COMMON INTERESTS

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Lambert v. Sea Oats is **Good News!**

Good news! In a case decided April 13, 2017, Lambert v. Sea Oats Condominium Association, Inc., the Virginia Supreme Court held that the trial court cannot base the amount of legal fees awarded solely on the amount of damages sought. Simply comparing the legal fees to the principal sought and finding the legal fees to be unreasonable because they are higher than the principal can no longer occur. The prevailing party MUST be awarded its reasonable legal fees and "… the court may [not]… award an amount [of legal fees] so low that it fails to reimburse the prevailing party for the costs necessary to effectively litigate the claim that – after all – it prevailed on." In other words, if you win, you shouldn't be as bad off as if you'd lost.

LINK TO COURT CASE SUMMARY:

http://law.justia.com/cases/virginia/supreme-court/2017/160269.html

WHERE THERE'S SMOKE...

by **ROBERT J. SEGAN**

As a baby boomer, I grew up during times when most adults smoked, and they smoked everywhere. You could not walk into a building or an office without seeing and smelling a smoker. The smell of air tinged with cigarette smoke, fresh as well as stale, was a normal part of the background. Even on airlines, when smoking was first banned, it was banned in the rear rows only, as if that protected passengers in the rear from the effects of smoking in the front.

Times have changed as the hazards of second-hand smoke have become well known and documented, and as everyone has become sensitized to the smells and the dangers of tobacco smoking.

The Bylaws of some newer condominiums ban smoking throughout a building, but most Bylaws do not address the issue directly. Virtually all condominium documents ban "nuisance" activities, however. A nuisance, as a matter of law, is an activity which unreasonably diminishes the enjoyment of another's property and/or causes a material disturbance to their use or occupancy of the property.

A 1906 Virginia Supreme Court opinion put it this way: "the question is whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant."

Condominium Bylaws generally give Boards the authority to make reasonable rules regarding the use of the common elements. This authority should encompass a Board-enacted ban on smoking in the general common elements. It is also probably enough to allow a Board to ban smoking in limited common element elements, such as balconies. But what about smoking in a Unit?

Banning in-unit smoking through a Board rule is an "iffy" proposition, because if challenged, a Board might have to prove that there is no way that a resident could smoke in his/her unit without creating a nuisance for others. However, in response to individual resident complaints, a Board can certainly take action against a resident whose smoking activities can be shown to be a nuisance to the neighbors. Among the steps the Board can require are improving the ventilation, abating the smoke through the use of smoke free ashtrays, and even restricting the resident's smoking.

If that does not work, the Board will have to make a judgment about whether to take action against the smoker. A Board trip to the complainant's unit might be necessary to see if "persons of ordinary sensibilities" perceive the smoke and that physical discomfort results. Several facts should be considered, including the possibility that the complainant has a condition that requires protection under the Fair Housing Act.

Sometimes these matters will result in a suit by the complainant against the Association only. In those circumstances, it is important to have a record showing that the Board did all it reasonably could to work the matter out. This would help a Board to successfully argue to a Court that this is really a dispute between the two residents. Most condominium documents provide that a breach of the Bylaws by an owner can result in an enforcement action by the Association "or if appropriate by a unit owner." Unless the smoking is clearly intolerable, this might be an appropriate case for enforcement by a unit owner.

In a recent case in a Circuit Court in Roanoke, a condominium resident sued a neighbor as well as the Association. The plaintiff claimed the Association breached its obligation to the plaintiff by not taking steps to prevent the neighbor's in-unit smoking. The Court dismissed the claims against the Association, and allowed the residents to fight it out among themselves.

The Court's opinion stated that an essential element of a nuisance claim is the defendant's "using, authorizing the use of one's property, or of anything else under one's control, so as to injuriously affecting the owner or occupier of a property." The Court said the Association did not own the offending unit, did not authorize the use of the offending unit by authorizing smoking, and did not control the unit, so no nuisance was involved on the Association's part.

Some Courts will not be so narrow in their interpretation of an association's duty, so these cases need to be handled carefully.

LEGISLATIVE UPDATE 2017

by **AIMÉE T.H. KESSLER**

This year's General Assembly session was relatively quiet for community associations. Some hot issues were addressed – like AirBnB – and others were killed (for now) – like home based businesses. Here are the highlights of some of the laws that go into effect July 1:

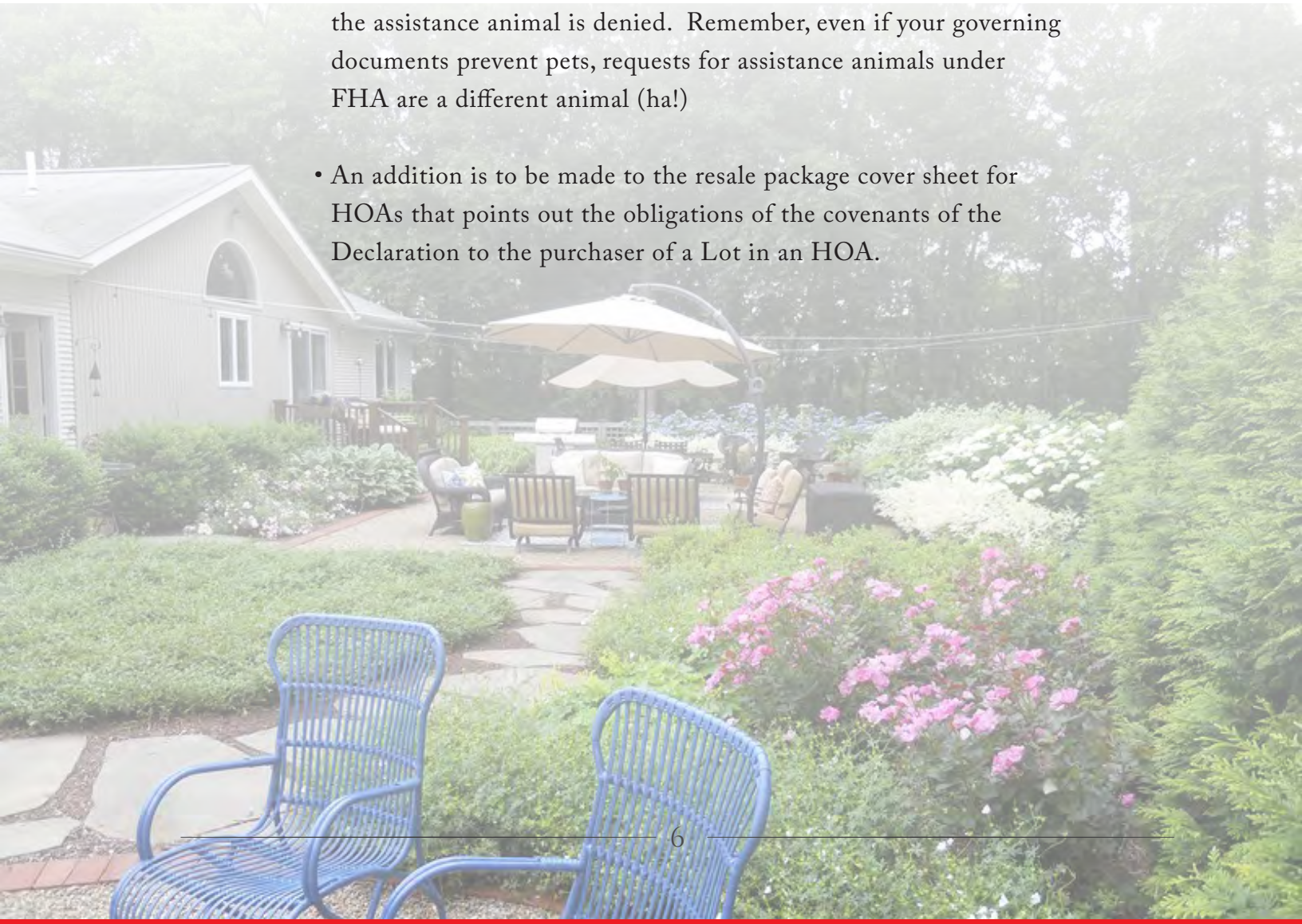
- Localities can adopt ordinances to create registries for those engaging in the short term rentals of their property (less than 30 consecutive days) and penalize those who continue to rent their properties for the short-term without registering or with multiple violations of state and federal laws, including those related to alcoholic beverage

control. The Association's covenants against short term rental, if they exist, can also be enforced on the Association level.

- The Director of the Department of Conservation and Recreation is now authorized to provide grants to community associations that own dams for use in design, repair and modification for safety reasons.

- Specific procedures are defined for addressing requests for assistance animals in a dwelling under Virginia Fair Housing Law, including requiring a process for an alternative accommodation if the assistance animal is denied. Remember, even if your governing documents prevent pets, requests for assistance animals under FHA are a different animal (ha!)

- An addition is to be made to the resale package cover sheet for HOAs that points out the obligations of the covenants of the Declaration to the purchaser of a Lot in an HOA.

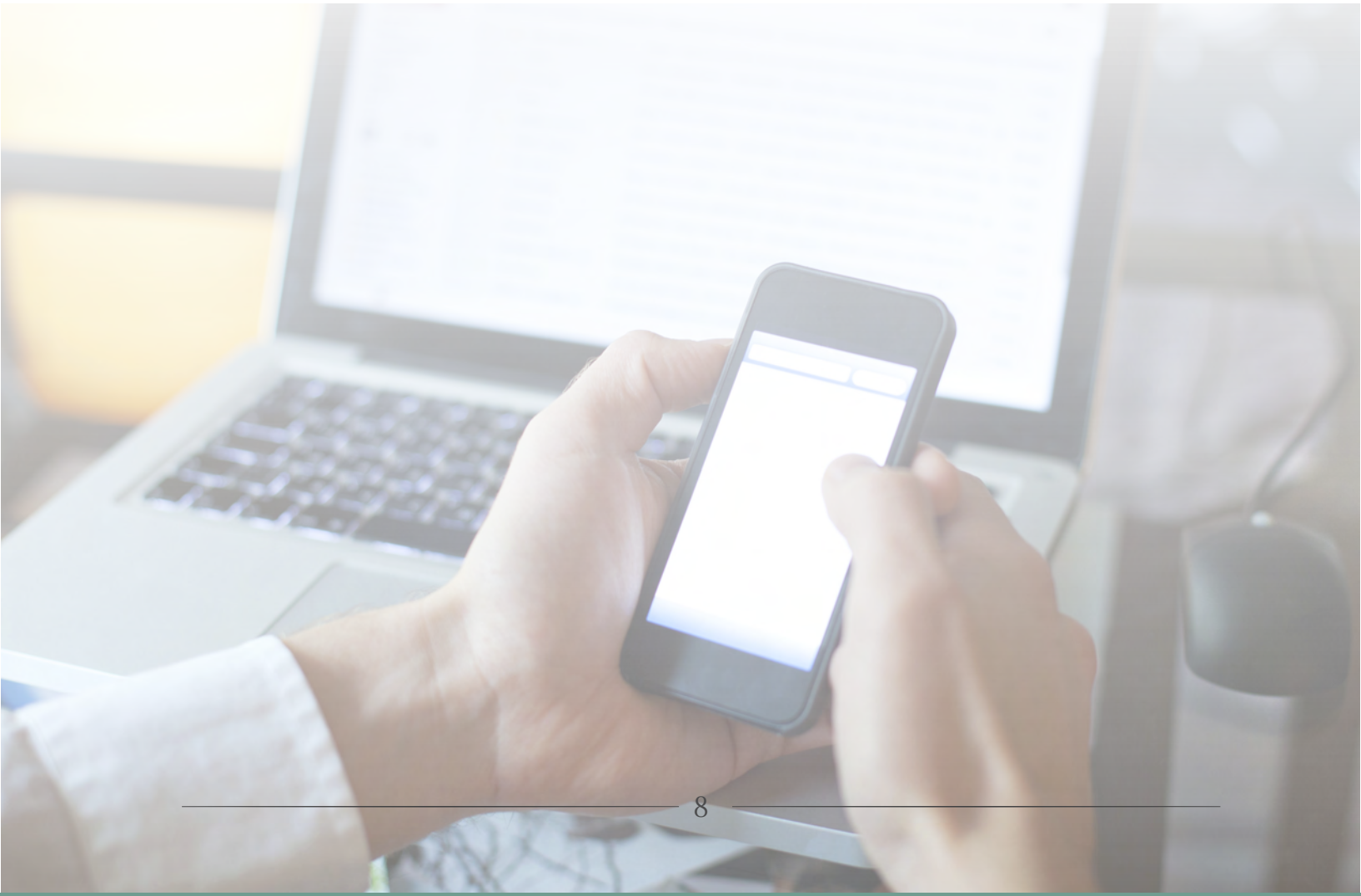


YOU'VE GOT "E"-MAIL?

by **AIMÉE T.H. KESSLER**

As lawyers, we try to anticipate what is needed now to protect the Association in the event of litigation later. What is discoverable in a case is broader than what is considered the books and records of an Association. Emails specifically are discoverable, thus their preservation has become of increased importance in litigation. In the typical corporate environment, employees are issued an email for use in their work – **akessler@seganmason.com**, for example. However, in the world of community associations, the use of "work" emails is less common. Sometimes there's a **board@association.com** email address that is given to the membership for its use, with Board members being forwarded emails sent to that address for review. Quite often Board members use their personal email addresses for Board business. You can easily imagine the difficulty of obtaining all discoverable emails from current and former Board members from their personal emails. That difficulty increases when former Board members have moved away or become hostile to the current Board. One simple means of addressing this issue – Board member specific emails that are used exclusively for Board/Association business. The Association maintains owner-

ship and control so that the emails are properly preserved for any litigation but the individual Board members can use the emails for their time on the board. Additionally, by creating a "corporate" email for Board business the distinction between business and personal is more defined, potentially alleviating questions of whether the Board is doing business outside of an open meeting when two friends who also happen to be Board members are just chatting about something over email.



"Go to sleep... and dream... of snow"

by **WILLIAM MASON, JR.**

They say that community association boards rise and fall based on the amount of snow each winter. Some believe that the Community Associations Institute (CAI), actually has a secret formula: One head will roll per 10 inches of accumulation on non-pervious surfaces.

And then there are the professionally licensed community managers. No luxury exists to gaze at "the moon on the breast of the new-fallen snow**." People need to go to work! Now!!! Or to gather milk and bread before the grocery store shelves are bare—until tomorrow. Heavens, they were only predicting flurries!

Now, you are probably wondering how this all affects the well-being of lawyers. The invoices don't just melt away with the first warm spring day. After the community association has begrudgingly paid for tons of snow to be removed…something or somebody has to go. Let's see…where in the budget is something or somebody we really don't need, at least, for a while? H-m-m-m.

So, I am relieved that we skated through this past winter with only a mere dusting in March. Now, what are community associations going to possibly do with all that budgeted, but not spent, money? How about amend their documents—electronic voting—now that would be good for the next "nor'easter". Then, we can vote on our laptop sitting by the fire and sipping egg nog. After all, why save for a rainy (or snowy) day, when those dusty and old architectural guidelines could use a good overhaul now?

Or we could just sue people. They were in violation for years—but now we have a war chest. Torn with indecision? Fiduciary duty got you down? Check the Farmer's Almanac for the long-range weather forecast. That's responsible. Dollars are like snowflakes—no two are exactly the same—and they both just melt away come spring, probably to plant spring flowers or bushes by the community entrance sign, only to be buried by the first winter blizzard.

Oh, that early snow storm wasn't in the Almanac? Then, turn to the professionals. Lawyers? No. Rustle up a ground hog now, while they're out looking for other ground hogs. Get the inside scoop before hibernation. That is, if your community pet covenant does not prohibit harboring such a varmint.

"Snow, it won't be long before we'll all be there with snow
Snow, I want to wash my hands, my face and hair with snow"

- Irving Berlin | *White Christmas*

** Clement Clarke Moore | *A Visit from St. Nicholas*

THANKS FOR READING!

JUST A HEADS UP...

If a police investigation leads them to an owner in your community...

who rents out the unit to a tenant, Section 55-248.9:1 of the Virginia Code requires that you release the lease to the requesting police officer even in the absence of the tenant's or owner's consent. Hopefully, no one reading this will ever need to know that – but just in case!

See our Ad in CAI's *Quorum Magazine*