COMMON INTERESTS

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Panning for Gold in a Condo Court Opinion

by **WILLIAM BRADLEY MASON, JR. & ROBERT J. SEGAN**

In the beginning…practitioners in the Commonwealth looked to the states of California and Florida for trends in community association law. They had many planned developments—and we had but a few. Now, members of the Virginia General Assembly often lament that you can't buy a home these days without being forced to join a community association. Nevertheless, there are still only a small number of published cases in Virginia to suggest how a court would rule on the many issues facing communities.

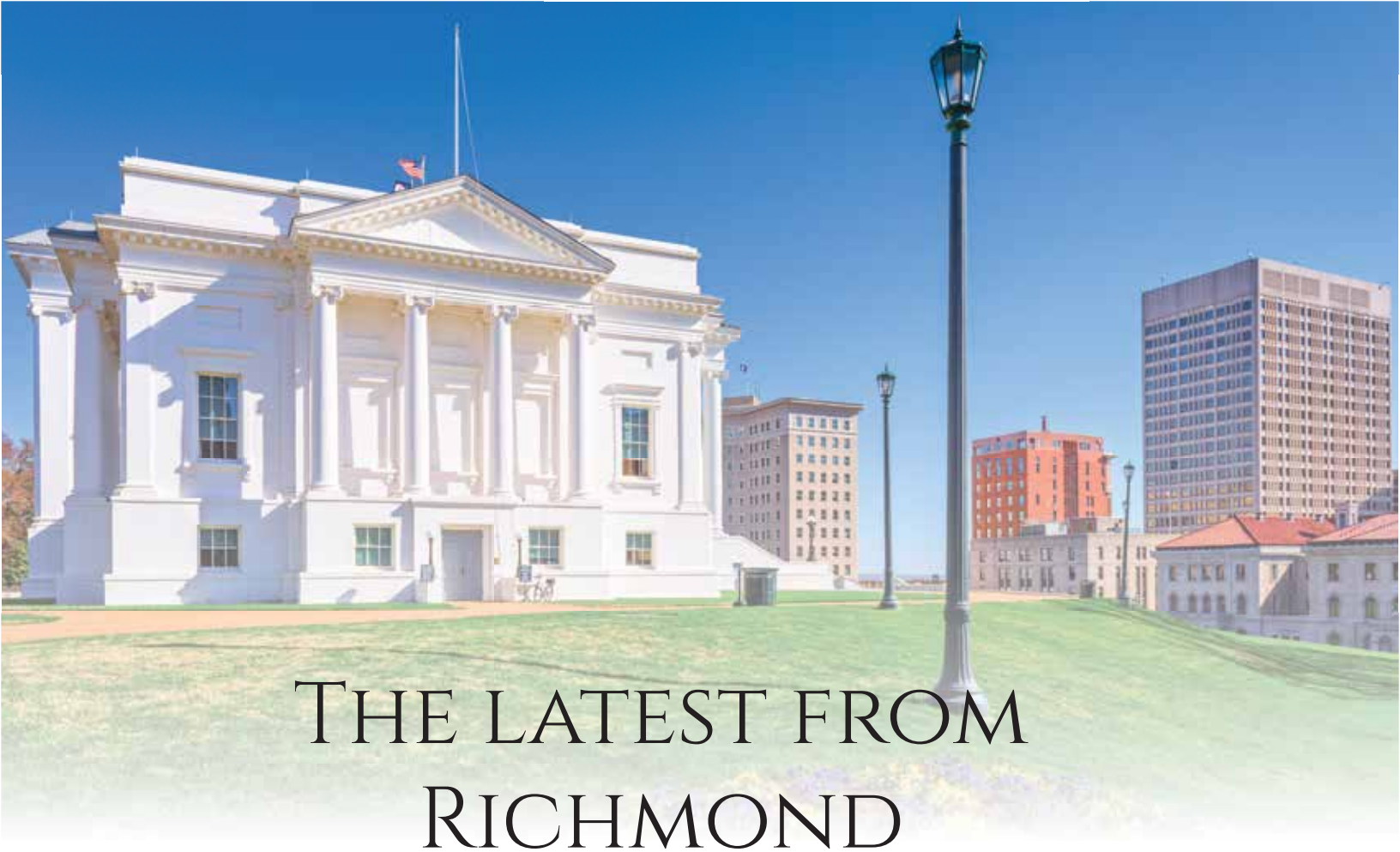
While hardly representing the mother lode of community association law, the Virginia Supreme Court decision in ***California Condominium Association v. Peterson*** still delivers a few nuggets about a subject

near and dear to our hearts—collecting delinquent assessments. Don't let the name fool you: the California Condominium is just a few blocks from the Atlantic in Virginia Beach!

California Condominium recorded a lien for unpaid assessments and argued that it should be enforced even though more than three years had passed since the recording. Perhaps sensing this argument was dust, the Association then abandoned its lien claim and filed a separate cause of action against the owner *personally* arguing that the clock on the statute of limitations—potentially barring the claim—began to run upon the transfer of the property in 2016, rather than the recording of the liens in 2006.

This notion of a "new promise" to pay the overdue assessments was allegedly cradled in two documents—a promise in the Declaration to pay the overdue assessments prior to sale or transfer and the owner's personal divorce settlement agreement and its promise to pay all housing related debts. Rather than rush to a decision, the case was remanded to the trial court for a more detailed review…accompanied by some skepticism by the Virginia Supreme Court, comparing this "new promise" argument to "tacking against the wind."

First nugget…the better course for associations is to make best efforts to adhere to the three-year statute of limitations and to start the countdown when the payment is due or the lien securing the amount is recorded, rather than resorting to creative arguments. We want the "wind" at our backs at trial. The second nugget is the Court recognized the law-of-the-case doctrine in a condominium law setting. This essentially means that the courts will honor prior decisions in that case, even though the matter may have been decided by another judge, which may be good if the prior rulings were in your favor.



The Latest from Richmond

by AIMÉE T. H. KESSLER

This year, the General Assembly had other things to do than tinker with community associations, thanks in no small part to the Community Associations Institute's work to kill some problematic bills.

What has been signed by the Governor:

In response to the collapse of a condominium in Florida, a work group has been established to study the adequacy of current laws on structural integrity and maintaining reserves for capital components in community associations. Recommendations are due by April 1, 2023. As you know, community associations are required to have a reserve study performed every five

years and to save adequate funds to address the items identified in that reserve study. Virginia is one of only a handful of states to have this requirement which puts us somewhat ahead of others on this issue.

Another work group was established to determine the feasibility of requiring the submission of audio and video recordings with the Notice of Adverse Decision to the Common Interest Community Ombudsman. Those findings are due by November 1, 2022.

Both homeowner associations and condominium associations have to recognize any person designated by the owner as his/her representative without a formal power of attorney, as long as the written authorization provides the representative's name, contact information, real estate broker's, salesperson's, and/or real estate team's license number and is signed by the owner. A caveat is that the particular association's governing documents must be followed in terms of who can exercise an owner's vote.

HB 450 makes it illegal to park a non-electric chargeable vehicle in a parking space adjacent to an electric vehicle charger if that parking space had appropriate signage, to include stating the penalty of $25.00. The Governor got this penalty lowered from $50.00.

BOOTS ON THE GROUND

AWARDS ON THE RISE:

What Can Associations "Reasonably" Expect from Courts?

BY: AIMÉE T. H. KESSLER & RACHEL M. ROGERS

Few people enjoy arguing, and even fewer enjoy going to court, unless of course you happen to be the friendly neighborhood attorney. Still, the courtroom is often the best and most civil way to solve disputes that otherwise cannot be resolved – which is why we call it civil court!

Since legal action is commonly used to collect unpaid assessments, many community associations may ask themselves how much it costs to bring a lawsuit. Luckily, under the Virginia Property Owners' Association Act and the Condominium Act, community associations "can be" reimbursed for all of the fees and costs expended – but whether the Association "will be" depends on the Judge.

In Virginia, the POAA and Condominium Act entitled community associations to recover reasonable attorneys' fees if they are the prevailing party in court, with most Master Deeds, Declarations and/or By-Laws having similar language. Therefore, an Association can theoretically recover the full costs and fees

they expended when going to court. Yet "reasonable" is not "all", meaning courts get to decide whether the amount an association has expended is reasonable or not.

While judges are required to look at a variety of factors when determining the reasonableness, often the differences in fees awarded comes down to the particular judge's personal experience in the courtroom. This was reflected in cases decided during the COVID-19 pandemic, when many judges would grant judgment against debtors for the unpaid amounts, but award significantly lower than typical legal fees and costs in that judgment. In making an award of legal fees applying the reasonableness standard, judges often took into account a debtor who was willing to pay assessments but was struggling due to a once-in-a-generation pandemic, despite the fact that the actual work required to bring a lawsuit had not changed.

Today, as courts lift their mask mandates and allow individuals to invade each other's personal spaces, it seems the sentiment of the bench is changing. The trend in the courtroom now has the judges are awarding higher legal fees and costs to more fully reimburse associations. This means that for community associations, the costs of going to court are getting more accurately reimbursed in judgment.

Of course, there is no guaranteed outcome in the courtroom as the concept of "reasonableness" is subjective. Assessments are the lifeblood of the community association which is why Boards have a fiduciary duty to collect, even if full recovery of legal fees and cost is unsuccessful. Legal action to collect unpaid assessments has more of an impact that simple recovery of the unpaid amounts; it also reinforce an association's collections policy and demonstrates to owners that it doesn't pay to not pay.