COMMON INTERESTS



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by AIMEE T.H. KESSLER

It's that time of year again – when we brace for the changes the General Assembly made, and the Governor signed, to the laws of the Commonwealth. While several changes have been made, this session of the General Assembly was not the nail-biter some others have been.

Another year, another change to the resale certificate.

Actually, this year there are 2 changes. House Bill (HB) 2110 amends §§ 55.1-2309 and 55.1-2310 to prohibit associations from requesting the purchaser's name before preparing a resale certificate while Senate Bill (SB) 808 adds to the information to be included in the resale certificate a statement "(ii) indicating that the governing documents may make an owner responsible for payment of all or part of the deductible when making a claim against such insurance." We expect to see a new Common Interest Community Association Resale Certificate from the Common Interest Community Board sometime around July 1, 2025 effective date of these new provisions. It will be posted to their website when available. Keep a look out!

HB 2750 clarifies the provisions of §§ 55.1-1837 and 55.1-1940.1, both entitled Termination and duration of certain management contracts. These statutes provided that if a management contract contains an automatic renewal provision, it could be terminated by the association or the manager at any time without cause with at least 60 days' notice. This bill noted that the contract could be terminated both without cause and without penalty.

This bill also added language to § 54.1-2353.A to include the requirement that a manager transfer and release all funds and close all bank accounts maintained on behalf of an association within a reasonable time after termination of management contract without any additional cost to the association.

While not precisely community association law, several bills passed the General Assembly and were signed into law that impact associations. SB 761 increased the time provided for in § 16.1-79 to serve a defendant with a lawsuit from 60 days to 90 days prior to the court date. With courts being as busy as they are, this enables counsel to keep cases moving without being as limited as previously in hearing dates. SB 1291 expands the maximum amount of damages being sued for in cases that the General District Court can hear from \$25,000 to \$50,000. As a lawsuit in General District Courts generally move faster and cost the Association less in legal fees than the same lawsuit in Circuit Court, this change could help associations' bottom line. This increase in the amount that can be sued for in General District Court makes the expansion of time to serve from 60 to 90 days all the more important, as the number of cases filed in General District Court will most certainly increase, increasing competition for the available hearing dates and times.

And for those associations who lease out a unit or a house, HB 2430 amends the Virginia Residential Landlord and Tenant Act to further specify that the information required to be provided on the first page of a lease include an itemization of all charges to the tenant that comprise (i) the security deposit, (ii) the amount of rent due per payment period, and (iii) any additional one-time charges due prior to the commencement of the lease or that will be included in the first rent payment. It also requires that, immediately above the itemized list of fees on the lease, it shall state: "No fee shall be collected, additional security

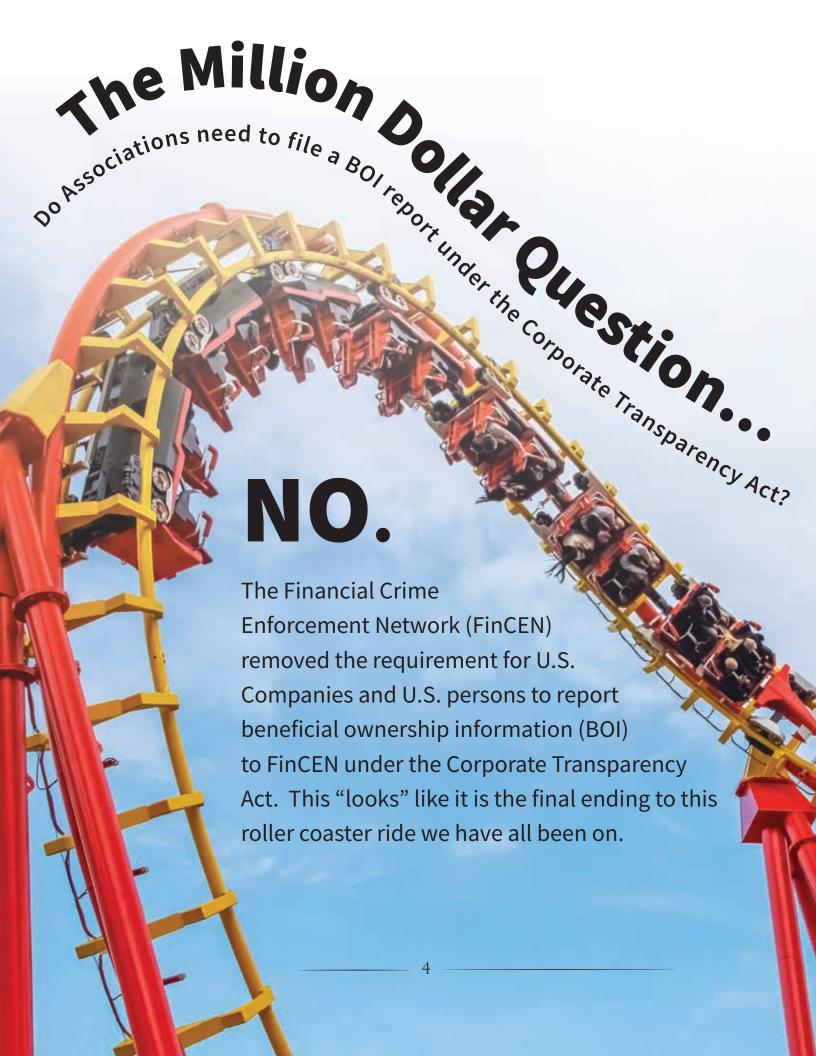
deposits or rent shall be charged unless it is listed below or incorporated into this agreement by way of a separate addendum after execution of this rental agreement." This requirement only applies to leases entered on or after July 1, 2025.

Finally, HB 2000 - the Dam Safety Act - came out of a Housing Commission workgroup and amends §§ 10.1-603.19, 10.1-604.1, 10.1-605, 10.1-605.3, 10.1-606.2, 10.1-606.3, 10.1-607, 10.1-608, 10.1-609, 10.1-612.1, and 10.1-613.6. If your association has a dam, we recommend that you consult with your counsel regarding the impact that these amendments have on your association.

Now, for what to expect next year! Bingo, conservation landscaping and ham radio. This past session, legislation was introduced to allow over-55 community associations to hold a certain number of bingo games per year but, as it IS gambling, and Virginia's Gaming Commission isn't up and running yet, the bill was essentially tabled to next year, with the hope that the Gaming Commission would be able to oversee these games, among others.

As for ham radios, there is a strong lobby in their favor, which has failed to succeed at the federal level, but now has Virginia in its range. This year's proposed legislation would have overridden all recorded covenants and applied the same rules to all communities. As we all know, an antennae on a townhouse in Old Town Alexandria is far different from one on a single family house in rural Loudoun!

The same distinction applies to conservation landscaping, as the small plot of land that comprises a townhouse's yard is clearly distinct from the acreage that comprises some lots in the hamlets of Loudoun, for example. The proponents of this legislation, like ham radios, would have it overrule the recorded covenants of community associations regardless of style or size. This topic also has strong support behind it, with it being billed as an environmental boon; however, one person's butterfly garden is another person's unkempt weeds.





by WILLIAM B. MASON, JR.

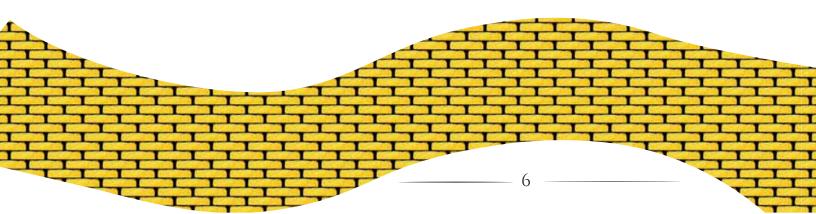
The Virginia Supreme Court wrote that courts have "consistently applied the principle of strict construction to restrictive covenants." Or, put more bluntly by one judge..."I quite frankly do not favor condo owners' associations and homeowners' associations and I view the enforcement of their rules and regulations with a sharp eye."

So, before you're off to see the judge, know what process is due, and follow, follow, follow, follow, follow, follow the steps for covenant enforcement. For condominium and homeowners' associations, the *statutory* process is the same and requires a (1) Notice of Violation, (2) Notice of Hearing, and (3) Notice of Hearing Results (Section 55.1-1959 of the Virginia Condominium Act, and Section 55.1-1819 of the Virginia Property Owners' Association Act, "POAA," respectively).

The governing documents for *your* community association may require something more, such as two notices of a violation rather than one.

A community association should read all the enforcement rules together whether provided by the statute, the recorded governing documents, or its own adopted rules or resolutions, and take the high road rather than the path of least resistance. Associations should not short-cut these procedures for "repeat offenders." Notices that are incorrectly sent at the association level will prejudice the association's ability to correct the alleged violation in a lawsuit.

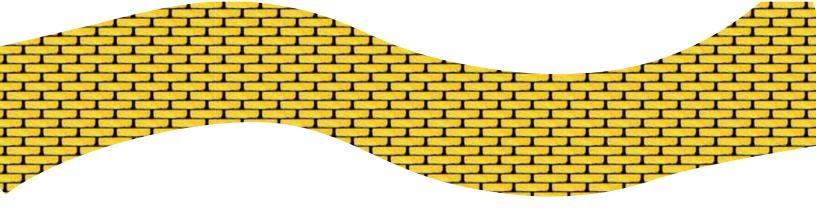
- 1. Time. How do you measure time? For example, both statutes require "at least" fourteen days' notice of the hearing, although the day of the mailing and the day of the hearing cannot both be counted under Va. Code Ann. § 1.210. The best practice to focus on the phrase "at least" employed in the statute and provide notice that has ample room for any miscalculation.
- 2. Name. Notices should match the name of the owner shown on the deed recorded in the land records so that any judgment obtained will attach to the property. Government tax records are sometimes misleading since the complete list of owners, or their complete names, may not fit into the limited space available. A judgment against one spouse, without mentioning the other spouse, for example, will not attach as a lien if the property is held as tenants by the entirety or husband and wife. And avoid addressing owners as "Mr. and Mrs. Frank Jones," for example. The courts view each owner on the deed as a separate and individual party.
- **3. Actions that May be Taken.** The law requires that the Notice of Hearing state that actions that may be taken in accordance with those statutes cited above, such as assessing fines, filing a lawsuit, etc. The renowned United States Supreme Court Justice Oliver Wendall Holmes famously opined that even a "bad man" (wicked) should be made aware of the potential consequences of his acts (or inactions).



While it is not required in the statutes cited above, the Notice of Hearing should also reference the sections of the Condominium Instruments, Governing Documents, or rules that are alleged to have been violated, or, at the very least, provide a plain words description of the violation. It is likely not enough for the Notice of Hearing to state, for example, that you will be "turned over to the attorney." Be specific and state that the attorney will file a *lawsuit*.

Some "actions" are *not* included in the statutes cited above, such as a suspension of the right to use the recreational facilities for a *rules violation* (a failure to pay assessments *is* in the statute), suspension of the right to vote, or "self-help" by the Association to cure the violation, therefore the *statutes* do not require a Notice of Violation, Notice of Hearing or Notice of Results of Hearing. Nevertheless, the better practice is to put all the actions authorized by the Condominium Instruments or Governing Documents together in the Notice of Hearing. This might also address separate notice requirements tied to these penalties that are provided for in the Condominium Instruments, Governing Documents, or rules adopted by the Board.





THERE'S NO PLACE LIKE A HOME... | by WILLIAM B. MASON, JR.

- **4. Opportunity or a Hearing.** There is sometimes a belief that owners are not entitled to a hearing *unless* they make a request after receiving the Notice of Violation. The statute is not completely clear but *strongly* implies that an actual hearing is required regardless of whether it is requested. Because...what is the forum for deciding the result if the community association opts not to have a hearing? Additionally, as the statutes require a Notice of Results of Hearing, a hearing impliedly has to be held. The better practice is to err on the side of due process and have a hearing in *all* cases (more on that later).
- 5. Authority. Know what "wonderful" things the association can, or cannot, do. Make certain that those actions listed in the Notice of Hearing are rooted in the express and specific authority in the recorded Declaration for homeowners' associations or the recorded Condominium Instruments for a condominium, or that a rule is properly enabled by these recorded documents. Does the Board have authority to suspend parking privileges or assess charges? The reliance on cookie-cutter forms is understandable in this industry but assuming one size fits all can result in enforcement problems. At least make more cookies for different situations—exterior dwelling maintenance v. short-term rental use v. landscaping!
- 6. Executive Session. Statutes applicable to condominiums and homeowners' associations both permit the board, or a covenants committee, to discuss and consider rules or covenant violations in executive session. However, the body must vote in an *open* session for its action to be effective. Note that while the rule violations *may* be considered in closed session under these statutes, the unintended consequence may be that owners perceive that they are being treated differently behind closed doors.

- 7. Mail. The statutes require that the Notice of Hearing and the Notice of Hearing Results be personally delivered or sent by registered or certified mail, return receipt requested. Failure to do so is an absolute roadblock to enforcement (no defying gravity here). Statutory remedies are strictly construed by the courts. It is good practice to also send notice by regular mail. Some owners ignore certified mail, but judges will often presume that the regular mail "works" if the regular mail notice is not returned as undeliverable. As an equitable matter, a court often wants to know that the owner had actual notice but chose to do nothing.
- 8. Reasonable Time to Comply. The statutes provide that an owner has a "reasonable" time to comply after sending the Notice of Violation. What is "reasonable" may depend on the circumstances, such as the weather...because you shouldn't need a meteorologist in court to prove that there were several days where temperatures permitted painting the shutters in January. An association can be both reasonable and diligent without being inflexible. Drafting guidelines is sometimes difficult and often requires some flexibility or reference to the specific violations or the provisions of the Condominium Instruments or Governing



- Documents for the "reasonable" time to cure. It is more difficult and time-consuming for an owner to replace a roof than remove the garbage and debris stored in the driveway, for example.
- **9. Appeal.** What happens when the decision of the Covenants Committee is appealed to the Board? Is the authority to file a lawsuit reserved to the Board? Should the same statutory provisions cited above regarding notice be followed such as sending another Notice of Hearing by certified mail with at least fourteen days' notice for the hearing on the appeal? The statute is arguably silent; however, the equitable view is that a final decision has not yet been made until the next and last stage. The better practice is to act if the same statutory rules apply. Because...the association wants to be able to argue in court that the owner had every opportunity to remedy the alleged violation.
- 10. Follow Your Own Rules. Nothing will doom an association faster than failing to follow its own rules before filing a lawsuit for a rules violation. Was an extra "friendly reminder" required by the guidelines adopted by the Board? Further, if the association wishes to enforce a rule it should be able to prove that the rule was properly circulated or published under the statute and the Condominium Instruments or Governing Documents. Courts are loath to enforce a rule where there is no presumption created that the owner knew, or should have known, of the rule. The best practice is for the Board to insert language in the text of the rule that directs that it be circulated by management which creates a presumption that this was done.

Restrictive covenants are enforced in what was once called the "equity" side of the court, rather than the "law" side. While the labels have melted away, the principles of "equity" and fairness have not. Equity, I was once told by a judge, is the ability to do the right thing or what is just. A common maxim of equity applied by the courts is "he who seeks equity must do equity." This is something for community associations to remember when they consider an owner's impassioned request for a hearing continuance or compliance delay for "personal reasons." A court sitting in equity is not a tinman without a heart.

By contrast, an unreasonable enforcement delay by the association—this has been a problem for "years"—can be struck down by the equitable defense of "laches" which is like a bar by the statute of limitations but undefined as to a specific amount of time ("Equity aids the vigilant not the indolent"). Another common mistake is threatening to assess fines in the Notice of Hearing, for example, where there is no authority in the Condominium Instruments or recorded Declaration…because the association may be accused of having "unclean hands" and denied relief under this equitable defense.

Of course, "equity must follow the law" i.e. the written black and white restrictive covenants "running with the land," but to ignore the existence of these judicial currents is like watching the "Wizard of Oz" in "black and white" rather than color television...you may not be certain on how to follow the yellow-brick road.

