CHADWICK WASHINGTON MORIARTY ELMORE & BUNN P.C.

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THE QUARTERLY ASSESSMENT

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WEBSITE UPDATE:

Chadwick, Washington, Moriarty, Elmore & Bunn P.C. is pleased to announce the launch of an improved website, providing a valuable online legal resource to current and potential clients.

www.chadwickwashington.com

Effective July 1, 2012, Adoption of Cost Schedule For Inspection and Copying of Association Books and Records

As previously referenced in our firm's July 1, 2011 *Special Assessment* newsletter, please be aware that, by no later than **July 1, 2012**, boards of directors for Virginia condominium associations and property owners' associations need to adopt and publish a cost schedule relating to members' requests to inspect and copy association books and records.

Effective July 1, 2012, charges can be imposed on a requesting member only in accordance with the board-adopted cost schedule. The cost schedule must: (1) specify the charges for materials and labor, (2) apply equally to all members in good standing, and (3) be provided to the requesting member at the time the request is made. Please note, however, that the law still requires that the charge to the member reflect the "reasonable costs of material and labor, not to exceed the actual costs thereof." If you are a board member or manager for a community association represented by this firm and would like additional guidance or assistance with complying with this law, please feel free to contact us.

New CICB Regulations for Community Managers, Effective March 1, 2012

By Susan L. Truskey

Virginia's Common Interest Community Board (CICB) has announced new regulations affecting individual community managers and non-accredited firms that provide management services to community associations. These regulations, which became effective March 1, 2012, include changes to the licensure application forms and offer alternative methods to qualifying for a Common Interest Community (CIC) Manager license.

New Regulations - March 1, 2012

Pursuant to Virginia law, the CICB requires any firm providing management services to be licensed as a common interest community manager, which may be achieved by one of two ways. Firms may qualify for licensure by maintaining an active designation as an Accredited Association Management Company (AAMC) by the Community Associations Institute (CAI), or, a firm may qualify by meeting certain individual requirements prescribed by the CICB. The March 1st regulations affect the latter method for qualification by providing alternative methods to non-accredited firms seeking licensure.

Under the new regulations, non-accredited management firms seeking licensure are required to designate one "qualified individual" who is in-

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volved in all aspects of management services and who possesses supervisory authority, or is an officer, manager, owner or principal of the firm. This individual must also satisfy at least one of four categories of prerequisite credentials based on varying degrees of professional training and experience, which are as follows: (i) possesses an active designation as a Professional Community Association Manager (PCAM) by CAI, (ii) successful completion of a CICB-approved comprehensive training program and have at least three (3) years of qualifying experience, (iii) successful completion of a CICB-approved introductory training program and have at least five (5) years of qualifying experience, or, (iv) submit credentials obtained through documented coursework to the CICB and have at least ten (10) years of qualifying experience.

In addition, a non-accredited firm seeking licensure is now required to certify that at least half of their employees whose principal responsibility is to provide management services either (i) have an active designation as a Professional Community Association Manager (PCAM) and at least 12 months of community management experience, or (ii) have two years of experience providing management services and (a) an active designation as a Certified Manager of Community Associations (CMCA), (b) have an active designation as an Association Management Specialist (AMS), or (c) have successfully completed a CICB-approved comprehensive or introductory training program.

As of March 1st, the CICB will no longer accept applications submitted using its older forms, applicants are now required to submit new applications using updated forms, which are available on the CICB's website.

New Regulations—July 1, 2012

Additional regulations governing the CICB's individual certification program became effective July 1, 2012. These regulations pertain to individuals of management services firms who themselves are principally responsible for providing management services or who supervise employees directly involved in community management. These new regulations require all such employees to become certified in accordance with CICB regulations. To do so, these individuals must either obtain a certificate issued by the CICB within two years after their employment, or, work under the direct supervision of a certified principal or supervisory employee.

Background on the CICB

The CICB was established in July of 2008 by Virginia's Department of Professional Occupational Regulation to regulate Common Interest Community Managers. The Board is responsible for issuing regulations to establish and maintain professional standards of conduct, training and certification programs, and implement best practices for the industry. In addition to regulating certification and licensure requirements, the CICB also regulates various aspects of property owners', condominium and cooperative associations.

New ADA Pool Accessibility Requirements, Effective March 15, 2012

By Christopher S. Chipman

With spring upon us and summer just around the corner, community associations and community members alike are beginning to gear up for the 2012 pool season. Just as pool-goers prepare for pool season by feverishly attempting to get in shape, associations must ensure that their pool facilities are "in shape" as well. On average, this only requires associations to de-winterize, clean, and inspect their pool facilities to ensure that they are in safe operating condition. This year, however, some associations may be required to take the additional step of modifying their pool facilities to comply with new Americans with Disabilities Act ("ADA") regulations.

The Department of Justice promulgated new ADA regulations (officially known as the 2010 Standards for Accessible Design, "Standards") to further the ADA's fundamental purpose of ensuring that people with disabilities are afforded an equal opportunity to use and enjoy certain public facilities. The Standards – for the first time in the history of the ADA -- purport to regulate swimming pools, wading pools, and spas.

Since the Standards were first published in 2010, there has been considerable confusion and concern among community association members and professionals regarding their applicability. In response to the mounting confusion and considerable backlash from the community association and hotel industries, the Department of Justice extended the original March 15, 2012, compliance deadline by sixty (60) days. The new compliance deadline is now tentatively set for May 15, 2012; however, it may be further extended in the coming weeks.

Generally speaking, the ADA only applies to private

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pool facilities if they are considered places of "public accommodation" under Title III of the ADA. Title III of the ADA defines a "public accommodation" as a private facility whose operations both fall within one of twelve (12) defined categories **and affect commerce**. Pool facilities unquestionably fall under the ambit of the ADA as they are considered "places of exercise or recreation." The pertinent question thus becomes whether a particular pool facility's operations affect commerce.

The key to determining whether a particular pool facility's operations affect commerce and are, therefore, subject the pool facility to the Standards, depends upon a variety of factors. In general, courts have opined that association common areas – including pool facilities – generally do not affect commerce if their use is restricted to association members and guests. Conversely, pool facilities may be considered to affect commerce if their use is not restricted to association members and guests (*i.e.*, the facility is rented out for private events or membership is open to the general public).

Although the previous paragraph portrays the issue as being relatively straight-forward , there are a number of activities and situations that are less than clear-cut. For instance, many associations form community swim teams and host swim meets. While swim teams provide a great source of recreation for children who would otherwise languish on their summer vacations, they also have the potential to complicate an association's obligation to comply with the Standards.

Often, swim teams are comprised of non-members who are drawn from surrounding communities and swim meets invite non-members to use the otherwise private pool facilities. While these activities may have the potential to affect commerce, they generally do not mandate compliance with the Standards if they are limited in scope and duration. Ultimately, whether a particular activity will be determined to affect commerce depends upon a variety of circumstances and should be evaluated on a case-by-case basis.

In the event that a pool facility is determined to be a public accommodation, pursuant to Title III of the ADA, the affected association must remove any "physical barriers" to the extent that it is readily achievable to do so (*i.e.*, easily accomplished and able to be carried out without much difficulty or expense). The Standards specify how "physical barriers" are to be removed: pools with more than 300 linear feet of wall must have two accessible means of entry, with at least one being a pool lift or sloped entry; while pools with less than 300 linear feet of wall are only required to have one accessible means of entry, provided that it is either a pool lift or a sloped entry.

Although it may be tempting for a rogue association to argue that it is not readily achievable to install a sloped entry or a pool lift, the Department of Justice has made clear that the definition of readily achievable varies among different associations from year to year – making it extremely difficult to anticipate what will be considered readily achievable for any given association. Furthermore, the Department of Justice has strongly intimated that it will be difficult for any association to effectively argue that installing pool lifts is not readily achievable given their relatively low cost (approximately $2,000.00 - $10,000.00).

Failure to comply with the Standards may subject a recalcitrant association to lawsuits and stiff civil penalties. Title III of the ADA expressly permits courts to assess civil penalties against nonconforming associations of up to $55,000.00 for the first violation and $110,000.00 for subsequent violations. Additionally, the ADA expressly permits courts to award reasonable attorneys' fees to meritorious plaintiffs. Given the stiff penalties that stem from noncompliance, all associations should review their current pool facilities operations to ensure that they are not unknowingly exposing themselves to significant liability.

Polybutylene Pipes: What to do When Time Runs Out

By Bruce H. Easmunt

Few condominium components have the potential to cause as much damage as plumbing systems. This is especially true in the case of plumbing systems comprised of polybutylene piping. Polybutylene plumbing was hailed as an inexpensive alternative to copper and was installed in many condominiums in the area throughout the 1980's. Polybutylene piping has proven to be an inferior product due to its extraordinarily high failure rate leading to massive amounts of damage caused by leaks. There has been a class action settlement with regard to installed polybutylene pipes; however, the qualifications to receive any part of the settlement fund require that association's file their claim within seventeen years of the date of installation of the polybutylene pipes. Given the amount of time that has passed since the initial installation of most polybutylene pipes, this qualification may preclude many associations from qualifying to receive benefits from the fund.

Most associations discover that polybutylene is present in their buildings after a leak has already occurred. Shortly after discovery, associations often receive notices from their respective insurance carriers requiring the replacement of the polybutylene pipes. If associations fail to do so, they risk the chance that their insurance carrier may increase their premiums or drop coverage altogether. Replacement of common element polybutylene piping is typically not challenging; however, replacement of unit component piping

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can become a logistical and political struggle.

But all is not lost. Associations, through their board of directors, may have the ability to require unit owners to replace the respective polybutylene pipe components of their units. If an association has received notice from an insurance carrier to replace the polybutylene pipes, boards can typically rely on provisions in the association's bylaws prohibiting a unit owner from maintaining anything in their unit that would cause the association's rate of insurance to increase or be cancelled.

In the alternative, boards can look to the maintenance provisions of an association's bylaws, many of which require unit owners to maintain their units in good condition and repair and provide that such unit owner will be responsible for damage to another unit or the common elements if such maintenance or repair is not performed. Section 55-79.79(A) of the Virginia Condominium Act provides a similar provision. Given the overwhelming evidence showing that polybutylene pipes will ultimately fail, boards may be able to put unit owners on notice that they must replace their unit component polybutylene pipes or risk liability for lack of maintenance or repair of those pipes.

Some associations offer to negotiate a bulk rate with a contractor to replace as many pipes as possible, provided that the unit owners choose to use the selected contractor. Some associations have decided that it is ultimately less expensive and faster for the association to replace individual unit pipes. Whether your association decides to replace the unit component polybutylene pipes or to require unit owners to replace them, legal counsel should be consulted and a careful review of the association's condominium instruments should be performed.

Dealing With Disaster: Code Enforcement Obligations When A Major Casualty Strikes

By Sara J. Ross

You sit on the Board of Directors of your community association, and house a block away is severely damaged by a fire. It has been six months and the house remains empty and is covered by a blue tarp, the yard is unkempt and overgrown, and the entire lot has become an eyesore for the community. Neighbors are complaining, and the Board is in the dark as to what the owner is planning. When a dwelling sustains significant damage, which is visible from the exterior, is the Association obligated to immediately enforce its covenants and rules and regulations against the owner for the multitude of violations? Or, must the Association wait and take no action, regardless of the length of time? The answer may be to take an approach that is somewhere in the middle.

Earthquakes, hurricanes, floods or a single lightning strike; disaster can strike a homeowner at any moment, taking away their home and their possessions. When such disaster strikes, owners have a lot to contend with, including dealing with the initial process of cleaning up, making insurance claims, relocating to temporary housing, rebuilding, etc., as well as the emotional toll it takes. Likely, the last thing they are thinking about is how their personal disaster is affecting their community association. Their priorities are on restoring their home; not on whether the lawn is cut. As a result, in such situations, the Board often finds itself balancing its obligations to enforce its association's covenants and rules and regulations against its inclination to treat the homeowner with kid gloves (i.e. take no action) so as not to appear to be a bully.

Board members have a duty to act and make good faith decisions: specifically, they have a personal and collective obligation to make decisions in accordance with their business judgment and in the best interests of the Association. And although the Board may have a duty to enforce the covenants and governing documents, such enforcement still requires the Board to exercise its discretion in the method/manner of enforcement and its timing. When a home has been severely damaged, it is rarely the case that the homeowner is able to immediately start the repairs and renovation process, as the owner has to contend with insurance, contractors, local licenses/inspections, etc. Accordingly, it would seem unreasonable for a Board to vigorously enforce the covenants immediately after the casualty's occurrence.

On the other hand, it is not reasonable for a Board to allow a violation to continue indefinitely. In its attempt to be sympathetic and understanding to the homeowner, the Board runs the risk of losing its ability to enforce its covenants, with regards to the violation.

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The legal terms are "waiver," "estoppel," and the granddaddy of them all, "laches," which all lead, roughly, to the same conclusion: you waited too long to act! How long is too long? It is impossible to say. One month — not likely. Two years — possibly. Ten years — definitely.

So how does a Board balance between draconian enforcement and overindulgent leniency? The answer lies in communication. Once an Association is made aware that a home within in the community has sustained significant damage, the Board should promptly reach out to the homeowner. Offer sympathy, as well as assistance, such as providing master policy insurance information, if applicable, and names of reputable contractors, vendors, architectural/covenants committee members. The Board should also offer to have a meeting with the owner to discuss the owner's plan for restoration.

The initial meeting should be an information sharing session. The owner should share with the Board the extent of the damage, whether there is insurance coverage, preliminary plans for restoration, including any contractors already engaged, and anticipated completion date, if known. The Board should provide the owner with guidelines and expectations for exterior modifications, and the procedures for applying to the appropriate committees. The Board should also advise the owner regarding any violations, but do so in an informative, not accusatory manner. Let them know that the Board understands that it may take some time, and that it is there to assist and guide them as needed. You do not want to overburden the owner at a time when they are literally picking up the pieces.

Following the initial meeting, there should be regular, periodic status update meetings, during which the owner provides the Board with updates on the progress and advises of any hiccups or holdups. These meetings are helpful in keeping the Association informed on the status of the restoration, and give the Board an opportunity to weigh in and/or provide guidance, on a periodic basis. If during the restoration process, the owner strays from the Association's architectural guidelines, these progress meetings provide an opportunity to address the issue early on and hopefully steer the owner back in the right direction.

In the event the homeowner is unwilling to meet with the Board and/or provide periodic status updates, or if all progress stalls or halts for an excessive amount of time, the Board should then consider taking steps to enforce the covenants against the violations. It is critical that the Association makes an effort to keep in close communication with the owner, and is kept apprised of any issues or delays, claims of waiver, estoppels or laches, in the event the Association needs to enforce the covenants against the owner at a later date.

By keeping the lines of communication open with the owner, the Board can enforce the covenants, but in a reasonable and non-hostile manner. Furthermore, when the disgruntled neighbors complain about the ongoing violations, or lack of discernible progress, the Board will be able to say honestly, that it is on top of the situation.

Resolutions...Get Your Resolutions!

By Marie E. H. Johnson

Resolutions are a great way to provide clarity and more specific details to policies or procedures found in your association's declaration and bylaws. They can be a wonderful tool to help streamline Board decisions and assist the association's management agent and attorneys in efficiently completing their jobs.

Resolutions are useful for three main reasons:

First, they can be changed more easily than a bylaw or declaration amendment, because they require only a majority vote of the Board of Directors. Secondly, they can be drafted to deal with community specific needs, which may change over time. For example, regulations related to parking may change if more parking is made available in a community. Lastly, they provide clarity to the association's management agent and attorneys about specific board needs and preferences. For example, if an owner is delinquent on paying assessments the resolution can prescribe the amount of time that must pass before the account is forwarded to the attorneys for collection action.

The most popular types of resolutions for community associations include the following:

Collection Resolution - addresses the collection policies for an association and establishes deadlines for payments, a timeline for board and attorney action for collection, acceleration of assessment installments and payment allocation.

Due Process Resolution - pertains to procedures for the establishment of rules violation charges and/or suspension of privileges in an association. It usually tracks the requirements of the Virginia Property Owners' Association Act or the Virginia Condominium Act and ensures associations are complying with all minimal legal mandates. This policy resolution also usually addresses the appeals process from Board or committee decisions.

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Parking Resolution - addresses parking procedures and rules for the association. It usually includes information on whether parking passes are required, licensure/registration requirements for vehicles, and what vehicle maintenance is allowed on association property.

Pet Resolution - pertains to the registration of pets, rules related to the number of pets allowed in a unit or lot, and protocols for disposing of pet waste. Also, pet policies can deal with pet disturbances (i.e. barking) or damage to common element or common area (i.e. chewing or pet waste).

FIRM HAPPENINGS

Awards:

Brendan Bunn was recently inducted into the College of Community Association Lawyers of CAI in honor of his contributions to the community association industry.

Allen Warren was recently recognized by WMCCAI for his successful completion of his term as President of the chapter.

Bruce Easmunt was recently awarded the Washington Metropolitan Chapter of Community Associations Institute's 2011 Rising Star Award and was appointed to serve as the WMCCAI Outreach Committee Co-Chair.

Case Update:

In line with the firm's distinguished history of handling cases that help establish precedent for the interpretation of community association law, recently, Andrew Elmore and Mike Sottolano successfully defended a lawsuit in which a Condominium Board of Director's authority to spend on repairs to the Condominium was challenged. The results of this case were published in the February 2012 edition of Community Association Law Reporter ("*Board Can Levy Assessment Without Owner Approval*, Investors USA, LLC v. The Links Condominium Association, Inc., No. CL11-931, Va. Cir. Ct., Henrico County, July 12, 2011") and can be found at http://newsmanager.commpartners.com/cailaw

Recent Events:

Wil Washington, Jerry Wright and Steve Moriarty presented at the CVCCAI Southwest Regional Council Education Expo.

Mike Sottolano recently spoke at the CVCCAI 2012 Community Associations Day Trade Show & Expo on the topic "Adventures in Social Media."

Bruce Easmunt was a featured presenter at the WMCCAI Electronic Voting Seminar and the CVCCAI Southwest Regional Council Reserve Seminar.

Recent Publications:

Brendan Bunn recently published an article entitled "*Neighbor to Neighbor: Knowing When to Enter—or Exit—the Fray*" in the April 2012 issue of *Quorum* Magazine.

Sara Ross recently published an article entitled "*New ADA Pool Accessibility Standards: Does My Association Have to Comply?*" in the April 2012 issue of *Quorum* Magazine.

Bruce Easmunt recently published an article entitled "*What to do with Polybutylene Pipes*" in the December 2011 issue of WMCCAI's periodical, *Quorum* Magazine.

Upcoming Events:

Jerry Wright and Sara Ross will be presenting a course entitled "Hookers and Hoarders: Practical Methods for Dealing with Extraordinary Situations" at the CAI National Conference in Las Vegas on May 4, 2012.

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