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## **Update Regarding Virginia Tree Case – *Fancher v. Fagella***

As you may know, the Virginia Supreme Court, in September 2007, decided an important case concerning damage by trees to adjoining property. This decision attempted to clarify what had been a rather murky standard with respect to the rights of owners damaged by a neighbor's tree. While the long-term impact of this case on community associations (as well as homeowners within association developments) is not immediately clear, we wanted to apprise you as soon as possible regarding potential issues which could arise.

New Virginia Rule: *Fancher*. In *Fancher v. Fagella*, the Virginia Supreme Court overturned a 69-year-old precedent [*Smith v. Holt*, 174 Va. 213 (1939)] by holding that an owner whose property was damaged by the root system of a neighbor's tree was entitled to relief other than "self-help", which had been the only clearly available remedy under the old rule. ("Self-help" essentially meant that an owner was allowed to cut back, to the property line, the roots and overhanging branches which intruded onto their property.) In this new case, Fancher's brick retaining wall, patio, and sewer/water pipes were allegedly damaged when the roots from a tree located on Fagella's property grew over onto Fancher's property. The Virginia Supreme Court held that Fancher was entitled to relief in addition to self-help and then remanded the case back to the Circuit Court for a decision on the facts.

Reliance on "Hawaii Rule". In making this decision, the Supreme Court adopted a legal standard referred to as the "Hawaii Rule". Although this standard originated, as you may guess, from a Hawaii court decision, the Virginia Supreme Court relied on a Tennessee court's interpretation of the "Hawaii Rule." That Tennessee court explained the "Hawaii Rule" as follows:

Encroaching trees and plants are not nuisances merely because they cast shade, drop leaves, flowers, or fruit, or just because they happen to encroach upon adjoining property either above or below the ground. However, encroaching trees and plants may be regarded as a nuisance when they cause actual harm or pose an imminent danger of actual harm to adjoining property. If so, the owner of the tree or plant may be held responsible for harm caused by it, and may also be required to cut back the encroaching branches or roots, assuming the encroaching vegetation constitutes a nuisance. We do not, however, alter existing ... law that the adjoining landowner may, at his own expense, cut away the encroaching vegetation to the property line whether or not the encroaching vegetation constitutes a nuisance or is otherwise causing harm or possible harm to the adjoining property.

In the Tennessee case, one property contained 3 large oak trees, which were located close to the common boundary and extended significantly over the neighbor's property. The roof was damaged by falling branches that crashed through the neighbor's roof, as well as damage to the roof and walls, because the persistent foliage never allowed the property to dry. Moreover, the tree's expanding roof system damaged the neighbor's septic system, precluding her from using her bathroom shower or toilet for over 2 years. The Tennessee Supreme Court held that the tree causing this damage constituted a nuisance to the neighbor's property, thus entitling the neighbor to damages and the right to have the nuisance abated.

In *Fancher*, the Virginia Supreme Court determined that the old "self-help" remedy alone was insufficient to protect the rights of the damaged property owner. The Court decided that the Hawaii Rule "strikes an appropriate balance between the competing rights of adjacent property owners" and confirmed that owners suffering a nuisance from an adjoining landowner's tree have the right to damages and to have the nuisance abated. The Court also upheld the old "self-help" remedy as an additional means of protection for an aggrieved landowner.

Courts in other jurisdictions have interpreted and applied the Hawaii Rule, and provide some guidance as to what degree of harm (or threat of imminent harm) a court might consider sufficient to constitute a "nuisance." While it remains to be seen how Virginia courts will apply this new legal standard, it would appear from the cases from other jurisdictions that the most important factor in determining whether one has a claim against their neighbor is the likelihood of serious damage. If falling leaves and sticks exist, but do not cause serious harm, they don't quite rise to the level of a nuisance. On the other hand, if a home is in imminent damage of harm (due to the height of the tree and the fact that the tree is leaning almost entirely over the neighboring property), a nuisance may well exist, such that a court can require the owner to remove the tree.

### **Impact on Community Associations**

The decision in *Fancher* allows Virginia homeowners to bring nuisance actions, in addition to engaging in self-help, to combat the intrusion by neighboring plants/trees onto their property. This decision could have a significant impact on the way homeowners in Virginia care for their land and landscaping. We suggest that Associations consider the following:

- Decisions concerning the removal and/or pruning of trees should be made on a case-by-case basis, based on the facts and circumstances surrounding each individual situation. If there is actual or imminent potential harm from the tree to an adjoining property, removal or pruning of the tree should be considered, as directed by an arborist. Please keep in mind that removal of trees or canopy cover can also have zoning or covenant implications, so the involvement of the local jurisdiction may be necessary.
- Associations may wish to be more proactive in inspection and maintenance of trees on Association property, particularly those near the common area boundaries;

- Budget increases might be necessary for:
  - Additional expenditures for tree maintenance, i.e. pruning, removal, advice from arborists or other experts, etc.
  - Potential increased legal costs and fees for lawsuits arising out of damage caused by neighboring trees owned by the Association.
- Insurance policies should be reviewed and plans made for possible increased premiums due to increased responsibilities, claims and liability for damage caused by trees.
- Respond to and be prepared to promptly investigate complaints about damage (i.e., to retaining walls, pipes/sewer lines, sidewalks, etc.) allegedly caused by trees.