COMMON INTERESTS

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The Latest & Greatest *from* Richmond

LEGISLATIVE UPDATE

by AIMÉE T.H. KESSLER

During the 2023 Virginia General Assembly session, legislators considered 4,176 bills and resolutions. Community Associations Institute's (CAI) Virginia Legislative Action Committee (VA LAC) closely monitored more than 57 bills that would have directly or indirectly impacted common interest communities. Virginia lawmakers passed several pieces of legislation that go into effect July 1 that will assist community associations.

The most sweeping change is the recodification of the disclosure packet and resale certificate laws out of the Property Owners Association and Condominium Acts and into the new Resale Disclosure Act. While the law remained largely unchanged, the new Resale Disclosure Act will require payment of the resale package fee up front and not at closing. [HB 2235 & SB 1222]

In addition:

- Changes made to the enforcement power of the Common Interest Community Board over continuing violations shifts more decision-making power to the Common Interest Community Ombudsman but requires her to send repeat violators directly to the Board for it to exercise its enforcement powers.[HB 1627 & SB 1042]

- Associations with walking trails on their property for which the locality or park authority holds an easement, lease or license are protected from civil liability in the absence of the association's gross negligence or willful misconduct. [HB2041 & SB 807]

- Professional management contracts with automatic renewal will now be considered to have a 60 day without cause termination provision for either party. [HB1519]

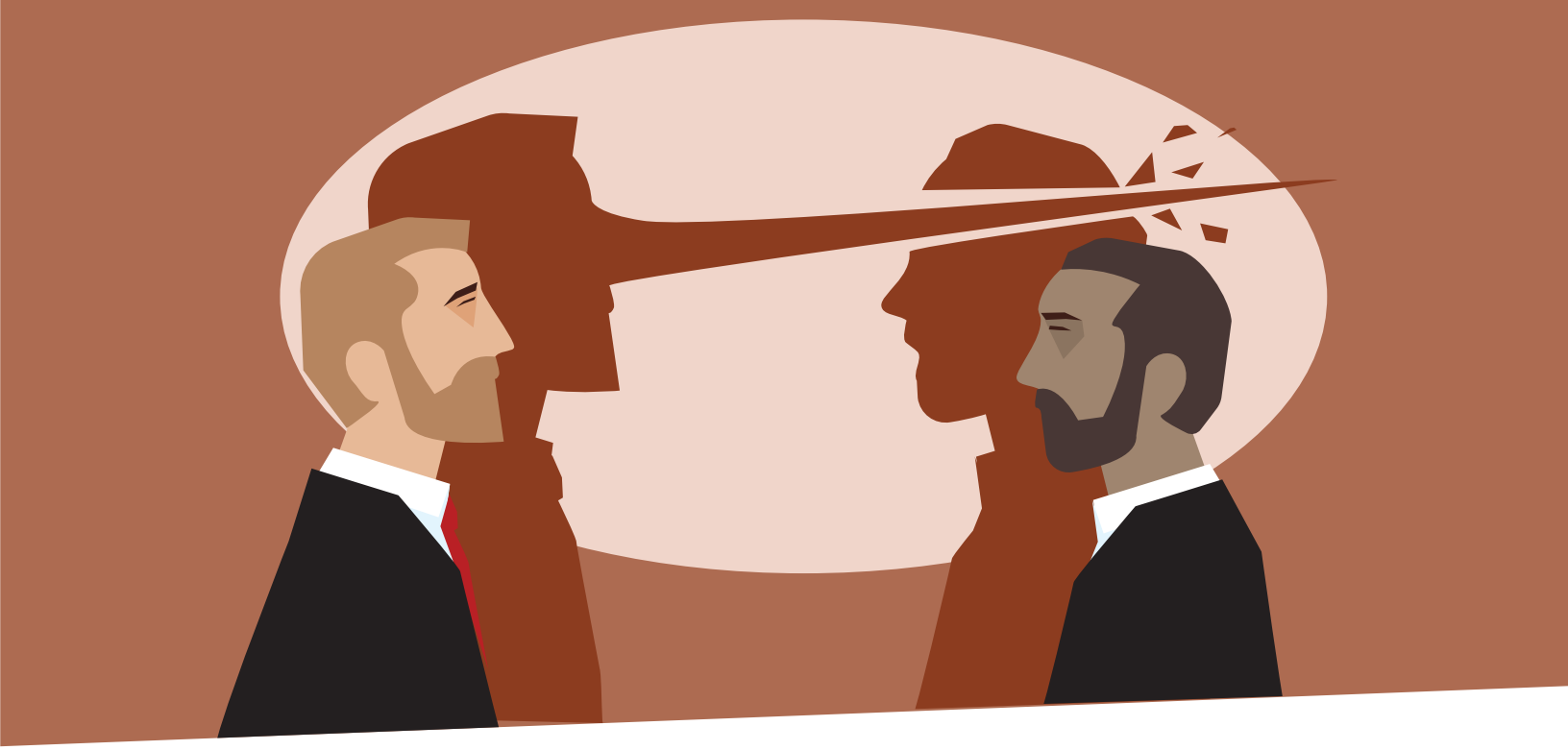
- Fair Housing law has been amended to prohibit those who are authorized to provide supporting documentation to a person requesting an assistance animal in their home from doing do fraudulently. If they do commit such fraud, it's a violation of the Virginia Consumer Protection Act. [HB1725]

Unfortunately, a bill that was sponsored by Delegate David Bulova in response to an issue brought to him by a constituent, which passed the House of Delegates, was brutally defeated in the Senate. The bill - HB2098 – would have empowered associations to suspend access to certain facilities of the association's when the owner was in violation of the governing documents, not just delinquent on their assessments, and would have allowed "repeat offenders" of the one-time violation scenario (ex. Leaving the trash can out on a day when it shouldn't be out) to be charged an additional violation charge without having to repeat due process as long as it was the same violation.

So associations do not gain any power to make their jobs easier but some of the rough edges have been polished off that which already exists to make the way smoother.

Important UPDATE

In our **Summer 2021 newsletter**, we reported on Fairfax County's Zoning Ordinance Modification Project ("ZMOD") that went into effect July 1, 2021 ("Fairfax County Updates Its Zoning Ordinance"). On March 23, 2023, in the case of Berry et al. v. Board of Supervisors of Fairfax County (Record No. 211143), the Virginia Supreme Court struck down the law, finding that the public hearings were held in violation of the public comment rules of the Freedom of Information Act. The County has already begun the process to re-adopt the law.



IT DOESN'T HAVE TO BREAK YOUR BONES TO HURT YOU!

BY WILLIAM BRADLEY MASON, JR.

But words cast at you—written or spoken—must meet certain criteria before they are deemed actionable, according to a recently publicized decision of the Court of Appeals of Virginia. And no, I am not talking about the "Johnny Depp" defamation trial.

The ruling in *Theodore Theologis v. Mark Weiler, et al.* (Record No. 0133224, 2023) deals with directors, just not the ones behind the camera. Several community association members in Fieldstone Townhouse Association, Inc. criticized the board president in a petition for a special meeting for removal, in a letter circulated to the community members, and in a "social media post" on the website "NextDoor."

Among other things, the communications alleged that the president was "capricious" in his enforcement of "HOA policy" and "has broken our HOA bylaws." Other alleged mudslinging noted by the Court included statements by the defendants claiming that the board president "had made repeated efforts to impose far more restrictive policies that provided for in the Covenants & By-Laws [and]

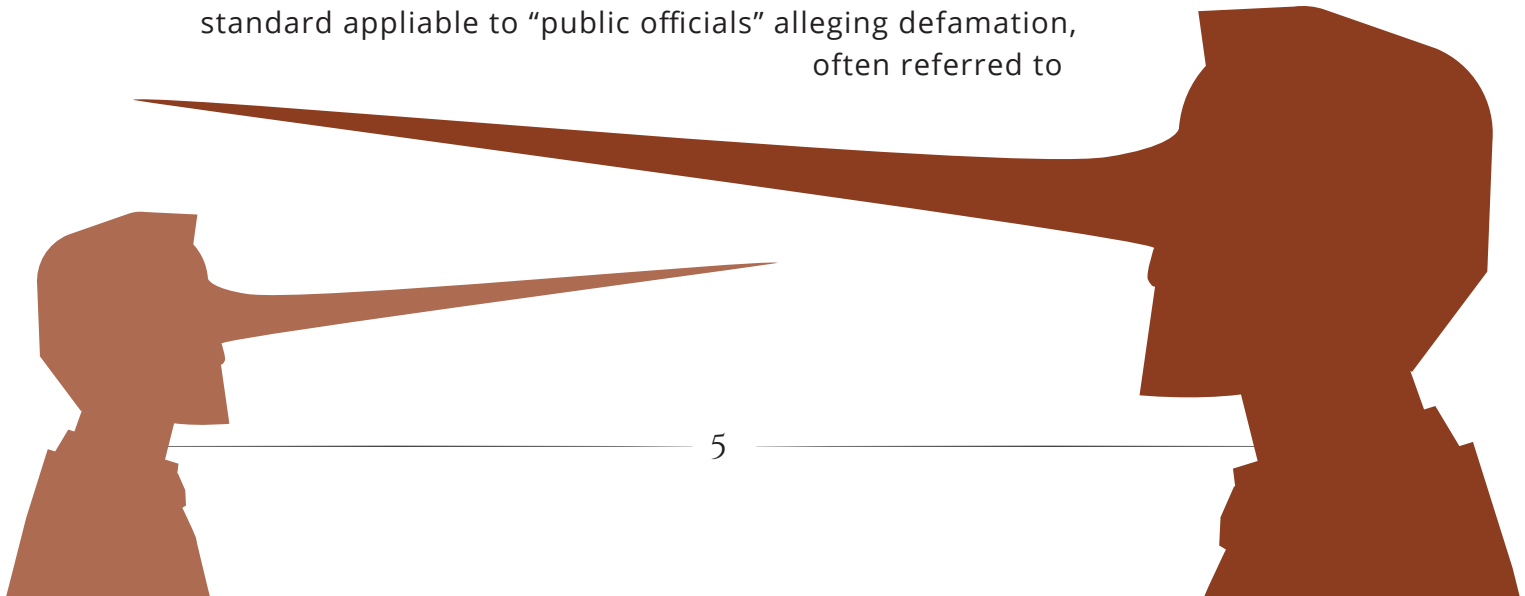
usurp[ed] the authority granted by the Board as a whole via the Covenants & By-Laws." The recall effort "fizzled," noted the Court, however, passions did not. Theologis sued.

Defamation is one of the few notable exceptions to the cherished principle of "freedom of speech," just like screaming "fire" in a crowded theatre. By contrast, yelling "the president is a pie-hole" in a crowded community center is not likely to be actionable but a mere opinion, and therefore, a defense to the defamation exception.

Statements that a director violated the governing documents are not enough because they lack the requisite "sting," stated the Court, which required that the statement "tends to injure one's reputation in the common estimation of mankind, to throw contempt, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous." The Court added, "By contrast, language that is insulting, offensive, or otherwise inappropriate, but constitutes no more than 'rhetorical hyperbole' is not defamatory."

Restrictive covenants are "contractual in nature," and an alleged "misapplication" of the governing documents "is not inherently defamatory and does not stigmatize him as a 'law breaker,'" wrote the Court. A prior decision cited by the Court did "not hold that accusations of violation of covenants are *never* defamatory" simply not "*inherently* defamatory."

The Supreme Court of the United States has adopted a higher standard appliable to "public officials" alleging defamation, often referred to



as the *New York Times* malice standard. (*New York Times Co. v. Sullivan* (1964)). It bars a public official from recovering damages for a "defamatory falsehood" unless he proves that the statement was made with "actual malice," which is further defined as made "with knowledge that it was false or with reckless disregard of whether it was false or not." By contrast, a person who is solely a member of a community association would have less of a burden as the standard for "common law malice" would apply.

The Court decided the case on narrow grounds without addressing the limited-public figure standard…"we therefore express no opinion on the other issues…whether the complaint pleaded such facts sufficient to establish *New York Times* malice."

Recently, an Arizona Court held that directors were limited-public figures for purposes of prevailing on a defamation claim. (*McCoy v. Johnson*, Ariz. Ct. App. 2022). This dispute also originated in the petri-dish of social media and was laced with allegations that certain directorial decisions were religiously motivated. The directors alleged that the limited-public figure standard did not apply to directors of a *private* association. The Arizona Court of Appeals ruled that the directors' actions may not have been important outside the community gates but were of concern to the limited public comprised of community members, and therefore, were limited-public figures with respect to their services on the board. Finally, the Arizona Court noted that the directors voluntarily ran for the board and submitted themselves to such scrutiny. In short, they asked for it.

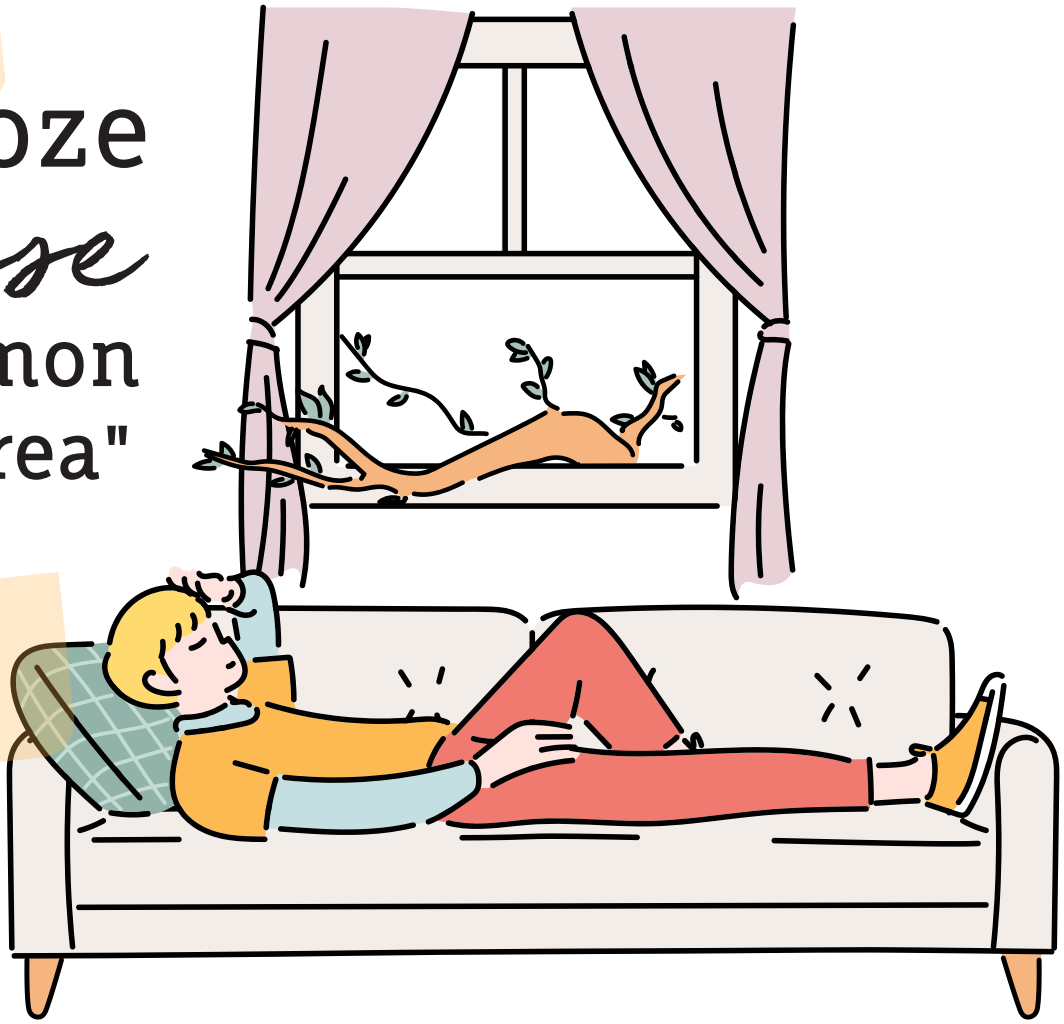
The Court sustained the demurrers filed by each defendant in the *Theologis* case and ruled that the board president failed to check all the boxes for a defamation action. A demurrer is a legal pleading where *all the facts* alleged by the complaining party in this legal reality are deemed to be true for the sake of legal argument. There have been several published defamation cases in Virginia, although we are not aware of any that directly involve community association directors, other than this one.

Nevertheless, this published case provides some teasers into our community association world, and its expanding nexus between social media, the government, and the sometimes, among those perceived as hostile, the governed.

Does the Virginia decision mean that some community association meetings can still be peppered with public comments that may be "insulting, offensive, or otherwise inappropriate," so long as they lack the requisite "sting" and thereafter, may be shushed away as mere "rhetorical hyperbole?" Arguably, the chief "limitation" on saddling directors of a community association with a "limited-public figure" standard is the constraints on financial compensation—there is none.

It may depend on the alleged fact or "falsehood." A statement alleging that the board president, for example, embezzled the association's reserve funds and lost them gambling on horse races may be found to have more "sting" than an alleged violation of the governing documents. And just because a statement lacks the requisite "sting" to be actionable does not mean such a statement is consistent with civil discourse, and should be tolerated as the norm, or even encouraged. As the Honorable Justice Ruth Bader Ginsburg once said, "You can disagree without being disagreeable."

You Snooze *you lose* "Common Area"



by DONNA M. MASON

Could a community association lose the right to tell a lot owner to remove the vegetable garden from common area? A recent Virginia Supreme Court opinion (Horn v. Webb, Record No. 220230, February 9, 2023) ruled "yes".

This case was involving the right of lot owner (Horn) to dock his pontoon boat on the property of lot owner (Webb) in the Lake Barcroft community located in Fairfax County, Virginia. The Virginia Supreme Court overturned the Fairfax County Circuit Court holding that Horn could do so because Horn had established the right by a prescriptive easement. A prescriptive easement is when someone trespasses on the land of another openly, visibly and continuously for at least 20 years . The use of the land must be proven to be "hostile", i.e. without permission of the owner. If Webb could prove that permission was given to Horn to dock the boat, then Horn's argument that he had a prescriptive easement wouldn't hold water as the key

element (hostile use) would be missing to start the 20 year clock ticking.

What makes the Virginia Supreme Court ruling noteworthy as it relates to community associations is how easily the Board could lose the right to demand a member to cease an exclusive use of common area if a prescriptive easement is established. One would typically expect that to prove land use was hostile to the owner that there would need to be a heated argument . . . a Hatfields and McCoys scenario. However, in Horn v. Webb, the neighbors were friendly -- celebrating July 4th together on the pontoon boat. The Court ruled that being friendly or not objecting does not mean permission was granted. In other words, Horn kicking back some beers watching the 4th of July fireworks with Webb on the Horn's pontoon boat docked on the Webb's property does not equal "permission". Yikes!

The second takeaway from this ruling was even if permission can be proven from a prior owner of Webb's lot, that permission does not transfer to the benefit of subsequent owners including Webb. In this case, Webb could prove that a prior owner to his lot did give written permission to dock the boat to a previous owner to the Horn lot. The Court ruled that once the prior owner of Webb's lot sold, the permission was revoked automatically and the 20-year clock started to tick.

But before you say, this is easy, we just grant permission to everyone using common area - you better check your recorded Declaration and Bylaws to make sure the Board has the authority to grant licenses and/or easements. Even if the Board does have authority, you need to ask if it is in the best interest of the association to grant the license or easement? The morale of the story -associations are well served to conduct and document periodic inspections of the common area or the best you may be able to get is some fresh produce.