

# Fly Ash/Golf Course: Supreme Court of Virginia Interprets Property Sale Warranty Provisions

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The Supreme Court of Virginia addressed whether warranty provisions in a property sale contract were breached because of the presence of fly ash. *CPM Virginia, LLC v. MJM Golf, LLC*, 780 S.E.2d 282 (2015).

The contract involved the development and sale of a golf course.

The Court addressed:

1. Whether fly ash was a hazardous substance when used as fill material on a golf course
2. Warranties were violated in regard to maintenance of topsoil on the golf course.

In 2002, Dominion Resources, Inc. ("Dominion") entered into an agreement with CPM Virginia, LLC ("CPM") to use non-hazardous fly ash, a residue generated by coal-fired power plants, as fill material in a planned 18-hole golf course (the "Property"). Four years later, CPM sold the property to MJM Golf, LLC ("MJM") through a promissory note with the condition that CPM would obtain a special-use permit to develop the course.

As a part of the agreement, CPM made warranties to MJM which included:

1. During CPM's ownership "there has been no use, generation, manufacture, storage, treatment, disposal, release or threatened release of *any hazardous substances* by any person on, under, about or from the Property";
2. CPM "has no knowledge or reason to believe there has been any breach of any environmental laws."; and
3. "To the best of [CPM'S] knowledge, all activities taken with regard to the Property are fully in compliance with the zoning and planning laws of the City of Chesapeake, Commonwealth of Virginia and the United States of America."

Over the next several years, MJM incurred over one million dollars of expenses in maintaining the topsoil cover on the golf course. While Dominion paid for all of those expenses, MJM believed it was entitled to disregard its agreement with CPM and refused to pay its promissory note.

In 2013, CPM sued MJM for its failure to pay, and MJM counterclaimed alleging that CPM breached warranties in the contract because it did not cover the fly ash used in the golf course's development with an appropriately thick layer of topsoil.

The trial court ruled in favor of MJM. However, the Supreme Court of Virginia reversed for CPM finding that no warranty provisions in the contract required CPM to ensure that at least 18 inches of topsoil covered the fly ash.

The appellate court determined that MJM presented no evidence that fly ash was a "hazardous substance." Nor did the trial court ever suggest or hold that it was. The first warranty was therefore deemed not violated.

Further, MJM presented no evidence alleging that CPM knew or had reason to know of any environmental violations at the time the contract closed and the property was conveyed. Therefore, the second warranty was not breached.

Finally, the Supreme Court of Virginia addressed whether the failure to cover the fly ash with 18 inches of topsoil violated the third warranty. The court held that since the warranty only concerned the "activities taken" with CPM's knowledge at the time of the contract's execution, nothing in the warranty could imply that the Property would be in perpetual compliance after the contract closed and title was transferred. Additionally, neither MJM nor the trial court ever identified any specific zoning or planning laws that might have been violated.

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