COMMON INTERESTS

OUR FIRM NEWSLETTER

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A BALANCING ACT

FREE USE OF PROPERTY VS. RESTRICTIVE USE OF COVENANTS

by AIMÉE T. H. KESSLER

Continuing a line of cases that started at least as far back as 1947 with *Schwarzschild v. Welborne*, became more express with *Sainani v. Belmont Glen Homeowners Association*, and even more explicit with *Burkholder v. Palisades Park Owners Association, Inc.*, the Virginia Supreme Court has now decided *Westrick v. Dorcon Group, LLC.*

Lot 5, owned by Dorcon Group, to be used for a wedding venue and bed and breakfast, was excepted from the Berkeley Chase Subdivision's restrictive covenants when the subdivision was established, allowing this Lot to be used for nonresidential purposes as approved by Loudoun County Zoning ordinances. The restrictive covenants also provided that these restrictions could be "excepted, modified, or vacated in whole or in part at any time upon an

affirmative vote of the owners of twenty three (23) lots in said subdivision."

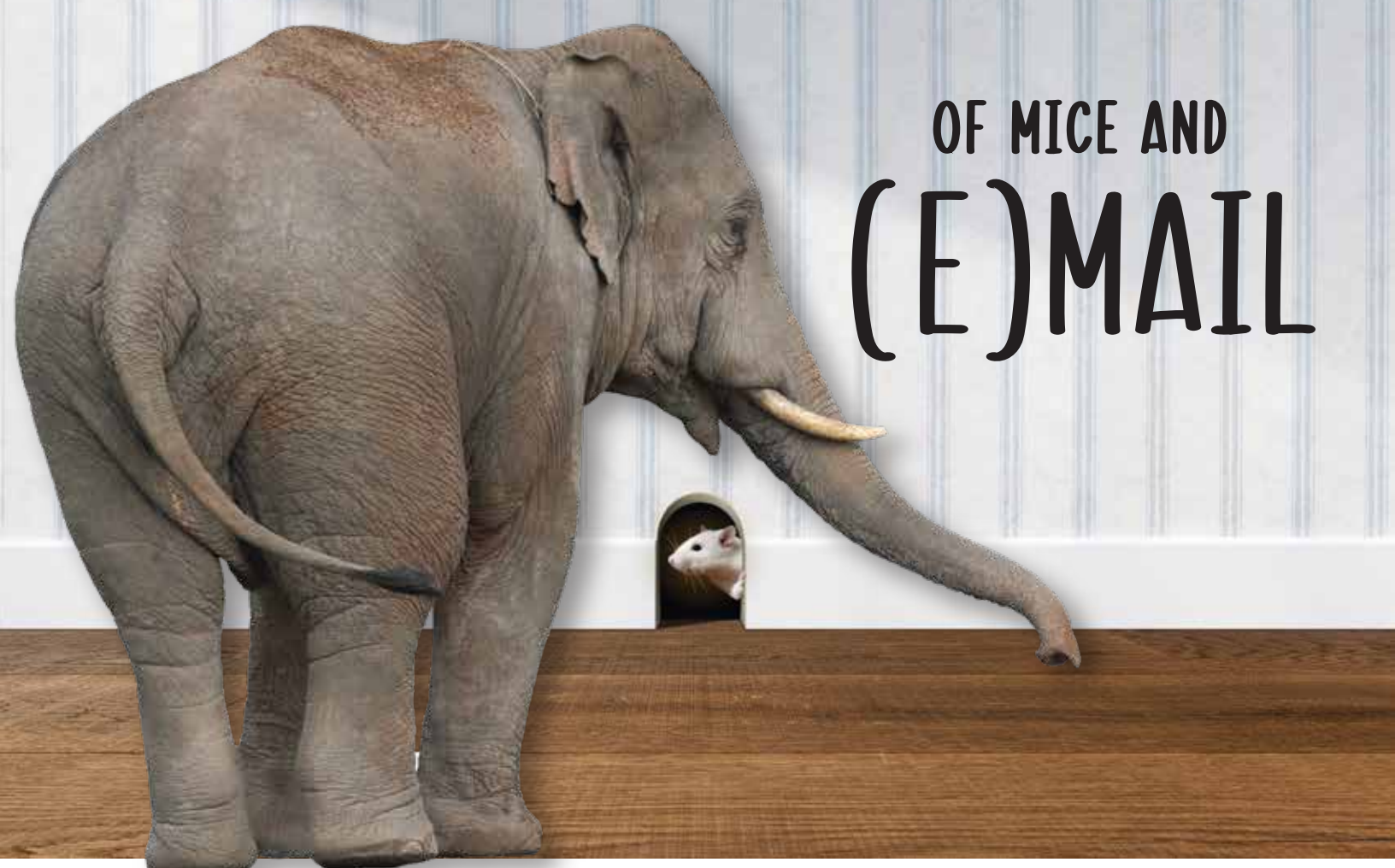
In May 2020, the owners of twenty five (25) Lots in the Berkeley Chase Subdivision recorded an amendment that prohibited all Lots in the Subdivision from being used for certain commercial activities, including event venues. When Dorcon Group learned of the amendment, it sued for declaratory and injunctive relief, which the Circuit Court denied concluding that the amendment was valid under the provision quoted above. The Court of Appeals reversed, interpreting the quoted language as not empowering the addition of new restrictions to the covenants.

In evaluating the legal arguments, the Supreme Court again cited to past cases that held that restrictive covenants are to be construed narrowly and against the person seeking to enforce them, with ambiguity resolved in such a manner to favor the free(er) use of property and against restrictions.

The Supreme Court noted that the language providing that "these restrictions" may be changed, does not address changing the exceptions to the restrictions, which is what allowed Dorcon Group to operate a bed and breakfast and event venue on Lot 5. As the language does not empower anyone to alter the exceptions but only the restrictions, the amendment fails.

Additionally, as the language must be construed strictly, the ability to modify does not allow the addition of new restrictions to the Subdivision, but only to alter the existing ones. While restrictive covenants may include language establishing a means to modify or terminate them, the language establishing such a means must be followed explicitly.

It's important to note that the common law was used by the Court to decide this appeal as this Subdivision does not have a property owners' or condominium association. However, the decision's rationale would likely also apply to the restrictive covenants of a community association. Be sure to consult your counsel with any amendment project.



OF MICE AND (E)MAIL

by **WILLIAM B. MASON, JR.**

Email addresses, even though they may be among the books and records of a Virginia nonstock corporation, are not records available to members for examination and copying under the Virginia Nonstock Corporation Act ("Nonstock Act"), according to a recent decision of the Virginia Court of Appeals in *William L. Respess, et al. v. VMI Alumni Association* (2024).

The Nonstock Act is similar to the Virginia Property Owners' Association Act ("POAA") and the Virginia Condominium Act ("VCA"), in that the POAA and VCA also require that the associations maintain a record of members that includes the names and *addresses* of all members. Furthermore, many community associations are governed by the Nonstock Act, as nonstock corporations, and the POAA as property owners' associations, or the VCA as condominium unit owners' associations. Which governs here?

Presuming the books and records request was made under the Nonstock Act, the *VMI Alumni Association* case is *binding* on Virginia nonstock corporations, but as to a request made under the POAA, the VCA, or Virginia common law (more on that later), it is considered by the courts to be merely *persuasive* authority. However, we are persuaded, and believe that the reasoning of the *VMI Alumni Association* case would justify, that withholding an email address and a director's personal and confidential information (more on that later, too) is allowed under the Nonstock Act, the POAA, the VCA and the Virginia common law.

In the *VMI Alumni Association* case, member candidates for the board of directors of a nonstock corporation were denied access to the email addresses on file with the association, which were requested for the purpose of electronically soliciting votes for an upcoming election. The VMI Alumni Association conducted most of its business through email correspondence and maintained a record of the members' email addresses. Its records also included "very detailed" and often "confidential information" about its members. A separate provision of the Nonstock Act provides that it does not limit the members' "common law right" to inspect the corporation's records. However, the Court of Appeals stated that this particular request for the email addresses was made pursuant to a separate section—the books and records provisions of the Nonstock Act—and that this "statutory right" did not require VMI Alumni Association to reveal the members' email addresses.

"Petitioners," noted the Court of Appeals, "did not assert any right of inspection under Virginia common law." The Court of Appeals clarified that "there are two sources for such rights"…the common law, as may be modified by the Virginia General Assembly, and the Code of Virginia. It cited a published ruling of the United States Supreme Court from 1811…"When our ancestors migrated to America, they brought with them the common law of England." The "general rule" at common law,

summarized the Court of Appeals, is that all shareholders have the right to inspect the books and records of the corporation. However, the Court of Appeals did not "reach" whether the Petitioners would have been entitled to the email addresses under Virginia common law. Our previous recommendations in this article stand and are based on the logic of the *VMI Alumni Association* case.

The Court of Appeals traced decades of enactments of statutes applying to Virginia stock and nonstock corporations. Although acknowledging that nonstock corporations are required to membership list of the names and addresses of those entitled to vote, an "address," said the Court of Appeals, does not mean an "email address." Their rationale for stating that is based on the fact that recent amendments to the Virginia Nonstock Corporation Act have demonstrated the General Assembly's familiarity with email communication. The Court of Appeals found the bypass of the book and records provisions to be "conspicuous." In other words, if the General Assembly had intended for "addresses" to include "email addresses," it would have written the statute differently and required corporations to maintain, and disclose, all member information, including email addresses.

Finally, the petitioners argued that recent amendments to the Virginia Stock Act specifically excluded email addresses from the disclosure requirement but a corresponding amendment to the Virginia Nonstock Corporation Act was never made thereby inferring that email addresses

are required to be disclosed when requested under the Nonstock Act. The Court held that such an inference would be "unreasonable". Citing a prior case, the Court of Appeals wrote…"Like Congress, the General Assembly does not generally 'hide elephants in mouse holes.'" We are not sure if the "mouse hole" argument made the voyage across the "Pond" as part of the common law of England.

The Court also notes that the Nonstock Act does not provide that ***all*** addresses and ***all*** information as to the members must be disclosed…"it is not a vehicle to discover all information about a member that may happen to reside in the corporation's files." The Court of Appeals acknowledged that VMI "recoils at such a broad construction, which it fears would require it to disclose confidential alumni information."

The Court of Appeals ruling does not directly address the POAA or the VCA, and whether those statutes, if broadly constructed, would require disclosure of ***all*** information on the members and/or directors, held as books and records of the association, as those laws were not the basis of VMI's actions. However, by analogy, with email addresses, we are once again persuaded by the reasoning of this case and believe the denying books and records requests for email addresses made under the POAA or the VCA should be extended to the personal and confidential information of members and/or directors provided to the community association and therefore not provided under a books and records request.

Associations may eventually wish greater certainty and seek an amendment to the Nonstock Act, POAA and the VCA excluding email addresses and other confidential information of directors or other relevant volunteers from statutory disclosure and negating any argument for access to these records according to the common law. Otherwise, members of the community might decline to serve on the board of directors, and the community might be deprived of volunteer leaders of quality, creativity, and having the ability to communicate with their neighbors. This dilemma will soon become the "elephant in the room." And there is no mouse hole big enough to hide it.

The Rising Tide of Leak-o-nomics

by **ROBERT J. SEGAN**

Happy Budget Season!

We hear that the line item giving boards the most severe case of sticker shock is the upcoming year's insurance premium. This is especially true of condominium associations, which must insure against plumbing leaks.

The large increase in premiums has many causes, including enormous claims like the Florida Surfside tragedy, weather events and fears of future claims caused by climate change. Because of these circumstances at least one large insurer has left the market, leaving a dwindling supply which faces the same demand. When that happens, prices rise dramatically.

We don't have any magic formula for decreasing those costs, but there are important things to know as you cope with having to absorb them. First, you should know that Virginia condominium associations are required to promptly notify owners in writing of changes to -- or termination of – the master insurance

policy. Second, as you consider methods to save the costs of additional premiums, a prime target is increasing the deductible for claims. Before you do that, you should know what your governing documents provide regarding payment of the deductible.

Condominium bylaws generally one of have three different methods of determining who pays the deductible.

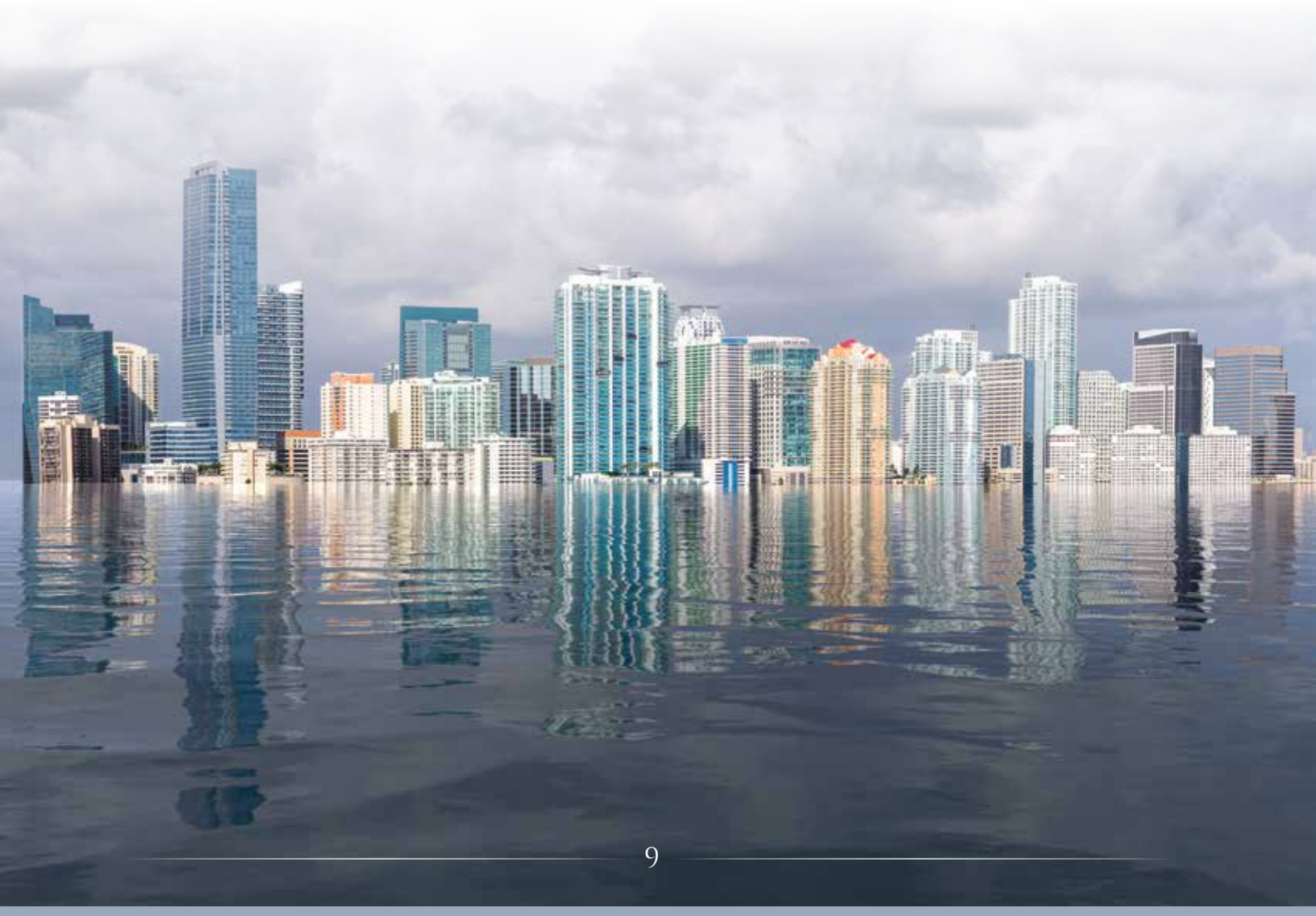
1. Perhaps the most common Bylaw provision requires the association to pay the deductible unless it can prove that the leak was caused by the negligence of the owner or occupant of the leaking unit. This places the burden of paying a larger deductible on the association, even if the leak came from a unit, because it is often difficult to obtain sufficient evidence to meet the burden of proving that the leak was caused by negligence. Under this Bylaw provision, proving that the leak came from a unit is not enough. You must prove that the leak came from the unit because an owner or occupant did not reasonably maintain the unit, causing the leak.

2. Your Bylaws may say that the association pays the deductible only if the leak was the fault of the association. This is usually found in a Section of the Bylaws stating what happens if the proceeds of the master policy are insufficient to cover a claim. In those circumstances, the owners of the damaged units (or their insurance carriers) will have to pay the deductible unless they can show that the leak originated in the common elements and that it was due to the Association's negligence. This often lets the association off the hook, but it impacts innocent unit owners, who should make sure they have insurance to cover this.

3. The least common Bylaw provision allocating the deductible stipulates that the responsible party is determined by where the leak originates, regardless of negligence. So if a leak comes from a unit, under this provision, the deductible is charged to the leaking unit owner regardless of the circumstances.

We are often asked whether the Association is required to submit a large claim under its master policy to its insurer, when a unit owner either innocently or negligently caused the leak. The answer is yes, unless the association is prepared to absorb what the master insurance carrier would have covered. Master insurance protects unit owners, as well as the association, so it covers losses, even those the association has had no part in causing.

Insurance issues can be complex, befuddling and counterintuitive. So it is best to check with counsel to get guidance on these matters promptly after they occur.



Corporate Transparency Act Reporting Deadline of January 1, 2025 is Looming. Act Now!

We have all hoped that by now community associations would be exempted from the burdensome requirement to report Beneficial Owners Information ("BOI") with the Financial Crimes Enforcement Network ("FinCen") as required under the Corporate Transparency Act. Unfortunately, the exemption is not forthcoming for 2024 as the Court has not granted an extension beyond the January 1, 2025 deadline for community association compliance.

There is some difference of opinion throughout the country whether "unincorporated" condominium associations are required to report. However, it is our strong recommendation that unincorporated condominium associations comply with the BOI reporting requirement. Until there is clear direction from FinCen that unincorporated condominium associations are exempt, all condominiums should assume they are required to timely meet the deadlines for the BOI reporting. Failure to do so would subject the association and board members to steep penalties and possible imprisonment. Stay connected to updates concerning the filed lawsuits as well as details concerning the Corporate Transparency Act at https://www.caionline.org/Advocacy/Priorities/CTA/Pages/Landing.aspx

Beginning action to comply NOW is very important so that you do not get caught in the "traffic jam" with millions of companies trying to comply later in the year.

The civil penalty for willfully failing to meet the January 1, 2025 deadline is $591 per day (adjusted for inflation). In addition, willful noncompliance is considered a criminal offense, punishable by up to 24 months imprisonment and a maximum fine of $10,000.

Here's what we recommend you do **NOW**:

- Contact your association's management company to determine whether they will be partnering with a reputable reporting company to assist with the association's filing requirements.
- If management company is not providing this service, or if your association is self-managed, your association should directly contact a reporting company. **BEWARE OF FRAUDULENT COMPANIES!** There already are companies that are offering reporting services that are not legitimate.
- Alert board members that they will be required to submit the required information promptly (full name, residential address, date of birth, copy of passport or driver's license) to the reporting company at the link the association provides.
- In addition, alert any individual property owner who has 25% or more ownership interest in the condominium or homeowner association that they must also comply with these requirements.
- Communicate to potential candidates running for the board that they must comply with the BOI reporting if they are elected. We recommend preparing a disclosure that explains what information a board member will be required to provide, along with the penalties for failure to do so.
- Consult with the community association's accountant to determine if the association qualifies under an exemption, i.e. tax exempt 501(c)(4). **Note: Most Community Associations are NOT 501(c)(4) so they will not qualify.**
- Identify who is the administrator of the reporting. The administrator must oversee not only that the initial reporting is filed before January 1, 2025 but is also responsible to update the BOI reporting **within 30 days** of a change to the Board as well as updating expired identifications (passport or driver license). **Note: Even if a third party reporting company is used, it will be up to the administrator**

to update board members as the reporting company will have no knowledge of a change of the board. Third party reporting companies will typically as part of their service provide a notification of an upcoming expired identification but the administrator is still responsible that the identification is timely updated to file the amended BOI reporting within the 30 day deadline.

- If a board member fails to cooperate to comply with the BOI reporting, contact the association's counsel for direction how to proceed.