



WEINBERG LAND USE FORUM

NEWS

WINTER 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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Hirschler Fleischer Moving to Shockoe Bottom!

We are excited to share with you an important milestone in the growth of Hirschler Fleischer. We have signed a lease to become the anchor tenant of Richmond's historic Edgeworth Building located along Richmond's riverfront on East Cary Street between 21st and 22nd Streets. Originally built in 1920 and once home to Larus & Brothers Tobacco Company, the move coincides with the 60th anniversary of Hirschler Fleischer.

While we will not relocate until later this year, the 67,334 square foot space will allow us to accommodate our recent growth and the expansion we see in the future. In the past 10 years, we have grown from 42 attorneys in 1996 to 75 attorneys in 2006.

Our new location also reflects our commitment to provide quality services to our clients. It offers a comfortable and exciting space with state-of-the-art technology in which to work and serve our clients. This move also allows us to continue to directly participate in an area where we have great experience and passion – the developing landscape of greater Richmond and the revitalization of historic buildings and neighborhoods. 



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And Negotiating Easement Documents

BY ROBERT W. HUGHES

An easement is the right to use someone else's property. They come in endless variety: easements for utilities, access (ingress and egress), parking, view, signs, driveways, maintenance... the list goes on and on. This article outlines some of the basic issues one must keep in mind when drafting or negotiating easements. This article is by no means exhaustive. You should consult an attorney when drafting easement documents.

Burdens and Benefits. Every easement burdens some particular property. Often, but not always, an easement benefits some particular property. For example, when the owner of one parcel of land has an easement to cross adjacent land to reach a road. This article uses the term "burdened property" to refer to the property burdened by an easement, and "benefited property" to refer to the property benefited by an easement.

When an easement benefits particular property, it is called an "easement appurtenant." Sometimes, however, an easement does not benefit any particular property, but instead benefits a person or entity. This is commonly seen with utility easements. For example, when the power company has a power line easement across your property, the easement probably benefits the power company itself, and not any particular property. This kind of easement is called an "easement in gross."

Parties. Use care to properly identify the parties to the easement document. Every owner of the burdened property must join to grant the easement. It is often prudent to have the burdened property's title checked to confirm ownership. If the burdened property is leased or ground leased, then it may be necessary to have the tenants join in granting the easement. If the easement is an easement appurtenant, then the benefited property should be clearly identified. If the easement is an ease-

ment in gross, use care in identifying the proper grantee. If there are persons other than the grantee that are intended to benefit from the easement, such as the grantee's customers, agents, employees, contractors, guests, etc., then those persons should be clearly identified.

Property. The burdened property – and benefited property, if applicable – should be clearly identified. The clearest way to do this is to identify the properties by their legal descriptions. The easement document should clearly state that the easement "runs with the land" of the burdened property, and, if applicable, the benefited property.

Permanent vs. Temporary. The easement document should specify whether the easement is a permanent (or "perpetual") easement or a temporary easement, and if temporary, when it terminates.

Purpose. One should put significant thought into exactly what the purpose of the easement is, and make sure this purpose is clearly stated. Often the owner of the burdened property will want the purpose of the easement to be drafted narrowly, in order to maximize her enjoyment of her property. On the other hand, the beneficiary of the easement will often want the easement's purpose to be drafted broadly, in order to give him maximum flexibility. For example, in the case of a utilities easement, the owner of the burdened property may want to limit what particular utilities the easement may be used for – power company facilities, for instance, but not telecommunications facilities. Or he may want to limit the easement to underground facilities only, as opposed to overhead facilities. In order to maximize flexibility, the beneficiary of an access easement may want to specify that he has the right to use the easement for vehicular and pedestrian access.

Reserved Rights. The grantor of the easement may want to reserve the right to use the easement area for some particular purpose. If so, then that reservation should be clearly stated in the easement document. For example, in the case of a utility easement, the grantor may want to reserve the right to use the easement area for agricultural purposes, or to erect fences. Or, in the case of an access easement, the grantor may want to reserve the right to use the easement area for the grantor's own access.

Exclusivity. In Virginia, when an easement is "exclusive," that means that the beneficiary of the easement has the exclusive right to use the easement for the named purpose. The easement document should specify whether the easement is exclusive or non-exclusive.

Width and Location. Many easements, especially utility easements, encumber a strip of uniform width running across the burdened property. With such easements, it is often useful to specify the width of the easement. Also, the easement document should clearly identify the location of the easement on the burdened property. The least ambiguous way to do this is to attach a plat, or at least a drawing, of the burdened property showing exactly where the easement is located. It can also be very helpful to describe the specific part of the burdened property that is burdened by the easement with a metes and bounds legal description. The owner of the burdened parcel may want the right to relocate the easement. If so, the easement document should specify who bears the expenses of such relocation.

Maintenance. The easement document should specify who is responsible for maintenance, repair and replacement of improvements located in the easement, and to what standard such improvements must be maintained. If maintenance

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Hirschler Fleischer Announces The Formation of a New Subsidiary: HF Consulting, LLC

Hirschler Fleischer is pleased to announce the formation of HF Consulting, LLC. HF Consulting is a Richmond-based government relations/business consulting firm that assists companies, individuals, trade associations, cities and universities in their dealings with state and local governments. In addition to lobbying, HF Consulting will be able to assist clients interested in participating in economic development incentives offered by the Commonwealth as well as procurement and privatization opportunities.

We understand that the process of dealing with state and local governments is becoming more complex. Information and expertise are needed so that clients can better understand the process. HF Consulting will help its clients with the development of strategic positions and arguments related to the specific issues they face and will work in concert with other interests and lobbyists to achieve a coordinated and more effective result on our clients' behalf.

Seth Ginther and Marshall Cook are the principals involved in HF Consulting. Both Seth and Marshall have built a strong political network throughout state and local governments. Seth was appointed Senior Assistant Attorney General and Chief of Commerce and Financial Law in 2003 by the Attorney General of Virginia, a position he held until December 2005, when he rejoined Hirschler Fleischer. In his capacity at the Attorney General's office, Seth had overall responsibility for the legal representation of all state boards and agencies reporting to the Secretary of Finance and the Secretary of Commerce and Trade. In addition, Seth played a leadership role in the Attorney General's successful policy initiatives in the areas of economic development, regulatory reform, and combating gang and domestic violence.

Marshall Cook served as Deputy Attorney General of Virginia from 1990-93, where he supervised one of four legal divisions of the Office of the Attorney General of Virginia, seven Senior Assistant Attorneys General, and 18 Assistant Attorneys General. Marshall has remained active in the State and local government arenas and, in 2004, was named as one of Virginia Business' Legal Elite for regulatory and legislative affairs.

To learn more about HF Consulting and to discuss legislative needs with which we can assist please contact Seth Ginther at 804-771-9540 or Marshall Cook at 804-784-1900.

About HF Consulting


HF Consulting, LLC is a wholly-owned subsidiary of Hirschler Fleischer, PC. Hirschler Fleischer is a full-service firm engaged in a diverse and sophisticated practice offering legal services to corporate, institutional, governmental and individual clients. The firm has offices in Richmond and Fredericksburg and has served Virginia for nearly six decades. www.hf-law.com.

Choice of ENTITY

For Real Estate Investment and Development

The choice of a business entity is a decision that has a profound impact on your business venture. You are probably already aware that the type of entity you choose will carry with it specific tax consequences and that certain business entities afford liability protection. Did you know that in the area of real estate investment and development the rules get more complex? Although that gives rise to certain planning opportunities, it can also lead to unintended consequences unless choices are carefully considered and properly documented. For example, the establishment of separate business entities for the purpose of reducing tax liability can be subject to attack by the IRS, resulting in an increased tax burden and even penalties. The documentation of the non-tax

reasons for the use of the separate entity can often reduce the likelihood of these adverse consequences. Additionally, certain multiple-entity structures can be formed in order to insulate certain assets and concentrate the liability risk. Have you considered strategies to lock in pre-development appreciation on real estate as a capital gain, leaving only development profit subject to tax treatment as ordinary income? Are you aware of the consequences associated with the higher risks endemic to land development, as opposed to passive land investment?

To learn more about how the choice of entity should factor into your business plan, please contact Janet S. Thomas, Esquire, at (804) 771-9532 or jthomas@hf-law.com. 

Fredericksburg TRENDSPOTTING

On September 26, 2005, Hirschler Fleischer's Fredericksburg real estate attorneys, Carrie Hallberg O'Malley, John McManus, Gary Nuckols and Alonso Cisneros, conducted the forum's program, highlighting current trends in the Fredericksburg area real estate market.


The Fredericksburg, Virginia area is a thriving and growing region. Comprised of the City of Fredericksburg and Spotsylvania, Stafford, King George and Caroline counties, the region has been the fastest growing region in the Commonwealth for the past six years, with a current population of 260,000. The Fredericksburg region is known for its unique mix of history, architecture and culture and is centrally located between Washington, DC and Richmond, Virginia, with access to many major interstates and highways, as well as commercial rail and air facilities.

The rapid growth and resident concerns have led to the creation of no-growth and/or slow-growth groups that have

become active in lobbying for the slowing down of development. The result has been that the composition of several elected boards has changed in recent elections to include representatives with a slow-growth bent. Spotsylvania and Stafford counties have enacted recent down-zoning legislation and proffer guidelines aimed at decreasing residential density and reducing expansion. The result has been an increase in by-right development leading to sprawl and a drastic reduction in successful residential rezonings, which has been accompanied by a severe delay in governmental review and approval of site plans, building permits and subdivision plats.

These occurrences have affected both the residential and commercial climates in the Fredericksburg region. Despite the boom in the residential development market, there has been a significant increase in lot prices and many residential development projects have been diverted to the neighboring counties of King George, Caroline, Orange

and/or Culpeper. The average cost of housing increased by 23.15 percent in only one year, to \$359,390, making it difficult, if not impossible for many residents to afford to purchase homes. Commercial development is however, thriving in the Fredericksburg region with on-going development in every county and the City of Fredericksburg, including numerous large scale commercial/retail projects and expansive senior living facilities in progress throughout the area.

With the growth and expansion come many challenges, including managing transportation, cash proffers, rezoning applications, sprawl and affordability, as well as finding the middle ground between intelligent growth and no-growth positions. While the Fredericksburg region is in a position to capitalize on its many attributes, it must also come to grips with the challenges ahead in order to realize its true potential as an economic force in the Commonwealth of Virginia. 

Jurisdictional

UPDATES

THE TOWN OF
Ashland

With almost an entirely new Planning Staff, Ashland property owners should be observant with regard to potential changes to the Zoning Ordinance for the Town of Ashland, whether deemed to be beneficial or having a negative impact. 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 that effort completed by June. 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 zoning districts to regulate more appropriately the varying types of development in Ashland.

THE COUNTY OF
Chesterfield

The County is attempting to delete multi-family uses as permitted by right in C-3, C-4 and C-5 districts. The proposal would permit multi-family uses in those districts with an additional Conditional Use Permit.

At its February 21 meeting, **Jim Theobald** caused the Planning Commission to defer the matter in order to consider the impact on existing C-3, C-4 and C-5 zoning, as well as to address grandfathering provisions.

THE COUNTY OF
Hanover

The Planning Department has drafted language for a proposed mixed use zoning district, which is available for review. Work sessions to consider the proposed mixed use district language could be scheduled in the near future.

The Board of Supervisors has taken action to accelerate the update of the Comprehensive Plan, from 2007 to 2006. A joint meeting of the Planning Commission and

Board of Supervisors to begin the process is scheduled for March 1, 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 COUNTY OF
Henrico

On March 9 the Planning Commission will consider an amendment to the County’s Land Use Plan and Major Thoroughfare Plan related to the proposed extension

of Three Chopt Road from Lauderdale Drive to North Gayton Road.

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.

The City is continuing to review the possibility of adopting a new commercial zoning district which would be used primarily on East Broad Street, Manchester and Jackson Ward. The district would authorize a broader range of uses than current uses indicated for such areas. Additionally, flexibility for providing parking is under consideration where mixed uses are located in proximity to each other.

So, You Want TO BE A TIC SPONSOR?

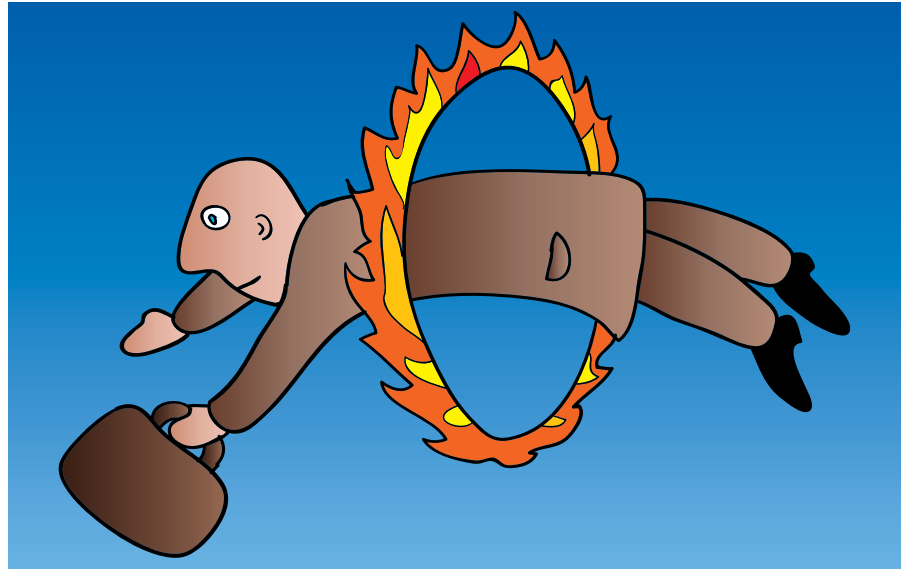
What You Need To Understand

BY: DEBORAH SCHWAGER FROLING

The exponential increase in both the money and volume of transactions in the syndicated tenant in common (“TIC”) market has increased real estate companies’ awareness of and interest in the TIC industry. According to Omni Brokerage, Inc., in 2001, there were approximately 9 sponsors of TIC syndications who raised \$167 million in equity. In just the third quarter of 2005, a little over \$1 billion in equity was raised by close to 60 sponsors.

Real estate companies that are contemplating entering into the syndicated TIC market need to make sure they understand what they are dealing with before taking the leap. The “think before you leap” caution applies equally to newly formed as well as long established real estate companies. The rules that apply to real estate companies selling properties (i.e., caveat emptor, or buyer beware, and newspaper advertising) are very different from those that apply to syndicators of securitized TIC properties (i.e., anti-fraud provisions of the securities laws, disclosure of all material facts and no general solicitation or advertising).

First, and foremost, in a TIC syndication, there is a lengthy disclosure document (lawyers get paid by the word, after all) used in a securities offering that has as its primary purpose to tell an investor every possible bad thing that could conceivably happen to the property, the real estate market, the economy and the world at large. The types of things you can say when selling a property through a real estate broker are generally not things you want to say when selling the same property through a securities broker-dealer. It is the difference between saying “this is the best property in the world” and “this is potentially the worst property in the world and let me tell you all the reasons why in the next 100+ pages.” In addition, everything that is described in the offering document, including any projections related



to the property, must be supportable and reasonable. Clearly, this type of disclosure regime takes some getting used to by even the most experienced real estate professionals.

Another challenge for TIC syndicators is building enough time into the process to get the transaction completed – the syndication piece as well as the actual closing on the property. The structure of a TIC deal is complex and requires significant time to make certain that all components of the structure work for the property, the sponsor’s organization, the investors, the broker-dealers and the due diligence officers. Given the structuring complexities and the distribution channel challenges, it is very difficult to get a first TIC deal to market in less than four to six months. A new sponsor cannot start the process after it has gone hard on a purchase contract and has 30 days to close. By then, it is too late.

After the structuring is complete and the disclosure documents are prepared, the sales process begins. Even if you have been in real estate for 5, 10 or 20 years and you know lots of real estate brokers who can sell your property, you may not know any securities broker-dealers who can help you navigate

the jungle of the Regulation D, private placement securities distribution channel. There are broker-dealers who are familiar with the TIC syndication market and those will be extremely important to help navigate the way through the rest of the process. They can be a valuable resource in interacting with the investors. Once the investors are identified, it would seem simple enough to get the transaction closed. Experienced real estate companies are used to the actual closing mechanics of real estate – the dance between lenders, title companies, lawyers, etc. However, in a TIC syndication, you need to factor into the process the vagaries of that closing process times 35. First, because investors trying to complete a 1031 exchange can identify multiple properties to complete their exchange, it means that investors may drop out or come in at the last minute. Add to that all of the pieces necessary to actually get an investor closed – paperwork completed and all signatures obtained, lender approval, qualified intermediary coordination and settlement statements finalized – and some days a TIC syndicator seems more like a ringmaster in a three ring circus than a sophisticated real estate professional.

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Pending

ZONING CASES

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 COUNTY OF
Henrico

Jim Theobald is representing Bon Secours - St. Mary's Hospital in a rezoning at the corner of Maple and Monument Avenues. A surface parking lot is proposed.

permit age-restricted, detached condominiums.

Jim Theobald is representing Attack Properties in a variety of residential rezonings.

Jim Theobald won approval of companion zoning cases in Varina in the area of Laburnum Avenue, Darbytown Road and Miller Road, which was a continuation of the larger, original zoning case for the former Highwoods Industrial Park. Light industrial uses are proposed.

Jim Theobald is pursuing a rezoning at the corner of Francistown and Nuckols Roads to R-3C for a single family detached development for Beazer Homes. Thirty-six homes are proposed.

Jim Theobald recently obtained approval for a rezoning in Twin Hickory for HHHunt Corporation in which property which was originally zoned for office use was amended to

Jim Theobald and **Caroline Nadal** have filed an R-5AC rezoning request on Steeple Lane at East Richmond Road in Varina for the development of 64 zero lot line homes.

THE COUNTY OF
Chesterfield

Jim Theobald was successful in representing The Rebkee Company in a Conditional Use request at the corner of Genito and Charter Colony Parkway. A CVS drug store is proposed.

retail, recreational facilities and assisted living, to be known as Branner Station.

Jim Theobald has filed a rezoning request on 1,600 acres on behalf of HHHunt Corporation on what is known as the "Shoosmith" tract near Chester to be developed as a mixed-use, planned community including single family, multi-family,

Jim Theobald has zoning cases pending for Cliff Sowers on Duval Road and Baileys Bridge Road for mixed-use residential developments. Jim also has a case pending for Doug Sowers on County Line Road for a single family residential development.

THE COUNTY OF
Hanover

Chuck Rothenberg is representing Memorial Regional Medical Center in obtaining a Conditional Use Permit for a helipad to serve the hospital.


What You Need To Understand **FROM PAGE 6**

The deal is closed and you have successfully navigated the complexities of a TIC syndication. Congratulations, you are now an investor relations professional. Having taken on the business of selling a property to up to 35 unrelated parties, you have now become responsible for regularly communicating with those 35 investors and more often than you would expect. If you close 5 to 6 TIC transactions in a year, you have approximately 210 investors who will be receiving monthly distribution checks and to whom you are responsible – and that's just in the first year. In addition, many of those 210 investors are investing in a TIC

deal because they are retiring from the active management of their own real estate portfolio and may have lots of suggestions related to your management of their property. The communication with your investors can prove to be quite time consuming and overwhelming but is necessary to fulfill the obligation to them that was part of the deal when they bought the property.

As you can see, if you want to be a successful TIC sponsor you need to work with experienced professionals at every step (attorneys, broker-dealers, due diligence officers, title companies, lenders) and be

prepared for it to take twice as long as you ever thought possible. But if you have the right team and the right mindset, the transition from real estate company to TIC syndicator can be done successfully.

Ms. Froling is a shareholder in the business section and is one of the leaders of the Real Estate Securities Practice Group at Hirschler Fleischer, Richmond, Virginia, a leading law firm in the TIC syndication and real estate securities industry, which represents over 20 active TIC sponsors. Ms. Froling can be reached at dfroling@hf-law.com or (804) 771-9514. 



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The purpose of the Forum is to promote quality development and viable communities through constructive dialogue between the development community and state and local governments. Hirschler Fleischer's Land Use Team has long been known for its ability to achieve the goals of its clients in all matters of zoning and permitting. Its members continually track ordinance and policy amendments at the state and local levels. We are often called upon to help draft legislation and provide input on new initiatives. We would like to share that knowledge and experience with you on an ongoing basis.

Drafting and Negotiating Easement Documents

FROM PAGE 2

costs are to be shared, the easement document should specify how each party's share is to be calculated.

Liability. Consider providing in the easement document that the owners of the burdened and benefited properties shall have no personal liability for acts or omissions that occur before or after their period of ownership of such parcels. The owner of the burdened property may want the easement beneficiary to indemnify him for acts, omissions, negligence and willful misconduct of the easement beneficiary and the easement beneficiary's customers, guests, agents, employees, contractors, other permitted users, etc. In addition, the owner of the burdened property may want the easement beneficiary to obtain liability insurance naming the owner of the burdened property as an additional insured.


Assignability. May the grantee assign the easement? For easements appurtenant, this is rarely an issue, because the easement runs with the benefited property

and typically never needs to be assigned. The issue of assignability is much more important with easements in gross. The beneficiary of an easement in gross may want the right to assign his easement rights with, or share them with, others. The owner of the burdened property may want to limit such rights.

Defaults. The easement document should describe what constitutes a default under the easement and what the remedies are for the party defaulted against. For example, if the easement beneficiary defaults, can the owner of the burdened property terminate the easement altogether? (Most easement beneficiaries would object to this.) Or would the remedies be limited to monetary damages or injunctive relief? Consider whether you want to give the parties the rights to written notice of, and opportunity to cure, any default. Specify whether the defaulting party must pay the attorneys' fees and costs of the other party.

Notices. Specify where notices to each

party should be sent. This can require some thought, if the easement is truly a perpetual easement.

Lender/Lienholder Subordination. The easement beneficiary will want the holders of all recorded, preexisting mortgages, deeds of trust and other liens affecting the burdened property (i) to consent to the granting of the easement and (ii) to subordinate their rights to the easement. Often, the granting of easements by a property owner without his lender's permission constitutes an event of default under his mortgage or deed of trust. In that case, getting the lender's consent is important. Also, if a lender or other lienholder does not subordinate its lien to the easement, then the easement may be wiped out, if there is a foreclosure or judicial sale. That would leave the easement beneficiary with no easement at all. 

Sources: Jesse S. Ishikawa, A Checklist for Drafting Easements, The Practical Real Estate Lawyer, November 2005, at 9.