

29

REAL PROPERTY

Jan L. Proctor¹
County Attorney
Accomack County

29-1 INTRODUCTION

29-1.01 Scope of Chapter

This chapter is intended to provide a general overview of real property law and then focus on areas that may be of particular interest to counsel for local governments. This is no substitute for independent research—entire treatises have been written on the subject—and does not attempt to be an exhaustive summary of every real property issue the governmental practitioner may encounter.² It begins with a glossary of commonly used words and phrases.

29-1.02 Glossary

Bona Fide Purchaser (for value and without notice) — A bona fide purchaser is one who is without knowledge or notice, actual or constructive, of the grantor's intent to defraud his creditors and who has not been put on such inquiry as would lead to knowledge or notice. *Neff v. Edwards*, 148 Va. 616, 139 S.E. 291 (1927). One who purchases legal title to real property without actual or constructive notice of any infirmities, claims, or equities against the title. *Black's Law Dictionary* 1001 (7th ed. 2000).

Due Diligence — “[S]uch a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.” *STB Mktg. Corp. v. Zolfaghari*, 240 Va. 140, 393 S.E.2d 394 (1990). “Whether such due diligence has been exercised must be ascertained by an examination of the facts and circumstances unique to each case.” *Id.* (citing *Mears v. Accomac Banking Co.*, 160 Va. 311, 168 S.E. 740 (1933)); see also *Schmidt v. Household Fin. Corp.*, 276 Va. 108, 661 S.E.2d 834 (2008).

Easement — An easement is a privilege without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person; by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former. *Stevenson v. Wallace*, 68 Va. (27 Gratt.) 77 (1876); see generally section [29-10.01](#).

By implication — Easements by implication arise from an implied grant or reservation resulting from application of the principle that whenever a party conveys property, also conveyed is whatever is necessary for the beneficial use of that property. Retained is whatever

¹ Many thanks to James E. Barnett, former County Attorney for York County, for his past service as co-author of this chapter.

² Some additional resources that the practitioner may consider useful include: Raleigh C. Minor & Frederick D.G. Ribble, *The Law of Real Property* (2d ed. 1928); *Real Estate Transactions in Virginia* (Neil S. Kessler & Paul H. Melnick eds., 5th ed. 2019); W. Wade Berryhill & Michael V. Hernandez, *Real Estate Closings* (2021-2022 ed.); *Michie's Jurisprudence of Virginia and West Virginia*; Barbara Goshorn, et al., *Michie's Virginia Forms* (2021); and *A Virginia Title Examiner's Manual* (4th ed. 2017), by Douglass W. Dewing, former co-author of this chapter.

is necessary for the beneficial use of the land still possessed. *Jennings v. Lineberry*, 180 Va. 44, 21 S.E.2d 769 (1942).

By prescription — In order to establish a prescriptive easement, the claimant has the burden of proving, by clear and convincing evidence, that its use of the easement was “adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land over which it passes, and that the use has continued for at least 20 years.”³ *Johnson v. DeBusk Farm, Inc.*, 272 Va. 726, 636 S.E.2d 388 (2006).

By necessity — To prove an easement of necessity, both the dominant and servient estates must have belonged to the same person at some time in the past, *Middleton v. Johnston*, 221 Va. 797, 273 S.E.2d 800 (1981), and the easement must be necessary, as opposed to more convenient, *Fones v. Fagan*, 214 Va. 87, 196 S.E.2d 916 (1973), or less expensive to develop, *Jennings v. Lineberry*, 180 Va. 44, 21 S.E.2d 769 (1942).

Estate of Inheritance — An estate which may descend to heirs. *Black’s Law Dictionary*.

Fee Simple — A fee simple is a freehold estate of inheritance, free from conditions and of indefinite duration. It is the highest estate known to the law and is absolute, so far as it is possible for one to possess an absolute right of property in lands. *Goin v. Absher*, 189 Va. 372, 53 S.E.2d 50 (1949).

Leasehold — A tenant’s possessory estate in land or premises, the four types being the tenancy for a term, the periodic tenancy, the tenancy at will, and the tenancy at sufferance. *Black’s Law Dictionary*.

Tenancy for a Term — a tenancy whose duration is known in years, weeks, or days from the moment of its creation. *Black’s Law Dictionary*. The tenancy of years is an estate created by contract or estoppel, whereby the tenant is given the possession of lands or tenements and enters upon the same for a definite period of time fixed or agreed upon by the parties. 1 Raleigh C. Minor & Frederick D. G. Ribble, *The Law of Real Property* § 336 (2d ed. 1928).

Periodic Tenancy — a tenancy that automatically continues for successive periods unless terminated by notice. *Black’s Law Dictionary*.

Tenancy at Will — the tenant holds possession with the landlord’s consent but without fixed terms as to duration or rent. *Black’s Law Dictionary*. Every person who occupies the land of another as tenant is, in law, a tenant at will, unless he can show a lease of his lands, whereby his term is rendered certain. *Jones v. Roberts*, 13 Va. (3 Hen. & M.) 436 (1809).

Tenancy at Sufferance — arises when a person who has been in lawful possession of property wrongfully remains as a holdover after the interest has expired. *Black’s Law Dictionary*.

License — A right, given by some competent authority, to do an act that without such authority would be illegal, a tort, or a trespass. *Power & Kellog v. Tazewells*, 66 Va. (25 Gratt.) 786 (1875). A revocable permission to commit some act that would otherwise be unlawful; esp., an agreement that it will be lawful for the licensee to enter the licensor’s land to do some act that would otherwise be illegal. *Black’s Law Dictionary*.

Marketable Title — A marketable title is one that is free from liens or encumbrances; one which discloses no serious defects and is dependent for its validity upon no doubtful questions of law or fact; one that will not expose the purchaser to the hazard of litigation or embarrass him in the peaceable enjoyment of the land; one that a reasonably well-informed and prudent person,

³ Water and sewer prescriptive easements are established after ten years of continual use. Va. Code § 15.2-2109.1.

acting upon business principles and with full knowledge of the facts and their legal significance, would be willing to accept, with the assurance that he, in turn, could sell or mortgage the property at its fair value. *Denton v. Browntown Valley Assocs.*, 294 Va. 76, 803 S.E.2d 490 (2017) (quoting *Madbeth, Inc. v. Weade*, 204 Va. 199, 129 S.E.2d 667 (1963)) (regardless of contract requirement of title examination, it is seller's burden to prove marketable title, when challenged).

Option — An option contract is one in which a seller makes an irrevocable offer to sell on specified terms and that creates in a buyer a power of acceptance. *Landa v. Century 21 Simmons & Co.*, 237 Va. 374, 377 S.E.2d 416 (1989) (quoting 1A A. Corbin, *Corbin on Contracts* § 261A (1963)).

Right of First Refusal — is distinguished from an absolute option in that the right of first refusal does not entitle the holder to compel an unwilling owner to sell. Instead, it requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the right of first refusal. *Cities Serv. Oil Co. v. Estes*, 208 Va. 44, 155 S.E.2d 59 (1967); *Landa, supra*.

Tenancies

Tenancy in Common — where two or more hold the same land, with interest accruing under different titles, or accruing under the same title, but at different periods, or conferred by words of limitation importing that the grantees are to take any distinguished shares. *Patton v. Hoge*, 63 Va. (22 Gratt.) 443 (1872). This is the "default" tenancy when there are multiple owners. See Va. Code § 55.1-134(A).

Joint Tenants — differs from tenancy in common in that joint tenants had one estate in the whole and no estate in any particular part. Survivorship between joint tenants was abolished in Virginia as early as 1787. See Va. Code § 55.1-134(A).

Joint Tenancy with Right of Survivorship — When it manifestly appears from the tenor of the instrument transferring title that it was intended the part of the one dying should then belong to the others, Va. Code § 55.1-134(A) shall not apply. Va. Code § 55.1-134(B). If the expression "with survivorship," or any equivalent language, is used in the vesting deed, then it is presumed that such persons are intended to own the property as joint tenants with the right of survivorship as at common law. Va. Code § 55.1-135.

Tenants by the Entirety — "Tenancy by the entirety comes into being when land is acquired by the husband and wife, through deed or will. Based on the fiction of the unity of husband and wife, the whole fee simple passes to the survivor, but meanwhile neither has an interest which can be conveyed. In consequence, while land thus held is subject to execution on judgment rendered against the spouses jointly, neither the land itself, nor either interest, can be reached under a separate judgment against husband and wife."⁴ *Vasilion v. Vasilion*, 192 Va. 735, 66 S.E.2d 599 (1951). *But see Evans v. Evans*, 290 Va. 176, 772 S.E.2d 576 (2015) (a deed executed by one spouse can convey his or her ownership in a property held by the entirety to the other spouse; it is not necessary for both to join in the deed as grantors as long as there is sufficient evidence of intent to make such a conveyance and that acceptance was voluntary). The statute was amended in 2017 to make explicit that "no interest in real property held as tenants by the entirety shall be severed by written instrument unless the instrument is a deed signed by both spouses as grantors." Va. Code § 55.1-136.

Life Tenant — holds a freehold estate, not an estate of inheritance, being of indeterminate duration as it terminates upon the death of the tenant or of another living person. 1 *Raleigh C. Minor & Frederick D. G. Ribble, The Law of Real Property*, § 191 (2d ed. 1928).

⁴ In 2019, the definitional term "husband and wife" was replaced with "spouses." Va. Code § 55.1-136.

Remainder — A remainder is defined to be “what is left” of an entire grant of lands or tenements after a preceding part of the same grant or estate has been disposed of in possession, whose regular expiration the remainder must await. 1 *Raleigh C. Minor & Frederick D. G. Ribble, The Law of Real Property* § 702 (2d ed. 1928); *Copenhaver v. Pendleton*, 155 Va. 463, 155 S.E. 802 (1930); *Braswell v. Braswell*, 195 Va. 971, 81 S.E.2d 560 (1954).

Reversion — A reversion is the remnant of an estate continuing in the grantor, undisposed of, after the grant of a part of his interest. It differs from a remainder in that it arises by act of the law, whereas a remainder is by act of the parties. A reversion, moreover, is the remnant left in the grantor, whilst a remainder is the remnant of the whole estate disposed of, after a preceding part of the same has been given away. *Copenhaver v. Pendleton*, 155 Va. 463, 155 S.E. 802 (1930) (quoting 1 *Raleigh C. Minor & Frederick D. G. Ribble, The Law of Real Property* § 769 (2d ed. 1928)); *Braswell v. Braswell*, 195 Va. 971, 81 S.E.2d 560 (1954). See also Va. Code § 8.01-255.1, which established a ten-year statute of limitations to assert a reversionary interest.

Warranty of Title — Deeds may be conveyed with a general warranty of title, a special warranty, with “English covenants of title,” or with no warranty of title as a quitclaim. See the discussion in section 29-6.02 for a description of each warranty.

29-2 PARTIES TO A REAL ESTATE TRANSACTION

When acquiring or disposing of real property, the government may find itself dealing with the entire panoply of persons and entities capable of holding title. The following discussion is limited in that it addresses these parties in the context of their appearance in a deed.

Obviously, all owners should sign the contract and deed, and in cases of ownership by other than natural persons, signature must be by a person authorized to act on behalf of the owning entity. In most cases, determining the identity of the owners will be easy, by reference to the most recent deed, and the names of the sellers in the deed should mirror the spellings of the names in the deed by which the sellers took title; however, this detail may be less important in the contract than in the deed by which title will later be conveyed, as long as the sellers’ identities are clearly specified.

A foundational rule to keep in mind in identifying the proper parties to a real estate transaction is the protection afforded innocent purchasers, such as the locality when purchasing real estate, by the Recording Act. Virginia is what is called a “race notice state.” Every contract in writing, deed conveying real estate, deed of gift, deed of trust or mortgage shall be void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors, until and except from the time it is duly admitted to record in the county or city where the property is located. Va. Code § 55.1-407.

29-2.01 Individuals

29-2.01(a) Ascertaining Identity and Capacity

A title examination may reveal actions taken or liabilities incurred by an individual with the same or a similar name. The common law doctrine of *idem sonans* prevents a variant spelling of a name in a document from voiding the document if the misspelling is pronounced the same way as the true spelling, *Black’s Law Dictionary*, even if “somewhat carelessly pronounced.” *Butler v. News-Leader Co.*, 104 Va. 1, 51 S.E. 213 (1905).

The most common occurrence of extraneous matters appears in the judgment liens reported, especially when the owner has a popular name. Many title insurers will insure without objection upon receipt of a “not me” affidavit from the owner providing a basis to distinguish the owner from the judgment debtor (never lived at the defendant’s address, not the same social security number (if not fully redacted), never did business with the creditor, never used that variant of name).

The general rule that an individual can take any action regarding property they own may be limited in the event the individual lacks the capacity to understand the transaction. A court proceeding may be necessary to convey the property of a person under a disability. Va. Code §§ 8.01-6 et seq, 64.2-2000 et seq.

29-2.01(b) Joint Ownership

In identifying the owners for purposes both of the sales contract and of the deed, be aware of the following:

1. If the property is held by tenants in common, or a joint tenancy, all owners must sign, unless the conveyance is intended to be only of the interests of less than all the owners. Unless there is a contrary intent expressed in the instrument creating the joint tenancy, all co-tenants are presumed to own equal undivided shares in the property. *Jarrett v. Johnson*, 52 Va. (11 Gratt.) 327 (1854); *Smith v. Alderson*, 116 Va. 986, 83 S.E. 373 (1914). Any tenant in common can convey his or her interest without the consent of the other co-tenancy. *Leonard v. Boswell*, 197 Va. 713, 90 S.E.2d 872 (1956); *Goodloe v. Woods*, 115 Va. 540, 80 S.E. 108 (1913).
2. As discussed in the definition of *Joint Tenants*, sole ownership by the survivor of a joint tenancy has long since been abolished in Virginia, Va. Code § 55.1-134(A), and the ownership of the decedent passes to the decedent's heirs rather than to the surviving joint tenant unless the writing creating the joint tenancy expressly provides otherwise. Va. Code § 55.1-134(B).
3. Tenancy by the entirety continues to exist, however, between spouses as long as they are married, and for survivorship to take effect, it is sufficient for the deed to designate the spouses as taking title as "tenants by the entireties" or "tenants by the entirety." Va. Code § 55.1-136. Both spouses must sign in order to have a valid conveyance, and both must sign before any interest in real property can be severed. A divorce will convert the ownership into a tenancy in common. Va. Code § 20-111; *see also Evans v. Evans*, 290 Va. 176, 772 S.E.2d 576 (2015) (a deed executed by one spouse can convey his or her ownership in a property held by the entirety to the other spouse; it is not necessary for both to join in the deed as grantors as long as there is sufficient evidence of intent to make such a conveyance and that acceptance was voluntary).

29-2.01(c) Death and Intestate Succession

In the event of a death of an individual owner (i.e., a natural person), recourse must be made to recorded wills and lists of heirs. If title has passed through intestacy, ownership will be determined by Virginia's intestacy statute, Va. Code § 64.2-200 et seq. Note that the statute has been amended at various times, and the identity of the heirs will depend on the date of the decedent's death, e.g., if the person died before October 1, 2012 (the date Va. Code § 64.2-200 became effective), the identity of the heirs is governed by Va. Code § 64.1-1 et seq.

In the event the estate is administered in another jurisdiction, copies of the will and other estate documentation should be, and are authorized to be, recorded in the jurisdiction where the property is located. Va. Code § 64.2-455.

In instances where ownership by an heir is not clear from the record, a recitation in the deed of the authority of the grantor to convey is recommended. Such recitals are prima facie evidence of the regularity of the sale and the truth of the recitals, especially when no list of heirs has been filed. Va. Code § 8.01-389; *see also Harman v. Stearns*, 95 Va. 58, 27 S.E. 601 (1897).

29-2.01(d) When Ownership Cannot be Established or All Interests Acquired

A problem frequently encountered in cases of intestate succession is that it may be impossible to account for all ownership interests if, for example, there are heirs who cannot be located. In cases where eminent domain is authorized, the missing interests may be acquired by condemnation. See [Chapter 4, Eminent Domain](#).

Another possibility sometimes recommended by local government attorneys is for the locality to acquire those interests which can be purchased by voluntary conveyance and then to file a suit for partition in order to acquire the balance, Va. Code § 8.01-81 et seq., when the unpurchased interests constitute a minority of the ownership. The petition would ask the court to order a sale of the remaining interests to the locality, in lieu of an in-kind partition or subdivision of the property, as authorized by Va. Code § 8.01-83. Statutory amendments potentially rendered the partition process more costly and complex. Under these provisions, if the court orders partition it must allocate to the unknown or unlocatable parties a part of the property representing the combined interests of such parties as determined by the court, and such part of the property must remain undivided. In most cases, an appraisal must be ordered, a hearing must be held regarding the property's value, and the sale must be conducted on the open market. Moreover, the commissioner must be disinterested, impartial, and not a party to the action. See Va. Code §§ 8.01-81, 8.01-81.1, 8.01-83, 8.01-83.1, 8.01-83.2, 8.01-83.3.

One wonders if there may be some risk that one of the unlocated owners suddenly appears in response to a notice served by publication and successfully demands that the property be subdivided rather than sold in toto to the locality (assuming that the property in question is susceptible to a lawful subdivision), or that the missing heir will appear and convince the court to conduct a judicial sale at auction under Va. Code § 8.01-96 et seq., at which the locality will have to offer its bid to buy the property. However, some who have successfully used a partition sale in this manner suggest that it is procedurally easier than a condemnation suit, and that courts will typically allow the locality to buy the property rather than order a sale. There is no jury to determine value, and the cost of the proceeding can prove lower than the cost of condemnation. The sale will proceed as a judicial sale, with a commissioner appointed to ascertain value and handle the sale.

29-2.01(e) Testate Succession**29-2.01(e)(1) Requirements of a Will**

No will that is intended to pass title to real estate in Virginia shall be valid unless it is in writing and signed by the testator or by some other person in the testator's presence and by his direction, and acknowledged as a will by the testator in the presence of at least two competent witnesses. A will wholly in the testator's handwriting is valid if it is entirely handwritten (filling in blanks on a preprinted form raises a question and should be acknowledged before attesting witnesses in the same manner as a typed will), signed by the testator, and proved as such by two disinterested witnesses. Va. Code § 64.2-403. The testator's signature may be by a "mark." *Ferguson v. Ferguson*, 187 Va. 581, 47 S.E.2d 346 (1948). A will may be made self-proving if it complies with the requirements of Va. Code §§ 64.2-452 and 64.2-453. A foreign will may be readmitted to probate in Virginia if it complies with Virginia law. Va. Code § 64.2-450.

29-2.01(e)(2) Where to Probate/Record a Will

Wills are probated in the circuit courts in the following order of preference: in the county or city where the decedent resided; in the county or city where the decedent owned real estate; in the county or city where the decedent died or had any estate. Va. Code § 64.2-443.

29-2.01(e)(3) Power of Executor to Convey

A personal representative has no powers or duties with respect to real estate, as can be seen by the general statutory charge: Every personal representative shall administer, well and truly, the whole personal estate of his decedent. Va. Code § 64.2-514. Any power over real estate must be authorized by statute or the terms of the will. A personal representative may execute

a deed to transfer title to real property contracted to be sold by the decedent during their lifetime. Va. Code § 64.2-523. A personal representative may bring suit to subject the real estate to claims of creditors. Va. Code § 64.2-536. Any other power of an executor over real estate must be conferred by the will, either in explicit terms or by implication. *Neblett v. Smith*, 142 Va. 840, 128 S.E. 247 (1925). If the will directs real estate be sold, and the proceeds distributed, but names no one to conduct the sale, the executor will have that power. Va. Code § 64.2-521. Where the will merely confers a power of sale upon the executor, the executor must divest the devisees of their interest. *Coles' Heirs v. Jamerson*, 112 Va. 311, 71 S.E. 618 (1911). Where the will devises the land to the executor with a power of sale and direction as to the distribution of the proceeds, the executor succeeds to the title of the real estate and the devisees' interest is personalty. *Yamada v. McLeod*, 243 Va. 426, 416 S.E.2d 222 (1992). If the power is not exercised, the interest in the title to the real estate may be converted back to realty. See *Strickler v. Byrd*, 171 Va. 347, 198 S.E. 918 (1938).

29-2.01(e)(4) Rights of Creditors

If a decedent's personal estate is insufficient to satisfy their debts, all of their real estate is an asset for the payment of such debts. Va. Code § 64.2-532. Heirs or devisees who sell real estate that is an asset for the payment of a decedent's debts within one year of the date of death are liable for the value of such real estate to those creditors. Va. Code § 64.2-534.

The lien in favor of the United States to secure its claim to the estate tax attaches on the date of death and continues for ten years. 26 U.S.C. § 6324. No filing is required to perfect the lien. The federal estate tax exemption states that a decedent's estate is not subject to federal estate tax, and no federal estate tax return needs to be filed, if the gross value of the estate (increased by the decedent's adjusted taxable gifts and specific gift tax exemption) is less than the threshold set for the year of the decedent's death. The exemption threshold is adjusted every year for inflation.⁵

Virginia imposes an estate tax in the amount of the federal credit. Va. Code § 58.1-902. The lien attaches upon filing of a memorandum in the county or city in which the real estate is located and is enforceable for ten years from the date of death. Va. Code § 58.1-908.

29-2.01(f) Sole Proprietorship

A sole proprietorship is a form of business in which one person owns all the assets of the business in contrast to a partnership, trust, or corporation. The sole proprietor is solely liable for all the debts of the business. Even when an individual does business as a sole proprietorship under a different name, the individual remains personally liable for all obligations of the business. A sole proprietorship is not a legal entity separate and distinct from the individual owner doing business in that name. *Recalde v. ITT Hartford*, 254 Va. 501, 492 S.E.2d 435 (1997). Certificates should be filed in the circuit court when a person or entity transacts business under an assumed name. Va. Code § 59.1-69. Grantors who have elected to operate a sole proprietorship under a business name, that is, "doing business as" or "trading as," may need to be advised that it is the owner individually who is the grantor, and not the business under its assumed name.

29-2.01(g) Spousal Interest

Historically, a surviving spouse's interest in real estate was more universally applicable. The common law identified those interests as dower and curtesy, and while there were distinct differences, over time in Virginia the two interests came to be treated in the same way. Prior to June 30, 1977, the spousal interest was a life interest. Between July 1, 1977 and January 1, 1991, the interest was a 1/3 fee simple interest in all the real estate of which the deceased spouse was seized during the marriage. Va. Code § 64.1-19 (repealed 1991), dower and curtesy

⁵ In 2023, the threshold for the exemption was \$12,060,000, and in 2024 it rises to \$13,610,000. https://www.irs.gov/irb/2023-48_IRB#REV-PROC-2023-34.

were abolished and replaced with the concept of an elective share in the decedent's augmented estate, but the repeal did not change or diminish the nature or right if the interest had vested prior to 1991. Va. Code § 64.2-301. The rules governing a spouse's elective share of a decedent who died before January 1, 2017 are governed by Va. Code § 64.2-300 et seq.; for those whose spouses died on or after January 1, 2017, the governing statutes are Va. Code § 64.2-308.1 et seq.

The augmented estate includes the value of property conveyed by the decedent during their marriage to a person other than the surviving spouse, to the extent the decedent did not receive full consideration. Examples include retained life estates, retained powers to revoke or consume, a survivorship estate with someone other than the spouse, and gifts. Va. Code § 64.2-305. If a claim is filed, the original recipient of the property may be liable for contribution. Va. Code § 64.2-306. A full discussion of the augmented estate is beyond the scope of this chapter and lies more in the realm of the administration of estates.

29-2.01(h) Transfer on Death (ToD) Deed

Essentially an estate planning device authorized by the General Assembly in 2013, the recordation of a ToD deed has no effect on ownership until the owner's death. Va. Code § 64.2-615.

29-2.02 Corporations, Partnerships and Other Entities

The following should be investigated when entities are selling to the locality:

1. Is the entity in good standing in its state of formation?
2. Is the transaction authorized by the proper parties according to the organizational or governing documents?
3. Is the person signing authorized to do so?

29-2.02(a) Actions in the Ordinary Course of Business

Certain transactions fall within the definition of "ordinary course of business," such as the sale of a lot or the granting of easements by a real estate development entity. Other actions involving the disposition of all or substantially all of the entity's assets often fall outside the ordinary course of business and may require authorization by a majority (or super-majority) of the shareholders, partners, or members. The entity's governing documents need to be reviewed carefully when a recent transaction in the chain of title is

1. A deed in lieu of foreclosure;
2. A deed of trust involving cross collateralization among special purpose entities (even if the underlying "owner" of the entities is identical or related);
3. A deed of trust where the loan proceeds are paid to an entity other than the vested owner; or
4. A rollup of an entity into a parent or a merger, conversion, or contribution to an affiliated entity.

Some title insurers have noted that in this era of increasing fraud, forgery, and identity theft, a recent change in control of a single purpose entity may be as indicative of a fraud perpetrated upon the real owner and the government agency regulating entities (the State Corporation Commissioner here in Virginia, the Secretary of State in many other jurisdictions), as it is evidence of a change of control pursuant to an authorized sale.

29-2.02(b) Corporations

Corporations generally sign by a president, acting president, vice-president, or such other person authorized by the corporation's directors to do so. Va. Code § 55.1-624. If a corporate officer signs, confirm their status and title with the State Corporation Commission and while you are at it, confirm the exact spelling of the corporate name, since a surprising number of corporate officials get lax about the name of the entity. If someone not listed on the SCC's records as a corporate president or vice-president wishes to sign, have the corporation provide a corporate resolution or other documentation (incumbency certificate) evidencing the authority of the person signing. Many large corporations will have a standing resolution, or perhaps a provision in their corporate articles or bylaws, authorizing a regional officer to execute deeds.

Virginia recognizes two forms of corporate entity: a stock corporation and a non-stock corporation. Shareholders and Directors govern stock corporations. Transactions in the ordinary course of business may be authorized by the directors without shareholder approval if the corporate governance documents do not require a different procedure. Va. Code § 13.1-723. Transactions involving all or substantially all the corporate assets require shareholder approval. Va. Code § 13.1-724.

Non-stock corporations may have members but may be organized without them. Va. Code § 13.1-819. The directors may authorize transactions in the ordinary course of business without member approval. Va. Code § 13.1-899. Transactions other than in the ordinary course would need to be authorized by a resolution adopted by the board of directors after giving notice to the members. Va. Code § 13.1-900.

Your title insurer may require copies of certificates of good standing, organizational documents, bylaws, notices, resolutions, or written consents in lieu of a meeting in order to insure the purchase from a corporation.

A dissolved corporation may continue its business for the purpose of fulfilling the plan and disposing of its assets, meaning that the corporate officers can continue to sign contracts and deeds for that purpose. Va. Code § 13.1-745. If the corporate charter is terminated for failure to pay the annual registration fee or file the annual report, then title to the corporate assets vests in the directors as trustees in dissolution. Va. Code §§ 13.1-752-753, 13.1-914-915. The circuit court may also appoint a receiver to dispose of a remaining asset of a corporation. Va. Code §§ 13.1-748, 13.1-910.

29-2.02(c) Partnerships

Partnership property should be conveyed or mortgaged in the same style or manner in which title was acquired. However, the signatures which may be required will be controlled by state law or practice and by the terms of the partnership agreement. In addition, the following issues must be considered and addressed:

1. When the title to partnership property has been taken in the name of one or more of the partners, you should consider whether state law requires the signature of the spouse also. If it is difficult to determine that the property is indeed "partnership property," it may be prudent to have the spouses join in the execution in those states where that is a normal requirement for non-partnership property.
2. Under the Uniform Partnership Act (Va. Code § 50-73.79 et seq.), when less than all of the existing partners execute a conveyance of partnership property, you must determine the authority of the partner or partners to act on behalf of the partnership. Specific authority from the other partners must be secured or all partners must join in the execution of the instrument.

29-2.02(c)(1) General Partnerships

Property acquired by a partnership is property of the partnership and not of the partners individually. Va. Code § 50-73.89. Each partner is an agent of the partnership for the purposes of carrying on the ordinary business of the partnership, and the act of a single partner can bind the partnership unless the partner had no authority to act and the person with whom the partner is dealing knew or had received notification that the partner lacked authority. An act not in the ordinary course of the partnership's business requires the consent of all partners. Va. Code § 50-73.91. A deed signed by a single partner is sufficient to transfer title to partnership property, Va. Code § 50-73.92, assuming, that is, that the partner is properly authorized and the transaction is in the partnership's ordinary course of business. A general partnership may be created by means of a written partnership agreement, although a partnership agreement may be oral or implied, Va. Code § 50-73.79 (definition of "partnership agreement"), and while a written agreement may be filed the State Corporation Commission and locally with the land records, Va. Code § 50-73.83(A) and (B), there is no requirement for a partnership to do so.

A partnership may file with the SCC a "statement of partnership authority" which, among other things, will name all partners and identify the names of any partners authorized to execute a deed in the partnerships name. Va. Code § 50-73.93. If such a statement is filed, anyone dealing with the partnership is deemed to have constructive knowledge of its contents and restrictions relative to conveyances of real property for a five-year period, unless earlier terminated. A person named as a partner, or as having certain authority relative to the partnership in a statement filed with the SCC may file a "statement of denial," which may include a denial of the person's partner status or his authority to act. Va. Code § 50-73.94.

Your title insurer may require copies of certificates of good standing, organizational documents, partnership agreements, statements, any amendments, notices, resolutions or written consents in lieu of a meeting in order to insure the purchase from a general partnership.

29-2.02(c)(2) Limited Partnerships

Limited partnerships are required to file a certificate of limited partnership with the State Corporation Commission, which among other things will include the names and addresses of each general partner. Va. Code § 50-73.11. Unfortunately, that information is not available online, but a copy of the certificate can be requested from the SCC for a copying and certification fee. The general partners of a limited partnership are agents of the partnership for purpose of carrying on the ordinary or usual business of the partnership to the same extent as a partner in a general partnership, Va. Code § 50-73.29, meaning that an act of a general partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by all the other partners, including all the limited partners.

Any partnership, either limited or general, may also register to become a "Registered Limited Liability Partnership." Va. Code § 50-73.132. Such entities must file annual continuation reports with the SCC. Va. Code § 50-73.134. The statement of registration may also serve as a statement of partnership authority, denial of authority, or other matters. Va. Code § 50-73.136.

Your title insurer may require copies of certificates of good standing, organizational documents, partnership agreements, statements, any amendments, notices, resolutions, or written consents in lieu of a meeting in order to insure the purchase from a limited partnership or a registered limited liability partnership.

29-2.02(d) Limited Liability Company

A limited liability company signs by a "member," or if the LLC is run by a manager, then the manager signs. Va. Code § 13.1-1021.1(C). The statute clarifies that the agency of a member or of a manager to convey property is only with respect to the apparent carrying on of the

ordinary course of the company's business, unless the member or manager had no authority to act and the buyer was aware of such limitation. Va. Code § 13.1-1021(B)(3). Unfortunately, the State Corporation Commission will not have records identifying the members or managers of an LLC. The LLC should be asked to produce a copy of its Articles of Organization, which in most cases will identify the members and the manager, if any. However, the Articles are not required to identify members or managers, Va. Code § 13.1-1011, and if the Articles do not, the locality may have to content itself with a certificate of incumbency signed by all known members. Most title companies will require the LLC's organizational documents to be produced to verify the authority of a member or manager to sign. Where there is no written operating agreement (which, unfortunately, does happen), the company is required by Va. Code § 13.1-1028 to keep a copy of its "membership list" showing the names and business addresses of all members. You may also wish to search the land records for other documents also signed on behalf of the LLC to check for consistency.

Your title insurer may require copies of certificates of good standing, organizational documents, operating agreements, statements, any amendments, notices, resolutions, or written consents in lieu of a meeting in order to insure the purchase from a limited liability company.

29-2.02(e) Trusts

Trusts can be created in several ways (e.g., by a written trust agreement or through a will), and a full discussion is beyond the scope of this chapter. An increasingly common estate planning practice is for realty owned by a married couple to be held in a family trust, which is likely not recorded, meaning that the seller may be asked to produce a copy of the trust to verify the identities of the trustees and their authority to convey property. For a testamentary trust, the recorded will should be examined. If the will has not been recorded or probated, then the seller may need to prove the trust was established and remains in existence.

Your title insurer may require copies of certificates of qualification, trust documents, any amendments, notices, accountings, resolutions, or written consents in lieu of a meeting in order to insure the purchase from the trustee.

29-2.02(f) Business Trusts

The Virginia Business Trust Act, Va. Code § 13.1-1200 et seq., requires a business trust (which may include a real estate investment trust) to file "articles of trust" with the SCC, Va. Code § 13.1-1211. Such trusts governed by a "governing instrument" that may detail the authority of its trustees and the manner in which the trust's assets, including realty, may be conveyed. Va. Code § 13.1-1219. Before acquiring title from a business trust, the locality should obtain from the SCC a copy of the articles of trust and a certificate of good standing and from the trust a copy of the governing instrument.

Your title insurer may require copies of certificates of good standing, organizational documents, governing documents, any amendments, notices, resolutions, or written consents in lieu of a meeting in order to insure the purchase from a business or real estate trust.

29-2.02(g) Churches and Unincorporated Associations

29-2.02(g)(1) Incorporated Churches

In 2006, Va. Const. art. IV, § 14, was amended (following *Falwell v. Miller*, 203 F. Supp. 2d 624 (W.D. Va. 2002)) to allow churches and other religious institutions to incorporate. If incorporated, a church may sign real property sales contracts and deeds as corporations do generally (see section [29-2.02\(b\)](#)).

29-2.02(g)(2) Churches Controlled by Trustees

Many churches have not incorporated, and their property is owned by trustees appointed or confirmed by the local circuit court. Va. Code § 57-8. In such a case, the church must obtain consent of the circuit court before conveying or encumbering any portion of its property. Va.

Code § 57-15. Many churches are unaware of this requirement, and you will have to advise them. In practice, circuit courts grant such consent freely, provided that the court is provided with documentary evidence that the church has followed its own bylaws or other formative documents in electing to sell its property. See also Va. Code § 57-16, which allows certain churches to convey property without a court order whenever the laws, rules, or ecclesiastic polity of the church or sect allow a bishop, minister, or other officer to do so. The Catholic Church, for one, holds title to real property in this manner, and a diocesan bishop will likely have authority to sign contracts and deeds. (There are two Catholic dioceses in Virginia: the Diocese of Arlington contains all or part of twenty-one counties, and the Diocese of Richmond contains the rest).

29-2.02(g)(3) Benevolent Associations

The laws applicable to conveyance of property by churches are also applicable to certain benevolent associations, including the Freemasons, Odd Fellows, Sons of Temperance, posts of Veterans of Foreign Wars and the American Legion, Spanish War Veterans, Disabled American Veterans and other veterans' associations, benevolent and literary associations, school leagues, and groups organized for rural community civic purposes and for improvement of farm life. Va. Code § 57-19. See Va. Code § 57-20 for limits on the amount of land certain benevolent associations may own.

29-2.02(g)(4) Unincorporated Associations

Unincorporated associations cannot, at common law, hold or convey title to real property in their own names, even though Va. Code § 8.01-15 allows them to sue and be sued. 6 Am. Jur. 2d *Associations and Clubs* §§ 13, 14 (1963). If it appears the vesting deed named the association as grantee and it can qualify as a benevolent association, as defined above, it should be able to petition the circuit court for the appointment of a trustee to execute documents consummating the transaction.

29-3 ACQUISITION AND DISPOSITION OF REAL PROPERTY

29-3.01 Acquisition

Localities may acquire such realty as they desire for any public use by purchase, gift, devise, bequest, exchange, lease, or otherwise, within their jurisdictions. Va. Code § 15.2-1800(A). Cities and towns may also acquire realty for public uses outside of their boundaries, while counties may do so only when expressly authorized by law. Va. Code § 15.2-1800(C).

Cities and counties may acquire land within their boundaries for purposes of the development of business and industry as long as they do not do so by condemnation. Towns, however, may purchase land for such purposes within their boundaries and within three miles outside of their boundaries. All localities must hold a public hearing before acquiring land for such purposes. Va. Code § 15.2-1802. See, however, Va. Code § 15.2-4917, which authorizes any locality to acquire (but not by condemnation) a "facility site" within or without its boundaries for the purposes of conveyance to an economic development authority. In such a case, the conveyance may be authorized by a resolution of the governing body without the necessity for the requirements imposed by other statutes for disposition of real property. Va. Code § 15.2-4917.

Every deed purporting to convey realty to a locality shall be approved by counsel, and the acceptance of the conveyance must be evidenced on the face of the deed or in a separately recorded instrument. Va. Code § 15.2-1803. A number of localities have adopted standing resolutions authorizing their chief administrative or executive officer to sign deeds conveying realty to the locality to show acceptance. Virginia Code § 15.2-1803 appears to have been adopted as an attempt to prevent owners of undevelopable land or land on which taxes owed exceed the land's value from surreptitiously recording a deed conveying the land to the locality in order to rid themselves of the tax burden.

Counties operating under the county manager plan are required either to have title searched for every purchase of realty exceeding \$1,000 in consideration or to acquire a policy of title insurance and file it with the clerk of the circuit court along with the deed. Va. Code § 15.2-728.

29-3.02 VFOIA

The Virginia Freedom of Information Act (VFOIA) provides protection to records created during contract negotiation. Virginia Code § 2.2-3705.1(12) protects from disclosure any records relating to the negotiation of a contract where bargaining is involved “and where the release of such information would adversely affect the bargaining position or negotiating strategy of the public body.” Virginia Code § 2.2-3711(A)(3) allows closed meetings for discussion or consideration of the acquisition of real property for a public purpose or the disposition of public property where discussion in an open meeting would adversely affect bargaining position or negotiating strategy. The final contract, however, will be a public document obtainable under VFOIA.

29-3.03 Conveyances

At first glance, the procedure to be followed in conveying an interest in realty seems relatively straightforward, although cities and towns have special requirements applicable to them (but not to counties, a surprising reversal of the general favor that the General Assembly usually reserves to municipal corporations to the neglect of counties). Virginia Code § 15.2-1800(B) requires, with some exceptions, that there be a public hearing before any interest in land is conveyed, whether through a fee conveyance of title, an easement, or other form of conveyance or encumbrance. The hearing need only be advertised once in a newspaper having general circulation in the locality at least seven days prior to the public hearing.⁶ Va. Code § 15.2-1813. The same subsection says, however, that no hearing is needed for the leasing of realty to another public body, political subdivision, or authority of the Commonwealth or the conveyance of easements, including beneficial easements and utility easements for transportation projects, across the locality’s own property if consistent with the comprehensive plan and for purposes of the improvement of the locality’s own property, for example, utility easements serving a public building (i.e. the locality’s site development easements). In such cases, a resolution authorizing the execution of a deed will suffice. The vacation and conveyance of interests in easements and roads created through the subdivision or zoning process are subject to their own requirements, however, and are not addressed here. See, for example, Va. Code §§ 15.2-2270, 15.2-2271, 15.2-2272, and 15.2-2274 as to vacations of conveyances by reason of site plans and subdivision plans and Va. Code §§ 15.2-2006 and 15.2-2208 for an alternate method for vacating and conveying certain streets.

A title insurer for the purchaser may require copies of the board resolutions, including vote totals where a supermajority of the board is required, and any delegations of authority, if

⁶ Additional requirements apply to cemeteries: before selling a cemetery to a private owner, a county or city must make a good faith effort to ensure that ownership of the cemetery is vested in the estate of the last owner of record or that permission for the sale has been granted by family members or descendants of the owner. Va. Code § 57-35.37(A). A “good faith effort” requires that the locality attempt to contact all known family members and descendants of the owner at least three separate times by phone, mail, or by visiting the last known address of the family members or descendants. If the county or city is unable to successfully contact a family member or descendant, it must utilize two different contact methods listed above on a total of three different occasions in its attempts to reach the family members or descendants of the last owner of record of the cemetery. Va. Code § 57-35.37(B). The locality must keep written records of each attempt. *Id.* The locality must also publish a notice in a newspaper of general circulation in the locality at least two weeks prior to the sale (or as soon thereafter as possible) and on its website, if one exists, of any publicly owned property that contains a known cemetery, graveyard, or other place of burial. Va. Code § 15.2-978. The notice shall specify that a cemetery is present on the property. No notice is required if the property is a significant historic or archeological site and public disclosure of its location would jeopardize the site. *Id.*

the signer is not identified in, or not the same person as identified in, the resolution in order to insure the purchase from the county.

Virginia Code § 15.2-734 sets forth special provisions applicable to a county having adopted the county manager plan as its form of government.

Virginia Code § 15.2-953 allows donations of real property to certain charitable or nonprofit organizations but does not suggest that a conveyance of realty for such purposes may ignore the procedural requirements otherwise required for other conveyances of realty.

29-3.03(a) City or Municipal Corporation

Article VII, § 9 of the Virginia Constitution restricts the disposition of real estate by cities and towns as follows:

No rights of a city or town in and to its waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, or other public places, or its gas, water, or electric works shall be sold except by an ordinance or resolution passed by a recorded affirmative vote of three-fourths of all members elected to the governing body.

No franchise, lease, or right of any kind to use any such public property or any other public property or easement of any description in a manner not permitted to the general public shall be granted for a longer period than forty years, except for air rights together with easements for columns of support, which may be granted for a period not exceeding sixty years. Before granting any such franchise or privilege for a term in excess of five years, except for a trunk railway, the city or town shall, after due advertisement, publicly receive bids therefor. Such grant, and any contract in pursuance thereof, may provide that upon the termination of the grant, the plant as well as the property, if any, of the grantee in the streets, avenues, and other public places shall thereupon, without compensation to the grantee, or upon the payment of a fair valuation therefor, become the property of the said city or town; but the grantee shall be entitled to no payment by reason of the value of the franchise. Any such plant or property acquired by a city or town may be sold or leased or, unless prohibited by general law, maintained, controlled, and operated by such city or town. Every such grant shall specify the mode of determining any valuation therein provided for and shall make adequate provisions by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates and the maintenance of the property in good order throughout the term of the grant.

Accordingly, cities and towns may sell, or convey rights in, their public property only upon adoption of an ordinance on an affirmative vote of three-fourths of the membership of the governing body and must override a veto by the mayor by the same margin. Va. Code § 15.2-2100(A); see *Stendig Dev. Corp. v. Danville*, 214 Va. 548, 202 S.E.2d 871 (1974) (decided under former § 125 of the 1902 Virginia Constitution; three-fourths vote limitation of the Constitution applies only to the sale of property dedicated to public use).

For a lease or franchise “or right of any kind to use public property or any other public property or easement of any description” in city or town property in excess of five years, the bidding procedures in Va. Code § 15.2-2100(B) must be followed. That provision requires publication of a solicitation for bids once a week for two weeks in a newspaper having general circulation in the locality, requesting written bids to be opened in public session per Va. Code § 15.2-2102. A brief summary of each bid is to be read aloud, and at the time of opening bids additional bids may be offered for consideration. The city or town council may make such further investigation as is deemed prudent, after which an award may be made to the highest bidder by adoption of a suitable ordinance. Va. Code § 15.2-2102. The city or town may accept a lower

bid but must set forth its reason for doing so in the ordinance awarding the franchise. If no satisfactory bids are received, the locality may readvertise, and if no bid is received the city or town council may make an award of the lease or franchise to any person who has applied for it. Va. Code § 15.2-2103. No lease or franchise may be granted for a period in excess of forty years, except for air rights, together with easements for columns for support, which may be granted for a period not exceeding sixty years. Va. Code § 15.2-2100(B).

Amendments to previously granted leases and franchises may be made after following the above procedure. Va. Code § 15.2-2105.

The Attorney General has stated that the supermajority requirements of Va. Const. art. II, § 9 and Va. Code § 15.2-2100 are not implicated when a permanent easement is transferred to another public agency for a public purpose and not private use. Thus, a supermajority was not required to grant a permanent easement by a city to the Commonwealth for the manifestly public purposes of construction, maintenance, and repair of a public monument on public property owned by the Commonwealth. 2017 Op. Va. Att’y Gen. 207 (also stating that the forty-year limitation did not apply because a permanent easement is the equivalent of fee simple title). A supermajority was not required for a city to authorize the sale of park property to the state for purposes of constructing a highway that would later be deeded back to the city. 2004 Op. Va. Att’y Gen. 38.

29-3.03(b) Counties

For counties, the requirements set out in Va. Code § 15.2-1800 apply but not the additional requirements of Va. Code § 15.2-2100 et seq. Counties may grant leases or “franchises” in their land unrestricted by the forty-year limit imposed on cities and towns by Va. Code § 15.2-2100(B).

29-3.03(c) School Boards

School boards are empowered to acquire realty in their own name, or a city may, by mutual consent of the school board and the city council, have school property titled in the name of the city. Va. Code § 22.1-125. Schools may acquire realty by gift, purchase, condemnation or otherwise, and have authority to acquire by eminent domain. Va. Code § 22.1-127. If the realty is not located in the locality’s boundaries, the site cannot exceed fifty acres. Va. Code § 22.1-126.1. A school board must either have title searched and certified by an attorney or purchase a title insurance policy for any land purchased. The attorney’s opinion of title or the title policy shall be filed with the clerk of the school board along with the deed. Va. Code § 22.1-128. Notwithstanding Va. Code § 22-125, if a locality incurs a financial obligation payable over more than one fiscal year related to school property, the local governing body of the locality shall be deemed to have acquired title to the school property as a tenant in common with the school board for the term of the financial obligation. Va. Code § 15.2-1800.1.

Whenever a school board determines that some of its realty is “surplus,” the school board may adopt a resolution declaring the realty to be surplus and then may sell it and retain all or a portion of the proceeds if the locality consents, or otherwise convey the realty to the locality of which it is a part. If the school division is composed of more than one locality, conveyance will be to the locality in which the realty is situated. Va. Code § 22.1-129(A). School boards may exchange property, lease property either as lessor or as lessee, and grant easements on school property. Va. Code § 22.1-129(B). There appears to be no requirement for any kind of advertisement or public hearing before authorizing a sale or other disposition of realty.

The title insurer for the purchaser may require copies of the board resolution in order to insure the purchase from the school board. A copy of the resolution should be recorded with the deed when title is conveyed to the locality. Va. Code § 22.1-129(A).

29-3.04 Economic Development Authorities

Economic (or Industrial) Development Authorities may generally purchase land and interests in land for purposes of an “authority facility” as defined by Va. Code § 15.2-4902, regardless of whether the authority facility is then in existence. Va. Code § 15.2-4905(4). That is, an EDA can purchase vacant or developable land for purposes of future improvement or eventual sale to an entity for purposes of economic development provided that the ultimate project qualifies as an “authority facility,” the definition of which is sufficiently broad as to encompass most commercial activities. There is no particular procedure to be followed for either purchase or sale, other than a resolution adopted by the authority’s board. Virginia Code § 15-2.4904(E) requires that any lease or disposition of an authority facility must be authorized by a majority of the members of the authority’s board of directors, regardless of quorum. The title insurer may require copies of the resolutions in order to insure.

29-4 JUDICIAL AND TAX SALES

The procedural requirements for a conveyance of property through a judicial sale (as in the case of property being sold in a partition suit, for collection of debt, or a foreclosure sale) are beyond the scope of this chapter. For judicial sales, a deed will be conveyed by a commissioner appointed by the circuit court. See Va. Code § 8.01-96 et seq. as to judicial sales generally. Your title insurer will be reviewing title coming through judicial proceedings to confirm that the remedy matches the prayer for relief, that all parties having an interest in the property as disclosed by the title examination (or the pleadings) have been made parties to the litigation, that a sale was ordered and the terms of the sale complied with, and that the appeal period has expired. For a full discussion, see Chapter 10, Collection of Delinquent Taxes, section [10-5.03](#).

29-5 DRAFTING A REAL PROPERTY SALES/PURCHASE CONTRACT**29-5.01 Statute of Frauds**

The governmental practitioner is bound by many of the same rules as attorneys in private practice. One of the most important of those when dealing with real estate is the Statute of Frauds: “Every contract, not in writing, made in respect to real estate . . . or made for the conveyance or sale of real estate, or a term therein of more than five years . . . shall be void, both at law and in equity, as to purchasers for value and without notice and creditors . . .” Va. Code § 11-1. Further, no action can be brought upon any contract for the sale of real estate or for the lease thereof for more than a year unless the contract is in writing and signed by the party to be charged or his agent. Va. Code § 11-2.

29-5.02 Practical Considerations

In drafting an agreement for the sale or purchase of real property, you may wish to consider the following:

1. The property description in a contract is often not as detailed as will be included in the deed (which may be based on a survey not yet performed); although, as with all contracts, greater specificity is preferred over less. Descriptions by reference to street address or tax map identification numbers are common as well as the acreage, if known.
2. The price should be clearly stated either as a sale by the acre or square foot or as a “sale in gross and not by the acre or square foot.” Sales where the purchase price is to depend on a surveyed acreage are not uncommon, in which case it is typical for the buyer to order and pay for the survey (by a surveyor acceptable to both parties) with the price to be adjusted on a stated value per acre (or square foot, as the case may be). There is case law in Virginia suggesting that a failure to state that a sale is in gross where the acreage of the property or its estimate is stated, will imply that the sale is meant to be by the acre with the purchase price adjusted accordingly.

See Farrier v. Reynolds, 88 Va. 141, 13 S.E. 393 (1891); *Epes v. Saunders*, 109 Va. 99, 63 S.E. 428 (1909).

3. A deposit may be held by seller, or buyer's attorney, or the real estate agent, if there is one. The contract should specify whether the deposit will be deposited in an interest-bearing account, and if so, it is common to state that the interest will be deemed as additional deposit to be credited against the purchase price at closing or to the buyer or seller as the case may be in the event of default. There is no rule of thumb for the amount of the deposit, except that the seller will wish for it to be of sufficient size to compensate for the passage of time or any losses sustained in the event of a default by buyer.
4. A clause specifying whether the conveyance will be by general or special warranty deed or by quitclaim.
5. A clear indication of any rights being reserved, such as utility or other easements.
6. The default clause should spell out the allowable remedies in the event of a default by buyer or by seller. If representing the buyer, consider making retention of the deposit the seller's sole liquidated damages in the event of buyer's default. The buyer will wish to retain at least the right to sue for specific performance in the event of seller's default. The seller, on the other hand, may wish a broader remedy for buyer's default than the retention of the deposit, although in the writer's experience most sellers will agree to a liquidated damages clause. Beware of default provisions allowing claims for open-ended damages, such as "any other remedy allowable under law or equity."

It is common for contracts to contain a number of contingencies:

1. A "due diligence" study period (usually sixty-ninety days) to allow the buyer to enter the property and perform surveys, environmental examinations, and soil borings to determine suitability for the proposed development or inspections of existing structures, and the like. A typical clause will allow the buyer to rescind the contract and receive a full refund of the deposit prior to the end of the study period for any reason but require the buyer to repair any damages to the property caused by the examinations. If representing the seller, consider a clause requiring the buyer to provide the seller, without cost, copies of all surveys and other reports produced for the buyer in the event the buyer rescinds the contract by reason of this contingency.
2. A contingency for marketable title subject, however, to easements and other matters of record. Such contingencies typically require the buyer to report any title objections to seller by the end of the contingency period and often allow the seller time to cure title defects. If representing the seller, you will likely want the contract to state that an inability of seller to cure title defects despite diligent efforts limits the buyer's remedies in the event of default to rescission of the contract and obtaining a refund of the deposit.
3. A survey contingency, such that a survey will reveal no overlaps or gaps when compared with the boundaries of adjacent parcels. Problems can arise when the boundary descriptions of adjacent parcels do not coincide, such that a space is left between two parcels (a "gap") or they overlap. In the writer's experience, gaps do not by themselves always constitute a title issue but can be a development issue if a road or utility line is desired to access that property through the area of the gap or if the buyer owns the

adjacent property and wishes to consolidate the parcels. Overlaps suggest a title defect (unless the buyer also owns the adjoining parcel) and may be cause for a buyer to terminate the sales agreement. In practice, however, overlaps are sometimes solved by a voluntary boundary line adjustment with the owner of the adjacent lot, even if doing so requires conveying the entire area of the overlap to the adjacent owner.

4. A rezoning of the property to a zone desired by the buyer or a determination that the property is subsequently in accord with the zoning for the intended use. The length of such contingency periods will depend on what is reasonable in the locality. Because the contingency period may last many months, possibly in excess of a year depending on circumstances, a rezoning contingency may call for a larger deposit than normal to compensate the seller for keeping the property off the market for an extended time.
5. A financing contingency for the buyer if financing will be used to fund the purchase price. Localities typically pay cash for purchases out of general funds and will not have need for a financing contingency when buying. However, if bond funds will be used for the purchase, a contingency for a successful closing on the bond is suggested.
6. Where the locality is the seller, because the contract will often be negotiated and signed before formal approval by the local governing body, a contingency for such approval may be required. See generally Va. Code § 15.2-1800 et seq.; Va. Const. art. VII, § 9; and Va. Code § 15.2-2100 et seq. as to cities and towns.

The contract typically will provide for a resolution in the event any portion of the property is subject to taking by eminent domain prior to closing. A common provision allows the buyer at its option to terminate the agreement in such event (but with no default against the seller) or elect to proceed to closing and have the condemnation proceeds paid to the buyer if condemnation is concluded by the date of closing or have the seller assign any future condemnation award to the buyer if condemnation is not completed by the date of closing.

The contract may contain several covenants to be made by the seller, which may or may not survive closing. If representing the seller, you will likely attempt to have few covenants and to have no covenants survive closing, such that the buyer has no further recourse against the seller once title has been conveyed. If representing the buyer, your negotiating efforts may be to the contrary. Such covenants may include the following:

1. That the property is not contaminated with hazardous waste. The seller will wish only to covenant that it has no knowledge of contamination with the covenant not surviving closing, and the buyer's remedy for the discovery of contaminants prior to closing to be limited to rescission of the contract and a return of the deposit. The buyer may wish the seller to covenant that there are no contaminants regardless of seller's knowledge and to be liable for remediation costs even if discovered after closing. In practice, most buyers will eventually agree to accept the seller's position.
2. That the seller has title to the property and authority to convey without the necessity of the consent of any other person.
3. That the property has access to a public road (assuming, that is, that such access is believed to exist).
4. That there are no outstanding violations of any law affecting the property and no enforcement actions with respect to any claimed violations. The

selling locality will wish to covenant only that it has no knowledge of any such violations, such covenant not to survive closing.

5. That there are no unpaid bills for materials or work which could result in the filing of a mechanics lien and that the seller will release any such lien that may thereafter be filed for work performed, or materials supplied, prior to closing. Sellers typically will provide an Owner's Affidavit to this effect. See Va. Code § 29-7.04.

Buyers, by statute, have the right to select the settlement agent in certain transactions. Va. Code § 55.1-1006. It is customary in other transactions for the buyer to name the settlement agent, but the parties can agree that the seller will name the agent. The date for closing is usually described as being "of the essence," which in the case of the seller will allow the transaction to be cancelled and the property offered to another buyer at a better price if such an opportunity exists. In practice, closing dates are routinely adjusted as the need dictates, although a seller may request payment in exchange for an agreement to extend a settlement date, frequently asking for an amount equal to the interest that would be expected to accumulate on the purchase price during the extension period.

29-6 THE DEED

29-6.01 Description of the Property

The baseline requirement in both the contract and the deed is that the property be described in sufficient detail that it can be identified by location. "In a deed conveying land or an interest in land, the main object of the description 'is not in and of itself to identify the land sold . . . but to furnish the means of identification, and when this is done it is sufficient.'" *Firebaugh v. Whitehead*, 263 Va. 398, 559 S.E.2d 611 (2002) (quoting *Harper v. Wallerstein*, 122 Va. 274, 94 S.E. 781 (1918)). The description of the subject property must be sufficient to afford the means, with the aid of extrinsic evidence, of ascertaining with accuracy what is conveyed and where it is. *Smith v. Bailey*, 141 Va. 757, 127 S.E. 89 (1925). Failure to adequately describe the boundaries of land in an action for title constitutes grounds for granting a demurrer. *Matney v. McClanahan*, 197 Va. 454, 90 S.E.2d 128 (1955) ("The inadequate descriptions of the tracts of land did not advise defendants of the location, lines or dimensions of the area or areas that they were charged with wrongfully mining.")⁷ The description need not be given with such particularity as to make a resort to extrinsic evidence unnecessary. *Pavlock v. Gallop*, 207 Va. 989, 154 S.E.2d 153 (1967). A deed description is sufficient "if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property it is intended to convey." *Matney v. Cedar Land Farms, Inc.*, 216 Va. 932, 224 S.E.2d 162 (1976) (citing *Midkiff v. Glass*, 139 Va. 218, 123 S.E. 329 (1924)). Indeed, a deed conveying "all" of a grantor's property is legally (but not practically) sufficient as between seller and buyer, although it may not be effective notice as against a subsequent bona fide purchaser for value. See *Wilson v. Langhorne*, 102 Va. 631, 47 S.E. 871 (1904); *Snyder v. Grandstaff*, 96 Va. 473, 31 S.E. 647 (1898); *Mundy v. Vawter*, 44 Va. (3 Gratt.) 518 (1847). See also *Duggan v. Krevonick*, 169 Va. 57, 192 S.E. 737 (1937), where a sales contract which described the property to be conveyed as "Duggan's Inn in Hanover County, Virginia" was found to be a sufficient description of fifteen acres of land with a gas station, restaurant, and swimming pool, given that the parcel was well known in the community by that name.

The observations discussed below are submitted both as guidance in drafting contracts and deeds, and in reviewing title.

⁷ For cases discussing boundary mistakes in the adverse possession context, see *Hollander v. World Mission Church*, 255 Va. 440, 498 S.E. 2d 419 (1998); *Brown v. Moore*, 255 Va. 523, 500 S.E. 2d 797 (1998); *Chaney v. Haynes*, 250 Va. 155, 458 S.E. 2d 451 (1995); *Christian v. Bulbeck*, 120 Va. 74, 90 S.E. 661 (1916); *Clinchfield Coal Co. v. Viers*, 111 Va. 261, 68 S.E. 976 (1910); and *Schaubach v. Dillemath*, 108 Va. 86, 60 S.E. 745 (1908).

29-6.01(a) Metes and Bounds

Particularly when property is newly surveyed in connection with the intended sale, the metes and bounds description will frequently be the calls of points, compass directions, and distances that the surveyor produces, provided (in cases where title insurance is being obtained) that the surveyor relies on a title report performed by an examiner approved by the title company and the survey is consistent with the standards of the American Land Title Association (ALTA) and the National Society of Professional Surveyors (NSPS).⁸ The resulting metes and bounds description may be substituted for older descriptions in the deed, either by incorporating the new metes and bounds description into the deed or attached as an exhibit or recording the survey with the deed and incorporating it by reference in the deed's text. A new survey may contain minor discrepancies from older surveyed metes and bounds descriptions, such differences being accounted for by natural drifts in the Earth's magnetic poles if magnetic North is used as the reference point or by improvements in surveying techniques. Title companies are familiar with such discrepancies and can typically be assured by the surveyor that, notwithstanding the discrepancies, the survey accurately represent the parcel's true boundaries. Surveyors have advised the writers that complete consistency between surveys produced by different surveyors is not always to be expected, especially where curves are involved.

Except in the case of an original⁹ survey, that is, of a parcel being newly subdivided or for which no recorded survey exists, the ALTA/NSPS Land Survey standards advise that preparation of a new description should be avoided unless deemed necessary or appropriate by the surveyor and insurer. They likewise advise that preparation of a new description should generally be avoided when the record description is a lot or block in a platted, recorded subdivision. Except in the case of an original survey, if a new description is prepared, a note shall be provided by the surveyor stating (a) that the new description describes the same real estate as the record description or, if it does not, (b) how the new description differs from the record description. Increasingly, as development spreads out into farm and woodland, parcels being bought and sold will have useable surveys of record to which reference may be made in the deed, in which case a new boundary survey may be deemed advisable only if there are concerns of encroachments, gaps, or overlaps with adjacent parcels. In the absence of a new survey, a title policy will likely contain an exception for "rights or claims of parties in possession and easements or claims of easements not shown by the public records, boundary line disputes, overlaps, encroachments, and any matters not of record which would be disclosed by an accurate survey and inspection of the land," or similar language, which may or may not be of concern to the buyer. Older properties may have no survey of record. In the writers' experience, family farms or other large parcels that have been passed down through generations of a family without surveys or title searches are notorious for inaccurate deed descriptions of acreage and boundaries.

In older deeds, a metes and bounds description relying on natural monuments (such as boulders, roadways or trees) as points can be problematic where the monuments have disappeared or, in the case of roads, which have been relocated. In such cases, the title company, if there is one, or the knowledgeable buyer may insist on a new survey and incorporation of the recorded survey description in the deed.

Note that in resolving discrepancies of property descriptions in the chain of title, a distinct order of preference is applied: (1) natural monuments; (2) artificial monuments and lines; marked or surveyed; (3) adjacent boundaries; (4) calls for courses and distances; (5) designation of quantity. *Spainhour v. B. Aubrey Huffman & Assocs.*, 237 Va. 340, 377 S.E.2d

⁸ The current ALTA/NSPS standards (adopted in 2021) may be found [here](#).

⁹ Virginia standards for boundary surveys may be found in the Administrative Code at 18 VAC 10-20-370; those for "house location surveys" at 18 VAC 10-20-380; and those for topographic surveys at 18 VAC 10-20-382.

615 (1989). In *Ettinger v. Oyster Bay*, 296 Va. 280, 819 S.E.2d 432 (2018), the Virginia Supreme Court reiterated that quantity designations are the least certain mode of describing land “and hence must yield to description by boundaries and distances.”

As precise as a metes and bounds description may be, however, it may not be controlling as a description of what is actually conveyed if it can be ascertained that the intent of the parties is to convey property whose boundaries are at variance with the metes and bounds stated in the deed. If a deed description suffers from ambiguities, the intent of the parties will govern if it can be ascertained. *Poindexter v. Molton*, 237 Va. 448, 377 S.E.2d 450 (1989). For example, if a deed expresses an intent to convey all of a parcel of land, which is then described by metes and bounds that do not coincide with the boundaries of the entire property, the metes and bounds description may be disregarded, and the entire parcel will be deemed to have been conveyed. See *Gish v. City of Roanoke*, 119 Va. 519, 89 S.E. 970 (1916). Moreover, if the description contains courses and distances as well as references to the monuments, the monuments will control over the described courses and distances. *Schwalm v. Beardsley*, 106 Va. 407, 56 S.E. 135 (1907).

A description that supplies the boundary of a parcel by reference to the boundaries of abutting parcels is a variety of a metes and bounds description and can be used provided that the boundaries of the abutting parcels can be identified. Increasingly, such descriptions are being replaced in the records by more current surveyed metes and bounds descriptions.

29-6.01(b) Reference to a Plat

Where an existing survey has already been made of record or a new one is to be recorded with the deed, the property may be described by reference to the property as shown on the plat. *Schwalm v. Beardsley*, 106 Va. 407, 56 S.E. 135 (1907); *Burdette v. Brush Mountain Estates, LLC*, 278 Va. 286, 682 S.E.2d 549 (2009). Where a plat is referred to and made a part of a deed, the description is as much a part of the deed as if it were copied into the deed. *Schwalm, supra*. A repetition of what is shown on the map serves no useful purpose and introduces opportunity for conflicting false descriptions. See *State Sav. Bank v. Stewart*, 93 Va. 447, 25 S.E. 543 (1896). Lots in residential subdivisions are most commonly described in such fashion. The plat will likely depict surveyed boundaries and serve as a pictorial metes and bounds description. The survey should be recorded, for obvious reasons. Conveyances by reference to unrecorded plats may be good between the parties but void as to third parties. See *Matney v. Cedar Land Farms, Inc.*, 216 Va. 932, 224 S.E.2d 162 (1976); *Jennings v. City of Norfolk*, 198 Va. 277, 93 S.E.2d 302 (1956); see also *Ettinger v. Oyster Bay*, 296 Va. 280, 819 S.E.2d 432 (2018) (when a deed describes a lot by reference to a survey plat depicting a street as a boundary, the general rule that a deed conveys title to the center of that street applies; a mere reference to the plat does not constitute evidence of contrary intent).

29-6.01(c) Streams and Bodies of Water as Boundaries

Property may be described as being bounded by a stream, pond, or tidal water. In cases of inland ponds and private streams, there may be a presumption that the property extends to the centerline of the pond or stream. *Talbot v. Mass. Mut. Life Ins. Co.*, 177 Va. 443, 14 S.E.2d 335 (1941) (dicta); *Schwalm v. Beardsley*, 106 Va. 407, 56 S.E. 135 (1907) (dicta). Moreover, where the boundary is described as being formed by a stream, together with a description of the stream as flowing from point to point described by monuments, the “actual boundary” as formed by the stream will control. *Patterson v. Overbey*, 117 Va. 345, 84 S.E. 647 (1915). Property bordered by a body of water will be subject to the loss or gain of land through erosion or accretion, and the property boundary will shift with gradual (that is, “imperceptible” while actually occurring, even though observable over time) and natural fluctuations in the course of the stream or of the shoreline. *Carr v. Kidd*, 261 Va. 81, 540 S.E.2d 884 (2001). However, sudden changes in the course of a stream (avulsion) will not affect the location of the boundary. *Woody v. Abrams*, 160 Va. 683, 169 S.E. 915 (1933). The title of the Commonwealth to the public waters likewise shifts with the shifting sands, but that which is lost at one place is

sometimes gained at another. *Steelman v. Field*, 142 Va. 383, 128 S.E. 558 (1925). The case law suggests that if it is apparent from the deed that the boundary is to remain fixed despite fluctuations in the location of the stream bed, such intent will control. For that reason, the location of a boundary line that follows the present course of a stream will often be described not as following the stream, but as defined by metes and bounds that follow the shoreline or the centerline of the stream (a “meander line”), in order to avoid the issue of loss of land by caprice of nature. The deed must be specific on this point, as a description of property as being bordered by a stream, without more, will result in the variable stream forming the boundary even though the present location of the stream is described by metes and bounds. *Fentress v. Pocahontas Fowling Club*, 108 Va. 155, 60 S.E. 633 (1908).

Note that the Commonwealth owns the bottomlands of bays, rivers, creeks, and shores from the mean low-water mark seaward (out to a limit of three geographical miles), unless there is in the chain of title a deed showing the contrary. See Va. Code §§ 1-302, 28.2-1200 et seq., 41.1-3. See also *Commonwealth v. Morgan*, 225 Va. 517, 303 S.E.2d 889 (1983), as to “King’s Grants” recognizing that Colonial-era grants of subaqueous lands from the King of England are valid as against the Commonwealth’s claims to title. The Commonwealth is prohibited by Va. Code § 41.1-3 from conveying its interests in various kinds of realty, including ungranted beds of bays, rivers, and creeks and the shores of the sea. The Virginia Marine Resources Commission has taken the position that, with respect to man-made channels in tidal areas, the Commonwealth does not acquire title to the bottomland created simply by reason of dredging. On the other hand, the Attorney General has opined that the Commonwealth retains its claim to bottomlands that are lawfully covered with fill pursuant to a valid permit from the Virginia Marine Resources Commission or other valid authority, as may be the case when an owner restores an eroded beach. In such cases, the riparian owner is entitled to the exclusive use of the filled area (that is, the restored beach does not become a public beach) even though the Commonwealth continues to own the bottomland on which the new fill has been placed. 1981-82 Op. Va. Att’y Gen. 245.

On a side note, despite the Commonwealth’s ownership of submerged lands seaward of the low water mark, the boundary of any locality, and hence its zoning and police power, bordering on the Chesapeake Bay, its tributaries, or the Atlantic Ocean, includes any piers, wharves, docks, and other structures, but not bridges and tunnels, that have been erected along the waterfront and within the territorial jurisdiction of the Commonwealth. Va. Code § 15.2-3105; *Jennings v. Bd. of Sup’rs of Northumberland Cnty.*, 281 Va. 511, 708 S.E.2d 841 (2011).

29-6.01(d) Streets and Roads Boundaries

At common law and prior to the adoption of the predecessor to Va. Code § 15.2-2265 (relative to local government ownership of streets shown on approved, recorded, subdivision plats), a description in a deed of property as abutting a road implied a conveyance of the adjacent land in the roadway to the centerline, assuming the grantor owned the entire width of the roadway and no contrary intent was expressed in the deed. *Ettinger v. Oyster Bay*, 296 Va. 280, 819 S.E.2d 432 (2018). If the street ran along the boundary of a parcel being subdivided into lots, the owners of the abutting lots were presumed to own the entire width of the road adjacent to their parcels. See *Tidewater Area Charities v. Harbour Gate Owners Ass’n*, 240 Va. 221, 396 S.E. 2d 661 (1990); *Talbot v. Mass. Mut. Life Ins. Co.*, 177 Va. 443, 14 S.E. 2d 335 (1941). The effect of an abandonment of a road on the boundary of abutting parcels will depend on how the road or highway was created and the manner in which abandonment was accomplished. Many older roads came into being by public use without any acquisition by deed, and upon abandonment the presumption is that title will revert to the abutting landowners, each taking to the centerline. *Bond v. Green*, 189 Va. 23, 52 S.E. 2d 169 (1949). In more recent times, the Commonwealth has acquired title to roadways by condemnation or deed, and an abandonment will not result in a change in the boundaries of abutting lots. The local office of VDOT is often helpful in determining whether the Commonwealth claims title to an abandoned or vacated

highway. Subdivision streets created by the recordation of an approved plat will be conveyed in fee to the locality by virtue of Va. Code § 15.2-2265. If a local road is abandoned under Va. Code § 15.2-2006, Va. Code § 15.2-2008 allows the locality to condition the abandonment upon the purchase by an abutting property owner of any interest the locality has in the roadbed. For streets created by subdivision, the result of abandonment pursuant to Va. Code § 15.2-2272 ("Vacation of plat after sale of lot"), is to vest title to the street in the abutting lot owners. Va. Code § 15.2-2274. Abandonment by means of a vacation of a subdivision plat under Va. Code § 15.2-2271 prior to the sale of any lot merely eradicates the recorded plat lines and title remains in the subdivider.¹⁰

29-6.01(e) Description by Street Address or Tax Map Identifier

While either address or tax map number may be a legally enforceable property description, neither is recommended in the drafting of deeds. *Harper v. Wallerstein*, 122 Va. 274, 94 S.E. 781 (1918). Sales contracts will frequently identify property in such a manner, given that a more accurate description may be awaiting the production of an updated survey. A cautionary note relative to the use of a street address as a property description in a sales agreement is illustrated in *Polyzos v. Cotrupi*, 264 Va. 116, 563 S.E.2d 775 (2002). There, a realtor listed by street address a property that the owners intended to reduce in size by a boundary line adjustment plat approved but not yet recorded, retaining a portion of the property to be added to their adjacent residential property. The sales agreement was drafted using the same street address as a description, omitting a copy of the plat showing the lot line revision. In a suit for specific performance, the sellers were held obligated to sell the entire large parcel, and not the smaller one intended to be created by the boundary adjustment. Note also that while circuit court clerks may require a tax map number be included on a cover sheet, "[t]he cover sheet shall not be construed to convey title to any interest in real property . . . or be considered a part of, or affect the interpretation of, the deed." Va. Code § 17.1-227.1.

29-6.02 Warranties in Deeds

In Virginia, deeds may be of general warranty (and may refer to "English covenants of title"), special warranty, or quitclaim.

29-6.02(a) General

A covenant by the grantor in a deed, "that he will warrant generally the property hereby conveyed," shall have the same effect as if the grantor had covenanted that he, his heirs and personal representatives will forever warrant and defend such property unto the grantee, his heirs, personal representatives, and assigns, against the claims and demands of all persons whomsoever. Va. Code § 55.1-354. A general warranty is a guarantee, simply, that title is free of all defects and recourse may be had against the grantor (or against any prior grantor under a general warranty deed in the chain of title) for any title defects later discovered that occurred during or prior to the grantor's ownership.

29-6.02(b) English Covenants of Title

The words "with English covenants of title" or words of similar import in the granting part of any deed shall be deemed to be an expression by the grantor of those covenants set out in Va. Code §§ 55.1-359 through 55.1-362, inclusive, and in addition thereto the covenant that he is seized in fee simple of the property conveyed. Va. Code § 55.1-356. Specifically, the grantor warrants as follows:

¹⁰ For a good discussion of ownership of roadways, see Richard B. Kaufman's 1983 Virginia Bar Association's *VBA News Journal* article entitled "Title to Vacated Streets in Virginia Cities and Towns" and Leo Rogers's Spring 2009 [LGA conference presentation](#) on this topic.

1. "Right to Convey": that the grantor has full and absolute authority to convey the land with all buildings thereon, and with all privileges and appurtenances belonging to the land. Va. Code § 55.1-359.
2. "Quiet Possession": That the grantee, his heirs and assigns will have quiet possession of the land, without any eviction, interruption, suit, claim or demand whatever; and if the words "free from all encumbrances" are added, that the grantor shall guarantee that the possession will be free from any charges or encumbrances. Va. Code § 55.1-360.
3. "Further Assurances": That the grantor, his heirs or personal representatives, will execute such further assurances of title as may be required, at any time and on reasonable request. Va. Code § 55.1-361.
4. "No Act to Encumber": That the grantor has done no act, nor executed or knowingly suffered any act or deed by which the property conveyed will be charged, affected, or encumbered in its title, estate or otherwise. Va. Code § 55.1-362.

In *Oreze Healthcare LLC v. E. Shore Cmty. Servs. Bd.*, ___ Va. ___, 886 S.E.2d 504 (2023), the Virginia Supreme Court noted that the right to recover upon a broken covenant does not follow the land, but instead "remains a chose in action" (holding that, where deed conveying property did not assign to purchaser the seller's breach of contract action against tenant, the conveyance neither extinguished the seller's right to pursue the claim, nor transfer the claim to the buyer).

29-6.02(c) Special Warranty

A covenant by any such grantor "that he will warrant specially the property hereby conveyed" shall have the same effect as if the grantor has covenanted that he, his heirs, and his personal representatives will forever warrant and defend such property unto the grantee, his heirs, personal representatives, and assigns, against the claims and demands of the grantor, and all persons claiming or to claim by, through, or under him. Va. Code § 55.1-355. A special warranty, in short, guarantees only that no defects occurred during the time of the seller's ownership or by virtue of acts of the grantor or persons claiming through him. It offers no guarantee against defects occurring prior to the grantor's ownership, and hence is the preference of many grantors.

29-6.02(d) None or Quitclaim

A quitclaim deed purports to convey only such title as the grantor has, and makes no representation of title or even that the grantor has ownership of the property conveyed. It operates as a release by the grantor of any claims he may have to the property, and no more. Va. Code § 55.1-363. In short, the quitclaim deed says, "I may or may not own the property, or any interest in it, but whatever I own I convey to you." There is no recourse against the grantor for any title defects. Many title companies will not insure title over a quitclaim deed. Given the power to condemn title defects away, localities may feel more freedom in accepting title by quitclaim, but a quitclaim deed is obviously an inferior form of conveyance.

In practice, the buyer will want a general warranty deed and possibly one with English Covenants of Title in order to gain maximum title guarantees, and the seller will wish to offer as few guarantees as possible. However, many title companies will not offer title insurance over a quitclaim deed (or will only do so with assurances that title is nonetheless marketable), meaning that the seller's best option will be to convey by a special warranty deed. It appears to be the practice of federal agencies to convey only by quitclaim deed, which may cause no problems acquiring owner's title insurance if the United States has held title for an extended period of time. In other circumstances, consult with your title insurer.

29-6.03 Drafting practices**29-6.03(a) Explaining Variations in Names of Grantors**

In identifying the parties, it is helpful to account for changes in name or marital status or other matters affecting ownership that may have occurred since the recordation of earlier deeds in the chain of title or elsewhere and also to clarify inconsistencies that may appear in the records relating to name spellings. For example, property originally conveyed in joint tenancy to a husband and wife, with the husband now deceased, may identify the grantor as "Jane Doe, widow of John Doe," adding "and not remarried" if a curtesy interest is a potential title issue. Likewise, name changes of individuals or legal entities may be noted by stating that the grantor was "formerly known of record as" the older name. In the event that a person's name is spelled in different ways in different recorded documents (a relatively common experience), use the deed to clarify the various spellings and name changes by noting that the grantor is "also known of record as" the other name forms. Thus, Jane Marie Doe may be "also known of record as J. Marie Doe and Jane M. Doe."

Note that Va. Code § 55.1-300 requires the names of the grantor and grantee to be set out in the first clause of the deed. Where the name variation results in the name appearing in a different part of the index, it would be prudent to include the variations in that first clause.

29-6.03(b) Property Description

Use as precise a description as will be available to you. If the description of record is satisfactory, it can simply be carried forward into a new deed, and absent a new survey, the existing description will likely be all that you have. Notwithstanding the flexibility the law allows, if possible, use a reference to a recorded survey or a metes and bounds description. If you must use a metes and bounds description, proofread it carefully against the original sources to ensure it was accurately reproduced.

29-6.03(c) "And Being . . ."

Do the next title examiner a favor and include an "and being" clause to refer to the prior deed of record. While not legally required, it assists greatly in subsequent title searches, and should an error of omission or transposition creep into the current deed, identifies an earlier description which may aid in curing the error.

29-6.03(d) Housekeeping

Refer to the recordation requirements in Va. Code § 17.1-233 et seq. for technical requirements for a deed to be recorded. A few of the specifics for which a deed may be rejected for recordation are as follows:

1. The clerk may require that the surnames of any individual parties and the entire name of any entity be either underscored or capitalized. Va. Code § 17.1-223(A).
2. The clerk may require that the name of each party to such writing under whose name the writing is to be indexed as grantor, grantee, or both is listed in the first clause of the writing. Va. Code § 17.1-223(A).
3. The clerk may require that each page be numbered in a single sequence. Va. Code § 17.1-223(A).
4. For deeds conveying residential property containing not more than four residential units, with noted exemptions, the clerk shall require that the first page of the deed show the name of the person or entity who drafted it. Va. Code § 17.1-223(B).
5. For deeds conveying residential property containing not more than four residential units, the deed shall state on the first page the name of the title

- insurance underwriter or a statement that the existence of title insurance is unknown to the preparer. Va. Code § 17.1-223(B).
6. No social security numbers may be included. Va. Code § 17.1-223(B).
 7. All signatures must be notarized. Va. Code § 47.1-1 et seq. For statutory forms of acknowledgment, see Va. Code § 55.1-612 et seq. A writing that appears on its face to have been properly notarized shall be presumed to have been notarized properly and shall be recorded by the clerk. Va. Code § 17.1-223(D).
 8. The clerk may require that the federal or state code section authorizing an exemption from a recordation tax be noted on the face of the deed. Va. Code § 17.1-223(A). See section [29-11.08](#) for a list of state recording tax exemptions.
 9. If the locality has a parcel identification system, the deed must show the tax map reference number or GPIN number (by whatever name they are known in the locality) on the first page. Va. Code § 17.1-252.
 10. If the grantor wishes to sign through an attorney-in-fact through a power of attorney, the original power of attorney should either be recorded with the deed or already of record in the jurisdiction where the property is located. While not a statutory requirement for the recordation of a deed, the validity of a deed and the authority of the attorney-in-fact to act on behalf of the owner may be questioned absent a recorded power of attorney, and a title insurer may not issue a policy. See *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S.E. 36 (1899) (“The authority to execute a deed must be by deed, ‘for the law requires that the power of attorney to execute a deed should be in writing, and of the same solemnity as the deed itself; . . . and the authority of the agent should be co-extensive with the act to be done, and the instrument clothing him with the authority as complete as the deed which he is to give.’”)

29-7 SETTLEMENT PRACTICES

29-7.01 Closings under the “Wet Settlement Act”

Chapter 27.3 of Title 55 of the Code of Virginia, Va. Code § 55.1-1000 et seq., governs the conduct of settlements and settlement agents in any sale of property having one to four residential units. It was originally adopted in 1997 as the “Wet Settlement Act,” although that name no longer appears in the title of the Chapter. (A “wet” settlement is one where all proceeds and necessary documents are in the settlement agent’s hands as of closing, as opposed to a “dry” settlement when documents might be signed before loan funds or other proceeds are received.) A settlement agent in such a transaction must maintain an errors and omissions malpractice policy with a minimum of \$250,000 in coverage, a fidelity bond in an amount of at least \$100,000, and a surety bond of not less than \$200,000 and (except for attorneys and certain title companies) have escrow accounts audited annually. Va. Code § 55.1-1004. In addition, the contract must include a disclosure of the buyer’s right to choose the settlement agent and state that the buyer has the right to receive a copy of the settlement service guidelines of the Virginia State Bar, Va. Code § 55.1-1007, and that the agent must disburse proceeds within two days of closing. Va. Code §§ 55.1-1008, 55.1-903. The requirements of the Wet Settlement Act will convince most local government attorneys to advise their locality to employ an outside settlement agent for a covered transaction.

29-7.02 Outside Settlement Agents

In-house local government counsel may legally handle any real estate closing (subject to the requirements of the Wet Settlement Act, as applicable), and will typically handle the acquisition of easements and other simple transactions. However, the settlement agent is typically considered the agent for the buyer (the buyer will likely assume so) and acting as closing agent when the locality is not the buyer may present issues of conflicts of interest. Moreover, if the locality is the buyer and wishes to buy an owner's title policy (which is recommended), title companies typically will not issue a policy except on the basis of a title search performed by an attorney with significant real property experience and who is on a list of attorneys approved by the company. In the alternative, the examination may be conducted by the title insurer's (or agent's) staff.

29-7.03 Settlement Statements

For most closings in which localities are involved, a variation of the familiar HUD-1 settlement statement may continue to be widely used, and many settlement agents may resort to it automatically because of its familiarity. For sales of residential property in which a loan is involved, a five-page Closing Disclosure form has replaced the two-page HUD-1 form, which was declared obsolete in 2015. The HUD-1 assumes an institutional lender, and hence the buyer is referred to as the "borrower." In a simple all cash transaction with no lender, most of the lines on a variant of the HUD-1 form will prove superfluous, and if a local government attorney is acting as settlement agent for a cash purchase by the locality, a simple settlement statement may be prepared and the use of the HUD-1 form avoided. A self-prepared settlement statement usually shows the buyer's transaction on one page and the seller is on another, but there is no reason both cannot be combined on a single page. The American Land Title Association has prepared [model settlement statements](#) to supplement the Closing Disclosure for use in both loan and cash transactions.

29-7.04 Mechanics' Liens and Owner's Affidavits

Many of the affidavits required by a title insurer at closing serve the purpose of making seller representations run directly to the insurer, as well as to the buyer. Historically they addressed "off record" concerns, such as unfiled mechanics' liens and unrecorded leases. Insurer's claims experience has led to additional representations regarding other "off record" matters.

Mechanics' liens should not be an issue when a locality sells its realty, because government property is exempt from such liens. *Solite Masonry Units Corp. v. Piland Constr. Co.*, 217 Va. 727, 232 S.E.2d 759 (1977); *Thomas Somerville Co. v. Broyhill*, 200 Va. 358, 105 S.E.2d 824 (1958); *Legg v. Cnty. Sch. Bd. of Wise Cnty.*, 157 Va. 295, 160 S.E.60 (1931); *Phillips v. Rector of UVA*, 97 Va. 472, 34 S.E. 66 (1899); *Manly Mfg. Co. v. Broaddus*, 94 Va. 547, 27 S.E. 438 (1897). However, mechanics' liens may be a factor when property is being purchased from a private entity. Liens may be filed against property on which work has been performed by anyone performing labor or furnishing materials in the amount of \$150 or more, including the reasonable rental value of equipment. Va. Code § 43-3. A memorandum of lien may be filed not later than ninety days from the last day of the month during which labor or materials were supplied or in any event not later than ninety days from the date the building or other work is completed or work thereon terminated. Va. Code § 43-4. The lien relates back to the time that the work was performed or the equipment or materials supplied, even though the memorandum of lien may be filed later and will take priority over construction loans and permanent financing deeds of trust. Va. Code § 43-21.¹¹ Suit may be brought to enforce the lien up to six months from the time the lien was recorded or sixty days after work on the structure was completed or terminated, whichever is later. Va. Code § 43-17. Consequently, realty may be subject to an unrecorded lien at the time of closing for which reason title companies will routinely require that the seller execute an Owner's Affidavit attesting to the fact

¹¹ A general contractor may contract in writing to subordinate his lien rights to prior recorded and later recorded deeds of trust. Va. Code § 43-21.

either that no work has been performed on the property for a period of time preceding closing or, alternatively, that any such work has been paid for and that the owner will hold the title company harmless from any subsequent mechanics' lien claims. Localities, when selling, will likely be asked to sign an owner's affidavit at closing despite the immunity of government property from mechanics' liens, since after closing, the immunity would no longer exist.

29-8 TITLE INSURANCE

In the 21st century world, title insurance companies fulfill many of the roles formerly occupied by private practice real estate attorneys, especially in the urban areas of the Commonwealth. Insurers examine title to properties, provide escrow services, and issue insurance policies protecting "against loss by reason of liens and encumbrances upon property, defects in the title to property, and other matters affecting the title to property or the right to the use and enjoyment of property." Va. Code § 38.2-123. An advantage of a title policy over the traditional attorney's opinion is that the title policy is governed by contract law rather than negligence law. As corporate entities with perpetual existence and a statutory obligation to safeguard reserves, insurers are more likely to be in existence if a loss occurs long after the participants in a transaction retire or die. A disadvantage of the title policy is that the insurer, with its obligation to defend claims, is less likely to insure over doubtful matters. Another concern for the cost-conscious municipal attorney is that premium expenses on small transactions may make the cost appear exorbitant, and many title insurers will not offer their examination and escrow services on a freelance basis. Notwithstanding that caveat, a title insurer can become a valued member of the local government attorney's circle of resources.

29-8.01 Policies

Insurers predominantly issue two classes of policy: Owner's and Lender's. A less frequently used Seller's policy is also available. The American Land Title Association (ALTA) provides policy forms on its [website](#). ALTA has also drafted dozens of endorsement forms available to supply special coverages. The Owner's form provides insurance against loss for four basic risks:

- Title being vested other than as stated in the policy;
- A defect in, or a lien or encumbrance on the title;
- Unmarketable title; and
- No right of access to and from the land.

Premiums are calculated based on the Amount of Insurance shown on Schedule A, which sets the limit on the insurer's liability. (Should the property be improved, or appreciate in value over time, an increase in the liability amount may be requested.) Owners' policies are rarely brought forward in time from the Date of Policy as any new exceptions since the Date of Policy are typically a result of the insured's actions. Excluded from coverage are matters arising from governmental regulation and police powers (except to the extent a notice of violation was recorded in the land records), including condemnation or eminent domain, matters known to the insured and not disclosed to the insurer or not in the land records, and claims arising from federal bankruptcy or state creditors rights law. Losses from those matters identified by the insurer during the title examination and included within the exceptions to title are also not covered. The insurance contract is governed by the conditions of the policy. Lenders' policies include additional coverages specific to the nature of their security interest in the property and the priority of their lien. The preliminary title information and the requirements the insurer will insist be satisfied prior to issuing a policy appear in the commitment to insure.

29-8.02 The Nature of the Insurance

The effective date of a title insurance policy is typically the date the vesting documents are recorded. The title policy, unlike many casualty lines of insurance, insures against loss arising from defects occurring prior to the effective date, and the one-time premium is paid when the policy issues. Title insurance is a risk-elimination line of insurance, and the requirements in the

commitment are intended to address those risks discovered during the title examination or potentially arising in the transaction documents. In the event a claim arises, the title insurer may pay the amount of insurance to the insured, pay or otherwise settle with those seeking to enforce the defect claimed, or defend/prosecute litigation to establish the title as insured.

29-8.03 Services the Insurer Can Provide

The most obvious service an insurer provides is the title examination that serves as the foundation of the policy. While insurers have a bank of previously issued policies upon which they rely to reduce the time and expense of examination, the general rule calls for an examination extending back sixty years to a general warranty deed. In those areas where development occurred more than sixty years ago, the examination may be extended further back in time to encompass the actions taken by the developer. Whether title is examined by an approved attorney or an insurer's employee, an error in the examination is one of the risks insured against (the insurer may seek reimbursement from the examination provider, but the insured will not have to).

Another service often provided is that of escrow agent or settlement agent. The title insurer, as an impartial third party, is an ideal candidate to fulfill the fiduciary obligations inherent in those roles.

As the insurer, along with its employees, is a layperson, it is not permitted to draft documents, perform actions, or express opinions that fall within the general category of the practice of law.

29-9 LEASES

29-9.01 General Authority

Cities, counties, towns, school divisions, and economic (or industrial) development authorities all have authority to lease property. For cities, counties, and towns, see generally Va. Code § 15.2-1800(B), and for cities and towns, see Va. Code § 15.2-2100, discussed in section [29-3.03\(a\)](#), for procedures and limitations for leases (or "franchises") in public property. For school divisions, see Va. Code § 22.1-129(B), and for economic development authorities, see Va. Code § 15.2-4905(5). We will leave it to the reader to search the Code of Virginia for authority pertaining to other types of local government authorities and districts.

Leases are governed generally by Chapter 12 of Title 55.1 of Va. Code (§ 55.1-1200 et seq., "Landlord and Tenant"). Because most localities and economic development authorities, to the extent that they ever lease public property or lease property for public purposes, will be engaged in commercial leases, this Chapter will not delve into the particulars of the Virginia Residential Landlord and Tenant Act, Va. Code § 55.1-1200 et seq., or those provisions in Chapter 12 of Title 55.1 that are exclusive to residential property.

29-9.02 Drafting a Lease

The contents of a lease agreement are almost entirely a matter of negotiation between the landlord and tenant and, for the most part, not regulated by statute. Although Va. Code § 55.1-1400 et seq. sets out provisions applicable to nonresidential tenancies, the lease or rental agreement controls the landlord-tenant relationship unless such lease or rental agreement is silent, in which case the provisions of Va. Code § 55.1-1400 et seq. apply. Checklists for commercial leases can be gathered from a number of sources, including Va. Code § 55.1-1400 et seq., and a full discussion of the finer aspects of commercial leases is beyond the scope of this chapter. However, some suggested topics to be addressed in a lease are discussed below.

29-9.02(a) Identification of the Premises

For leases, this is usually a simple matter, properties typically being identified by street address, possibly with an exhibit attached showing the property boundaries. For leases of a portion of a structure, such as a storefront in a shopping center or a suite in a building, a sketch of the floor

plan of the larger structure with the rental space outlined in a contrasting color is commonly attached as an exhibit. Care should be taken in describing the premises as containing a specific floor area, as landlord and tenant may have differing thoughts about how to measure the space. It is common for architects to define area as measured from the outside of exterior walls, and the center of demising (or dividing) walls, while tenants may assume that a floor area is to be measured from the insides of exterior walls, a difference which can be significant if the rent depends on floor area. Presumably, as with real estate sales contracts, a description of leasehold premises containing a specified area may be interpreted as a lease by the square foot entitling the landlord or tenant to an increase or reduction in rent, as the case may be, in the event the stated measurement is inaccurate, although the writers have not located any case law on this point specific to leases (see discussion in section 29-5.02(1) as to conveyances). As with a sales contract, a lease may be “in gross and not by the square foot,” or the description of the premises may omit any reference to floor area altogether.

29-9.02(b) Commencement Date

In instances where the premises require improvement, particularly when the tenant will be making improvements or completing a build-out prior to use, the lease may provide for both a “lease commencement date” and a “rent commencement date,” allowing the tenant a period of rent-free occupation in order to complete necessary work.

29-9.02(c) Lease Term

This provision may address renewal options, if any, or commonly state that the lease will be converted to a month-to-month lease upon expiration if the lease is not otherwise renewed for another definite term.

29-9.02(d) Conditions of the Premises

This may be of particular importance when an economic development authority is leasing out a shell building or other newly constructed but incomplete space to be finished by the tenant. The construction industry will frequently fall back on descriptive phrases, such as a “warm shell” (meaning one that has HVAC installed and is wired for electricity) or a “warm white” or “vanilla” shell (similar, but with the walls prepped for painting). But to the authors’ knowledge, there is no case law giving such terms definite meaning, and the perceived meanings may vary between communities. Any degree of required tenant build-out should be specified in detail, along with a specification of the ownership of tenant improvements upon lease termination.

If, at the beginning of the tenancy, a condition exists in a rental dwelling unit that constitutes a fire hazard or serious threat to the life, health, or safety of tenants or occupants, including an infestation of rodents or a lack of heat, hot or cold running water, electricity, or adequate sewage disposal facilities, the tenant is entitled to terminate the rental agreement and receive a full refund of all deposits and rent paid to the landlord, provided the tenant provides notice as required by statute. Va. Code § 55.1-1234.1. The landlord may assert that the tenant is unjustified in his termination of the rental agreement and provide written notice to the tenant of his refusal to accept the tenant’s termination notice, along with the reasons for such refusal. If the tenant has not taken possession of the dwelling unit or has vacated same, he may file an action in a court of competent jurisdiction to contest the landlord’s refusal to accept the termination notice. The prevailing party is entitled to recover reasonable attorney fees.

29-9.02(e) Use of Premises

Most commercial leases will be specific concerning the allowable and prohibited uses of the premises. Carefully define all significant terms; you may find yourself defining terms that you didn’t know had to be defined such as (in one author’s experience) “sandwich” in a lease giving a restaurant operator the exclusive right to sell “sandwiches” when a new tenant in the same project began selling “wraps.” See *White City Shopping Ctr., L.P. v. PR Restaurants, LLC*, No. 200619631, 21 Mass. L. Rep. 565 (Mass. Super. Oct. 31, 2006) (deciding that a burrito is not

a “sandwich” in a similar situation involving an exclusivity clause as between two tenants in a shopping center).

29-9.02(f) Parking and Other Use of Common Areas

In addition to sufficient parking for customers and visitors, tenants may wish to have spaces designated for employee parking. Tenants are commonly required to abide by landlord’s rules and regulations for use of the common areas.

29-9.02(g) Rent

For leases by localities for office or other space, rent is usually a simple monthly amount, often with a provision for rent increases on a percentage basis after the initial terms. For economic development authorities out-leasing commercial space, rents can be more structured, often with a base rent (with escalator clause) and “additional rent” based on gross income to be verified by the periodic production of financial statements to the landlord. Other items of additional rent may include a pro-rata share of common area maintenance costs (or CAM) and payments toward utility costs for any central utility service not metered specifically for the leasehold premises. The rent provision should state how and when rent is to be paid and to whom or at what address, and specify the requirements for a late payment fee (such being common). Rent is deemed paid most typically only when received regardless of method of transmission.

29-9.02(h) Security Deposit

The standard security deposit is an amount equal to one or two months’ rent, to be held as security for payment of rent as well as for damages to the premises. The lease should indicate whether the deposit must be held in an interest-bearing account.

29-9.02(i) Liability for Taxes and Utilities

Tenants typically are liable for utilities with the landlord being liable for real property taxes, but these terms are frequently the subject of negotiation. A landlord may agree to provide all utilities in exchange for a higher rent but may wish to impose charges for utility usage above a certain amount. In a “triple-net lease,” the tenant agrees to pay applicable real property taxes, insurance, and maintenance costs in exchange for a lower rent.

29-9.02(j) Maintenance Obligations of Landlord and Tenant

Typically, the landlord is obligated to maintain all plumbing (although possibly not interior plumbing fixtures), the roof, exterior wall, structural elements of the building, and the HVAC system. The tenant typically bears responsibility for interior lighting and electrical fixtures and damage to floors, ceilings and walls, and is obligated to report promptly to landlord any repairs for which landlord is responsible (such as a leaking roof) or bear the cost of damages caused by delay.

29-9.02(k) Assignability and Subletting

Most landlords will insist on clauses allowing assignments or subleasing only with the written consent of the landlord, if such is to be permitted at all. If a lease is silent on this point, the lease is assignable. *Taylor v. King Cole Theatres, Inc.*, 183 Va. 117, 31 S.E.2d 260 (1944).

29-9.02(l) Tenant Improvements and Trade Fixtures

Many commercial leases will provide for any “tenant improvements” to remain with the premises following termination or expiration of the lease, while the tenant is free to remove “trade fixtures,” without clearly defining the distinction between the two. Particularly on the topic of trade fixtures, definitions vary. “Generally, a trade fixture is an article of personal property brought to the leasehold by a tenant that is necessary to conduct a trade or business.” *Bainbridge Holdings, LLC v. Bay Bridge Enters., LLC*, 87 Va. Cir. 429 (City of Chesapeake 2012). Landlords and tenants are free to determine between them which improvements are to be removable by the tenant at lease termination. “It is well settled that by agreement the parties

may fix the character and control the disposition of property, which, in the absence of such a contract, would be held to be a fixture, where no absurdity or general inconvenience would result from the transaction," but improvements required by the lease to be installed by the tenant will likely not be deemed a removable trade fixture unless the lease expressly allows removal. *Tunis Lumber Co. v. Dennis Lumber Co.*, 97 Va. 682, 34 S.E. 613 (1899). See *Roberts v. Yancey*, 209 Va. 537, 165 S.E.2d 399 (1969), where the Court found that booths, stools, sinks, dishwashers, refrigerators, and other items of equipment used by tenants in their restaurant business were trade fixtures that they were entitled to remove (a point that the landlord had conceded at trial), while lighting fixtures, paneling and sheetrock, and canopies or false ceilings had become so affixed to the building as to be fixtures which could not be removed. "It is said to be an essential quality of all removable erections that they shall have been made under such circumstances as show that the tenant made them of his own volition and for his own benefit, intending that they should remain his property, and not in fulfillment of a duty or obligation which he owed the lessor." *Roanoke Marble & Granite Co. v. Standard Gas & Oil Supply Co.*, 155 Va. 249, 154 S.E. 518 (1930) (citing *Tunis Lumber Co.*, *supra*) But the intention of the landlord and tenant is the determining factor; in *Hagan v. Richmond Trust Co.*, 148 Va. 528, 139 S.E. 317 (1927), the Court, after first stating the rules that railway rails are generally held to be removable fixtures, added that "the general rule . . . is always subject, among other tests, to the test of intention of the parties to make the article annexed a permanent accession to the freehold—and intention in this respect is gathered as well from the circumstances and purposes of the annexation as from the expressed intention of the parties."

29-9.02(m) Tenant to Make No Improvements to the Premises Without Landlord's Consent

The extent to which a tenant may make physical improvements to the property is negotiable, with leases most commonly stating that tenant can make no improvements to the premises without the landlord's consent and with all such improvements passing to the landlord upon termination.

29-9.02(n) Ability of Tenant to Erect Signs

Most tenants will wish to erect signage, in which case the landlord may wish to retain final approval of design and placement. Commercial leases may specify allowable sign areas and design. In a shopping center lease, the landlord frequently provides signage (along with signs for other tenants) on a monument-type sign adjacent to an entrance to the facility.

29-9.02(o) Insurance and Indemnification

The tenant typically provides insurance for the tenant's own trade fixtures and equipment, while the landlord will provide fire and hazard insurance on the building. In the event of destruction of the premises, the landlord's obligation to restore the premises is usually alleviated, or alternatively, the tenant can terminate the lease without default if the premises cannot be restored after a stated period of time. The tenant may be required to indemnify and hold harmless the landlord from liability arising from the tenant's use of the premises.

29-9.02(p) Damage to or Destruction of the Premises

Common lease terms will require the landlord to repair damages to the premises if repairs can be completed within a stated period allowing either landlord or tenant to terminate the lease if repairs will take longer with rent wholly abated if the premises are unsuitable for occupancy during the period of repair or prorated based on the portion of the premises that can be occupied if damage is partial.

29-9.02(q) Right of Landlord to Enter Premises for Inspections

A lease grants to the tenant the sole right of possession of the premises even as against the landlord, unless the lease reserved to the landlord some right of entry. *Stonegap Colliery Co. v. Kelly & Vicars*, 115 Va. 390, 79 S.E. 341 (1931) (citing *City of New York v. Interborough Rapid Transit Co.*, 125 A.D. 437, 109 N.Y.S. 885 (1908)).

29-9.02(q)(1) Condemnation of All or a Portion of the Premises

The landlord is usually entitled to all condemnation proceeds while the tenant is free to seek separate damages for personal property taken.

29-9.02(r) Default

Actions constituting default should be defined, and the tenant's opportunity to cure upon a notice of default. Most leases will not provide a notice and cure period for nonpayment of rent. Actions constituting default may include, among others:

1. Nonpayment of rent
2. Breach of any term or condition and failure to cure following notice
3. Being adjudicated a bankrupt
4. Insolvency of tenant or tenant's guarantor
5. Appointment of a trustee or receiver over the assets of tenant or tenant's guarantor
6. Tenant making a general assignment for the benefit of creditors
7. Tenant entering into an arrangement with creditors
8. A bankruptcy petition filed against tenant not being vacated within a stated period of time
9. A failure of tenant to commence occupancy and open for business within a specified time
10. Vacation of the premises for longer than a stated period of time or sale of a substantial portion of tenant's inventory or assets not in the ordinary course of business

The landlord's remedies for default will be described, commonly:

1. Acceleration of rent due for the remaining term, possibly discounted to present value
2. Right to repossess the premises by force or otherwise
3. Removal of tenant's property with no obligation to store or protect or, in the alternative, to store at tenant's cost
4. Re-rent the premises applying rent received first to amounts owed by tenant, including landlord's costs of re-renting
5. Terminate the lease
6. That all remedies are cumulative and that landlord may have other remedies recognizable at law or equity.

29-9.02(s) Attornment Clause

Requiring the tenant to recognize any successor to the landlord upon being notified of a change in ownership by foreclosure, sale, or otherwise. Virginia Code § 55.1-1408 provides that a grant or devise of a leasehold is effective without an attornment from the tenant, but the tenant has no liability to the new owner for rent paid to the grantor before being notified of the conveyance.

29-9.02(t) Estoppel Certificates

Requiring the tenant to execute, at landlord's request, a statement certifying the condition of the lease, specifically whether there is any landlord or tenant default and whether the rents are current and not paid in advance. Such certificates are commonly required by a purchaser of the premises or by a lender prior to financing.

29-9.02(u) Memorandum of Lease

In lieu of recording the lease, a memorandum of lease may be recorded. It must be signed by both lessor and lessee, identify the names of the lessor and the lessee, reference the lease itself and its date, provide notice addresses for both parties, describe the leased premises, and provide the commencement and termination dates, along with any rights to extend or renew. Va. Code § 55.1-1601. The same statute provides the necessary contents of a memorandum for an option to purchase real estate.

29-9.03 Landlord's Remedies**29-9.03(a) Notice to Terminate a Tenancy**

Apart from landlord's remedies in instances of default, under Va. Code § 55.1-1410 a tenancy in non-residential premises from year to year may be terminated by either party on three months' notice in writing prior to the end of any year of the tenancy; see also *Marks v. Gorla Bros.*, 121 Va. 491, 93 S.E. 675 (1917); *Sweeney v. W. Grp., Inc.*, 259 Va. 776, 527 S.E.2d 787 (2000); a tenancy from month to month may be terminated upon notice in writing thirty days in advance of the next rent due date unless the lease provides for a different notice period. For other tenancies, this section does not govern, and the lease terms may require some other notice or no notice. A tenancy is from month to month or from year to year (and thus is a "periodic tenancy") if it is for an indefinite period, extended from one period to another unless it is terminated by either party at the end of a lease period. *Elliott v. Birrell*, 127 Va. 166, 102 S.E. 762 (1920). The distinction between a tenancy from year to year and one from month to month is a factual issue depending upon "the character of the letting, the payment of the rent, and the attendant facts proper to be considered in seeking the intention of the parties." One fact is whether the rent is expressed as a monthly or annual rent, although the fact that rent is "measured by an aliquot part of a year" is not by itself determinative of a lease from year to year. *Id.*

29-9.03(b) Holdover Tenants

If a tenant remains in possession of the premises following expiration of the term with the landlord accepting a rent payment for the holdover period, there is a rebuttable presumption that the parties intended to create a new lease of like term to the original lease, such that a tenancy from year to year becomes another tenancy from year to year. If the lease provided for an option to renew, the presumption is that the tenant exercised the option. *Rubin v. Gochrach*, 186 Va. 786, 44 S.E.2d 1 (1947). See, however, Va. Code § 55.1-1413, by which a nonresidential tenant from year to year, month to month, or other definite term will not be obligated on a renewed lease if the holdover was not due to willfulness, negligence, or other avoidable cause, but will be liable only for damages to the landlord by reason of the holdover.

If the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or its termination, the landlord may bring an action for possession and may also recover actual damages, reasonable attorney fees, and court costs, unless the tenant proves by a preponderance of the evidence that the failure of the tenant to vacate the dwelling unit as of the termination date was reasonable. Va. Code § 55.1-1253(C).

29-9.03(c) Desertion of Premises

Unless the lease provides another remedy for abandonment of the premises by the tenant, Va. Code § 55.1-1414 allows the landlord for a tenant then in default who has left insufficient goods behind on which to levy for payment of rent to post a notice on the premises requiring the tenant to pay rent within one month if the lease is from year to year or within ten days if the

lease is month to month, following which the landlord may enter the premises and take possession.

29-9.03(d) Unlawful Detainer

Despite the standard lease terms allowing a landlord to have immediate repossession of a premises by force, if necessary, upon an uncured default, many localities will consider that an action in unlawful detainer is the wiser course of action, avoiding a tenant's claim for unlawful eviction and resulting damages. For non-payment of rent, the tenant must be provided a five-day notice to pay or vacate the premises. Va. Code § 55.1-1415.

In the case of residential properties,¹² for curable defaults other than the nonpayment of rent, Va. Code § 55.1-1245(A) requires notice and twenty-one days' opportunity to cure. If the default is not remediable, Va. Code § 55.1-1245(C) allows the landlord to terminate the lease on thirty days' notice. If the default involves certain actions by the tenant that are criminal or constitute a threat to health or safety, the landlord can terminate immediately. The action for unlawful detainer may be commenced in circuit court, Va. Code § 8.01-124, or in general district court, Va. Code §§ 8.01-126, 16.1-77(3). If the landlord is successful, the court will issue an order of possession allowing the landlord to reoccupy the premises, plus an award of such rent as is then due. Va. Code § 8.01-128. There are two statutes dealing with removal of tenant's personal property by the sheriff. Under Va. Code § 8.01-156, if tenant's personal property must be removed, it shall be overseen by the sheriff who shall place the property in a storage facility designated by the locality to be stored at the tenant's cost. If the tenant does not appear to retrieve his property within thirty days, the sheriff may sell it at auction, and if the amount realized from the sale is insufficient to pay the sheriff's costs, the locality will reimburse the deficiency to the sheriff. Under Va. Code § 55.1-1416, notwithstanding Va. Code § 8.01-156, the sheriff may place property from non-residential premises in the public way (meaning in most cases the sidewalk) in which case the tenant has twenty-four hours to remove them, after which time the landlord may dispose of them. Alternatively, the property may be placed in a storage area designated by the landlord, and the tenant has twenty-four hours to claim them, after which the landlord may dispose of them as he sees fit. If sold, proceeds are credited to the tenant's account.

29-9.03(e) Distress and Levy

Under Va. Code §§ 8.01-130.1, 8.01-130.4, and 8.01-130.6, the landlord has a lien on tenant's property found upon the premises or removed therefrom within the previous thirty days and may sue for a levy for up to six months' rent if the premises are in a city or town or any residential property and for up to twelve months' rents if the premises are used for agriculture. The procedure is set out in Va. Code §§ 8.01-130.4 and 8.01-130.5. The action for distress must be brought within five years of the rent being due on a sworn petition that the rent is due and that one or more of the criteria for attachment set out in Va. Code § 8.01-534 are satisfied. A bond will be required of the landlord. A judge or magistrate may issue the warrant for levy following an ex parte hearing, but once the personalty has been levied upon by the sheriff, the tenant may petition for a hearing under Va. Code § 8.01-130.7 to determine whether the property should be returned or may apply for a review of the ex parte order by the circuit court under Va. Code § 8.01-130.8. The tenant may also post a bond with the sheriff under Va. Code § 8.01-526 to prevent the seizure of the property. Following seizure of the property or the posting of the tenant's bond, the landlord may petition the court to have the property sold or the bond forfeited, at which time the tenant may offer his defenses. Va. Code § 8.01-130.7.

¹² This would be relevant in the event a locality purchases property occupied by residential tenants.

29-9.04 Tenant's Remedies**29-9.04(a) Rent Escrow**

While the Code of Virginia provides a procedure for escrow of rent by a residential tenant (Va. Code § 55.1-1242), there is no such remedy for commercial tenants. *See Halifax Eng'g, Inc. v. Doyle, Inc.*, 23 Va. Cir. 466 (Fairfax Cnty. 1991).

29-9.04(b) Complaint in Circuit Court

A lease is a contract and enforceable as such, and either landlord or tenant may seek an injunction or damages for breach through an action in contract. *See, e.g., Clyborne v. McNeil*, 201 Va. 765, 113 S.E.2d 672 (1960). The tenant may be assisted by the rule of construction which says that lease terms will be construed most strongly against the grantor and the intention of the parties must be ascertained by reference to the entire instrument not to disjointed parts of it. *Big Vein Pocahontas Co. v. Browning*, 137 Va. 34, 120 S.E. 247 (1923) (citing *Stonegap Colliery Co. v. Kelly & Vicars*, 115 Va. 390, 79 S.E. 341 (1913)).

29-9.04(c) Constructive Eviction

In *Buchanan v. Orange*, 118 Va. 511, 88 S.E. 52 (1916), the Virginia Supreme Court recognized a remedy of a tenant for constructive eviction if the actions or inactions of the landlord made continued tenancy impossible. One circuit court has interpreted the *Buchanan* opinion as requiring that all five elements of constructive eviction must be sufficiently pled in order to maintain a cause of action: (1) a defective condition existed on the demised premises; (2) the defective condition was the responsibility of the landlord to repair; (3) the condition required under the lease was breached by the landlord; (4) the tenant gave notice of this breach to the landlord; and (5) the tenant vacated within a reasonable timeframe. *Neurology Servs. v. Fairfax Med. PWH, LLC*, 67 Va. Cir. 1 (Fairfax Cnty. 2005). Ordinarily, to constitute a constructive eviction, there must be a complete abandonment by the tenant of the demised premises within a reasonable time after intentional conduct by the landlord permanently deprives the tenant of the beneficial enjoyment of the premises, and the burden of proof is on the tenant to show constructive eviction. *Cavalier Square LLP v. Va. Alcoholic Beverage Control Bd.*, 246 Va. 227, 435 S.E.2d 392 (1993).

29-10 EASEMENTS AND LICENSES**29-10.01 Definition of an Easement**

An easement is a privilege without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person; by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former. *Stevenson v. Wallace*, 68 Va. (27 Gratt.) 77 (1876). Former students of the preeminent Washington and Lee University School of Law may recall the pared-down definition offered by the late Professor Roger Groot of an easement as "a non-possessory interest in land." The land benefitted by the easement is referred to as the "dominant estate," and the land burdened by the easement (that is, the land across which the easement lies) is the "servient estate." Easements can arise by various means, as discussed below.

29-10.01(a) By Express Grant

An express grant is typically done by recording a deed of easement signed by the grantor in the manner of a deed of conveyance, albeit commonly without any reference to warranties of title, in which case the extent of the easement is as defined in the deed and the standard rules of the interpretation of contracts apply to determine the scope of the rights granted. *Strickland v. Barnes*, 209 Va. 438, 164 S.E.2d 768 (1968); *Hamlin v. Pandapas*, 197 Va. 659, 90 S.E.2d 829 (1956); *Gordon v. Hoy*, 211 Va. 539, 178 S.E.2d 495 (1971). If an easement is granted without express limitations on use, the easement may be used for any purpose for which the dominant estate could be used at the time the easement was created, provided however, that the use is not thereafter expanded so as to create an undue burden on the servient estate (see discussion in section [29-10.04](#)).

As with deeds generally, it is recommended that the easement deed specify the location of the easement boundaries by reference to metes and bounds or to a drawing, plat, or otherwise. If the location is not specified, then the use of the servient property by the easement owner to which the property owner has acquiesced will determine the location of the easement. *Hamlin v. Pandapas, supra*. This is the case with many older electric and other utility easement deeds that convey a general grant to extend utility lines across the servient property without specifying the location of the lines. If the utility lines are not existing and obvious, a surveyor may, in the case of electric transmission lines, for example, search the servient property closely to find evidence of the location of former transmission lines, such as the remains of power poles or depressions in the ground, regularly spaced, suggesting the former location of power poles and mark the location of the easement there. With respect to easements granted to public service corporations, be aware of Va. Code § 56-259(B), which provides that if an easement deed specifies the easement location by means other than a metes and bounds showing courses and distances, the easement will be determined by the actual location of the facilities, centered on the facilities. In the writers' experience, the sketches accompanying most utility easement deeds show only approximate locations of utility lines.

29-10.01(b) By Reservation

An easement may be retained by a seller in the deed of conveyance, perhaps most typically for access to an adjoining tract.

29-10.01(c) By Implication

Easements by implication arise from an implied grant or reservation resulting from application of the principle that whenever a party conveys property, also conveyed is whatever is necessary for the beneficial use of that property. Retained is whatever is necessary for the beneficial use of the land still possessed. *Jennings v. Lineberry*, 180 Va. 44, 21 S.E.2d 769 (1942). Perhaps most instances of easements by implication relate to the use of adjacent private roadways owned by the grantor where the conveyance of a lot, the boundaries of which are described in the deed in part by reference to a roadway, implies an easement to use the road. *Walters v. Smith*, 186 Va. 159, 41 S.E.2d 617 (1947); see also *Stoney Creek Resort, Inc. v. Newman*, 240 Va. 461, 397 S.E.2d 878 (1990) (where sale of a lot in a residential community featuring a lake, the recreational benefits of which were advertised by the developer for marketing purposes, implied an easement to the use of the lake).

29-10.01(d) By Prescription

Prescription of the easement is the equivalent of adverse possession, except that in order to establish a prescriptive easement, the claimant has the burden of proving by clear and convincing evidence that its use of the easement was "adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land over which it passes," and that it continued for at least twenty years, rather than the fifteen years required for adverse possession of a fee interest. *Johnson v. DeBusk Farm, Inc.*, 272 Va. 726, 636 S.E.2d 388 (2006); *Horn v. Webb*, 302 Va. 70, 882 S.E.2d 894 (2023). Such easements are not lightly presumed, and the burden of proof is on the claimant. *Nature Conservancy v. Machipongo Club, Inc.*, 571 F.2d 1294 (4th Cir. 1978).

Note, however, that the period for prescriptive ownership of water and sewer easements is only ten years. Va. Code § 15.2-2109.1. This section states further that it shall not affect any other requirement which may be necessary to establish a prescriptive easement.

An easement acquired by prescription is limited in scope to the use which gave rise to the easement, and while a reasonable increase in the intensity of the use, once established, may be allowed, the geographic extent of the easement is limited to the actual use over the necessary time. *Willis v. Magette*, 254 Va. 198, 491 S.E.2d 735 (1997); *Martin v. Moore*, 263 Va. 640, 561 S.E.2d 672 (2002). In *Willis*, plaintiffs established that a prescriptive easement existed for access across the servient estate but could only show historic use of a twenty-foot

wide easement area and not the thirty-foot width that was claimed. The character of the use cannot change, but its intensity can be increased “in degree only” if the increase places no additional burden on the servient estate. In *McNeil v. Kingrey*, 237 Va. 400, 377 S.E.2d 430 (1989), a prescriptive easement established for agricultural use could not be converted into commercial use. In 2007 Op. Va. Att’y Gen. 60, the Attorney General opined that VDOT could not permit installation of water lines along a road it had acquired by prescriptive easement for a public road in a county. The opinion, citing *Anderson v. Stuarts Draft Water Co.*, 197 Va. 36, 87 S.E.2d 756 (1955), recognized that the result may be different in urban areas.

29-10.01(e) By Necessity

To prove an easement of necessity, both the dominant and servient estates must have belonged to the same person at some time in the past, *Middleton v. Johnston*, 221 Va. 797, 273 S.E.2d 800 (1981), and the easement must be necessary, as opposed to merely convenient, *Fones v. Fagan*, 214 Va. 87, 196 S.E.2d 916 (1973), and will not arise merely because the easement would make the property less expensive to develop, *Jennings v. Lineberry*, 180 Va. 44, 21 S.E.2d 769 (1942). The claimant has the burden of proof by clear and convincing evidence. *Hurd v. Watkins*, 238 Va. 643, 385 S.E.2d 878 (1989). The most common easement of necessity appears to be one for vehicular and pedestrian access for a landlocked parcel where the grantor owns road frontage and conveys an interior parcel that needs access across the grantor’s retained land to reach the road. See, e.g., *Davis v. Henning*, 250 Va. 271, 462 S.E.2d 106 (1995). A dominant landowner has the right to expand an established easement by necessity without the servient landowner’s consent if the expansion does not create unreasonable burdens on the servient estate. *Palmer v. R.A. Yancey Lumber Corp.*, 294 Va. 140, 803 S.E.2d 742 (2017) (widening road to accommodate tractor-trailers for removing timber reasonable and not unreasonably burdensome).

29-10.01(f) By Estoppel

An easement may be created by estoppel if a seller of land makes affirmative representations to the buyer of the existence of an easement on land retained by the seller, as when the seller assures the buyer that the seller’s adjacent parcel would not be developed because it failed percolation tests. *Prospect Dev. Co. v. Bershader*, 258 Va. 75, 515 S.E.2d 291 (1999). In such a case, the Statute of Frauds will not be invoked to operate a fraud on the buyer, and the buyer will have a negative easement by estoppel to prevent development of the adjacent parcel by the seller.

29-10.01(g) By Previous Use

In *Carter v. County of Hanover*, 255 Va. 160, 496 S.E.2d 42 (1998), the Court distinguished an easement by previous use from one by necessity. It noted that while both easements arise by implication, an easement by necessity will not be found if there is another way of access although less convenient and which will involve some labor and expense to develop. The determination that an easement from previous use is reasonably necessary to the use and enjoyment of the dominant tract “requires a showing of need which, by definition, may be less than that required for establishing an easement by necessity, but must be something more than simple convenience.” *Id.* Whether this element is established generally will depend upon the “circumstances of the particular case.” *Id.*

29-10.02 Easements Appurtenant and in Gross

29-10.02(a) Appurtenant

An appurtenant easement is one that benefits and attaches to a dominant estate over a servient estate. It will pass with title to the dominant estate even if not expressly referenced in the deed of conveyance unless an exception is made in the deed. Va. Code § 55.1-303. Easements are presumed to be appurtenant and not simply a personal right or privilege unless a contrary intent is plain. *Prospect Dev. Co. v. Bershader*, 258 Va. 75, 515 S.E.2d 291 (1999).

An appurtenant easement for access may be relocated by the owner of the servient estate by the recordation of an instrument showing the consent of all affected parties and showing the new location. In the absence of such consent, the circuit court may be petitioned to relocate the easement with notice to all parties in interest on a showing that the relocation will not work to the detriment or undue hardship of any interested person and that the easement has been in existence for not less than ten years. Va. Code § 55.1-304.

29-10.02(b) In Gross

An easement in gross is a personal interest in one person to use the lands of another that is not attached to the ownership of any dominant parcel. At common law, they were disfavored and could not be transferred. *United States v. Blackman*, 270 Va. 68, 613 S.E.2d 442 (2005). However, Va. Code § 55.1-105 revises the common law in this respect and allows any interest in land, including an easement in gross, to be conveyed by deed or will. A public water or sewer easement conveyed to a locality would appear to be an easement in gross, there being no dominant estate of the locality being served.

29-10.02(c) Affirmative and Negative Easements

Easements are described as “affirmative” when they convey privileges to the owner of the dominant tract to use the servient tract in a particular manner or for a particular purpose. Negative easements, also known as servitudes, do not permit the dominant owner to use the servient tract but to object to a use of the servient tract by its owner in a manner inconsistent with the terms of the easement. *United States v. Blackman*, 270 Va. 68, 613 S.E.2d 442 (2005). At common law, four negative easements were recognized; those protecting the flow of air, light, and artificial streams of water and subjacent and lateral support of buildings and land. In 2005, the Supreme Court added land conservation and historical preservation easements created after 1966 to the list. *Id.*

29-10.03 Use of Land by Owner of Servient Estate

Regardless of the manner in which an easement is created, the owner of the servient estate is free to continue to use the land within the easement so long as the use does not unreasonably interfere with the enjoyment of the easement by the owner of the dominant estate. Va. Code § 55.1-305. The same is true of an easement in gross, in which there is no dominant estate, as a matter of common law. *Lester Coal Corp. v. Lester*, 203 Va. 93, 122 S.E.2d 901 (1961). Moreover, the owner of the servient estate has no obligation to repair or maintain the easement absent an express contractual provision to the contrary; the burden of maintaining the facilities within the easement which allow its enjoyment is upon the owner of the easement. *Greiner v. Columbia Gas Transmission Corp.*, 41 F. Supp. 2d 625 (S.D. W. Va. 1999); *Anderson v. Lake Arrowhead Civic Ass’n*, 253 Va. 264, 483 S.E.2d 209 (1997).

29-10.04 Expansion of Use, Burden on Servient Estate

Virginia Code § 55.1-305 provides further that the owner of the easement shall not use the easement in a way that is not reasonably consistent with the uses contemplated by the grant of the easement. This issue arises periodically when, for example, the owner of an access easement subdivides the dominant estate so that the easement originally serving a single residence now serves as a travel lane over the servient estate for multiple homes. In that regard, see *Cushman Virginia Corp. v. Barnes*, 204 Va. 245, 129 S.E.2d 633 (1963), in which the Court found that an easement deed for an access road serving three large parcels, but containing no express limitation on the scope of use, could be used for access to a residential subdivision of a 126-acre portion of the property, overturning the trial court’s limitation on the use of the easement for agricultural purposes and residential access for only one or two houses. Likewise, the Court in *Hayes v. Aquia Marina, Inc.*, 243 Va. 255, 414 S.E.2d 820 (1992), agreed that an access easement formerly serving a marina with eighty-four boat slips could accommodate an expansion of the marina to 280 slips. See also *Shooting Point, L.L.C. v. Wescoat*, 265 Va. 256, 576 S.E.2d 497 (2003); *Dalrymple v. Effingham Farm Homeowners*

Ass'n, 95 Va. Cir. 498 (Prince William Cnty. 2017) (non-residential use of easement reasonably contemplated by grant of easement).

29-10.05 Licenses

A license to use land is a mere personal right that is not transferable, creates no interest in the land, and is revocable at will. It allows entry onto land under circumstances that otherwise might constitute trespass. See *Bunn v. Offutt*, 216 Va. 681, 222 S.E.2d 522 (1976). Because a license creates no interest in land, it may be created orally and does not fall within the Statute of Frauds. *Power & Kellog v. Tazewells*, 66 Va. (25 Gratt.) 786 (1875). Licenses will be of limited use to localities, but there may be occasions when short-term entry onto land is sought and there appears to be no need for the formality of an easement or lease, in which case a letter or other communication from the owner allowing entry may be sufficient.

29-10.06 Easement over Condominium Common Area

The acquisition of an easement over a condominium represents a special situation. By virtue of the condominium form of ownership, every unit owner (and their lender) has an undivided interest in the common areas of the condominium. A statutory power is granted to the condominium association to act on behalf of all its members. Virginia Code § 55.1-1956 states:

Except to the extent prohibited, restricted, or limited by the condominium instruments, the executive board of the unit owners' association, if any, and if not, then the unit owners' association itself, has the irrevocable power as attorney-in-fact on behalf of all the unit owners and their successors in title with respect to the common elements, including the right, in the name of the unit owners' association, to (i) grant easements through the common elements and accept easements benefiting all or any portion of the condominium, (ii) assert, through litigation or otherwise, defend against, compromise, adjust, and settle any claims or actions related to common elements, other than claims against or actions involving the declarant during any period of declarant control reserved pursuant to subsection A of Va. Code 55.1-1943; and (iii) apply for any governmental approvals under state and local law.

29-11 SPECIFIC ISSUES

29-11.01 Adverse Possession

While a full discussion of the acquisition of realty by adverse possession is beyond the scope of this chapter, it should be noted that a number of Virginia cases have held that adverse possession cannot divest the Commonwealth, or by extension localities, of title. See, e.g., *Buntin v. City of Danville*, 93 Va. 200, 24 S.E. 830 (1896); *Va. Hot Springs Co. v. Lowman*, 126 Va. 424, 101 S.E. 326 (1919) (adverse possession of public right of way not permitted); *Bellenot v. Richmond*, 108 Va. 314, 61 S.E. 785 (1908) (same); *Norfolk & W. Ry. Co. v. Waselchalk*, 244 Va. 329, 421 S.E.2d 424 (1992) (one cannot obtain adverse possession against a public service company). Governments may, however, acquire property through adverse possession. The time period required to gain ownership through occupancy that is "actual, exclusive, open and notorious, accompanied by a bona fide claim of title against that of all other persons" (*Yellow Poplar Lumber Co. v. Thompson*, 108 Va. 612, 62 S.E. 358 (1908)) is fifteen years for fee title (Va. Code § 8.01-236) and twenty years for prescriptive easements (*Ward v. Harper*, 234 Va. 68, 360 S.E.2d 179 (1987)). For water and sewer easements the period is reduced to ten years, Va. Code § 15.2-2109.1. See, however, the statute of limitations on inverse condemnation claims discussed in section [29-11.02](#).

29-11.02 Inverse Condemnation

[Note: A full examination of inverse condemnation claims under the federal and state constitutions is beyond the scope of this chapter.] While localities cannot inadvertently lose title to property by adverse possession, title of a sort (permanent or temporary) can be gained inadvertently through use or physical invasion of private property, subjecting the locality to

damages by means of a claim of inverse condemnation. Typically, cases involving inverse condemnation do not seek to compel a locality to assume permanent ownership of property, but the regular occupation of private property, intentionally or otherwise, may subject the locality to compensation for damages. In recent years, several court opinions have allowed claims against localities whose drainage easements have “regularly” overflowed drainage ditches, inundating private property with floodwaters. See, e.g., *Jenkins v. County of Shenandoah*, 246 Va. 467, 436 S.E.2d 607 (1993), where “extensive flooding” of a number of residential parcels occurred because the locality allegedly performed no maintenance within a drainage easement. The Court rejected the County’s pleas in sovereign immunity, stating that the claim was in contract and not in tort. Even a single instance of flooding may support an inverse condemnation claim. See *Livingston v. VDOT*, 284 Va. 140, 726 S.E.2d 264 (2012); *Hampton Roads Sanitation District v. McDonnell*, 234 Va. 235, 360 S.E.2d 841 (1987); see also *Kitchen v. City of Newport News*, 275 Va. 378, 657 S.E.2d 132 (2008) (alleging “frequent and regularly recurring” flooding because of the city’s failure to properly control stormwater flows from development).

Emphasizing that inverse condemnation claims arise under Va. Const. art. I, § 11, the Supreme Court in *AGCS Marine Insurance v. Arlington County*, 293 Va. 469, 800 S.E.2d 159 (2017), held that just like a de jure condemnation action, a public use limiting principle applies to inverse condemnation claims. Admitting it was difficult to apply that principle to inverse condemnation claims, the Court stated that the “common thread” of the above cases was that the purposeful act or omission causing the taking of, or damage to, private property was for a public use. In *Jenkins* and *Kitchen*, governmental authorities used private property as flooding sites to handle expected overflows from the public stormwater system. In *McDonnell*, the damage to private property was for a public use because a bypass valve operating as designed poured excess sewage onto an adjacent landowner’s property. In *Livingston*, VDOT “elected to use” nearby residential developments as “makeshift storage sites for excess stormwater” by failing to maintain a tributary to a river that had earlier diverted excess water. In all of the cases, the damage resulted from more than mere negligence of a government actor participating in public function. Under this framework, the Court in *AGCS Marine Insurance* found that a complaint that a county’s sewage system had been improperly maintained so that a business suffered a sewage backup did not state a claim for inverse condemnation. The Court stated, however, that a complaint that alleged that the county *purposefully* (because of an underfunded and poorly managed maintenance program) incurred the risk of a sewage backup in order to keep the sewage system operational for all other users could state a claim for inverse condemnation.

In *Johnson v. City of Suffolk*, 299 Va. 364, 851 S.E.2d 478 (2020) (LGA filed an [amicus brief](#)), several oyster farmers alleged that the sewer and stormwater management systems maintained by the City of Suffolk and the Hampton Roads Sanitation District emitted untreated water into the Nansemond River, resulting in unsanitary conditions and rendering the oysters not harvestable. Relying on *Darling v. City of Newport News*, 123 Va. 14, 96 S.E. 307 (1918), the Virginia Supreme Court held that the inverse condemnation action must fail because there was no cognizable property interest in the right to raise oysters in favorable environmental conditions. Rather, the oyster farmers assumed the risk that the waters surrounding the leased grounds would be insufficiently pure to permit the direct harvest of oysters from them.

The statute of limitations for inverse condemnation actions is three years for suits under implied contract, Va. Code § 8.01-246(4), rather than the five-year statute for damages to property, Va. Code § 8.01-243(B), the implied contract being one between the owner and the government that just compensation will be paid for a taking of or damage to property under the Virginia constitution. See *Richmeade, L.P. v. City of Richmond*, 267 Va. 598, 594 S.E.2d 606 (2004). The language of the decision suggests that in any action seeking damages for a government occupation of land, it is the three-year statute of limitation that will apply rather than the fifteen-year limitations period for adverse possession with the exception of the ten-

year period expressly applicable to water and sewer easements mentioned in the preceding subsection, although the writers have found no case law clarifying this point.

29-11.03 Purchases on Installment, Debt Clause, Issues for Counties

The writers can find no prohibition on a locality selling realty under a contract by which the purchaser will pay the purchase price in installments and take back a deed of trust as security. However, the Virginia Attorney General has opined that purchases whereby the locality will pay the purchase price in installments with the possibility of foreclosure and loss of title in the event of default is a violation (at least as to counties) of the debt clause of the Va. Const. art. VII, § 10(b), even though the county's obligation to make payments is "subject to appropriations," because the county's assets remain at risk in the event of non-payment. 1990 Op. Va. Att'y Gen. 51. At least one local government attorney has suggested that the restrictions of the debt clause can be avoided by the mechanism of having the deed to the county placed in escrow not to be delivered (and title therefor not conveyed) until all payments have been made, while the county's use of the property in the interim can be secured by a short-term lease. The writers offer this suggestion without further comment, and there appear to be no court opinions on point.

29-11.04 Riparian Rights

The owner of property abutting a stream or through which a stream passes has the right in common with other riparian owners to use the water for domestic, agricultural, or manufacturing purposes, provided that the use does not materially diminish the flow of water. On navigable streams, the riparian owner is also entitled to access to and from the navigable portion of the water, including the right to build a pier or wharf reaching out to navigable water, subject to any regulations of the Commonwealth. *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. 875 (1904). Riparian rights may be conveyed separately from ownership of the upland parcel. *Hite v. Town of Luray*, 175 Va. 218, 8 S.E.2d 369 (1940); *Thurston v. City of Portsmouth*, 205 Va. 909, 140 S.E.2d 678 (1965). In Virginia, the construction of piers on lands claimed by the Commonwealth requires a permit. Va. Code §§ 28.2-1203 through 28.2-1205. For land to be riparian, it must be in the watershed of the stream in question and must be contiguous to the stream. *Town of Gordonsville v. Zinn*, 129 Va. 542, 106 S.E. 508 (1921). Riparian rights seem similar to easements, but case law stresses that a riparian right is not merely an easement to use the water but includes an interest in the soil under the water. *Thurston v. City of Portsmouth*, 205 Va. 909, 140 S.E.2d 678 (1965). On tidal waters, as noted in earlier sections, the Commonwealth's ownership of land seaward of the low-water mark, as well as federal legislation such as the Clean Water Act, may ameliorate the riparian owner's interests in the submerged lands. However, all beds of bays, rivers, creeks and shores of the sea within the jurisdiction of the Commonwealth may be used as a common by all people of the Commonwealth for purposes of fishing, fowling, hunting, and the taking and catching of oysters and other shellfish. Va. Code § 28.2-1200. The limits of the riparian owner's rights to erect piers and wharves on the bottomland of a navigable river are defined by a formula taking into account the owner's length of shoreline and a proportional claim to the line of navigability with lines drawn from the property lines at their intersection with the shore to the proportional share of the line of navigability thus determined. *Langley v. Meredith*, 237 Va. 55, 376 S.E.2d 519 (1989).

29-11.05 Surface Waters and the Common Enemy Doctrine

Inherent in the rights of ownership of realty is the right to fend off surface waters even if to the detriment of the adjacent owner, with some restrictions. Virginia has adopted a modified common law rule as to surface waters, which are deemed a "common enemy" that anyone may divert from their property in order to preserve or use their own land, as long as not done wantonly, unnecessarily, or carelessly nor from a natural channel or watercourse. Surface waters also cannot be collected into an artificial channel or discharge point to be directed onto the neighbor's property with increased force to the effect of causing erosion. *Mullins v. Greer*, 226 Va. 587, 311 S.E.2d 110 (1984). This is a purely private property right, and Virginia's

stormwater management statutes and regulations promulgated thereunder may prohibit local governments from approving land development plans that do not adequately provide for drainage control.

29-11.06 Due Diligence Inquiries

Many practitioners have their own due diligence checklists for real property acquisitions that address dozens of issues ranging from disposition of earnest money deposits to potential endangered species located on the property. At a minimum, the local government attorney should make sure the locality's purchase is contingent upon the following:

1. that the property is what is expected and that the seller has good title;
2. that the physical condition of the property permits the proposed use, both as regards the improvements and the land (or its appurtenances) itself. For example, a police or fire station in the center of a radio signal "dead zone" may not best serve the public necessity. A soil test may be recommended to determine whether the property is suitable for proposed construction;
3. that the existing uses or restrictions affecting the property will not interfere with the proposed use, which includes matters discoverable by survey;
4. that there are no liens (financial, environmental, or other), contracts, leases or other encumbrances that may survive the purchase and prevent or delay the locality's development;
5. that the seller exists, is in good standing, and is competent to convey the property;
6. that any representations and warranties to be made by the seller can be verified;
7. that the date to complete the investigations and proceed to closing is clear; and
8. that the local government has authorized the funding.

A survey is recommended based upon a title report to locate all easements and other matters of record, to verify the acreage, to identify evidence of roadways or easements not noted in the land records, and to identify gaps and overlaps in boundary descriptions. A "gap" occurs when the recorded boundaries of adjoining parcels do not coincide, leaving a space between them of land whose ownership is uncertain. A gap may present no impediments to development unless the purchaser intends to buy the adjacent parcel and combine the two or unless the purchaser needs to cross the gap for access or for utilities. An overlap occurs when the recorded boundaries of two parcels do not agree as to the common boundary such that the recorded boundary of one intrudes across the boundary of the other, creating a space of conflicting claims of ownership. An overlap, if not significant, is often resolved by a joint agreement by the two owners to relocate the common boundary (by recordation of an approved resubdivision plat with quitclaims of interest or other conveyances each to the other of the portions of the overlap to which each is relinquishing title) or in some cases is resolved by a conveyance of the entire overlap by one owner to the other. Short of such an agreement, an action to quiet title may be necessary.

Environmental studies vary in extent. A "Phase I" study consists primarily of a review of land records and possibly interviews of prior owners to determine if there is a suggestion that the property (or adjacent property) may previously have been used in a manner that could result in contamination. If so, then a "Phase II" study may be necessary to analyze soils and groundwater for hazardous materials.

29-11.07 Foreign Sellers**29-11.07(a) Tax Reporting or Withholding**

While the vast majority of the locality's acquisitions will be from Virginia residents, counsel should be aware of special reporting requirements for those transactions that involve non-Virginia residents or non-American taxpayers. The Virginia Department of Taxation requires the registration of sellers where the proceeds are payable to nonresident payees, defined as "every individual who is not a resident, every nonresident estate or trust, every partnership and S corporation which has nonresident partners or shareholders, or every corporation which is not formed or organized under Virginia law." Va. Code § 58.1-317. It would be prudent to assume limited liability companies are also included in the registration requirement. The forms for registration or exemption are the R-5, R-5P, and R-5E and may be found at the Department of Taxation [website](#). The registration forms, if registration is required, must be filed with the Department of Taxation before the fifteenth day of the month following the month in which title was transferred.

Any time real property is transferred, some percentage of the gross sales price must be withheld and remitted to the Internal Revenue Service unless the seller or the transaction is exempt from withholding. It is the obligation of the buyer (transferee in the language of the IRS), and not of a settlement agent, to determine if an exemption applies. 26 U.S.C. § 1445. [IRS Publication 515](#) defines a foreign person as a nonresident alien individual, foreign corporation, foreign partnership, foreign trust, foreign estate, and any other person that is not a U.S. person, including a foreign branch of a U.S. financial institution. There are ten exceptions from the withholding requirement, two of which may be of special interest to the governmental attorney in a real estate transaction. In the fourth most often used exception in transactions, the seller certifies to the buyer they are not subject to withholding because they are not a foreign person. Exception eight excepts transactions in which the property is acquired by the United States, a U.S. state or possession, a political subdivision, or the District of Columbia.

29-11.07(b) Acknowledgments

Virginia clerks are authorized to accept for recording documents acknowledged before (and under the official seal of) any ambassador, minister plenipotentiary, minister resident, chargé d'affaires, consul-general, consul, vice-consul or commercial agent appointed by the government of the United States to any foreign country, or the proper officer of any court of record of such country, or of the mayor or other chief magistrate of any city, town or corporation therein. Va. Code § 55.1-613. Members of the armed forces (including spouses) may have their acknowledgment taken by military personnel authorized to do so under 10 U.S.C. § 936(a), Va. Code § 55.1-614, or commissioned officers, Va. Code § 55.1-615. A Virginia commissioned notary may take an acknowledgment outside the Commonwealth if it is to be used within the Commonwealth. Va. Code § 55.1-616. If the party signing the document appears before a local notary, it should be remembered that the obligations of a person holding an office with notary in its name overseas do not always match those of a notary public in Virginia, and the foreign notary should arrange to affix an apostille to their acknowledgment in which a competent authority within the local government certifies the notary is qualified under the terms of the [Hague Apostille Convention](#).

29-11.08 Recording Taxes and Exemptions

State and local recordation taxes imposed by Va. Code §§ 58.1-801 ("Grantee's tax") and 58.1-814 are not due from the United States of America, the Commonwealth of Virginia or any county, city, town, district or political subdivision thereof when it acquires property. Va. Code § 58.1-811(A)(3). If the governmental entity is leasing property rather than buying, no recordation tax imposed by Va. Code § 58.1-807 will be due. Va. Code § 58.1-811(E).

Grantor's tax imposed by Va. Code § 58.1-802 is not due from a locality when it sells property. Va. Code § 58.1-811(C)(4). If the locality is obligated by law to reimburse a seller for the costs of the grantor's tax or regional congestion relief fee when purchasing land, then the

seller may be entitled to claim an exemption as well. Va. Code §§ 58.1-811(C)(5), 25.1 1-218. Deeds of gift are exempt from both Grantor's and Grantee's taxes under Va. Code § 58.1-811(D).

Localities are also exempt from the fee for Information Technology pursuant to Va. Code § 17.1-279.1.

Recordation taxes imposed by Va. Code § 58.1-803 are not due on a deed of trust given by any local governmental entity or political subdivision of the Commonwealth to secure a debt payable to any other local governmental entity or political subdivision. Va. Code § 58.1-811(B)(4).