COMMON INTERESTS

SECOND QUARTER 2024

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Home Inspections & HOA Pergolatory

by **WILLIAM B. MASON, JR.**

"Going forward do not enter my property without my permission unless you want to face serious consequences," said the homeowner to the board president. Perhaps, there was a good reason why my brother-in-law did property inspections in the middle of the night when he was his association's board president. Further, catching an afternoon "show" may have an entirely different meaning in the Old Dominion.

While the legal barriers to home inspections may have been made smooth by this year's statutory enactments—see our newsletter article—danger still abounds. The board president was personally sued for his walk-about by the homeowner alleging trespass, a private nuisance and intentional infliction of emotional distress.

This board president had both the duty and express authority in the recorded declaration to enter upon the lot before the board assessed a "restoration assessment" for an unapproved and illegal "pergola." The Court of Appeals agreed that "without entry onto the land, as in this case where there is only a partial view of the violations from the roadway, the Board cannot exercise its power to levy an assessment."

Rather than embrace a "shoot first, ask questions later" approach, the Court noted that an enforcement hearing would be held before levying a restoration assessment. "It only makes sense" that the association would first determine if a violation existed and gather information before a hearing, stated the Court in its ruling favoring both the association and its president. The unpublished case is ***Dan Chacko v. John R. Ford, Jr.***, from the Circuit Court of Loudoun County, February 13, 2024.

LEGISLATIVE UPDATE 2024

by AIMÉE T. H. KESSLER

This year's legislative session kept all of us on the Legislative Action Committee at high alert with the multitude of bills being introduced concerning community associations. Following is an overview of the bills that will become law July 1, 2024, and few which will likely be coming back next year:

RESALE DISCLOSURE ACT

The Resale Disclosure Act is only a year old and already changes are being made. The big change last year was to require the resale certificate be paid before delivery. The newest legislation (HB 876/SB 526) provides that the payment for the financial update, if ordered by seller or seller's agent, does not have to be paid before delivery but instead can be paid by electronic means if the association sends instructions to the seller to do so or collected at closing if the seller agrees to pay those fees. This is not the case if the purchaser, purchaser's agent, settlement agent or other authorized third party request the financial update. In that case, the payment must

be paid prior to delivery. This bill also makes explicit that the seller's agent can now order the resale certificate in addition to the seller. The bill also authorizes the purchaser or the purchaser's agent to request an updated resale certificate so long as they pay upfront.

Section 55.1-2309 gives associations 14 days to deliver the requested resale certificate but it will now be deemed "unavailable" if not provided within those 14 days. (HB 876/SB 526) This bill also amends Section 55.1-2312 regarding how long the purchaser has to cancel a contract for a property in a community association – 3 days after receipt of the resale certificate or notice that the resale certificate is unavailable unless the ratified real estate contract provides another time period. If the purchaser is never provided either a resale certificate nor notice that it is unavailable, the purchaser or purchaser's agent can cancel the contract any time before settlement.

Another bill (HB 105) adds condominiums and real estate cooperatives to those community associations which cannot collect certain fees unless current with its Common Interest Community Board filings.

Associations' Spending Power

Spurred by the Surfside Condominium disaster in Florida, many states are taking action on reserve studies. While Virginia already required reserve studies, a bill addressing the Board's powers to fund and use reserves has passed. In addition to adding a definition of "reserve study" to both the Property Owners' Association Act and the Condominium Act (HB 1209), this bill amends Sections 55.1-1826 (POAA) and 55.1-1965 (Condominium Act) to give the board discretion to meet repair and replacement requirements of capital components through reserves, additional assessments, or loans, unless the declaration increases or limits such ability.

This legislation also makes explicit that ***additional*** assessments can be levied for maintenance and upkeep of the Common Area and other areas of association responsibility including maintenance, repair and replacement of capital components, amending Sections 55.1-1825 (POAA) and 55.1-1964 (Condominium Act) of the Code, ***removing*** the ability of the membership to rescind or reduce such

additional assessment.

Proposed in response to the Virginia Court of Appeals' decision in ***Burkholder v. Palisades Park Owners Association*** (SB 672), Sections 55.1-1805 (POAA) and 55.1- 1904 (Condominium Act) are being amended to explicitly provide that "Nothing in this chapter shall be construed to prevent an association from levying or using assessments, charges, or fees to pay the association's contractual or other legal obligations in the exercise of the association's duties and responsibilities." This section will now also provide that the association can impose a ***charge*** against one or more, but less than all, owners when it is a fee for services provided, related to the use of the Common Area (POAA) or authorized under Section 55-1-1964 (Condominium Act), or a fee authorized in the Resale Disclosure Act.

Associations' Employment Power

The exceptions and exemptions from licensure that is otherwise required by the Common Interest Community Board was amended to provide that those common interest community residents that are being paid for providing record keeping, billing or bookkeeping services to their association are presumed to be independent contractors as opposed to employees. (HB 214)

Memoranda of Lien

The statutory requirements for judicial or nonjudicial foreclosure of a memorandum of lien will change on July 1, 2024. A condominium or homeowners association Memorandum of Lien created July 1, 2024 or thereafter will now have a lifespan for one hundred and twenty months from the date of recording (an increase from thirty-six months) but, in order to take action to enforce the lien, the amount required to be secured by one or more memoranda of lien must total $5,000 or more, not including costs and attorney's fees (HB 880/SB 341). The statute regarding enforcement of judgment liens is being similarly amended to add the $5,000 minimum for one or more judgments, not including interest or costs, before enforcement action can be taken.

It's important to note that while the validity period of a memorandum of lien has been extended to 120 months, the time period secured by a memorandum of lien has not been changed – for condominiums, the lien must be filed "before the expiration of 90 days from the time the first such assessment became due and payable" and for property owners' associations, the lien must be filed "before the expiration of 12 months from the time the first such assessment became due and payable".

These bills also amended Section 55.1-1815 and 55.1-1945 to make explicit that property owners' associations and condominium associations, respectively, are required to maintain individual assessment records and maintain records of any recorded lien as long as it remains effective. Consult with legal counsel to determine what changes may need to be made to the association's record keeping and collection policy.

SPEED LIMITS

Section 46.2 of Code of Virginia has been amended (HB 144) to require that the Commissioner of Highways provide notice of a change in a speed limit to the locality where the change will occur. The locality is then responsible to notify the property owners' or condominium association board of directors of the change, including where it will occur, the effective date, the new speed limit, and the reason.

A bill regarding crosswalks in a property owners' association not having to have a certain amount of traffic to be required (HB 142) was tabled until 2025 but will remain on our "radar screen."

TOWING

Two bills on this "popular" issue passed and were signed into law this session. For the first - HB 925 - the Virginia Legislative Action Committee of Community Associations Institute successfully worked to explicitly exempt out community associations from its provisions and therefore does not apply to us. However, another bill (HB 959) eliminates the exemption for Loudoun, Prince William, Fairfax, Arlington, Alexandria, Manassas, Manassas

Park, Spotsylvania, Caroline, King George, Stafford, Fredericksburg from Section 46.2-1232. As a result, these localities will now be able to adopt ordinances requiring written authorization from the property owner before a vehicle can be towed from its property. Simply having a roaming towing contract is not enough. Please consult with your counsel regarding the existence and terms of any relevant local ordinance that may apply to towing in your community.

Board Meetings

As for Board meetings, Section 55.1-1816 is being amended (HB 723) to provide that its requirements govern the conduct of meetings of the Board whether or not a property owners' association is incorporated but also now specifically provides that the provisions of corporate law or the governing documents are not superseded by this section.

Nonstock Corporation Act

For those associations that are incorporated and therefore file an Annual Report with the State Corporation Commission, legislation (HB 124) amends Section 13.1-604 of the Nonstock Corporation Act to empower a "person authorized by the corporation" to sign the Annual Report in addition to an officer or director. You should consult with legal counsel to determine how to memorialize such authorization.

Coming back in 2025 – stay tuned...

In addition to conservation landscaping which is addressed in a separate article in this edition of our newsletter, bills regarding incentivizing developers to install electric vehicle charging stations (HB 107) and requiring regulations to be drafted requiring developers of multifamily projects of 25 units or more to make at least 25% of the parking electric vehicle charging ready (HB 471) were tabled to 2025. The trend to being more environmentally friendly continues.

Two Chickens in Every Pot And a Rain Garden on Every Lot

by WILLIAM B. MASON, JR.

Legislative bills that are carried over to be reconsidered the following Session are like bulbs first planted in seasons before…you forget about them, perhaps to the extent you don't even recall what was even planted there, and then surprise, one warm day they emerge in your backyard.

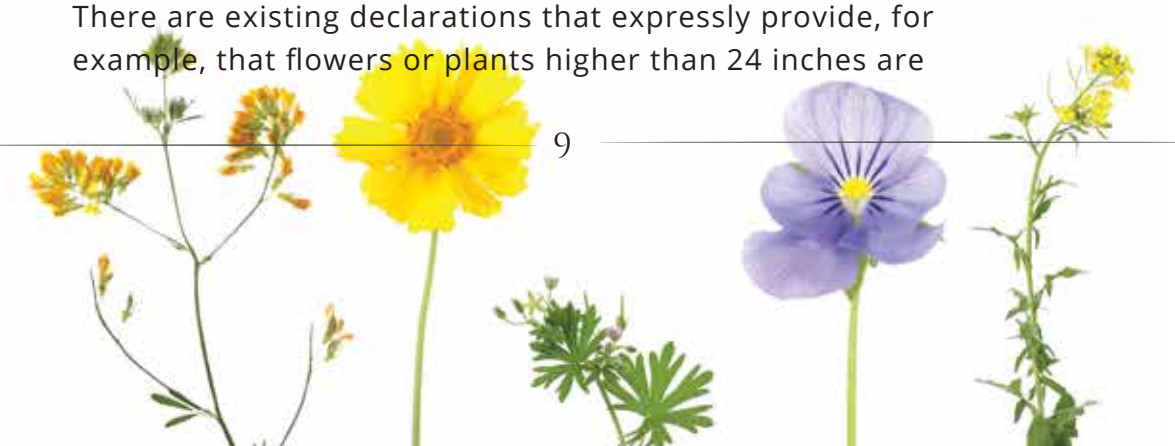
Don't be surprised if next year homeowner associations are prevented by House Bill No. 528 from prohibiting a property owner from installing "managed conservation landscaping" unless the recorded declaration specifically establishes such a restriction. The next Session is expected to stage a double feature as the conservation garden bill is joined by HB 922, which addresses the use of pesticides which affect the common area or a lot.

What is "managed conservation landscaping," and why is it supposedly good for you, or the world, in general? According to the bill, managed conservation landscaping is a planned landscaping practice that endeavors to meet Virginia water quality standards, reduce stormwater runoff and pollution, prioritizes native species over invasive species, supports pollinators and rain gardens, and is intended to reduce the use of chemicals and fertilizers promising to keep lawns green like-a-mat but fail to absorb and filter their runoff.

Some associations will no doubt cry out—there they go again—first solar energy collection devices, then electric vehicle charging stations—what's next—allowing windmills on a lot to generate wind power? The proposed bill mirrors its environmental predecessors and does not permit any installation on the common area. No worries about wind turbines churning during the neighborhood soccer game.

The power to adopt mere rules or guidelines restricting gardens and landscaping, without express or specific authority in the declaration, began eroding years ago. Citing the Restatement (Third) of Property—a cornerstone legal encyclopedia—the Virginia Supreme Court stated…"Except to the extent provided by statute or authorized by the declaration, a common interest community may not impose restrictions on the structures or landscaping that may be placed on individually owned property, or on the design, materials, colors, or plants that may be used." ***Sanjay Sainani, et al. v. Belmont Glen Homeowners Association, Inc. (2019)***.

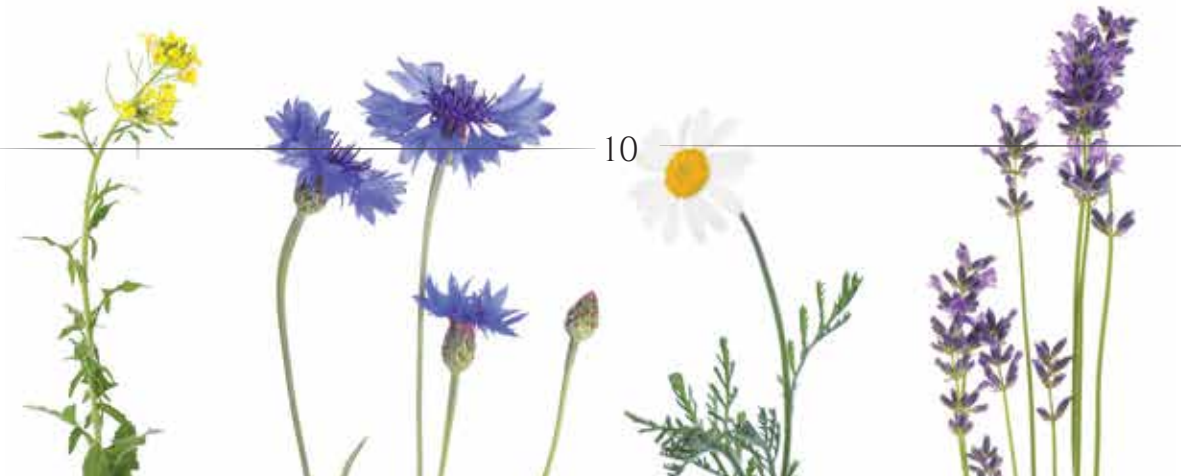
There are existing declarations that expressly provide, for example, that flowers or plants higher than 24 inches are



prohibited in the front yard, or gardens "in lawn" may only comprise eight percent of the exterior of an otherwise "in lawn" lot, but typical declarations require a lot to be maintained in a "neat" manner, or "consistent with good property management." If the Virginia Supreme Court vitiated restrictions on short term rentals, finding "for residential purposes" ambiguous, vague, and therefore, unenforceable, one can only imagine what they would do with the term "neat." ***Scott v. Walker (2007)***.

The Virginia Supreme Court has also debunked terms such as "architectural harmony" as subjective and unenforceable. Therefore, it is noteworthy that the bill empowers associations to adopt "design" and "aesthetic guidelines." Rules are required to be reasonable, and the proposed bill provides example of what is deemed an unreasonable rule, such as restrictions that "significantly" increase the costs of managed conservation landscaping, significantly decrease its efficiency, require the use of invasive species, prohibit managed conservation landscaping from being used in the front or visible areas of the lot, require turf grass, or impose percentage limits on conservation gardens.

Associations will be relieved to know that the managed conservation landscaping bill would not allow leaving turf grass lawns "unattended" for the purpose of returning the area to a "natural state." In short, it's not a homeowner defense for failing to mow your lawn. No one really knows what the political landscape will be in 2025, but for conservation gardens, it's same time, next year.



Update on the Corporate Transparency Act

In an opinion issued in March, the United States District Court for the Northern District of Alabama (Northeastern Division) invalidated the Corporate Transparency Act as going beyond Congress's Constitutional authority. The decision has been appealed to the 11th Circuit with Community Associations Institute (CAI) having filed an amicus curiae brief supporting the decision. Currently the case's decision is only being applied to the Plaintiffs who sued in that case, but its rationale, if upheld, would apply and invalidate the Act in its entirety.

In addition, CAI will be filing its own lawsuit to exempt and protect community associations from requirements outlined in the Corporate Transparency Act later this summer.

This link:
https://www.caionline.org/Advocacy/Priorities/CTA/Pages/landing.aspx
will have all the updates.

Stay tuned!