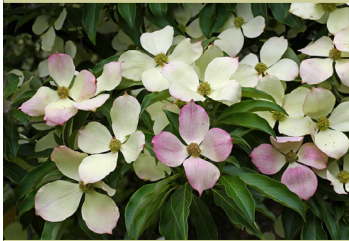


# Common Interests

*The Newsletter of the Virginia Common Interest Community Board*

## ***A Word from the Executive Director...***



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### **Disclaimer:**

The information in this newsletter is intended to provide a summary of various updates and actions. It does not contain all information and should not be relied upon exclusively. Please contact the Board's office if you would like more information regarding the topics covered in this newsletter.

Welcome to the Spring 2020 edition of Common Interests, the newsletter for the Common Interest Community Board. Normally, the introduction to this newsletter would report with excitedness the recent activities of the Board and preview upcoming changes affecting common interest communities, association members, and the public. Regrettably, these are not normal times. The COVID-19 virus has greatly affected citizens of the Commonwealth over the last few months, causing severe disruption to the lives of individuals, families, and businesses. The Board, the Department, and its staff are no exception, and have also been impacted by this force of nature we all face.

The Governor of Virginia has declared a state of emergency for the public health emergency caused by COVID-19, and, in addition to imposition of "social distancing" practices, directed the closure of many businesses that provide "non-essential services." The Governor's declaration, though, did not include state agencies, and the Department and the Board's office remain available to serve members of the public. With that said, the current public health situation has caused some changes in our business operation for the near term. For one, the Department is closed to the public to reduce the risk of spreading infection. However, members of the public may still reach the Board's office by mail, telephone, and email. In addition, the Department is emphasizing social distancing and has adjusted its staffing of operations accordingly. Many Department staff members' responsibilities can be transitioned to working from home, so there are many who are regularly working remotely. However, licensing functions, such as processing applications and fees, as well as manning the call center, cannot be transitioned off-site, so licensing staff must continue to come into the office. To minimize staff time in the office, the Board's office has implemented schedule adjustments to permit some staff to be out of the office (e.g. working four 10-hour days with one off day), and teleworking to allow staff to work on projects that do not involve processing and to work on profes-

sional development. We have also limited call center hours to 8:30 a.m. to 1:00 p.m. In addition, some staff members have opted to utilize Public Health Emergency Leave that is available to state employees. Staff are available by email during regular work hours 8:15 a.m. to 5:00 p.m., and we are encouraging the public to contact staff by email, whenever feasible.

In recognition of the difficult circumstances many face, the Director of DPOR, in accordance with the Governor's executive orders, has issued the following regulatory waivers:

### **1. Temporary Waiver of Regulations to Extend Validity of Expired Licenses, Certifications, Registrations and Other Authorizations (Effective March 18, 2020).**

Extends the validity of licenses, certifications, registrations, and other authorizations issued by regulatory boards under DPOR that would otherwise (i) expire during the state of emergency and (ii) be eligible for renewal or reinstatement during the state of emergency under applicable regulations, until the 30th day after the date by which the state of emergency is lifted. This waiver does not waive statutory requirements or limitations, nor does it amend or permanently extend the previous expiration date of affected licenses, certifications, registrations, and other authorizations.

The waiver applies to common interest community manager licenses, principal or supervisory employee certificates, and common interest community association registrations. The waiver also applies to registrations for time-share alternative purchases and time-share resellers. The waiver does not apply to condominium registrations, time-share program registrations, or time-share exchange program registrations.

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## **2. Temporary Waiver of Regulations to Extend Examination Eligibility Deadlines (Effective March 19, 2020).**

Extends examination eligibility deadlines established by regulations of boards under DPOR that would otherwise expire during the state of emergency, until the 30th day after the date by which the state of emergency is lifted. This waiver does not waive statutory requirements or limitations, nor does it amend any other examination eligibility provisions.

The waiver does not apply to licenses, certifications, or registrations issued by the Common Interest Community Board.

## **3. Temporary Waiver of Regulations that Prohibit or Limit Online, Electronic, or Distance Theoretical Instruction (Effective March 13, 2020).**

Waives any regulations of regulatory boards under DPOR that prohibit or limit online, electronic, or distance theoretical instruction, in order to prevent and mitigate the spread of the coronavirus (COVID-19). This waiver does not waive statutory requirements or limitations, nor does it waive practical (hands-on) instruction required by a board's regulations.

There are no regulations of the Common Interest Community Board which prohibit or limit online, electronic, or distance instruction. Common interest community manager training programs approved by the Board may provide online, electronic, or distance instruction. However, providers are highly encouraged to ensure training is delivered utilizing a platform that allows the instructor to ensure students are in attendance for the duration of the training, and allows a method for questions and answers during the training.

Each of these waivers remains in force and effect until amended or rescinded by further executive order.

The dedicated staff at the Board's office stand ready to assist regulants and members of the public during these trying times. In addition, the Office of the Common Interest Community Ombudsman is available as a resource for association members and members of the public who have questions regarding common interest community laws. As one might expect, the Ombudsman has received many inquiries from associations and others over the last several weeks regarding how to conduct association business, while still complying with social distancing guidelines, including whether association member meetings and board meetings could be held electronically. Please see Page 12 for an update from the Ombudsman on recent developments on this front.

These unprecedented times are calling upon us all to think of creative ways to continue to fulfill our responsibilities to the public. Throughout this emergency, my objective has been and continues to be safeguarding the health and well-being of our team. With the constant support of the Director, we have been able to make a variety of adjustments to our daily work routines and there will likely be other adjustments to our operations as this situation evolves. I have been most proud of how our office's team has remained so committed, flexible, and dedicated on behalf of the Board and the Department. We appreciate your patience as we weather this storm.

- Trisha Henshaw

*Executive Director*

*Common Interest Community Board*

## **Board Welcomes Two New Members**

At its meeting on March 12, 2020, the Board welcomed its two newest members recently appointed by Governor Ralph Northam. Board Chair Drew Mulhare introduced Jim Foley, a community manager, and Anne M. Sheehan, a CPA.

Mr. Foley was appointed to the position previously held by Paul Orlando, formerly the Board's Vice-Chair, whose term expired in June 2019. Mr. Foley is the President of National Realty Partners, LLC (NRP), a full-service real estate firm that specializes in the management of common interest communities. NRP provides management services to more than 100 communities, including over 17,000 homes, throughout the Northern Virginia and Washington, D.C. area. Mr. Foley has been involved in property management and community management since 1986. Mr. Foley attended the University of Hawaii, majoring in Travel Industry Management.

Ms. Sheehan was appointed to the vacant position previously held by Beth Johnson, who resigned from the Board in May 2019. Ms. Sheehan is a principal in Goldklang Group CPAs, P.C., an accounting firm that specializes in providing audit, tax, budget, and consulting services to common interest communities in the Metropolitan Washington area. Ms. Sheehan began her career with Goldklang Group in 1991, becoming a shareholder in 2004. Ms. Sheehan has expertise in the auditing of common interest communities, and is actively involved in the audits of the most complex associations in the area. Ms. Sheehan received her degree in accounting from George Mason University.

## **A Note About the Newsletter**

*Common Interests* is produced by the staff of the Common Interest Community Board's office. The newsletter does not have an established publication schedule, though staff aims to publish the newsletter at least semi-annually. To receive notification regarding the publication of upcoming editions of the newsletter, please register as a public user at the Virginia Regulatory Town Hall website. Registered users of the site will also receive important updates from the Board, including notices of regulatory action and changes to board-issued documents. To register with Town Hall, visit its website at: <http://townhall.virginia.gov/L/Register.cfm>. Staff also welcomes input from the public regarding topics for upcoming editions of the newsletter. You may submit any ideas for future articles or other suggestions for the newsletter to the Board's email: [CIC@dpor.virginia.gov](mailto:CIC@dpor.virginia.gov).

## 2020 Legislative Update

On January 8, 2020, the Virginia General Assembly convened for its 2020 session. The session concluded on March 12, 2020. During this session, the Assembly considered and adopted several bills affecting common interest communities. The list below includes only those bills that were enacted and directly impact the CIC Board. There may be other legislation affecting common interest communities that are not on this list.

*(Note: Except where otherwise indicated, all legislation will become effective on July 1, 2020. Bill information was obtained from the General Assembly's Legislative Information System. Further details on these bills are available at <http://lis.virginia.gov/>*

### Associations/Association Governance

**HB 414/SB 504 - Virginia Energy Plan; covenants regarding solar power; reasonable restrictions.**

**Summary:** Provides that a restriction on solar energy collection devices is not reasonable if application of the restriction to a particular proposal (i) increases the cost of installation of the solar energy collection device by five percent over the projected cost of the initially proposed installation or (ii) reduces the energy production by the solar energy collection device by 10 percent below the projected energy production of the initially proposed installation. The owner shall provide documentation prepared by an independent solar panel design specialist that is satisfactory to the community association to show that the restriction is not reasonable according to the criteria established in the bill.

**SB 630 - Common interest communities; electric vehicle charging stations permitted.**

**Summary:** Prohibits certain common interest community associations from prohibiting the installation of an electric vehicle charging station within the boundaries of a member's unit or limited common element parking space appurtenant to the unit owned by the unit owner or, in the case of a property owners' association, a lot owner's property, and sets forth provisions governing the installation and removal of such charging stations. The bill also requires the association member installing an electric vehicle charging station to indemnify and hold the association harmless from all liability resulting from a claim arising out of the installation, maintenance, operation, or use of such charging station.

**HB 1548 - Common interest communities; Virginia Condominium Act; termination of condominium; respective interests of unit owners.**

**Summary:** Provides that the respective interests of condominium unit owners upon the termination of a condominium shall be as set forth in the termination agreement, unless the method of determining such respective interests is other than the relative fair market values, in which case the association shall provide each unit owner with a notice stating the result of that method for the unit owner's unit and, no later than 30 days after transmission of

that notice, any unit owner disputing the interest to be distributed to his unit may require that the association obtain an independent appraisal of the condominium units. The bill provides a method of adjusting the respective interests of the unit owners if the amount of such independent appraisal of an objecting unit owner's unit is at least 10 percent more than the amount stated in the association's notice.

### Associations/Sales Transactions/Disclosures

**HB 176/SB 672 - Property Owners' Association Act and Virginia Condominium Act; contract disclosure statement; extension of right of cancellation.**

**Summary:** Provides for a limited extension of the right of cancellation where such extension is provided for in a ratified real estate contract, defined in the bill.

**HB 720 - Property Owners' Association Act; notice on restrictions on display of political signs.**

**Summary:** Requires the association disclosure packet to contain a statement of any restrictions on the size, place, duration, and manner of placement or display of political signs by a lot owner on his lot. See Page #6 for additional details.

### Common Interest Community Board

**SB 584 - Common interest communities; Virginia Real Estate Time-Share Act.**

**Summary:** Amends language in the Virginia Real Estate Time-Share Act to clarify the use of the terms "project" and "program" as they relate to registration of a time-share program.

### Miscellaneous

**HB 1340 - Revision of Title 55.**

**Summary:** Makes technical amendments relating to the revision and recodification of Title 55 enacted in the 2019 Session. The bill also implements clarifying changes and other changes made in the revision and recodification. This bill is a recommendation of the Virginia Code Commission.



## Regulatory Actions Update

### Recent Regulatory Actions Completed:

#### **Common Interest Community Manager Regulations - Title 55 Recodification (Effective November 1, 2019)**

At its June 6, 2019 meeting, the Board voted to undertake an exempt action to amend the Common Interest Community Manager Regulations to conform the regulations to changes in statute resulting from the recodification of Title 55 of the Code of Virginia to a new Title 55.1. The changes included updating citations of statute, elimination of an obsolete section of the regulations pertaining to provisional licensure of managers, and technical corrections. The exempt action was filed on September 10, 2019, and published in the Virginia Register on September 30, 2019. The amendment became effective on November 1, 2019.

#### **Common Interest Community Management Information Fund Regulations - Title 55 Recodification (Effective November 1, 2019)**

At its June 6, 2019 meeting, the Board voted to undertake an exempt action to amend the Common Interest Community Management Information Fund Regulations to conform the regulations changes in statute resulting from the recodification of Title 55 of the Code of Virginia to a new Title 55.1. The changes included updating citations of statute, and technical corrections. The exempt action was filed on September 10, 2019, and published in the Virginia Register on September 30, 2019. The amendment became effective on November 1, 2019.

#### **Common Interest Community Ombudsman Regulations - Title 55 Recodification (Effective December 11, 2019)**

At its June 6, 2019 meeting, the Board voted to undertake an exempt action to amend the Common Interest Community Ombudsman Regulations to conform the regulations to changes in statute resulting from the recodification of Title 55 of the Code of Virginia to a new Title 55.1. The changes included updating citations of statute, and technical corrections. The exempt action was filed on October 10, 2019, and published in the Virginia Register on November 11, 2019. The amendment became effective on December 11, 2019.

#### **Time-Share Regulations - Title 55 Recodification (Effective December 30, 2019)**

At its June 6, 2019 meeting, the Board voted to undertake an exempt action to amend the Time-Share Regulations to conform the regulations to changes in statute resulting from the recodification of Title 55 of the Code of Virginia to a new Title 55.1. The changes included updating citations of statute, and technical corrections. The exempt action was filed on October 15, 2019, and published in the Virginia Register on November 11, 2019. The amendment became effective on December 30, 2019.

#### **Condominium Regulations - Title 55 Recodification (Effective December 31, 2019)**

At its June 6, 2019 meeting, the Board voted to undertake an exempt action to amend the Condominium Regulations to conform the regulations to changes in statute resulting from the recodification of Title 55 of the Code of Virginia to a new Title 55.1. The changes included updating citations of statute, and technical corrections. The exempt action was filed on October 17, 2019, and published in the Virginia Register on November 11, 2019. The amendment became effective on December 31, 2019.

#### **Public Participation Guidelines - Periodic Review**

On September 6, 2019, an announcement of periodic review of the Public Participation Guidelines was filed with the Registrar of Regulations. On September 30, 2019, the periodic review announcement was published in the Virginia Register to commence a 21-day comment period, which concluded on October 21, 2019. No comments were received during the comment period. On December 5, 2019, the Board voted to retain the regulation in its current form.

#### **Time-Share Regulations - Periodic Review**

On September 6, 2019, an announcement of periodic review of the Time-Share Regulations was filed with the Registrar of Regulations. On September 30, 2019, the periodic review announcement was published in the Virginia Register to commence a 21-day comment period, which concluded on October 21, 2019. No comments were received during the comment period. On December 5, 2019, the Board voted to retain the regulation in its current form.

#### **Common Interest Community Manager Regulations - Periodic Review**

On September 6, 2019, an announcement of periodic review of the Common Interest Community Manager Regulations was filed with the Registrar of Regulations. On September 30, 2019, the periodic review announcement was published in the Virginia Register to commence a 21-day comment period, which concluded on October 21, 2019. One comment was received during the comment period. On December 5, 2019, the Board voted to retain the regulation in its current form.

#### **Common Interest Community Management Information Fund Regulations - Periodic Review**

On September 6, 2019, an announcement of periodic review of the Common Interest Community Management Information Fund Regulations was filed with the Registrar of Regulations. On September 30, 2019, the periodic review announcement was published in the Virginia Register to commence a 21-day comment period, which concluded on October 21, 2019. No comments were received during the comment period. On December 5, 2019, the Board voted to retain the regulation in its current form.

*Continues on Page #5.*

## Regulatory Actions Update (continued)

### Common Interest Community Ombudsman Regulations - Periodic Review

On September 6, 2019, an announcement of periodic review of the Common Interest Community Ombudsman Regulations was filed with the Registrar of Regulations. On September 30, 2019, the periodic review announcement was published in the Virginia Register to commence a 21-day comment period, which concluded on October 21, 2019. One comment was received during the comment period. On December 5, 2019, the Board voted to retain the regulation in its current form.

### Regulatory Actions In Progress:

### Common Interest Community Management Information Fund Regulations - General Review (Final Stage)

In March 2017, the Board initiated a general review of the Common Interest Community Management Information Fund Regulations. The scope of these regulations includes the registration and annual report requirements for community associations. The Board considered proposed amendments to the regulations at its November 2017 meeting. The Board voted to withdraw the action and restart the review to allow for additional public participation through formation of a regulatory review committee.

A regulatory review committee of the Board, consisting of selected Board members and other stakeholders, met on September 27, 2018, to discuss potential changes to the regulations. The committee reviewed and adopted proposed language for amendments to the regulations. At its November 29, 2018 meeting, the Board reviewed and accepted the proposed amendments. In February 2019, the proposed amendments were submitted for review by Executive Branch agencies. Executive Branch review was completed on September 19, 2019. The proposed stage was published in the Virginia Register on October 28, 2019 to commence a 60-day public comment period. A public hearing was held on November 12, 2019. The public comment period ended on December 27, 2019.

At its meeting on March 12, 2020, the Board reviewed the proposed amendments and public comments received. Based on some of the comments received, the Board elected to make revisions to the proposed amendments. The Board adopted the amendments as revised. On May 14, 2020, the amended regulation was filed for Executive Branch review. Upon completion of Executive Branch review, the final regulation will be published in the Virginia Register.

### Common Interest Community Manager Regulations - Amend Trade/Fictitious Name Requirements (Exempt Action) (Effective June 1, 2020)

At its March 12, 2020 meeting, the Board voted to initiate an exempt action to amend the Common Interest Community Manager Regulations to revise trade/fictitious name requirements for management company licensure so that a firm seeking licensure register any trade or fictitious name with the State Corporation

Commission. The change was made so that the regulations would comport with a change in state law effective January 1, 2020. Prior to the change in the law, businesses were required to register any assumed or fictitious names with the circuit court of the locality where business was conducted.

### Condominium Regulations - Amend Declarant Trade/Fictitious Name Requirements (Exempt Action) (Effective June 1, 2020)

At its March 12, 2020 meeting, the Board voted to initiate an exempt action to amend the Condominium Regulations to revise trade/fictitious name requirements for declarants seeking to register a condominium so that a declarant register any trade or fictitious name with the State Corporation Commission. The change was made so that the regulations would comport with a change in state law effective January 1, 2020. Prior to the change in the law, businesses were required to register any assumed or fictitious names with the circuit court of the locality where business was conducted.

### Time-Share Regulations - Amend Developer and Reseller Trade/Fictitious Name Requirements (Exempt Action) (Effective June 1, 2020)

At its March 12, 2020 meeting, the Board voted to initiate an exempt action to amend the Time-Share Regulations to revise trade/fictitious name requirements for developers seeking to register a time-share so that a developer register any trade or fictitious name with the State Corporation Commission. A similar change was made regarding the registration requirements for time-share resellers. The change was made so that the regulations would comport with a change in state law effective January 1, 2020. Prior to the change in the law, businesses were required to register any assumed or fictitious names with the circuit court of the locality where business was conducted.

More information on the public comment period for this action may be found at the Virginia Regulatory Town Hall website.

Further information on these regulatory actions may be found at the Virginia Regulatory Town Hall website (<http://townhall.virginia.gov/>).

### Public Comment on Regulatory Actions

**The Board welcomes the public's participation in the regulatory process. Individuals may offer comment on pending regulatory actions, to include proposed regulations or regulation amendments, and proposed guidance documents or guidance document amendments. To sign up to receive notices regarding the Board's regulatory actions, including notification of public comment periods and to submit comments during a regulatory comment period, visit the Virginia Regulatory Town Hall website (<http://townhall.virginia.gov/>). In addition, public comments on regulatory actions may be submitted to the Board directly by mail or by email.**

## Expiration of Temporary Fee Reduction for CIC Association Registrations

In March 2015, the Board adopted a temporary change in the registration renewal filing fees for all common interest community associations from a staggered fee (based on the number of lots/units in the community)—ranging from \$30 to \$170—to a flat fee of \$10 regardless of community size. In 2017, the Board voted to expand the temporary fee reduction to include applications for initial registration of common interest communities, making the application fee for initial registration \$10. These temporary registration fees are set to expire on June 30, 2020.

During the 2019 Session of the General Assembly, the legislature enacted two measures that also changed the Board’s financial position. First, the agency put forward a bill to eliminate the statutorily-mandated gross assessment income fee\* that associations were required to pay annually, thereby reducing the amount of revenue collected by the Board. A separate change in the law required surplus monies in DPOR accounts, including the Common Interest Community Management Information Fund (“the Fund”), to be sequestered into a reserve account for certain designated expenses.

At its March 12, 2020, meeting, the Board reviewed the current financial position of the Fund, along with projected revenue and expenses for upcoming years, and determined that continuation of the temporary reduction of initial registration and renewal fees is no longer feasible.

Accordingly, on July 1, 2020, the initial registration and renewal fees for associations will revert back to the staggered fee previously established in regulation. The initial registration and registration renewal fees are as follows:

Number of Lots/Units	Application Fee	Renewal Fee
1-50	\$45	\$30
51-100	\$65	\$50
101-200	\$100	\$80
201-500	\$135	\$115
501-1000	\$145	\$130
1001-5000	\$165	\$150
5001+	\$180	\$170

Any application for initial registration of an association, or renewal of a registration, received on or after July 1, 2020, will be subject to the fee schedule outlined above.

Notification regarding this upcoming change is available at the Board’s website. In addition, the Board’s office recently issued a mailing to all currently registered associations and licensed common interest community managers to advise of the upcoming change in fees.

For additional information, please contact the Board’s office.

\*Prior to July 1, 2019, associations were required to pay .05% of their gross assessment income, with a minimum of \$10 and a maximum of \$1,000, with each annual report filing, in addition to the application and renewal fees.

## Upcoming Change to POA Disclosure Packet Requirements

During the 2020 General Assembly Session, the legislature approved, and the Governor signed, HB 720 which amends the Property Owners’ Association (POA) Act. As a result of the amendment, POAs will be required to include as part of disclosure packets a “... statement setting forth any restrictions as to the size, place, duration, or manner of placement or display of political signs by a lot owner on his lot.” The change in disclosure packet requirements will become effective July 1, 2020. The change does not apply to condominium resale certificates prepared by condominium unit owners’ associations.

As a further result of this legislative change, the Board will be amending the POA Disclosure Packet Notice that is to accompany disclosure packets so that it reflects the new requirement. The revised disclosure packet is expected to be available on the Board’s website by July 1, 2020. In addition, the Board’s office anticipates issuing notification regarding the change to all registered common interest community associations and licensed common interest community managers.

## Recent Cease and Desist Actions

At its meeting held on March 12, 2020, the Board imposed a temporary cease and desist order against the declarant for the following condominium registration due to non-compliance with the registration requirements in the Virginia Condominium Act. Under the terms of the order, declarant must cease and desist from sales of condominium units until it comes into compliance.

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### Vineyard Terraces, a Condominium at the Virginian

(Registration No. 0517130116)

Bristol, VA

Declarant: The Virginian Golf Club. LC

Order adopted on March 12, 2020

(Compliance Obtained on March 23, 2020)

**You may refer to the Board’s website for the most up-to-date information regarding active cease and desist orders.**

## Notable Recent Final Determinations from the Ombudsman

### File Number 2020-00742, *Simmons v. Green Run Homes Association*

#### Determination issued on October 18, 2019.

The Complainant (Simmons) alleged the association violated § 55-509.5(A)(7) (now § 55.1-1809(A)(7)) of the Property Owners' Association (POA) Act when it issued a disclosure packet dated February 14, 2019. Section 55.1-1809 states, in part:

A. Within 14 days after receipt of a written request and instructions by a seller or the seller's authorized agent, the association shall deliver an association disclosure packet as directed in the written request. The information contained in the association disclosure packet shall be current as of a date specified on the association disclosure packet. If hand or electronically delivered, the written request is deemed received on the date of delivery. If sent by United States mail, the request is deemed received six days after the postmark date. An association disclosure packet shall contain the following:

7. A statement of the nature and status of any pending action or unpaid judgment (i) to which the association is a party and (ii) that could or would have a material impact on the association or its members or that relates to the lot being purchased;

Simmons stated the association did not disclose a pending lawsuit filed against the association in the City of Virginia Beach Circuit Court. The plaintiff in the case was seeking \$500,000, and according to Simmons a "finding in favor of the plaintiff could have a detrimental impact on the Association..."

In its response to the allegation, the association noted there are two specific times a lawsuit must be disclosed in a disclosure packet – (i) when an active case or judgment could or would have a material impact on the association or its members, and (ii) when a case or judgment is related to the property for which the disclosure packet is being prepared. The association noted the second requirement was not applicable since the pending lawsuit is not related to the property for which the disclosure packet was issued. As to the first requirement for disclosure, the association stated it has never denied a case was pending. It contended that because the association's legal costs are paid by the association's insurance company, which would likely "cover any adverse verdict," the association was "not at risk for an excess verdict and there is no likelihood that a special assessment will result regardless of the amount of an award against the Association." The association added that it "appears that there will be no significant or 'material' increase in the cost of insurance for the Association or its members." The association did note in its response that the answer provided to Item #13 on the disclosure packet coversheet (which addresses the element of the statute pertaining to pending actions or unpaid judgments) could be interpreted as stating the association was not a party

to any litigation, but that this was not the intent when providing an answer to that particular portion of the disclosure packet.

In her determination, the Ombudsman outlined two questions that needed to be addressed. The first is whether the association answered Item #13 on the disclosure packet coversheet in such a way that it appeared to be saying it was not a party to any litigation, or did it intend to say it was not party to any litigation which either could or would have a material impact on the association or its members? In its answer to Item #13 on the coversheet, the association wrote that "[t]here are no suits or unpaid judgments pending to which the association is a party..." But its answer was in response to the statute and disclosure packet coversheet which require a statement as to whether there are any pending suits or unpaid judgments to which the association is a party which either could or would have a material impact on the association or its members. The Ombudsman noted it was unclear if the association was simply not specific enough in its response and meant to include the additional language regarding material impact, or if it intended to state there are no suits or unpaid judgments. The second question is whether the association should have disclosed the pending litigation. The Ombudsman noted there was an essence of subjectivity to this question. The association was clearly the subject of litigation at the time the disclosure packet was prepared. The litigation was not related to the property being sold. So there was no violation with respect to that aspect of the statutory requirement. However, with respect to whether the pending action "could or would have a material impact on the association or its members" the Ombudsman could not make a determination, as doing so was outside the scope of the Ombudsman's office. The Ombudsman's office cannot make a determination as to the nature of the pending case and its potential outcome and subsequent impact on the association.

The Ombudsman determined the association's unclear response to Item #13 on the disclosure packet coversheet could be construed as a violation of § 55-509.5(A)(7) (now § 55.1-1809(A)(7)) since a statement that there are no pending suits without the additional language about material impact could lead someone to believe that there are, in fact, no pending suits at all. The association appeared to recognize this as a potential problem, and has a plan in place to more accurately answer the question of pending litigation in the future. The Ombudsman encouraged the association to follow through on its intention to more carefully respond to Item #13 on its disclosure packet coversheets in the future in order to ensure it does not imply that there is no pending litigation, unless or until any pending litigation has been resolved.

Separately, the Ombudsman directed the association make certain that it includes a complainant's right to file a Notice of Adverse Final Decision in its decision as well as the contact information for doing so as required by 18 VAC 48-70-50.10 of the Common Interest Community Ombudsman Regulations.

*Article continues on Page #8.*

## Notable Recent Final Determinations from the Ombudsman (continued)

### File Number 2020-00842, *Convirs-Fowler v. Hillcrest Farms Homeowners' Association*

#### Determination issued on October 18, 2019.

The Complainant (Convirs-Fowler) alleged that her association failed to comply with § 55-510.2 (now § 55.1-1817) of the Property Owners' Association (POA) Act, which requires that the "... board of directors shall establish a reasonable, effective, and free method, appropriate to the size and nature of the association, for lot owners to communicate among themselves and with the board of directors regarding any matter concerning the association." Convirs-Fowler asked several questions of the board of directors, via the designated method, but never received a response. The association's response to this allegation was that its current website only allows for submission of questions and does not provide an open dialogue due to the potential private nature of some of the questions and concerns posted to the board. Instead, questions submitted via the website are disseminated to the proper person, who will then provide a response. The association noted that the response may not be immediate due to the possible need to research the inquiry or discuss the question with board members.

The Ombudsman determined that the association is not in violation of § 55.1-1817, because there is no requirement in that statute that an association or its board respond to questions, inquiries, or any other form of communication. While it would certainly be reasonable to expect a response, absent such language in the law, an association cannot be forced to respond to general inquiries. The Ombudsman noted there are other instances, such as regarding requests for books and records, or submission of a Notice of Final Adverse Determination, where an association is required to provide a response. However, in this case, the statute does not specifically require a response from the board, only that there be a method of communication with the board.

Convirs-Fowler also alleged her association failed to provide proper notice for a board of directors meeting as required under § 55-510.1 (now § 55.1-1816) of the POA Act. Section 55.1-1816(A) provides that "[a]ll meetings of the board of directors, including any subcommittee or other committee of the board of directors, where the business of the association is discussed or transacted shall be open to all members of record. The board of directors shall not use work sessions or other informal gatherings of the board of directors to circumvent the open meeting requirements of this section. Minutes of the meetings of the board of directors shall be recorded and shall be available as provided in subsection B of § 55.1-1815." Further, § 55.1-1816 (C) provides:

The board of directors or any subcommittee or other committee of the board of directors may (i) convene in executive session to consider personnel matters; (ii) consult with legal counsel; (iii) discuss and consider

contracts, pending or probable litigation, and matters involving violations of the declaration or rules and regulations adopted pursuant to such declaration for which a member or his family members, tenants, guests, or other invitees are responsible; or (iv) discuss and consider the personal liability of members to the association, upon the affirmative vote in an open meeting to assemble in executive session. The motion shall state specifically the purpose for the executive session. Reference to the motion and the stated purpose for the executive session shall be included in the minutes. The board of directors shall restrict the consideration of matters during such portions of meetings to only those purposes specifically exempted and stated in the motion. No contract, motion, or other action adopted, passed, or agreed to in executive session shall become effective unless the board of directors or subcommittee or other committee of the board of directors, following the executive session, reconvenes in open meeting and takes a vote on such contract, motion, or other action, which shall have its substance reasonably identified in the open meeting. The requirements of this section shall not require the disclosure of information in violation of law.

The association's notice of a board of directors meeting indicated the meeting would take place at 7:00 p.m.; however, the board convened an executive session at 6:12 p.m., motioned to go into executive session for covenant hearings and then entered an open meeting at 7:17 p.m. The association's response to this allegation was that the executive sessions referred to were "due process hearings" and that due process hearings follow a different set of notice requirements under § 55-513 (now § 55.1-1819) which provides, in part, "[n]otice of a hearing, including the actions that may be taken by the association in accordance with this section, shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the member at the address of record with the association at least 14 days prior to the hearing. Within seven days of the hearing, the hearing result shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the member at the address of record with the association." The association noted that due process hearings are not open to the general membership due to the private nature of those hearings. The association wrote that it will continue to hold all due process hearings prior to board meetings, but the board will wait to call the board meeting to order until after the hearings are held and the result of the hearings will be voted on in open session.

The Ombudsman disagreed with the association's position that that the notice for due process hearings is so different than for board meetings that it negates the requirement that all members be given notice of all meetings. The notice to the



## Notable Recent Final Determinations from the Ombudsman (continued)

member accused of a violation is different than a standard meeting notice for a board or committee meeting, but that does not do away with the general notice requirement for all meetings. Under § 55-509 of the POA Act which was the law in place when the alleged violation took place, a meeting is defined as "...the formal gathering of the board of directors where the business of the association is discussed or transacted." (The current version of the POA Act removes the definition of "meeting" and inserts language to that effect in § 55.1-1816(A).) Accordingly, it would appear that a covenant hearing would meet the definition of meeting, and, therefore, notice should be given to all association members of the due process hearings, not just the board meeting taking place afterward.

The Ombudsman noted that the issue in this case was that the association held an executive session prior to a scheduled board meeting but did not provide notice of that executive session, and only gave notice of the open board meeting to follow at 7:00 p.m. Based on the minutes for the meeting, the board made a motion "in an open meeting" to move into executive session for the purpose of covenant hearings. However, the Ombudsman was not certain the meeting was, in fact, open, if no one ever received notice of it. The association clearly understood, based on the minutes, that what was held was a meeting, and recognized the need to motion in an open meeting before entering an executive session. The Ombudsman determined the board was well within its rights to move into executive session for the purpose of considering violations of the declaration or rules and regulations, but it must first make a motion in an open meeting. A meeting cannot be considered open if the association members have not been given notice of it.

The Ombudsman notified the association that failure to provide notice of a meeting in the future may result in referral of the matter to the Common Interest Community Board for whatever action it may deem appropriate.

Separately, the Ombudsman directed the association make certain that it includes the association's registration number, the common interest community manager's name and license number, and the contact information for filing a Notice of Adverse Final Decision as required by 18 VAC 48-70-50.9 and 18 VAC 48-70-50.10 of the Common Interest Community Ombudsman Regulations.

### **File Number 2020-02071, Buckley v. The Meadows at Dahlgren Determination issued on April 8, 2020.**

The Complainant (Buckley) alleged the association failed to provide notice of association meetings by posting notice to the association website or by using any other reasonable method for posting notice. Buckley believes the association has used work sessions, informal gatherings, and email exchanges to vote and make decisions that should be made in an open forum. Buckley also alleged the association failed to post agen-

das and other supporting materials to the association website or to make these documents available through some other method at the same time they are made available to the association's board of directors. Buckley alleged these actions violated § 55-510.1 (now § 55.1-1816) of the Property Owners' Association (POA) Act.

In its response to the complaint, the association acknowledged its failure to provide notice of upcoming meetings in accordance with the association's meeting protocols, but did not believe this to be a violation of § 55.1-1816(B), which states, in part, "[n]otice of the time, date, and place of each meeting of the board of directors or of any subcommittee or other committee of the board of directors shall be published where it is reasonably calculated to be available to a majority of the lot owners." The association did not respond to the allegation that it had failed to provide any notice of meetings.

The Ombudsman determined the association did not provide sufficient information in response to the allegation it has not provided notice of board meetings. While the Ombudsman's office cannot read or interpret an association's meeting protocols, there is a very clear requirement for notice of all meetings under Virginia law. The allegation in the complaint was that the association failed to post or announce meeting notice in advance of board meetings. Regardless of what the association's meeting protocols might contain, the POA Act requires notice of all meetings, and that notice must be "published where it is reasonably calculated to be available to a majority of the lot owners."

Regarding the allegation of misuse of work sessions, informal gatherings, and email, the association stated that it has used work sessions in the past to complete an action not completed in a regular meeting. The association acknowledged it has used email to cast votes when an in-person meeting was not possible. The association also stated it has held telephonic voting for the same reason, but ensure that two board members were in one location during the conference call. The association said that it will provide the proper announcement for phone voting in the future, to include the subject, location, and time.

The Ombudsman determined the association must cease using unannounced work sessions where it is discussing or transacting the business of the association. Section 55.1-1816 specifically addresses the misuse of work sessions and notes they are not to be used to circumvent open meeting requirements. The same statute also requires "[a]ll meetings of the board of directors, including any subcommittee or other committee of the board of directors, where the business of the association is discussed or transacted shall be open to all members of record..."

As to the issue of voting by email, the Ombudsman concluded the POA Act does not address voting by email and, therefore, no determination could be provided regarding the issue. However, the Ombudsman determined that based on the information in the Notice of Final Adverse Determination, the association's attempt to vote telephonically was not carried out correctly. Unlike email

## Notable Recent Final Determinations from the Ombudsman (continued)

voting, where board members are not gathered at one time to discuss or transact the business of the association, the very nature of telephonic voting requires the gathering of board members, just not necessarily in the same location. Accordingly, it does constitute a meeting, and while the association may have had two board members present it did not appear to have provided notice of the telephonic meeting, which is required by § 55.1-1816 of the POA Act.

Regarding agendas and meetings, the association responded it has always provided a copy of the agenda to members attending meetings. The association also said it has provided agendas via email to board members and association members, and posts the agenda to the association's website. A copy the agenda is also available at board meetings.

The Ombudsman determined the association may misunderstand the requirements of the POA Act related to providing agenda packets. Section 55.1-1816(B) states, in part:

Unless otherwise exempt as relating to an executive session pursuant to subsection C, at least one copy of all agenda packets and materials furnished to members of an association's board of directors or subcommittee or other committee of the board of directors for a meeting shall be made available for inspection by the membership of the association at the same time such documents are furnished to the members of the board of directors or any subcommittee or committee of the board of directors.

The Ombudsman noted agenda packets are not required to be available or distributed at the actual meeting to which the packet pertains, but instead, must be made available for inspection to association members at the same time it is given to the board members, whether that is one day in advance of the meeting, or ten days in advance.

The Ombudsman directed the association to make certain that all meetings are open to all members of the association, to include providing appropriate notice as required by § 55.1-1816, and to end the use of unannounced work sessions, and improper telephone meetings. The Ombudsman also directed the association to ensure agenda packets and any materials it provides to board members are also available to owners at the same time such documents are given to the board members.

The Ombudsman further noted that failure to address the statutory violations outlined in the determination may result in referral to the Common Interest Community Board for whatever action the Board may deem appropriate.

### **File Number 2020-02239, Moynahan v. Salem Fields Community Association**

#### **Determination issued on April 10, 2020.**

The Complainant (Moynahan) alleged her association failed, on

three occasions, to provide notice of a special meeting. Moynahan indicated the association's bylaws require three days' notice for meetings. The Ombudsman's office cannot provide determinations regarding association compliance with governing documents, such as association bylaws, so Moynahan's complaint regarding alleged non-compliance with the bylaws was not addressed. However, the complaint implicates provisions of the Property Owners' Association (POA) Act that require notice of all meetings.

Section 55.1-1816(B) of the POA Act requires "[n]otice, reasonable under the circumstances, of special or emergency meetings shall be given contemporaneously with the notice provided to members of the association's board of directors or any subcommittee or other committee of the board of directors conducting the meeting."

In its response, the association stated it had adhered to the bylaws, and complied with the requirements of § 55.1-1816(B) of the Code of Virginia regarding notice of special meetings, by posting notice in several locations in the community three days prior to all special board meetings, and by giving notice to board members.

Based on the response from the association, and without any information to suggest otherwise, the Ombudsman determined the association appeared to have provided notice appropriately and in compliance with common interest community law. No action was required of the association.

### **File Number 2020-02204, Sledzaus and Moran v. Purple Sage Cluster Association**

#### **Determination issued on April 11, 2020.**

The Complainants (Sledzaus and Moran) alleged their association and a representative from a management company the association was contemplating hiring failed to comply with § 55.1-1816 of the Property Owners' Association (POA) Act regarding a meeting between three members of the association's board of directors and the company representative. The meeting took place at the home of one of the board members, and notice of the meeting was not provided to the association membership. The Complainants believe this was an improper use of an informal work session to conduct the affairs of the association.

In its final decision, the association stated the purpose of the meeting with the prospective managing agent was solely information gathering, and that no action was intended to be taken, and no contracts were approved. The association added that the contract it ultimately entered into with the managing company was approved in an open session of the board. The association noted, though, that whenever a quorum of the board meets with prospective vendors it may be construed as a board meeting. As a result, the association found the complaint to be valid, and reaffirmed its commitment to open meetings and indicated it would take care in the future to ensure that when a quorum of the board gathers with the purpose of discussing association business that the formalities of a board meeting, including notice and an open forum, be followed.

*Article continues on Page #11*

## Notable Recent Final Determinations from the Ombudsman (continued)

The Ombudsman concluded that it was difficult to say whether the three board members were transacting or discussing the business of the association when the three board members met with the company representative, since the Ombudsman was not present for the meeting, and since the management contract was approved in an open meeting. The Ombudsman noted “[i]n the present situation, this office simply cannot determine if the Board of Directors was conducting the business of the association in its meeting, which would most certainly require notice to all members, or simply, as it stated, gathering information from a prospective management company.” Therefore, it was not possible for the Ombudsman to provide a determination as to whether meeting should have been an open meeting for all members and constituted a violation of § 55.1-1816.

The Ombudsman noted that while an allegation was made that the management company representative also violated § 55.1-1816, that statute, and the POA Act generally only apply to property owners’ associations. Therefore, it is not possible for the representative to have violated the statute.

The Complainants also alleged the representative of the management company violated a provision of the Common Interest Community Manager Regulations. This aspect of the complaint was referred to the Department’s Complaint Analysis and Resolution section for review.

## Common Interest Community Ombudsman’s 2018-2019 Annual Report

This past fall, the Common Interest Community Ombudsman issued her 2018-2019 Annual Report to the Virginia General Assembly. The annual report outlines the Ombudsman’s activities for the past year, which include offering assistance and information to members of associations regarding the rights and processes available to them through their associations, receiving complaints involving common interest communities and time-shares, reviewing and making determinations regarding Notices of Final Adverse Decisions (NFADs) submitted to her office, and conducting public education and outreach to constituent groups.

In the report, the Ombudsman noted that during the past year, her office responded to 1,560 telephone calls and 1,949 emails. Often these inquiries were complex and required substantial time and research in order to be appropriately addressed. In the last year, the Ombudsman’s office received a total of 197 complaints. Nearly half of complaints received related to property owners’ associations, and about 20% related to condominium unit owners’ associations. Nearly one-third of complaints related to time-shares.

The Ombudsman explained that associations continue to struggle to comply with adopting and carrying out the state-mandated association complaint procedure. There were various reasons for these failures by associations. Among the more prevalent causes was turnover in the membership of association governing boards, with new members simply not up to speed on the complaint process. In addition, associations often stop responding to complaints because of the belief the complaint process is being abused by repeated submissions of complaints from one owner. In addition, a number of common interest community managers who are familiar with the complaint procedure requirement nonetheless do not fully understand how to carry out the process

when the association receives a complaint.

In addition, a significant number of complaints received by the Ombudsman involved time-share companies. Overwhelmingly, the complaints received related to allegations of misrepresentations during sales presentations.

Among the complaints received were 33 NFADs from individuals requesting a final determination from the Ombudsman regarding an adverse decision made by an association. Access to books and records, and notice of meetings were the most common issues raised in the NFADs. Other issues raised in NFADs included compliance with disclosure packet/resale certificate requirements, right to vote, distribution of information, executive session requirements, and requirements for association reserves.

The Ombudsman’s outreach activities included participation in a Virginia Bar Association continuing legal education program, and participation at Community Association Institute (CAI) events. The Ombudsman also created a video tutorial on the complaint process that is available online and at the Ombudsman’s website.

For additional details, the Ombudsman’s 2018-2019 Annual Report (as well as reports for previous years) may be obtained through the website for the Ombudsman’s office:

<http://www.dpor.virginia.gov/CIC-Ombudsman/>.



## Virginia General Assembly Throws Community Associations a Lifeline

Community associations were thrown a major curve ball when COVID-19 hit the streets and changed the way we do business. Suddenly, we were forbidden to get within six feet of another person, we were cautioned to wear masks and gloves and gatherings of more than ten people were forbidden. With constraints like these, the prospect of holding board meetings and member meetings became challenging, to say the least.

My office heard from many associations who were simply trying to do the right thing when it came to meetings, but were struggling to find ways that they could meet state law related to common interest communities, as well as state and federal orders, and at the same time provide ample opportunity for members to attend and participate in meetings. It became clear, almost immediately, that there was no way to make everyone happy, and as we learned more about the possible health consequences of COVID-19, it quickly became obvious that any type of in-person meeting was simply not possible or safe.

My message to association boards of directors and owners was to stay safe and follow the federal and state mandates that were in place. If a meeting needed to be held but could not be held because of those mandates or because it was simply unsafe to do so, I encouraged associations to consult with their attorneys and to make decisions that would protect the health and safety of both the board and the members. It was also imperative, I explained, that if an open meeting could not be held, members must be kept in the loop and be provided appropriate information related to that meeting.

Essentially, we were all stumbling a bit, and trying to figure out how we were going to find a way to take care of association business in the midst of a pandemic. While the laws that govern common interest communities consider many possibilities, there is nothing in those laws that ever planned for the possibility of a pandemic that would preclude members and boards from meeting.

Fortunately, an amendment to the Governor's Budget Bill was presented that would provide some much-needed guidance in the current situation. That amendment, as part of House Bill 29 was adopted April 22 and became effective April 24, 2020. Under the provisions of the new law, if the Governor has declared a state of emergency pursuant to Va. Code § 44-146.17, association governing boards may meet electronically without having a member physically present at one location. This is permitted only if the emergency makes it impracticable or unsafe for the board to assemble in one place; the purpose of the meeting is to discuss or transact business of the association required by statute or necessary to continue operations of the association; and the governing board distributes minutes of the meeting the same way it provided notice of the meeting.

In order to convene a meeting under this new law, the governing board must give notice to members using the best method available given the nature of the emergency, and that notice must be given at the same time it is given to the governing board. The governing board must also make arrangements for association members to access the meeting through electronic means, including videoconferencing if practicable. If possible, the members should be provided an opportunity to comment.

Minutes of any such electronic meeting should include the nature of the emergency, the fact that the meeting was held electronically, and the type of electronic meeting method used.

Member meetings, i.e. annual meetings, are not addressed by this legislation, so it will be up to the individual associations to determine whether they can have a member meeting and if so, how best to go about doing so.

As is always the case, I would encourage associations to communicate with their managers and attorneys as they work through these very challenging times. And of course, always feel free to contact the Office of the Common Interest Community

Ombudsman if you have any questions.

Please stay safe and healthy.

- Heather Gillespie

CIC Ombudsman

For additional information, here are links to the new legislation:

<https://budget.lis.virginia.gov/item/2020/1/HB29/Chapter/4/4-0.01/> See Paragraph 2g.

<https://budget.lis.virginia.gov/item/2020/1/HB30/Reenrolled/4/4-0.01/> See Paragraph 2g.



### State Regulatory Panel Reviews Necessity for Certification of Principal or Supervisory Employees for Community Management Firms

As a result of recommendations in a 2018 Joint Legislative Audit and Review Commission (JLARC) report and legislation during the 2019 General Assembly Session, the Board for Professional and Occupational Regulation (BPOR) is evaluating several licensure or certification programs to determine whether continued regulation is needed. One of the programs being studied is the certification of principal or supervisory employees of common interest community managers. Prior to the Governor's declaration of a public health emergency for COVID-19, BPOR had scheduled a series of public hearings around the state to receive public comment as part of the evaluation process. However, these public hearings have been postponed and will be rescheduled.

## Architectural Compliance after *Belmont Glen*

This article originally appeared in the March 2020 edition of *Quorum*<sup>TM</sup> - a publication of the Washington Metropolitan Chapter of the Community Associations Institute (WMCCAI) ([www.caidc.org](http://www.caidc.org)). Reprinted with permission.

By Lucia Anna “Pia” Trigiani, ESQ., CCAL & Tiago D. Bezerra, ESQ.

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*Tiago is an associate with MercerTrigiani and is a member of the Virginia Legislative Committee of the Washington Metropolitan Chapter of CAI. He is a regular contributor to WMCCAI's monthly Quorum magazine and has been a speaker in multiple programs, including most recently at the WMC-CAI Conference & Expo in February 2020.*

The August 2019 decision of the Supreme Court of Virginia in *Sainani v. Belmont Glen Homeowners Association, Inc.* seemingly rocked the world of community association architectural compliance, calling into question architectural review and compliance practices in Virginia common interest communities – or did it?

Community association lawyers across the Commonwealth have dissected and discussed the case. The impact of the ruling is undoubtedly cause for concern. But, did we learn anything new? Did the decision depart from the growing trend of cases that give narrow construction to restrictive covenants and rules? Is it not just another sign of caution to community associations to mind their due process p's and q's and only proceed when authority is clear?

<sup>1</sup> The Court also rejected an association argument that more general language qualifying the exterior lighting covenant prohibiting “noxious or offensive activity” expanded Board authority, following the canons of *noscitur a sociis* and *ejusdem generis* that the more specific exterior lighting restriction limited the application of the more general prohibition on nuisance activity.

### The Case

In *Belmont Glen*, the Virginia Supreme Court held that rules restricting seasonal decorations adopted by a Virginia property owners association were unenforceable because the rules exceeded the scope of, and were not reasonably related to, the restrictive covenants.

The rule giving rise to the case established specific time periods during which seasonal and holiday decorations could be displayed and required homeowners to apply for approval to display decorations for any other celebrations. The rule also required homeowners to turn lights off by midnight. Following a strict construction approach, the Court analyzed four covenants relied upon by the association in evaluating whether the association had authority to adopt the seasonal decorations policy.

**Exterior Lighting** – The first covenant prohibited homeowners from directing exterior lighting outside lot boundaries and installing exterior lighting causing “adverse visual impact to adjacent lots whether by location, wattage or other features.” Noting that the seasonal decorations rule did **not** mention “adverse visual impact” or regulate “location, wattage or other features,” the Court determined the rule exceeded association authority established by the exterior lighting covenant.<sup>1</sup>

**Approval** – The second covenant the association relied on prohibited homeowners from modifying or altering property without application to and approval of the association. The Court determined that the approval requirement similarly did not establish association authority to adopt the seasonal decoration rules – on two bases. First, the Court suggested that restrictions on exterior lighting installations may be regulated only on the bases provided in the exterior lighting covenant (i.e., adverse visual impact, location, wattage or other features). Second, the Court determined that approval is only required for **permanent** changes and that seasonal decorations are merely temporary.

**General Appearance Regulation** – The association also relied on a covenant providing general authority to “regulate the external design and appearance of the Property. . . so as to

preserve and enhance property values and to maintain harmonious relationships among structures and the natural vegetation and topography.” Following a rule of construction requiring interpretation of the covenant “from a reading of the whole instrument,” the Court concluded that the seemingly broad authority established by this covenant is limited by other declaration provisions – the association may only regulate the permanent modification or alteration of a lot.

Significantly, the Court went further to address whether design-control powers include an **implied** power to impose design controls for aesthetic purposes.

*Continues on Page #14.*

### Architectural Compliance After Belmont Glen

**Is the rule based on express authority?**

In the recorded documents?

In statute?

**Give architectural guidelines and rules a fresh review**

Develop a plan that includes budgeting for review.

Invite community comment.

Evaluate the need for the rule or guideline.

Identify and cite authority in recorded documents or statute.

Consider amending documents to establish authority.

**Carefully evaluate whether to pursue compliance**

Risk and benefits of pursuing compliance

Cost – financial and other resources

### Voluntary Compliance Approaches

- Educate and notify.
- Build consensus.
- Periodic rule review.
- Act promptly.
- Be reasonable!
- Give ample time to comply.
- Provide clear information on the rule.
- Be consistent.
- Be flexible.

From *Reinventing the Rules* by Lucia Anna Trigiani, published by Community Associations Press in 2002.

Continued from Page #13.

While **express** design-control powers established by statute or in recorded covenants are enforceable, the Court limited the scope of **implied** powers to “governing or protecting common property and preventing ‘nuisance-like activities’ on individually owned property.” In doing so, the Court warned that greater implied design-control powers create risks for property owners, including creating uncertainty in how design control standards can be applied.

**General Rule-Making Authority** – Finally, the Court rejected an association argument for authority to adopt the seasonal decorations rule in a covenant granting the association broad rule-making authority. The Court determined that the rule-making authority covenant requires that the adopted rules be in furtherance of other restrictive covenants. Because no other covenant authorized the regulation of seasonal decorations, the association was without authority.

#### Continuing Trend

The *Belmont Glen* case may be a fine example of the adage – Bad facts make bad law. The *Belmont Glen* decision is indeed based on particular facts and circumstances. And, undoubtedly, the factual background of the case had to have had an impact on the case proceeding. Even so, the trend applied by Virginia courts continues to be a standard of

strict construction – common interest communities may promulgate rules only to the extent expressly authorized in recorded covenants. In other words, community associations may only adopt rules that are authorized by clear, express language in recorded documents. This is nothing new.

We have been taught, encouraged, implored to review the documents, to return to the source of authority. It is our mantra - or should be! Perhaps we have put aside or forgotten that important rule. Or, perhaps we have become too comfortable and pushed limits by relying upon general rule making authority rather than confirming and relying upon specific authority in the recorded governing documents. With the very best of intentions, perhaps we have given architectural review broad application. But the lesson in *Belmont Glen* – no more!

The long line of parking cases offers guidance, too. Reasonable rules based on general authority are not enough. Those cases teach us that associations cannot curtail or limit the rights of others without **express authority** in the recorded documents. It is not enough that the rule solves challenges created by insufficient parking, makes perfect sense and is modeled after local government parking compliance tallies. The courts have told us – owners have property rights and if the goal is to limit those property rights, you must look to clear authority in the recorded documents where property rights are granted and limited.

#### What Next?

Architectural review is not over for community associations. Association practices and procedures do indeed need to be reconsidered and restructured – ever mindful that the courts –

at least in Virginia – will apply a strict construction standard when rules or architectural guidelines are challenged.

The first question each community should ask – do we need a rule? If the answer is yes, the next question is – do we have authority for the rule? If not, do we want to amend the governing documents? And, if the community has authority or amends to establish authority, is the rule clear and concise and uniformly applied.

But the primary lesson in *Belmont Glen* - care should be taken in development and periodic review of association rules and regulations and architectural guidelines to ensure the rules are based on express authority.

There is a secondary lesson that we should take from *Belmont Glen* – and it is about compliance. There is nothing to suggest in *Belmont Glen* that the association acted inappropriately – in fact – the general district court and then the trial court, where due process compliance would have been considered, ruled in favor of the association. But that may become lost in the record on appeal. So, associations should approach compliance with the goal of seeking voluntary compliance – first. And, in evaluating action, consideration should be given to the nature of the violation and its impact.



***“The more things change, the more things stay the same.”***

Jean-Baptiste Alphonse Kaur and Bon Jovi

## Board Member and Meeting Information

### *CIC Board Membership*

The CIC Board is composed of 11 members appointed by the Governor. Board members' terms are four years and a member can serve up to two terms. The *Code of Virginia* stipulates that the Board's membership is composed of:

- Three (3) representatives of common interest community managers
- One (1) attorney whose practice includes representing associations
- One (1) CPA who provides attest services to associations
- One (1) Time-Share Industry Representative
- Two (2) Representatives of Developers of CICs
- One (1) Citizen Serving/Served on Self-Managed Association Governing Board
- Two (2) Citizens Residing in Common Interest Communities

Drew R. Mulhare (Community Manager) First four-year term ends June 30, 2022 <b>Board Chair</b>	David S. Mercer (Attorney) First four-year term ends June 30, 2023 <b>Board Vice-Chair</b>	Maureen A. Baker (Community Manager) Unexpired term ends June 30, 2020
Tom Burrell (Citizen Serving on an Association Board) First four-year term ends June 30, 2022	Jim Foley (Community Manager) First four-year term ends June 30, 2023	Amanda Jonas (Developer) First four-year term ends June 30, 2022
Lori Overholt (Time-Share Industry) First four-year term ends June 30, 2020	Eugenia Lockett Reese (Citizen Residing in a CIC) First four-year term ends June 30, 2021	Anne M. Sheehan (CPA) Unexpired term ends June 30, 2021
Scott E. Sterling (Developer) Second four-year term ends June 30, 2023	Katherine E. (Katie) Waddell (Citizen Residing in a CIC) First four-year term ends June 30, 2021	Mary Broz-Vaughan Director, Department of Professional and Occupational Regulation <b>Board Secretary</b>

### CIC Board Staff

- ◆ Trisha L. Henshaw  
Executive Director  
Trisha.Henshaw@dpor.virginia.gov
- ◆ Lisa T. Robinson  
Licensing Operations Administrator  
Lisa.Robinson@dpor.virginia.gov
- ◆ Joseph C. Haughwout, Jr.  
CIC Board and Regulatory Administrator  
Joseph.Haughwout@dpor.virginia.gov
- ◆ Tanya Pettus  
Administrative Assistant
- ◆ Lee Bryant  
Program Administration Specialist
- ◆ Ben Tyree  
Licensing Specialist

### *2020 Meeting Dates \*\**

March 12, 2020 @ 9:30 a.m.

June 4, 2020 @ 9:30 a.m.

September 3, 2020 @ 9:30 a.m.

December 3, 2020 @ 9:30 a.m.

*Note: As needed the Board will convene meetings of its Training Program Review Committee. These meetings typically take place on the afternoon preceding a scheduled board meeting date.*

**\*\* Due to the current public health emergency, the schedule listed above is subject to change, to include the rescheduling or cancellation of scheduled meetings. Notification regarding changes to scheduled meetings will be posted to the Virginia Regulatory Townhall (<https://townhall.virginia.gov/>).**

## Contact Us

### Common Interest Community Board

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### Office of the Common Interest Community Ombudsman

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CIC Ombudsman

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