COMMON INTERESTS

SPRING EDITION 2021

A SEGAN MASON & MASON, P.C. PUBLICATION

Counseling Virginia's Communities since 1995

SEGANMASON.COM | 703.354.9170 | FIRM@SEGANMASON.COM | ANNANDALE, VA

WHERE THERE'S Smoke, THERE ARE ASSOCIATION RULES

by **ROBERT J. SEGAN**

On July 1, 2021, a new Virginia law will take effect allowing boards of directors of condominium associations, and homeowners associations with attached dwelling units, to enact rules prohibiting smoking in units and in homes. This law will not apply to homeowner associations consisting of homes that are detached dwellings.

The new law will allow enactment of such a rule without a vote of the owners. Only board action is required, unless the association's governing documents expressly prohibit enactment of such a rule.

However, owners of condominium and homeowner associations whose boards enact an in-unit or in-home smoking ban will have the opportunity to overturn the rule by calling a special meeting of the owners in accordance with the association's bylaws. Typically, bylaws require that a petition signed by a certain number of units or homes (often 25%) be submitted to the board. If a special meeting of the

owners is called to vote on overturning the rule, and a quorum is present, a majority of those voting could override the board's action.

Before this law, the ability of boards to make a rule prohibiting smoking in homes and units would have required a provision specifically authorizing a ban in the governing documents, or amending those documents to add such specific language. Without a general rule prohibiting smoking in the governing documents, banning a resident from smoking in a unit or a home would usually require proving the smoking caused a nuisance, which is an "unreasonable" limitation on the right of neighbors to peacefully use and enjoy their property. What is considered "unreasonable" has undergone a great change over the years. Some of us are old enough to remember walking into office buildings where many people smoked and barely noticing it. Now if one person is smoking on a floor of a building, just about everyone notices. And, of course, the health problems produced by secondary smoking have been well documented.

This new law gives the boards another tool to deal with smoking complaints, although using it in some associations make lead to a battle among owners at a special meeting.

Adopting such a rule should be done with care. Therefore, we recommend that boards consult with their legal counsel before drafting and adopting such a prohibition.

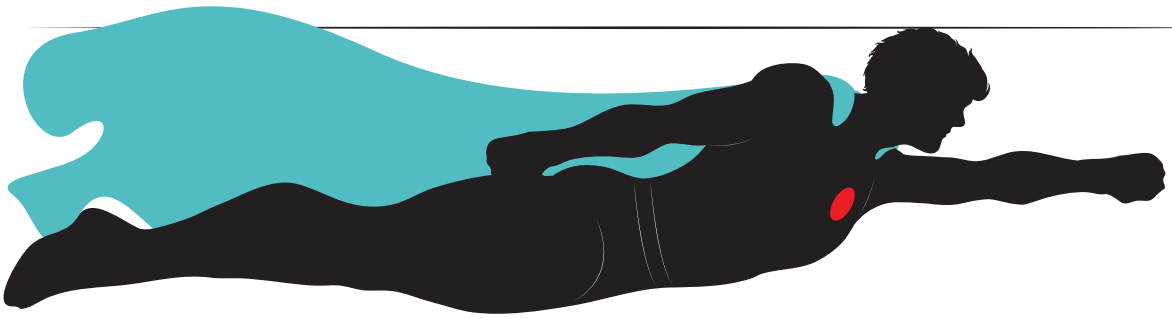
KNEEL BEFORE ZMOD

by AIMÉE T. H. KESSLER

Virginia law requires all community associations to have a reserve study done at least once every five years. That deadline is coming up for many associations, who choose to do their studies in years ending in “5” and “0”, so now is a good time to review the basics of reserves and reserve studies.

In Virginia, community associations are required to include in their annual budget a “set aside” of funds for capital projects. These are held as reserves. While most associations’ governing documents already required this, in 2002, the Virginia General Assembly made it a statutory requirement, and both the Virginia Condominium Act and the Virginia Property Owners Association Act now set forth rules by which the reserve obligation must be met.

First is the requirement that each association conduct a reserve study once every five years. The study must



catalogue all of the capital components the Association is required to maintain. Then the major work, other than routine maintenance that is done every year, is specified, along with a prediction of when it will have to be done and what it will cost. Then the study will state how much your association needs to contribute to reserves each year. In theory, this will assure that the association is sufficiently funded to do the work when it is needed, rather than having to go to impose a special assessment on the owners.

Once the study is complete, the Board should review it to determine whether the Association's reserves are sufficiently funded. If reserves are short, the Board should develop a plan for getting reserves to the recommended level.

Although the study is done only once every five years, reserve analysis must be done each year during the budgeting process. Virginia law requires associations to review the study each year and determine what adjustments in the amount of reserves are appropriate. If, for example, a very bad winter of freezing and thawing deteriorates your parking lot, moving the resurfacing date one or two years sooner might be required. A mild winter might allow the date to be pushed back. In either case, the funding of reserves could be adjusted accordingly.

Boards should be careful about leaving reserves too low. Lenders may refuse to approve loans on homes within associations containing reserves significantly below the study's recommended levels. This could lead to loss of sales by owners, and decline in property values, as well as claims against the Association. In addition, in order to be approved for Federal Housing Administration funding, condominiums must annually deposit at least ten percent (10%) of the budgeted assessment income into the reserves account.

HERE ARE SOME QUESTIONS WE GET FREQUENTLY ABOUT RESERVES:

Q: Why are reserves required? Why can't we just special assess when we need the money?

A: Having reserves keeps associations financially sound, but it also requires those who are owners when an item wears out pay for it, rather than special assessing those poor souls who happen to be owners when the expenditure is needed.

Q: What qualifications are required of the company or person doing the study?

A: The statute does not specify, but your fiduciary duty as a Board member requires you to select someone with sufficient expertise. There are companies that specialize in doing reserve studies and an association should use such a company.

Q: Do we have to follow the results of the study? What if we think it is wrong?

A: The Board does not have to accept as gospel the opinion of any expert. However, it is dangerous for a Board to just ignore the advice. If you have doubt about the conclusions and recommendations obtained, getting a second opinion would be the prudent course.

Q: What is required when we do the annual review of reserves?

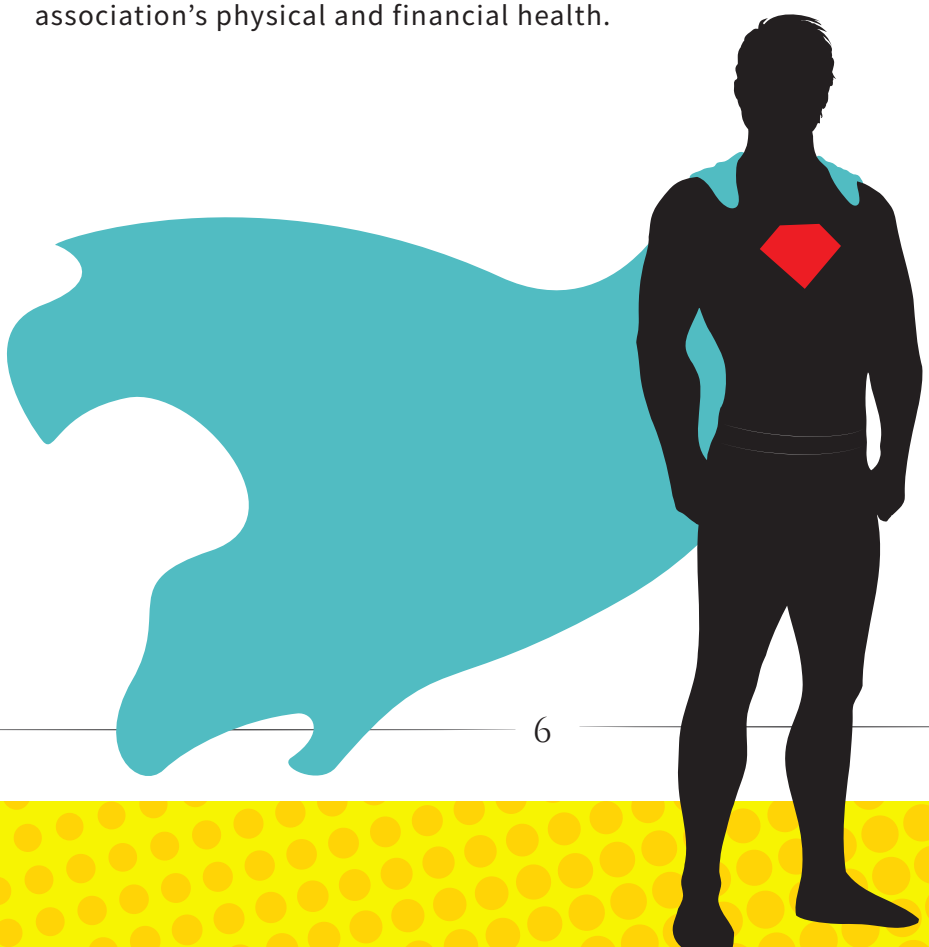
A: The statute provides that the Board should "review the results of that study at least annually to determine if reserves are sufficient" and "make any adjustments the … board deems necessary to maintain reserves, as appropriate." We anticipate that some tangible evidence that circumstances

for the past year tuned out differently than the study had predicted would be required to support making a change to the amount being held in, or budgeted for, reserves.

Q: I am buying a home in a community association. How much should they have in their reserves account so that I am protected from a special assessment?

A: The only way to determine this is to compare the amount held in reserves by the association with that which was recommended in the reserve study. Virginia law requires that a summary of the reserve study be given as part of the resale package. An association with very low reserves might be much healthier than one with high reserves. If the "low reserves association" just completed numerous major capital projects, it has years to build them back up before they are needed again, and a low level may be just right for it. On the other hand, a "higher reserves association" might need to have major work done immediately which will deplete their reserves account that appears to be flush with funds.

In short, the required reserve study is a useful tool to the association, the owners, and any potential purchasers in evaluating the financial health of the association and what next steps are required in order to maintain the association's physical and financial health.



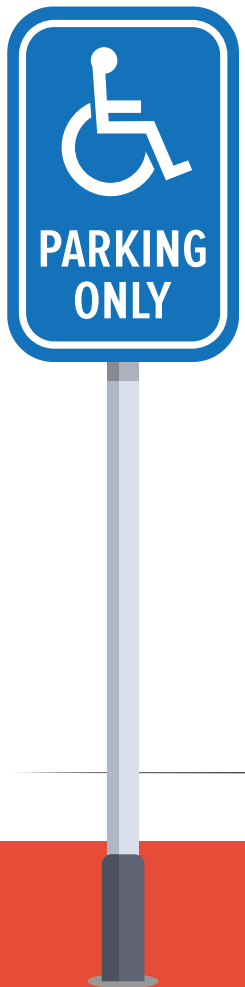
Reasonable Accommodation for Accessible Parking

by DONNA M. MASON

Effective July 1, 2021, there has been a clarification to the Virginia Fair Housing Law as it pertains to the definition of "Reasonable Accommodation". This truly is more of a clarification than a change as the Condominium and Homeowner Associations' ("Associations") legal requirement to accommodate the request of a person with a disability for accessible parking remains unchanged. HB 1971 has taken any guess work out of whether a request for accessible parking to accommodate a disability is considered a "reasonable accommodation". If the legislature felt the need to add this clarification then probably it's a good idea to take the time to revisit this topic.

One of the important goals of the Fair Housing Act and the Virginia Fair Housing Law ("FHA") is to ensure that a person

with a disability has an equal opportunity to use and enjoy a dwelling as any other owner. Associations play a critical role in assisting with that goal. Looking solely at FHA as it relates to parking accessibility, when a resident makes a request to the Association asserting the need for accessible parking as a result of a disability of the resident or someone associated with the resident, the Association must be conscious that this is a request for "reasonable accommodation" whether the resident uses those words or not. FHA mandates that the Association promptly responds to this request. The Association cannot stand behind the established parking policy as a reason not to accommodate the disabled person. FHA expects and requires associations as part of the reasonable accommodation to modify existing parking policies as necessary. Simply stating, for example, that the parking policy is "first come first serve" so dedicating a specific space to a disabled resident is not possible will most certainly put the association in harm's way of violating FHA. Unless it can be shown to be an undue financial and administrative burden or a fundamental alteration to the nature of the operations of the Association, the Association is expected to absorb the expense of signage, painting, etc. in accommodating the disabled person's request.



No two cases are ever exactly alike. The facts of each case must be carefully reviewed to determine the best course of action. As navigating FHA can send even the most well- intentioned Association into rough waters, it is extremely important, particularly if the Association is denying a request for a reasonable accommodation, to consult with legal counsel prior to communicating with the resident.

"When the Dog Bites"*

by WILLIAM B. MASON, JR.

What does the new and improved dangerous dog statute have to do with community associations? While outlining procedures for keeping a dangerous dog, the statute recognizes that a recorded restrictive covenant, declaration, or condominium instrument may prohibit the keeping of dangerous dogs or impose conditions that are more restrictive that those of the statute. It is noteworthy that the statute does not also include a reference to the rules and regulations adopted by the community association but only lists the recorded documents above.

The dangerous dog statute continues to provide graphic but objective detail on what may constitute a dangerous dog. A "single nip or bite resulting only in a scratch, abrasion, or other minor injury" is not enough. Serious injury to a person,

including lacerations, broken bones, or substantial skin punctures by teeth is the ticket to a dangerous dog adjudication. This is consistent with a circuit court case once filed against a condominium association rejecting an allegation unleashed upon the association that it was on notice of a potentially dangerous dog and had a duty to keep the animal out of the common area. A previous bite or attack was required, not just a suspicion, ruled the court.

Once ruled to be a dangerous dog, the dog may be required to display dangerous dog tags and be implanted with an electronic locator chip which identifies the owner and listed on the **Virginia Dangerous Dog Registry**. An owner of a dangerous dog is required to notify an animal control officer of any relocating of the dog so that the Registry can be updated. Members or residents of a community association may consult the Registry for information on the location of dangerous dogs within the community.

**Lyrics by Oscar Hammerstein II and Richard Rodgers. The Sound of Music.*
***Crocker-Sanford v. Landrum, 40 Va. Cir. 282 (1996).*

Thanks for Reading!

Check out our **Winter 2021 Newsletter** for details on the **legislation authorizing fully virtual Board, committee and membership meetings** and electronic voting. It has now been signed into law by the Governor and goes into effect July 1, 2021!

Our
Summer 2021
Ad in Quorom
Magazine