COMMON INTERESTS

A SEGAN MASON & MASON, P.C. PUBLICATION

Counseling Virginia's Communities since 1995

SPRING EDITION 2018

The Air Up There

by **WILLIAM MASON**

Well, here we are. The Virginia General Assembly formally kicked open the door to "short-term rentals" last year by empowering local governments to adopt rules governing their operations. While they consider what they want to do, community associations are scrambling to review their recorded documents to determine if short-term rentals - renting a room or entire house or unit for less than 30 consecutive days - are prohibited or permitted.

First, let's review what we know, or at least what we think we know. A declaration or condominium instrument that contains language prohibiting a "lease of less than six months," for example, is pretty clear, and thus, enforceable. Seven is okay…five is not.

However, the Supreme Court of Virginia in *Scott v. Walker* nodded sideways and opined: something's missing. The question before the Court in this case in 2007 was whether the covenant for "residential purposes" prohibited short-term rentals. The Court ruled that the phrase "residential purposes" was ambiguous, and therefore, invoked Virginia case law that

held that substantial doubt or ambiguity about the intent of a covenant is resolved in favor of free use of property. The developer, added the Court, could have added language prohibiting short-term rentals if that was its intent. Ouch!

A ruling prior to this case construing "residential purposes" was distinguished by the Court because the owner clearly used the home as a business or "tourist home" renting to "transients" and not as a residence, and therefore, the activity was barred. Absent other language, this may be the path left open to some community associations, arguing that operation of an AirBnB, for example, is a business activity and not a residential activity.

Over twenty five years ago, the Supreme Court of Virginia addressed a community association program that permitted owners to sell their "guest privileges" to the general public as "invitees" because it conflicted with terms and purpose of the recorded declaration. While acknowledging "economic pressure" in *Bauer v. Harn*, the Court noted that these guests "become a member of a new class of persons entitled to use Association facilities without becoming a member of the Association." The Court stated, "We reject this interpretation which, if approved, would permit the destruction of the entire concept of this planned residential community."

I seem to recall an old Kung Fu television episode where Grasshopper asks…"-Master, why is it that a child in his home is not the same as a child in a home day care? Are they both not children?" Judge Bach—one time Chief Judge of the Fairfax Circuit Court—saw a distinction when construing the covenant "for residential purposes only" and the operation of a home day care. "This is a contracts case…a contract not to have businesses within this particular small neighborhood." (*Burke Cove Condominium Unit Owners Association v. Polly Wilson*, Fairfax Circuit Court, Chancery No. 99716, July 28, 1987.)

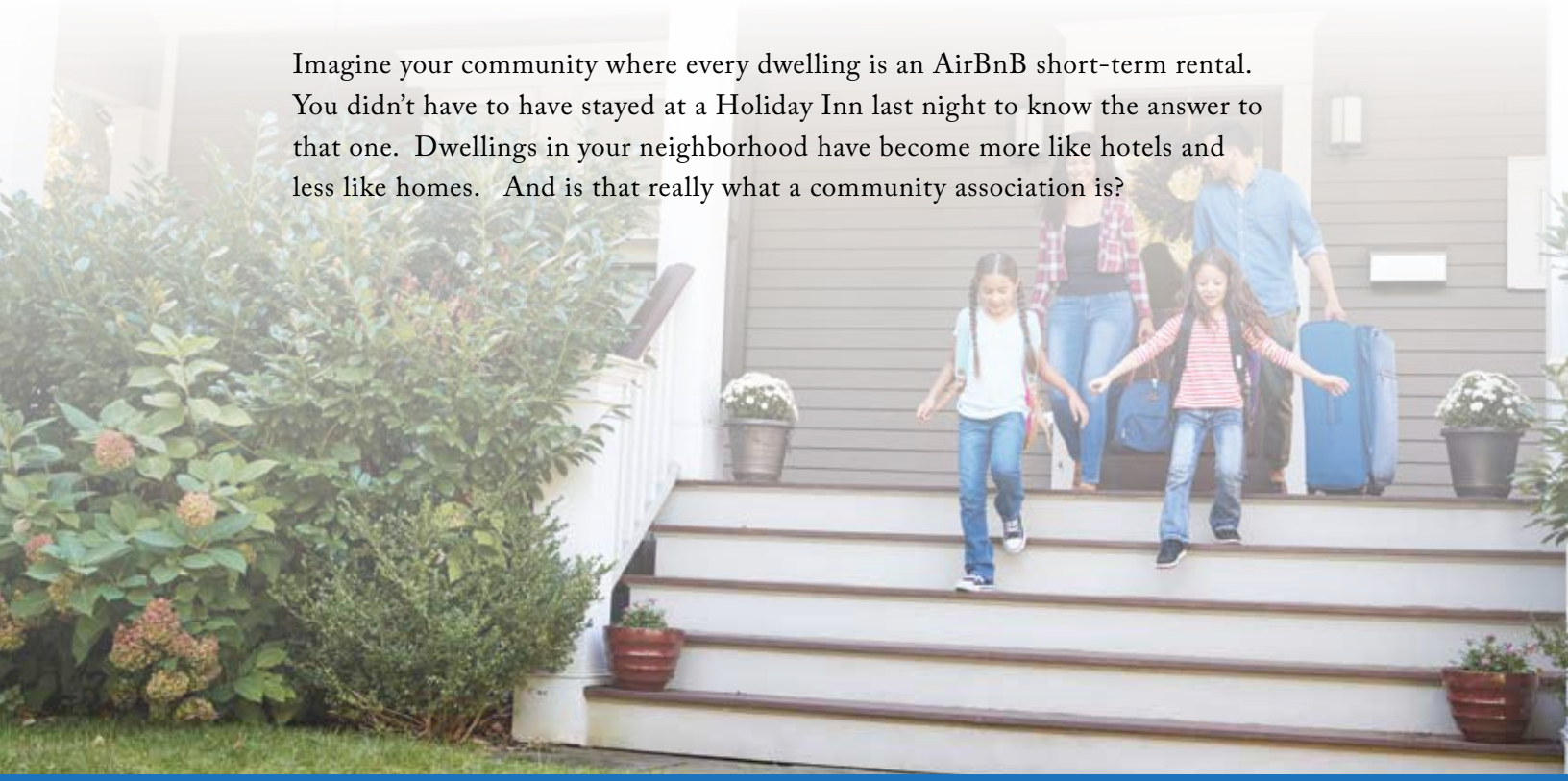
There is support for this argument but not without planting oneself on the proverbial "slippery slope." Time and technology have changed—many community association members have a business in the home or bring work home. No employees, signs, extra traffic, noises…just the hum of the computer and scanner.

Is this an erosion of the use of the home for "residential purposes only" or an evolution? It is all as clear as "Oobleck". One way of making it clearer is to add language to the covenants by amendments prohibiting rentals for less than a specific term.

How do you find owners with short-term rentals in violation of the covenants? It is not like short-term occupants simply vanish into thin "air" and reappear at the Lincoln Memorial. They may use the community's recreational facilities, create additional traffic, rely more on management services or add to insurance risks. Check out the comments on-line about short-term lease properties—perhaps even in your community! "So cozy and convenient to metro and shopping—Victoria's dinner suggestions were right on—hope to be back soon!" "The bottle of wine and the fridge stocked with our favorite snacks were perfect. Better than any hotel. Thanks, Dylan." Actually, just like a hotel. But one bad apple doesn't spoil the whole bunch…or does it?

Which brings us to our final comment from Judge Bach about residential purposes and home day care businesses: "I can't think of any way that would allow Polly Wilson to [operate a home day care] without letting all 430 people run daycare centers in their home. If you let one do it, you have to let them all to do it."

Imagine your community where every dwelling is an AirBnB short-term rental. You didn't have to have stayed at a Holiday Inn last night to know the answer to that one. Dwellings in your neighborhood have become more like hotels and less like homes. And is that really what a community association is?



Seeking the Truth about Community Association Law

by **DONNA M. MASON**

Welcome to the second part of our four part series as we further delve into common misbeliefs about community association law in Virginia.

Assessing Covenant Violation Charges in Homeowners Associations

Belief: A homeowners association can assess statutory charges as authorized in Section 55-513 of the Virginia Property Owners' Association Act so long as the Bylaws expressly authorize.

Truth: Section 55-513 requires that the charge authority must be in the Declaration. Having the charge authority in the Bylaws alone is not sufficient. Additionally, if the authority in the Declaration includes language that states that it is "at the discretion of the Board" to enforce the charge authority the Board's decision to exercise that power must be documented in a Board resolution.

Statutory Late Fees

Belief: A Board action is not required to impose the statutory late fee for delinquent assessments?

Truth: The wording of the statute states that the Board "may impose a late fee" if the governing documents are silent but there must be a Board vote to adopt the statutory late fee. It is best to memorialize the Board vote through a written Board resolution.

Recording Open Meetings by Members

Belief: A member is required to disclose to the Board that he intends to record an open Board meeting prior to doing so.

Truth: The Board must adopt rules regarding recording an open meeting which may include the requirement that the member announce the intention to record the meeting. Without the adoption of a rule, the member would not be required to disclose the recording of an open meeting.

Requirement for Resolutions of Board

Belief: So long as the governing documents for the Association expressly state collection powers, i.e. acceleration, late fees, etc., no action of the Board is required to invoke the express powers.

Truth: Many governing documents state that the Board "may" accelerate or "may" impose a late fee as determined by the Board. It is essential that the Board vote

The Times They Are A'Changin (come July 1, 2018)

by **AIMÉE T. H. KESSLER**

Membership Meetings

HB 1205 empowers non-stock corporations to hold their membership meetings via remote communication as long as everyone can read/hear the meeting's proceedings, unless the Bylaws or Articles of Incorporation of the Association require otherwise. The Board of Directors would determine whether its association wishes to do so. Remote communication isn't defined – does it mean email? Chatrooms? Facebook Messenger? The Virginia Supreme Court held in 2004 in Beck v. Shelton that email exchanges did not constitute a meeting; however, it pointed out that the emails in that case were exchanged hours apart. If the emails were more rapid fire, would the Supreme Court have had a different opinion? What do you think the owner forum will look like when it's all texting and emojis?!

Books & Records

SB 722 provides that if a book or record of an association that is requested contains information that is capable of being

withheld pursuant to statute, but also contains information that is capable of being disclosed, the book or record must be redacted and disclosed rather than completely withheld. So order some Sharpies and get ready to do some editing!

Resale Disclosures

HB 1031 authorizes self-managed associations to collect the same fees for disclosure packages as professionally managed associations so long as they make their disclosure packages available electronically if the seller so requests. So now the little guy can charge the same as the big guy for the same work! Congratulations!

This bill also makes explicit that an association has to be properly registered with the Common Interest Community Board (CICB), have paid its annual fees, filed its annual report, and be capable of providing the disclosure package electronically if so requested in order to collect the statutory fees for disclosure packages. This applies big or small, professional managed or self-managed, so keep up with your CICB requirements!

H 923 makes the requirement of the inclusion of the CICB "cover sheet" on a resale disclosure package applicable to condominium associations and homeowners associations. It also specifies additional information to be included on the "cover sheet" including:

1.) Any limitations on ability to rent the lot/unit
2.) Any limitations on ability to store or park certain vehicles or boats within the community
3.) Any limitations on ability to have a certain animal as a pet
4.) Architectural guidelines applicable to the lot/unit
5.) Any limitations on ability to operate a business on lot/ in unit

The form must also make explicit that the buyer is responsible to examine the documents included in the disclosure package and that the contents of the package control over the "cover sheet".

The "cover sheet" is also no longer referred to as the "one page cover sheet" and thank goodness, because I know I couldn't read type small enough to make all these new requirements fit on one page along with those that already existed! The CICB will develop the new form and make it available for use by associations. Stay tuned.

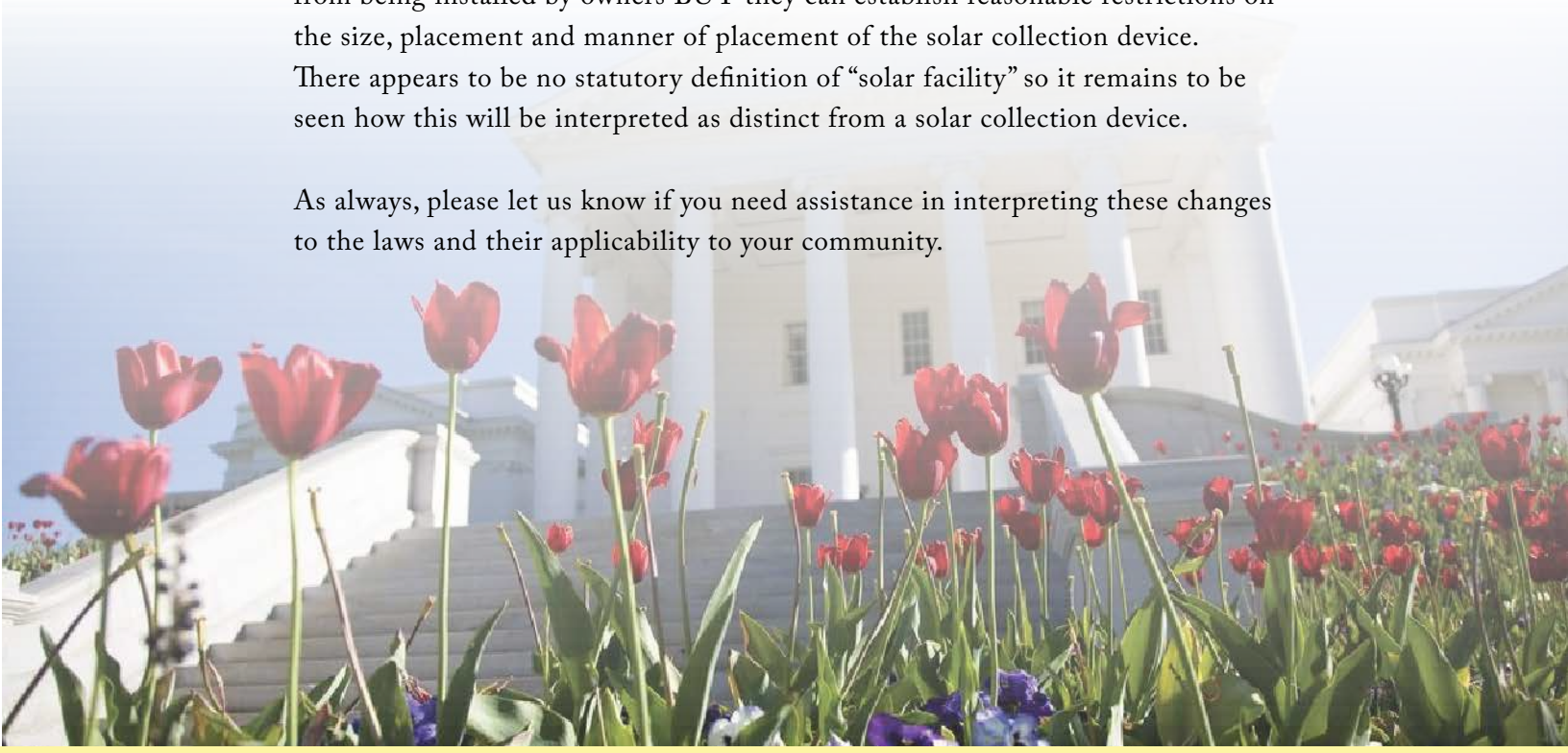
Common Interest Community Board Registration

S 328 requires that a developer register an association with the Common Interest Community Board within 30 days after recording the declaration creating the community association and ensure the required reports are filed thereafter, thus setting the association on the yellow brick road to happiness in Emerald (Richmond) City and proving there truly is no place like home…owners associations.

Solar Facilities

HB 509, HB 508 and SB 429 address allowing property owners to install solar facilities on their properties; however, explicit in the language is that nothing in these bills can be used to supersede or otherwise limit the provisions of the recorded governing documents of a community association. Keep in mind that, under Virginia law, associations already could not prevent solar collection devices from being installed by owners BUT they can establish reasonable restrictions on the size, placement and manner of placement of the solar collection device. There appears to be no statutory definition of "solar facility" so it remains to be seen how this will be interpreted as distinct from a solar collection device.

As always, please let us know if you need assistance in interpreting these changes to the laws and their applicability to your community.



THANKS FOR READING!

See our Ad in CAI's Quorum Magazine