

COMMON INTERESTS



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DON'T LET YOUR ASSOCIATION BE LEFT OUT IN THE COLD

by DONNA M. MASON

It may be time to thaw out the collection policy by a cozy fire. Ok, maybe the collection policy wasn't the first thing that comes to mind when sitting by a fire but it's going to be a long snowy winter! Follow our step by step checklist to make sure your collection policy is not on thin ice. Here are some questions to ask yourself:

- ❄ When's the last time your collection policy was updated?
- ❄ When's the last time your late charge was increased?
- ❄ When's the last time you reviewed assessing or increasing costs for reminder letters, postage and final notices prior to turnover to legal counsel?
- ❄ Do you know all the powers your Association has to collect?
- ❄ Is your Association using all its powers?

Step One: What are some of the main collection powers that associations may have?

- ❄ Late charge authority
- ❄ If not, the ability to adopt the statutory late charge
- ❄ Recovery of costs of collection, i.e. expenses for generating late notices and related postage

- ❄ NSF cost recovery for a homeowner's check failing to clear the bank
- ❄ Suspension of use of facilities, parking, and/or other services like in unit service or concierge service
- ❄ Suspension of the right to vote/run for election/serve on Board

Step Two: How do I know if our Association has any of these powers?

These powers (with the exception of the statutory late charge and NSF cost recovery) need to be granted in the Association's recorded governing documents. Legal counsel should be consulted to confirm your Association's powers and the possible need for a resolution to fully use them.

Step Three: What should be reviewed for powers the Association has?

- ❄ **Late Charge:** Most documents that authorize a late charge allow the Board to determine the amount. If your late charge has not been reviewed for an increase for several years, it's time for the Board to decide if an increase is in order. The late charge should be proportionate to the amount of the assessment. For example: A \$75.00 late charge for a \$50 monthly assessment may be challengeable in court as unreasonable.
- ❄ **Statutory Late Charge:** If Association's documents do not permit a late charge, adopting the statutory late charge of 5% of the unpaid assessment when greater than 60 days delinquent should be considered,



EVERYTHING NEW IS OLD AGAIN...

by **AIMÉE T. H. KESSLER** The Virginia General Assembly opened its 2019 session last week with many bills relevant to the community association world proposed. Several, however, may seem to be just another “Law & Order” rerun. The hot topics appear to be home based businesses, solar energy, books and records, disclosure packets/resale certificates, and transparency of board meetings. Is everything old really new again?

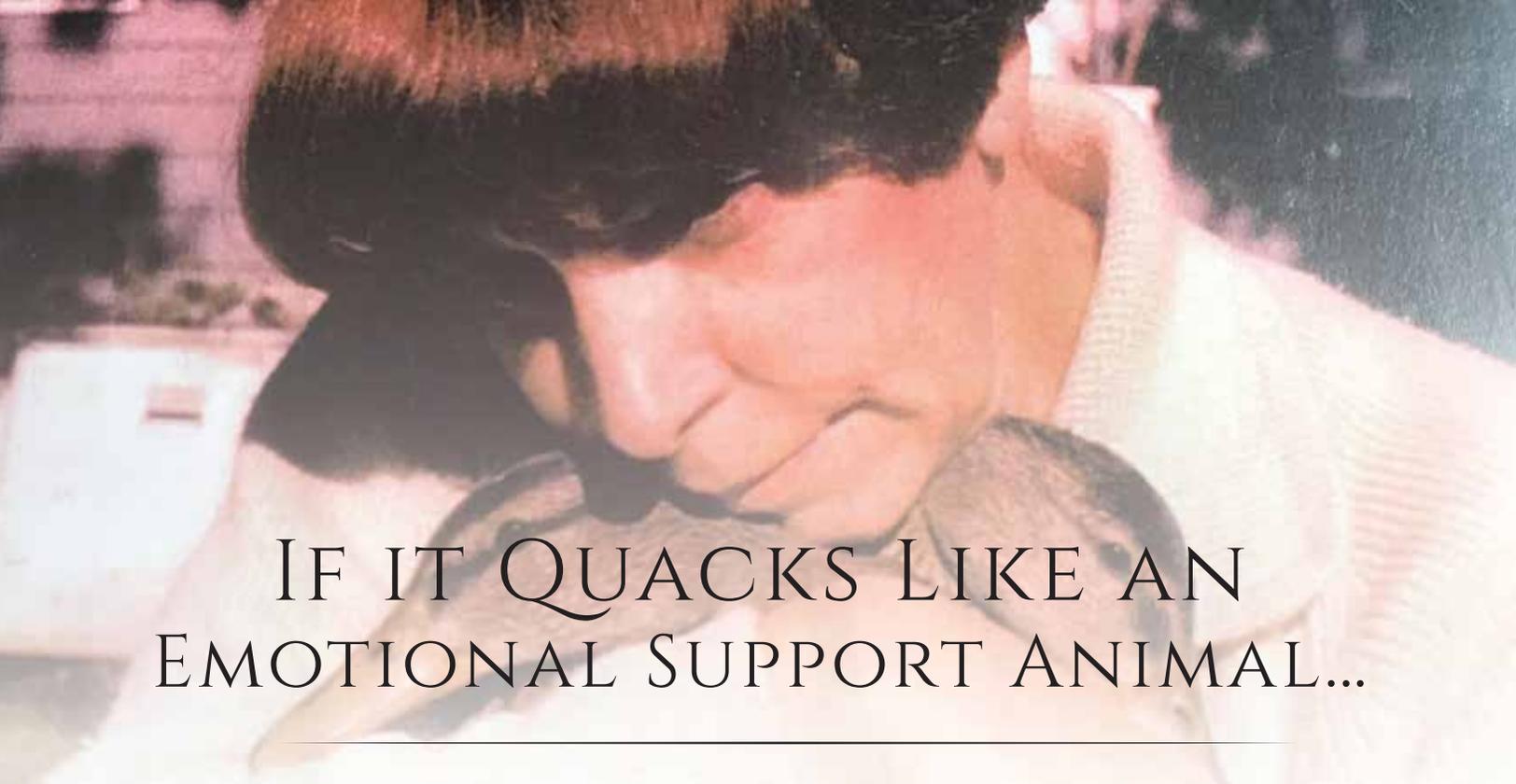
The home based business debate centers around in-home day cares. While every parent dreams of easy access to affordable day care, it doesn’t take much imagination to predict the problems that could arise from in-home day cares being allowed in every house in the neighborhood. Because, if one member can have it, can’t all members have it? Based on one approach being proposed – making a home-based business an ancillary or auxiliary use of the house – this could quickly expand beyond in-home day cares to other businesses. Last year the issue was sent to the Housing Commission for study and testimony was taken. Stay tuned for how this one turns out.

All members in good standing have access to an association's books and records – with certain exceptions outlined in law. The statute is silent regarding phone numbers and email addresses. However, pending legislation would expand what would be included in those books and records to include, among other items, email addresses. While I may enjoy those Nigerian Prince emails from my Aunt Mavis, I don't know how I would feel if the other 99 owners in my townhouse community started sharing their daily missives with me. The number of unread emails already taunts me from my iPhone. Do I want it to increase? The law already requires a space be provided for member communication. Is this necessary?

Few would disagree with the premise that all Board meetings should be open so legislation to increase Board meeting transparency should be the proverbial “no-brainer”. However, when it's the week between Christmas and New Year's, there a tree leaning precipitously over the Common Area parking lot, and a coming snow storm, requiring an open Board meeting with the necessary notice to the membership prior to its being held before a decision can be made on which contractor should remove the tree may be an exception. This legislation wouldn't allow for exceptions. Another bill would place requirements on the contents of the minutes. But what's good for the 12 townhouse condominium in Arlington may not apply to the 1000+ homeowners association in Loudoun.

The local chapter of Community Associations Institute has committees that advocate for associations in the General Assembly. But legislators don't want to hear from lawyers and managers – they want to hear from their constituents. They want real world examples, not legal speculation. So if any of these issues, or others, light your fire, give them a call or send them an email. And stay tuned for the next newsletter where the decisions have been made and the laws passed.





IF IT QUACKS LIKE AN EMOTIONAL SUPPORT ANIMAL...

by **WILLIAM B. MASON**

An association is sued over a duck. Poached, scrambled and fried, the dispute settled out of court without a trial, and then the association is cancelled by the defending insurance company. A fate most fowl.

This recent flap involves the federal Fair Housing Act (“FHA”) and its regulations on Emotional Support Animals (“ESAs”) (FHEO Notice: FHEO-2013-01 or the “ESA Regulations”). It is natural to imagine ESAs such as a cat or dog, even a rabbit, as being comforting or supportive. But cuddling up to a duck or other feathered friend on a dark and stormy night, police sirens blaring on the streets outside? Are these animals believable as pillars of emotional support? Maybe not...but an association prohibition is sometimes actionable. To file a complaint at your local Fair Housing office is duck soup— a one or two page form at best. While the statutory penalties may not be hare-raising, the legal fees awarded to the complainant if she or he prevails may be several hundred thousand dollars. And that’s not chicken feed.

So, I decided to put pen to paper and warn associations of these nebulous provisions engendered by the FHA before they run afoul of the law.

Associations have to comply with FHA and its regulations, which include making reasonable accommodations to the association's covenants, rules and regulations for disabilities, among other things. But what if your association bans pets, or certain types of pets? The ESA regulations preempt association restrictive covenants, rules and regulations.

The ESA Regulations are broad and lacking in detail, which will no doubt be sketched in by future court decisions, just as the rules regarding handicapped parking now have more definition. Until then, the vagueness of the ESA regulations may encourage abuse.

The first stage of any inquiry is whether a resident seeking a reasonable accommodation from an association rule or covenant—a “no pet policy” for example—has a disability and that the need for the ESA is related to that disability. FHA defines a disability as a physical or mental disability that substantially limits one or more major life activities. Unless the disability is obvious, the association may require the resident to provide documentation of the disability. That documentation may be provided by a physician, psychiatrist, social worker, or other mental health professional.

There is no stated requirement in the ESA Regulations that the mental health professional resides in the same state as the resident or even have physically met the resident. A diagnosis may have been made based solely on information submitted electronically. There is no basis set forth in the ESA Regulations for requesting medical records or extensive information about the resident's disability. The inquiry is a narrow one. Does the resident have a disability and documentation of a disability-related need for an ESA?

The ESA Regulations do not address what types of animals may provide emotional support. By contrast, certain regulations under the Americans with Disabilities Act (“ADA”), which are not the subject of this article, define a “service animal” to include only dogs, such as seeing-eye dogs, for example. There is no list of approved emotional support animals, no “Most Supportive Animals of 2018.”

Maxim magazine has a list. People Magazine, The New York Times and Billboard Magazine all have lists. The ESA Regulations do not.

The association may believe that a pot belly pig would damage the Common Area open spaces or that a raccoon would spread rabies.¹ The ESA Regulations may allow prohibition of animals that pose a direct threat to the health and safety of others, but that conclusion must be based on an “individualized assessment” and not “mere speculation.”

So we return to same question...is it believable or reasonable that a person could derive emotional support from a duck? Before you write me off as some quack attorney yelling that the sky is falling, let me share a story.

I grew up near the Chesapeake Bay. When a nighttime predator, such as a raccoon, killed the mother duck, my mother often raised ducklings from abandoned eggs until the hatchlings quite literally flew the coop. She was the Florence Nightingale of the duck world. Ducklings were fed through an eye dropper and nested on a small heating pad inside an incubator.

After they opened their eyes, our family would play with the ducklings—the duckling’s favorite tactic was gnawing on your hair and ear lobes. We also took those ducks that had been injured by a predator for frequent walks to the Bay. This may seem odd to the suburbanized world, but rest assured, this was not a head-turner in communities around the Bay.

That day always came. My dad would chase the grown-up flock around the yard, and in a panic, they instinctively would take flight. My Dad was burdened with his own physical handicaps. But, every morning he went to the lake near our house and banged the same metal corn pail used before they could fly. Magically, our ducks would fly from the far side of the lake before landing on the shore for breakfast. Eventually, the lake froze and the ducks were forced to seek the open waters of the Bay. They did not return with the spring thaw.

IF IT QUACKS... | *by* WILLIAM B. MASON

I can at least imagine how a duck could be an emotional support animal. But, I hope to leave the imagining to judges and juries in distant regions. Our neighborhood pet detectives can then benefit from the wisdom gleaned from the court experiences of those associations anxious to be guinea pigs for these regulations.

¹ Peggy the Pot Belly Pig—you should have been born in this world.





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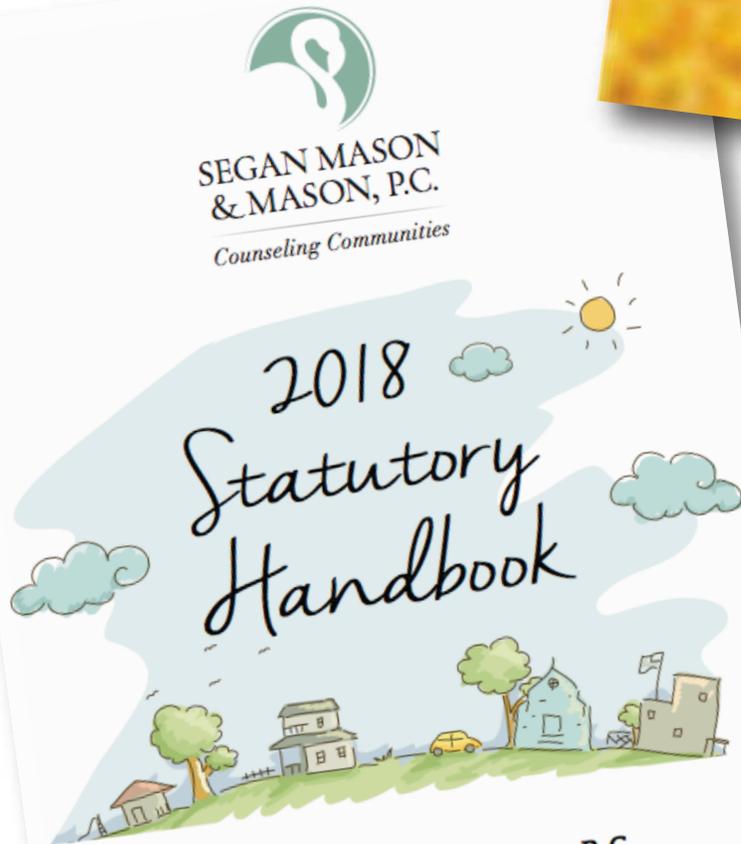
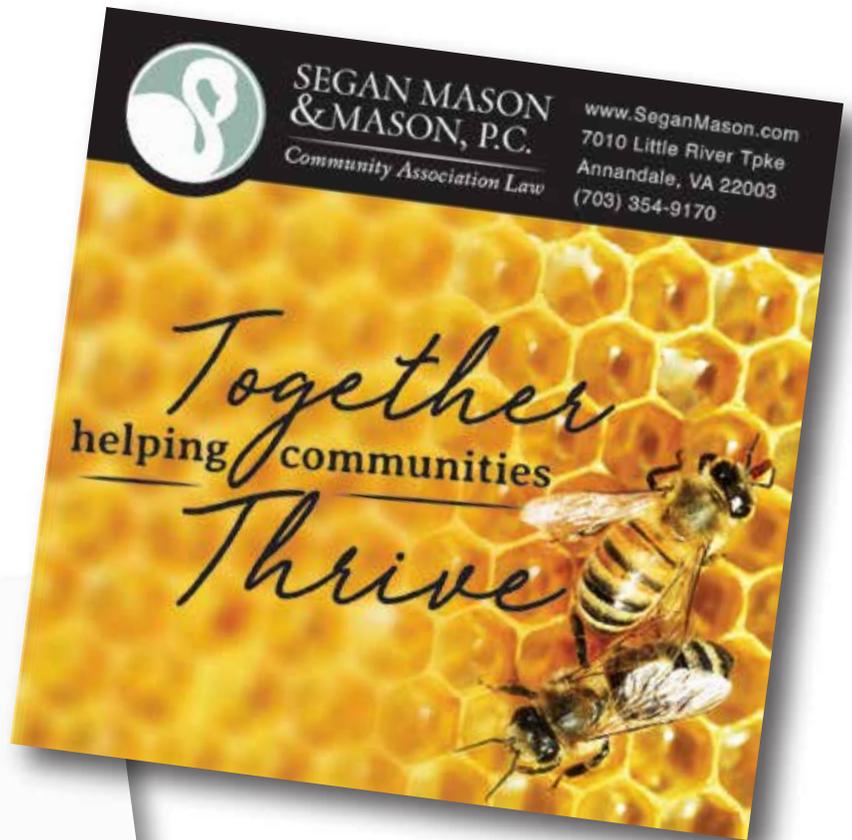


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