COMMON INTERESTS

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What Do You Remember about Synonyms from Elementary School?

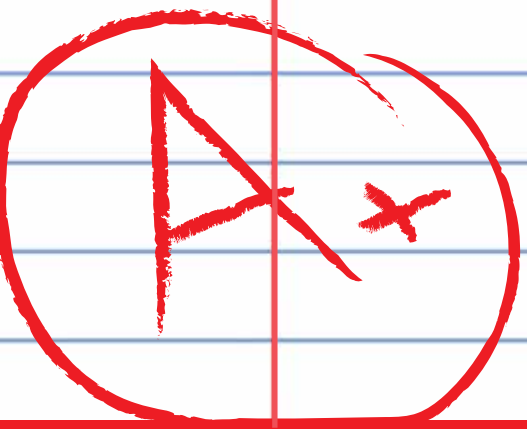
by AIMÉE T. H. KESSLER

In Burkholder et al. v. Palisades Park Owners Association, Inc. (Court of Appeals of Virginia, Record No. 0187-22-4, 2023), two homeowners in the Palisades Park Owners Association in Arlington sued the Association seeking 1) a declaratory judgment that charging and collecting inspection fees, other than for resale inspections, violated Section 55.1-1805, 2) an injunction preventing the Association from continuing to do so, and 3) attorneys' fees and costs. The trial court found in the Association's favor and the homeowners appealed to the Court of Appeals. The Court of Appeals reversed the trial court, finding that Section 55.1-1805 required there be explicit authority in the declaration to impose assessments for lot compliance inspections and that no such language exists in the Association's Declaration. Palisades Park's Petition for Appeal to the Virginia Supreme Court, and its subsequent Petition for Rehearing, were denied, leaving the Court of Appeals the law of the Commonwealth.

While the Virginia Supreme Court required the use of express language for restrictive covenants in Sainani v. Belmont Glen Homeowners Association, Inc., 297 Va. 714 (2019), the Court of Appeals took it one step further stating that explicit and express are synonymous, refusing to take the logical step from the declaration ***requiring*** the association to do something to the association being ***empowered*** to use assessments to pay for it. In other words, the Court didn't say lot compliance inspections could not be performed, just that the Association could not pay someone to do them. Taking this to its logical conclusion, an association's declaration may require the association to manage waste removal but not empower it to use assessments to pay for it!

The Community Associations Institute has state Legislative Action Committees that monitor, propose, oppose and lobby for and against legislation. The Virginia LAC has worked with other groups and Senator Adam Ebbin, whose constituency is directly effected by this decision, as are all Assemblymen's and Senators', to propose legislation (SB 672) that would amend §55.1-1805 of the Property Owners Association Act (and its corollary §55.1-1904 in the Condominium Act) to more accurately reflect the statutes' underlying purpose and to re-establish certainty over what types of charges associations may impose to ensure that associations may continue to levy declaration-based assessments against the membership to pay for expenses incurred by associations to carry out their legal obligations and authorities.

We will continue to monitor this legislation and will report in a future issue as to the outcome. As this case is now the law of the land, however, we recommend consulting legal counsel regarding expenditures about other than common area or common elements items.



CORPORATE TRANSPARENCY ACT

Exactly What is this X-Ray Vision Being Used for?

by AIMÉE T. H. KESSLER

Beginning January 1, 2025, corporations including homeowners associations, condominiums associations and cooperative associations existing as of December 31, 2023 will have to comply with the Business Ownership Information reporting requirements of the Anti-Money Laundering/Corporate Transparency Act, filing through an online portal through U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) https://www.fincen.gov/boi

The Corporate Transparency Act was passed in 2021 to detect and report suspicious activity regarding money laundering and terrorist finance, to facilitate tracking money that has been sourced through criminal or terrorist activity, and to safeguard the national security and the financial system of the U.S. The U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) published a statement recognizing the charitable sector that operates domestically

presents a low risk for money laundering terrorism financing risk. Nevertheless, no exception has yet been carved out for community associations. Those corporations with an IRS non-profit tax determination are exempt from these requirements but those incorporated as a STATE non-profit corporations, without an IRS designation, appear not to be exempt.

Community Associations Institute, the community associations' industry's interest group, has taken the position that the Anti-Money Laundering Act and Corporate Transparency Act are not intended to apply to community associations and that they should be exempt and is lobbying federal legislators to adopt such an exemption. It is joined by a number of other groups that believe the wide net cast by the law has unintentionally caught more than a few dolphins!

If an association were required to file such a report, it would have to at least annually and within 30 days of any change, report:

- **Business name, any fictious names, address, state of formation and tax identification number**
- **Legal name of board members, birthdate, home address, and identifying number from a driver's license, state ID, or passport.**
- **Individuals with substantial control. The same information (name, birthdate, home address, identifying number) of person (s) who exercise substantial control over financial reporting for the community association corporation. It is unclear whether a community manager and/or management company qualify as an individual with substantial control. May include those owning more than 25% of the lots/Units**

Noncompliance could result in civil penalties of $500 per day and criminal penalties of up to $10,000 and up to 24 months in prison.

Stay tuned as we are keeping on top of this issue.

EXECUTIVE SESSIONS

LAST YEAR/TODAY

Time for a Quick Re-Cap of the Latest Ombudsman Determinations

by WILLIAM B. MASON, JR.

It has been a busy start to the year, but we begin with our main story about executive sessions. A Notice of Final Adverse Decision ("NFAD") was filed with the Virginia Common Interest Community Ombudsman ("Ombudsman") by an owner charging that the board of directors convened in executive session to "review a waiver request" and, another time, to discuss "related issues." Part of the executive session was to review a written opinion for the Association's legal counsel, so the Board considered the session to be consultation with legal counsel, even though counsel was not present. The owner's complaint alleged that counsel had to be present for it to qualify as consultation with legal counsel, allowing the matters to be considered in executive session. The Ombudsman did not find any Virginia cases on this matter and focused on the specific language of the statute noting that there "may be a disconnect here that creates a bit of confusion." The Virginia Property Owners' Association Act ("POAA") provides that a

board may convene in executive session "to consult with legal counsel." The Ombudsman concluded that legal counsel must be physically (or virtually) present for this reason to convene in executive session to apply. Of course, if the purpose of convening in executive session was another option provided by the statute, such as "to consider and discuss probable or pending litigation," consideration of a related written opinion from legal counsel would be on the menu as part of the consideration and discussion of the litigation. The Ombudsman determines whether the action, inaction, or decision by the board of directors or managing agent is in conflict with the laws or regulations governing common interest communities, including the POAA and the Condominium Act. A determination by the Ombudsman is not legally binding and the Ombudsman herself retired at the end of 2023, leaving open the question of whether the next person to hold this position would interpret the statute the same way. One option for the board to address this dilemma – balancing the Ombudsman determination, attorney-client privilege, and the board's fiduciary duty - may be to invite legal counsel to join the meeting electronically at the outset of the open meeting, convene in executive session to consult with legal counsel, and then invite legal counsel to kindly "get off the clock" and leave the meeting once the Board exits executive session "for the purpose of consulting with legal counsel".

In a separate NFAD, another association's board convened in executive session to consult with insurance counsel about pending litigation—who was physically present—but remained in executive session to discuss two "unrelated" matters—a loan option and survey. The association contended that the loan option and survey "were directly relevant to, and part of" its deliberations with insurance counsel to resolve the litigation. If the survey and loan were part of the insurance counsel consultation, there would appear to be no violation of the Condominium Act, stated the Ombudsman. Noting that the complaint was based on supposition and inference, rather than eye-witness testimony, the Ombudsman observed that there is "no way" of knowing what talks actually occurred in this private meeting "short of being a fly on the wall." Exactly!

Moving right along, a complaint against a third association charged the board with continually failing (1) to state the reasons for entering executive session, (2) to make a motion to enter executive session, (3) to ratify executive session deci-

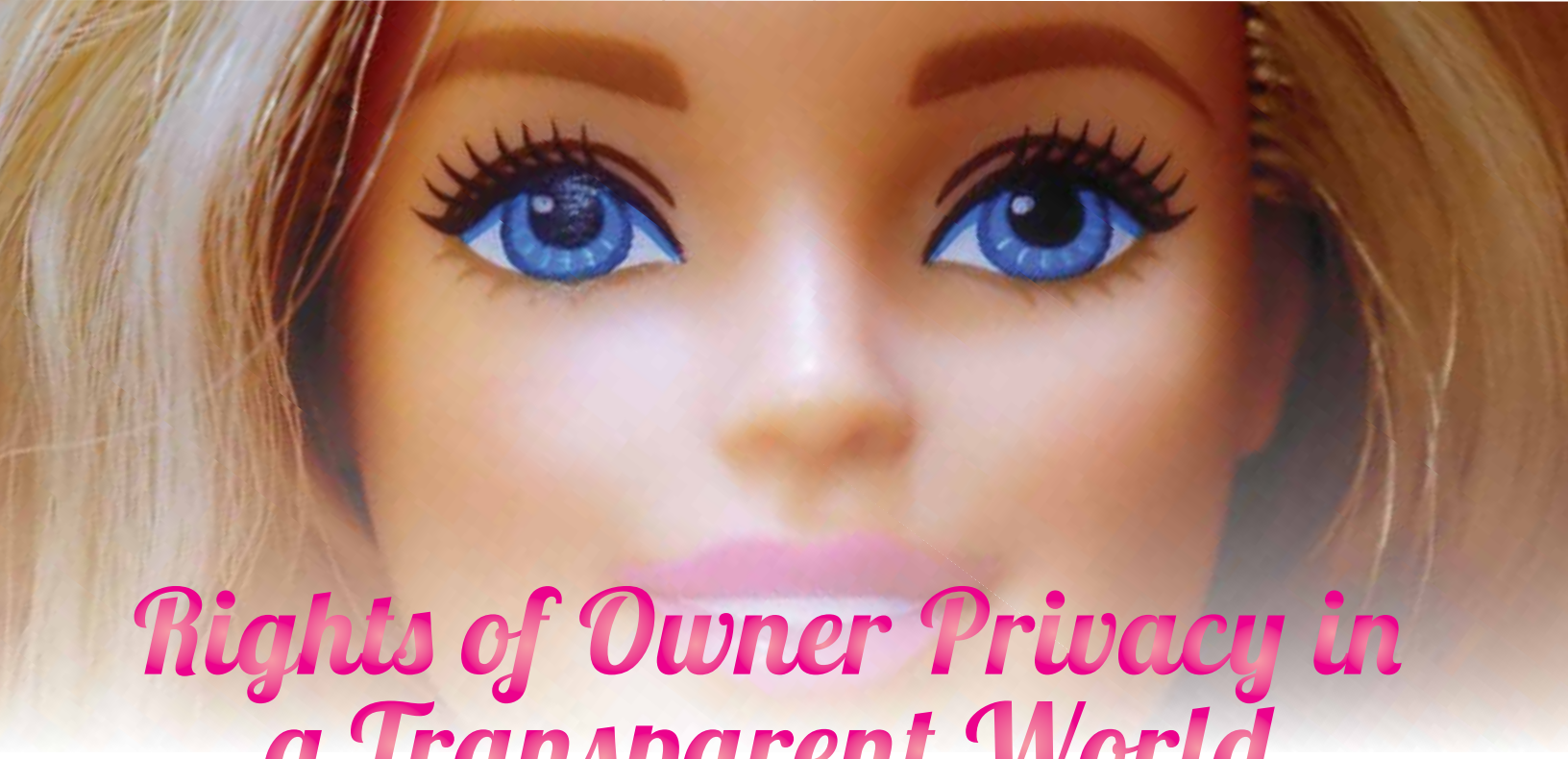
sions, and with (4) entering executive session for "improper reasons," and (5) asking owners to leave electronic meetings for an executive session but "repeatedly fail[ing] to allow owners back into open session after completing an executive session." Wow! That's a lot to unpack. Citing a paucity of documentation, including whether the board reconvened in open session, the Ombudsman was unable to determine the "validity" of the claims, but did "encourage" the board to comply with the POAA and "return to the open meeting to vote as necessary." While the POAA doesn't explicitly state this, it would seem that the board would need to return to open session if only to adjourn the meeting. This may explain other complaints that boards simply materialize in executive session at the beginning of a subsequent meeting without first calling the meeting to order. It's like this…the board is not on the Starship Enterprise and cannot simply leave the holodeck program running until next time. Every meeting begins (and ends) in open session before a proper motion to convene in executive session (and a similar proper motion to exit it).

Our final executive session determination involves the board convening in executive session to consider whether the complaint submitted by the owner contained "any legal issues." While the Ombudsman acknowledged that the board is able to consult with legal counsel in executive session, she found that there are "limited reasons" for convening in executive session and that reviewing a complaint from an owner to see if legal issues were raised in it did not qualify. In a determination issued to a separate association, the Ombudsman reaffirmed that the statute requires a motion that includes the purpose for entering executive session but did not require that the association take any specific action other than to adhere to the POAA since the association had "mended its ways."

And now this…meeting minutes. Let's dive straight in—the complaint charged that the association illegally failed to post or distribute the meeting minutes, including meetings of its committees. The association countered that minutes of committee meetings are not required by the POAA or their governing documents. The Ombudsman responded that board meeting minutes must be recorded under the POAA, and the minutes be made available for copying and examination; however, the association is not required to circulate them. Another NFAD claimed the board minutes were "incomplete" and did not "contain enough detail to determine who attended the meeting, what was discussed, and what was decided." Citing a

lack of specific examples by the complainant, the Ombudsman concluded that the POAA does not specify what information the minutes should contain.

Well folks…that's our recap of the most recent cases. Stay tuned for our review next year of our favorite Final Determinations.



Rights of Owner Privacy in a Transparent World

by WILLIAM B. MASON, JR.

Is the clash between the right of privacy and transparency so explosive that it should be viewed only in an "IMAX" Theatre?

The statutes governing community associations require that associations maintain the "addresses" of the Owners. "Originalists" give a term its meaning at the time the text became law. Others argue that interpretation of the text may require a more flexible approach based on current circumstances. Under the Originalist view, the term "addresses" did not refer to the "email" addresses, or telephone numbers, of Owners at the time of the original effective date of the Virginia Property Owners' Association Act (POAA") (1989) or the Condominium Act (1974).

According to Verity Jennings in A Brief History of Email: Dedicated to Ray Tomlinson, email was supposedly not invented until the early 1970's—the Queen of England's first email was sent in 1976—and email did not emerge from its relatively exclusive use in the military and academic worlds, and become popular in the everyday course of business, until the mid-1990's.

However, email addresses and telephone numbers of owners provided to the association are "books and records" and required by statute to be available for examination and copying by other owners in good standing, unless an exception applies. The Supreme Court of the United States recently held that there was not a right of privacy expressly stated in the United States Constitution. Some community association lawyers may argue that the United States Constitution does not apply to community associations because they are "private," rather than public, actors, and therefore, community associations cannot rely on it for protecting an owner's individual files from public scrutiny.

Virginia recently enacted Section 59.1-575 of the Code of Virginia that provides a right of privacy as to certain "personal information," but it is not clear whether this statute even applies or overrules the statutory obligations of community associations. Community association rights and responsibilities are governed by their recorded master deed, declaration, or bylaws (hereinafter, the "Constitution"), and the POAA, Condominium Act, or sometimes, the Virginia Nonstock Corporation Act.

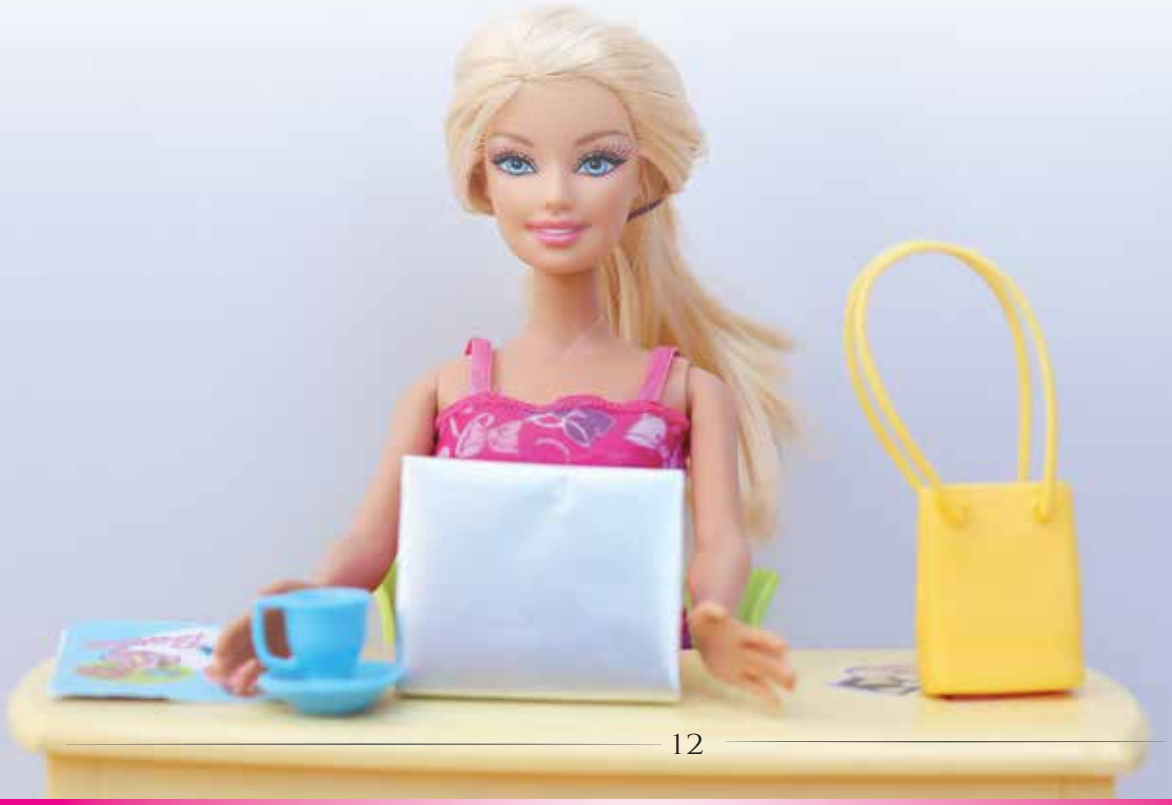
Arguably, an exception within those statutes applies to the email addresses and telephone numbers of owners. The Board may withhold books and records from copying and examination to the extent that they concern "individual" owner files, including any individual member's files "kept by or on behalf of the association." Note that it's not a "right" of the owner, but an option ("may") of the board.

In this area, the telephone numbers or email addresses sometimes may be considered confidential for security reasons or as a matter of company policy....but arguably the owner "used" this personal information at some point to contact the association suggesting implied consent by the owner for that information to then be shared. It is easy to see how this happens.

For example, a stereotypical owner—let's call him Government Worker Ken—opens a letter from Architectural Control Committee ("ARC") Chair Chelsea, charging that the association—Casa Cluster HOA—intends to assess monetary fines if the PINK flamingo lawn ornament is not removed in three days. Knowing that "color" is not a standard in the recorded Case Cluster Constitution for ARC

review, and that fines are not expressly authorized by those same covenants running with the land, Government Worker Ken goes atomic, and fires off a defiant email to ARC Chair Chelsea, and even calls Casa Bluster Board President Barbie to give her a "piece of his mind." Now, Ken's email address and telephone number are books and records of the Casa Cluster HOA. And, it may result in Government Work Ken receiving future emails at work from other owners at Casa Cluster HOA..."vote for me, the current board is a bunch of nimrods," or worse yet, an email from his employer about the company rules.

A lot may depend on how the email address and telephone number are stored. Some might argue that this record must be physically stored in the individual owner's file for the statutory exception to apply. Is it stored, for example, in a sub-file labeled "Casa Cluster Covenant Violators," in an electronic envelope with all the other Kens, or in a manilla folder marked "Government Worker Ken?" Is the right or expectation of confidentiality lost by the comingling of electronic files? Or, maybe we should combine our imagination with our common sense. Arguably, an individual owner's "file" is a "concept" of data pertaining only to that owner and not just a physical manilla folder.



A determination* published by the Virginia Common Interest Community Ombudsman, while not legally binding, best summarized this view. The Ombudsman wrote....

While the question regarding emails and phone numbers really does not pertain to this statute, I will note that in many associations, emails and phone numbers are not distributed due to their private nature. Associations do have to provide access to their association member list if requested....but under the that statute, "Individual unit owner or member files...including any individual unit owner's files kept by or on behalf of the unit owners' association can be withheld from examination or copying." Emails and phone numbers are often considered part of an individual owner's file. (Emphasis Added).

**Common Interest Community Ombudsman Determination, Carol L. Keith and Overlook Condominium, File Number 2022-01310, February 18, 2022.*

Rather than rely on implied consent, one suggestion is for community associations to provide owners with a form that grants the written permission to the association for distribution of email addresses or telephone numbers to other members, or limits communication from the association, for example, to notice of meetings, calls for candidates, etc.

"Stereotypical" Constitutions also often have a provision that requires that a vote for directors be by "secret ballot." A recent amendment to the POAA and the Condominium Act permits voting by electronic means but also provides that if the vote is required by the Constitution to be by "secret ballot" the electronic means "must protect the identity of the voter." By contrast, there is not a specific exception in the books and records statutes for the examination and copying of "secret ballots."

How are we to read these seemingly conflicting statutes together? One interpretation is that secret ballots may only remain a "secret" during the election and the protection of the voter's identity evaporates once a book

and record request is made by another owner for the examination and copying of all the ballots.

While certain matters may be physically “split” such as the minutes of the Casa Cluster HOA ARC and the email contacts of the alleged violators, secret ballots cannot realistically be divided into individual lot owner files. The secret ballots must be examined as a whole.

Some community associations, citing the expectation of privacy, maintain that they will only release the "secret ballots” upon a court order. A better alternative may be to task a neutral third-party with examining and re-counting the “secret ballots.” It certainly would be less expensive than a trip to the courthouse and hopefully, will satisfy everyone’s concerns.