Virginia Legislative Update
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Update on Virginia Law: Covenants Restricting Solar Panels

By Daniel D. Blom

Solar Panel Covenants and Restrictions

In Virginia, community associations cannot prohibit solar energy collection devices (i.e., solar panels) from being installed on an owner's property ***unless*** the association's recorded declaration establishes such a prohibition (see Virginia Code Secs. 55.1-1820.1 and 55.1-1951.1). Under the statutes, if an association wants to completely ban solar panels from the community, the recorded declaration must expressly provide for such a ban. Otherwise, the association must amend its declaration to provide for a complete ban as the statutes do not allow for a strict prohibition on solar panels on individually owned property by board-adopted rule or regulation.

"Reasonable" Restrictions on the Size, Place, and Manner of Placement Permitted under the Statute

Community associations can still restrict the size, place, and manner of placement of solar panels on individually owned property, even if the recorded declaration does not expressly address solar panels. The statutes unambiguously provide that community associations may establish ***reasonable*** restrictions concerning the size, place, and manner of placement of solar energy collection devices. Potential restrictions include board-adopted rules and regulations governing the visibility of the solar panels, the number and size of solar panels, screening requirements, and permissible locations, among others.

While associations ostensibly have the right to regulate the size, place, and manner of placement of solar panels, such restrictions may be challenged as unreasonable under the applicable statute. Section 55.1-1820.1 of the Virginia Property Owners' Association Act and Section 55.1-1951.1 of the Virginia Condominium Act set forth the same objective standard for what is considered "reasonable" for solar panel restrictions. This objective standard will significantly hinder

a community association's ability to regulate solar panels absent an express prohibition in the association's recorded declaration.

Under both statutes, a restriction is not reasonable if application of the restriction to a particular proposed solar panel design either

(i) increases the cost of installation of the solar energy collection device by five percent (5%) over the projected cost of the initially proposed installation, or

(ii) reduces the energy production by the solar energy collection device by ten percent (10%) below the projected energy production of the initially proposed installation.

This objective standard of reasonableness will make it fairly easy for homeowners to challenge certain restrictions. For example, restrictions that require solar panels to be installed only on the rear roof or prohibit solar panels on the front roof may be successfully challenged because adding solar panels to the front roof will almost assuredly achieve the 10% energy gains required by the law. This may make enforcement of restrictions that would otherwise be considered reasonable (e.g., solar panels only permitted on the rear side of the lot/unit) quite difficult.

Homeowner Challenges to Reasonableness of Restrictions

Significantly, the onus is on the homeowner to challenge the reasonableness of such restrictions and associations still have the right to impose and enforce restrictions on the size, place, and manner of placement of solar panels absent a successful owner challenge. To successfully challenge the reasonableness of a solar device restriction, a homeowner must provide:

- Documentation prepared by an independent solar panel design specialist who is
    - Certified by the North American Board of Certified Energy Practitioners, and
    - Licensed in Virginia.

The documentation must be satisfactory to the association to show that the restriction is not reasonable according to the criteria discussed above (i.e., increases the cost of installation by five percent (5%) or reduces energy production by ten percent (10%)). An association can require an owner who is set on having solar panels installed in conflict with an association's established rules and regulations to provide this documentation prior to installing the solar panels. Community associations interested in protecting their architectural standards should demand such documentation before capitulating to an owner request in these cases.

Prohibitions on Common Area and Common Elements

Community associations are still allowed to prohibit the installation of solar panels on common area and common element property, regardless of whether such prohibition is contained in the recorded declaration. Prohibiting owners from installing solar panels on common area and common element is generally advisable given the increased risk of liability to an association and the potential increase in insurance costs associated with allowing an owner to use the common area or common element to install solar panels. Boards of directors should discuss the implications of installing solar panels on common area or common element property before approving any such requests or entering into any agreements with solar panel installation contractors.

Architectural Review Process

Another important consideration is that associations can still require owners to go through the regular architectural review process to ensure that the association's restrictions and established processes are being followed. An association can still deny an application to install solar panels if the proposed design does not comply with the association's

covenants and architectural standards. Whether the association may be forced to accept a proposed solar panel installation hinges on (i) whether the recorded declaration expressly prohibits solar panels and (ii) whether the owner can supply the additional documentation from an NABCEP-certified solar panel design specialist showing that the association's restrictions are not reasonable under the applicable statute.

If there are any questions as to the applicability of the solar panel statute in any given situation, boards of directors should contact their association's legal counsel to review the situation and discuss the association's options.

Virginia Legislative (Brief) Update – Solar Panel Statutory Provisions Find a New Home

By Allen B. Warren

In our firm's April 2021 newsletter, we provided a Virginia legislative update for changes in the law that became effective as of July 1, 2021. However, effective October 1st, please be aware that the statutory provisions restricting the authority of associations to prohibit solar panels (and other solar energy collection devices) have found a new "home" in the Virginia Code. Specifically, the restrictions found in Virginia Code Sections 67-700 and 67-701 ("Covenants Restricting Solar Energy Collection Devices") were moved to the Condominium Act and the Property Owners' Association Act as new Sections 55.1-1951.1 and 55.1-1820.1, respectively. This relocation is the result of a bill adopted during one of this year's Special Sessions of the General Assembly. Of note, though, there were no substantive changes to these statutory restrictions – it was purely a relocation of existing statutory restrictions to a different part of the Virginia Code. We have posted an updated PDF version of our 2021 Virginia Statutes book on our firm's website at: https://www.chadwickwashington.com/resource-center.

What Community Associations Need to Know About Virginia's Latest COVID-19 Safety Guidelines

By Michelle A. Wahab

Effective September 8, 2021, the Virginia Occupational Safety and Health ("VOSH") laws have been updated to present new regulations for Virginian employers to follow to mitigate the spread of COVID-19. Though most community associations may not consider themselves to be employers, even hiring temporary or contract employees such as landscapers, cleaning crew, front desk staff, or managers can submit the association to these guidelines. As long as non-residents are coming to your association to work, the VOSH rules can apply.

Community associations must become familiar with the new guidelines to ensure their employees are safe and to prevent any potential VOSH claims. The Virginia Department of Health ("VDH") is now requiring employers to conduct training regarding infectious disease preparedness, as well as requiring infected employees to stay home. The regulations differ per employer depending on how many of their employees are vaccinated against COVID-19, as having too many unvaccinated employees could create an "at-risk workplace" which would require the association to undertake additional safety protocol.

Keep in mind that these guidelines only apply to employees – not owners, residents, or tenants. Virginia has not yet allowed for associations to mandate vaccines for owners, and Governor Northam's executive orders regarding face coverings has expired. Of course, associations can still require owners wear face coverings in common areas, but their authority is generally limited to the CDC guidelines.

The VOSH statutes regarding COVID-19 can be found in Virginia's Administrative Code under 16VAC25-220, et al. Here are some highlights that community associations in particular should be aware of:

1. PPE Must be Readily Available.

Associations must have PPE, such as face coverings and hand sanitizer, readily available for their employees. Setting up a small, visible station in the lobby of a condominium building or at the entrance to the recreational facility might work for most associations, or even having someone on-site to provide PPE to any employee who asks. If associations are concerned about supply chain issues, the new statute thankfully will not consider the association in violation of this provision if they truly cannot obtain the proper amount of PPE after attempting to do so.

2**. Associations Must Have a COVID-19 Policy.**

Most associations should already have some sort of COVID-19 safety policy in place for their common areas, but this regulation mandates the policy and establishes an anonymous complaint system, where the association must be able to receive complaints of violations, anonymously. The VDH expects employers to attempt to resolve these complaints as well – they cannot just be ignored.

As for the safety policy itself, the statute does not introduce anything unusual: assess the workplace for hazards, encourage employees to self-monitor for COVID-19 symptoms, and have a method available for employees to report any suspected or positive cases. If an employee, even someone who is only coming in for one day that week, is suspected of having COVID-19 or their case is confirmed, they are not allowed to enter the workplace, and are not allowed to interact with owners or residents until they are cleared, regardless of vaccination status. Since most community associations typically contract with companies for employees, the association management should stay in touch with those companies to ensure the workers they are sending over are not suspected of having COVID-19, and should request that those employees be excluded from the project.

In order for an employee to return, the association – or their direct employer if said employee is a contractor – must provide them a PCR test, at no cost to the employee. If the employee is negative, they can return immediately. If positive or if they refuse to take the test, then they cannot return to the workplace. Keep in mind that antibody testing does not meet the VOSH standards, and neither does a rapid test.

If an employee tests positive for COVID-19, the association must notify other employees who may have been exposed, all while keeping confidential the identify of the positive employee. If two or more cases are confirmed within a 14-day period, then the association must report such incidents to VDH as well.

To note, if any positive cases are confirmed, the association has to have the common areas where that employee worked cleaned and sanitized. For condominium and apartment buildings, the common areas of the entire floor of the worksite must be cleaned.

3. Proof of Vaccination.

Barring federal guidelines regarding vaccine mandates, in Virginia, the VDH leaves it up to the association whether they wish to require proof of vaccination from their employees. The association can require its employees submit proof of vaccination, but can also rely on the employee's word.

4. Physical Distancing Policies Related to Unvaccinated Employees.

Although it may seem from above that the lack of a vaccine mandate might alleviate the pressure on associations to monitor the spread of COVID-19 within its facilities, the VOSH guidelines place a few burdens on employers who hire unvaccinated employees. For example, associations must implement additional policies and procedures to ensure physical distancing in the workplace – both on the job and during breaks – and such requirements do not have to apply to fully vaccinated employees. Unvaccinated employees have limited to no access to common areas, breakrooms, or lunchrooms. This is especially important for associations who contract employees to clean their common areas.

For associations who have company vehicles, such as for security, unvaccinated personnel should not share that vehicle. If there is no other option, then the association must take additional measures, like opening the windows, setting occupancy limits, providing face coverings, and the like, in order to meet the VOSH standards.

Unvaccinated employees are also required to wear face coverings at all times in the workplace, save for a few small exceptions written into the code.

5. Cleaning & Disinfecting Common Areas.

Notwithstanding the previously-mentioned cleaning policies above, the VDH expects common areas to be frequently cleaned, which can be tricky for community associations as both residents and employees use the common areas.

Within 24 hours of a COVID-19 positive case in a common area or worksite, that space must be both cleaned and disinfected. After 24 hours, only cleaning is needed. After three days, no additional cleaning beyond regular cleaning practices is needed. For frequently touched surfaces, such as doors and bathrooms, cleaning should be once per shift. If no COVID-19 positive persons have been in that space, cleaning once per day is acceptable. Hand sanitizer or soap and water must be readily available to employees.

Shared tools, equipment, and vehicles shall be cleaned prior to transfer from one employee to another; however, if the transfer is between fully vaccinated employees, cleaning is not necessary.

6. High-Risk Workplaces.

Most associations do not meet the criteria of a high-risk workplace, that is, a place of employment with substantial transmission due to close workspaces or close contact with the community, but be aware that the VOSH guidelines do require air-filtration systems, COVID-19 pre-screening, staggered work shifts, and so on for employers with numerous unvaccinated employees. If your association has a food service or retail kiosk available to residents or something similar, then please contact us so we can walk you through how the VOSH work practice controls for high-risk workplaces would apply.

7. Infectious Disease Preparedness and Response Plan – New Requirement for High-Risk Associations with at least 11 Unvaccinated Employees.

If your association has a high-risk workplace and has at least 11 unvaccinated employees, then you must develop and implement the Infectious Disease Preparedness and Response Plan, a training program addressing infection control principles. A person designated by the association will be in charge of implementing this training and shall talk to unvaccinated employees about the hazards and risks of being exposed to COVID-19 in the workplace and how to prevent such exposure. Fully vaccinated employees do not have to participate in this training program and can receive a written outline.

8. Non-Discrimination.

Finally, community associations cannot discriminate against employees, including firing them, for raising concerns about infection control in the workplace or refusing to do work because of a reasonable fear of illness or death. Associations can also not discriminate against employees who wear their own PPE, unless that PPE creates a greater hazard for others.

We hope this summary of the new VOSH guidelines clarifies your questions regarding how to mitigate the spread of COVID-19 at your association and how to comply with VDH's workplace safety standards. We are always available to answer any more questions you may have on how to implement these policies in practice or whether your association qualifies as an employer.

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