COMMON INTERESTS

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The Basics of Reserve Studies

by **ROBERT J. SEGAN**

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.

VIRGINIA ADOPTS MANDATORY WORKPLACE SAFETY RULES!

*A **Must Read** for Virginia Employers*

by **DONNA M. MASON**

Virginia employers will have another challenge to meet in order to ensure that their employees are safe during this pandemic. The Emergency Temporary Standard Infectious Disease Prevention ("the Temporary Standards") will become effective the week of July 27, 2020, making Virginia the first state in the nation to adopt mandatory workplace safety rules to prevent the spread of the coronavirus. The Temporary Standards will expire 1) six months from the effective date, or 2) at the expiration of Governor's State of Emergency, or 3) when replaced with Permanent Standards, whichever comes first. These Temporary Standards are "in addition" to all previous Executive Orders.

The summary below is only intended to be an overview of some of the provisions of the Temporary Standards. As these Temporary Standards are quite complex, employers should consult with legal counsel to assist with the development of the workplace safety rules.

Important information and tools for training and compliance are now available at:
https://www.doli.virginia.gov/covid-19-outreach-education-and-training/

A sample template for creating the Workplace Safety Rules is also available at:
SeganMason.com, under our "Resources" Tab

Virginia Employer Mandates

Regardless of employee risk level, all Virginia employers must comply with the following:

- Comply with the various sanitation requirements outlined in Temporary Standards
- Assess risk level of each job task and comply with the appropriate Temporary Standards
- Educate employees about COVID-19 and encouraging self-monitoring
- Develop Return to Work policy (cannot rely on antibody testing)
- Prohibit known or suspected COVID-19 infected employees from working
- Implement flexible sick leave policies consistent with public health guidance and applicable laws
- Discuss the company's practices and policies to suspected and known COVID-19 cases with subcontractors and companies that provide employees to your company
- Establish system to receive reports of positive COVID-19 test results and communicate system to employees and others as detailed in the Temporary Standards
- Develop procedure for employees to report when they are experiencing COVID-19 symptoms (unless alternative diagnosis made)

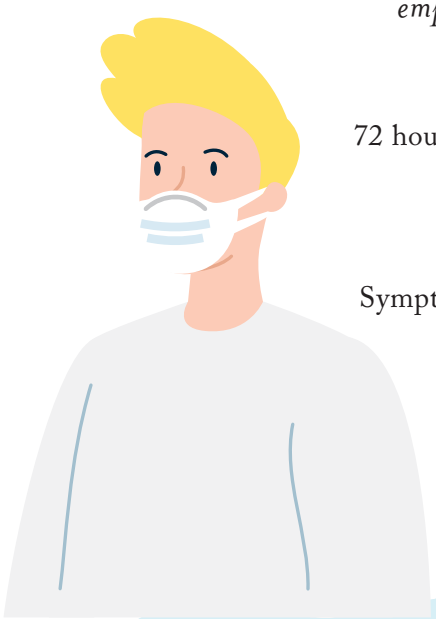
- Provide employees access to their records relating to their exposure during employment
- Control access to breakrooms and common areas as outlined in the Temporary Standards
- Ensure compliance with industry standards for respiratory protection and PPE when more than one employee is occupying a vehicle or when an employee's workspace does not allow for physical distancing

Assessing Risk Levels

The Temporary Standards outline specific mandatory standards for an employer depending on the risk level of exposure to COVID-19 - Very High, High, Medium or Low. The Temporary Standards outline the factors to assess the risk l. Basically, think of health care workers as being in very high/high risk; employees working with the public like retail stores, hair salons, etc. as being medium risk; employees in office buildings that can maintain six feet physical distancing and minimal contact with other employees or the public as low risk.

Pick Approach for Return to Work Policy

For known or suspected COVID-19 positive employees to return to work, employer must select one of the following two approaches:



Approach 1 – Symptom-based strategy

72 hours passed since symptom free AND at least 10 days passed since first symptom

Approach 2 – Test-based strategy

Symptom free AND 2 consecutive negative FDA approved tests collected 24 hours or more apart

For known asymptomatic COVID-19 employees to return to work, employer must select the following two approaches:

Approach 1 – Time-based strategy

10 days has passed since tested positive (unless develop symptoms during 10 days)

Approach 2 – Test-based strategy

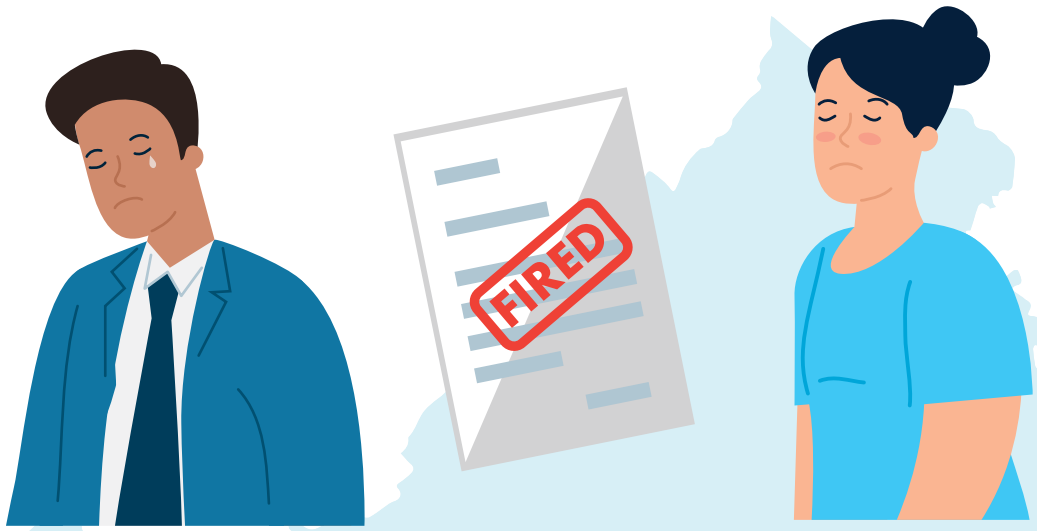
2 consecutive negative FDA approved tests collected 24 hours or more apart

Prohibits Discrimination against an Employee

Employer is prohibited from discriminating against an employee based on:

- Employee exercising their rights under the Temporary Standards
- Employee voluntarily wearing PPE not provided by employer
- Raising reasonable concerns about COVID-19 infection control to the employer, other employees or to the public

Again, this is only an overview of the Temporary Standards, with interpretation of them and additional guidance from the Department of Labor likely forthcoming. As a result, we recommend consulting with legal counsel to develop workplace safety rules and to be sure you, as an employer, have the most up-to-date information.



Sign, Sign Everywhere There's Signs

Messing up the harmony
*Breaking my mind**

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

The resale certificate prepared by homeowner associations must now include a statement setting forth any restrictions as to the size, place, duration, or manner of placement or display of political signs by a lot owner on his lot.

The legislation focuses strictly on resale disclosure and did not alter the existing statutes governing the use of property found in the Virginia Property Owners' Association Act (POAA). Other than "for sale" signs, many homeowner association declarations prohibit any kind of sign. Some associations have adopted rules limiting the size, number and duration of political signs to "keep the peace" during the march to November's elections. This may be a wise tactic given the potential legal conflict that looms, and now, has creaked open the door to the POAA.

Is this new statute, a "sign" of things to come? There have been dust ups before. A bill was once introduced in the Virginia General Assembly to strike down homeowner association restrictions on political signs but was ultimately withdrawn by the patron from Prince William County. A lot owner reportedly sued a Fairfax County association for removing political signs—but the case was settled outside of court.

At some future point, the Virginia General Assembly, or the Supreme Court of Virginia, may be on the "horns of a dilemma." Does the Constitution of the United States or the Constitution of Virginia apply to private homeowner associations? When you joined a community association did you think you left your constitutional rights at the neighborhood entrance? Due process. Right to Assemble. Freedom of speech. Political signs.

The Attorney General of Virginia has opined that the Constitution of the United States does not apply to private entities or associations because they are not governmental actors. Or are homeowners' associations the "fourth level of government" as some suggest?

The New Jersey Supreme Court held that the free speech guarantees of the New Jersey State Constitution applied to a homeowner association and struck down a rule prohibiting political signs. You may wonder what New Jersey has to do with the Commonwealth of Virginia. Lots. Critical parts of the New Jersey State Constitution were modeled in colonial times after the Virginia Constitution.

The Supreme Court of Virginia has been known as a "property rights" forum when reviewing homeowner restrictions of the free use of property. But, is it ready to embrace the application of constitutional rights to a homeowners' association? A more likely result is that the courts will refuse to grant an association request for injunctive relief to enforce covenants prohibiting political signs because to do so would require "state action."

**Lyrics (in part) by Five Man Electrical Band (Les Emmerson, author)*

Thanks for Reading!

the 2020
Statutory Handbook
is now available
[on our website]

Get the info & tools
you need on our
website's NEW
[Resources tab]