COMMON INTERESTS

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Acceleration
can Save you Time & Money

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What does "acceleration" mean to you and your community? It is not that one neighbor who ignores the speed limit while flying over the speed bump outside your house on their way to work in the morning. I am instead referring to a helpful tool Associations use to manage delinquent accounts.

Members who live in a community association are required to pay an assessment that helps pay primarily for the maintenance of the common area and expenses. Unless the governing documents mandate the assessment payment be made on specific dates, the Board normally has the power to establish the due dates for the annual assessment. This power of the Board can be a very effective collection tool that can save the Association money as well.

It will be assumed for this article that your association has the power to accelerate an account if an owner is delinquent. However, you should always consult with legal counsel to confirm the ability to accelerate prior to adopting a collection policy that incorporates this tool. When an account is "accelerated", the remaining future fiscal year installment payments become immediately due and payable at once. For example, if an owner is delinquent for the March 1 monthly installment, the owner would be required, in accordance with the Board's adopted collection policy, to pay the remaining unpaid future monthly installments for the fiscal year at one time. In other words, they no longer have the privilege of spreading out the balance of the current fiscal year in 12 monthly installments.

This is a valuable tool for the association for several reasons. Primarily, it permits the law firm to seek a monetary judgment against the owner for the entire fiscal year of 2024, for example, instead of just for a few monthly installments. This alleviates the need for the association to file multiple actions including a few months at a time for delinquent dues in one year. Since the association is charged the same amount for attorney fees and court filing fees whether the judgment is filed seeking recovery for two quarters or the entire fiscal year, the association can take comfort in knowing that it will not have to expend additional legal fees and court cost for a judgment again until a delinquency occurs in the next fiscal year.

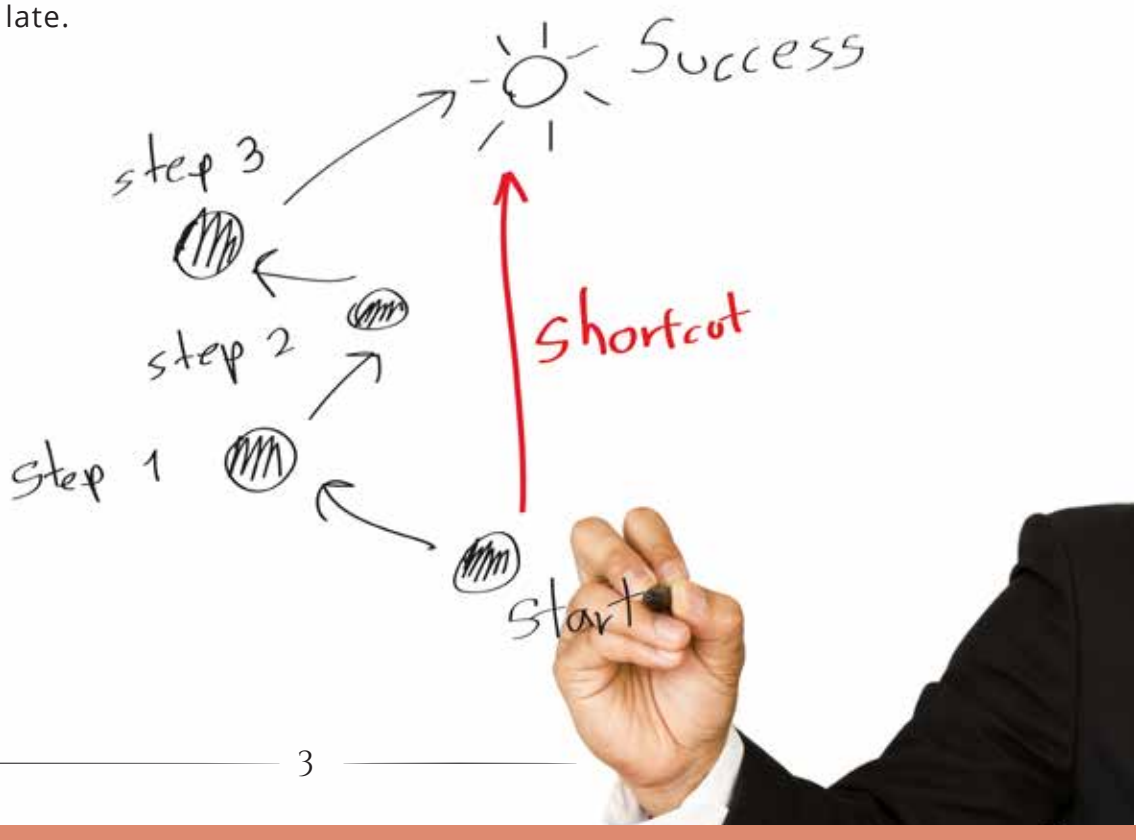
Additionally, there still are some Judges that will provide a percentage award for attorney fees. In other words, the larger the judgment principal, the larger the attorney fee award. The Virginia Supreme Court has repeatedly held, most recently in ***Lambert v. Sea Oats Condominium Association Inc.,*** that more has to be considered by a Judge in making an award of attorney fees than just the comparison of the amount sued for to the amount incurred in attorney fees and costs, and enumerated six factors in addition to this comparison. However, many Judges still balk at awarding more attorney fees than judgment principal, despite the amount of work that goes into getting to court.

A word of caution regarding late charges. If an account is accelerated, the late charges for those future monthly installments should not be posted after

acceleration. The reasoning is that once an account is accelerated, the entire fiscal year is due and payable so additional late charges would no longer be appropriate. The idea being that you cannot require the owner to pay the entire fiscal year at one time but treat the owner as paying quarterly for the purposes of charging a late fee.

Another necessary step to using the acceleration tool is the adoption by the Board of a collection policy. Even if the governing documents provide the Board the power to accelerate a delinquent account, the Board still must access that power by voting on a collection policy agreeing to its use. The policy should provide the detail of any notices the owner should expect to receive prior to the acceleration.

As a side note, a collection policy is necessary for other things as well, i.e. late charges, collection cost, due process for suspension, and payment application to name a few. It is always a good idea to review your collection policy periodically to make sure it is in alignment with the practice being followed. The collection policy is how the Board communicates the consequences for an owner being delinquent. It is in the best interest of the association to publicize this policy to ensure that owners are aware of those consequences and that they act as a deterrent to an owner paying late.



THE BAMBOO HUNTERS

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

He emerged from the common area woods adorned in dark sunglasses, a baseball cap, and scanning the area, with an assistant behind him checking each address on his clip board. "We're bamboo hunters," he explained, and then they moved purposely down the pathway to the "running bamboo" located around the corner.

The homeowner association, Fairfax County Code Enforcement, or bamboo mercenaries? I wasn't sure. But I do know it is now illegal in Fairfax County for a landowner to permit "running bamboo" to extend from their lot into a neighboring property, including the common area, and the "bamboo hunters" are on the prowl.

"Running bamboo" is a "fast-growing, invasive grass with a complex, horizonal root system called rhizomes that aggressively spread underground," according to Fairfax County's web site. Imagine, the opening credits from the

hit television zombie drama, The Last of Us, and you may understand the possible genesis of Fairfax County Code § 119-3-2 (the "Bamboo Ordinance"). But it's not the end of the world, it's just illegal in Fairfax County.

Several botanical authorities acknowledge that there is "good" bamboo used for products all over the world, but what is the difference between "running" bamboo and "clumping" bamboo, for example? My spouse—enamored with the company's soft bamboo sheets—also ordered running shorts made of bamboo from the Cozy Earth catalogue. This is not what is meant by "running" bamboo. "Clumping" bamboo, by contrast, grows slowly, is not invasive, and more importantly, is not subject to penalties under the Bamboo Ordinance. The root of the "wrong kind of bamboo," warns Fairfax County, can "push through brickwork, drains, cavity walls, patios and exploit cracks or weaknesses in concrete."

But what if you don't live in Fairfax County? And if you do, is "running" bamboo prohibited under the community association's recorded governing documents, thereby allowing the community association to act independently of Code Enforcement? Recorded restrictive covenants prohibiting "running bamboo" or "invasive vegetation", which the courts require to be expressly stated, are unusual.

However, many covenants prohibit "nuisances." Community associations, as both a landowner, and an entity enforcing its restrictive covenants, might be tempted to cite the Fairfax County ordinance as possible evidence that "running bamboo" is a "nuisance." This requires getting into the weeds of the Virginia Supreme Court's decision of ***Fancher v. Fagella*** (2007), where the plaintiff alleged that his neighbor's sweet gum tree—a regional native—was an "obnoxious" nuisance, with its roots invading and damaging his retaining wall, patio pavers, and sewer and water pipes. ***Fancher*** also argued that the overhanging branches left leaves and "spikey gumballs" on his roof and lot and sought an injunction requiring his neighbor to cut back the roots and branches.

The Court noted that "issues raised by vegetation encroaching across property lines" have "confronted" courts throughout the country. The Court held that encroaching trees and plants were not "nuisances" merely because they "cast shade, drop leaves, flowers, or fruit, or just because they happen to encroach upon adjoining property" but they can only be regarded as a

nuisance **"when they cause actual harm or pose an imminent danger of actual harm to adjoining property."** The Bamboo Ordinance is more expansive, simply crossing the property line is enough, whereas, the Court require that the danger or harm be **"imminent."**

In short, reliance on the Bamboo Ordinance as an example of a nuisance cannot be reconciled with the Court's test. An exception for Fairfax County lot owners might be if the "nuisance clause" also prohibits any violation of local ordinances, which is common governing document language.

Short of filing a lawsuit against your neighbor for injunctive relief, an owner's ability for "self-help" to remove invading bamboo roots, at the removing owner's expense, was not disturbed by ***Fancher***. The Fairfax County web site recommends repeated doses of herbicides and notes that removal of "running" bamboo often "requires heavy equipment."

There are natural remedies for those concerned about the "environmental" impact of such remedies, but how to find bamboo-eating panda bears when they are in such short supply? A potential solution is for Fairfax County to adopt a "sister city" in the People's Republic of China, say the city of Wenzhou, to grease the wheels of trade. Do this—or nothing—just know the bamboo hunters are on the prowl.

THEY PAVED PARADISE AND PUT UP A PICKLEBALL COURT*

by WILLIAM B. MASON, JR.
Shareholder

It was interesting to read recently that playing pickleball has become popular among prison inmates and that some prison yards have been converted to accommodate the demand for pickleball courts.** Perhaps, only there—judging from the racket reported in the national media—can the "residents" favor such a change to the common grounds without protest, or threats of being "served" with a lawsuit.

Some residents believe that they have a vested "right" of quiet enjoyment in their home—the common area was serene and undeveloped when they moved here—and it should stay that way. However, this article is not about whether the constant "pok-pok-pok" of a pickleball volley is a nuisance, or whether residents have a right of privacy, as opposed to a mere expectation. Fairly or unfairly, those protesting pickleball courts in their associations are being labeled as "NIMBY's" (not in my back yard). The dilemma is that the common area is every members' back yard and for all of their common use and enjoyment.

Most community associations have a duty to "maintain" the common area, which is often defined as meaning to continue, preserve, or to keep in an existing state. But

what about the obligation, and the power, to change when the needs and desires of the community evolve? It may be hard to for some picklers to imagine now, but pickleball may be soon forgotten (or become a standard Olympic sport). Quidditch anyone? We should be mindful of the ancient Chinese proverb on our path to architectural harmony: "Be not afraid of growing slowly, be only afraid of standing still."

The answer seems like an easy "smash". The association is the owner of the common area, and the board of directors, acting on behalf of the association, has the power and discretion, to improve, modify, and build on the common area. One of the general purposes of assessments is to promote the recreation, health, safety and welfare of the owners within the community. However, these general words may not be enough in today's legal environment.

For example, other supplementary definitions of the word "maintain" are broader and include the act of constructing, changing, or improving. However, the Virginia Supreme Court has refused to enforce restrictive covenants where there is "substantial doubt or ambiguity," such as the term "residential purposes," in favor of the free use of property. If the term "residential purposes" was intended to bar short-term rentals, noted the Court, "it would have been easy to say so, and it would not likely have been left to the uncertainty of inference" (short-term equals six months or less, for example). In short, don't rely on the judges to reach for Webster's and its definitions of "maintain" to bail you out.

Recently, the Court of Appeals has treated the entire declaration as a "restrictive covenant" and extended that test from individual properties to the power of associations to contract for certain services related to the association's common purpose, such as property inspections. This decision has been appealed. Hopefully, future courts will not require such specificity as to the ability of a board of director to make changes in the common area, such as requiring that the declaration actually state "for pickleball purposes." But admittedly, there does need to be certain language granting the discretion to the board of directors to change, modify, replace, construct, improve the common area, something contemplating the use of backhoes, for example.

Some recorded declarations or easements may require certain areas owned by the association to be preserved as “open space” or “natural areas” and may prevent certain types of development. And then there are any local government zoning requirements to review and the proffers on future development from the developer to the local government.

Money, and not just the lack of it, is often a frequent issue. Some declarations require approval of a percentage of the members to spend over a certain sum, borrow money, or to use the common area or future annual assessments as security. The funds squirreled away by the association may also be “reserved” for the replacement of existing assets, such as roads, community centers or pools. The board of directors may wish to consult with its accountant and its legal counsel regarding any flexibility for using existing reserves targeted for a particular project for another. Another possible “follow though” is to build into its future reserve study funding for improving the common area. Finally, such a project may require the approval of the members to exceed the maximum annual assessment or for a special assessment to fund the project.

But, let's "return" to pickleball. The association currently has two tennis courts and wants to convert one for occasional pickleball use. There are those that will argue that this cannot be physically done because the "non-volley zone" and the "transition zone" are incompatible with "real" tennis. Assuming the absence of the constraints on the use of the common area, and that the declaration grants some discretion to the board of directors and includes some "backhoe" authority with words like improve, construct, or build, the board of directors, it might be possible. As a general rule, board actions are judged according to its fiduciary duties to the association and the "business judgment rule." That rule envisions the board of directors diligently reviewing and considering the options, and then, exercising its business judgment as to what is in the best interests of the association. Perhaps, change for a changing membership.

**With apologies to Joni Mitchell.*

***Which brings full circle the argument that homeowner associations are but "gulags with grass! Soccer-playing stalags with recycling!" Steve Twomey, Its Time Association Paid Dues," The Washington Post, June 13, 1994, Page D01.*