COMMON INTERESTS

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Ombudsman Update

by AIMÉE T.H. KESSLER

While it may seem like our association's documents are stuck in the past, the Regulations regarding the Common Interest Community Ombudsman were recently updated and they were first adopted in 2012!

The options for sending the acknowledgment of receipt of the complaint, the notice of the hearing on the complaint and the notice of the decision have eliminated certified mail as an option and added third-party courier with proof of delivery. The acknowledgement can also be sent by electronic means with sufficient proof of delivery, unless prohibited by the association's documents. This is an expansion from the prior requirement that use of electronic means be consistent with the association's procedures.

Common interest community associations must still adopt a written complaint procedure, but it must now include contact information for the Office of the Common Interest Community Ombudsman. An appeal process, or the lack thereof, must also be detailed in the association-adopted complaint procedures.

The complainant no longer has to suggest a resolution to the issue being addressed.

Also, the time for an association's written acknowledgment of receipt of a complaint has been extended from seven (7) to fourteen (14) days. Notice of the hearing on the complaint now must be provided within fourteen (14) days, and not "within a reasonable time." As much as law likes to rely on the reasonable man, reasonable minds can differ! The decision on the complaint still must be sent within seven (7) days.

The requirement to include the applicable association governing documents with the complainant's filing of the Notice of Adverse Decision with the Ombudsman's Office has been eliminated. This makes sense since the complaints filed with the Ombudsman cannot be based on the association's documents but can only be based on the action, inaction, or decision by the association, governing board or managing agent that conflicts with common interest community laws and regulations.

The regulations now make explicit that "Information that was not part of the final adverse decision will not be considered." This addresses an issue that has arisen where the complainant's filing with the Ombudsman's Office includes additional issues or documentation that was not provided to the association when the complaint was initially submitted to it for review and decision. This also makes it even more important that a thorough Notice of Adverse Decision be provided to the complainant after hearing addressing all issues as the association will also not be able to bring up additional information at the Ombudsman level.

The considerations for the waiver of the filing fee – which has not changed from $25.00 – have been expanded from "good cause" to use the U.S. Department of Health and Human Services Poverty Guidelines and requires documentation. At the time of the receipt of the Notice of Final Adverse Decision, the Ombudsman office will decide whether to review the complaint itself or refer it to the Comon Interest Community Board. If an association has been found in violation within 365 days of another complaint being filed for the same violation, the

ombudsman has to refer the complaint to the Board for its review and action. So what's an association to do? Considering the changes that have been made – which are many and significant – a revision of the required association complaint procedure should be in the offing. Particularly considering that the revised regulations had revised requirements which, if not complied with, could serve as the basis of a complaint against the association for failure to comply with the common interest community regulations.

EVERYTHING I KNOW ABOUT COMMUNITY ASSOCIATIONS & EXTERIOR ILLUMINATION

by WILLIAM B. MASON, JR.

Perhaps it's not quite a Christmas Vacation moment like when Clark Griswold finally plugs in the strands of holiday lights—imagine this on a condominium balcony!—but there may be a subtle erosion taking place of the bright line treating the regulation of limited common elements.

Parking spaces, patios, balconies…these typical limited common elements may be for the exclusive use of the attached unit but are a ***portion of the common elements***, owned by all the unit owners, and subject to the reasonable rules of the condominium.

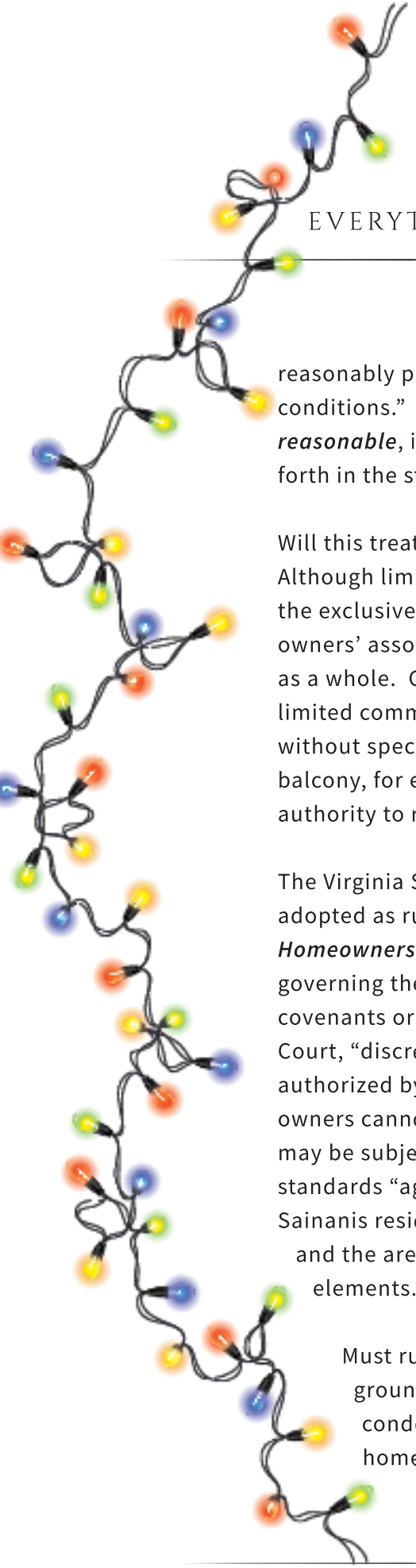
However, some statutes appear to be treating the limited common elements differently and vesting the unit owner with certain rights which arguably may prevail over the rules of the condominium project. The contrast is glaring. Let's start at the top and work our way down. Satellites and antennas, for example.

Satellite Dishes and Antennas. The Over-the-Air Reception Devices ("OTARD") Rule issued by the Federal Communications Commission, pursuant to the Telecommunications Act of 1996, acts to preempt antenna prohibitions on "exclusive use" areas, such as a balcony, terrace, deck or patio that may have been put in place by the condominium. The OTARD Rule does not apply to restrictions existing on the common elements such as the roof, hallways, etc.

Solar Energy Devices. Still in space...the Condominium Act also appears to blur the distinction between the common elements and the limited common elements allowing a ***prohibition*** of solar energy collection devices in areas "designated and intended for individual ownership and use" only when expressly stated in the recorded declaration. If the declaration is silent, the unit owner's association cannot ***prohibit*** solar energy collection devices under its general rulemaking power as to limited common elements. It can only make reasonable restrictions pursuant to the statute.

Flags. The federal preemption created by the federal Freedom to Display the American Flag Act of 2005, and repeated in the Condominium Act, further ignores the rulemaking power of a unit owners association to prohibit display of the flag of the United States on an area to which a unit owner "has a separate ownership interest ***or a right of exclusive possession***." Of course, the unit owners' association can establish reasonable restrictions as to the size, place, duration, and manner of placement or display of the flag...but outright prohibition is ***not*** a reasonable rule.

Electric Vehicle Charging Stations. The Condominium Act's treatment of electric vehicle charging stations ("EVCS") also blurs the bright line between common elements and limited common elements. Unless the condominium instruments provide an express prohibition, a unit owner is permitted to install an EVCS in the unit owner's "limited common elements parking space." There are exceptions, such as when the installation is not "technically feasible or



reasonably practical due to safety risks, structural issues, or engineering conditions." However, it is no longer enough that a rule prohibiting an EVCS is ***reasonable***, it must be related to a safety risk or one of the other criteria set forth in the statute.

Will this treatment of limited common elements extend to the courts? Although limited common elements may be assigned as appurtenances for the exclusive use of a unit owner, like the general common elements, the unit owners' association may regulate their use in the interests of the unit owners as a whole. Condominium instruments that condition the exclusive use of the limited common elements on ***house rules*** adopted by the board—often without specific criteria or detail—may be legally acceptable because the balcony, for example, is part of the condominium which the Board has the authority to regulate.

The Virginia Supreme Court took a dim view of "implied" design guidelines adopted as rules by the board in ***Sanjay Sainani, et al. v. Belmont Glen Homeowners Ass'n, Inc.***, 831 S.E.2nd 662 (2019) holding that restrictions governing the use of the lots must be expressly stated in the recorded covenants or declaration running with the land. Otherwise, reasoned the Court, "discretionary design-control powers" that are not expressly authorized by statute or the declaration create uncertainty because property owners cannot predict how the controls will be applied, and property owners may be subject to arbitrary or discriminatory treatment because there are not standards "against which the power's exercise can be measured." The Sainanis resided in a homeowners' association, rather than a condominium and the area in question was owned by them; it was not part of the common elements.

Must rules adopted by a condominium unit owners association be grounded in the express and ***specific criteria*** set forth in the condominium instruments, and thereby, be held to same standard as homeowners' associations? Do condominium instruments need to

also have specific criteria for the substance of design rules, as opposed to a general statement as to the board's power to make them? Must the condominium instruments specify the bulb colors, color temperature, and number of lumens for holiday lights and other luminaria…or do boards have a "blank check" to adopt rules because the limited common elements are part of their house?

A homeowners' association is normally the owner of the common area and the declaration grants lot owners the overall use and enjoyment of the common area. By contrast, all of the unit owners of a condominium are owners of the common elements, including the limited common elements, and the unit owner normally has the exclusive ***use*** of a limited common elements appurtenant to the unit, such as a balcony.

The Court in ***Sainani*** railed on about architectural guidelines gone amuck and the vagueness of architectural harmony. It rejected the use of "implied" design restrictions on the free use of property for merely aesthetic reasons. However, the Court in ***Sainani*** also noted exceptions as to "common property" and preventing "nuisance-like activities on individually owned property." Here some powers might be implied, rather than expressly stated, suggested the Court.

Some might argue that the difference is that limited common elements are subject to reasonable rules, whereas rules regarding use of "individually owned property" private property must be expressly and specifically enabled by the recorded restrictive covenants.

Ironically, the ***Sainani*** case involved a single strand of holiday lights—not two hundred and fifty—draped across the deck railing, launching us—much like the Griswold's reindeer and sleigh—into a discussion of exterior illumination. The Sainanis celebrated several holidays at different times of the year, including Navaratri, Diwali, and Uttarayan. The dates of these holidays did not always coincide with the time of the homeowners' association's holiday lights intended to accommodate the big three--Christmas, Hanukkah, and Kwanzaa, and so the

Sainanis were charged by the association.

I am reminded of two single-family homes around the corner from me—on St. Patrick's Day their houses were uniformly outlined by green and orange lights, on Valentines Day pink and red, and on Christmas…green and red, and so on. The point is that there are so many holidays during the year that the exceptions become the rule, and the rule becomes unenforceable without inviting claims of discrimination.

The ***Sainani*** Court appeared to be baffled by the association's lack of emphasis on the "adverse visual impact" to adjacent lots by the holiday lights, and the association's focus instead on the dates and times on which residents could display holiday lighting to accommodate the "big three." One "bright idea" to diffuse the controversy may be to focus less on aesthetics and more on protections—free use of property so long as does not unreasonably interfere with the neighbors use and enjoyment of theirs.

Towing Change

by ROBERT J. SEGAN

Prince William County adopted changes to its towing regulations (Section 13-497) at its October 2025 Board meeting to require giving cars parked without a parking permit (where one is required) a 10-minute grace period before towing.

Signs are also now required to state that a permit is required for parking and that towing is enforced "24/7" if applicable. A lettering size requirement has also been added. Changes may be required to an association's signage to comply with the new requirements. The towing agreement between the association and the towing company must be provided to law enforcement upon request.

The County amendments should not be viewed as a local government endorsement of the "soft-boiled egg approach" to combatting vehicular delinquencies, but rather as another nail in the tire intended to slow random towing. State and local government statutes or ordinances authorizing towing by a private lot owner, which include an association as the owner or manager of its common area, are often viewed as a gap-filler when the recorded association governing documents are silent regarding the authority of an association to tow.

These changes do not eliminate the need for associations to follow their own governing documents and established procedures; associations should continue to strictly comply with those procedures. The recorded governing documents, or the rules, guidelines or resolutions adopted by the Board, may require something more, such as a hearing, a longer time period before towing, or that a tag or notice be placed on the vehicle. Towing may be viewed as a form of "self-help" and those rules may also apply. In short, the County amendment should be viewed as another layer of due process and not a shortcut for enforcement.

This new ordinance may hinder towing for the lack of a parking permit when done by towing companies with contracts with an association. The 10-minute grace period may force the towing company to move on to another area and not circle back to a community. Community associations should make sure their towing contractor is complying with the changes in Prince William County and also, that the contractor agrees, and is contractually bound, to monitor or document the violation for the 10-minute minimum. The towing contractor is still required to obtain and maintain documentary evidence (such as photos) evidencing the reason for removing the vehicle.

Towing often triggers emotions and lawsuits, requiring that the association have evidence that can be used in a court action to justify the towing. A typical picture towing companies produce today shows the vehicle, license plate number, and parking space with any "Reserved" or "No Parking" signs. The new ordinance presents this problem: How do you prove to the judge that ten minutes had elapsed? The tow truck operator is unlikely to volunteer (for free) to testify, especially when that driver could be towing another car every ten minutes. An affidavit alone—"I swear that I counted to 600"—is more likely to be dismissed as "hearsay." Time-stamped photos might slide into evidence, if the towing truck operator has such a camera. Therefore, it is essential that Prince William County community associations verify that their towing contractor can provide the required evidence. We recommend that those associations double-check their contract to make sure they are covered.