

Some Air Rights Considerations in Virginia

Description

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I. Introduction and Background

At its broadest, ownership of or title to land means the right to use or develop, to exclude others from, and to otherwise control everything within the cubic space located not only below and upon, but also above a defined area located on the surface of the earth.^[1] Except for condominiums, the upper and lower bounds of such cubic space are not generally defined but may be limited by law.^[2]

Someone who owns the entirety of the three-dimensional space described above not only owns and, therefore, may use or develop any resource contained in such space, but also may convey title to a specific cubic space located within the larger space or rights to specific resources located at any altitude or depth.^[3] Once title to such vertical interests are severed from the surface estate, conflicts may arise as easily between vertical neighbors as between horizontal neighbors.

In U.S. v. Causby, 328 U.S. 256 (1946), the United States Supreme Court, in preparation for adjudicating the rights of a landowner whose property was regularly overflowed by military aircraft descending to land at an adjacent airfield, explained:

[I]f the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land.^[4]

Any multistory building, whether a single-family home or a soaring commercial skyscraper, acknowledges in wood, steel, and concrete that *[t]he landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land.*^[5] While it may be convenient and conventional to think about the boundaries of real property in two dimensions, condominium documents may bound title to property in three dimensions.^[6] *The right of an owner to carve out of his property as many estates, or interests (perpendicular or horizontal, perpetual or limited), as it may be able to sustain, cannot be open to doubt.*^[7] The lease of space in a soaring skyscraper and the lease or sale of any unit located above the ground floor in a commercial or residential condominium demonstrates that title to airspace may be sold or otherwise conveyed.

Because regulation of navigable airspace is committed to the Federal Aviation Administration (FAA), notice must be given to the FAA regarding construction or alteration to buildings constructed beyond the limits set forth in 14 C.F.R. Â§ 77.9.^[8] Under certain circumstances, property owners may be compensated for air navigation burdens.^[9] But, because *[t]he FAA lacks authority to prohibit a construction or alteration it believes to be hazardous to air navigation*, local zoning will usually determine the height to which structures may be built.^[10]

The Capitol Crossing Project is an example of air rights being developed above transportation corridors in Washington, D.C.^[11] Similar projects were considered in the 2010s in Fairfax and Arlington counties, but these appear to have been shelved due to cost considerations.^[12] [Va. Code Â§ 15.2-2030](#) permits localities *to authorize the sale or lease of the airspace over or under any public street . . . owned by it in fee simple*. The vPoint Apartments in Arlington County appears to be an example of development completed in severed airspace above an existing structure.^[13]

II. Restrictions and Easements.

Obviously, as with property located below the surface, property located above the surface can only be accessed through the surface estate. Thus, if not made explicit, there must be an implied easement through the surface estate to severed airspace. In a condominium, such connections will usually be deemed common elements and rights to the connections and other common elements will be set forth in the condominium declaration or other condominium documents.^[14]

A landowner may not only convey the right to develop air rights, but may also agree to a restrictive easement, or a developer or other grantor may set out vertical restrictions in a declaration or other covenants that run with the land.^[15] Property Owner's Association or Condominium declarations or other documents may likewise limit vertical development.^[16] Easements for light and air are another example of how air rights may be quantified and conveyed.^[17] Certain easements authorized by statute, called conservation easements, may also limit the ability of a landowner to develop vertical property.^[18] Note that both easements for light and air and conservation easements must be recorded to exist; they cannot arise by prescription or, at least as between private landowners, by necessity.^[19]

The [Virginia Solar Easements Act](#), Va. Code Â§ 55.1-137 *et seq.*, authorizes easements *for the purpose of exposure of solar energy equipment, facilities, or devices*, and sets out what terms such easements must include. [Va. Code Â§ 15.2-2288.7](#) limits local regulation of solar facilities. The Property Owner's Association Act, the Virginia Condominium Act, and the Virginia Real Estate Cooperative Act also restrict associations' ability to prohibit the installation of solar panels on owner's or lessee's individual property.^[20] Specifically:

No association shall prohibit an owner from installing a solar energy collection device on that owner's property unless the recorded declaration for the association establishes such a prohibition. However, an association may establish reasonable restrictions concerning the size, place, and manner of placement of such solar energy collection devices on property designated and intended for individual ownership and use.^[21]

Usually, title insurance commitments and the resulting title insurance policies should include exceptions as to any recorded conveyance of airspace or easements that govern the use of airspace above the property to which title is to be insured. Conveyances, easements, and restrictions may be disclosed not only in title searches, but also in surveys provided to title insurance consumers. Contact your title insurance underwriter with any question regarding what exceptions should appear in any specific policy.

III. A word about trespass and nuisance

Governmental responses to low-level flights by unmanned aircraft systems (â??UASâ?•), also known as drones, demonstrate how laws and expectations surrounding real property rights, trespass, and nuisance change in response to innovative technology. Both at and below the surface, uninvited parties do not generally have the right to enter real property.^[22] But the right to exclude is much more limited

in the air above the surface.^[23] Even though many UAS fly below the historical floor of navigable airspace, the FAA has asserted that its *exclusive authority to regulate aviation safety and the efficient use of the airspace by aircraft* means not only that it may regulate both recreational and commercial UAS applications, but also that its regulatory authority preempts state limitations regarding *flight altitude or flight paths* — even if such limitations are intended to protect the safety of individuals and property on the ground.^[24] Virginia acknowledges this federal preemption in [Va. Code Â§ 18.2-121.3](#), which exempts activities authorized by federal regulations from the definition of, and penalties related to, UAS trespass. Still, [Va. Code Â§ 18.2-130.1](#) outright prohibits certain unwelcome UAS activity by stating:

It is unlawful for any person to knowingly and intentionally cause an unmanned aircraft system to secretly or furtively peep or spy or attempt to peep or spy into or through a window, door, or other aperture of any building . . . without just cause, under circumstances that would violate the occupant's reasonable expectation of privacy.

While no political subdivision of the Commonwealth *may regulate the use of [UAS] within its boundaries . . . a political subdivision may, by ordinance or regulation, regulate the take-off and landing of [UAS] on property owned by the political subdivision.*^[25] Further

Nothing in this section shall permit a person to go or enter upon land owned by a political subdivision solely because he is in possession of [UAS] if he would not otherwise be permitted entry upon such land.^[26]

But, again: *Nothing in this section shall be construed to prohibit . . . compliance with [FAA] regulations . . .*^[27]

[Va. Code Â§ 19.2-60.1](#) prohibits the use of UAS for criminal law enforcement by Virginia entities without a warrant. Virginia State Park regulations state: *No person shall voluntarily land or unlawfully operate within or upon any park, any [UAS].*^[28]

The noted statutes, regulations, and federal guidance demonstrate how modern technology has required old standards to be revisited. When air travel started in the early 20th century, Congress declared the air to be a public highway.^[29] Courts affirmed that the ancient doctrine that ownership of land extended to the periphery of the universe had been properly limited in response to the emerging technology.^[30] But Courts still recognized strong property rights below the federally defined minimum safe altitude of flight.^[31] Now, with UAS flights becoming more common, the FAA has asserted exclusive authority to regulate UAS flights below traditional flight minimums.^[32] And some Virginia statutes acknowledge that authority.^[33] From one perspective, it appears that the right to exclude has been diminished. But, on the other hand, not all of the Virginia statutes cited above appear to perfectly defer. Neither [Va. Code Â§ 18.2-130.1](#) nor [4VAC5-30-400](#) explicitly exempt FAA-compliant operators. We should expect that the laws regarding drones will continue to change as public norms and expectations develop further.

[T]he term nuisance, in legal parlance, extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property.^[34]

Traditionally, smells, smoke or other noxious airborne substances, other pollutants, and, even, unwelcome light and sounds that cross property boundaries have been considered or deemed to be nuisances.^[35]

Trees and other vegetation, especially in residential areas, mix trespass and nuisance as a source of conflict between neighbors. In [Fancher v. Fagella](#), 274 Va. 549 (2007), the Virginia Supreme Court reviewed a conflict between two townhome neighbors regarding a tree whose trunk lay several feet from the joint property line, but whose roots had *displaced the retaining wall between the parties' properties, displaced the pavers on [the neighbor's] patio, caused blockage of his sewer and water pipes and [. . .] impaired the foundation of his house.*^[36] In response to these facts, the Court set out the circumstance in which an injunctive remedy could be obtained for invasive plants and affirmed the right of the offended party to remove limbs or roots that cross the property line when an injunction is not available.^[37] In

[Willems v. Batcheller](#), 78 Va. App. 199 (Va. Ct. App. 2023), the Virginia Court of Appeals sustained an injunction that required a property owner to control bamboo growth deemed to be not only invasive but also harmful to a neighbor's shed.

In both criminal law and civil law, actions for trespass apply ownership rights.^[38] Actions for ejectment, unlawful detainer, and eviction likewise emerge from the rights of real property titleholders.^[39] The right to property includes *the right to exclude others.*^[40] But statutes of limitations, including both the 5-year limitations period applicable to injuries to property and the 15-year period that applies to adverse possession, limit the ability of landowners to obtain redress after a certain number of years.^[41] This is why it is important (in title insurance policies) to take exception to encroachments — including matters located in the air or below the surface of the earth — whether discovered in a survey or by any other means, even when such are not authorized by an easement or other conveyance document disclosed in the title search. If the limitations period has passed, or if the insured does not take timely action to remove the encroachment, then what could have previously been removed as a trespass may become a permanent aspect of the violated estate. Again, contact your title insurance underwriter with any question regarding what exceptions should appear in any specific policy.

[1] See [Ho v. Rahman](#), 79 Va. App. 677 (2024) at 832-3 (background principles) and [Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co.](#), 105 Va. 574 (1906) at 592 (introducing a presumption that *the owner of the surface owns all beneath and above the surface*).

[2] See, e.g., [Va. Code Â§ 55.1-1900](#) (def. of *Land*) and [United Masonry, Inc. v. Jefferson Mews, Inc.](#), 218 Va. 360 (1977) at 361-63 (history of condominiums).

[3] See [Ho](#), *supra* note 2, at 833 (*[O]wnership interests may be split among various owners and conveyed independently of each other*), [Va. Coal & Iron Co. v. Richmond](#), 128 Va. 258 (1920) at 278 (*One indisputable right of an owner in fee is to dispose of any portion of the fee, the timber, the mineral, or the water rights therein*).

[4] [Causby](#) at 264.

[5] *Id.*, citing [Hinman v. Pacific Air Transport](#), 9th Cir. (1936), 84 F.2d 755. But note [Brown v. U.S.](#), 73 F.3d 1100 (Fed Cir. 1996), at 1104: *[A] high altitude intrusion into an owner's theoretical airspace that had no impact whatever on the surface property could not be actionable.*

[6] See [Va. Code Â§ 55.1-1916\(A\)\(4\)](#) and definition of *Land* in [Va. Code Â§ 55.1-1900](#).

[7] [Wilson Bros. v. Branham](#), 131 Va. 364 (1921) at 373-4. Cited, approvingly, in [Ho](#), *supra* note 2, at 832-3.

[8] [49 U.S. Code Â§ 40103\(a\)](#) provides:

(1) *The United States Government has exclusive sovereignty of airspace of the United States.*

(2) *A citizen of the United States has a public right of transit through the navigable airspace.*

[49 U.S. Code Â§ 40103\(b\)](#) directs the FAA Administrator to *develop plans and policy for the use of the navigable airspace* and [Â§ 44718](#) requires *adequate public notice . . . of the construction, alteration, establishment, or expansion, or the proposed construction, alteration, establishment, or expansion, of a structure or sanitary landfill.*

[9] See [Taylor v. United States](#), 959 F.3d 1081 (Fed Cir. 2020) at 1090 (*physical taking* related to aviation).

[10] See [BFI Waste Sys. of N. Am., Inc. v. FAA](#), 293 F.3d 527 (D.C. Cir. 2002) at 253, citing [Aircraft Owners & Pilots Ass'n v. FAA](#), 600 F.2d 965 (D.C. Cir. 1979) at 967. See also [Va. Code Â§ 15.2-2280\(2\)](#).

[11] See U.S. Dept. of Transportation, Fed. Hwy. Admin. Center for Innovative Finance Support, [Project Profile: Capitol Crossing/ Third Street Tunnel](#) and <https://capitolcrossingdc.com/project/>.

[12] See Jeff Clabaugh, [Virginia Transportation Leaders Drop I-66 Air Rights Plans](#), WTOP News (July 18, 2017). See also Va. Dept. of Transportation, Office of Transportation Public-Private Partnerships, [Air Rights Project: Utilizing air space above transportation facilities](#) (2016).

[13] See Liz Farmer [Clarendon Church Apartment Project Could Be National Model](#), Washington Examiner, October 13, 2010, Katie Pyzyk, [Mixed-Income Apartment Complex Opens in Clarendon](#), ARLNow, April 13, 2012, and <https://www.vpointapts.com/>.

[14] See, generally, [Va. Code Â§ 55.1-1907](#) as to what must be set out in condominium declaration and instruments.

[15] See [U.S. v. Blackman](#), 270 Va. 68 (2005) (Virginia law permits negative easements in gross) and [Barner v. Chappell](#), 266 Va. 277 (2003) (restrictive covenants that run with the land).

[16] [Va. Code Â§Â§ 55.1-1828](#) and [55.1-1916](#).

[17] Recorded easements for light and air are enforced in [Robinson v. Nordquist](#), 297 Va. 503 (2019) and [First Nat. Trust & Sav. Bank v. Raphael](#), 201 Va. 718 (1960), and, and noted as possible in [Tardy v. Creasy](#) 81 Va. 553 (1886) at 556-7.

[18] *Id.* and [Virginia Conservation Easement Act](#), Va. Code Â§ 10.1-1009, *et seq.*

[19] See [Tunstall v. Christian](#), 80 Va. 1 (1885) at 2, and [Shield v. Peninsula Land Co.](#), 147 Va. 736 (1926). See also W. Wade Berryhill and William H. Parcell III, [Guaranteeing Solar Access in Virginia](#), 13 U. of Richmond L.R. 423, 431-44 (1979).

[20] Va. Code Â§Â§ [55.1-1820.1](#), [55.1-1951.1](#), and [55.1-2133.1](#).

[21] *Id.*

[22] See, generally [Va. Code Â§ 18.2-119](#) and, [Ho](#), *supra* note 2, at 690 (citing [Palmer v. Atlantic Coast Pipeline LLC](#), 293 Va. 573 (2017) at 581 and [Mountain Mission School, Inc.](#), 207 Va. 518 (1966), at 522-23.

[23] See, generally, [Causby](#), *supra* note 5, at 261-2 (affirming the air is a public highway).

[24] See FAA, Office of the Chief Counsel, [State and Local Regulation of Unmanned Aircraft Systems \(UAS\) Fact Sheet](#) (2023).

[25] [Va. Code Â§ 15.2-926.3\(A\)-\(B\)](#).

[26] [Va. Code Â§ 15.2-926.3\(C\)](#).

[27] [Va. Code Â§ 15.2-926.3\(D\)](#).

[28] [4VAC5-30-400](#).

[29] See, e.g., [Causby](#), *supra* note 5, at 260-261 (acknowledging the federal statute).

[30] *Id.*

[31] *Id.* at 264 (acknowledging that *if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere*).

[32] See [\(UAS\) Fact Sheet](#), *supra* note 25.

[33] See, e.g., [Va. Code Â§ 18.2-121.3\(B\)](#) and [Va. Code Â§ 15.2-926.3\(D\)](#).

[34] [Turner v. Caplan](#), 268 Va. 122 (2004), at 128, quoting [Bragg v. Ives](#), 149 Va. 482 (1927). See also [Collett v. Cordovana](#), 290 Va. 139 at 145-6.

[35] *Id.*

[36] [Fancher](#) at 552.

[37] *Id.* at 555-7.

[38] See [Va. Code Title 18.2, Ch. 5, Art. 5](#), [Kim v. Commonwealth](#), 293 Va. 304 (2017), and [Cooper v. Horn](#), 248 Va. 417 (1994).

[39] [Va. Code Â§Â§ 8.01-130](#) and [8.01-470](#), [Title 8.01, Ch. 3, Arts. 13](#) and [14](#).

[40] [Ho](#), *supra* note 2 at 690.

[41] See [Va. Code Â§Â§ 8.01-236](#) and [8.01-243](#).

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