoning for a specific use or density is one of the listed SAGAs. Note that the fact that the landowner has vested rights does not preclude the locality from rezoning that land. Let's assume the landowner had acquired a vested right to build the townhome project and then built it. The locality could subsequently enact a new ordinance rezoning that parcel, and at that point, the townhome project would be considered "lawfully nonconforming." *See Bragg Hill*, *supra*.

This type of vesting – lawful nonconformance – also derives from Code § 15.2-2307, subpart C, which enables localities to enact zoning ordinances that provide for a landowner's right to continue or maintain *lawfully nonconforming* "land, buildings, structures, and the uses thereof," subject to certain conditions and limitations.[7] A nonconforming lot, nonconforming building, or nonconforming

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[5] Va. Code § 15.2-2307(A) provides:

> Nothing in this article shall be construed to authorize the impairment of any vested right. Without limiting the time when rights might otherwise vest, a landowner's rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

[6] Pursuant to Va. Code § 15.2-2307(B):

> For purposes of this section and without limitation, the following are deemed to be significant affirmative governmental acts allowing development of a specific project: (i) the governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment; (ii) the governing body has approved an application for a rezoning for a specific use or density; (iii) the governing body or board of zoning appeals has granted a special exception or use permit with conditions; (iv) the board of zoning appeals has approved a variance; (v) the governing body or its designated agent has approved a preliminary subdivision plat, site plan or plan of development for the landowner's property and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances; (vi) the governing body or its designated agent has approved a final subdivision plat, site plan or plan of development for the landowner's property; or (vii) the zoning administrator or other administrative officer has issued a written order, requirement, decision or determination regarding the permissibility of a specific use or density of the landowner's property that is no longer subject to appeal and no longer subject to change, modification or reversal under subsection C of § 15.2-2311.

[7] Va. Code §15.2-2307(C) provides in part:

> A zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years, and so long as the buildings or structures are maintained in their then structural condition; and that the uses of such buildings or structures shall conform to such regulations

use, respectively, means "a *lawful* [lot, building or use] existing on the effective date of the zoning restriction and continuing since that time in non-conformance to the ordinance." *Hardy v. Board of Zoning Appeals,* 257 Va. 232, 235 (citations and internal quotation marks omitted). While the law protects property rights in permitting the continuance of nonconformities, such nonconformance is disfavored, and therefore, subject to certain limitations. The purpose of the law is "to preserve rights in existing lawful buildings and uses of land, subject to the rule that public policy opposes the extension and favors the elimination of nonconforming uses. Nonconforming uses are not favored in the law because they detract from the effectiveness of a comprehensive zoning plan."[8]

Unlike SAGA vesting, the enabling legislation for the nonconformity portion of the vesting statute permits localities to condition or limit, or even cause an owner to lose, vested rights. For example, an owner's discontinuance of a lawfully nonconforming use for more than two years can cause the owner to lose the right to continue the use. *See Prince William County Board of Supervisors v. Archie*, 296 Va. 1 (2018) ("Code § 15.2-2307(C) provides for a locality to adopt a zoning ordinance that allows nonconforming uses to continue unless the use is discontinued[.]"). Additionally, the locality may provide that the owner is only allowed to continue such nonconforming uses or buildings if they do not intensify the use or do not enlarge the building. *See* Va. Code § 15.2-2307(C) ("[Lawfully nonconforming] land, buildings, structures, and the uses thereof . . . may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years, and so long as the buildings or structures are maintained in their then structural condition; . . . .").

THE ARCHIE *CASE – NONCONFORMING USE NEVER DISCONTINUED*

In *Archie*, *supra*, the Supreme Court of Virginia held that the circuit court did not commit error when it held that an automobile graveyard was a lawfully nonconforming use, even though the property had been sold and owned by another person for a number of years and even though the automobiles were kept on the property without that owner's permission. The landowner had come before the Prince William County Board of Zoning Appeals (BZA) to contest the Zoning Administrator's determination that a certain parcel of his land could no longer be used as an automobile graveyard. In 1954, the landowner's family had established an automobile salvage business on property that was later subdivided into Parcels 20, 20A, and 20B. Parcels 20 and 20B had been used continuously as an automobile graveyard, which the County Code defined as "any lot . . . upon which five or more inoperative motor vehicles of any kind are found." In 1958, the County adopted a zoning ordinance, which precluded such land from being used as an automobile graveyard; however, lawful uses pre-dating the enactment of this ordinance could continue as lawful nonconforming uses.

Parcel 20A was sold to a commercial purchaser in 1987, but the landowner repurchased it in 1992. In 1990, the commercial purchaser obtained a court order requiring the landowner to remove all cars from the land, but there was uncontested evidence that this order was never obeyed, and that over one hundred vehicles remained on the property the entire time. The BZA upheld the Administrator's determination; however, on appeal, the circuit court reversed, finding that the nonconforming use of Parcel 20A as an automobile graveyard had never been abandoned or discontinued. The County appealed.

> whenever, with respect to the building or structure, the square footage of a building or structure is enlarged, or the building or structure is structurally altered as provided in the Uniform Statewide Building Code (§ 36-97 et seq.).

[8] *Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 43 (1997) (*citing* 8A Eugene McQuillin, Municipal Corporations § 25.184 (3d ed. 1994)). The legislature's approach to permitting nonconformities in certain circumstances – a type of "vesting" – reflects the tension between the desire to protect individual property rights and to not unduly hamper local governments' efforts to promote public health, safety and welfare through long-range land use planning.

The Virginia Supreme Court held that the circuit court did not commit error. The County Code provides that a nonconforming use terminates when such use is intentionally abandoned or discontinued for a period of two years. The County argued that the parcel's use as an automobile graveyard had ceased for two independent reasons: (1) the landowner did not own Parcel 20A from 1987 to 1992 and (2) during that time, the commercial owner never placed junk vehicles on the lot. However, the County Code states that the nonconforming status adheres solely to the land, irrespective of its owner. Therefore, it was immaterial that the landowner did not hold title to the parcel from 1987 to 1992, or that the commercial purchaser did not deposit any junk vehicles there. Because Parcel 20A housed five or more inoperative motor vehicles for an uninterrupted period of time prior to the enactment of the 1958 zoning ordinance, the lawful nonconforming use of the land as an automobile graveyard never terminated. The court therefore affirmed the circuit court's judgment in favor of the landowner.

THE COHN *CASE – PAID TAXES DID NOT "VEST" AN UNLAWFUL USE*

In *Board of Supervisors of Fairfax County. v. Cohn, et al*., 296 Va. 465, 473 (2018), the Supreme Court of Virginia considered a different subsection of the vested rights statute; however, the court's examination of the statute as a whole helps to clarify the statutory framework for vested rights. In *Cohn*, the court held that the Circuit Court of Fairfax County erred when it reversed the decision of the BZA, which had upheld the zoning administrator's decision to require the Cohns to cease using two of the three structures on their lot as dwellings in a residential district where only one dwelling per lot is allowed. The two illegal structures (a detached garage and a garden house) were constructed before the Cohns acquired the parcel in 1998. No zoning violations had been issued since their construction. However, in 2016, an inspection revealed that the garage and garden house had been converted to dwellings (before the Cohns purchased the property). The zoning administrator issued a notice of violation (NOV), instructing the Cohns to remedy the violation by removing the kitchens and other appliances used for cooking and removing all gas, plumbing and electrical connections, thereby restoring the structures to their original *permitted* use, which the evidence showed was use as a garage and a garden house, respectively, and not as dwellings. The building permits issued for the garage and the garden house expressly stated that "there are no kitchens or bathrooms approved" and therefore it was clear that use of these structures for dwellings was illegal.

The Cohns admitted that neither the garage nor the garden house "conform to the original building permits," and that it was likely the use of the garage and the garden house as dwellings "was established unlawfully." *Id.* at 471. However, the Cohns argued that because they had paid taxes on the property for more than 15 years, Code § 15.2-2307(D) created a vested right to continue the use of the structures as dwellings. The board of zoning appeals determined that Virginia Code § 15.2-2307(D)(ii) did *not* protect the unlawful use of the structures as dwelling units. The trial court held otherwise, concluding that Virginia Code § 15.2-2307(D)(ii) created vested rights for both the illegal structures *and their uses*. The Supreme Court of Virginia reversed, holding that only the structures themselves were protected by Va. Code § 15.2-2307(D)(ii), and that § 15.2-2307(D)(ii) "does not provide protection for the uses of those structures." *Cohn*, 296 Va. at 477.

In outlining the statutory scheme for vested rights, the court first observed that "[t]he General Assembly enacted Code § 15.2-2307 to prevent the impairment of vested rights in a landowner's use of their property." *Id*. at 473. The first subsection of Code § 15.2-2307 concerns the vesting of the right to use of land. It provides that a significant affirmative governmental action allowing the *use* of land *in a particular way* may result in the beneficiary receiving a vested right to use the land *in that manner*. *See Cohn*, 296 Va. at 473. Code § 15.2-2307(C) concerns a landowner's vested right to maintain nonconforming "land, buildings, and structures, and the uses thereof." A nonconforming use of a building or structure is, generally, "a *lawful* use [of a building or structure] existing on the effective date of the zoning restriction and continuing since that time in non-conformance to the ordinance." *Hardy v. Board of Zoning Appeals*, 257 Va. 232, 235 (1999) [citations and internal quotation marks omitted]. Landowners are entitled to maintain lawfully nonconforming buildings, structures, and uses. *Hale v. Board of Zoning Appeals for Town of Blacksburg*, 277 Va. 250, 271

(2009) ("It is well established in the law that as to an existing use, absent condemnation and payment of just compensation, the landowner has the right to continue that use even after a change in the applicable zoning classification causes the use to become nonconforming.") (citing *Board of Supervisors of Fairfax County v. Board of Zoning Appeals*, 271 Va. 336, 348 (2006)). However, "[a] nonconforming use may not be established through a use of land which was commenced or maintained in violation of a zoning ordinance." *Hardy*, 257 Va. at 235. And while Code § 15.2-2307(C) acknowledges the vesting of the right to maintain a nonconforming building, structure, or use, it also provides that if the structural condition of the building is altered, the vested right to the nonconforming use is lost. *Cohn* at 474-75.

Because the kitchens and bathrooms installed in the garage and garden house were unlawful, the Cohns could not (and did not) claim that their dwelling use was *lawfully nonconforming.* Rather, they sought relief under Va. Code § 15.2-2307(D) on the basis that they had paid taxes on the structures for more than 15 years. Va. Code § 15.2-2307(D) prohibits the government from requiring removal of a building or structure that was previously built in accordance with a building permit issued by the government, and upon completion, a certificate of occupancy or use permit was issued, or if the owner has paid taxes for that *permitted* building or structure for more than the previous 15 years.

However, with no vested right to *use* the structures *as dwellings*, the court found against the Cohns, holding that subsection (D) of the vested rights statute only protects the *structures* from removal, and further, that this did not prevent the County from requiring the Cohns to take out the kitchens, plumbing, etc. that support the illegal *use* of the structures as dwellings. *Cohn*, 296 Va. at 477-78 (holding "that Code § 15.2-2307(D)'s references to 'building' and 'structure' concern the edifices themselves, not their uses, and only protects the building or structure itself from removal."). In other words, through the "paid taxes vesting" provision, the Cohns had acquired a vested right to have the structures remain – but only to remain for what these structures were permitted: a garage and a garden house, not dwellings.

REMEDIAL VESTING – CODE § 15.2-2311 (THE RHOADS *CASE)*

In addition to the vested rights conferred by Va. Code § 15.2-2307, discussed above, a landowner may acquire a vested right "to use property in a manner that otherwise would not have been allowed," *Board of Supervisors of Richmond County v. Rhoads*, 294 Va. 43, 52 (2017), pursuant to Va. Code § 15.2-2311(C), which provides:

> In no event shall a written order, requirement, decision or determination made by the zoning administrator or other administrative officer be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud.

In *Rhoads*, the owners filed an application to build a 2-story garage, and the application was approved. The owners, in reliance on the approval, built the garage at a cost of approximately $27,000. *Rhoads, id., at 47*. About a month after they built the garage, a new zoning administrator informed the owners that the previously approved 2-story garage was in violation of the city ordinance, which prohibited a garage from being taller than the primary structure (the house). The owners appealed the decision of the zoning administrator and the BZA denied their appeal, affirming the zoning administrator's decision that the garage violated the ordinance. The owners then appealed to the circuit court. The circuit court reversed the BZA, finding that the owners

were entitled to relief under Va. Code § 15.2-2311(C). The Board of Supervisors appealed, and the Supreme Court of Virginia affirmed the circuit court, finding in favor of the owners.

The Board had argued that Va. Code § 15.2-2311(C) did not apply because the first zoning official (the one who erroneously approved the 2-story garage), "lacked the authority to approve a plain violation of the Zoning Ordinance, and the Certificate he issued was therefore void *ab initio.*" The Board also claimed that the "Certificate" approving the garage was not a "determination" within the meaning of the statute. Additionally, it asserted that the statute only applies to bar the subsequent actions of a zoning administrator or other administrative officer, and not those of any other body, such as the Board or a court. The court rejected all three arguments.

The court found that the plain terms of the statute clearly prescribe the prerequisites for when Va. Code § 15.2-2311(C) applies, namely: (1) a written order, requirement, decision or determination made by the zoning administrator; (2) the passage of at least 60 days from the zoning administrator's determination; and (3) a material change in position "in good faith reliance on the action of the zoning administrator." There was no question that more than 60 days elapsed between the zoning administrator's initial approval and his successor's later assertion of a zoning violation and it was undisputed that the Rhoadses materially changed their position in good faith reliance on the zoning administrator's approval of their specific plans, because they built the garage at a cost of nearly $27,000.

With respect to the Board's argument that the initial grant of approval was erroneous and in violation of the zoning ordinance, and therefore void *ab initio*, the court noted that while "prior to 1995 administrative zoning decisions that violated the zoning laws were void and property owners bore the sole responsibility for the consequences of a government's zoning mistake (citations omitted), . . . [t]he plain language of Code § 15.2–2311(C) indicates that the statute is intended to eliminate the hardship property owners have suffered when they rely to their detriment upon erroneous or void zoning decisions." *Rhoads*, 294 Va. at 51. "The remedial purpose of Code § 15.2–2311(C) is to provide relief and protection to property owners who detrimentally rely in good faith upon erroneous zoning determinations and who would otherwise suffer loss because of their reliance upon the zoning administrator's error. Thus, Code § 15.2–2311(C) manifestly creates a legislatively-mandated limited exception to the judicially-created general principle that a building permit issued in violation of applicable zoning ordinances is void." *Id*.

The Board also claimed that even if the Certificate was not void *ab initio*, the signed Certificate was still not a "written order, requirement, decision or determination" by the zoning administrator. The Supreme Court rejected this argument, explaining that "[i]n issuing the Certificate, the zoning administrator necessarily made a determination that the building plans complied with the Zoning Ordinance in all respects. . . . The issuance of the Certificate clearly constitutes a decision or determination by the zoning administrator that the building plans complied with the Zoning Ordinance." *Id*. at 52.

Finally, the Board also claimed that Code § 15.2–2311(C) only binds a zoning administrator, but need not and should not be considered by any other body such as a board or a court in determining if there is an enforceable violation of a zoning ordinance. The court rejected this argument, finding that "[b]y its terms, Code § 15.2–2311(C) and its vesting provisions must be considered and enforced by a BZA, a board of supervisors, or a court in making a zoning determination or reviewing its correctness, if the prerequisites for the application of the statute are satisfied." 294 Va. at 54. So long as the zoning administrator has made a "decision" or "determination" within the meaning of Code § 15.2–2311(C), the BZA and board are bound, otherwise, the statute "would afford scant, if any, protection to the property owner, and would not serve to 'remedy the mischief at which [the statute] is directed.'" *Id*. at 55. "The remedial purpose of the statute requires the statute to be interpreted so as to provide relief and protection to property owners who rely in good faith upon erroneous zoning determinations . . . [o]nce the Rhoads' rights vested, they were not subject to alteration by the zoning administrator, the BZA or the Board." *Id.*

ZONING LETTERS AND DETERMINATIONS AS SOURCES OF "VESTING"

Whether or not a landowner acquires vested rights by virtue of a zoning official's letter or determination also is highly fact-dependent. In *Rhoads*, the zoning administrator affirmatively approved the zoning for the garage project at issue, and in that case, the court found that the "Certificate of Compliance" constituted a "determination" by the zoning administrator. The court distinguished cases in which letters or other written communications from officials have been found to lack the definitive and specific approval needed to constitute a determination. *See Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 354–56 (2013) (Code § 15.2–2311(C) did not apply to a "Cash Receipt" signed by a zoning administrator, because that document "was not a specific determination by the zoning administrator or any other City official that either of these businesses could use their respective premises in a manner not otherwise allowed under the zoning ordinances in effect at that time.").

Other cases involving the issue of whether a zoning administrator's letter constitutes a determination or decision upon which an owner may obtain vested rights have made clear that rights only vest to the extent of what is clearly *approved* in such letters. *See e.g., Board of Supervisors of Prince George County v. McQueen,* 287 Va. 122 (2014) (no vested rights accrued where zoning administrator did not "affirmatively approve" the project; rather, the "compliance letter" at issue "simply answered the question concerning the classification of [plaintiff's] project" and stated in the letter that "the verification was subject to change."); *James v. City of Falls Church*, 280 Va. 31, 44 (2010) (holding that a zoning administrator's mere "interpretation" that the zoning ordinance permitted a consolidation with the caveat that actual approval of the requested consolidation was a planning commission function "lacked the finality of an 'order, requirement, decision or determination' under Code § 15.2–2311(C)," such that no vesting occurred); *Board of Supervisors of Stafford County v. Crucible,* 278 Va. 152, 160–61 (2009) (finding that Code § 15.2–2311(C) did not apply to a "zoning verification letter" because the letter did not affirmatively approve the project at issue and establish a vested right, but merely interpreted the definition of "school" under the then-current zoning laws).

NO PROPERTY INTEREST IN MERE EXPECTATIONS FOR PROJECT NOT YET APPROVED

Finally, it is worth noting that federal courts have invoked similar principles when evaluating whether a landowner has a constitutional property interest in anticipated development plans that are thwarted by regulatory action. The Fourth Circuit reiterated that a landowner does not acquire vested rights to develop a "hoped for" or anticipated project that has yet to be approved by the governing body. In *Pulte Home Corp. v. Montgomery County*, 909 F.3d 685 (4th Cir. 2018), the Fourth Circuit concluded that Pulte failed to state viable constitutional claims, affirming the federal district court. After Pulte had invested more than twelve million dollars to purchase several hundred transferable development rights (TDRs) and recorded ownership of the TDRs, intending to build between 954 and 1,007 detached homes and townhomes on the land it had purchased in the TDR receiving area, the County amended its 1994 Master Plan, implementing a variety of regulatory changes that severely reduced the number of dwellings Pulte could build on its land, and placed additional costly burdens on Pulte, such as a requirement to dedicate parkland.

Pulte alleged that as a result of the changes to the 1994 Master Plan on which it had relied when it made its purchase, it now could only develop 17% of its land. The court held that Pulte had no constitutional property interest to develop its land under the 1994 Master Plan. The court explained that "the 1994 Master Plan plainly apprised all who read it that it was intended to be revised . . . and the County could . . . take whatever land use actions it deemed necessary," and that even after prerequisites listed in the plan were satisfied, local officials retained discretion to determine whether those criteria were met. The court reiterated its longstanding rule that any "significant discretion" left to "zoning authorities defeats the claim of a property interest." Here, it was clear that the zoning authorities retained significant discretion to make changes to the plan, and therefore, Pulte had "only a hope, not a legally cognizable expectancy" of being able to develop what it wanted. Indeed, the

court noted that "[i]f Pulte expected to easily obtain approval to construct approximately one thousand homes there, that expectation was not reasonable in light of the text of the 1994 Master Plan." *See also Loch Levan Limited. Partnership, et al. v. Board. of Supervisors. of Henrico County, et al*., 297 Va. 674 (Aug. 22, 2019) (vested rights doctrine "inapplicable where there is no underlying property right for the constitution to protect").

CONCLUSION

Zoning attorneys are frequently asked to evaluate the impact of zoning changes on property rights. "Vested rights" is sometimes used as an umbrella term to describe generally a landowner's right to conduct an activity that was once allowed but is prohibited under current zoning law. However, "vested rights" has a particular meaning under Virginia law, and it is just one of several distinct sources of property rights. For example, property rights may derive from protection offered by a clause in an ordinance, or from a significant affirmative governmental act (SAGA) approving a specific project, or from an ordinance permitting the continuance of a nonconforming structure so long as it is not expanded beyond a stated limit. Practitioners should be careful to ascertain the particular source of the property rights at issue. Doing so will lead to using the most precise language to describe those rights, leading to better communication with clients, local governments, concerned citizens, and colleagues.

PREPARING TO ADVISE AN UNHAPPY TIME-SHARE OWNER

By Stuart R. Sadler

Mr. Sadler is a retired common interest community lawyer. After 25 years representing developers in large developments, he became involved in representing owners of time-shares. Beginning in 2000 and increasingly thereafter, Mr. Sadler devoted his time to understanding how time-shares worked in Virginia. Mr. Sadler is now living in New Mexico.

I suspect that this is not an uncommon situation. A new client is coming to your office and has a problem with his time-share. Likely you don't own one, don't want one and as a result, know little about this curious estate. Where do you start so you can get a handle on your new client's problem? Some of the common problems I have run across include:

a. Client is tired of paying ever-increasing assessments;
b. Client is facing a large special assessment;
c. Client is being sued by the Developer or Association for delinquent assessments;
d. Client was lied to by a salesman during the sales pitch for the time-share;
e. Client is suffering from buyer's remorse over recent purchase, (If in seven-day cancellation period, see §55.1-2221 of the *Virginia Real Estate time-share Act* - immediately send required notice via certified mail - return receipt requested), or
f. Client has received notice of foreclosure. (If foreclosure by reverter deed, see automatic release of any lien obligations, §55-2222(B)(3))

Where do you start your research?

In my experience, most time-share owner complaints relate to money. Generally, complaining owners appropriately feel taken advantage of, though not necessarily for legally supportable or provable reasons.

1. **Your client most likely will have a complaint against the Developer of the time-share that was purchased**. If this is the case, consider the five ways by which most Developers make their money from time-shares:

   A. **Selling the time-share**. Just as subdividing a parcel can bring in more total revenue than selling a property as a single parcel, subdividing an individual townhouse, condominium unit or apartment into 52 annual weeks (one week every year), 104 biannual weeks (one week every two years) or 156 triannual weeks (one week every three years), brings in substantially more gross revenue than the sale of an individual property. (Be aware that selling these time-shares for what the market will bear does not bring in as much net revenue as you might expect because sales and marketing costs can run between 40% to 60% of gross.)

   B. **Selling or hypothecating the purchase money notes**. In my experience, approximately 85% of the time-share sales are financed through the Developer at rates that would make a credit card company blush. (15% to 18% per annum interest rates are what I was accustomed to seeing.) These notes are typically hypothecated, and the lender and the Developer typically split the interest income, to the extent the interest rate of the notes exceeds the lender's cost of funds. This results in the Developer getting a substantial additional return on the purchase money debt, subject to buyback provisions.

   C. **Managing the time-share Association**. The Developer or a related company generally will manage the time-share Association for a typical commission of 15% or so of total dues. This management allows the Developer to earn additional revenues and sometimes, though rarely in my experience, results in inflated fees. I once saw a failing Developer

taking management fees equal to 54% of dues collected, which fees were shown in the financial statements, but grossly exceeded the amounts shown in the public offering statement and the management agreement.

D. **Selling transient occupancy in unused time-shares**, either in the form of daily rentals to the public as in a hotel, or in the form of "Alternative Purchases". An Alternative Purchase, as defined in §55.1-2200:

> means anything valued in excess of $100 that is offered to a potential purchaser by the Developer during the Developer's sales presentation and that is purchased by such potential purchaser for more than $100, even though the purchaser did not purchase a time-share.

You can learn about any Alternative Purchases in the files of the Common Interest Community (CIC) Board, which I will discuss below. This is very profitable in that typically the Owners pay the operating costs for these properties, but the Developer keeps all the revenues. In particular, this applies to unsold time-shares, sold time-shares where the owner has not paid his assessments and other unused time-shares where the owner does not bother to enter into a rental agreement with the Developer.

E. **Having Estate time-share owners pay for facilities and improvements located outside the time-share Project, which the Developers continue to own**. This is popular with recreational facilities and external parking in crowded areas.

Your client's and any owner's rights with respect to a time-share will depend on which of the two types of time-shares that is owned. The most popular type of time-share, especially with smaller Developers, is the time-share Estate. A time-share Estate is defined in §55.1-2200 as:

> mean[ing] a right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options, coupled with a freehold Estate or an Estate for years in a time-share Project or a specified portion of such time-share Project."

Time-share Estates are conveyed by deed. Owners of time-share Estates have substantially more rights than owners of time-share Uses. Developers of time-share Estates assemble and monetize loan packages similar to conventional real estate loans and thereby earn most of their profit on time-share sales.

The second type of time-share is a time-share Use, which is similar in use to a time-share Estate, but which does not involve the Developer selling a freehold or deeded interest. Owners of time-share Uses have substantially fewer rights than owners of time-share Estates. I suspect that this is the reason that some large Developers are turning to time-share Estates under the guise of offering a panoply of different resorts that are accessed through time-share Uses pursuant to this type of ownership. I have seen large companies purchase time-share Projects from the original Developers and strongly promote a hard-sales campaign to get existing owners to convert from time-share Estates to time-share uses, charging these owners for the privilege of giving up their time-share Estate rights. An example of a hard-sale in my clients' experience had the salesman make threats to the owners of time-share Estates, saying that the new Developer would not be able to continue to maintain the old time-share Estates, only the new time-share Use Units. These and similar representations will not be contained in any new public offering statement relating to the new offering. While it may be difficult to prove a simple "he said-she said" statement, you likely can get confirmation from other time-share Estate owners, who were sold the same use conversion by getting their names from the deeds back recorded in the local Clerk's office. I have been reasonably successful in determining addresses and/or phone numbers of such owners through diligent

use of Google, particularly for husband and wife conveyances where the time-share deeds do not include an address.

F. If your client has a time-share Estate, there are many sources of information readily available for you to search out:

Begin with reviewing the sales contract, the Public Offering Statement, the time-share Instrument and the Association Bylaws, collectively the "time-share Documents". When examining these documents, pay particular attention to:

1. The physical boundaries of the time-share Project which are defined in the time-share Instrument. (I note that many copies of time-share Instruments provided by the Developers to purchasers do not include all amendments that are required to be provided. See §55.1-2217 A.16. Failure to amend the Public Offering Statement is a violation of the Act. See §55.1-2217 E. ."If, because of the occurrence of a material change, the public offering statement is amended between the time of contracting to purchase a time-share and the time of settlement, the developer shall provide the amended public offering statement to the purchaser and the right of cancellation shall renew from the date of delivery of such amended public offering statement." See §55.1-2221 C. See also definition of "material change" in §55.1-2200. See also §55.1-2223, which allows deeds to be recorded up to 180 days after "the time-share estate purchaser has fulfilled all of his obligations under the contract and is entitled to a deed for his time-share estate".)

2. The number and types of units.

3. The amounts and terms for the time-share assessments.

4. Please remember that if some of the terms in the time-share Instruments do not agree with the requirements of the Act, such provisions are void. See §55.1-2206 of the Act. Examples of such violations include requirements that owners are required to pay for costs of properties located outside of the Project during the Developer Control Period or that the Developer can maintain control of the Association after the end of the Developer control period.

Also obtain the Developer's complete file with the CIC Board. (A written FOIA request addressed to the CIC Board always worked for me.) In the CIC file, pay attention to the annual reports required to be filed (See §55.1-2213 of the Act). These reports will show the number of units in the Project, the number built, the number sold and will contain both a budget and a financial statement. You can sometimes use the budgets and annual reports to confirm the number of units sold, especially if the assessments are shown on an accrual basis. The CIC Board file will also contain a copy of any offering statement relating to any Alternative Purchases being offered by the Developer. In reviewing the Association budget and annual financial statement, check whether there is any provision under which the Developer pays the operating costs for Alternative Purchases or for rentals (I've never seen any, but there is always a first time).

Finally review Developer communications, including any minutes of Association meetings as well as any advertising that the Developer may have placed on the Web for the rental of time-share units. Another information source may be the Developer's or Association's website. You will probably need help from your client to access this last.

G. What will you be looking for in the materials you have collected?

1. **Is this time-share Association in the Developer Control Period,** which is defined in §55.1-2200 as "a period of time during which the Developer or a managing agent selected by

the Developer manages and controls the time-share Project and the common elements and units it comprises." In my experience, this is usually done by the Developer controlling the Board of Directors of the time-share Association. Under §55.1-2210 A of the Act:

> **All costs associated with the control, management, and operation of the time-share Estate Project during the Developer control period shall belong to the Developer, except for time-share Estate occupancy expenses** that shall, if required by the Developer in the time-share instrument, be allocated only to and paid by time-share Estate owners other than the Developer. [emphasis added]

The term time-share Estate Occupancy Expenses is defined in §55.1-2200 as

> all costs and expenses incurred in (i) the formation, organization, operation, and administration, including capital contributions thereto, of the Association and both its board of directors and its members and (ii) **all owners' use and occupancy of the time-share Estate Project**, including without limitation its completed and occupied time-share Estate units and common elements available for use." [emphasis added].

Please note in this definition that time-share Estate Occupancy Expenses does not include expenses for property located outside the Project or expenses that relate to non-owner use of the Project, for example, rentals or Alternative Purchases. I do not know of any Court determination under this section: whether or not an owner, who does not use the Project, should be liable for the use of the Project by other owners. I note further that time-share documents frequently define "Developer Control Period" in terms that do not comply with the terms of the Act. Any non-compliant definition of "Developer Control Period" is void. See §55.1-2206.

2. **In reviewing the Annual Reports, which include the Association financial statements and budgets, check the following:**

   a. Has the Developer built or bonded enough units to accommodate the number and types of time-share sold?

   b. Does the Developer pay maintenance fees for unsold units? I have never seen this but as always, there might be a first time. Unsold units by definition are not used or occupied by Owners and, during the Developer Control Period, are the financial responsibility of the Developer.

   c. Does the Developer pay the operating costs for units the Developer rents or uses as Alternative Purchases? I doubt it, but check anyway.

   d. Does the Developer/Association charge for recreational or other facilities which are not part of the time-share Project as defined in the time-share Instrument? I have found this to be very common and, during the Developer Control Period, is a practice that is contrary to the Act.

   If any of these conditions apply, the Developer will be faced with substantial potential financial liability. You may want to get additional information relating to rentals and expenses, which should be available pursuant to §55.1-2212, if your client-owner is in good standing, or §55.1-2233, which applies to all owners. I recommend getting a copy of the Association's General Ledger for any periods in question, which will show all income and all expenses for the Association for the periods in question. I also recommend getting a copy of all reservation and use information for the time-share

Project. This should show how much use is by the owners and how much use is by others. Finally get information on all time-share sales, sales/trades back and foreclosures. You do not need nor are you allowed to demand the names and addresses of the owners. You can use the Owner Number or index number to identify owner use of time-shares. Expenses relating to Non-Owner use should be the Developer's responsibility. The Developer likely will object and frequently will state that the information is not readily available, arguing that assembly of the information is an onerous chore based on the examination of myriad records. If you are not comfortable with database languages, design and reports, including Structured Query Language and Crystal Reports, get yourself a geek and have him or her explain the "select" command, what "queries" can do and generally how to get the information you want from a relational database. Determine the database program(s) used to maintain these records (timeshareWare was the most popular program I saw) and make sure your expert is comfortable with such program(s).

3. **Sale of time-shares by a subsequent Developer**. In addition to the potential claims set forth in Part 1 above, check to see if the existing time-share purchase money notes were conveyed as part of the deal. The subsequent Developer may have to turn over control of the Association to the owners, if the subsequent Developer does not own the notes, see §55.1-2210 to determine whether the Developer Control Period should be terminated. Developers typically do not want to turn over control of the Association as it will cause loss of substantial revenues from time-share rentals and/or sale of "Alternative Purchases".

4. **Improper Association Assessments**. If the Project is within the Developer Control period, see Part 1 above. If the Developer Control Period has been terminated, make sure the Association is being operated in accordance with the time-share Instrument and Bylaws. Look at inflation limiting clauses and purpose clauses, especially any language that may limit expenses in the time-share Project or limit Special Assessments, especially expenses relating to property located outside the Project. Finally check to see if the time-share instrument has been improperly amended.

5. **Final Issues.** It takes a long time to read a set of time-share documents. (The first set I reviewed took me about 10 hours and this is after I had spent the prior 25 years drafting scores of sets of condo and interstate land sales documents.) The drafters of the time-share documents typically do not make any effort to make the documents clear and easy to read, rather the reverse. If you get a CIC Board filing, it may run to thousands of pages contained in a poorly organized PDF file. I indexed these CIC Board filings so I could find what I wanted. As you might guess this review and indexing also takes substantial time. If you are going to review the records filed in the local Circuit Court Clerk's Office, you may be looking at index entries for tens of thousands of transactions. The only reasonable way I found to deal with this was to acquire the information in digital format, develop a database and, use string functions to analyze the transactions. If this sounds a little intimidating, you might want to associate with a more experienced lawyer who has access to these materials and techniques.

A final note, see §55.1-2230 A. which allows, but does not require, the Court to award attorney fees to the prevailing party, if a person subject to the Act violates any provisions thereof or of the time-share Instrument.

VIRGINIA REAL ESTATE IN THE TIME OF COVID*

By Benjamin D. Leigh

HISTORY MAY NOT REPEAT ITSELF, but it does often rhyme, so said Mark Twain. This is written in May 2020, weeks into the COVID-19 intrusion. While disruption abounds, we find ways forward. Daniel Defoe in his "*Journal of a Plague Year*,"[1] detailing virus-threatened London life in 1665, wrote that "[t]his was the beginning of May, yet the weather was temperate, variable, and cool enough, and people had still some hopes."

Disrupting the Work and Revealing the Digital Divide

All lawyers faced atypical problems these past few months. Before solving client problems, many lawyers re-located to home offices, separating from legal assistants, paralegals and colleagues. Hypothetical technology debates became action-items. CLE programs on remote access technology, remote conferences, and e-everything were the hot ticket. It felt like drinking from a firehose.

After managing forced change on "how to work," next up were the client problems. Do we meet in person? Mask and gloves? Sanitize the room afterwards? For acknowledgments, is my notary comfortable sitting six feet away? Did the client just touch that pen? They just returned from *what* country?

The challenges were just beginning. Perhaps three weeks into this contagion, I joined a conference call for the Real Estate Council of the Virginia Bar Association. This is a group of smart lawyers across the Commonwealth, sharing their views on issues, case-law, legislation and regulation. Kay Creasman, the immediate past-Chair of the Real Property Section of the Virginia State Bar, reported a shocking reality — some smaller Clerk's Offices were open for recording, but land records research was unavailable. If online land records only went back a few years, no full title examination could be had. This stymied sales and financing. A digital divide was made apparent. Some jurisdictions had full remote access and comprehensive digitized land records.

Having to Learn New E-tricks

The digital divide also exists amongst lawyers. Some Virginia lawyers have avoided dealing with e-signatures, e-notaries and e-recording, citing some rule about old dogs. The dog is now barking at us. We can all admit to resisting change, if not hating it.

Change came fast. When a corporate client needs a land-use document executed and acknowledged to build a new phase of one of the more important commercial projects in a Virginia locality, and has a corporate policy of e-signatures during COVID-19, the time is now. Easy enough in theory, but real life shows us where lawyers must swim with the tide. Read Virginia's version of the "Uniform Electronic Transactions Act" and specifically Virginia Code section 59.1-485, entitled "legal recognition of electronic records, electronic signatures and electronic contracts." Then read the rest of the Act — it helps with insomnia during these times. This appears promising, a way to get things done electronically.

That optimism is crushed by lenders who report "we do not accept e-signatures as a matter of policy." So too with governmental planning and engineering departments, even those mandating e-filing. They may demand a "wet" signature.

Even with an executed and acknowledged document in hand, what now? The digital divide resurfaces. Some Clerk's offices allow for e-recording — yet not all records qualify to be handled electronically. If e-recording is not an option, we decide again who goes to the Clerk's Office to record. If you have a staff member with special health considerations or a resistance to going to a public courthouse, employment law questions arise (at which you shudder, "I just want to be a real estate lawyer"). Arriving at the record room, the recording clerk finds a box. No access to the prior day's recording. Just leave the documents in the box and the Clerk will record. Examination and negotiation of the "gap indemnity" more than we used to, and title insurers are trying to work through an acceptable risk.

The estate planning and probate processes, facing their own unique challenges, hit home where these documents form part of the chain of title and empower sales by estate

representatives. Some Circuit Court Clerk's offices are reportedly mailing back probate records proffered for filing. An executrix may not want to appear to qualify in one of the Commonwealth's busiest probate offices, given health concerns. There are no quick fixes to these problems but it does make one re-examine the benefits of probate avoidance.

Ripples and Ruptures in Real Estate

All of this disrupted productivity from "stay-at-home" orders, workforce furloughs, or other ripples in the economy beget work that piles up on the real estate lawyer's desk. An event facility faces a season of cancelled weddings — are refunds due? National commercial tenants sent out letters (not formal notices) stating they will not be paying rent for a specified period of time. Mortgages, residential or commercial, somewhere behind all this may not be timely paid.

Real estate lawyers are going to be busy. Who else will read that business interruption insurance policy and requirement for "physical loss or damage" or the boilerplate exclusions for viral or airborne illness? Who else even thought about ways to draft force majeure clauses (and admit it, not many of you thought about these circumstances). **What class in law school prepared you for the medical practice tenant that wants to set up a COVID-testing facility in a parking lot of the landlord's mixed-use center?**

These problems surface at a time when many remedies are temporarily barred by federal responses under the CARES Act[2] (providing for stays of certain federally-financed residential foreclosures and evictions, forbearance for residential and multi-family loans). Or Virginia's response in House Bill 340 adopted in April. HB 340 became effective immediately as part of Title 44 of the Code of Virginia. Title 44? That covers "Military and Emergency Laws" — not a volume of the Code often touched. Piling on further, most remedies are stayed by the Supreme Court of Virginia's "judicial emergency" orders.[3]

Blessed are the Problem-Solvers

While we may not be in court, the real estate lawyers are on the front lines of this. Many had to become the "PPP Loan guy." My firm calculates processing loans with some 4,000 jobs associated with them — and I hope many of you greatly surpass those numbers.

In between the PPP loans, you might have had a client buy an office building — or try. At the end of March, we had the gut-wrenching phone call with a particular bank, telling the client – "we won't be closing loans for the next 90 days." The seller under something called a "contract" with a "closing deadline" of mid-April (and an internal intra-seller fight brewing for years) was not pleased. Then the Phase 1 environmental report came back with "hits" mandating further investigation. Was DEQ even open? Can I still hoard Excedrin along with the toilet paper? That sale closed before the end of April, thanks to a lot of blood, sweat and good counsel representing seller, lender and buyer.

The work will continue. There will be bona fide rent forbearance to consider for affected Virginia families and businesses. When the landlord wants to work with the pizza tenant, who set records for takeout during the pandemic but still may want three months of rent deferred into next year, you have the job of reminding the landlord we have to get the lender to sign off, in order to avoid triggering the "bad acts" guaranty provisions. Then there will be the "asks." Such as when the commercial tenant asks for a 6-month rent abatement. The landlord's lawyer points out the lease requires financials — only to see that the tenant principal is paying himself $100,000 a month (and then you wonder about your vocational choice).

There will also be the brazen — national tenants who have millions or even a billion in cash — making blanket pronouncements they will not pay rent. If the lease permits such remedies, what will the finance accountant at headquarters do if the national store is chained up and possession retaken without lease termination?

Real Estate Opportunities to meet Challenges

COVID-19 will create work for the real estate lawyers. The ability to use e-meeting technology, make e-payments and remotely connect to an office pushes the need for even more data storage in high-value buildings near "internet pipe." Localized and last-mile logistics are the rage among supply chains — many are looking to repurpose failed retail real estate. On the fiscal side, we will be working through the back side of those PPP loans — they were forgivable — right?

We will muddle on through all this and be better tomorrow than today. After all, Mr. Twain helps us close out: "The secret of getting ahead is getting started." ⚖

Benjamin D. Leigh is a partner in the Leesburg firm Atwill, Troxell & Leigh, P.C. and was a former Law Clerk to Chief Justice Harry L. Carrico. Leigh is the 2020 recipient of the Real Property Section's Traver Scholar Award that honors lawyers who embody the highest ideals and expertise in the practice of real estate law.

Endnotes

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[1] A free version is available from the Project Gutenberg at https://www.gutenberg.org/files/376/376-h/376-h.htm

[2] The Coronavirus Aid, Relief, and Economic Security (CARES) Act became effective March 27, 2020.

[3] Defoe's London lawyers must have been subject to similar orders: "[t]he Inns of Court were all shut up; nor were very many of the lawyers in the Temple, or Lincoln's Inn, or Gray's Inn, to be seen there."

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR

AGENDA

FALL MEETING OF THE BOARD OF GOVERNORS AND
AREA REPRESENTATIVES

Friday, September 18, 2020

Virtual Meeting
Conference Call#: 1-646-680-9905
Conference ID: 313 666 402#

I. WELCOME — Schweller — Please email Secretary Karen Cohen kcohen@protoraelaw.com to let us know that you are attending.

II. ADOPTION OF MINUTES — Spring Meeting of the BOG and Section was held March 6, 2020 at the Williamsburg Lodge — Schweller [Attachment A].

No Summer Meeting was held by direction of the Bar; votes for Board members and officers were conducted by electronic survey. The Section's Board of Governors now comprises ten members with three or four serving in each of a three-year term according to Section Bylaws. Minutes of this meeting will be circulated to the Board soon after this meeting for comments, with final adoption to occur at the Winter meeting.

III. FINANCIAL REPORT — Schweller

1. Budget Information – Budget for Fiscal Year 2021 (July 1, 2020-June 30, 2021) is $36,640 (no expenditures to date) [Attachment B].
2. Expense Vouchers – NA

IV. STANDING COMMITTEES

1. Membership — **Pam Fairchild and Rick Chess**
   a. As of 6/30/20 = 1932 members (increase of 67 members from 2/1/19)
   b. Please review the DRAFT roster of Board members and Area Representatives [Attachment C]. Please make sure your contact information is accurate, and check committee lists to make sure you are listed properly. Send any changes to lschweller@williamsmullen.com with a copy to kcohen@protoraelaw.com.
   c. Nomination of new Area Representatives
      a. Brian Thornton Wesley [Attachment D] (Phil Hart)
      b. Thomas B. Gladin [Attachment E] (Whitney Levin)

2. Fee Simple – **Steve Gregory & Rick Chess**

a. Article Submission Deadline — **October 2, 2020**
b. Legislative update

3. Programs – **Ben Leigh**

4. Technology — **Matson Coxe**

V. SUBSTANTIVE COMMITTEES

a. Commercial Real Estate — **John Hawthorne**

b. Common Interest Community — **Josh Johnson & Sue Tarley**

c. Creditor's Rights and Bankruptcy – **Lewis Biggs**

d. Eminent Domain — **Chuck Lollar**

e. Ethics — **Ed Waugaman and Blake Hegeman** (Report Attached)

f. Land Use and Environmental — **Karen Cohen & Lori Schweller** (Report Attached)

g. Residential Real Estate — **Susan Walker & Hope Payne**

h. Title Insurance — **Cynthia Nahorney**

VI. VBA UPDATE — **Will Homiller**

VII. NEW BUSINESS

a. Service opportunity:

Black Family Land Trust (BFLT) Legal Services Advisory Committee
- soft launch virtual meeting 9/21/2020 1-2:30 p.m. (See email attached as Attachment F)
- opportunity for pro bono / reduced fee work with family in Henrico County (See Attachment F)

VIII. NEXT MEETING — The next meeting TBD (historically held in conjunction with the Advanced Real Estate Seminar (March 2021)

X. ADJOURNMENT

*Summary of Important Deadlines for Presenting a CLE at the June 17-19, 2021 Annual Meeting
10/16/2020: Advise the Better Annual Meeting Planning Committee whether the Section is interested in collaborating on a Showcase CLE or presenting a practice-oriented CLE in conjunction with the 2021 annual Meeting (submit

proposed topic)
11/18/2020: Detailed information due for (titles, narrative descriptions, speakers)
1/15/2021: final program information due
4/2/2021: CLE materials due

ATTACHMENT A

REAL PROPERTY SECTION OF THE VIRGINIA STATE BAR
BOARD OF GOVERNORS AND AREA REPRESENTATIVES

SPRING MEETING

Minutes

Friday, March 6, 2020
Williamsburg Lodge, VA

Chair Ron Wiley called the meeting to order at 10:00 AM.

The chair opened by welcoming all attendees, both those physically present and those via telephone. He asked all physically present introduce themselves plus sign the list being passed around and requested that all those on the phone notify Secretary/Treasurer Kathryn Byler via text or email. The chair announced that a quorum of the Board was established.

The chair called for adoption of the minutes of the winter meeting as presented by the secretary/treasurer, Kathryn Byler. Ron Wiley noted that the meeting was held at the Williamsburg Inn and not the Williamsburg Lodge. With that sole revision, the minutes were adopted by a unanimous vote.

Chair Wiley opened a discussion regarding the budget to date and commented that the section is in good shape at this time. He mentioned that some of the funds that appeared to be surplus in the prior year's fiscal reporting were actually paid after the end of the year. Also, he mentioned that the line item for travel expenses has been reduced for the current year. A potential discount for young lawyers or others is a good idea but it won't change the budget. Regarding offering an honorarium for speakers, the VA CLE discourages the practice and the VSB may or may not allow such payment. We are awaiting a response from VSB on the question.

A review of the upcoming Advanced and Annual CLE's was given by committee Co-chair Sarah Louppe Petcher and VA CLE representative Tracy Banks. The Advanced Real Estate Seminar that will begin following this meeting has 144 people registered. The Annual Real Estate Seminars are May 6, May 19 and May 21, 2020. All topics and speakers are confirmed except a speaker to present the Time Share segment in Williamsburg. Vanessa Carter volunteered to make that presentation. The chair was commended for his assistance in obtaining excellent speakers for the Advanced. In turn, the chair stated that feedback is greatly appreciated regarding the topics, speakers and location. Tracy Banks was asked if it's possible for an attendee to sign up for one day of the Advanced and not for the full program. She responded that this has traditionally not been offered and is not currently an option. Tracy encouraged all area representatives and members of the board to attend one of the Annual Real Estate Seminars.

The chair noted that a Nominating Committee needs to be appointed. The bylaws call for the composition to be the immediate past chair, the current chair, the vice-chair, and 2 other section members. It appears that the two remaining members of the committee do not have to be area representatives. Section members serving on the Nominating Committee are ineligible for consideration to be nominated to serve in on the board or as an officer. The report of the Nominating Committee should be presented at the Annual meeting in June. The bylaws call for board members to serve for a term of three years. It's possible to serve three consecutive three-year terms. It was noted that Whitney Levin will end her third three-year term in June, thereby creating an opening on the board. (After the meeting Ron Wiley corrected this statement. Whitney is not at the end of her last eligible term but Lewis Biggs is.) Past Chair Bill Nusbaum asked if the bylaws allow for a partial term. Ron Wiley responded that the bylaws do not specifically permit or prohibit partial terms. A discussion was held regarding the desirability of amending the bylaws to address the concern of a large percentage of the board vacating at once. Ron stated that any proposed amendment to the bylaws would have to be reviewed and approved by bar counsel. Past Chair Susan Pesner commented that review by bar counsel is not a difficult process, but it takes time and would not be available for a change in June 2020. In addition to the vacancy on the board created by Whitney's (Lewis's) termination, the Nominating Committee should make a recommendation for a new secretary/treasurer and for the positions of chair and vice-chair.

When asked if there are any nominations for new area representatives, Robert Hawthorne nominated Ross Charles Allen of Owens & Owens. The motion was seconded after which Robert offered support for his nomination. Allen is a graduate of Florida State and Regent Law. He is a young attorney and Robert vouches for his professional and intellect for real estate law. A vote was called resulting in Ross Charles Allen being unanimously approved to serve as the section's newest area representative.

Ed Waugaman and Blake Hegeman reported for the Ethics Committee. The committee met on February 20 at which time VSB Ethics Counsel Jim McCauley suggested that VSB staff might assist with the LEO project as presented by Christina Meier. The LEO's might generally be categorized into four areas making a search more user-friendly. General consensus was that the section should take advantage of any and all assistance that VSB counsel and staff offers. Past Chair Kay Creasman noted that some of the LEO's are obsolete and cited the example of a 1980 opinion stating that "wiring of funds never happens." Ed commented that this project appears to be ground-breaking and will set a high standard that other sections may follow. He compared this progressive effort to the Fee Simple and how the Real Property section was the first and best at developing a newsletter that has become a formidable journal.

The chair brought back to the floor a tabled motion to create a new position of assistant editor for the Fee Simple that was made at the winter meeting. After a reading of the motion and clarification of a board member making and seconding it, discussion ensued. Steve Gregory reported that the Fee Simple committee met and voted to support the motion by a vote of 4 in favor and 1 opposed. Rick Chess spoke to his opposition noting that he feels the Fee Simple Committee and editorial staff need guidance as they currently lack direction from the section. He further noted that he doesn't conceptually oppose an assistant editor or appointment of Hayden-Anne to the position. A vote was called and the motion to create a new position of assistant editor to the Fee Simple passed with Hayden-Anne as presumptive appointee. Sarah Louppe Petcher suggested that a task force be created to provide guidance to the Fee Simple committee. The chair agreed that this is a good suggestion and indicated that he would assemble a task force. Steve Gregory mentioned that the committee welcomes articles. Deadline for the spring edition is the first Friday in April.

It was noted that former editor of the Fee Simple, Lynda Butler, recently retired. A discussion followed with suggestions of ways to honor her substantial contributions to the section over the years. Steve Gregory mentioned that he could feature her picture on the cover of the next edition of the Fee Simple as was done previously for Courtland Traver. The issue could then be printed so that section members could sign it and it could then be presented to Lynda. A suggestion was made to pass a formal resolution that could both be printed in the Fee Simple and printed in a format suitable for a presentation. The resolution would need to be worded and passed by the board before the next meeting for it to be included in the spring edition of the journal.

Reporting for the Traver Scholar Award Committee, Past Chair Kay Creasman announced that this year's recipient is Ben Leigh. The collective attendees congratulated Ben on his well-earned recognition upon which he graciously thanked the group. Kay presented a proposed press release announcing the award to the secretary/treasurer and requested that she send it to The Virginia Lawyer, The Virginia Weekly, the Fee Simple, and the local Leesburg newspaper, if Ben provides the contact information. A copy of proposed press release is attached hereto.

Lori Schweller commented that she recently joined the VBA real estate section and encouraged others to do the same. The VBA representative, Will Homiller, was present and commented on the value of the organization specifically noting that it tracks pending legislation and gives members important insight to bills after their introduction to the legislative session.

Past Chair Kay Creasman noted that there are openings on the Bar Council and encouraged anyone interested to run for office. She elaborated that very few real estate attorneys are involved in bar leadership.

The allocated time for the meeting having lapsed, the meeting was adjourned at 11:45 AM followed by lunch and opening of the 2020 Advanced Real Estate Seminar.

Respectfully submitted:

Kathryn N. Byler, secretary/treasurer

List of Attendees
Fall Board of Governors and Section Meeting
Friday, March 6, 2020

Board Members
Ronald D. Wiley, Jr., Chair
Lori H. Schweller, Vice-chair
Kathryn N. Byler, Secretary/Treasurer
Whitney Levin
Sarah Louppe Petcher
Karen Cohen
Kay Creasman, Immediate Past-Chair
Richard B. "Rick" Chess
Stephen Gregory
Robert E. Hawthorne, Jr.
Blake Hegeman
Steven Gregory
Will Homiller, Ex-officio Board
Mark Graybeal*

Area Representatives
Ray King
Richard Campbell
Vanessa S. Carter
Cynthia Nahorney
Jean Mumm
Hope V. Payne
Thomson Lipscomb
Ed Waugaman
Harry Purkey
Ralph E. Kipp
Lawrence A. Daughtry
William L. Nusbaum
Heather Steele
Susan Pesner
Page Williams
Barbara Goshorn
Tracy Horstkand
Robert Deal
George Hawkins
Douglas W. Dern
Larry McElwain
Howard E. Gordon
Max Weigard*
Randy Howard*
Pam Fairchild*
Hayden-Anne Breedlove*
Rick Richmond*

Tracy Banks, VA CLE

*Attended by telephone conference call

ATTACHMENT C
DRAFT ROSTER

BOARD OF GOVERNORS
REAL PROPERTY SECTION
VIRGINIA STATE BAR
(2020-2021)

[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]

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

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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).

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March 2, 2020

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Re: Statement of Interest for an Area Representative Position

Dear Board of the Real Property Section,

I would like to express my sincere interest in joining the Board of the Real Property Section ("Section") as an Area Representative. It has been a pleasure getting to know many of you over the past year as the YLC Board Liaison and I would like to continue the work that we have started in increasing young lawyer participation in the Section and in the practice of real estate.

I currently have a small practice in Richmond where my father, Ron Wesley, and I practice real estate law focusing primarily on seller's transactions, property tax issues, partition suits and resolving complex title issues. In addition, I have recently joined the Black Family Land Trust Legal Services Advisory Committee, which is working to develop a program for pro-bono legal services for landowners. I think a synergy with the Section exists and could provide opportunities for future Section involvement. As an Area Representative, I would like to use my practice experience to serve as a link between the veteran real estate attorneys and those just beginning a real estate practice.

As I will be terming off the YLC Board in June, I will no longer be able to serve in my current capacity as Board liaison to this Section. As a past president of the Young Lawyers Conference, I intend to keep a strong relationship with the YLC Board to continue the relationship between the Section and the YLC as well as assisting the new YLC Board liaison in getting up to speed.

I have attached my resume and thank the Section in advance for its consideration. If I can be of additional assistance or if additional materials are needed, please feel free to contact me at bwesley@thorntonwesley.com or via telephone at 804-874-3008.

Sincerely,

Brian T. Wesley

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Advised clients on corporate, real estate, personal injury and litigation matters. Managed all client representations as a first-chair attorney. Developed the firm's conflicts database and technology protocols.

NAACP Legal Defense Fund, Washington, DC
Virginia Law Foundation Oliver W. Hill Fellow May 2007 - Dec. 2007
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Hogan & Hartson, LLP, (now Hogan Lovells), Washington, DC
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University of Virginia, Charlottesville, VA Dec. 2016
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AWARDS

Super Lawyers, Virginia 2019 Rising Stars, Civil Litigation (Plaintiff), April 2019
Virginia State Bar - Young Lawyers Conference, Excellence in Service Award, June 2012
Virginia State Bar - Young Lawyers Conference, Excellence in Service Award, June 2011
Howard University School of Law, Award for Outstanding Achievement, April 2008
CALI Award for Academic Achievement in Entertainment Law, April 2008

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Virginia State Bar
- Black Family Land Trust Legal Services Advisory Committee, Feb. 2020 - Present
- Better Annual Meeting ("BAM") Committee, June 2018 - Present
- Executive Committee, June 2018 - June 2019
- Bar Council, June 2018 - June 2019
- Virginia State Bar President's Special Committee on Lawyer Well-Being, Aug. 2018 - June 2019

Virginia State Bar -Young Lawyers Conference ("YLC")
- Board of Governors, Immediate Past President, June 2019 - Present
- Virginia State Bar Real Property Section, Liaison, Feb. 2019 - Present
- Board of Governors, President, June 2018 - June 2019
- Board of Governors, President-Elect, June 2017 - June 2018
- Board of Governors, Secretary, June 2016 - June 2017
- Board of Governors, Third District Representative, June 2013 - June 2016
- Northern Virginia Minority Pre-Law Conference, Chair, June 2010 - June 2013

Virginia Supreme Court Medical Malpractice Review Panel, Member, July 2019 - Present

COMMUNITY INVOLVEMENT

Benedictine College Preparatory, Alumni Agent Board (Class of 1999), Aug. 2009 - Present
St. Philip's Episcopal Church of Richmond, Vestry, Feb. 2015 - Feb. 2018

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Commonwealth of Virginia, Jan. 2009

PUBLICATIONS

Wesley, Brian T. "YLC: Opportunities for Professional Growth, Leadership and Helping the Community", *Docket Call*. (Fall 2018): 1. Online. https://www.vsb.org/docs/conferences/young-lawyers/dc_fall2018.pdf

Wesley, Brian T. "President's Welcome", *Docket Call*. (Summer 2018): 1. Online. https://www.vsb.org/docs/conferences/young-lawyers/dc_summer2018.pdf

Wesley, Brian T. "YLC recognizes the late Honorable Barry G. Logsdon for his commitment to mentorship and service to the YLC". *Docket Call*. (Summer 2018): 9. Online. https://www.vsb.org/docs/conferences/young-lawyers/dc_summer2018.pdf

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Wesley, Brian T. "YLC Mentorship Network Brings Opportunities to Aid Virginia's Future Young Lawyers.", *Docket Call.* (Winter 2017): 5. Online. https://www.vsb.org/docs/conferences/young-lawyers/dc_w2017.pdf

Wesley, Brian T. "YLC Northern Virginia Minority Pre-Law Conference." *Docket Call.* (Spring 2012): 7. Online. https://www.vsb.org/docs/conferences/young-lawyers/dc_spr2012.pdf

Wesley, Brian T. "A Day at the YLC's Minority Pre-Law Conference." *Docket Call.* (Spring 2011): 1. Online. https://www.vsb.org/docs/conferences/young-lawyers/dc_spr2011.pdf

PRESENTATIONS & SPEAKING ENGAGEMENTS

Virginia CLE, Mentorship for Virginia Attorneys, Program Moderator & Faculty for the "(Attempting to) Achieve Wellness through Work-Life Balance" Panel, August 27, 2019, Fairfax, VA.

Virginia State Bar, Admissions & Orientation Ceremony, YLC President's Welcome, December 5, 2018, Richmond, VA.

Virginia State Bar General Practice Section & YLC First Day in Practice Seminar, YLC President's Welcome, December 4, 2018, Richmond, VA.

Gentry Locke, "Gentry Locke University presents Young Lawyer Involvement in Bar Activities", Panelist, November 6, 2018, Roanoke, VA.

Virginia State Bar, YLC Bench-Bar Dinner, Keynote Speaker Welcome, March 29, 2018, Richmond, VA.

University of Virginia Black Male Initiative (BMI) Conference, "The Laws of Alumni Engagement: Get Involved", Panelist, April 1, 2016, Charlottesville, VA.

University of Virginia Black Male Initiative (BMI) Discussion, "A Discussion on Bryan Stevenson's *Just Mercy*", Panelist, February 24, 2016, Charlottesville, VA.

ATTACHMENT E
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Thomas Gladin is a Virginia native with ties to the greater Richmond area and the Tidewater region. He earned his B.S. with a major in Business Administration and Management from Virginia Commonwealth University and his J.D. from Regent University School of Law. Thomas currently practices with the Shaheen Law Firm in the firm's Newport News and Virginia Beach offices focusing on residential and commercial real estate, small business representation, and landlord-tenant matters.

Prior to joining the Shaheen Law Firm Thomas served as a Circuit Court Law Clerk to the Honorable Edward A. Robbins, Jr. of the Twelfth Judicial Circuit of Virginia. Thomas' prior experience includes an internship with The Honorable Randolph A. Beales at the Court of Appeals of Virginia and an internship with the largest consumer bankruptcy firm in Virginia.
During law school Thomas served as Managing Editor of the Regent Journal of Global Justice and Public Policy and as a Council Member on the Regent University School of Law Honor Council.
In his free time Thomas enjoys spending time with his wife and three sons. He especially enjoys spending time with his boys traveling, camping, and teaching them mechanical skills. Thomas is an active leader with the Boy Scouts of America and an Eagle Scout.

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VSB Real Property Section
Report of the Ethics Committee

The Ethics Committee met via teleconference on September 8, 2020.

Committee members present: Blake B. Hegeman (Co-Chairman), Kay M. Creasman, Eric Zimmerman, Susan Pesner, Richard Campbell, and J. Page Williams.

1. Co-Chairman Blake Hegeman called the meeting to order.
2. Old Business: The Minutes of the February 20, 2020 Committee Meeting were approved unanimously.
3. New Business:
    a. Legal Ethics Opinion (LEO) project – Kay Creasman provided an update concerning the status of the project given the delay created by the pandemic. Key points of the presentation included:
        i. Kay has categorized the data compiled by former Committee member Christina Meier into subject areas. She provided copies of Christina's initial summaries of the real estate LEOs to the committee.
        ii. The next step is to solicit volunteers to conduct a second review of the real estate LEO's. Kay will contact Section members to seek volunteers for this review within one week of the Committee meeting. Her goal is to have 20-30 volunteer reviewers: All Ethics Committee members on the call agreed to serve as reviewers.
        iii. Volunteers will be assigned LEOs with a report deadline at the end of October. Kay will provide guidance to the volunteer reviewers concerning the criteria of the LEO reports and submission directions.
        iv. Upon completion of the second review we will discuss collaboration opportunities with James McCauley, VSB Ethics Counsel.
        v. The Committee will seek guidance from the Board of Governors and Area Representatives concerning how to disseminate the Committee's work to the full Section after feedback from Jim McCauley's office
    b. COVID Best Practices – Blake Hegeman asked the Committee how they and their firms have managed to continue practicing while keeping clients and staff safe. Below is a summary of their responses:
        i. Every firm attorney and staff member must wear a mask when he or she leaves their office/workstation. One member created blue tape lines around work areas to encourage social distancing.
        ii. All Committee members have a designated staff member that sanitizes every meeting space after any client interaction. One member requires a log in form in firm meeting spaces to ensure sanitization occurs.
        iii. A member shared that she directed building maintenance staff not to enter the firm office space to empty trash - a firm staff member takes out the trash.
        iv. All Committee members provide ample hand sanitizer in key areas of the office.

v. Some Committee members limit transaction meetings to the parties and the firm attorney (no real estate licensees, lenders, etc).
vi. Some Committee members conduct transactions outside and at car windows upon a client's request. Also, some Committee members conduct transactions through physical barriers (like a glass door) - separating the attorney and client.
vii. Firm employees and staff are encouraged to work remotely when possible in some member offices.
viii. Several Committee members conduct Skype/Zoom/Facetime meetings from their office with clients in conference rooms in other areas of the office.
ix. One Committee member uses encrypted portals and powers of attorney in some transactions if approved by the lender. The process was impressive, and the Committee member should be asked to share it at the next Board of Governors and Area Representatives meeting.

Adjournment.

Respectfully submitted,
Blake B. Hegeman
Committee Co-Chairman

Report of the Land Use & Environmental Committee

Fall 2020 Meeting

Telephonic Meeting - September 15, 2020

Attendees: Lori Schweller and Karen Cohen (Co-Chairs)
Preston Lloyd
Steve Romine
Max Wiegard

I. New Business

a. **COVID-19 impact on land use practice**: the Committee discussed how various localities in the state are handling land use hearings. The general consensus is that the majority of jurisdictions now are conducting a hybrid of virtual and in-person hearings, providing means for applicants and the public to attend in person or provide comments virtually. Planning Commission schedules are full.

b. **Legislative extension of the validity of land use approvals**: Preston Lloyd presented an update on the legislative extension of the validity of certain land use approvals. SB 5106, which was introduced in the Special Session of the General Assembly provides for the extension of local land use approvals to address the COVID-19 pandemic. The legislation extends until at least July 1, 2022 the sunset date for various local land use approvals that were valid and outstanding as of July 1, 2020. This bill incorporates SB 5044. The bill passed 32-4 in the Senate and there is a good chance of passage by the House. Read the bill to understand the types of approvals affected and applicable limitations.

c. **Solar energy utility facility land use legislation**. Lori Schweller updated the Committee on new solar energy legislation. The new law is in response to the solar industry wanting to do more to benefit localities but feeling constrained by proffer laws and local policy and procedure. The provision pertaining to negotiating a siting agreement with the locality is applicable to properties that are *eligible to* be opportunity zones and the negotiation with the locality may result in the solar energy company providing benefits to mitigate impacts (or not even necessarily to mitigate impacts) and can include financial compensation, deployment of broadband, or other benefits to the locality. The law also authorizes the locality to grant special exceptions with conditions that may include dedications of real property or cash. Another law enables localities to adopt into their zoning ordinances a waiver of substantial accord (2232) review. Steve Romine explained that the new laws open up multiple, layered revenue-enhancing opportunities for localities by permitting a reassessment of the tax on

the land; entering into a siting agreement and getting revenue that way; obtaining cash proffers; and enacting a revenue share ordinance.

d. **Updates in affordable housing policies and incentives**. The Committee discussed what is happening in various jurisdictions with respect to affordable housing legislation. Lori Schweller noted that Albemarle is in the process of revamping its entire policy. Preston Lloyd discussed the efforts of Homebuilders Association of Virginia (HBAV) in the City of Richmond to adopt legislation to expand incentives to allow density bonuses, relax parking, relieve height limitations, etc., to get more density. He noted that the City is considering a rebate program whereby development meeting certain parameters for affordable units would receive an automatic rebate from the Economic Development Authority through an administrative process. This program has not yet been adopted but HBAV is trying to get it through council in December. Karen Cohen said that Prince William County is currently working on a zoning text amendment for a new zoning district called the Mixed Use Zoning District (MUZD), which is intended to incentivize mixed-use, more dense development in certain planned areas of the County, which include areas that are designated opportunity zones. This is an issue that interests the largely new Board of Supervisors. However, in many parts of the County, resistance to residential development of any kind remains.

II. Announcements.

a. Lori Schweller informed the Committee of an email she received from a representative of the Black Family Land Trust Legal Services Advisory Committee (BFLTLSAC). A group is forming to help landowners with heirs property issues. The Uniform Partition of Heirs Property Act (UPHPA), which recently became law (March 2020) preserves the right of a cotenant to sell his interest in inherited real estate, while ensuring that the other cotenants will have the necessary due process, including notice, appraisal, and right of first refusal, to prevent a forced sale. These provisions are codified at Va. Code § 8.01-81, -81.1, -83, -83.2, -83.3. The first meeting of the BFLTLSAC is this coming Monday; Ms. Schweller to provide information upon request.

b. The next VSB Real Property Section meeting will be held Friday, September 18, 2020, 10:00-11:30, by call-in only (no in-person meetings permitted by VSB).

The Committee adjourned at 2:45 p.m.

ATTACHMENT F
BFLT EMAILS

From: Gantz, Crista
To: Gantz, Crista
Cc: "Ebonie Alexander"
Subject: RE: Black Family Land Trust - Help Bring Legal Services to Landowners in Need
Date: Friday, August 28, 2020 1:09:14 PM

Good morning,

September 21 from 1 – 2:30 pm works best for the majority of the group. I will send a calendar invite later today and I will send a link to the virtual meeting tool prior to the meeting.

Thank you,

Cris

From: Gantz, Crista
Sent: Monday, August 17, 2020 12:22 PM
To: Gantz, Crista <cgantz@vsb.org>
Cc: Ebonie Alexander <ebonie@bflt.org>
Subject: Black Family Land Trust - Help Bring Legal Services to Landowners in Need

Email sent on behalf of Ebonie Alexander, Executive Director, Black Family Land Trust (BFLT)

Greetings Virginia Attorneys and BFLT Friends:

As we all continue to adjust the reality of COVID-19 and the changes it has brought to each of our day-to-day lives I want to share some good news with you! Last December I wrote you asking that you join with the Black Family Land Trust to help us form the **BFLT Legal Services Advisory Committee**. For the past year the BFLT has worked with a coalition of 19 diverse organizations to adopt the **Uniform Partition Heir's Property Act** (UPHPA). The bills HB 1605 sponsored by Delegate Hope and SB 553 sponsored by Senator Ruff, passed unanimously and was signed by Governor Northam in March 2020. We are extremely proud of this bipartisan legislation that provides new protections to families that find themselves in a "tenancy in common" landownership situation. The enactment of this legislation is a victory for citizens of the Commonwealth!

The **BFLT Legal Services Advisory Committee's** mission to help the organization develop a program for delivering legal services to landowners in need has new tools. The Committee's work will include determining the structure of the legal services program, the scope of legal services to be provided to BFLT landowners, and creating the referral process. We'll also need help recruiting Virginia attorneys willing to provide pro bono and discounted legal services to our clients. Because the work of the Committee will be developing the legal services program, substantive legal experience in real property law, estate planning, and the other legal categories of need for BFLT clients is not necessary to participate on the Committee. We anticipate the initial work of the Committee to last a year with meetings no more than every other month. We hope we can gather in person for our launch meeting, but BFLT will facilitate remote attendance for those unable to attend ongoing meetings in person.

As a reminder, Black Family Land Trust (BFLT), a nonprofit organization in VA, SC and NC dedicated to the preservation and protection of African-American and other historically underserved landowners assets. The BFLT utilizes the core principles of land conservation and land-based community economic development to achieve our goals. We measurably improve

the quality of life for landowners, by providing families with the tools necessary to make informed, proactive decisions regarding their land and its use. The BFLT works primarily in the Southeastern United States, our programs are intergenerational in their design. We honor the legacy of those *stewards of the land* that came before us and have faith in those *stewards of the land* that will come after us.

Even with all we are doing for underserved landowners in Virginia, we cannot deliver justice to these families without the help of attorneys. The BFLT wants to find a way to effectively, efficiently, and affordably connect landowners in need with Virginia attorneys willing to help them resolve their legal issues. This is why we need your help. In the past year you (or your bar association/organization) have expressed some interest in learning more about the problem of black family land loss, the work of the BFLT, and the ways Virginia lawyers can help the organization and the people we serve.

We are reigniting our efforts to gather a group of interested stakeholders to form the **BFLT Legal Services Advisory Committee**. At this point you are not committing to providing pro bono or other legal services, just expressing interest in working with us to develop our legal services program.

If you are interested in learning more about this project, please respond to this Doodle poll to provide your availability for our first virtual meeting. Attendees will learn more about the BFLT, the UPHPA, and the anticipated work of the Committee.

I look forward to hearing back from you and working with you to address this incredible need in our community. We would be grateful for your help and your willingness to spread the word about this opportunity to any other lawyers you think may be interested in getting involved in this worthy cause. Do not hesitate to contact me at ebonie@bflt.org if you have questions about the BFLT or this initiative.

Thank you,

Lillian "Ebonie" Alexander
Executive Director
Black Family Land Trust

Crista Gantz, Director of Access to Legal Services
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From: Gantz, Crista
To: Schweller, Lori
Cc: RWiley@OldRepublicTitle.com
Subject: Henrico County Heirs Property - Attorney Referrals Needed
Date: Monday, September 14, 2020 9:05:55 AM

Good morning, Lori:

I got a call from Parker Angelasto with the Capital Regional Land Conservancy. He is working with a family with heirs property in Henrico County. They are in need of help with some title issues. They are getting a lot of calls from developers. The land has been in the family for 100 years. They want to keep it and would like to work with an attorney to form an LLC. It sounds like they have access to some funding to pay for an attorney, but want to keep the costs down, so have done a lot of work to explore options and come to an agreement. Partition is not being sought. Mr. Angelasto doesn't want them to cold call attorneys based on Google and came to me asking if I might be able to recommend a few possibilities.

Do you all have a recommendation of a few firms/lawyers that Mr. Angelasto might be able to call on behalf of the family to see if they might be interested in working with these landowners? Also, the pro bono coordinator at UVA mentioned that she can provide connection to UVA law students if interested attorneys need assistance. Just an idea that might help keep costs down.

On a related note, **we have our soft launch meeting (virtually) for the Black Family Land Trust Legal Services Advisory Committee next Monday (9/21) from 1 – 2:30 pm**. If you are interested in participating, please let me know. I am happy to forward the invite!

Thank you,

Cris

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BOARD OF GOVERNORS
REAL PROPERTY SECTION
VIRGINIA STATE BAR
(2020-2021)

[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]

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

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