Common Interests

A Community Association Newsletter

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NEWSLETTER | *Spring 2015*

Some Notes from the 2015 General Assembly Session

Written by Andrew P. Hill

Overall, the 2015 "short" session of the General Assembly produced a correspondingly "short" list of new community association legislation. After last year's fireworks, we think that this is a good thing!

All of the following bills have passed both houses of the General Assembly with no votes against, have been approved by the Governor, and will become effective July 1, 2015:

APPLICABLE TO PROPERTY OWNERS' ASSOCIATIONS ONLY:

- House Bill 1285 amends the definition of "employee" in the state workers' compensation statutes to exclude noncompensated employees, directors, and officers of property owners' associations.
- House Bill 1632 requires the Virginia Common Interest Community Board to develop "best practices" for property owners' association declarations consistent with the requirements of the Property Owners' Association Act. As originally introduced, this bill also required the Common Interest Community Board to develop a model declaration for property owners' associations; after lobbying by CAI, this requirement was eliminated from the bill.

APPLICABLE TO CONDOMINIUM ASSOCIATIONS ONLY:

- House Bill 2055 changes the voting procedures for condominium associations to eliminate from the total number of voting interests used to determine quorum unit owners who have had their voting privileges suspended.
- Senate Bill 1390 provides the option for condominium associations or any unit owner entitled to vote to petition the circuit court to order an annual meeting if the following conditions are met:
  1. No annual meeting has been held due to a failure to obtain quorum; and
  2. The condominium association has made good faith attempts to convene an annual meeting in three successive years, all of which have failed due to lack of quorum.

The court may set the quorum for the meeting and enter other orders necessary to convene the meeting.

APPLICABLE TO BOTH PROPERTY OWNERS' AND CONDOMINIUM ASSOCIATIONS:

- House Bill 2080 and Senate Bill 1157 clarifies that property owners' associations and condominium associations are to be given notice of foreclosure sales under deeds of trust and that the associations shall exercise whatever due diligence they deem necessary to protect their interests.
- House Bill 2100 contains a number of amendments relating to allowable charges, rental of units/lots, and resale and disclosure packets.
- The bill clarifies that only amounts stated in the governing documents, authorized by the Property Owners' Association and Condominium Acts, or otherwise permitted by law are allowed to be assessed against owners. The bill further permits the Common Interest Community Board to assess a monetary penalty against an association or a manager for violations of this provision.
- Relating to rental of units/lots, the bill provides that a community association may not do any of the following unless the recorded condominium instruments or declaration provide otherwise:
  1. Prohibit rental of units/lots or charge a processing fee in excess of $50.00 as a condition of approval of the lease;
  2. Require owners to use a lease prepared by the association; or
  3. Charge a security deposit from owners or tenants.
- The bill further provides that a community association may require landlord owners to provide copies of their leases with tenants and may further require landlord owners to provide the association with the tenant's acknowledgement of—and consent to—the association's rules and regulations.
- Relating to resale and disclosure packets, this bill requires such packets provided in electronic format to remain valid for a period of 90 days. In addition, the preparer is not permitted to charge an additional fee during the subsequent 12-month period except for an update fee of $50.00 after the expiration of 90 days from issuance. The bill further confirms that settlement agents are to escrow funds sufficient to pay all fees relating to resale and disclosure packets.
- Senate Bill 1008 creates an owner's "bill of rights" for both property owners' and condominium associations. These rights include:
  1. The right of owners to have access to the association's books and records under the provisions of the Property Owners' Association and Condominium Acts;
  2. The right of owners to cast a vote on any matter, except to the extent the declaration/condominium instruments provide otherwise;
  3. The right of owners to have notice of any Board meeting and to record and participate in such meetings;
  4. The right of owners to have notice of any Board proceedings conducted against them and the opportunity to have a hearing before the Board and to be represented by counsel; and
  5. The right to serve on the Board if duly elected and a member in good standing.

All of these rights are codified elsewhere in the Property Owners' Association and Condominium Acts. As such, we do not believe that this bill will have any significant impact.

APPLICABLE TO INCORPORATED PROPERTY OWNERS' AND CONDOMINIUM ASSOCIATIONS:

- House Bill 1878 makes a number of changes to the Virginia Nonstock Corporation Act, of which we believe two are relevant to the regular operation of our clients that

are incorporated:

- This bill changes the procedures for inspectors of election to more closely track what we believe is the common practice of the inspectors in relying on information provided by managers, attorneys, etc. in making determinations regarding votes at annual meetings. The change makes it clear that the inspectors are permitted to rely on information provided by anyone at the meeting, not just those persons appointed by the inspectors.
- This bill also provides an avenue for a director to provide consent to an action that shall be effective at a future time (not to exceed 60 days in the future). Any consent given shall be effective at the future time provided that the director is still on the Board and has not been revoked prior to that time.

5 Rules You Should Know About Condominium Water Leaks

Written by Robert J. Segan

The cherry blossoms have bloomed which means that we can finally be confident that Frozen Pipe Season is over. But it's not too late – or too early for next winter – to go over important things we all should know about water leaks in condominium projects.

Rule #1

The party responsible for maintaining an element is not necessarily the party responsible for the damage it caused.

In other words, if a pipe that is part of a unit breaks, the unit owner is responsible for repairing the pipe. However, different rules apply to the damage caused by the water that leaks from the pipe. Water leaks are a casualty and condominium documents generally require the Association's master insurance policy to cover the damage caused by these leaks.

This leads to an odd situation. In most cases, a person or company carries insurance to protect him, her or it from damages it would be responsible for if there was no such thing as insurance. But condominiums are different. Even though the Association would ordinarily have no responsibility for one unit's pipe leaking and damaging another unit, an association is still required to have a master policy to insure owners against damage from such leaks. Therefore, the Association should report all claims for water damage from pipes to the master insurance carrier or the Association may have to pay for the damage itself.

Rule #2

Just because the Association's master policy covers a claim does not mean the Association is responsible for the deductible on the claim.

Condominium Bylaws vary in the rules they provide for who is responsible for the deductible. Some say the damaged unit owners (or their insurance) take the hit. Some say the leaking units are responsible for it. Others say the association is responsible unless the leak was caused by someone's negligence. Please consult counsel to review your condominium documents to determine which rule applies to your association.

Rule 3

Master policies generally only cover water damage due to casualties.

Casualties are sudden, unforeseen events. If a roof begins to fail and

leaks, that is not ordinarily a casualty. It would be a casualty if it was caused by a tree limb, a hail stone or a meteor falling on it, because those would be sudden, unforeseen events.

Rule 4

Master insurance policies do not cover all losses a unit owner or resident may suffer from a casualty.

They generally only provide coverage to restore a unit to its condition when it was originally conveyed by the developer. So kitchen cabinet and counter upgrades, flooring upgrades, wall coverings, furnishings and personal property are not covered. Master policies also do not ordinarily cover relocation expenses that a resident must incur while his/her unit is repaired. It is important to periodically tell your unit owners about this, and to urge them to get their own policies.

Rule 5

Owners of units suffering water damage cannot necessarily recover their losses from the leaking unit owner.

If Unit 301 leaks into Unit 201, the 201 resident may have difficulty recovering losses from Unit 301 or his/her insurance. Unit owners are generally liable for losses caused by leaks from their unit that were caused by their negligence. This means that to recover, the damaged unit owner has to be able to show that the leak was caused by the failure of the occupant above to exercise reasonable care of the unit. If the water intrusion could not have been prevented by ordinary care, the victim is stuck – he or she must absorb the loss or report it to his/her insurance.

When we go through these rules with clients, the word comes to mind is "counterintuitive." Webster defines "counterintuitive" rules as rules that are "contrary to intuition or to common-sense expectation, but nevertheless are true." A perfect description.

When Does the Association Need to Warn Others of Potential Dangers

Written by Aimée T.H. Kessler

Between technology and the legal process, your attorney can find out a lot of information about a debtor that can be used to collect the amounts due the Association. The Board and the managers are also a valuable resource – you know that a particular owner drives a company vehicle for the local HVAC company, you're aware of the new renters that just moved into the house next door – all of which is information that we ask that you pass along to our office to aid in collection. Also helpful is any knowledge of an owner's dangerous behavior.

In Brown v. Jacobs, decided earlier this year by the Virginia Supreme Court, a deceased private process server's estate sued the attorney who hired him to serve divorce papers for wrongful death for not warning the process server of the risk of harm in proceeding to serve the individual. Allegedly attorney Jacobs was aware that the individual had a gun that the attorney's client indicated that he might become violent and he investigated whether he could force the individual to give up his gun as part of the divorce.

The Court found that a special relationship is required before a duty to warn is imposed by law and that no such special relationship exists between the lawyer and his hired process server. They also reiterated that particular circumstances could give rise to such a "special relationship" such to create a duty to warn.

I was previously alerted about a potential danger from a delinquent owner leading to our firm hiring a bodyguard to attend the trial with me. Debtors may be under greater pressures than simply not paying their assessments so please let us know in confidence if you suspect an owner will be packing more than their checkbook.

Virginia Fair Housing Law: When Does "Reasonable" Accommodation Become "Unreasonable"

Written by Donna M. Mason

The Virginia Supreme Court issued a ruling on December 31, 2014 in Commonwealth of Virginia, EX REL. Fair Housing Board v. Windsor Plaza Condominium Association, Inc. that clarifies "how far" an Association must go to make a "reasonable accommodation" under the Virginia Fair Housing Law. The case involved an owner who was disabled requiring the use of a wheelchair. A request was made to the Association to reassign a specific Limited Common Element parking space from one unit owner to the disabled unit owner. The requested parking space was larger and in a better location which the disabled unit owner argued was necessary to park the van needed to hold the wheelchair.

The Virginia Fair Housing Law exist to protect the rights of disabled individuals. One of those rights is that a reasonable accommodation request should be met if it is necessary to give a disabled person the equal opportunity to use and enjoy housing. There are many factors that come into play when deciding if a request is "reasonable". The Virginia Supreme Court clarified for Associations the boundaries of what is a "reasonable" request to the Association.

The Association in this case attempted to accommodate the owner by offering several different options. However, the owner was adamant that the only option suitable was that that specific limited common element parking space be permanently reassigned. The Condominium Act does not empower the Association to reassign a limited common element without the consent of all property owners affected by the reassignment. In the case at hand, the Association was unsuccessful in obtaining the consent for a permanent reassignment. The Commonwealth and the disabled owner felt that the Association was required to do so or would be in violation of the Virginia Fair Housing Law. The Virginia Supreme Court ruled that "the reassignment of limited common element parking spaces belonging to private individuals is unreasonable because Windsor Plaza has no authority to confiscate property belonging to one unit owner and to reassign that property to another."

Even though this is a favorable ruling to Associations to limit what is considered "reasonable" when attempting to accommodate a disabled owner, Associations should still be cautioned that the Virginia Fair Housing Law

is there to protect the rights of disabled individuals. In this case, the Association attempted to accommodate the owner in various ways: (1) the Association offered to assist with acquiring permanent street parking from the County and (2) the Association was successful in obtaining the consent from the owner of the requested parking space to allow the disabled owner to use the space but it was a revocable, not permanent, assignment. In summary, Associations should always consult with legal counsel prior to denying a request for reasonable accommodations to make sure that alternatives that the Association does have the power to effectuate are considered.

Another SOS for HAM Radios

Written by William B. Mason, Jr.

The HAM radio tower bill is back. Originally introduced as H.R. 4969 in the United States House of Representatives, the bill has been re-scrambled as H.R. 1391. But a rose by any other name, still has thorns (See our first review—HAM Radio Operators Aiming to Pierce Community Covenants—in our Autumn 2014 Newsletter).

The measure directs the Federal Communications Commission (FCC) to extend to community associations its rule relating to reasonable accommodation to amateur radio communications. There remain two main objections: Thing One: "Reasonable accommodation" with regard to satellite antennas, for example, has not gone well historically—most all restrictions by associations have not been viewed favorably by the FCC. Thing Two: Federal pre-emption of the "contract" or recorded governing documents between an association and its members seems unjustified—or in the words of the Community Association Institute—"heavy-handed and unnecessary intrusion".

So shout your objections to H.R. 1391 from the highest spot—but not a radio tower—and contact your U.S. Representative and U.S. Senators.


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