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THE QUARTERLY ASSESSMENT

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DON'T FORGET!

The deadline for Virginia common interest community associations to implement a written internal complaint process by which members and residents can challenge "adverse decisions" made against them by the association is **September 28, 2012**. *Check out Page 3* for more information.

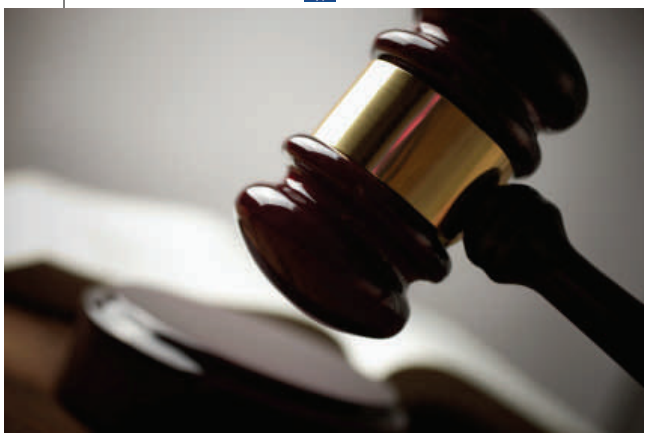
Authority to Assess Violation Charges: A Recent Virginia Supreme Court Decision

By Allen B. Warren

Is your Association in Virginia? Does your Association assess violation charges against owners who violate the Association's governing documents? If so, there is a recent Virginia Supreme Court decision that you should be aware of. On June 22, 2012 (in the case of *Shadowood Condominium Association v. Fairfax County Redevelopment & Housing Authority*), the Virginia Supreme Court ruled that the Shadowood Condominium Association's Board of Directors did not have the authority, through a Board-adopted rule, to assess violation charges against a non-compliant unit owner.

The Court reached this conclusion based on the provisions in the condominium's recorded master deed (commonly known these days as the "declaration"). The condominium's master deed provided authority for the unit owners' association to impose monthly assessments for the maintenance, repair and operation of the condominium, but also stated that "*no . . . other sums* shall be assessed . . . [or] collected . . .other than for the maintenance, repair, replacement or improvement of the general common elements." Given this language in the condominium's master deed, the Court held that the violation charges assessed against the noncompliant unit owner were beyond the scope of the association's authority as defined in the master deed, therefore rendering invalid the board-adopted policy resolution providing for violation charges. Notably, the Court did not appear to give any significance in this case to the fact that the Condominium Act provides that violation charges can be charged "to the extent the condominium instruments *or rules* duly adopted pursuant thereto expressly so provide," essentially deciding that Shadowood's enforcement policy was inconsistent with its own master deed.

Although this ruling specifically addressed a condominium association, similar language regarding violation charges is found in the Virginia Property Owners' Association Act, therefore potentially affecting non-condominium common interest community associations. We encourage our community association clients in Virginia to re-examine their authority to assess violation charges in light of this recent court decision. If you have any questions about this court decision and how it impacts your particular association, please do not hesitate to contact us.



Neighbor vs. Neighbor: Knowing When to Enter – or Exit – the Fray

By Brendan P. Bunn

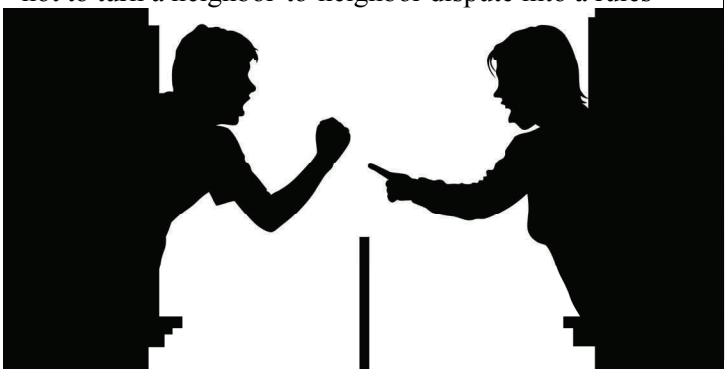
Condo resident works his usual late shift, comes home at midnight and tunes his massive TV to ESPN – with the volume just loud enough that his immediate neighbor is awakened on a nightly basis. *Result? Sleep-deprived neighbor complains about frequent noise problem to the Covenants Committee.*

Townhouse owner washes her VW in the driveway, the hose spray cascading onto her neighbor's SUV, causing some water spots. *Result? SUV owner complains to management, arguing that his property rights have been violated by the car-washer.*

Guy smokes cigar on his high-rise balcony, escaping his wife's wrath and sparing the adjoining units of cigar smoke invading the ventilation system – but irritating the sunbathing lady on the balcony just above. *Result: Smoked-upon lady files a complaint at the front desk, alleging smoke nuisance.*

These kinds of neighbor-to-neighbor disputes regularly vex association boards, covenants committees and managers. Sure, it's easy to assess violation charges against a dog owner in a pet-free building or the hoarder who unleashes a roach attack on the entire floor. But what does one do about borderline violations or low-level annoyances? Should the association press ahead with the rules violation process (including fines or charges) simply because there is a complaint?

Or should the Association – perhaps recognizing that some residents are more sensitive – decide not to act, leaving the neighbors to deal with one another? One truth that boards often forget is that an association can choose not to turn a neighbor-to-neighbor dispute into a rules issue or enforcement controversy. In most associations, the governing documents empower owners to take legal action to enforce the covenants, so the association is not the only game in town. Sometimes "no action" is the answer. Other times, of course, the violations are the very type that associations are created to address.



Reaching the Right Decision

The proverb "good fences make good neighbors" rings hollow in a world where fences are often regulated or prohibited. Whether fences are allowed or not, living in a multi-unit environment forces residents to achieve a reasonable tolerance level for all sorts of human activity. Defining that ever-elusive standard of "reasonable" is the real challenge. In order to do so, one must ask several questions: *What do our documents say? How credible is the complaint and the complainer? How would enforcement in this particular case affect the rest of the community?* And most importantly – *What kind of community do we want to live in?*

Here are some tips, thoughts and ideas about how to approach neighbor-to-neighbor disputes. These suggestions may assist your association in developing a process by which to determine if the association should become involved in a dispute between neighbors.

First Contact: Between Owners

How often do owners lodge complaints about neighbors they have never met? Too often. In many communities, the rules identify the association's formal complaint process as the first stop in addressing a recurring dispute between neighbors. This is probably a mistake.

A better approach is to require owners – as a prerequisite to pursuing a formal complaint -- to make good-faith attempts to resolve issues informally and directly with one another before involving the association or management. Personal contact can often lead to a successful resolution based on traditional concepts of neighborliness, consideration and cooperation. This approach has the added advantage of setting expectations high for adult, mature behavior among owners. Most of the time, reasonable people should be able to work these issues out – and this expectation should be the starting point for the association's rules enforcement process.

Initial Investigation

Last year, Joe Palca and Flora Lichtman wrote a book called *Annoying: The Science of What Bugs Us*, in which

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they explore the reasons why certain things – from nails on a chalkboard to crying babies – get under one's skin. In the world of community associations, we all know that certain owners are hypersensitive to certain stimuli, whether noise, odors or other kinds of annoyances.

It is useful to identify complaints from hypersensitive owners sooner in the process rather than later. A "preliminary" or "initial" investigation by an experienced manager who can tell the difference between a hypersensitive complaint and a valid one can accomplish this and act as the initial filter so that the committee or board receive only the more serious violations.

How About Mediation?

A mediation is a process in which a neutral party attempts to bridge a chasm between two opposing parties by meeting with them and exploring whether they can voluntarily resolve their differences. The mediator can be the association's counsel, an experienced manager or perhaps a member of the board who has no particular stake in the situation. This approach is increasingly useful in neighbor-to-neighbor disputes and for good reason.

First, a mediation session forces the parties to physically sit down and face one another, which may or may not have occurred previously. Second, the presence of a neutral third party can often impose a level of "adult supervision" over the two disputing residents and make them realize that their lack of consideration or super-sensitivity is either unreasonable or immature. Yes, mediation may take some investment of time and even fees, but a two-hour mediation with an attorney may be far less expensive than a lawsuit with an angry owner. Mediation also has the benefit of allowing all parties to vent their frustration, which can often decompress the situation and allow a resolution.

Due Diligence and Next Steps

Of course, not all neighbor-to-neighbor issues can result in settlement and happy residents. If everything else has been tried, winding through the rules violation process is the logical next step, with the association formally investigating the allegations to determine if the alleged nuisance or rules violation is appropriate for enforcement action. For noise violations, this may involve inspecting the upstairs unit to ensure that the requisite carpet coverage is in place or offering to come to the complaining resident's unit to hear the alleged noises. In other situations, it may be required for the committee to set a hearing date to obtain testimony and other documents related to the claims of each resident.

When does an association decide that a dispute is truly a neighbor-to-neighbor issue that does not implicate the association? This is not always easy to tell. Here are some factors a board should consider in reaching this determination:

Factors Favoring a "Hands-off" Approach

- The alleged violation is "de minimus" and is probably being raised only because the complaining owner is hypersensitive.
- The alleged violation is simply not observable or verifiable.
- The alleged violation involves ONLY the two owners at issue and does not involve other owners or the common areas.
- The documents allow owners to take legal enforcement action on their own without the association's involvement.
- The alleged violation is not typical in the community, would be costly to enforce and/or does not appear that it would impact other homes or residents.

Factors Favoring Enforcement Action by the Association

- The violation is clearly observable or verifiable – and violates the rules or governing documents.
- There are concerns of safety, property damage or a decline in property values for the community in connection with the violation.
- There would be a negative precedential effect of NOT enforcing the rule throughout the community.

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CICB-mandated Complaint Procedure Policy

Please be reminded that the new CICB Ombudsman Regulations now require that Virginia Common Interest Communities (*i.e.*, condominium associations, including commercial condominiums, property owners' associations and real estate cooperatives) adopt a written complaint process by which members can challenge "adverse decisions" made against them by the association. **This complaint process must be in place by Friday, September 28, 2012**. Further information about this new statutory requirement can be found on our website and we encourage our clients and their managing agents to contact us for additional guidance in preparing the required Complaint Procedure in time for adoption by the CICB's September 28, 2012 deadline.

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In sum, there are times when it is appropriate for an association to act on behalf of all other owners and enforce the governing documents, even if the dispute is primarily neighbor-to-neighbor. Still, keep in mind that the association is not obligated to get involved in every single neighbor-to-neighbor dispute. If the common area is not affected, or if the issue between the owners is clearly personal or does not implicate other owners or safety concerns, the board can make a valid business judgment that association involvement is not warranted, thus leaving the owners to pursue their own options. After all, associations have limited resources, and rules – while they are indispensable in community association living – are no substitute for a sense of community, fairness and tolerance among neighbors.

"SIGN, SIGN, EVERYWHERE A SIGN BLOCKING OUT THE SCENERY BREAKING MY MIND" [1]

(Restrictive Covenants and Free Speech)

By Jerry M. Wright, Jr.

[1] From the song *Signs*, written by Les Emmerson

After you read this article, take a drive around your neighborhood. Chances are you will see at least a handful of signs placed in yards, in front of buildings, in windows, etc. – "for sale" signs, contractor signs, meeting notices, advertising signs, you name it. And in this, an election year, there is a greater chance you will see the political campaign signs cropping up throughout your development. Signs are a form of speech, and as such, enjoy certain protections under the U.S. Constitution and state constitutions against abridgement by federal, state and local governments. This article focuses on the balance between the constitutional protections of speech versus the rights of associations to enforce covenants, rules and regulations that restrict the placement of signs in a community, in light of recent opinions of the Virginia Attorney General and the New Jersey Supreme Court.

Recently, the Attorney General of Virginia opined on the validity of local ordinances that impose size limitations on political signs placed upon private property. The ordinances in question impose stricter size restrictions on political signs than those placed on other temporary signs. Va. Code § 15.2-2280 authorizes localities to restrict signs as to "size, height, area, bulk, location …" Despite this authority, however, the Attorney General opined that localities may regulate temporary political signs **only** in the same manner as other temporary signs. Thus, a locality may not restrict the size of political signs to a smaller size than that allowed for other temporary signs. The Attorney General based this opinion on the more specific mandate of Va. Code § 15.2-109, which provides, in pertinent part, the following:

> *No locality shall have the authority to prohibit the display of political campaign signs on private property if the signs are in compliance with zoning and right-of-way restrictions applicable to temporary nonpolitical signs, if the signs have been posted with the permission of the owner. The provisions of this section shall supersede the provisions of any local ordinance or regulation in conflict with this section.*

The Attorney General's interpretation of the relevant statutory provision confirms that local governmental entities cannot treat political signs differently from other temporary signs.

So how does this opinion relate to community associations prohibiting or restricting signs, political or otherwise? The answer is that it does not. The opinion pertains to ordinances of local governments, not provisions of private recorded covenants.

However, the Attorney General was requested to pro-

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vide this opinion by the same Virginia Delegate who proposed legislation during the 2012 General Assembly that would invalidate any community association prohibition against an owner exercising his or her constitutional right to free speech on his or her own property. The Bill was House Bill 1008, which proposed to add the following language to the Virginia Property Owners' Association Act and the Virginia Condominium Act (the proposed language is essentially the same for both Acts, so the language quoted is for both Acts, with references to the Condominium Act in parentheses):

> *No provision of the declaration (condominium instruments) or rules or regulations adopted pursuant thereto shall prohibit a lot (unit) owner or any person entitled to occupy a lot (unit) from exercising his constitutionally protected right of freedom of speech upon property to which the lot (unit) owner or person entitled to occupy a lot (unit) has a separate ownership interest or a right to exclusive possession. Any provision of the declaration (condominium instruments) or rule or regulation adopted pursuant thereto that prohibits the exercise of such right upon such property shall be void as against public policy. An association (unit owners' association) may, however, establish reasonable time, place, and manner restrictions on such property provided such restrictions are necessary to protect a substantial interest of the association (unit owners' association).*
>
> *In any action brought by the association (unit owners' association) under § 55-513 (§ 55-79.80:2) for a violation of such restriction, the association (unit owners' association) shall bear the burden of proof that such time, place, or manner restriction is necessary to protect a substantial interest of the association.*
>
> *The association (unit owners' association) may restrict a lot (unit) owner's exercise of freedom of speech upon the common area (common elements).*

House Bill 1008 was continued to the 2013 session of the General Assembly.

As previously mentioned, political signs are a form of speech, and such speech typically cannot be abridged by "state action" (regulatory action by a governmental entity, whether federal, state or local). Constitutional free speech protections, however, do not typically apply in a setting where a private party, such as a community association has private covenants that restrict or prohibit speech such as signs within a community - unless you're in New Jersey.

In a recent decision, Mazdabrook Commons Homeowners' Association v. Khan, 2012 WL 2120868 (N.J. June 13, 2012), the New Jersey Supreme Court ruled that an association's policy banning all signs, including political signs, violated the free speech clause of the New Jersey State Constitution, which provides, in pertinent part, "*[e]very person may freely speak, write or publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.*" N. J. Const. art I, paragraph 6.

In that case, a resident of a townhouse community posted political signs in the window of his home for his campaign to run for town council. The association's rules and regulations prohibited signs of any kind from being placed in or on, among other things, windows and doors. The community's public offering statement contained an exception for one "For Sale" sign on the interior of a unit.

Citing a prior New Jersey Supreme Court case, State v. Schmid, 84 N.J. 535 (1980), the New Jersey Supreme Court acknowledged that the New Jersey Constitution afforded broader protections than the U.S. Constitution. In other words, the New Jersey Constitution protects free speech not only from government action but also from unreasonable restrictions by private parties. In Schmid, the Court focused its attention on the balance between the

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fairness and degree of the restriction versus the purpose and nature of the expressional activity.

In Schmid, the association's restriction completely prohibited political signs in a community, which the Court weighed against the political speech (in the form of a sign) by an owner in that same community. The Court implied that prohibiting *political* speech lies at the core of constitutional free speech protections. A complete ban could not be considered a minor restriction of the important constitutional right of political speech. Moreover, the prohibited "speech" only minimally interfered with the association's property or common areas. The Court noted that Khan did not erect a billboard, put up a soapbox, or use a loudspeaker. He merely posted a sign in his window and on his door.

The Court distinguished the facts in Mazdabrook from the facts in a prior (2007) decision on the same topic (Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 192 N.J. 344). In that case the Court upheld minor restrictions that permitted homeowners to place signs in their windows and in flower beds adjacent to their homes. The New Jersey Supreme Court found that the Twin Rivers Association had not unreasonably abridged the free speech right of it members, inasmuch as its restrictions permitted one sign per window and one sign per lawn.

In summary, then, in both the Mazdabrook and Twin Rivers cases, the New Jersey Supreme Court recognized that the First Amendment free speech protections afforded in the U.S. Constitution apply only to abridgements by governments, while the New Jersey Constitution protects citizens from abridgements of speech by private parties as well. The New Jersey Supreme Court then determined that whether a restriction on political signs is prohibited by the New Jersey Constitution depends upon the reasonableness of the restriction weighed against the purpose and import of the right of expression being restricted. Finally, in Mazdabrook, the New Jersey Supreme Court determined that a complete ban on signs (including political signs) was unreasonable when weighed against the importance of political free speech. Accordingly, the association's ban on political signs violated the New Jersey Constitution.

So should Virginians care about what the New Jersey Supreme Court thinks? The free speech provisions of the New Jersey Constitution are very similar to that of Virginia's Constitution; however, the Virginia Supreme Court has not addressed this specific issue. Accordingly, if a court in Virginia were to address the constitutionality of a private restrictive covenant restricting or prohibiting signs, the recent New Jersey cases could be instructive, and perhaps even persuasive, to the Virginia courts.

However, we note that other states have reviewed the issue and arrived at different conclusions than the New Jersey Supreme Court. Those other states have refused to extend constitutional protections to actions by private parties. For instance, in Linn Valley Lakes POA v. Brockway, 250 Kan. 169 (1992), the Kansas Supreme Court found that a private restriction against placement of signs on property did not constitute a "state action" under the U.S. Constitution or the Kansas Constitution, which is similar to Virginia's constitution.

In sum, supreme courts of other states have come down on both sides of the issue. It would not be a surprise to see the issue before the Virginia Supreme Court in the future. But irrespective of the courts, we predict that the issue will be addressed in some manner by the Virginia General Assembly in 2013. Until the Virginia courts or the General Assembly rule or legislate to the contrary, associations remain obligated to enforce their covenants, rules and regulations, including restrictions that reasonably limit or prohibit signs on properties in their respective communities.

How to Avoid a Fair Housing Complaint

By Michael A. Sottolano

In 2010, HUD and its Fair Housing Assistance Program partners (state and local agencies designated by HUD to investigate fair housing complaints in local jurisdictions) received over **10,000 housing discrimination complaints!** While not all these complaints were meritorious, many of them undoubtedly could have been avoided in the first place with proper education of residents and staff. Please read on to learn how you can help prevent your Association from falling victim to a Fair Housing complaint.

Most residential housing associations are governed by the Federal Fair Housing Act ("FHA"). The FHA contains seven protected classes:

1. Race;

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2. Color;
3. Religion;
4. National Origin;
5. Gender;
6. Disability; and
7. Familial Status.

The FHA prohibits the following housing actions:

- Denying housing or refusing to rent to an individual in a protected class.
- Discriminating in the terms, conditions or privileges for sale or rental of housing because of an individual's protected class.
- Enforcing a neutral rule or policy that has a disproportionately adverse effect on a protected class, unless there is a valid business reason for the rule or policy, and the Association can show there isn't a less discriminatory means to achieve the equivalent result.
- Indicating or stating a preference on an advertisement for a sale or rental of housing which discriminates against a protected class.
- Denying a disabled individual "reasonable accommodations" or refusing to allow "reasonable modifications" which are necessary to afford the individual an equal opportunity to use and enjoy the housing.
- Threatening, harassing, intimidating, coercing, interfering, or retaliating against an individual for asserting a fair housing right or making a Fair Housing claim—even if the claim eventually turns out to be unfounded.

With this in mind, what can your Association do to prevent a potential violation of the FHA and avoid a fair housing complaint? Remember, good business practices often are good fair housing practices, too.

(1) Review the Association's rules and policies periodically to make certain they do not target any protected class group. For example, don't have a rule which states "children cannot ride bikes in the parking lot" (which could be interpreted as discriminating against individuals in a protected class). Rather, such a rule should state "bicycle riding is not allowed in the parking lot". Also, always put your Association's rules and policies in writing and publish them to your members to ensure that all residents are aware of them.

(2) Always apply your Association's rules and policies equally, regardless of a resident's protected class. Remember, the Association is also responsible for the actions of its employees. So it is important to ensure that the Association, and all of its employees, do not harass or discriminate and always treat residents fairly, professionally, and similarly. In regards to harassment, the best prevention strategy is to write and periodically distribute non-harassment and anti-discrimination policies to all residents, employees and contractors, and to train employees on how to prevent and remedy all forms of harassment. Reported incidents of harassment should also be dealt with quickly and effectively, and include a follow-up by the Association or management to ensure that the problem does not recur.

(3) Always respond promptly to a request for a reasonable accommodation or reasonable modification by a resident. It is important to note that providing an interim response does not mean that the Association will grant every accommodation or modification request. By responding promptly, however, the Association guards against a claim that the request has been ignored or summarily dismissed. Additionally, while it is a good idea for residents to submit their requests for reasonable accommodations or modifications in writing, the FHA does not require that such requests be made in writing. Accordingly, the Association should consider all requests for reasonable accommodations or modifications, even if only made orally. The Association should always, however, provide any official response to a request in writing.

(4) Keep thorough written records of all actions taken when enforcing rules and regulations or when responding to a resident's request for a reasonable accommodation or modification. If a fair housing com-

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plaint is filed against your Association, a "paper trail" which documents all interactions with the resident related to the claim will be vital to establishing that the Association has not violated the FHA.

(5) Most importantly, if a fair housing complaint is received: Don't Retaliate! Retaliation is an act of harm by a housing provider against an applicant or resident because he or she has filed a fair housing complaint or has been a witness in a fair housing situation. Remember, after receiving a fair housing complaint the Association may still take appropriate actions if the resident violates the rules. However, the Association needs to be consistent in its enforcement of any rule violations against the resident because inconsistency can look like possible discrimination or retaliation. The best defense against retaliation is education. The Association should implement a written policy which makes clear that retaliation will not be permitted and employees should be trained that retaliation in housing is against the law.

In conclusion, while even the most vigilant Association can fall victim to a fair housing complaint, education regarding the FHA and recognition of the issues it presents can go a long way towards minimizing Association liability and exposing a bogus claim. If your Association would like further guidance on how to prevent a potential FHA violation, or if a fair housing claim has been asserted against your Association, please feel free to contact one of our lawyers.

RECENT FIRM HAPPENINGS

Recent Events:

Jerry Wright co-presented Legislative and Case Law Updates for the Central Virginia Chapter of the Community Associations Institute in Williamsburg and Richmond in June and at the Virginia Leadership Retreat in July.

Ken Chadwick, Wil Washington, Andrew Elmore and Jerry Wright were featured speakers at the 4th Annual Virginia Leadership Retreat hosted by the three Virginia Chapters of the Community Associations Institute in Hot Springs, Virginia, July 27 - 29, 2012. Chadwick Washington was a sponsor of the event.

Allen Warren taught a Foreclosure Seminar on Tuesday, June 26, 2012 in Leesburg on behalf of the Community Associations Institute. The seminar focused both on legal strategies and practical approaches to addressing the many problems created by mounting foreclosures and assessment delinquencies.

Ken Chadwick joined Virginia Common Interest Community Ombudsman Heather Gillespie for an Open Forum discussion regarding the new Ombudsman Regulations on Tuesday, July 31, 2012 at the Fairfax County Government Center.

Upcoming Events:

The firm's Fall Seminar Series began on August 28 in Arlington. Upcoming Seminars are scheduled for Reston, Eastern Prince William County, Charlottesville and Smith Mountain Lake.

Andrew Elmore has been selected to be a member of the "Panel of Pundits" to present at the upcoming Community Associations Institute 2013 Law Seminar in Tucson in January.

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