COMMON INTERESTS

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Big News Alert!

Everyone at Segan, Mason & Mason, P.C. couldn't be happier to congratulate Aimée T. H. Kessler, one of our own Shareholders, for being recognized for all her hard work and dedication she has provided to Virginia community associations for almost two decades. The highly respected **Virginia Legislative Action Committee of CAI National** has given Aimee a seat at the table by inviting her to be a Chapter Delegate Member effective October 1, 2022.

way to go Aimée!

DON'T GET TRIPPED UP GETTING FROM HERE TO THERE

by WILLIAM BRADLEY MASON, JR.

When the television commercial during the Sunday afternoon football game features a rancher, heaving his (or her) fence-posting gear into the back of an electronically-powered Ford F-150 pick-up truck, before hurtling down a dusty road, you have to know it's time to add electronic vehicle charging stations to the board meeting agenda!

A recent financial boost from the federal government and the constant threat of rising gas prices has caused some owners to act first, and ask permission (if at all), later. It's hard to reason with owners clamoring for a "hall pass" after they bought the electronic car. The challenge to homeowners associations is when the electronic

vehicle charging station ("EVCS") is located on a townhouse lot that does not have a garage or parking space for the electronic vehicle. This situation normally requires a cable and/or hose to extend from the EVCS located on the ungaraged lot across the common area in order to connect to the electronic vehicle.

Imagine a resident walking their dog at night, when a cable is extending from the lot—across the common area sidewalk—to the electronic vehicle parked on the association's common area. When the resident trips, who they going to sue? The owner who extended an electric vehicle charging station cord across the common area sidewalk without permission, or the association with its insurance policy and "deep pockets"? Everyone of course. The shotgun approach to litigation is the way they do things in my hometown.

Permitting the common area to be used for all, or part, of an EVCS, may ultimately be in the best interest of the association and its members, perhaps, even the planet. However, the immediate concerns are the safety of the residents and the association's potential exposure to liability.

Owners have a right to in install an EVCS on their lot, pursuant to Section 55.1-1823.1 of the Virginia Property Owners' Association Act (the "statute"), unless expressly prohibited by the recorded Declaration. In addition, the Declaration may expressly permit an owner to locate an EVCS in the common area parking space assigned for the exclusive use of that owner. Otherwise, homeowner associations should be considered to be in the "driver's seat" as to the permitted use of the common area, and to a lesser degree, regarding the installation of such an improvement on the lot. So, what are the advantages of adopting an EVCS policy resolution, and even permitting such use of the common area?

Insurance. The statute empowers the association to require the owner to obtain and maintain insurance covering claims and defenses related to installation, maintenance, operation, and use of

the EVCS, and for the association to be named as an insured on the policy. The association can require a certificate of insurance, as a condition of approval, and obligate the owner to provide updated certificates of insurance to the association upon renewal of coverage or change in carrier. The association can also require that the owner reimburse the association for any common expenses attributable to EVCS, including the cost of any increased association insurance premiums.

Indemnity. The statute also empowers the association to require the owner to indemnify and hold harmless the association from all liability resulting from a claim, arising out of the installation, maintenance, operation, or use of the EVCS as a condition of approval.

Safety Warnings. The process permits the association to state—IN BIG, BOLD CAPITAL LETTERS—that extension cords, hoses, or any portion of the EVCS that extend over the common area sidewalks, regardless of whether such cord, hose, or portion of the EVCS is enclosed in or covered by a "safety mat" are strictly prohibited. (If you witness, for example, children playing "jump rope" with an EVCS cable laying across the common area sidewalk, look for the association's checkbook).

Disclaimer. The process of approval permits the association to clarify that installation of the EVCS, while located in whole or part on the common area, is the done at the owner's risk and that the association is not liable for any damage to the EVCS on the association's property. Further, the process can clarify to the owner that the association shall not be considered a "bailee" of any personal property stored on the common area and is not responsible for the security or physical condition of the EVCS or any vehicle parked in the vicinity of the EVCS, i.e., leave your hat and coat at your own risk.

Application. Bolstering the submission of architectural applications may be a side-effect of licensing or permitting the use of the common area for an EVCS. It also provides the association an opportunity to sport their new EVCS resolution chock full of reasonable rules, and to require plans and specifications showing the kind, shape, height, materials, and location of the EVCS, prepared by a licensed and registered electrical contractor or engineer familiar with the installation and core requirements of an EVCS first be provided to and approved by the association before installation. Thank you, General Assembly!

License Agreement. The application and approval written documents provide an opportunity to clarify to the owner that the association is granting a revocable license or use of the common area, and not ownership, which may be revoked by the board in its sole discretion.

Standards. The association may set forth standards for installation that require that the owner engage the services of a licensed electrician or engineer familiar with the installation and core requirements of, and for installation, of an EVCS.

Installation Costs. Approval may be made expressly contingent upon the owner assuming the cost of installation on portions of the common area, the cost of the immediate restoration of the common area to the satisfaction of the board, such as a sidewalk, after installation, and the cost of the possible removal of the EVCS and related restoration of the common area.

Management Coordination. Approval may also require that the owner coordinate the installation of the EVCS, or cables with the association or its community manager.

Bollards and Buffers. The association may require that the EVCS be protected from vehicle damage by bollards, or such buffers required by the local and state law and the association.

Costs of Installation and Removal. As a condition of approval, the association can require restoration of the common area, and/or sidewalk, at the owner's cost upon voluntary removal, or a revocation of the license by the association. The association can also clarify that a separate application is required by a new owner who now wants to use the EVCS, including extension of the insurance and indemnity requirements.

The governing documents may not support a grant of a revocable license or permitted use of the common area; however, there are certain provisions that may apply to nonstock corporations where the governing documents are silent. A possible roadblock is the lack of authority to assign portions of the common area for the exclusive use of an owner. The need for more specific authority may become an "engine" for a future amendment of the Declaration.

The ability of the association to assign reserved parking spaces may have certain physical limitations, based on the limited number of spaces directly adjacent to the lots. "To each according to his needs" to charge their electronic vehicle? It may not be wise to base a resolution on the philosophical writings of Karl Marx, but perhaps, an annual lottery? The greater the discretion granted to the board in the Declaration provision, the better. However, a Declaration provision requiring location of the parking space as near as physically possible to the front door of the dwelling unit may not give the association many options.

Some of these same principles and approval requirements can be applied to another source of renewable energy finically super-charged by the federal legislation, and addressed by state law, solar panels. Thus far, there has been no similar state laws enacted as to wind farms or wind power stations on the common area, or on a dwelling unit, but where there is a bill, there is a resolution.

For Better is Halfe a Lofe than No Bread?

Navigating Neighbor-to-Neighbor Disputes

by **WILLIAM BRADLEY MASON, JR.**

They say, "something is better than nothing," which suggests that doing "something" is not what is required, but it is preferable to doing nothing.* Dismissing harassment complaints as mere "neighbor-to-neighbor" disputes, and therefore, doing nothing, might have been standard operating procedure for some community associations years ago. But half a loaf is not better than none, if the federal law "requires" the whole loaf.

Regulations from the United States Department of Housing and Urban Development ("HUD"), pursuant to the Fair Housing Act ("FHA"), require the community association to take prompt action to correct harassment of persons included in a

"protected class," such as one based on race, color, religion, sex, handicap, familial status, or national origin of such persons or of visitors or associates of such persons. The definition of protected class may be expanded by the state or local government, to include, for example, persons based on sexual orientation. While some traits may be obvious, such as confinement to a wheelchair, others are not, such as one's name possibly indicating their national origin. The more practical policy is one that is equally applies to all residents.

The focus of this article is the liability of associations for failing to take prompt action to correct the discriminatory harassment of a third-party, rather than culpability for the acts of an employee or agent. Why are associations being made the neighborhood cop? HUD reasoned that associations were already acting to enforce the neighborhood rules and broadening the task seemed a natural extension to their role. Associations weren't deputized by the feds—they were already wearing a badge.

HUD also relied on a decision of the United States Supreme Court recognizing that of all the potential "hostile environments," including the work-place and centers of commerce and recreation, the home is the least tolerable as it is the most treasured place. Discriminatory harassment can prevent a member of a suspect class from enjoying their home, the street where they live, or perhaps, even the association's common area, intended to be used and enjoyed by all.

The Supreme Court of Virginia recognized that the recorded governing documents, such as the declaration, in addition to the bylaws in the case of a condominium, are a "contract" between the association and the owners (and among the owners). Sometimes there are specific restrictive use covenants in the governing documents that address behavior that might be considered as discriminatory harassment under federal law. Most governing documents prohibit owners from actions which may be deemed immoral, unlawful, an annoyance, or a nuisance to the other residents. Many governing documents also provide for the quiet enjoyment one's home and the common area, whether it is expressly stated or implied from the use.

There is not a cause of action for "harassment" in Virginia, although it recognizes a civil claim for the intentional infliction of mental distress, which requires that such distress result in a physical manifestation, such as nausea. By contrast, federal law does not require evidence of psychological or physical harm, although this may be considered as relevant to the sum of damages awarded. Discrimination by "harassment" of a member of a protected class, however, is "unlawful" under federal law, and therefore, may become a sword against a nuisance-causing resident. Just make sure that the tip of the sword is not pointed towards you, as the community association, for doing nothing.

The association is limited by the remedies provided in its "contract." For example, assessing fines or "charges" against an owner for harassment—as some national wonks suggest—may not be an option for community associations in Virginia lacking express authority in their recorded governing documents to do so. In short, doing what is "required" under the federal regulations also depends on the authority of the association. The federal regulations recognize this limitation by providing that the "power" to end discriminatory harassment "depends upon the extent of…control or any legal responsibility" that the association may have as to the conduct of the third-party. Exposure exists when the association "knew or should have known" of discriminatory harassment by a third-party, had the "power to correct it" but failed to take "prompt" action to do so.

This legal background and the governing documents' nuisance clause must also be reconciled with the factual circumstances. Fortunately, both the Condominium Act and the Virginia Property Owners' Association Act require at least three steps before filing a lawsuit for injunctive relief, assessing charges, and/or suspending services or the use of Common Area facilities.

In such cases, associations are required under state law to send the owner accused of violating the governing documents (1) a notice of violation, providing a reasonable time to correct the alleged violation, (2) a notice of a hearing before the association, including the potential actions that may be taken by the

association, and (3) a notice of the results of the hearing.

But remember that the federal regulations require "prompt" action. It may not be appropriate for the board to act only when the situation has gone on long enough because "enough" can be based on a single incident, severe enough to constitute an environmental harassment violation, depriving a resident of the enjoyment of their home or the common area. Associations are encouraged to review the totality of the circumstances. In 2021, a Florida court summarily rejected a claim against the association because the judge concluded that the one incident—an allegation that the resident was called a "stupid Shiksa" and urged to move out of the predominately Jewish community—was not enough by itself for a jury find discriminatory harassment. The federal regulations provide this test—severe or pervasive—so repeated acts, or one act, may be "enough."

The statutorily mandated covenant hearing may provide a forum for residents to listen to each other, and sometimes under the threat of association legal action, to understand or at least tolerate one another. The hearing may provide the board an opportunity to supplement any written comments submitted to the board with the testimony of the parties and other residents. It also offers an opportunity for the board to suggest another path favored by HUD—and not chalked with lawyers—to mediate the dispute between the neighbors. However, the neighbors are unlikely to be singing "Kumbaya" when only the aggrieved party responds or appears at the hearing.

Only sending threatening letters and staging a hearing may not be "enough," ruled an Indiana court after reviewing a harassment claim based on a third-party's racial discrimination. Again, something is better than nothing, but it may not be what is "required" under the federal regulations. The goal is to "correct" the problem.

Most associations, have the "power" to also file a lawsuit to enjoin behavior that is deemed to be a nuisance, annoyance to others, unlawful or prevents a resident from using and enjoying their home or the common area. Nevertheless, the Board still has the duty to exercise its good faith judgment and act in the best

interest of the association. Unfortunately, the "business judgment" of the directors cannot be reconciled with the federal mandate. Filing a lawsuit is expensive. Cost alone is not a justification under the federal regulations for failing to do what is "required," especially when the fix is within the association's power. However, filing a frivolous lawsuit under state law, after the board has investigated and found insufficient evidence of any harassment, is inconsistent with both the spirit of the federal and state law.

This is the bottom line: Don't be an ostrich and do nothing about discriminatory harassment complaints. In the charge to do something, don't be a lemming either, and jump off the cliff when a harassment allegation, after a thorough review, does not have a basis in law or fact. Remember that the association's obligation is not just to enhance property values. It should recognize the public policy embraced in the Code of Virginia many years ago: "It is hereby declared that the protection and preservation of the home is the keystone of democratic government, that the public health and welfare and good order of the community require that members of the community enjoy in their homes as feeling of well-being, tranquility and privacy."**

John Heywood and his compilation of British proverbs in the year 1546.

****The Honorable F. Bruce Bach, Fairfax Circuit Judge, citing Section 18.2-418 of the Code of Virginia in an unpublished ruling, Burke Cove Condominium Unit Owners Association v. Polly Wilson (1987).***

Incident Report Form

link below to download this helpful form!

Boards, with managers' help, have the onerous task of enforcing the covenants. Members can be quite good at bringing covenant violations to the managers' and Board's attention but not so good when asked to step out of the shadows and disclose their identity and be a witness if necessary.

Boards cannot be expected to enforce, for example, a noise violation when the complaining member refuses to get involved beyond the complaining stage. To assist Boards and managers, we have developed a simple complaint form that can be used to ensure - before spending time and money - that the member is willing not just to complain but to take the necessary steps to assist with the covenant enforcement.

LINK TO FORM