

Draft

**FAILING SEPTIC SYSTEMS AND HEIRS' PROPERTY:
FINANCIAL LENDING CHALLENGES AND POSSIBLE SOLUTIONS**



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EXECUTIVE SUMMARY

Heirs' property is a little-known form of property ownership that arises when land is passed down through the generations without written wills. Heirs' property is a more common form of ownership in low-income families due to lack of knowledge regarding the importance of wills and lack of access to affordable legal assistance. Depending on the size of the family, there may be dozens or even hundreds of individuals with a legal interest in the property. Because of the lack of documentation regarding property transfers, it is difficult for individuals living on heirs' property to prove that they are the rightful owners.

An inability to document clear title to their property has prevented some homeowners in Virginia from participating in the Middle Peninsula Planning District Commission's Revolving Loan and Grant Program for onsite septic repair. The funds for this program come primarily from two sources. Loan funding originates from the Virginia Water Facilities Revolving Fund and must be repaid to the state. Grant funding originates from the Virginia Water Quality Improvement Fund and are not required to be repaid. The funds for this program come primarily from the Virginia Water Facilities Revolving Fund in the form of loans that the MPPDC must repaid to the state. To ensure that the MPPDC can repay its obligations to the state, loans over \$3,000 require the borrower to sign a deed of trust. Only the owner of the property can sign a deed of trust. If ownership is unclear, MPPDC cannot award the loan.

Many low- and middle-income homeowners cannot afford to repair septic systems without financial assistance. However, homeowners with failing septic systems living on heirs' property are often unable to qualify for the MPPDC's financing assistance because ownership of the property is unclear. As a result, the septic systems remain unrepaired and continue to pollute nearby waters.

Resolving an heirs' property situation to establish clear ownership is not easy, but there are a variety of options available to both homeowners and the MPPDC. Homeowners can take action to clear title to their land, either on their own or with the assistance of attorneys. After identifying all the individuals with an interest in the property, homeowners can obtain *quitclaim deeds* from those individuals transferring their interest in the property to the homeowner. If it is impossible to identify all the existing ownership interests or obtain quitclaim deeds, a homeowner can file formal legal action to *quiet title* to the property or *partition the property* among the co-owners.

Although all homeowners should be encouraged to establish clear title to their property, clearing title may not be an option for all homeowners as it is a time-consuming and expensive legal process. Fortunately, there are also steps that the MPPDC can take to help heirs' property homeowners obtain septic tank repair financing. Virginia law permits individuals who have inherited land from someone who died without a will to file an "*Heirship Affidavit*" with the county circuit court. In some situations, this documentation may be enough to establish that the homeowner is the true owner of the property. Another alternative, albeit one that would require additional study and legislative action, would be the modification of the onsite septic repair loan program to a *property tax assessed financing* program modeled after Virginia's Property Assessed Clean Energy (PACE) Program. These programmatic changes, in combination with education and outreach regarding the heirs' property problem, could lead to increased access to the MPPDC's funding and, ultimately, improved water quality in the region.

I. INTRODUCTION

Failing septic systems can contribute significant amounts of pollution to nearby waters, contributing to nutrient loading and spreading disease. Many low-to-moderate-income homeowners cannot afford to repair failing systems without financial assistance. The Middle Peninsula Planning District Commission's Revolving Loan and Grant Program provides financial assistance to homeowners in the Rappahannock, York, and Coastal watersheds with malfunctioning, failing, and absent on-site wastewater treatment systems. Most homeowners receive assistance through a combination of grants and loans. The MPPDC Onsite Septic Repair program is the only public program repairing failing septic systems across the Middle Peninsula PDC region (with 77 failed septic systems repaired/replaced as of November 2011).¹ The loans provided by the MPPDC have ranged from (\$500 - \$25,000) with repayment periods of 5 to 15 years. The average loan to date is just under \$5,000, although the total repair costs average \$9,200.²

Some residents have been unable to take advantage of the MPPDC Onsite Septic Repair Program because they are living on "heirs' property" – land held in common by the descendants (or heirs) of someone who has died without a probated will. An individual living in such a situation often cannot prove that they are the rightful owner of the property, an essential requirement for most government grant and loan programs. Without documentation of clear ownership and title to the land, the MPPDC cannot expend funding to fix the failing septic system. As a result, these properties continue to pose an ongoing threat to public health and the environment.

To raise awareness of heirs' property and assist residents in an heirs' property situation, the MPPDC partnered with the National Sea Grant Law Center to conduct legal research on heirs' property ownership, the methods of clearing title to heirs' property, and possible options for MPPDC to pursue to remedy failing septic systems on heirs' property. This white paper begins in Section II with an overview of what heirs' property is and how this form of ownership arises under the law. Next, in Sections III and IV, the paper examines the risks and challenges associated with heirs' property ownership, including the inability of property owners to document clear title. The legal process for clearing title is discussed in Section V. Because clearing title in heirs' property situations can be very expensive and take years to complete, alternative methods to address the financial lending challenges associated with failing septic tanks on heirs' property are presented in Section VI.

II. OVERVIEW OF HEIRS' PROPERTY

An heirs' property situation usually arises in one of two ways. First, land may have been passed down from one generation to the next without a will. A will is a legal document stating who will receive the property of someone who has died. During a survey conducted in 2000, the AARP found that three out of five adults age 50 and older (60%) report having a will.³ That percentage, however, decreases with income. Only 50% of surveyed adults with household income below \$15,000 reported having a will.⁴

¹ E-mail from Elizabeth G. Johnson, Administrative Assistant, Middle Peninsula Planning District Comm'n, to authors (Apr. 25, 2012) (on file with author).

² Personal Communication with Elizabeth G. Johnson (Sept. 18, 2012).

³ AARP, WHERE THERE IS A WILL ...: LEGAL DOCUMENTS AMONG THE 50+ POPULATION: FINDINGS FROM AN AARP SURVEY 2 (2000), available at <http://assets.aarp.org/rgcenter/econ/will.pdf>.

⁴ *Id.* at 3.

When a property owner dies without a will, ownership of the property automatically transfers upon death to the owner's living relatives or heirs in accordance with state law.⁵ This process is known as "intestate succession." All of the deceased's legitimate heirs inherit an undivided, equal share of ownership in the property. It does not matter whether the heirs live on the property or even know that the property exists. An heirs' property situation can also arise when a property owner dies with a will, but the estate is not properly probated or processed through the legal system. For example, the deceased's will may never have been presented to a court for filing. In such situations, the deceased landowner's name may remain on the title and tax roles. The transfer of property in either scenario creates a "tenancy in common," a form of property ownership in which each tenant (or heir) has an undivided interest in the property and each tenant is entitled to equal use and possession of the property.

Heirs' property is likely a significant issue in Virginia because of the Commonwealth's history as a southern slave state.

Between the close of the Civil War and 1920, African Americans obtained nearly 20 million acres of land in the United States. Collectively, these acquisitions represented an amazing achievement in a society largely hostile to African-American property ownership. These original purchasers used land ownership to participate in the economic and political life of the nation.⁶

Former slaves often hoped that land ownership would lead to self-sufficiency, economic opportunity, and political participation for their descendants.⁷ Much of this land was passed down through intestate succession as the result of verbal bequests, and therefore held as heirs' property. Heirs' property remains a common form of ownership in some African-American communities today, likely due to a combination of factors. In 2000, the AARP found that white adults (64%) were more likely to have wills than African Americans (27%), although these findings were based on a rather small sample size and might not be representative of all communities.⁸ Income is probably also a factor, as low-income individuals have limited ability to utilize the legal system to protect their property interest. In addition, misconceptions about the nature of heirs' property ownership are common. Some owners may believe that the property is protected from loss or development because it cannot be mortgaged or sold.⁹

Ownership interests in such property can quickly multiply exponentially. Consider the following situation. John Doe is a widower with five children who dies without a will. Upon his death, his five children each inherited an undivided one-fifth interest in the land as tenants in common.¹⁰ "Undivided" means that each legitimate heir owns and has the right to use and occupy the entire property. Returning to John Doe's situation, although each child only owns a one-fifth interest in the property, they each have the right to use and occupy the entirety (100%) of the property. Now assume each of

⁵ VA. CODE ANN. § 64.2-200.

⁶ *Heirs' Property and Land Loss Prevention*, Lawyers' Committee for Civil Rights Under Law, http://www.lawyerscommittee.org/projects/community_development/page?id=0029.

⁷ *What is Heirs' Property?*, Southern Coalition, <http://www.southerncoalition.org/hprc/?q=node/5>.

⁸ AARP, *supra* note 3, at 3.

⁹ Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 30 (2007).

¹⁰ The Virginia intestate succession laws state "if there is no surviving spouse, then the estate descends and passes to the decedent's children and their descendants." VA. CODE ANN. § 64.2-200(2).

John Doe's children has three children of their own and die without wills. There are now fifteen individuals owning the property as tenants-in-common. As the generations pass, more and more people, sometimes hundreds, inherit interests in the property. The heirs living on the property may not even be aware of how many people own an interest in the property, as they may lose touch with relatives and some heirs may have sold their ownership interest to individuals outside the family.

This exponential increase in co-owners creates numerous problems for land management. For example, heirs living on the property may be unable to obtain financing to maintain or improve the property because banks and lending agencies require all owners to agree to mortgage the property and repay the loan. Heirs that do not live on or near the property may not consider the property's upkeep their problem or even know that they are a co-owner. Reaching consensus is therefore difficult even when all the heirs' are known.

III. RISKY FORM OF OWNERSHIP

Although some families and communities may consider heirs' property ownership as one of the best ways to own and keep family land, heirs' property is actually extremely vulnerable to loss. Informal tenancies in common are rather risky because any person who inherits or purchases an interest in the property can force a sale by filing a legal action requesting that the tenancy in common be dissolved and the land partitioned. It only takes one unscrupulous land developer to purchase one of the heirs' ownership interests and force a sale of the entire property for someone to lose a home or farm that has been in the family for generations. Additionally, even when a forced sale is not a concern, heirs' property ownership can make it impossible for the person who is living on the property to enjoy many of the benefits of land ownership.

One of the primary legal problems with heirs' property is that it does not provide a clear title to the land. A clear title is an expression reflecting that ownership of the property is free of all mortgages, liens, leases, or encumbrances and that there are no legal questions or ambiguities as to the property's ownership.¹¹ Title to heirs' property is often considered "clouded" because the chain of title, or sequence of property transfers, is unclear and there are often unknown or unaccounted for ownership interests. A property owner with clear title to his land can use that land as security to obtain a mortgage or loan. Banks and other financial lending institutions insist on clear title because they do not want any complications if they have to repossess or sell the property in the event of a default. Even with small loans for home improvements, like septic tank repair, lenders need to know that their investment is secure.

In addition to the financing challenges, management of heirs' property is difficult because legally, every single heir, no matter how small his or her fractional interest, must sign off before anything can be done with that property. "This includes selling the property, taking out repair loans, obtaining some kinds of insurance, or getting assistance after disasters like Hurricane Katrina."¹² Individuals living on heirs' property may be unable to use the land for certain income-generating activities, such as timber harvesting, because all the heirs have to agree to that use. In addition, because each heir has an interest

¹¹ See Black's Law Dictionary 1622 (9th ed.).

¹² MISSISSIPPI CENTER FOR JUSTICE, HEIRS' PROPERTY: WHAT IT IS AND WHAT TO DO ABOUT IT, http://www.lawyerscommittee.org/admin/community_development/documents/files/0003.pdf.

in the property, they share equally in the risk when property is put up as security for a loan and therefore should have a say in how the property is used.

Fractional ownership also increases the risk that an heir will try to force a partition sale in order to escape the responsibility of paying any unpaid taxes or making costly repairs. Heirs may simply lack the necessary funds to cover expenses associated with the property and view a forced sale as their only option out of the situation. In addition, fractional ownership increases the risk that someone from outside the family will acquire an ownership interest and force a partition sale in an attempt to acquire the entire property. Virginia's partition law,¹³ as discussed in more detail below, permits any one of the co-tenants, no matter how small their share and how recently they acquired it, to ask a court to dissolve the tenancy in common and divide the property. If an equal division of the property among the co-tenants is not an option, the court can order the entire property sold at public action.¹⁴

IV. IMPROPER TITLES - OUTSIDE THE "CHAIN OF TITLE" (THE MOST COMMON HEIRS' PROPERTY SCENARIO)

Verifying clear title to real estate that has been passed to multiple heirs can be problematic. Title searches and examinations are usually performed in association with real estate transactions to provide assurance to buyers that the seller is the rightful owner and there are no defects with the title. Virginia law requires that title to land be registered with the local government not only to provide a record for taxation and other purposes, but also to provide notice of clear ownership to others. Because property ownership can change multiple times in a single generation, a registered title is necessary to establish that a person or persons claiming ownership is truly the owner. In this way, title records act like a "paper trail" of ownership. A title record, which is filed in the county where the property is located, provides a clear record of ownership.

Virginia uses an antiquated system for recording title, called the Torrens System.¹⁵ The Torrens System is "A system for establishing title to real estate in which a claimant first acquires an abstract of title and then applies to a court for the issuance of a title certificate, which serves as conclusive evidence of ownership."¹⁶ In a Torrens system, a physical certificate of title is issued (similar to the title to a car) for each parcel of real estate that serves as proof of ownership. A title search that reveals an improper title document or a lack of information regarding a parcel of property may indicate an heirs' property situation.

Indexes of land records and deeds are maintained by the clerks of the county circuit courts.¹⁷ A deed is considered valid in Virginia if it meets the following requirements:

- It is in writing;
- Signed by the grantor;
- Identifies the grantor and grantee;
- Contains words of conveyance that indicate the grantor's intention to immediately convey title.

¹³ VA. CODE ANN. § 8.01-81 ("Tenants in common ... may compel partition ...").

¹⁴ *Id.* § 8.01-93.

¹⁵ Currently, only eleven states use the Torrens System.

¹⁶ Black's Law Dictionary (9th Ed. 2009).

¹⁷ See VA. CODE ANN. § 17.1-249.

- Words such as grant, convey, transfer, give, or deed over will suffice; and
- Describes the property in sufficient detail so as to distinguish the land from all other parcels. The traditional rule holds that a deed is void if there is an incomplete description; however, modern courts are more willing to admit extrinsic evidence to clarify an ambiguous description.¹⁸

Under Virginia law, title to real estate automatically vests in the beneficiary upon the death of the owner. As a result, those who die intestate (without a will) in Virginia do not have to execute deeds to memorialize the passing of title, as many other states require.¹⁹ Rather, heirs are permitted to file an affidavit, referred to as an Heirship Affidavit, with the clerk of the circuit court of the jurisdiction where the real estate is located.²⁰ The Heirship Affidavit is then sent to the commissioner of revenue within that jurisdiction, who upon receipt “may transfer the real estate upon the land books and assess the real estate in accordance therewith.”²¹ Although the Heirship Affidavit is legal documentation of the identity of the heirs in existence on the date of the decedent’s death, it does not change the nature of the property ownership or amend the deed.

Without a deed in their name, it can be difficult for individuals living on the land to prove they are the rightful owners of property. In addition, failure to execute and record a new deed and/or file an Heirship Affidavit prevents the property transfer from being identified using the standard title search process. Such transfers are deemed to be “outside” the chain of title, and do not provide notice of ownership. For example, suppose O dies without a will. Heirs A and B fail to file a list of heirs with the clerk of the circuit court where the property is located. The land records will continue to identify O as the property owner and there would be no way for someone searching the records to know that A and B are the legal owners of the property.

Even when the proper documentation has been filed, title may remain clouded. Returning to the previous example, supposed O dies without a will, but this time Heirs A and B file an Heirship Affidavit and execute a new deed in their names. In this case, a title examination would reveal that the original owner died without a will, but the legal heir(s) recorded the title in their names. This would provide sufficient notice to potential buyers and interested parties that A and B are the rightful owners. Ownership, however, may become more fragmented as A and B’s interests are passed to others through sales or upon death. As time passes, it becomes more difficult to account for all the fragments of interest especially if some of the transfers are not recorded in the land records. All possible fragments of interest must be accounted for to insure a clear title; although “in most cases, the list of heirs recorded in the county clerk’s office will allow the title examiner to follow and document these conveyances.”²²

V. CLEARING TITLE TO HEIR PROPERTY IN VIRGINIA

¹⁸ See generally, VA Code Ann. § 55-48 for the required form of deeds in Virginia.

¹⁹ See generally *Probate in Virginia*, Virginia Court Clerks’ Association, available at http://www.courts.state.va.us/courts/circuit/resources/probate_in_virginia.pdf (outlining intestacy rules in Virginia).

²⁰ VA. CODE ANN. § 64.2-510. See also section IV.B.

²¹ *Id.*

²² W. Wade Berryhill, Va. Prac. Real Estate § 3:19, Title Examinations (2011 ed.).

For property owners to fully enjoy the benefits of property ownership, clouds on the title must be removed. The process of removing clouds is referred to as "clearing title." Once the title has been cleared, the current residents are able to document clear proof of ownership. Not only does this make it easier for the owners to obtain a mortgage or sell the property, but it also enables them to take advantage of state and federal grant and loan programs to ameliorate any deficiencies with the property itself such as a failing septic system.

Although the services of an attorney are not essential to clear title (as discussed below), legal assistance can be invaluable for a property owner. The process for clearing title usually starts with the lawyer reviewing the most recent deed for the property. A deed should contain a legal description of the property owned, identify the owner(s) of record and specify how the property is titled (i.e., joint tenancy,²³ tenants-in-common,²⁴ life estate,²⁵ etc.). Ideally, the client will be identified on the deed as the owner, either individually or jointly, of the property. In that situation, there is no problem with proving legal ownership. However, if the deed identifies someone other than the client as the owner of record, then the lawyer must retrace the chain of title to determine who holds legal title.

Because heirs' property can potentially have a significant number of heir-owners, attorneys recommend that individuals start by discovering their family tree. "A lawyer will discover the family tree for two purposes: (1) to trace the chain of title [as discussed above] and (2) to identify the beneficiaries of the estate of a decedent who did not have a will."²⁶ The most logical place to begin is with the owner of record, tracing all of the owner's descendants.

A lawyer will also trace the chain of title by examining the local probate records in the county where the owner of record resided to determine if that person's estate was probated. If so, the probate records will indicate whether the deceased had a will and, if so, how his or her assets were distributed. If the decedent did not have a will, Virginia's law of intestate succession determines how a decedent's assets will pass.²⁷

Once all of the heirs have been identified and located (which can be a monumental task), the lawyer will first try to have them relinquish their property interest by executing a quitclaim deed. A quitclaim deed conveys a person's present interest in the property, rather than the property itself.²⁸ If they can be obtained from all the heirs, quitclaim deeds can be used to consolidate the fragmented interests in the property into a single owner. Obtaining these releases of property interest, however, can be quite a

²³ "A tenancy with two or more co-owners who take identical interests simultaneously, having the same right of possession and a right of survivorship." Black's Law Dictionary 1505 (8th ed).

²⁴ "A tenancy by two or more persons, in equal or unequal undivided shares; each person has an equal right to possess the whole property but no right of survivorship." *Id.* at 1506.

²⁵ "An estate held only for the duration of a specified person's life, usually the possessor's." *Id.* at 588.

²⁶ GEORGIA APPLESEED, HEIRS PROPERTY IN GEORGIA ATTORNEY TRAINING MANUAL 3.2, available at http://www.gaappleseed.org/docs/heirproperty_attorney.pdf.

²⁷ The Code of Virginia has determined a line of succession for inheritance of the estate of a person that has died intestate. The surviving spouse of the deceased will inherit the estate, unless the deceased has children and descendants who are not the children of the surviving spouse. In this instance, one third of the estate will go to the surviving spouse and two thirds to the children or their descendants. If the deceased has no surviving spouse, the whole estate will be divided among the deceased's children. From this specific code, a lawyer can determine whether a family member has a right to some of the property. See VA. CODE ANN. 64.2-200.

²⁸ See BLACK'S LAW DICTIONARY 446 (8th ed.).

difficult task. Heirs are often reluctant to sign away all of their interests in the property due to personal connections with the property, expectations of payment, or family strife.

If obtaining quitclaim deeds from all the heirs is not possible, the lawyer may proceed to bring a quiet title action in the circuit court of the county where the property is located. In the heir property situation, a quiet title action is a proceeding to establish the resident heir's title to the property by forcing the other heirs to establish a claim to ownership or be forever prevented from asserting such right.²⁹ Remember that familiar saying "possession is 9/10 of the law"? Possession of property is presumptive proof of ownership because individuals generally own the property that they possess. This common law presumption of ownership based on possession requires that the party not in possession of the disputed property produce evidence of a superior title. If the party not in possession is able to produce such evidence of superior title, the presumption of ownership in the possessor is defeated. However, if the party not in possession fails to establish superior title to the property, the presumption of ownership based on possession prevails and relieves a court from having to preside over "a historical goose chase."³⁰ Quiet title actions can be fairly complex depending on the number of potential clouds involved and the lawyer must establish the particular form the action will take from the beginning.³¹ At the end of a successful quiet title action, the heirs currently in possession of the property will have obtained clear title.

Another, albeit drastic, measure to clear title is called a partition sale. A partition is the process by which a court divides the property among co-owners of a particular parcel in accordance with their respective interests, either by a partition in kind (where the land is physically divided up between the co-owners), or a partition by sale (where the land is sold and the proceeds are divided between the co-owners). The law allows anyone with an interest in the property to file a partition action and there is no requirement to obtain the consent of the other owners. Although partition actions might seem attractive options due to their simplicity, it is often difficult for the heir in possession to hold onto the property. If the court determines that the property cannot be divided between the co-owners, the property will be put up for sale at a public auction. If the heir in possession is unable to outbid other people at the sale, he or she will lose his or her home. In addition, the proceeds of the sale at public auction are often a fraction of the value that the parties or the market would ascribe to the property.

Many low- and middle-class families unfortunately lack the funds to retain an attorney to represent them throughout these lengthy legal processes. Property owners, armed with the proper information, can take significant steps on their own to clear title. As a first step, heirs can begin the process of identifying all family members who may have an interest in the property by constructing a family tree. The family tree should begin with the person identified as the owner of record and trace all the descendants. Once this is complete, the owners can file an Affidavit of Heirship form.

²⁹ See *id.* at 32.

³⁰ See *Graves v. Mortg. Elec. Registration Systems, Inc.*, No. CL-2010-17101, 2011 WL 3681735 (Va. Cir. Ct. June 29, 2011.)

³¹ The two forms of quiet title actions are conventional *quia timet* and *quia timet* against all the world. A successful conventional *quia timet* cancels any particular instrument which casts a cloud over the client's title to the land or subjects the client to potential future liability. A successful *quia timet* against all the world conclusively establishes the title of the land in the client and removes any particular cloud upon title to the land.

Clearing title to heirs' property, whether through quitclaim deeds, a quiet title action, or a partition action, is complex. Each method is extremely time-consuming because heirs must be identified, located, and informed of their interests in the property and rights under the law. Quiet title and partition actions can take years to work their way through the courts. Meanwhile, the failing septic systems on the heirs' property continue to pollute the water system. Although property owners should be encouraged to take action to obtain clear title to their property, there are alternative solutions to reduce the financial lending barriers associated with MPPDC's onsite septic repair program and heirs' property.

VI. Alternatives to Clearing Title

A. Affidavit of Heirship

Depending on the level and type of funding, MPPDC requires approved applicants for the MPPDC's Regional On-Site Wastewater Treatment and Disposal Funding to sign and record a Landowner Easement and Agreement "specifying that the homeowner will be responsible for maintaining the system."³² Only the owner of the property can legally sign easements and similar documents placing encumbrances on the property. If the homeowner is not the owner of record, there will be doubts as to whether the homeowner actually has the authority to sign the required legal documents.

In situations where the homeowner is not the owner of record, the MPPDC could inquire as to whether an heirship affidavit has been filed with the circuit court. Although an Affidavit of Heirship is not as reliable as other forms of administration of an estate, it does provide important documentation as to who has ownership interests in the property. As mentioned above, an Affidavit of Heirship is a legal device for recording the intestate transfer of real estate. The Affidavit of Heirship includes (1) a description of the real estate owned by the decedent at the time of his death, (2) an acknowledgement that the decedent died intestate, and (3) the names and last known addresses of the decedent's heirs at law.³³

An Heirship Affidavit identifying the homeowner as one of the heirs could be accepted as evidence that the homeowner in possession has a legitimate ownership interest in the property. Depending on the number of heirs listed on the form and the amount of time that has passed, this may be sufficient to establish that the homeowner has the authority to sign the easement and other required forms. For instance, if the homeowner is the only heir listed, he or she is likely the owner of the property. Confidence regarding ownership might decrease as the number of heirs increases, although it may still be feasible for the MPPDC to provide the grant money to ameliorate the failing septic systems. In general, to grant an easement over property, all owners must sign the easement. In addition, each owner would have to agree to bind themselves to their ratable portion of the loan (based on their fractional ownership). If there are only a small number of heirs listed on the affidavit, the homeowner may be able to obtain the signatures of all the heirs in order to submit the required legal documentation.

³² Letter from Beth Johnson, MPPDC Onsite Program Manager, to homeowners announcing availability of funding (Jan. 2012) (on file with authors).

³³ VA. CODE ANN. § 64.2-510(A).

Of course, if there are numerous heirs, significant time has passed since the filing of the affidavit, or the heirs fail to agree, the MPPDC would not be able to provide financial assistance. Family mediation or arbitration might be a possible next step for a homeowner; however, this can be a lengthy, expensive process as well. In these situations, the homeowner's only option may be to initiate legal proceedings to clear title. Because clearing title can be quite time-consuming and expensive, this will not be an option for some homeowners. Grant programs that require recipients to submit documentation of clear title will continue to deny such homeowners access to the vital assistance that they so desperately need and would otherwise qualify for.

B. Property Tax Assessed Financing

Another possible method to address the MPPDC's financial lending challenges with respect to septic tank repair is to restructure the loan program as a property assessment-based financing program, similar to the Property Assessed Clean Energy (PACE) Program. PACE is a financing tool for local governments to encourage private property owners to invest in clean energy projects, such as solar panels and other energy efficiency home improvements.³⁴ PACE financing helps private property owners avoid the high upfront costs associated with these types of energy improvements.³⁵ To secure the loan, the local government places a lien against the property where the improvements are being installed. The loan is then repaid to the local government through an incremental increase on the participating owner's property tax bill, often at a very low interest rate.³⁶ "PACE financing allows the property owner to pay for the project through a long-term, fixed-cost financing option that is underwritten by the value of the property (and not the property owner's credit)."³⁷ An appurtenant, first-priority lien³⁸ guarantees repayment of the total loan cost.³⁹ If for instance, the owner fails to pay off the PACE tax assessment before selling the property, then the new owner can either assume the obligation or require the seller to pay it off in full as part of the sale terms.⁴⁰ As government tax assessments usually have senior lien property over mortgage liens, the structure of the program also insures that the PACE loan is paid before any non-tax claims in the event of foreclosure.⁴¹ The Virginia Tax Code states that "There shall be a lien on real estate for the payment of taxes and levies assessed thereon prior to any other lien or encumbrance."⁴²

³⁴ Jason R. Wiener & Christian Alexander, *On-Site Renewable Energy and Public Finance: How and Why Municipal Bond Financing is the Key to Propagating Access to On-Site Renewable Energy and Energy Efficiency*, 26 SANTA CLARA COMPUTER & HIGH TECHNOLOGY L.J. 559, 574 (2010).

³⁵ Joel B. Eisen, *Can Urban Solar Become A "Disruptive" Technology?: The Case for Solar Utilities*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 53, 84 (2010).

³⁶ Wiener & Alexander, *supra* note 34, at 574.

³⁷ Jonathan B. Wilson, Maura A. Marcheski, Elias B. Hinckley, *The Great Pace Controversy: Renewable Energy Financing Program Hits a Snag*, 25 PROBATE AND PROPERTY 38, 38-9 (2011).

³⁸ See *Natural Res. Def. Council, Inc. v. Fed. Hous. Fin. Agency*, 815 F.Supp.2d 630, 633 (S.D.N.Y. 2011). The court also noted: "Because first lien status is critical to the success of PACE programs, eliminating the priority lien status would make PACE programs effectively impossible to finance through the capital markets." *Id.*

³⁹ Wiener & Alexander, *supra* note 34, at 574-75.

⁴⁰ Eisen, *supra* note 35, at 85. A more detailed analysis of the economics of land-sales contracts is beyond the scope of this research.

⁴¹ Wiener & Alexander, *supra* note 34, at 575.

⁴² VA. CODE ANN. § 58.1-3340

States establish PACE programs by granting municipalities the authority to create special assessment districts (SADs),⁴³ to define qualified improvement projects, and to issue bonds to raise capital.⁴⁴ SADs typically overlay traditional assessment districts that finance local improvements such as schools, roads, and water retention facilities.⁴⁵ After establishing a PACE SAD, the municipality can then raise the needed funds by issuing tax-exempt bonds,⁴⁶ which are backed by first-priority liens.⁴⁷ These bonds can be an attractive investment option.⁴⁸ PACE financing is often seen as a win-win situation for everyone: the property owner receives the benefit of lowered energy costs with little or no upfront expense, the investor receives a guaranteed investment return, and the community benefits from an improved environment.

The Virginia Legislature authorized the use of PACE financing in 2009. Pursuant to § 15.2-958.3(A) of the Virginia Code, “Any locality may, by ordinance, authorize contracts to provide loans for the initial acquisition and installation of clean energy improvements with free and willing property owners of both existing properties and new construction.” Local governments are further authorized to combine loan payments “with billings for water or sewer charges, real property tax assessment ...”⁴⁹ The Virginia Legislature reenacted the legislation authorizing the program in 2010 providing additional authority to local governments to secure the PACE loans by placing “a lien equal in value to the loan against any property where such clean energy systems are being installed.”⁵⁰

PACE financing is a twist on local government “special assessments.” Special assessments are commonly used by local governments to finance infrastructure improvements, such as paving a road or installing street lighting, through the assessment of property specifically benefited by the improvement.⁵¹ Virginia localities, for example, are authorized to use special assessments to fund local stormwater management programs.⁵² Initial funding to cover the cost of infrastructure and equipment may be obtained through the issuance of general obligation or revenue bonds.⁵³ Administration, maintenance, and monitoring costs may be paid for or recovered through charges “assessed to property owners or occupants ... and shall be based upon an analysis that demonstrates the rational relationship between the amount charged and the services provided.”⁵⁴ Localities may combine the billings for stormwater charges with billings for water or sewer charges, real property tax assessments, or other billings.⁵⁵

⁴³ SAD is a general term. Some jurisdictions have chosen to give the districts a unique name. See Wiener & Alexander, note 34, at 577 (noting that the city of Berkeley, California’s district is called Sustainable Energy Financing District).

⁴⁴ Eisen, *supra* note 35, at 84.

⁴⁵ Wiener & Alexander, *supra* note 34, at 570.

⁴⁶ *Id.* at 572.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ VA. CODE ANN. § 15.2-958.3(B).

⁵⁰ An Act to amend and reenact § 15.2-958.3 of the Code of Virginia, relating to clean energy programs, S. 110 (approved Mar. 11, 2010).

⁵¹ OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW 350 (2nd ed. 2001).

⁵² See, VA. CODE ANN. § 15.2-2114.

⁵³ *Id.* § 15.2-2114(F).

⁵⁴ *Id.* § 15.2-2114(B).

⁵⁵ *Id.* § 15.2-2114(F).

The Virginia legislature has approved the use of special assessment to improve water quality through the implementation of local stormwater management programs. Although septic tank repair is not a “clean energy improvement,” the authorization of PACE financing is evidence of legislative support for property assessed tax financing. The MPPDC may wish to explore the feasibility of partnering with local governments within the District to provide public financing for septic tank installation and repair with repayment through special assessments on local government property taxes. This type of financing mechanism reduces the need to establish clear title as the loan is repaid as the taxes on the property are paid. In addition, in the event of a default, the repayment can be secured through normal processes for tax default enforcement including, in extreme cases, the sale of the property. This repayment mechanism provides additional security that the underlying loan will be repaid.

Because Virginia is a “Dillon Rule” state, legislative authorization may be required before local governments can impose a special assessment for septic tank improvements. Legislative language could be modeled after Va. Code Ann. § 15.2-2114 (stormwater regulation) or § 15.2-958.3 (clean energy programs). MPPDC already has a designated funding source for the septic tank repair program, so there may not currently be a need to issue bonds. There is no dedicated long-term funding source, however, so alternative funding sources might need to be explored in the future. Although PACE financing may only be used to provide loans for the initial acquisition and installation of clean energy improvements, stormwater special assessments may be used to cover the ongoing administrative and maintenance costs of the stormwater program. By combining elements of both programs, the MPPDC may be able to obtain long-term funding for personnel or other costs associated with septic tank repair.

VII. Conclusion

Water quality is an issue of significant concern in the Chesapeake Bay region and the Middle Peninsula Planning District Commission’s Revolving Loan and Grant Program was established to provide funding and incentives for water quality improvement projects. MPPDC’s ability to reduce water pollution from failing septic systems is currently hampered when homeowners live on heirs’ property. Heirs’ property poses a number of challenges for property owners and their lending institutions that, unfortunately, are not easily addressed or solved. Homeowners should be encouraged to take action to protect their property interests through the execution of wills and recordation of deeds and other real estate documents. In addition, when ownership is unclear, homeowners should institute legal action to clear title to their property.

Recognizing that clearing title will not be a feasible option for all homeowners, the MPPDC could modify its lending procedures and policies to make it easier for heirs’ property owners to access financial assistance. For example, as mentioned above, heirship affidavits could be accepted in some situations as evidence of ownership and clear title. In addition, the loan program could be restructured as a property assessment based financing program. This would require a simple legislative modification to 15.2-958.3(A). These programmatic changes, in combination with education and outreach regarding the heirs’ property problem, would lead to increased access to MPPDC’s funding and, ultimately, improved water quality for the region.