

# **REAL PROPERTY: Landowners' Rights and Responsibilities in West Virginia**

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## **INTRODUCTION**

Each year, the West Virginia Legislature creates many laws to add to the several thousand that already exist. People who own land are directly affected by many of these laws. Limited opportunities exist for an individual property owner to know of these laws without spending many hours reading through the volumes of the West Virginia Code. Besides, the Code does not include interpretations of laws as a result of court decisions.

The purpose of this publication is to make property owners aware of significant property laws dealing with basic rights and obligations. More specifically:

- to provide a basic understanding as to what rights a landowner has in the use of real property;
- to explain what duties a landowner has toward neighbors, strangers, and government;
- to enumerate government rights that are superior to, or supersede, those of the landowner; and
- to serve as a reference guide for finding laws that are of interest.

Property items discussed in this publication are based upon several hypothetical situations and facts. It must be understood that if the hypothetical situations or facts change, legal results could be different.

This publication cannot substitute for qualified legal help. Persons interested in obtaining more legal information and persons having property problems should consult an attorney. Persons needing additional information on the availability of attorneys should contact the County Bar Association and/or the West Virginia Lawyer Referral Service, LRS Coordinator, West Virginia State Bar, 2006 Kanawha Boulevard, East, Charleston, WV 25311. As of this printing, the telephone number is 304-558-7991.

## **WHAT IS PROPERTY?**

Property generally falls into two categories: personal and real. Real property includes the land, what is beneath the land, vegetation (including unharvested crops), the air above, and any permanent structures on the land. Personal property includes money, stocks, bonds, furniture, domestic animals, non-permanent structures, and other such items. Generally when land is sold, the sale includes the real property but not the personal property. In this publication, the primary focus is real property, but issues involving personal property are also discussed.

Ownership may be described as the right to use and enjoy property with the right to exclude others from such use and enjoyment. Owners may legally sell, lease, or hold property at their own choosing. They may not use property, however, in such a way as to substantially interfere with the rights of fellow citizens to use or enjoy their property.

## **BACKGROUND OF PROPERTY RIGHTS**

In pre-agricultural times, man had little need for land ownership. He was primarily a hunter and gatherer who traveled in bands to wherever food could be found. Permanent communities did not exist because, as soon as the food became scarce in an area, the band moved. With the development of agriculture, people no longer had the need to be forever wandering in search of food. While game remained a major part of their diet, many societies established more or less stable communities surrounded by fields. After a hunt, the hunters would return with the meat to the village where it was prepared and eaten.

In tribal systems, the chief allocated land for cultivation, allotting the best land to those who were most useful to the tribe, such as the best warriors, who, in turn, would parcel it off to relatives. However, ownership remained with the tribe rather than with an individual. Tribal members remained together as protection from neighboring tribes intent on gaining more territory.

From this base grew the feudal kingdoms of Europe during the Middle Ages. A kingdom was ruled and protected by a king who was the sole owner of all the land in his kingdom. He would grant land to his most trusted warriors and advisers in return for their services of providing him with armies, food, and labor. The rights of ownership, however, remained with the king. The favored noblemen would, in turn, grant parts of their land to trusted friends who would subdivide further until the land was divided among the people who actually worked the soil. Thus, the small property holder actually was a tenant to his lord, who was a tenant to the higher lord, and on up to the king, who was the true owner.

By the year 1066, Harold had consolidated much of England under his power, and most of the large manors existed by his grace. The noblemen owed Harold their loyalty and their services while he provided them with protection from other kingdoms. When William the Conqueror invaded England and defeated Harold, he finished the job of imposing feudalism on the country. As centuries passed, the services owed to the king gradually decreased. As a money economy developed, a system of taxation was established. No longer did the great landowners send soldiers and food to the king. Instead, they sent money with which the king could buy armies and food. At the same time, these landowners exacted a tax, or rent, from those who held land under them.

This country was first settled under much the same system of grants by a king, but rather than soldiers, the recipients of vast amounts of territory in the colonies were usually trading companies, such as the Massachusetts Bay Company, or individuals favored for reasons other than their fighting skills, such as William Penn. It was advantageous for the owners of granted lands to have the land settled rapidly in order to clearly establish and protect their rights of ownership. Hence, after reserving certain lands for their personal use, owners distributed most of the granted lands to settlers for a small annual payment or none at all.

After the American Revolution, the state governments became the sovereign regarding property within their boundaries. Therefore, the state had the right to collect taxes from landowners. Ownership became much less difficult because there was no longer the complicated string of owners leading up to the sovereign. Rights of ownership and use were vested in the individual, while the states retained the rights of taxation, eminent domain, police power, and reversion to the state for failure to pay taxes or upon death of a landowner who had neither a valid will nor living heirs.

Against this background, property in West Virginia will be discussed. Private ownership rights are not necessarily superior to those of the state or federal governments, which retain strong powers to regulate or take land in the interest of society.

## **X vs. Z**

The chief actors in this publication are two fictional property owners: Z and X. Z owns two pieces of real estate in the same county. The first, called Homestead, contains a total of 200 acres which are fenced and include Z's house, barn, and other farm buildings. Approximately 100 acres are under cultivation, and most of the remaining acreage is pasture for Z's livestock.

Z's other piece of property, Eldorado, is in the hills about five miles away. It consists of about 80 acres, mostly wooded, but with some small clearings. There are no buildings on Eldorado because Z keeps it primarily as a private hunting and fishing spot. This land is unfenced, uncultivated, and not posted.

X is Z's neighbor at both Homestead and Eldorado. Several hypothetical situations and legal implications will be discussed with a view towards helping a property owner avoid serious trouble by seeking proper help before situations get out of hand.

Many laws will be specifically enumerated throughout this publication. A section in the back of this guide dealing with the West Virginia Code describes how and where these laws can be found. Do not rely on these statutes alone, however, as their meanings may not be as clear as they seem. The language of the statutes often can be interpreted in many ways. Legal assistance is the best way of determining whether a statute fits the facts of an individual case. In addition, much of the statutory law in West Virginia has been interpreted by individual cases decided by the West Virginia Supreme Court of Appeals. Often the statutory law must be read in light of the interpretation given to the statute by the Court.

## **TRESPASS**

### **General**

In 1978, the West Virginia Legislature enacted a law dealing with trespass, more clearly defining trespass and stating the remedies available to landowners who do not want unauthorized persons on their land. The following situations illustrate some of the rights and responsibilities of a landowner, under the law, as well as the liabilities a person can face for trespassing.

Z finds X sleeping under a tree at Homestead.

Q: Is X a trespasser?

A: Yes, if X is on Z's property voluntarily and without permission. The legal definition of trespass is "the willful unauthorized entry upon, in or under the property of another ..." [§61-3B-1(8)].

But X works for the state and is involved in a state-authorized project while on Z's land.

Q: Is X a trespasser in this situation?

A: No. An entry by a state official, agency, or instrumentality as authorized by law does not constitute trespass [§61-3B-1(8)(a)]. Other exceptions to the general trespass rule include:

- entry by a person or entity (often public utility) exercising rights under, and by virtue of, a right-of-way or easement, provided that person or entity owns such rights-of-way or easement by written or prescriptive right;
- persons entering property, not including buildings, from a public road for the purpose of asking permission to enter;
- entry performed in the exercise of a property right, as X's right to enter onto Z's land if Z sold the timber to X, who now wants to harvest it; and
- an entry for the purposes of surveying to ascertain property boundaries, of constructing or maintaining a boundary fence, or of repairing or maintaining a building immediately adjacent to the property line, provided no physical injury results to Z's property [§61-3B-1(8)(b)(c)(d)(e)].

### **Unauthorized Entry**

Z has established that X is trespassing.

Q: What can Z do about the problem?

A: Z should personally inform X that he is on private property and request that he leave. If X leaves peacefully and no damage has occurred, the incident need go no further. However, if X refuses to leave, or if he leaves a gate, door, or fence open which could allow animals to escape, or if X causes any other damage to the property, he could be guilty of a misdemeanor and, if convicted, could be fined from \$100 to \$500, imprisoned for up to six months, or receive both a fine and imprisonment [§61-3B-3(b)]. In addition, Z could bring a personal injury suit against X and demand double compensation for the harm caused by X [§61-3B-3(d)].

### **Authorized Entry, Unauthorized Refusal to Leave**

X is a guest of Z, but refuses to leave on Z's request.

Q: Does Z have a right to demand that X leave?

A: Yes. X would become a trespasser upon his refusal to leave even though he originally was on the premises with Z's permission. X could be guilty of a misdemeanor and could be fined up to \$100 for his obstinacy [§61-3B-2,3].

Q: Can Z take matters into his own hands and physically eject a trespasser from his property?

A: Yes, but it may not be a wise thing to do. A property owner in West Virginia has the right to use reasonable force to expel a trespasser from private property. However, the word *reasonable* is obviously open to interpretation. If X brought an action of assault and battery against Z, the question of *reasonable force* would be decided by a judge or jury, who may or may not decide in favor of Z. For both physical and legal safety, Z should leave any physical action to the proper authorities.

### **Damage to, or Taking of, Vegetation**

X finally agrees to leave, but in doing so he maliciously stomps through Z's garden, destroying many of the vegetables.

Q: What is X's liability for this act?

A: He is guilty of a misdemeanor and, upon conviction, could be fined up to \$50 for a first offense. He faces the possibility of the fine plus three months in jail if he has been guilty of this crime in the past [§61-3-48]. If Z sues, X may have to pay for triple the amount of Z's losses (treble damages) [§61-3-48a]. Even if the plants have no monetary value, §61-3-48 makes it unlawful to damage and remove any plant within 100 yards of either side of a public roadway without the written permission of the property owner.

### **Unauthorized Vehicles Parked on Private Property**

X parks his car on Z's property without Z's permission. Z wants it removed.

Q: What are Z's options?

A: §17c-14-13 allows Z to either move the car himself or have it moved at X's expense. Z is not liable for damage to the car unless he is negligent in moving it or in authorizing its removal. When Z takes such an action, he must notify the West Virginia Department of Public Safety. If he lives in an incorporated town, he must also notify the local police department.

### **Off-Road Vehicles on Private Property**

X is riding his motorcycle or four-wheeler on Homestead and on the property of Z's neighbors. He has cut several fences for better access from place to place.

Q: What penalties might X incur and for what damages is he liable?

A: There are no laws specifically relating to trespassing with motorcycles or four-wheelers. Off-road vehicles are subject to the same trespass laws as pedestrian trespassers. Thus, X could be fined up to \$500 for each act of trespass. In addition, he could be liable for damages (treble damages) caused by the fence cutting, loss of stock, or other losses caused by his trespassing [§61-3B-3(d)].

### **Injury to Trespasser**

While trespassing on Z's land, X cuts himself severely on an ax Z had left lying on the ground.

Q: Is Z liable for X's injury?

A: Z is not liable for injuries sustained by a trespasser unless those injuries were intentionally inflicted by Z. Even if Z had given permission to X to be on the land, Z is not liable. Only if X was on the property for purposes directly or indirectly having to do with business in which both Z and X have a mutual interest might Z be legally obligated to pay for X's injury.

In order to encourage landowners to make private land available to the public for recreational purposes, wildlife propagation purposes, or military training (defined as including, but not limited to, hunting; fishing; swimming; boating; camping; picnicking; hiking; pleasure diving; motorcycle or all-terrain vehicle riding; bicycling; horseback riding; nature study; water skiing; water sports; or visiting, viewing, or enjoying historical archeological scenic or scientific sites [§19-25-5(b)(5)]), the West Virginia Legislature passed a law that limited the liability of landowners to persons entering on the property for such purposes. The limitation of liability provided by the statute is limited and does not apply to situations in which the landowner charges a fee for the use of the land or has deliberately, willfully, or maliciously inflicted injury to persons or property [§19-25-(1-7)].

## **Trespassing Children**

One significant exception to the limited liability resulting from free public access to private land involves the situation of trespassing children. Generally, landowners owe a greater duty to protect trespassing children from injury than they do trespassing adults. This duty consists of taking ordinary care in not maintaining any *dangerous instrumentalities*, which can be defined as that which a landowner should know is attractive to children, is likely to bring children onto his land, and is likely to be injurious.

For example, if a child is injured while playing on an old rope swing on Z's property because the swing breaks, Z may be held liable for the injury even though the child was trespassing and Z was ignorant of the child's presence.

In order to be free of this kind of liability and to protect children from harm, Z should attempt to eliminate all dangerous instruments from his property. Anything a child is likely to play with, be attracted to (i.e., attractive nuisance) or on, and by which a child is likely to be injured, should be kept out of reach. In addition, all open water wells are required by law to be covered [§61-10-30]. Farm ponds, although they can be hazardous, are not considered to be dangerous instrumentalities unless a concealed danger, such as a sudden drop-off, exists. However, any actions that make property less hazardous can result in substantial savings in both suffering and money.

## **Posting**

The previous examples deal with trespass in general and provide the reader an overview of what does and does not constitute trespass. More specific trespass topics will be addressed later. It is important, however, to understand what constitutes proper, legal posting since it is the posting that gives the initial warning that the property is private and should not be entered without risking a charge of trespass.

Posting consists of maintaining signs not more than 500 feet apart along the boundaries of the property as well as at each corner [§61-3B-1(4)]. The signs must include the words *No Trespassing* in letters at least 2 inches high and include the name of the owner, occupant, or lessee of the land. The signs must be easily seen from outside the property line. It is not necessary to post land not larger than five acres on which there is a dwelling. Fenced or cultivated lands also are deemed to be posted. However, the landowner may wish to post these lands to avoid misunderstandings and to eliminate the excuse of ignorance by the trespasser. A landowner must be certain the signs are posted correctly on the property, since it is unlawful to post land that is not owned or legally occupied by the person doing the posting [§20-2-9].

Lawmakers have recognized the problem of outsiders removing or defacing *No Trespassing* signs. The removal or vandalism of a sign is a misdemeanor, and each incident constitutes a separate offense [§20-2-10]. The penalty upon conviction is a fine of from \$20 to \$200, a sentence in the county jail of from one to six months, or both fine and imprisonment [§61-3-30].

## **Hunting On Private Property**

During hunting season, Z hears shots that he thinks were fired on his property. Upon investigation, Z finds X within the boundaries of Z's fenced land, obviously engaged in hunting. Z is worried about the safety of his animals, so he wants X off the property.

Q: What rights does Z have regarding hunters on his property?

A: Hunting and fishing licenses provide no rights other than the right to hunt and fish. They do not provide the right to enter a person's posted, fenced, or cultivated land without permission. Several laws have been passed above and beyond the usual trespass laws to allow landowners to protect property from trespassing hunters and anglers.

§20-2-7 makes it unlawful to shoot, hunt, trap, or fish on any posted, fenced, enclosed, or cultivated property; to peel trees or timber; or to build fires without the written permission of the landowner. If a hunter causes damage to the property, the hunter is personally liable and must compensate the owner. In addition, the hunter may be found guilty of a misdemeanor, with an accompanying fine of from \$20 to \$300, a term in the county jail from 10 to 100 days, or both fine and imprisonment [§20-7-9]. The landowner can either have a conservation officer make the arrest or the landowner can do it and immediately take the guilty party to a magistrate. However, this last alternative is rarely used and could result in trouble for the landowner if the landowner uses, or is perceived to use, unnecessary force.

If a hunter carelessly or negligently injures or kills any person or domestic animal or destroys or injures any other chattel (personal property) or property, the hunter is required to file with the director of the Division of Natural Resources a full description of the incident or accident within 72 hours of the incident; if the hunter violates this provision, the may be found guilty of a misdemeanor and be subject to a fine of not less than \$1,000 or more than \$10,000 and to imprisonment of up to one year [§20-2-57]. In addition, the hunter will be liable for compensating those injured for their losses.

### **Hunting Near Dwellings**

Z's house at Homestead is 200 feet from X's property. X is hunting on his own land about 400 feet from Z's home. At no time is X on Z's property, but Z is disturbed about shooting taking place so close to his home.

Q: Does Z have a right to stop X from hunting near Z's house?

A: Yes. §20-2-58 makes it unlawful for X to discharge a firearm for any purpose within 500 feet of a dwelling. Also, it is unlawful to shoot or discharge a firearm across, or in, any public road in the state or within 400 feet of any schoolhouse or church or on or near any park or other place persons gather for pleasure. Z should contact a conservation officer to have X arrested if he refuses to stop. X's violation is a misdemeanor.

## **NUISANCE**

Somewhat similar to trespass is the law of nuisance. Although property owners generally have a right to do whatever they want with their property, they cannot do certain things if they substantially and unreasonably interfere with the rights of neighbors. This substantial and unreasonable interference is called a nuisance. Nuisance differs from trespass primarily in that there need not be an actual physical intrusion onto the property. Some of the more common nuisances are prolonged noise, noxious odors, unsanitary conditions, and incompatible use of the land, such as a stockyard in the middle of a residential neighborhood. In addition, intentional disturbance of a neighbor may be defined as nuisance.

Temporary and occasional irritations, such as the crying of a baby or the smoke and smell of an outdoor barbecue, do not constitute legal nuisances. The nuisance must be unreasonable and substantial before property rights are invaded. Another irritation that has been held not to be a nuisance is mere unsightliness. A yard that is chronically unkept and filled with debris does not constitute a nuisance, unless proof exists of an unsanitary or dangerous condition. Landowners who feel they are a victim of a nuisance as defined in this section and would like relief should speak with an attorney to identify opportunities.

## **ANIMALS**

### **Dogs Belonging to Others**

X's dog is frequently allowed to run loose and Z often sees it on his property. Although the dog does no damage to Z or his property, Z wants to keep it away from the property.

Q: What can Z do?

A: Other than asking X to tie the dog, Z can do nothing legally if the dog causes no harm. Under §19-20-12, a licensed dog is protected from willful stealing, injuring, or killing by any person not its owner. If Z were to kill or injure the dog, he could be found guilty of a misdemeanor and subject to a fine and/or imprisonment, depending upon the value of the dog. Z might also be liable for paying to X the cost of buying a dog of equal value.

If X's dog had injured Z or his property, X would be liable for all of the damages regardless of whether X was negligent in letting the dog loose [§19-20-13]. The statute provides that any owner or keeper of a dog who allows the dog to run at large shall be liable for any damages inflicted upon the person or property of another by the dog. According to West Virginia case law, a dog is considered to *run at large* if it is not properly secured [Marcum v. Bellamy, 203 S.E.2d 367 (W.Va. 1974)]. Z could lawfully kill the dog if it was endangering the life of a human or was chasing, worrying, or wounding livestock [§19-20-16]. Also, the dog owner or keeper is liable for the damages the dog inflicts to livestock [§ 19-20-14].

X's dog kills some of Z's chickens; but, before Z has a chance to react, the dog is gone.

Q: What are Z's options?

A: Z should complain to the police or sheriff, who would then notify X that X must have the dog killed. If X refuses, the issue goes before a magistrate. If the magistrate is convinced by the testimony that the dog did attack the chickens, he will direct the sheriff to kill the dog and assess the costs to X. X must also pay Z's losses [§19-20-18]. X also may be found guilty of a misdemeanor if he refuses to produce the dog or if he hides it so that it cannot be killed [§19-20-17]. In addition, for unlawfully harboring the dog, X could be fined \$10 to \$50 for each day he wrongfully protects the dog [§19-20-17].

### **Landowner's Dog**

Z also has a dog and is concerned about laws regarding dogs.

Q: What are the legal responsibilities of a dog owner?

A: In addition to the laws discussed in the previous section, several laws exist regarding dog ownership. An annual head tax of \$3 per dog, male or female, must be paid to the county assessor for each dog over 6 months old [§19-20-2]. The dog registration tag given to the dog owner must be worn by the dog at all times [§19-20-5]. An unregistered dog may be impounded and, if the owner does not pay the tax, the dog may be killed. Failure to register a dog is a misdemeanor with a penalty of a \$25 to \$100 fine [§19-20-9]. Municipalities, in addition to the state, may require a tax or license.

Every dog must be vaccinated for rabies every two years [§19-20A-2], and a vaccination tag must be worn by the dog at all times [§19-20A-4]. Failure to comply with either of these laws could result in a \$10 to \$50 fine, a 10- to 60-day jail sentence, or both a fine and jail term [§19-20A-6].

It is unlawful for a dog to chase deer. If a dog is seen doing so, a conservation officer may capture the dog and force its owner to pay the capture and impoundment costs when the dog is retrieved by the owner. If the owner does not claim the dog within ten days, the dog may be killed. A conservation officer may kill any dog found chasing deer if the dog eludes capture. [§20-2-16].

Abandonment, neglect, and cruelty to animals is against the law. Cruelty includes such acts as needless beating, torturing, tormenting, mutilating, overworking, or starving any animal. Also, it is a violation of state law for a person to use, train, or possess such animal for the purpose of seizing, detaining, or mistreating any other animal. Penalties for cruelty are a \$100 to \$1,000 fine, up to six months in the county jail, or both [§61-8-19]. Any person convicted of cruelty to an animal forfeits their interest in the animal, and the animal becomes the property of the humane society or local animal shelter.

A dog owner should be particularly careful if the dog shows a tendency to be mean or vicious. If the dog injures someone, even while on its owner's property and even if a *Beware of Dog* sign is posted, the owner will be liable for the injuries inflicted.

### **Other Pets**

Cats, other animals, and reptiles are similarly protected and a person can be liable for intentionally or unlawfully killing a cat, other animal, or reptile [§19-20-12]. People keeping wild animals for pets must first obtain a permit from the West Virginia Division of Natural Resources [§20-2-51]. If the wild animal injures someone, its owner will be held liable if it can be shown that there was carelessness or negligence in the restraint of the animal.

## **Livestock Running at Large**

Z finds several of X's goats devouring his vegetable garden.

Q: What can Z do to stop this problem?

A: Simply informing the owner of the problem may be sufficient. Most responsible people are willing to pay for damages done to others, and most landowners will be able to overlook minor inconveniences caused by loose animals. However, if friendly cooperation fails, the injured party is not without remedies.

Whether the goats are on Z's property or on a public road, Z can immediately impound them [§19-18-1 through §19-18-12]. Within three days, Z must notify X of the impoundment, describing the animals involved, the date impounded, the reason for the impoundment, and the amount claimed as damages and expenses. X must pay this sum before he retrieves the animals. If X believes the charges to be too high, he must notify Z in writing that he is appointing a landowner to arbitrate the dispute. Z then has the right to appoint an arbitrator, and the two already appointed arbitrators select a third. This panel then determines the damages to the property and the costs of impoundment. An agreement of any two of the arbitrators as to fair compensation constitutes the final decision [§19-18-8].

A different situation arises when a single lost animal is involved. The finder must attempt to find the true owner by posting notices in public places and, failing at that, by placing legal advertisements in the county or local newspaper. The owner must pay the finder's expenses before claiming the stray animal. Otherwise, the finder can keep the animal if the administrative details set out in §34-1-1 through §34-1-11 are followed.

## **Malicious Injury to Livestock**

X poisons Z's prize bull and is caught. Z wants to prosecute to the fullest extent.

Q: How much trouble may X expect?

A: The crime of poisoning, maiming, killing, causing the death of, or causing the theft of any domestic animal worth \$100 or more is a felony. X can be sentenced to the state penitentiary for one to ten years if convicted. If the animal is worth less than \$100, X may be guilty of a misdemeanor and subject to a term in the county jail of up to three months and a fine of up to \$500 [§61-3-27]. X is also liable to Z for the loss Z has suffered.

## **Livestock Illness**

Z discovers that one of his pigs has contracted brucellosis.

Q: What are Z's responsibilities under the law regarding diseased animals?

A: §19-9-6 specifies that upon finding or suspecting that an animal has any communicable disease, its owner must immediately report the information in writing to the West Virginia Department of Agriculture. Failure to do so could result in a \$100 fine. The owner must not sell, give away, or allow the animal to stray without permission from the commissioner of the Department of Agriculture under penalty of a fine of up to \$100 for the first offense and up to \$500, with a possible jail sentence of up to 90 days, for subsequent offenses [§19-9-39 and §19-9-40].

Z is also responsible for properly disposing of the carcass if the pig should die. Proper disposal of a diseased carcass is by one of three methods:

- complete cremation of the carcass;
- boiling or steaming the carcass for two continuous hours; or
- burial in a place not subject to stream or pond overflow, at least 100 feet from any watercourse, well, spring, highway, house, or stable, covered by at least 3 inches of quicklime, and buried to a minimum depth of 2 feet [§19-9-34].

Proper disposal must be done within 24 hours [§19-9-34]. If the disposal is not undertaken by the animal's owner, the commissioner, or the commissioner's agent, may do so and bill the owner for the costs of doing so. The disposal of any dead animal in or near any body of water used for domestic

purposes, on or near any roadways, or on the surface of any public or private land is forbidden. The penalty of violating this law is a fine of \$25 to \$100 [§16-9-2 and §19-9-3].

In the event of a communicable livestock disease, the commissioner may impose a quarantine on Z's farm, or on the entire locale, in order to prevent the spread of the disease [§19-9-13]. Under a quarantine, it is unlawful to remove, or allow to be removed, any animal, hay, straw, grain, fodder, or vehicle from the area without a written permit. In addition, dogs or other domestic animals are not allowed to run at large [§19-9-18 and §19-9-19].

The commissioner has the power to order the slaughter of any sick animal if the commissioner believes it necessary for health reasons [§19-9-32]. The animal's owner, however, will be reimbursed by the state for losses [§19-9-33].

## **REFUSE**

### **Dumping**

Z discovers X dumping debris on Eldorado.

Q: What should Z do to prevent dumping in the future?

A: He should request that X stop. If X refuses, Z should contact the sheriff and make a complaint. X is guilty of violating §20-7-26, which states that it is unlawful to deposit, dump, or throw any litter, garbage, refuse, paper, etc., on any private property without the consent of the owner. The penalties for this offense is a fine of \$50 to \$500. This section also makes provision for second and third offenses. At the request of the defendant, the court may instead sentence the defendant to pick up and remove garbage and litter for a period of eight to sixteen hours [§20-7-26].

Q: Are there restrictions on Z dumping garbage on his own property?

A: Yes. Disposal of garbage or other solid waste on one's own property constitutes creation of an open dump, which is prohibited by law [§22-15-10]. Violations of this prohibition on open dumps may result in civil, criminal, or administrative penalties, including fines of up to \$20,000 per day [§22-15-15]. Z also should be certain that he is not violating county and/or municipal health laws, which vary from place to place. Also, Z should be aware that he will be held responsible if he creates a health hazard or nuisance on his land that adversely affects his neighbors. Z is expressly prohibited from dumping or littering within 100 yards of the high water mark of any river, stream, creek, brook, lake, or pond [§20-20-7-28]. A first offense violation of this section is a misdemeanor, and Z could be fined \$50 to \$500. Similarly, the defendant may request the alternative of picking up and removing litter for a specific time period.

### **Salvage Yards**

Z is prohibited from dumping or allowing abandoned vehicles, household appliances, or old tires to be dumped on his land for the purpose of operating a salvage yard without first obtaining a license from the State Division of Highways for an annual fee of \$200 [§17-23-3]. All rules and regulations made by the commissioner must be followed when operating a salvage yard, including proper location, fencing, and screening as explained in §17-23-1 through §17-23-13. If Z is found in violation of any provision of this article, he may be fined from \$100 to \$1,000 for each month the violation continues.

## OUTSIDE BURNING

### Trash

Z wants to burn a pile of house trash, grass clippings, leaves, and wood scraps on his property.

Q: What restrictions apply regarding this burning?

A: Z is allowed to conduct the burning only if the waste was grown on the premises or produced in Z's household in the course of everyday living and if the area is not served by a municipal or private refuse collection service. Z must give careful consideration to the effect of the smoke on air quality in the vicinity before burning. In the event of an air pollution alert, warning, or emergency, all outdoor open burning is prohibited.

People who live in municipalities should check local burning regulations, as many incorporated areas prohibit open burning either entirely or during certain hours of the day.

The periods between March 1 and May 31 and between October 1 and December 31 are designated as statutory forest fire seasons [§20-3-5]. During forest fire season, no person shall burn or set fire to forest lands, grass, debris, or other inflammable materials between the hours of 4:00 p.m. and 7:00 a.m. Exceptions exist for campfires, provided a space of 10 feet around the location has been cleared of flammable material, and for when snow is 1 inch or more around the location [§20-3-5]. Also, such fires shall not be left unattended [§20-3-5].

### Ground Cover

Most of Eldorado is heavily wooded, and the surrounding property is also forested.

Q: Can Z lawfully burn the grass in the clearings and the underbrush in the forest?

A: Z can do his burning as long as he does not violate the West Virginia Office of Air Quality rules and regulations dealing with the landowner's responsibility to give careful consideration to the effect of the smoke on the surrounding area as well as the prohibition of burning during air pollution alerts, warnings, or emergencies. If Z's burning is significant and continuous, he may come under the disapproving scrutiny of the Office of Air Quality and may be subject to stiff penalties if he fails to stop burning once requested to do so by the Office of Air Quality [§22-5-6].

A permit is required and may be obtained from the director of the Division of Forestry if the burning is to be conducted during the statutory forest fire seasons.

§20-3-5 provides that the director of the Division of Forestry has the power to order any and all fires extinguished, including permitted ones, if conditions warrant such an act and prior approval is received from the governor.

### Damages Caused by Escaped Fire

Z fails to extinguish his fire and it escapes onto the land of his neighbor and onto land owned by the state.

Q: Is Z responsible for the damages caused?

A: Yes. Z must pay for all the losses suffered by his neighbor and by the state [§20-3-6, §20-3-7, and §20-3-15] and must additionally pay the costs incurred by the Division of Forestry in controlling and extinguishing the fire [§20-3-11]. Z is guilty of a misdemeanor for letting the fire escape.

Z would not be liable for damages and the costs of firefighting if the fire was started by a trespasser to Z's land, provided Z made a good faith effort to control the fire once he discovered, or was informed of, its existence. The person who started the fire, if convicted of intentionally setting the fire, could be fined \$500 to \$5,000, be sentenced to the state penitentiary for one to five years (since this crime is a felony), or both [§20-3-7].

## **Buildings**

The burning of any building, wilfully and maliciously, constitutes a crime of arson [§61-3-1 and §61-3-2]. These statutes also apply to cases of willful and malicious burning, or attempting to burn, the owner's own property. Arson is a criminal act and the penalties can be as much as 20 years in the state penitentiary, depending upon the property burned or attempted to be burned [§61-3-1 through §61-3-5]. Parents of children under the age of 18 who purposely start fires can be held financially liable for the damages, up to a maximum of \$2,500. This parental liability is not limited to fire, but applies to any situation in which the child wilfully and maliciously destroys property [§55-7A-2].

## **AIR AND LIGHT**

### **Air Space**

In previous years, a landowner owned not only the ground and below but also the air space above the ground up to the heavens. With the advent of aviation, this right was modified to eliminate a potential flood of lawsuits by landowners against aircraft that violated their air space. Today, a landowner's air rights include only that which he can reasonably use, but no higher.

X flies his airplane very low and very recklessly over Z's house, causing excessive noise and endangering Z's person and property.

Q: Is X in violation of a law?

A: If Z reports X to the sheriff, X may be found guilty of violating §29-2A-12, which prohibits the operation of aircraft in a careless or reckless manner so as to endanger the life or property of another. The penalty for this violation is a fine of up to \$500, a jail term of up to one year, or both fine and jail. In addition, X could be subject to various other penalties if he is found to be intoxicated while operating an aircraft [§29-2A-11].

### **Vegetation**

Several fruit trees belonging to X have branches overhanging Z's property.

Q: Does Z own the fruit on these branches?

A: No. Provided the tree stands on X's property, X owns all that the tree produces, and Z is liable to X if he takes any of the fruit from the branches. X cannot, however, go onto Z's property without permission to gather the fruit.

Z also has the right to trim the branches of the tree to the property line. If the tree is growing on the boundary line, Z and X would share ownership of the fruit.

### **Light**

Z has built a solar-heated greenhouse on the southern edge of his property. He learns that X, who owns the property adjacent to the greenhouse, is jealous of the project and plans to disrupt it by either building a tall fence or planting trees to block the sunlight.

Q: Can Z prevent X's action?

A: Probably not. This specific issue has never been addressed in West Virginia's courts; but, in two very old cases, the Supreme Court of Appeals ruled that no legal right exists to light or air. Provided no law exists restricting the height or location of fences or the planting location of trees, X probably can continue with his plan even though his motives may be purely malicious.

This is not to say a court would be bound to decide the issue in this case in the previous way, since the facts are different than in the older cases. Perhaps an overriding public interest could be found in encouraging maximum use of available cheap energy. An attorney could better advise someone with a similar problem on how strong an argument could be made either way, based upon the specific facts of the situation.

# **WATER**

## **Riparian Rights**

Riparian rights refer to the rights of a landowner whose land abuts a natural watercourse. This is a very complex subject and can be treated only in a general way in this publication. The general principle of law is that all landowners along a watercourse have the same right to the use and enjoyment of its water, provided no one owner substantially diminishes or pollutes the stream, thereby causing hardship to downstream users. A landowner does not own the water in a stream. Instead, he owns the right to use it, subject to the equal rights of other owners along the watercourse.

Ownership of the stream bed depends upon the stream's classification. If the stream is classified as non-navigable, the landowner's property extends to the middle of the streambed, provided the stream is designated as a boundary line in the deed. On a navigable stream, the landowner holds title only to the low water mark, and the rest of the streambed is owned by the West Virginia Public Land Corporation. A navigable stream is defined for ownership purposes as one that may be used by the public for transportation and commerce in its natural condition.

## **Irrigation**

One beneficial use Z may make of his water rights is irrigation. This use is complicated by the fact that, after Z's withdrawal for irrigation, enough water must remain in the stream for downstream needs. In times of below-normal rainfall when irrigation is most needed, taking water from the reduced stream may adversely affect landowners further down the stream.

This and other problems combine to make riparian rights a intricate subject. The reader is reminded that this is an introduction only to the legal aspects of the riparian doctrine. Entire books have been written on the subject. Providing a detailed perspective of water rights is outside the scope of this publication.

## **Pollutants**

Z is prohibited from discharging untreated pollutants into any watercourse without first obtaining a permit from the Chief of the Office of Water Resources [§22-11-8]. If Z does not apply for a permit or fails to be granted one, yet pollutes a stream, he may be found guilty of a misdemeanor punishable by a fine of from \$100 to \$1,000, by a six-month sentence in the county jail, or by both fine and imprisonment [§22-11-24]. He also may be liable for paying the replacement cost of any fish killed due to the discharge [§22-11-25].

## **Surface Water**

Surface water is defined as water that does not flow in a definite channel and is not collected in an identifiable body of water. Generally, under West Virginia law, a landowner can do as he wants with the surface water, with the exception of collecting it in an artificial channel and directing it upon the land of an adjoining neighbor. Therefore, Z has the right to divert surface water from his land or to impound it, provided he does not violate the previously mentioned sanctions.

A frequent problem in the past in urban areas was sewage or polluted water from one house seeping into the basement of another. With modern sewer systems, this is unlikely to happen; but if it does, the neighbor is liable for repairing the leak and paying the damages of the injured party. Property owners also have a right to compensation if water or sewer damage is caused by a negligently constructed municipal or public service district system.

A problem is occasionally caused by development of subdivisions and shopping centers. Such developments may result in abnormal storm water runoff due to the large amount of paved area, which does not absorb rainfall. This increased volume of surface water may cause erosion and related problems to property owned by people below or around the development. Injured landowners may successfully sue the developer for damages if it can be shown that the developer proceeded carelessly with the development.

Another frequent problem experienced in urban areas is that of water directed onto a neighbor's land from the eaves and gutters of a nearby building. A landowner has a right to be free of this problem and can demand that his neighbor properly divert the water. If the neighbor refuses to take remedial action, a complaint to the city building inspector or engineer may solve the problem since, in many municipalities, failure to maintain proper drainage constitutes a violation of the building codes. If a complaint to the city gets no result, legal help may be necessary.

## **Subsurface Water**

Z is entitled to all percolating water (water that infiltrates through the soil) beneath his land. However, water that is in underground channels cannot be used in a disproportionate amount if it deprives his neighbors of a fair share. Z is entitled only to satisfy his reasonable needs from this source of water.

## **EXCAVATIONS AND DITCHES**

In order to drain water from his property, X constructs a drainage ditch on his own property but adjacent to the property of Z. The water in this ditch has caused Z's land to be eroded.

Q: Is X responsible for Z's loss?

A: Yes. Every person has a natural right to support for his land from the adjacent and subjacent soil. Therefore, X has the duty to make his excavation in such a way that Z's land will continue to be supported. X is liable for damages that Z suffers.

The situation is different in urban areas, since the absolute right to lateral (side) support applies only to land in its natural state. So, if a property owner excavates property and uses reasonable care, prudence, and skill in doing so, the property owner is not liable in the event that a neighbor's land gives way as a result of a building or other structure on that land. The excavator would be liable only for damages if proper care was not taken in the work.

## **OBSTRUCTIONS IN ROADWAYS AND DITCHES**

Z receives a notice from the West Virginia Division of Highways informing him that a small rockslide on his property at Eldorado covered part of the public roadway. Z inspects the slide and decides it is too small a problem to address. Two weeks later, Z receives a bill from the state for the removal of the debris.

Q: Is Z obligated to pay the charge?

A: Yes. A landowner has the responsibility to move obstructions that fully or partially block the public roadway if the obstruction was caused by a condition on his land. These obstructions may include mud slides, fallen trees, carcasses of dead animals, garbage, and similar items. The state or county must notify the owner of the problem; and, if the obstruction is not cleared within 10 days, the state or county may do so at the landowner's expense [§17-16-3]. The landowner might additionally be fined from \$1 to \$5 for each day the problem remains after the notice is received [§17-16-5]. The landowner is also responsible for keeping ditches clear of debris [§17-16-9].

## **BOUNDARIES AND FENCES**

### **Ascertainment of Boundaries**

Z and X disagree on the location of the boundary between their properties.

Q: How can Z conclusively settle the dispute?

A: He can go to court and file a petition for ascertainment and designation of the boundary line. X will receive a copy of the petition, and both parties will have an opportunity to present their sides of the dispute in court, preferably through representation by legal counsel. The judge will make a decision based upon the evidence, and this decision will be conclusive if there are no appeals [§55-4-31]. In a serious dispute, the court proceedings can be very complex and take years before the actual property lines are determined, due in part to the often-inadequate property descriptions in older deeds.

### **Illegal Tampering With Boundary Markers**

Z learns that X has moved one of the boundary markers.

Q: What sanctions are there regarding this action?

- A: It is a misdemeanor to break down, destroy, injure, deface, or remove any boundary marker for any unauthorized purpose. X can be fined from \$20 to \$200, be sentenced to the county jail for one to six months, or both [§61-3-30].

### **Stream Boundaries**

The boundary between Z's Homestead and X's property is a meandering creek. Z's deed says that Z owns to the middle of the creek. However, during the previous spring, the creek overflowed its banks at one point and changed course, cutting off about two acres of Z's land.

Q: Who has the rights to this two acres of land?

A: Z does. When a watercourse suddenly changes its course and cuts a new channel, the boundary between two properties remains as it was before the change. The new creek bed does not become the new boundary.

Over a period of many years, the creek has very gradually shifted so that, at one point, X's land increased by several feet and Z's land decreased by an equal amount.

Q: Does this gradual change legally cause the boundary to change?

A: Yes. When the course of the creek changes imperceptibly, the boundary between the two properties will remain the center of the present creek bed even if one person's property is growing at the expense of another's. As long as nature is doing the work, Z has to accept his loss and X will reap a windfall. The same principle is true if Z lives along a navigable river where he owned up to the bank. If the bank expanded from the process of accretion, Z would be legally entitled to the additional land.

### **Rural Fences**

X builds a partition fence between his property and Z's property at Eldorado. He sends a bill for half the cost of the fence to Z.

Q: Should Z pay the bill?

A: The answer depends upon Z's plans for Eldorado. He must pay half the construction, maintenance, and repair costs if he plans to run stock on the land or to use it for agricultural purposes [§19-17-5]. Z has no obligation to share the cost for the fence if he has no intention of using Eldorado for cultivation, horticulture, or grazing purposes, since the fence would have no economic value to him. However, if Z later changes his mind and begins to use the land for agriculture, he must contribute his share of the costs to Z [§19-17-6].

Any disagreement over any aspect of the fence may be resolved through either party filing a civil action in the magistrate or circuit court having jurisdiction for the county where the fence is located [§19-17-8]. The person found responsible for paying for one-half the cost shall be responsible for the cost to build a fence that meets the standards of §19-17-1(e).

A fence that is accidentally built on a neighbor's property must be rebuilt so that it conforms to the actual boundary line or the neighbor is entitled to remove it. However, a fence may legally be placed exactly on the boundary line so that half its width is on each property.

### **Urban Fences**

The issue of adjacent landowners sharing the cost of a boundary fence does not arise in urban areas simply because the fencing laws were created to address the problem of livestock encroachment. A person owning property in town who wants to build a fence between his land and that of his neighbor must assume the full cost of the fence unless the neighbor voluntarily agrees to share the cost. If the fence between the two properties is a hedge, the hedge fence must be maintained so that, at no time, does it extend more than 18 inches over the boundary line onto the neighbor's property. Failure to trim a hedge within 10 days of notification of the necessity to do so is a misdemeanor, which carries a possible fine of \$1 per day the fence remains untrimmed after the 10-day grace period [§19-17-3].

## **GRAVES**

Z's father is recently deceased and Z plans to bury him at Homestead, where he was born.

Q: Can Z legally do so?

A: Yes. No state law exists prohibiting burial on a landowner's private property. The body must be properly and sanitarily buried, however, and a burial permit must be obtained from the West Virginia Bureau of Public Health, Division of Vital Statistics. Municipalities, however, may have separate ordinances dealing with burials. These municipal or local laws should be checked before proceeding with a burial.

If Z later should decide to remove the remains from the grave site, he must petition the circuit court for a permit for removal, transfer, and reinterment [§37-13-1]. After a court hearing, the petition will be either granted or denied [§37-13-4]. Z is barred from reinterment if the petition is denied and will be guilty of a felony and subject to imprisonment for two to five years if he ignores the petition denial [§61-8-14]. Any person who unlawfully disinters or disturbs a dead human body is subject to this penalty. Additionally, the wrongdoer is liable to the near relatives of the deceased for damages they may have sustained, such as mental anguish or the costs of reburial.

## **DRIFT PROPERTY**

### **General**

Z sees a beer keg floating down the creek by his property and retrieves it.

Q: Can he legally keep the keg?

A: Yes. If the owner of the keg fails to appear within three months, Z may either keep or sell it. However, Z must return the keg, or the money from the sale of the keg, if the owner ever shows up and pays Z's expenses of retrieval and care [§34-1-(6-8)]. These sections apply to all drift property except boats.

### **Boats**

Z finds a rowboat on his property by the creek and has no idea to whom it belongs.

Q: Is Z entitled to keep the boat?

A: Yes, if he attempts to find the owner and is not successful. Before Z can claim the boat, however, he must post notices in three public places explaining what was found and when it was found. If nobody identifies the boat as theirs within two weeks, Z must then have the notice published in a county or area newspaper once a week for two successive weeks. If the boat remains unclaimed for three more weeks, Z should have a magistrate issue a warrant to three landowners ordering them to view the property and swear under oath as to its value and character. Their certificate will be recorded and posted at the courthouse.

At any time during this procedure, the true owner may appear, pay Z's costs, and take the boat. However, the property belongs to Z if the owner does not show up within 30 days of the last posting [§34-1-1 through §34-1-7].

## **WILDLIFE AND PROPERTY**

### **General**

It was mentioned earlier that, historically, wildlife was considered to be part of a landowner's real property. However, the West Virginia Legislature enacted a law in 1929, §20-2-3, which designated all wildlife as property of the state, with the exception of aquatic animals within privately owned pools. For this reason, the state can require hunters and anglers to obtain licenses to hunt or fish.

### **Recreational Hunting**

During hunting season, Z wants to hunt on Eldorado, his own property, but he does not possess a hunting license.

Q: Can Z legally hunt on his own property without acquiring a license?

A: Yes. Z and his immediate family may hunt on his land without obtaining licenses, provided they comply with all other hunting regulations, such as those dealing with hunting seasons and reporting their kill. However, friends or guests of Z must possess hunting licenses even though they have Z's consent to hunt on his land [§20-2-28]. This section also applies to fishing.

### **Deer Damage**

Z's crops have been heavily damaged by deer, so Z plans to kill one or two of them if possible. It is not hunting season.

Q: Is Z's plan legal?

A: No. Before any such action is taken, Z must report his deer problem to a county conservation officer, county game biologist, or the director of the Division of Natural Resources, who must investigate the alleged damages. If the damage is found to be substantial, a permit can be issued to allow Z to kill one or more deer [§20-2-15].

### **Bear Damage**

Z has had problems with bears damaging his property at Homestead, and he is fearful for the safety of his livestock.

Q: What should Z do about the problem?

A: Z should notify a county conservation officer, county game biologist, or the director of the Division of Natural Resources, who will immediately investigate the problem. If the complaint is found to be justified, the conservation officer, Z, and Z's neighbors may hunt the bear or bears that caused the damage. The conservation officer is the party with the sole discretion as to whether the bear is to be captured or destroyed [§20-2-22a].

Z also may file a claim of damages, signed by three authorized appraisers, with the director of the Division of Natural Resources stating the total monetary losses caused by the bear. The claim will be ruled upon by a commission composed of Z, a conservation officer of the Division of Natural Resources, and a third person agreed upon by both parties [§20-2-22a].

Z may be found guilty of a misdemeanor and be subject to a fine of from \$500 to \$1,000 or a stay in the county jail of from 30 to 100 days if he kills a bear in violation of any provision of this section.

## **MINERALS AND TIMBER**

Coal, oil, gas, and other minerals existing on private property, as well as timber growing on the land, belong to the property owner unless sold or otherwise transferred. These natural resources may be of considerable value, and a landowner should proceed with caution when transferring this property to another party. A landowner contemplating a mineral sale or lease or a timber sale should first have knowledge of the value of the resources. The West Virginia Geological & Economic Survey can provide information on the location of minerals in the state.

Landowners benefit greatly from having a professional forester assist with the sale and administration of their timber. Those benefits typically include a well-planned and therefore environmentally friendly harvesting operation,

utilization of better forest management practices, and the realization of a higher sale price. Professional forestry assistance with timber sales can be secured from several sources: West Virginia Division of Forestry service foresters, industrial landowner assistance program (LAP) or cooperative forest management (CFM) foresters, private consulting foresters, and industrial procurement foresters.

A written contract, reviewed by an attorney, is recommended, whether the landowner is selling or leasing minerals or timber. The Lawyer Referral Service in Charleston, West Virginia, mentioned in the INTRODUCTION to this publication, can recommend a competent attorney.

## **OUTDOOR ADVERTISING**

### **General Restrictions**

A secondary but well-traveled road passes through a corner of Z's Homestead. A businessman wants to rent from Z the privilege of erecting a sign advertising his business. Z is agreeable to the deal but is concerned about sign regulations.

Q: What are the general restrictions on outdoor signs?

A: Significant restrictions exist regarding Z's right to erect a sign on his property, and they should be considered before the sign is erected [§17-22-4; see below].

*§17-22-4 General restrictions as to outdoor advertising.*

The following restrictions shall apply to all advertising signs, displays, and devices erected and maintained adjacent to any road within the state road system, including federal and interstate and primary roads.

- (1) No advertising sign shall be erected or maintained which involves rapid motion or rotation of the structure or any part thereof;
- (2) No advertising display or device shall use the word "stop" or "danger" or present or imply the need or requirement of stopping, or the existence of danger;
- (3) No advertising sign, display, or device shall be a copy or imitate a traffic sign or other official sign;
- (4) No advertising display or device shall attempt or purport to direct traffic;
- (5) No advertising sign shall contain lighting which is not shielded, and any lighting shall be of such low intensity as not to cause glare or impair the vision of the operator of any motor vehicle;
- (6) No advertising display or device shall be illuminated by any rapid flashing, intermittent light or lights;
- (7) No advertising display or device shall be painted, affixed, or attached to any natural feature;
- (8) No advertising sign, display, or device shall hinder the clear, unobstructed view of approaching or merging traffic, or obscure from view any traffic sign or other official sign;
- (9) No advertising sign, display, or device shall be so located as to obscure the view of any connecting road or intersection;
- (10) No advertising sign, display, or device shall be erected, outside of any municipality, within 500 feet of any church, school, cemetery, public park, public reservation, public playground, or state or national forest, except markers for underground utility facilities.

These regulations apply equally to commercial advertisement, political posters, and community service messages; but, do not apply to road signs.

Z should be certain that the party erecting the sign has a valid license from the West Virginia Division of Highways, as well as a permit for this particular sign [§17-22-13 and §17-22-15]. Once the sign is erected, the permit number must be posted on it [§17-22-16]. Also, the sign must be removed within 30 days of expiration of the permit [§17-22-17]. Z could be held responsible for the wrongful acts of those erecting the signs, since he permitted them on his property.

### **Additional Restrictions**

Suppose the sign to be erected is along a federal interstate or primary highway.

Q: Are there additional restrictions regarding signs in such a location?

A: Yes. The sign must be at least 660 feet from the right-of-way and must be clearly visible from the highway [§17-22-3]. The law permits an exception to the provisions of §17-22-3 when the sign is directional or official in nature, including signs to natural wonders, farm wineries, scenic, and historical attractions; signs advertising the sale or lease of property; and signs advertising activities conducted on the property, including marking underground utility facilities [§17-22-7].

### **Exemptions**

Z wants to put up a sign on his property advertising his own vegetables for sale.

Q: Is he required to comply with all of the above mentioned regulations?

A: No. If Z erects signs advertising sales or activities conducted on his own property, §17-22-7 exempts him from complying with the distance limitation from an interstate, and §17-22-13 exempts him from complying with the rules having to do with licenses and permits. However, he must comply with the regulations listed in §17-22-4.

### **Violations**

One day while at Eldorado, Z finds a sign posted advertising the business of someone else. Z has not given permission for this sign to be displayed on his property.

Q: What can Z do?

A: He can immediately remove the sign since it is unlawful to erect a sign on the property of someone else without the owner's consent [§17-22-19].

A violation of any of these provisions dealing with outdoor advertisements can result in fines of from \$50 to \$500 for each month the violation is continued or permitted [§17-22-22]. Cities and towns may have additional ordinances regarding outdoor advertising.

## **INVOLUNTARY LOSS OF PROPERTY RIGHTS**

### **General**

One of a property owner's most important rights is the right to the exclusive legal possession of the property. Normally, this right ends only when the landowner sells, leases, rents, gives the property to another party, or when the property passes to someone else upon the landowner's death. Nevertheless, there are several major means by which property rights can pass to another person or entity without an act of the owner. Most of these will be discussed. The loss of property through non-payment of debts or taxes will not be discussed, though.

### **Adverse Possession**

Eleven years ago, a family moved into an old, run-down house located in a remote corner of Z's Homestead. Z allowed them to stay as they were causing him no trouble, and he knew they were there because they could not afford to live anywhere else. They are now claiming ownership of the property.

Q: Who, in fact, owns this property?

A: Z owns it. The theory under which ownership is claimed is known as adverse possession, sometimes erroneously referred to as *squatter's rights*. However, squatters have no rights of ownership to property in West Virginia regardless of how long they stay on a piece of land. In this situation, the family would be considered squatters since they failed to satisfy all of a specific set of criteria required for them to gain title by adverse possession.

These criteria are:

- The family must have settled on the land for more than 10 years. They have passed this test.

- They must have resided on the land adversely to Z, meaning that Z did not give permission, either spoken or implied. Here, Z impliedly permitted them to stay.
- They must take the land under a claim of right to the property. The family never claimed they were the true owners of the property until after the 10 years had passed, so this requirement was not satisfied.
- The taking must be highly visible, not secretive. They complied with this condition.
- The family must have had exclusive possession, meaning that no one else was also on the property claiming it, against Z, as their own. Here, no other party is involved, so they are in compliance with this requirement.

The family met some of the requirements; but in order for them to gain title to the property, they must meet all of them. Thus, no valid claim exists, and Z can sell the property at will. The reader should be aware that this is a very simplified description of a vague and confusing law.

### **Prescriptive Easement**

The concept of prescriptive easement is similar to that of adverse possession. The difference is that an easement is the use, not ownership, of a particular piece of land for a particular purpose. Examples of easements include the right to locate and maintain a utility pole on private property, the right of access to one's land through that of someone else, or the right to flood a neighbor's land by use of a dam. The usual method of obtaining an easement is through purchase, and the easement purchased may be for a designated period of time or for perpetuity. If Z wanted to run an irrigation pipeline over X's property, he could pay X for the privilege, provided X was willing. However, a right to the easement may be obtained by prescription if there is a continued use for more than 10 years and if the person seeking the easement claims it for himself exclusively and without protest from the true owner.

X has regularly walked across Z's land on foot at one location for more than 10 years while believing he had a right to do so. Z knew about X's activity and took no action to stop it.

Q: Can X continue to do so if Z now protests?

A: X has a good case for prescriptive easement since the use was regular or continuous for more than 10 years, under claim of right, and without complaint from Z. If X is successful in gaining prescriptive easement, Z continues to own the land. However, X merely has the right to walk across it on foot at the designated location. X cannot increase his rights of easement by driving or taking his farm machinery over Z's property.

### **Way of Necessity**

Z decides to subdivide a portion of his property and sell lots. X buys a lot and soon discovers that Z has provided no means of access to the newly purchased property.

Q: Can X claim a right-of-way over Z's land for access to his lot?

A: Yes. This right-of-way is called a *way of necessity* and occurs when a property owner sells land that is completely surrounded by lands of the seller and/or others. However, if the newly purchased property is entirely bounded by lands of others, not the seller, the purchaser has no such right and may be required to purchase an easement in order to obtain access to the property.

## **Eminent Domain**

### ***Power to Take Property***

The state plans to re-route a section of the state highway through Homestead to make it straighter and, hence, safer. The new route will pass through the area on which Z's house is located. Z does not want the new highway on his land and does not want to be forced to move.

Q: Can Z prevent the state from building the road where it is planning?

A: Probably not. When the state, county, municipal, or federal government, as well as public and private corporations, show a need to obtain private property for purposes of public use or necessity, they are empowered with the right, known as eminent domain, to acquire the property [§54-1-1 et seq]. The party whose land is being taken has a right to be notified and heard in court before the circuit judge decides on the taking; but if it can be shown that the property is to be taken for one of the public uses listed in §54-1-2, the court will probably rule against the landowner.

The public uses for which private property may be taken or damaged are: the construction of highways, government buildings, utility lines, railroad lines, bridges, sewage systems, parks, cemeteries, schools, and others. Private uses by private companies are not included. For example, a railroad company may obtain land by eminent domain for a public railway station, but not for an office building.

### ***Compensation***

Q: When land is taken for one of the permitted purposes, is the property owner entitled to compensation for the loss?

A: Yes. Whenever property is taken, the party acquiring the property is required to compensate the landowner in such a way as to leave him in as good a position after the taking as he was prior to it.

Although procedures used to determine the value of property to be taken vary among the different agencies, basic similarities exist. The agency will usually engage an independent, private appraiser to inspect the property. The property owner will have the right to be present during the inspection and to make sure the appraiser does not overlook anything of importance. Some of the factors to be considered are improvements to the property, the value of minerals beneath the surface, and the loss of value of the portions of the property that are not being taken. The appraisal, based on the fair market value, will be reviewed by an agency review inspector, who will assign it to a negotiator if all appears to be in order. The negotiator will visit the property owner and make an offer for the property based on the appraisal. The actual appraisal is not made available to the landowner primarily because of the potential of a prolonged negotiation over details.

In most cases, the offer is considered to be a fair one, and the landowner accepts it with little discussion. However, if the offer is deemed to be insufficient, the landowner may reject it. If negotiations fail, the issue becomes one to be resolved by the courts. The landowner may choose to obtain the services of an attorney and an appraiser in order to provide support for his views. A landowner who is unsuccessful in gaining a greater award must accept the final judgment and make no further attempts to stop the land acquisition. Entities who are obtaining land in this manner usually are fair and do not take advantage of the landowner, working diligently to reach an equitable agreement for both sides.

### ***Relocation Benefits***

Q: If Z is forced to move, is he entitled to moving and other expenses?

A: Yes. In 1970, the federal government enacted the Uniform Relocation Assistance and Real Property Acquisition Policies Act, which provides relocation benefits for those uprooted by federal, or federal aid, projects. The West Virginia Legislature adopted this act in 1972 for all state projects [§54-3-1 et seq].

Benefits include:

- relocation and advisory assistance, including aid in finding decent, safe, and sanitary replacement housing and comparable commercial or agricultural property if either of these were involved in the displacement;

- moving expenses for moves of up to 50 miles;
- searching expenses for replacing business or farm property (not to include housing);
- possible supplemental housing payments if the cost of obtaining a comparable dwelling is higher than the amount paid for the original home; and
- costs of selling the property to the agency, such as recording fees and transfer taxes.

For more details on benefits available, the reader may obtain a copy of an Army Corps of Engineers publication titled *Relocation Benefits to Persons Displaced By Army Land Acquisition* #EP 405-1-1.

Contact: Office of the Chief of Engineers, Department of the Army, Washington, DC 20314.

All situations regarding eminent domain obviously cannot be covered in this publication. For answers to specific questions on the subject, the reader may contact an attorney or the agency involved.

### **Annexation**

A nearby incorporated municipality is considering expanding. If done, Z's property at Homestead may be annexed.

Q: Can this be done against Z's wishes?

A: Yes, but only after a majority vote of the people in the city and of those voting in the proposed area to be incorporated [§8-6-2]. The annexation may be challenged if the additional territory does not conform to the requirements of a municipality as listed in §8-2-1. For example, the land cannot be annexed if the addition of the territory would lower the density within the city limits to less than 500 people per square mile. And if the circuit court rules that there is too much open area, the open area can be excluded.

Z's land may be annexed without a vote if a majority of the qualified voters in the unincorporated area and a majority of all freehold owners of property in the area to be annexed petition to have the area annexed [§8-6-4]. Again, the area to be annexed must conform to §8-2-1.

The same procedure as that described in the first situation can be used to reverse the annexation at some future time [§8-7-2]. A simple majority of voters in the municipality can decrease the boundaries of their city.

Annexation does not change the ownership of land. The difference is that property owners may be subject to city taxes, assessments, and laws as a result. In return, they are entitled to all of the benefits of city government, such as police and fire protection, voting rights, and the right to participate in municipal government.

## **SOURCES**

### **West Virginia Code**

Should the reader wish to view the official wording of a particular section of code (the specific laws passed by the legislature), most counties have copies of the West Virginia Code available to the public in the county courthouse or county building. To find a specific code section, use the following steps. §51-8-8, which deals with counties being given the authority to establish law libraries to be made available to the public, is used as an example.

- Find the West Virginia Code, a nineteen-volume set in dark green covers, at the county courthouse. Help should be available.
- The back of the binding is marked "West Virginia Code." Below this marking is the volume number followed by the chapter number or numbers. These last numbers are important for locating the code section.
- The first number of the code section refers to the chapter, in this case chapter 51, which is found in volume 15.
- Each volume contains various code sections, followed by a heading, followed by the law itself, and sometimes followed by explanatory material or comments. Case law, decided by the West Virginia Supreme Court of Appeals interpreting the language of the particular statute and describing how it should be applied, may also be included.

- In this example of §51-8-8, the number 51 refers to the Chapter "Courts and Their Officers." The first 8 refers to the Article "State Law Libraries" and the last 8 refers to the specific section, "Authority to establish county law libraries." Certain volumes may also contain a *pocket part*, which is supplemental information regarding recent changes to the West Virginia Code. The reader should ALWAYS look in the pocket supplement to determine whether the particular statutory section being viewed has been changed, amended, or repealed since the volume was printed.
- Indexes for subject area are provided with the code should the reader not know the code section number in question.

The code should be used by the lay reader only as one of many sources for interpreting law. For serious legal questions, an attorney should be consulted regardless of how clear the language of the code appears. The attorney will know, or be able to determine, how a statute has been interpreted in the past.

### **State Agencies**

Many administrative rules and regulations are important to landowners. The reader may contact the particular agency for specific information. Some of these are:

West Virginia Division of Highways  
 Building 5, Room A122  
 Charleston, WV 25305  
 304-558-3505

West Virginia Division of Natural Resources  
 1800 Washington Street, East Building 3, Room 669  
 Charleston, WV 25305  
 304-558-2754

West Virginia Bureau of Public Health  
 Building 3, Room 519  
 Charleston, WV 25305  
 304-558-2971

West Virginia Department of Agriculture  
 Building 1, Room M28  
 Charleston, WV 25305  
 304-558-2201

### **County Offices**

Some of the county offices and officers that may be of help include the sheriff, the assessor, the county health department, the county clerk, and the prosecutor.

County listings in the local telephone directory will provide telephone numbers.

### **Legal Assistance**

The local County Bar Association should be able to make a referral to an attorney who can provide the type of assistance needed for a particular legal problem. The reader may also contact the West Virginia Lawyer Referral Service, LRS Coordinator, West Virginia State Bar, 2006 Kanawha Boulevard, East, Charleston, WV 25311. As of this printing, the telephone number is 304-558-7991.

## **CONCLUSION**

The laws discussed in this publication are, of course, not a complete catalogue of laws that affect landowners. However, those that are included are designed to help landowners avoid legal entanglements and to inform them about when their legal rights may be compromised and when they may be infringing upon the rights of others.

## GLOSSARY

- Abut - to join at a border or boundary
- Access - the means or opportunity of approaching
- Accretion - the gradual and imperceptible growing of land by natural causes
- Adjoin - abut
- Agent - a person authorized by another to act for him
- Alienate - in property, to transfer title of
- Allege - to state, assert, or charge
- Annexation - the act of adding, joining, or uniting one thing to another
- Appeal - to resort to an upper court after an adverse verdict in the lower court
- Appraise - to fix or set a value upon property
- Appurtenant - belonging to; an accessory of
- Arbitrator - a person chosen to decide a controversy
- Ascertain - to clear of doubt and uncertainty
- Boundary - every natural or artificial separation between pieces of property
- Cause of Action - a redressible wrong
- Claim - a demand of compensation
- Code - a collection of laws
- Condemnation - the process by which private property is taken for public purposes
- Contract - a promissory agreement between two or more persons that creates, modifies, or destroys a legal relation
- Convey - to pass title to property from one person to another
- Crime - an act in violation of the law
- Damage - loss, injury, or deterioration caused by one person to another; compensation in money for a loss or injury
- Deed - a writing signed by the seller, which transfers title in property from one person to another
- Disinter - to take a body out of a grave
- Diversion - a turning aside or altering the natural course of a thing
- Domicile - the place where a person has his/her permanent home
- Easement - the right of one person to use the land of another for a special purpose not inconsistent with the owner's use of that land
- Eject - to put or turn out of possession
- Eminent Domain - the power to take private property for public use
- Encroachment - an unlawful gaining upon the right or possession of another
- Estray - livestock whose owner is unknown
- Evict - to turn out of possession of lands by process of law
- Felony - a crime punishable by imprisonment in the state penitentiary
- Grant - a transfer by deed of real property
- Harbor - to give refuge to
- Improvement - a valuable addition made to property or an enhancement of its condition
- Incumbrance - a claim or liability attached to property
- Injury - any wrong or damage done to another

- Invitee - one who is at the invitation of another
- Judgment - the official decision of the court, directing one party to pay a certain amount to the other or directing one party's behavior toward another
- Jurisdiction - the legal right by which judges exercise their authority
- Lateral Support - support of land by the adjoining land or the soil beneath
  - Lawsuit - a proceeding by one person against another in a court of justice brought to redress a wrong
  - Lease - any agreement that gives rise to a relationship of landlord and tenant
  - Lessee - a person who rents property of someone else
  - Liability - any kind of legal obligation, responsibility, or duty
  - Licensee - a person who enters on another's premises for purposes directly or indirectly having to do with business of both the person entering and the owner
  - Litigant - a party to a lawsuit
  - Litigate - to carry on a lawsuit
  - Malice - the intentional doing of a wrongful act without just cause or excuse with an intent to inflict injury
- Misdemeanor - a crime punishable by fine and/or imprisonment in the local or county jail
- Municipality - a legally incorporated association of inhabitants of a limited area for purposes of local government
  - Negligence - failure to exercise ordinary and reasonable care
  - Noxious - hurtful; offensive
  - Offensive - a breach of the criminal laws
  - Ordinance - an enactment of the legislative body of a municipal corporation
  - Party - a person concerned or taking part in any matter
- Percolating Water - water that infiltrates through the ground without any definite channel
  - Remedy - the means by which a right is enforced
  - Rescind - to cancel a contract or agreement
- Right-of-Way - right of passage or easement over another's property
- Riparian Rights - the rights of owners of land on the banks of watercourses relating to water, its use, and ownership of soil under the stream
  - Sale - a contract by which property is transferred from one party to another for payment or promise of payment
  - Squatter - one who settles on another's land without legal right
- Subjacent Support - the right of land to be supported by the land that lies under it
- Subsurface Water - water which lies entirely beneath the surface of the ground
  - Title - the right to or ownership in property
  - Tort - a private or civil wrong or injury
  - Valid - having legal, binding force
  - Void - having no legal force or binding effect