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*** * * LEGAL UPDATE * * ***

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The information presented in this newsletter is not intended as specific legal advice to any association as your documents or the specific facts of your situation may require a different result. The laws cited herein may change from time to time.

CHANGES IN CONDOMINIUM AND HOMEOWNER PROCEDURES REQUIRED BY VIRGINIA LEGISLATION EFFECTIVE JULY 1, 2001!

1) House Bill 1716. Patron: Senator Mims, Delegate Callahan). - *Amends Sections 55-79.41, 55-79.75, 55-509 and 55-510.1 and adds 55-79.75:1 and 55-510.2 relating to meetings. A new definition for "meetings" is added. Meetings are defined as a formal gathering of the Board where the business of the association is discussed or transacted. It specifies that a work session or other informal gathering shall not be used to circumvent the open meeting requirements. A publication requirement of when each Board meeting is to be held has also been added.* The Association could meet this requirement by posting a sign in the Common Area in advance of Board meetings or by sending out a notice or including a newsletter article as to the date, time and place of each meeting of the Board. If the meetings change, a notice regarding the change should be posted.

The new sections 55-79.75:1 for the Condominium and 55-510.2 of the Property Owners' Association Acts require the Board to establish a reasonable, effective, and free

method, appropriate to the size and nature of the condominium or homeowners association, for owners to communicate among themselves and with the executive organ regarding any matter concerning the association.

2) House Bill 2428. *Amends Sections 55-79.74:1 and 55-510 regarding the costs of obtaining copies of books, minutes and records. Reasonable charges have been replaced by reasonable charges not to exceed the actual costs of material and labor.*

3) House Bill 2515. *Bill amends Sections 55-79.97, 55-511, 55-512 regarding resale certificates and disclosure packets to: 1) add that a purchaser has a right to request an update of the resale certificate without the 6 month limitation and sets the cost at no more than 10 cents per page or a total of \$50 for the update, 2) provide that the information must be current as of the date stated on the resale certificate; 3) require that a copy be provided of a notice given to the owner by the association of any current or pending rule or architectural violation; 4) limit the total cost to the actual cost of preparing the certificate not to exceed 10 cents per page or \$100; and 5) deletes the exemption for providing the certificate to a person who is not acquiring the unit for his own residence (such as an investor).*

LEGISLATION AFFECTING ALL ASSOCIATIONS

1) House Bill 2429. The General Assembly approved creation of a community association liaison on the Virginia Real Estate Board to be compensated with no more than 60% of the funds collected annually from the Common Interest Community Management Information Fund. The liaison's purpose is to administer the Chapter and serve as an information resource on governance, administration and operation of associations. The liaison may issue nonbinding interpretations of laws or regulations governing common interest communities and refer disputing parties to alternative dispute resolution services.

COOPERATIVE AND LANDLORD-TENANT LEGISLATION. Senate Bill 1229. *The time period within which a landlord must provide a list of the items to be deducted from the security deposit has been extended from 30 days to 45 after termination of the tenancy and delivery of possession.*

THE ONE THAT GOT AWAY (AGAIN):

House Bill 1988. Patron: Richard H. Black (Loudoun) - This Bill would have granted homeowners and unit owners a deduction of the portion of their regular annual assessments from their Virginia State Taxes used for government-type functions performed by the Association or its contractors, such as trash collection, snow removal and street maintenance. This Bill was sent to the House Finance Committee and never came out for approval.

IMPORTANT REMINDER. This

legislation went into effect July 1, 2000, but some associations are losing the ability to collect rules violation charges by not following the required procedures.

Section 55-79.80:2. Rules violation charges. (Same amendment made to Section 55-513 of the POA Act.) The notice of hearing must now include the charges or other sanctions that may be imposed. Rules violation charges for continuing offenses after July 1st, 2000 may not be assessed for more than 90 days. Please note that after July 1st, 2000, the hearing result must be hand-delivered or mailed by registered or certified mail, return receipt requested **within 3 days of the hearing!** Associations may wish to adopt a form that can be completed immediately after conclusion of the hearing so that the deadline can be met.

It may require more advance preparation prior to a hearing as to possible defenses so that a decision can be made and notice provided promptly or hearings may have to be continued to a later date for a decision after further evidence is provided. Boards and management agents should review your due process resolutions and procedures for compliance.

COLLECTIONS CORNER

LIENS. In a condominium, a lien must be filed within 90 days of when the assessment first becomes due. In a property owners' association, liens must be filed within 1 year of when the assessment first becomes due. If the lien is not filed, the association loses the right to perfect and file that lien.

NONJUDICIAL FORECLOSURES ON ASSESSMENT LIENS IN VIRGINIA. Community associations in Virginia were once limited to a single method of foreclosing on a

recorded assessment lien – judicial foreclosure. This method of foreclosure can be time-consuming, expensive and arduous. However, due to amendments to the Virginia Condominium Act and Property Owners' Association Act adopted in 1997, an association may now foreclose upon the property of a delinquent owner through a much quicker process. This process is called a "nonjudicial" foreclosure and is similar to a distress sale conducted by a first trust or mortgage company. To better understand this process, it is helpful to compare judicial and nonjudicial foreclosures.

Judicial foreclosures. In a judicial foreclosure, an association may foreclose on a perfected assessment lien by filing a lawsuit in the circuit court requesting that the delinquent owner's property be sold by a court-appointed commissioner. The lawsuit must include as parties all lien creditors of the defendant owner, including the trustees listed on the owner's deed of trust. The number of parties can range between 5 and 25 or more, depending on how many lien creditors the defendant has. The court will first appoint one commissioner to conduct a hearing regarding the priority of interests of the lien creditors and then appoint a special commissioner to conduct the sale and distribute the proceeds. Ultimately, the sale and the distribution of proceeds must be approved by the circuit court. Because of these involved procedures, a judicial foreclosure can take anywhere from 6 months to 2 or more years to complete.

Nonjudicial foreclosures. Under the procedures set forth in the Condominium and Property Owners' Association Acts, an association may now foreclose on an assessment lien by mailing foreclosure notices

to the debtor and the deed-of-trust creditors and by advertising the property for sale in a newspaper for 4 consecutive weeks. Following the advertisements and notices, the association may sell the property to the highest bidder at an auction held on the courthouse steps in the city or county in which the property is located. This procedure is considerably quicker than a judicial foreclosure proceeding. In fact, the entire nonjudicial foreclosure process can take as little as 6 to 8 weeks. The primary cost of the procedure is advertising expense and some legal fees, auctioneer's fee and other miscellaneous costs.

There are numerous obvious advantages to the use of nonjudicial foreclosures. The threat of a foreclosure creates a great incentive for a delinquent owner to pay off the account to avoid foreclosure and potential loss of the property. In addition, if the owner is also delinquent in paying his mortgage, the first trust holder, upon receipt of a notice of the sale, may intervene and decide to conduct its own foreclosure, which would result, at a minimum, in conveyance of the property to a new owner who would be responsible for paying assessments. Of course, the most obvious benefit of a successful nonjudicial foreclosure is that the association may rid itself of a nonpaying owner who has avoided other methods of collection.

Although the nonjudicial foreclosure procedure can certainly be effective, there are some potential concerns regarding this remedy that associations should keep in mind:

1. **Equity.** At a nonjudicial foreclosure on an assessment lien, the property would be sold subject to senior liens (such as tax liens

and the first deed of trust). As such, the equity position of the property may in large part dictate the level of interest in purchasing the property. For example, a property appraised at \$90,000 -- but which is saddled with a \$110,000 mortgage -- may generate little or no interest by potential purchasers, which could result in the association incurring the expenses of a sale without accomplishing the goal. On the other hand, a property with a solid equity position may generate much interest from purchasers.

2. Title insurance. It had been suggested shortly after adoption of the nonjudicial foreclosure amendment that there may be difficulty getting title insurance for properties foreclosed upon in this manner. In recent years, however, there are apparently some title companies who perceive no problem with this issue and have been willing to issue title policies after nonjudicial foreclosures. Nevertheless, associations should be wary of this potential issue.

3. Short History. Because the law is relatively new, not many associations have pursued this remedy. As with any new remedy, challenges to this procedure could result. We are aware of a number of successful nonjudicial foreclosures conducted by associations, with no reported cases of successful challenges. Nevertheless, associations should take care to consider this issue as well. Another effect may be to drive the owner into filing bankruptcy to prevent the foreclosure.

The statute also contains a few restrictions which should be noted, primarily:

- While associations and other third

parties may purchase the lot or unit being foreclosed upon at the sale, members of the association may not.

- The foreclosure must arguably be conducted within 24 months after perfection and recordation of the assessment lien.

- The newspaper in which the sale ad is to appear must be in general circulation in the city or county where the property to be sold is located.

Nonjudicial foreclosures may be an effective remedy in addressing serious delinquencies in community associations. Of course, like any collection activity, this remedy should only be pursued in close consultation with association counsel to ensure that the appropriate procedures are followed.

CLASS ACTION NEWS - GE is now offering repairs on defective dishwashers in addition to the previously offered rebates on purchases of new dishwashers. Information on the GE washer settlement and the affected washers can be found at <http://geappliances.com/product/recall.com> or by calling 1-800-599-2929. If you have one of these dishwashers and have not yet had it repaired, experts recommend that you leave the door unlocked when not in use to reduce the fire hazard potential.

**THE "OTARD" RULE:
AN UPDATE ON RESTRICTIONS
ON SATELLITE DISHES
AND OTHER ANTENNAS**

On January 11, 2001, the Federal Communications Commission (or "FCC") published a final rule amending and broadening

its Over-the-Air Reception Devices Rule (or the "OTARD Rule"). This amendment is expected to become effective in late spring or early summer, 2001.

The OTARD Rule has been in effect since October 14, 1996, and currently prohibits community associations from imposing restrictions that impair the installation, maintenance or use of antennas (including satellite dishes) *used to receive video programming*.

The current rule applies to video antennas including direct-to-home satellite dishes that are less than one meter (39.37") in diameter, local broadcast TV antennas, and wireless cable antennas. Generally, the rule prohibits most restrictions that: (1) unreasonably delay or prevent installation, maintenance or use; (2) unreasonably increase the cost of installation, maintenance or use; or (3) preclude reception of an acceptable quality signal. The rule does not prohibit legitimate safety restrictions or restrictions designed to preserve certain eligible historic properties. In addition, the rule does not apply to common areas or common elements.

However, once the most recent amendment takes effect, the OTARD Rule's reach will be extended to include customer-end antennas that *receive and/or transmit fixed wireless signals*.

"Fixed wireless signals" are any commercial non-broadcast communication signals transmitted via wireless technology to and/or from a fixed customer location. Examples include wireless signals used to provide telephone service or high-speed Internet access to a fixed location. This term

does not include, among other things, AM/FM radio, amateur ("HAM") radio, Citizens Band ("CB") radio, and Digital Audio Radio Services ("DARS") signals.

Significantly, the FCC recognizes that antennas capable of transmitting wireless signals present a safety issue relating to radio-frequency ("RF") exposure. To address this issue, the FCC requires transmitting antennas to be labeled as such and to meet FCC guidelines regarding RF exposure limits.

In addition, the FCC has commented that community associations can require professional installation of antennas capable of *transmitting* fixed wireless signals. Such a requirement would be considered an appropriate safety restriction to minimize the possibility that the antenna will be placed in a location that is likely to expose subscribers or other persons to the transmitted signals at close proximity and for an extended period of time.

However, as with any safety restriction placed on antennas governed by the OTARD Rule, the restriction must be: (1) clearly defined in the governing documents or rules and regulations, (2) based on legitimate safety objectives (such as concerns about RF exposure), which are articulated in the restriction (or readily available to antenna users); (3) applied in a non-discriminatory manner; and (4) no more burdensome than necessary to achieve the articulated objectives.

As you can tell from the above overview of the most recent FCC amendment, the OTARD Rule continues to grow in complexity. We encourage Boards of Directors and management companies to

review their current policies and procedures for compliance with the current OTARD Rule, as well as the most recent amendment.