COMMON INTERESTS

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WHEN THE DOG BARKS

by WILLIAM BRADLEY MASON, JR.

The siren blared at ten o'clock that night, and I first thought that it was an alert that polar bears had wandered into town again…or maybe, an urgent call to assemble at the fire station. But no, the siren's sole purpose was to let the residents of this Hudson Bay town (population 899) know that it was now ten o'clock.

"Noise" is best appreciated in context, such as time, place, and manner. A similar public announcement in my beloved Churchill may not have been appreciated as much at three o'clock in the morning.

Community association governing documents typically prohibit nuisances, such as "noise" which is "annoying" to the residents, especially excessive, loud, or amplified noise. But what is "loud" or "excessive" noise?

Webster's Dictionary, often cited by courts, defines "noise" as "a loud or unpleasant sound." What does "unpleasant" mean to a court? A professional opera singer belts out a tune in the comment element stairway may be music but is it still music at eleven o'clock at night?

The Virginia Supreme Court has ruled that restrictive covenants are to be construed strictly against the person seeking to enforce them, and that "substantial doubt or ambiguity" is resolved in favor of the free use of property.* In another, the Court rejected the term "residential purposes" as a vague limitation on short-term rentals. It suggested that if the intention was to prevent short-term rentals, "it would have been easy to say so" in the recorded declaration, i.e., a "short-term" is less than six months.

More recently, the Virginia Supreme Court debunked design guidelines intended to maintain "harmonious relationships among structures and the natural vegetation," as overly broad. Such subjective guidelines, wrote the Court, do not necessarily further the public interests or fulfill the "reasonable expectations" of owners. The Court again emphasized that restrictive covenants are to be construed "most strictly" and in favor of the free use of property.

At one covenant hearing on a potential noise violation, the complaining unit owner said she kept a detailed log, and each night held a tape recorder to the ceiling to record the intermittent banging of a hammer on the upstairs floor in the middle of the night, done with the ultimate goal of driving her "crazy." "Can you hear it? I'll just turn up the volume," she said while playing the tape. While the upstairs occupant in this case was able to show plane tickets evidencing that his upstairs unit had been vacant on the nights in question (and thus, rendering the alleged noise, at best, "mysterious"), the downstairs complainant and the Court, cited above, have a valid point. "Noise" can, and should be, objectively measured.

Generally, the restrictive covenants of a community association may be more restrictive—but not less restrictive—than the local government laws. However, most covenants related to noise, as a

nuisance, lack an objective, measurable standard, or definition, which may instead be found in local government ordinances.

For example, the "Noise Ordinance" adopted by Fairfax County sets forth specific limitations on "noise" or "sound" which can be measured by a "sound level meter."** It even provides a definition of noise—the intensity, frequency, duration, or character of sounds from a single source or multiple sources that may degrade public health, safety, or welfare. The Fairfax County Ordinance—or your association's applicable local government code—might be "borrowed" and inserted, by reference, in the association's architectural guidelines, or better still, in an amendment to their recorded governing documents.

The appeal of the Noise Ordinance is that it provides limitations or "maximum sound levels" for both "continuous sound" or "impulse sound" and for regulating noise for different places, times, and sources. As to a neighbor mowing his lawn at ten o'clock at night, for example, check the provisions for the

operation of power lawn equipment. Is the neighbor's animal creating "plainly audible" sounds or noise, even when your windows and doors are closed? Check the residential limitations for when an animal may bark, howl, bay, meow, quack, crow, etc., and for how long.

In reviewing the "intolerable nuisance," including the alleged odor from disinfectants, the Virginia Supreme Court wrote that a "reasonableness" standard should be applied to determine if the regulations for the operation of garbage trucks in the commercial condominium served a "legitimate purpose" or was "arbitrary and oppressive." *** The Court noted that the recorded condominium instruments did not expressly prohibit operation of such as business. but agreed that if the operation was deemed to "create noxious and offensive odors and amounted to a nuisance," then requesting injunctive relief was the appropriate remedy. However, the Court also determined that that such operation satisfied the local government health authorities, was a permitted use under the particular zoning ordinance, and held for the unit owner operating trucks, stating "courts should refuse to enforce regulations that are found to be unreasonable."

Although there is no shortage of published cases involving community associations and noise restrictions in the nation, there is a lack of published authority in Virginia. And Virginia, I have been told at trial, is what matters, not some case "across the river." The only Fairfax Circuit Court published opinion (Background: "A Cooking Dispute between Neighbors Boils Over") only addresses legal fees and not allegations that the cooking "odors" were a nuisance in the townhouse association.**** Therefore, the importance of relying on the Virginia Supreme Court decision in Sanjay Sainani, et al. v. Belmont Glen Homeowners Association (2019), is heightened, and its requirement of express, clear and recorded restrictions, while dismissing subjective and vague restrictions.

In the absence of objective standards, Courts today may elect apply a "reasonable" person standard for enforcement of a rule against any type of perceived nuisance, but it may be easier to second-guess a

Board that does not rely on objective standards. Would a reasonable person find that this "noise" at this time, place, and manner is "loud" or "unpleasant?" It's not like everyone has a "sound level meter" in their kitchen junk drawer, or that a sound meter is standard feature on a Swiss Army Knife. However, basic sound level meters are available on-line for the cost of a good night's sleep at a local motel. Absent any objective and measurable evidence, the tribunal may decide if the potential complainant, is being "reasonable" or simply, being "crazy."

**Scott v. Walker (2007); Sanjay Sainani, et al. v, Belmont Glen Homeowners Association, Inc.(2019)*

*** Chapter 108.1 (Noise Ordinance) of the 1976 Code of the County of Fairfax, Virginia.*

**** Unit Owners Association of BuildAmerica-1 v. Gillman, 223 Va. 752 (1982).*

***** Swahn v. Hussain (2019).*

There, and Back Again

by **WILLIAM BRADLEY MASON, JR.**

In our Fall Newsletter ("Don't Get Tripped Up Get ting From Here to There"), we raised issues that may occur when homeowners need to charge their electric vehicles and do not own the parking space and/or the land between their house and the parking space through which they now need to run a hose or cable. Condominiums have some similar issues as homeowners associations; however, there are several significant differences in the law and the practicalities of which you need to be aware.

Unit Owners have a right to install an electric vehicle charging station (EVCS) within the boundaries of their unit or appurtenant Limited Common Element parking space, pursuant to Section 55.1-1962.1 of the Condominium Act (the "statute"), unless expressly prohibited by the recorded Condominium

Instruments. The statute provides a number of items that an association "may require as a condition of" approval of the installation of an EVCS. A resolution is required to adopt these conditions into requirements for application and maintenance of an EVCS by a Unit Owner. Following are some of the conditions that can be included to consider:

Insurance.

- The statute empowers the association to require the Unit 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 also require that the Unit Owner reimburse the association for any common expenses attributable to EVCS, including the cost of any increased association insurance premiums.

Indemnity.

- The statute empowers the association to require the Unit 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.
- The association can also require a Unit Owner to indemnify and hold harmless the association from the liens of a contractor or supplier of the EVCS.

Application and Installation.

- The statute provides that the association can require plans and specifications showing the kind, shape, height, materials, and location of the EVCS be prepared by a licensed and registered electrical contractor or engineer familiar with the installation and core requirements of an EVCS.
- Design and installation must comply with the applicable building codes and/or recognized safety standards of the locality and/or Commonwealth regarding EVCS.

Standards.

- The association may set forth standards for installation that require that the Unit Owner engage the services of a licensed electrician or engineer familiar with the installation and core requirements of, and for installation, of an EVCS.
- An association may prohibit the installation of an EVCS if to do so would not be "technically feasible" or "reasonable practicable" in terms of safety, structural issues, and engineering considerations.

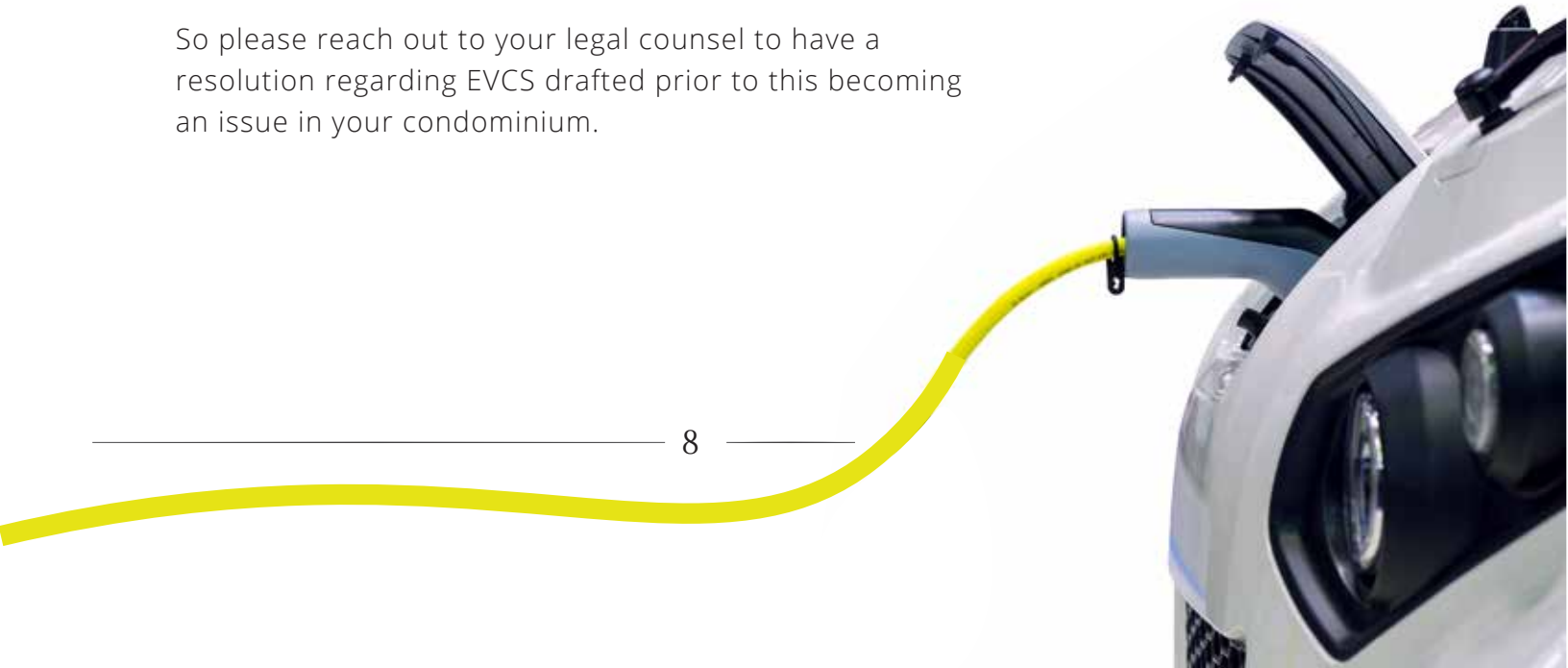
Costs.

- The association can also require the Unit Owner to assume the cost of installation, maintenance, operation and use of the ECVS as well as the cost of removal and restoration should the Unit Owner determine the EVCS is no longer needed.
- The association can require the electricity will be separately metered and paid by the Unit Owner.

Title.

- The conditions imposed on Unit Owners in a resolution developed pursuant to this statute become a part of the title to the unit to which the Limited Common Element parking space is appurtenant.

So please reach out to your legal counsel to have a resolution regarding EVCS drafted prior to this becoming an issue in your condominium.



by **RACHEL M. ROGERS**

The idiom "too many cooks in the kitchen" was one I heard often as a child, usually over the holidays when too many family members crammed themselves into our small, bright yellow kitchen to comment on the appropriate way to make gravy or whether the meat was fully cooked. It turns out that running a homeowner's association is a lot like cooking with your family – everyone is just trying to help – but, as we know, too many people helping can actually make a situation worse or confusing.

The unfortunate reality of homeowner and condominium associations is that sometimes our neighbors fall behind in the payment of their assessments. This may occur for a variety of reasons, but most can be addressed with a clear and open line of communication with the delinquent owner. However, it is essential that there is only one line of communication.

Just as getting advice from your aunt, grandfather, and cousin at the same time on how to perfectly roast the obligatory vegetables can leave you confused about the

right steps to follow, so too can a homeowner receiving information on their delinquent account from multiple people, i.e. Board member, manager and law firm.

Segan, Mason & Mason, P.C., like many other law firms who assist in the collection of debts, must adhere to the Federal Fair Debt Collections Practices Act ("FDCPA"). The FDCPA mandates that the law firm collecting a debt provide the amounts owed to the delinquent homeowner concisely, clearly, and in a way that eliminates confusion as best as possible. Once the law firm is wearing the chef's hat in that the account is "at attorney" for collection, a management company and/or board member doing anything else but directing the homeowner to the law firm for payoff information or account status is most certainly going to result in misinformation being given to the homeowner which will inevitably lead to confusion. . . too many cooks in the kitchen.

Often the person that a delinquent owner reaches out to is an association Board member or property manager with whom they are familiar and feel comfortable discussing their troubles. We also understand that, with purely good intentions, board members and managers may feel that delinquency can be cleared up with a quick, simple phone call or conversation. But as they say, no good deed goes unpunished. Trying to "help" once the account is with the attorney has a high risk of putting the Association and the law firm in harm's way.

Collection cases are extremely fluid. The cost and legal fees incurred, lien recordation, and entry of judgment change by the day. For example, promising the homeowner at an evening board meeting that the association will hold up on a collection when the law firm has already entered a judgment that day is the type of confusion and misrepresentation that can unintentionally expose the law firm to FDCPA violations and the Association to liability. Likewise, management providing payoff information without directing the delinquent owner to the law firm will inevitably result in unrecoverable legal fees and possible waiver of assessments.

To work as a team, we all have to wear that Chef's hat at different stages of the meal. So long as we pay attention to whose in the kitchen cooking the meal, the results should be good all around. Bon Appetite!