



WEINBERG LAND USE FORUM

News

SPRING 2006

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This publication may describe some of the legal matters that the attorneys of Hirschler Fleischer have worked on in the past. Of course, case results depend upon a variety of factors unique to each case and case results do not guarantee or predict a similar result in any future case undertaken by a Hirschler Fleischer attorney.

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Legislative Action on the Agenda at the March 2006 Forum



A review of the recently concluded session of Virginia's General Assembly was the subject of the March 7 Weinberg Land Use Forum. The Forum was honored to hear from Mike Toalson, Executive Vice President and Chief Lobbyist of the Home Builders Association of Virginia, as well as Jim Theobald, Chairman of Hirschler Fleischer and Seth Ginther, principal with HF Consulting.

During the 2005 gubernatorial campaign, then Lt. Governor Kaine, promised that if elected he would introduce a legislative agenda that tied any land use planning to transportation. Once elected, now Governor Kaine made good on that promise and backed legislation that did just that. After realizing early on in the session that he didn't have the votes he needed in the senate and the house to get the legislation passed, he pulled his support on it and focused on other issues he felt he could succeed on. Accordingly, the following passed legislation includes a watered down version of what the governor called for last year on the campaign trail.

Legislation promoting better transportation efficiency includes:

HB 666 (Delegate Wardrup) eliminates the number and dollar limitations on awarding of design-build contracts by the Commonwealth Transportation Board.

HB 667 (Delegate Wardrup) improves the efficiency of maintenance operations and allows for more flexibility in privatizing maintenance contracts for transportation.

HB 676 (Delegate Wardrup) requires the Commonwealth Transportation Commissioner annually to report to the General Assembly on the Virginia Department of Transportation's efforts regarding outsourcing, privatization, and downsizing.

SB 196 (Senator Williams) allows the Commonwealth Transportation Board to enter into written agreements with localities for the building and maintenance of any of the roads in any system of state highways by local employees.

This session also dealt with the way in which transportation and land use are connected. Bills relating to this issue include:

SB 699 (Senator Houck) requires traffic impact statements to be created for new rezoning requests, so that local planners will know how much traffic would be generated before they act on a request. The Department of Transportation will also provide comments on proposed changes to local comprehensive plans before they are adopted, to help localities understand the effect changes might have on local roads.

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Acquiring VESTED RIGHTS

in Virginia

BY: CAROLINE NADAL

In this post-*Kelo v. City of New London* era, many question the inviolability of individual property rights. During its past session, the General Assembly failed to enact legislation protecting citizens of the Commonwealth from what many would characterize as the same ill-fate of Ms. Suzette Kelo, whose former home is currently being replaced with retail shopping facilities.

Fear of governmental interference, however, is not new to land developers who have historically had to concern themselves with legislative, and in particular zoning changes that negatively impact their development plans. As one example, developers and landowners were severely affected by the enactment of the Chesapeake Bay Preservation Act in 1988 requiring, among other things, a one-hundred foot buffer area surrounding RPAs, or “resource protection areas,” as defined under the Act. Only until a developer has, in some manner, acquired vested rights in his plan of development or use, is he or she afforded protection from legislative change.

Vested rights are similar to grandfather clauses. Landowners and developers may acquire vested rights in planned uses of their land that may not be prohibited or reduced by subsequent legislation. In Virginia, the doctrine of vested rights has been codified at Section 15.2-2307 of the Code of Virginia, which was significantly amended in 1998. In that section, the General Assembly set forth the specific steps a landowner must follow in order to vest his rights to use his real estate in a desired way. Specifically, “a landowner’s rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner:

- (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project,
- (ii) relies in good faith on the significant affirmative governmental act, and
- (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.”

Va. Code § 15.2-2307 (2005).

The statute further provides the following non-exclusive list of “significant affirmative governmental acts”:

- (i) the governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment;
- (ii) the governing body has approved an application for a rezoning for a specific use or density;
- (iii) the governing body or board of zoning appeals has granted a special exception or use permit with conditions;
- (iv) the board of zoning appeals has approved a variance;
- (v) the governing body or its designated agent has approved a preliminary subdivision plat, site plan or plan of development for the landowner’s property; or
- (vi) the governing body or its designated agent has approved a final subdivision plat, site plan or plan of development for the landowner’s property.

Typically, there is little question as to whether the landowner is the beneficiary of a significant affirmative governmental act. The more difficult question, oft visited by the Virginia courts, is whether the developer or landowner has met the requirements of “diligent pursuit” and “significant expense” in reliance on that significant affirmative governmental act.

For example, in *City of Suffolk ex rel. Herbert v. Bd. of Zoning Appeals for Suffolk*, 266 Va. 137, 580 S.E.2d 796 (2003), a developer, Etheridge, had acquired tracts of land totaling approximately 464 acres in the late 1980s and early 1990s. Pursuant to Etheridge’s requests, the City of Suffolk rezoned the land from “Rural Residential” to “Planned Development Housing,” as well as subsequently rezoned ten acres from “Planned Development Housing” to “General Business.” In addition, the City’s Planning Commission approved Etheridge’s preliminary subdivision plat for approximately 154 acres of the property, and subsequently granted extensions of time for submission of the final plat in order to accommodate engineering designs relating to sewer, water, storm drainage, and related items.

After Etheridge submitted its final subdivision plat but before the Planning Commission took any action, the City enacted a Uniform Development Ordinance that effectively rezoned all of Etheridge’s property, other than the ten-acre commercial section, from “Planned Housing Development” to “Commerce Park” and “Office Institutional.”

In determining that Etheridge had vested rights in the “Planned Development Housing” designation, the Supreme Court held that the rezoning of the property from “Rural

2006 COMMERCIAL REAL ESTATE

Legislation Passed

BY: CAROLINE NADAL AND JENNIFER ROSEN

Below is a sampling of summaries from the Virginia Bar Association on legislation passed by the 2006 Virginia General Assembly. Additional legislation and full texts may be obtained through the Legislative Information System at <http://leg1@state.va.us>, which may also be accessed through a link on the Virginia Bar Association website at www.vba.org.

Passed – Counties, Cities and Towns	HB1073	Conditional zoning.	Provides that localities may accept proffered conditions once a public hearing has begun if the amended proffers do not materially affect the overall proposal.	<i>Patron - Dudley</i>
Passed – Property and Conveyances	HB0320	Virginia Residential Landlord and Tenant Act; noncompliance with rental agreement; recovery of damages by landlord.	Allows a landlord to seek the award for costs of attorney's fees under § 8.01-27.2 as a part of other damages requested and an unlawful detainer action. Under current law the landlord would be required to seek such damages separately.	<i>Patron – Albo</i>
Passed – Property and Conveyances	HB1575	Utility easements.	Provides that in the case of utility easements, the easement is considered to touch and concern the servient estate and shall run with the land whether or not the easement is appurtenant or in gross. The bill applies to easements expressly granted by an instrument recorded on or after July 1, 2006.	<i>Patron – Parrish</i>
Passed – Constitutional Amendments	SB0357	Constitutional amendment (voter referendum); property exempt from taxation.	Provides for a referendum at the November 2006 election on approval of a proposed constitutional amendment relating to property tax exemptions. The proposed amendment authorizes the General Assembly to enact legislation that will permit localities to provide a partial exemption from real property taxes for real estate and associated new structures and improvements in conservation, redevelopment, or rehabilitation areas.	<i>Patron – Edwards</i>
Passed – Taxation	SB0358	Real property tax exemption in redevelopment or conservation areas or rehabilitation districts.	Authorize local governing bodies to provide for the partial exemption from taxation of (i) new structures located in redevelopment or conservation areas or rehabilitation districts and (ii) other improvements to real estate located in redevelopment or conservation areas or rehabilitation districts. The partial exemption would be a percentage of the increase in assessed value as a result of the new structure or improvement or an amount not to exceed 50 percent of the construction cost of such structure or improvement. The local governing body would be allowed to establish criteria for qualifying real estate including, but not limited to, the square footage for new structures. The bill is contingent on a constitutional amendment authorizing the exemption.	<i>Patron – Edwards</i>
Passed – Taxation	SB0186	Use value assessment and taxation; roll-back taxes.	Provides that, at the option of the locality, roll-back taxes under local use value assessment ordinances shall not apply to a subdivision, separation, or split-off property which results in parcels that do not meet minimum acreage requirements, provided that no title to the subdivided parcels is held in the name of an immediate family member for at least the first 60 months following the subdivision.	<i>Patron – Martin</i>
Passed – Property and Conveyances	SB0430	Virginia Condominium Act; authorization of condominium association to be applicants in land use matters; disclosure.	Provides that the declarant is authorized to execute, file, and process any subdivision, site plan, zoning, or other land use applications or disclosures related to the condominium during the period that the condominium is under his control. The bill also provides that once the condominium is no longer under the control of the declarant, the authority to execute such land use applications shall belong to the executive organ of the unit owners' association or a representative appointed by the unit owners' association. In addition, the bill clarifies the owner of condominiums for purposes of compliance with the disclosures in land use proceedings pursuant to § 15.2-852 and disclosures of real parties in interest pursuant to § 15.2-2289. This bill is identical to HB 128.	<i>Patron – Devolites Davis</i>
Passed – Study Resolutions	SJ0184	Construction and operation of a controlled access highway alternative to Interstate Route 95; report.	Requests the Secretary of Transportation and the Commonwealth Transportation Commissioner to explore the feasibility and desirability of entering into an interstate compact for the construction and operation of a controlled access highway between Dover, Delaware, and Interstate Route 95 southwest of Charleston, South Carolina, with their counterparts in the states of Delaware, Maryland, North Carolina, and South Carolina.	<i>Patron – Wagner</i>
Passed – Housing	SB0046	Local rehabilitation zones.	Authorizes localities to designate housing rehabilitation zones for the establishment of incentives to rehabilitate housing stock in the zone and to perform general improvement of the neighborhood. Incentives include reduced user fees, special tax incentives, special zoning, expedited permitting, and the waiver of tax liens under certain circumstances. In addition, the locality is authorized to establish a special service district to expand or improve the public infrastructure in the zone.	<i>Patron – Locke</i>
Passed – Counties, Cities and Towns	SB0374	Clustering of single-family dwellings.	Deletes certain optional provisions regarding the clustering of single-family housing and reinserts those provisions as mandatory provisions of zoning or subdivision ordinances for counties and cities that had a population growth rate of 10 percent or more from the next-to-latest to latest decennial census year. Such localities shall provide in their zoning or subdivision ordinances, applicable to a minimum of 40 percent of the unimproved land contained in residential and agricultural zoning district classifications, standards, conditions, and criteria for the clustering of single-family dwellings and the preservation of open space developments. In establishing such standards, conditions, and criteria, the localities may include any provisions they determine appropriate to ensure quality development, preservation of open space, and compliance with their comprehensive plan and land use ordinances.	<i>Patron – Watkins</i>

Residential” to “Planned Development Housing” was a significant affirmative governmental act because the rezoning was for “a specific use or density” under § 15.2-2307. Moreover, the Supreme Court held that Etheridge diligently pursued the development of the property prior to the enactment of the Uniform Development Ordinance. The Court found the following activities to be sufficient evidence of diligent pursuit over a five year period of time:

“In reliance on the 1988 rezoning of the Property to PD-H, Etheridge undertook the 1993 engineering analysis and commenced development activities with the 1994 rezoning and amended master land use plan. The City approved the revised plan and rezoned the Property from high-density residential to an overall density of only four units per acre. Since, at that point, Etheridge was proceeding alone, it was necessary to reestablish the demarcation of the development from the land of the adjoining landowner through a survey and a re-subdivision plat which were filed and approved in 1995. Etheridge also completed a comprehensive traffic impact analysis for development of the entire Property in 1994, which was reviewed by the City and later approved by VDOT. In 1997, Etheridge deeded 1.129 acres to VDOT, without compensation, for road improvements to access the Property.

Etheridge undertook to develop a plan for recreational use, which the City approved in 1996, to dedicate certain recreational areas within the Property. Etheridge also developed the entrance phase, Planter’s Station, with the preliminary subdivision plats filed in 1996 and approved by the City.”

Id. at 147-48 147-48, 580 S.E.2d at 801.

Finally, the Court held that Etheridge’s expenditures of over \$158,000 toward the development of the property amounted to a substantial expense. *Id.* at 148, 580 S.E.2d at 801.

Similarly, the Circuit Court of Spotsylvania County addressed whether a landowner had vested rights to proceed with the subdivision of its property after the county amended the zoning ordinance. In Salem Fields, LLC v. Spotsylvania County Zoning Appeals Bd., 40 Va. Cir. 289 (Va.

Cir. Ct. 1996), Salem Fields, LLC (“Salem Fields”) owned a tract of land zoned A-1 “Agricultural” that it planned to develop into a 27-lot subdivision. Spotsylvania County Planning Commission approved Salem Field’s preliminary subdivision plat at a time when the Spotsylvania County ordinance required a developer to submit its final subdivision plat for approval within one year of preliminary plat approval and to record the final plat within six months of final approval.

At the same time Salem Fields submitted its final plat for the Planning Commission’s approval, two days prior to the one-year deadline, it discovered that Spotsylvania County had amended the ordinance to require final recordation of the plat by the same one-year deadline. Because Salem Fields could not record the property by the new deadline, the Planning Commission refused to accept its final subdivision plat.

Because Spotsylvania County conceded that its preliminary approval of a subdivision plat constituted a significant government act, the sole issue for the court was whether Salem Field’s expenditures were of sufficient magnitude to entitle it to a vested right. In holding that Salem Fields did undertake significant expenditures, the court cited the following activities:

“[Salem Fields] hired an engineering firm to develop construction plans and the final plat at a cost of \$38,080.00. It obtained the services of another firm to delineate wetlands, to locate drainfields on the lots, and to coordinate review of the project by the appropriate agencies. These services cost \$16,800.00. Further, the developer obtained a construction bond from a local bank. The bond fee was \$2,190.00.”

Id. Accordingly, the court held that Salem Fields had acquired a vested right to continue with its development in conformance with ordinances in effect at the time of the preliminary subdivision plat approval.

Although not addressed in case law, another seemingly frequent scenario involving a determination of vested rights is as follows: Developer Jones acquires property where, thirty years prior, his predecessor-in-title submitted a final subdivision plat that was approved by

the county. Approximately ten years after receiving the county’s approval, the previous owner took significant steps toward developing the property in accordance with the subdivision plat, but failed to complete the development as planned. Five years ago, the county downzoned the property in such a manner that subdivision plat is out of compliance with the current zoning ordinance. Developer Jones requests a vesting determination from the county.

In this scenario, the determination will likely turn on whether the previous owner “diligently pursued” the development. County officials will aptly seize upon the fact the predecessor-in-title failed to (a) begin development within ten years of subdivision plat approval and (b) complete development within thirty years of the same. Developer Jones will have an uphill battle in convincing the county that he has vested rights in the subdivision plat despite the significant expenditures made by his predecessor-in-title, which were undoubtedly reflected in the purchase price of the property.

In sum, the above examples demonstrate, if nothing else, that a determination of vested rights is a highly factual one. A developer or landowner benefiting from a significant affirmative governmental act must establish that he or she incurred substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act. If, under this test, the property owner holds vested rights, he or she is shielded from future legislative action and is free to develop the land in accordance with his or her plans. That is... unless the government decides that the property is better suited for a shopping mall. 🏪

Jurisdictional

UPDATES

THE TOWN OF
Ashland

The Town is reviewing its Zoning Ordinance in an effort to “clean it up”, i.e., to minimize inconsistencies and improve the structure of the Zoning Ordinance. Neil Holthouser, the Director of Planning, hopes to have the first part of this effort completed by early 2007. The Town contemplates addressing substantive issues which need attention in the Fall. Currently, the Planning Department

feels that certain of Ashland’s zoning districts are too broad. The Planning Department feels that it could be good for future Town development to create additional business and industrial zoning districts to regulate more appropriately the varying types of development in Ashland.

THE COUNTY OF
Chesterfield

Best Management Practice Facilities (“BMP’s”), be they stand alone or regional, are the current hot topic in Chesterfield County in the Upper Swift Creek area. With the rejection by the Army Corps of Engineers of the County’s regional BMP plan, developers are being asked to provide permanent BMP’s on individual sites to achieve the .22 pounds of phosphorus removal while continuing to pay into the County’s Regional BMP Fund. Engineers working on developments within the Upper

Swift Creek area are concerned about meeting the phosphorus removal requirements without the regional program. Inasmuch as payment to the BMP fund is required by ordinance, the Board of Supervisors will need to provide relief since there does not appear to be such a program at the moment. Refunds are presumably possible. Tyler Craddock with the Home Building Association of Richmond has also been active in this dialogue with the County.

THE COUNTY OF
Hanover

The Planning Commission has held a workshop on a proposed mixed use zoning district. The amendment is intended to provide for more flexibility for development of larger parcels in suburban areas. It is also intended to encourage preservation. A second work session will be scheduled in a few months, after revisions are made to address comments made at the first workshop.

to 2006. Hanover property owners should monitor the Comp Plan amendment process, to be sure that potential future uses of their properties are not adversely affected in the Comp Plan amendment process. If you have questions regarding how the Comp Plan update process might affect (positively or negatively) your Hanover properties, you may want to contact a member of our land use team.

The Board of Supervisors has taken action to accelerate the update of the Comprehensive Plan, from 2007

THE CITY OF
Richmond

Roy Benbow of the Planning Department reports that the City’s Interagency Task Force on Community Infrastructure is looking at ways to encourage developers to include affordable housing in new city developments.

The City is also considering the addition of a mixed use zoning district to the Zoning Ordinance, which will have more emphasis on multi-family residential use, with complementary commercial uses permitted.

Hirschler FLEISCHER

60 Years of Serving the Community, Professionally and Individually

“Engaging the community’ are not empty words at Hirschler Fleischer,” said James L. Weinberg, the law firm’s president. “Community involvement is endorsed and encouraged. Each attorney is asked to volunteer at some level – whether in pro bono legal services, civic organizations, or faith-based institutions. Employees also are encouraged and supported in their involvement efforts – individually and with firm initiated opportunities.”

During the past 60 years we have grown from two attorneys, Ed Hirschler and Alan Fleischer, to 77 attorneys. While we have grown and changed over the past six decades, our focus on the quality of business and the quality of people remains unchanged. Jay M. Weinberg, our firm’s first associate and current Chairman Emeritus, has lead by example and made community involvement a way of life. His is past Rector of VCU, president of Jewish Community Federation of Richmond and currently is a board member of the Virginia Holocaust Museum.

Our track record is solid. Last Thanksgiving, 103 employees and their family members prepared and served a holiday meal for Boys and Girls Club members and their families.

“There was a phenomenal turnout from our employees and their family members, considering we have 180 employees,” said Jim Weinberg.

A sampling of other non-profits that benefit from our efforts include the Virginia Home for Boys and Girls, Rebuilding Together, the Salvation Army and Stop Child Abuse Now. Employees participate in annual fundraising walks for Juvenile Diabetes and Making Strides Against Breast Cancer.

In addition, the Virginia Bar Association Community Servant and Pro Bono Servant Program recognized 15 of the firm’s attorneys for 50 certified hours of service and three others for

100 certified hours of service.

What we have learned during the past sixty years of participation in various community endeavors is best said by Jay Weinberg. “The definition of character is doing the right thing when nobody is looking.”

At Hirschler Fleischer we pride ourselves on being an organization of the highest character.

At Hirschler Fleischer every individual works to make a positive difference in society.

*The definition of character,
to me, is doing the right thing
when nobody is looking.*

– Jay M. Weinberg, Chairman Emeritus

*We salute our many caring employees and family members
who continue to give of themselves.*

Your character is showing.

Pending

ZONING CASES

THE COUNTY OF
Caroline

Chuck Rothenberg and **Jennifer Rosen** have a proposal to amend the County's Zoning Ordinance to permit communications tower in excess of 199' in height. We

additionally have a proposal for a 300' communications tower in the Beaverdam region of the County, assuming the Ordinance amendment passes.

THE COUNTY OF
Chesterfield

In Chesterfield County, **Jim Theobald** obtained approval for a rezoning of fifty acres on Duval Road for Cliff Sowers for a residential community. Jim has also filed a

residential request for rezoning on 484 acres of land for Cliff near Bailey's Bridge Road and Route 288.

THE COUNTY OF
Cumberland

Chuck Rothenberg and **Jennifer Rosen** have a proposal for a 300' communications tower in the Cartersville region of the County.

THE COUNTY OF
Henrico

Jim Theobald successfully represented Bon Secours/St. Mary's Hospital in obtaining approval for a satellite parking lot at the corner of Maple Avenue and Monument Avenue. As is usually the case in that area, the request sparked much public controversy.

Jim Theobald recently filed a rezoning request on behalf of the Rebkee Company for an upscale retail and town home community to be located at the southwest corner of relocated Pump and Church Roads to be known as "The Shire".

Jim Theobald and **Caroline Nadal** are representing Lloyd Poe and Kevin McNulty in the rezoning of a parcel of land in eastern Henrico County on Steeple Lane near Laburnum and Nine Mile Road for the development of 64 zero lot line homes.

Jim Theobald recently concluded a successful rezoning for Beazer Homes, Inc. of a parcel of land on Francistown and Nuckols Roads for the development of luxury homes. This is Beazer's first entrée into the Richmond area.

THE CITY OF
Richmond

Glenn Moore and **Caroline Nadal** are representing Goodwill of Central Virginia in connection with a special use permit application to allow Goodwill to expand its parking area to better accommodate the storage and auction of donated vehicles and to provide more customer and employee parking.

Glenn Moore is working with St. Christopher's School on a street closing matter.

THE CITY OF
Williamsburg

Chuck Rothenberg and **Jennifer Rosen** have a proposal to co-locate cellular antennas on a Dominion Virginia Power pole on Richmond Road, near the Outlets.

HOLD THE DATE!

The Weinberg Land Use Forum

Monday, June 26, 2006
at 5:15 p.m.
Westwood Club
6200 West Club Lane



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Legislative Action on the Agenda at the March 2006 Forum

FROM PAGE 1

SB 373 (Senator Watkins) allows for transfer of development rights, allowing communities to help guide development toward more efficient patterns while protecting the property rights of local landowners. TDR programs will allow landowners in areas marked for conservation to voluntarily trade their development rights to parcels in developed areas, and to be compensated for their loss of property value.

SB 374 (Senator Watkins) promotes cluster development, allowing development while protecting open space. Developers with large parcels of land will be allowed to cluster their development in one part of the property, in exchange for permanently protecting the remainder of the property as a park or open space. The Governor's recommendation includes technical amendments.


SB 412 (Senator Houck) strengthens the Intermodal Office of the Department of Transportation, giving the office the specific charge to advocate for better links between

roads, rail, air and sea ports, and to develop performance measures for state and regional efforts to connect our transportation network. The Governor's recommendation includes additional responsibilities in coordinating modes of transportation.

HB 686 (Delegate Brink) allows localities to require sidewalks whenever a parcel is developed that adjoins an existing sidewalk, better connecting neighborhoods.

Finally, the General Assembly failed this year to reach any resolution on how it will respond to the United States Supreme Court decision of *Kelo v. New London, Connecticut*. In the *Kelo* case, the high court ruled that using eminent domain to take private property for economic development can be a "public use" under the takings clause of the Fifth Amendment. The case related to a move by an economic development corporation in New London, Conn., to seize private property to make way for an economic development project by the city. Residents affected by the project challenged the effort in court.

In the wake of the high court's ruling, property rights advocates around the country have focused on their own state legislatures in hopes of pushing for legislation to bar – or limit – localities from taking private homes or businesses for private uses that may generate more tax revenue. Legislators across the country have either introduced or plan to offer measures aimed at limiting the use of eminent domain for private development. A major debate ensued during the 2006 session over how Virginia should respond to this issue, but the body never came to a consensus and no legislation was passed. We expect legislation responding to the *Kelo* decision to reappear during the 2007 session.

As always, we look forward to working with you and sharing our knowledge and experience on all commercial real estate matters. 

Article drafted by M. Seth Ginther, principal with HF Consulting. If you have questions, call 804-771-9540 or email sginther@hf-consulting.net