

# 2008 Legislative Update – Virginia

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The 2008 Session of the Virginia General Assembly convened on January 9, 2008 and adjourned on March 13, 2008, even though it was initially scheduled to adjourn on March 8, 2008. This was a “long session” of the General Assembly, lasting 60 days (65 days with the extension) and dedicated to consideration of the biennial budget. A special session was convened on March 13, 2008 following adjournment of the regular session, and recessed until April 24, 2008 – to address bonds and capital improvements. The addition of five days to the regular session necessitated moving the reconvened session (more commonly referred to as the *veto session*) one week, from April 16, 2008 to April 23, 2008.

This was a year of change following the election of all 140 members of the General Assembly. The election resulted in a shift in control of the Senate, seating all new committee chairs, mostly representing urban districts. Likewise, in the House, there were a number of changes in committee chair assignments due to member retirement and election results.

In all, 3,322 bills were introduced during the 2008 session. Of the bills considered, 1,654 were passed by the Senate and the House of Delegates and forwarded to Virginia Governor Tim Kaine for signature. A total of 1,352 bills failed, and another 316 bills were carried over for consideration in the 2009 session. Governor Kaine vetoed five measures this year, and recommended changes to more than 80 other bills.

The General Assembly considered a number of bills affecting community associations – addressing solar panels, real estate cooperatives, time sharing, regulation of the community association industry, and resale disclosure. More than any others, two bills captured and will continue to capture industry attention: House Bill 516 and Senate Bill 301. These identical sister bills establish a new regulatory program for community association managers and community associations and make further changes to the resale disclosure provisions of the Condominium Act and Property Owners’ Association Act. These two measures were introduced as recommendations of the Virginia Housing Commission and may

be the most significant legislation to affect community associations since enactment of the Property Owners’ Association Act in 1989.

Community Associations Institute (CAI), the Virginia Association of Community Managers (VACM), and the Virginia Association of Realtors (VAR) worked to achieve compromise on the legislation. As with any legislation produced through compromise, provisions of the legislation are not favorable to or to the liking of all those affected by the legislation. And because many changes were made to the legislation during the fast-paced session, some provisions may require further review. Clarifying amendments and refinements are likely in coming legislative sessions.

## Common Interest Community Board

Legislation adopted by the General Assembly during the 2008 session establishes the Common Interest Community Board, an eleven-member citizen board, appointed by the governor. Members of the Board will include representatives of the management industry, the timeshare industry, and real estate developers, as well as citizen members, an attorney, and an accountant. The Board will be housed within the Department of Professional and Occupational Regulation, where the Real Estate Board is likewise housed.

**Registration of Community Managers** – Among the powers and duties of the Common Interest Community Board, the Board will promulgate regulations to establish the criteria and standards of conduct for the licensure of community association management firms and the certification of community association managers.

**Enforcement** – The Common Interest Community Board will also be responsible for enforcement of new statutory and regulatory requirements for licensure and certification. The Board is authorized to seek injunctive relief and has the power to assess a monetary penalty of not more than \$1,000 for violations of the law.



The Board is also empowered with the extraordinary authority to seek receivership of a common interest community management firm if the Board determines that the management firm cannot properly discharge its fiduciary duties to its community association clients. In seeking receivership, the Board has authority to require immediate inspection and production of records and to enjoin the withdrawal of bank deposits.

**Recovery Fund** – Common interest community management firms and common interest communities are required to contribute to a recovery fund to protect the interests of associations. Managers will be assessed a fee of \$25 upon initial application for licensure and each common interest community must make a contribution of \$25 upon filing the first annual report after the effective date of the new law – July 1, 2008. On or after July 1, 2011, the minimum fund balance must be \$150,000.

**Annual Report Filing Fee and Assessment** – The newly created Board will administer the Common Interest Community Management Information Fund, currently administered by the Real Estate Board. Community associations will now file an annual report with the Common Interest Community Board. Community associations will pay a flat fee with the annual report together with an annual assessment as established by the Board in an amount equal to the lesser of \$1,000 or 0.02 percent of an association's annual gross receipts. The Real Estate Board is currently amending regulations to increase the annual report fee, but the scope of this new statutory authority is greater than what has been proposed by the Real Estate Board in the new regulations.

**Property Registration Program** – The newly created Board will also administer the property registration programs currently administered by the Virginia Real Estate Board for the registration and regulation of residential condominiums and timeshare development sales.

## Management Firm Licensure

Effective January 1, 2009, entities offering management services, as defined in the new law, must obtain and maintain a license with the Common Interest Community Board. The Board will issue *provisional licenses* to community association management firms engaged in the business that make application prior to January 1, 2009; the provisional licenses are effective until 2011.

The Common Interest Community Board will establish criteria for the licensure of management firms – to include experience and educational requirements. The Board will approve accredited training programs. The Accredited Association Management Company designation administered by CAI will be considered the standard for compliance with these requirements.

The new law makes it clear that the management firm owes a fiduciary duty to the association to which the management firm is providing services. As a condition of licensure, the management firm must be in good standing and have established a code of conduct to avoid conflicts of interest as well as internal accounting controls to prevent the risk of fraud. The management firm must also certify to the Board that services are provided to community associations under a written form of contract. The management firm must undergo an annual independent review or audit of the company's books and records.

Management firms are required to carry blanket fidelity bond or employee dishonesty insurance that protects the management firm and communities managed by the management firm from loss. The insurance coverage must be in an amount equal to the lesser of

\$2,000,000, or the highest aggregate amount of both the operating and reserve balances of all associations under the control of the management firm, but in no event, not less than \$10,000.

## Manager Certification

Persons within a management firm who have the principal responsibility for providing management services, as defined in the new law, or who have supervisory responsibility for employees who participate directly in the provision of management services, must obtain certification from the Common Interest Community Board within two years after employment by a common interest community management firm. The Board certificate certifies that the individual possesses the character and minimum skills necessary to engage properly in the provision of management services. Obtaining designation as a Certified Manager of Community Association (CMCA), Association Management Specialist (AMS) or Professional Community Association Manager (PCAM) qualifies an individual for certification.

The new law specifies a number of exemptions from the licensing and certification requirements which should be carefully considered. Employees of the association are not required to obtain certification, nor are volunteer board members. The law also requires the common interest community management firm to notify the Board if a certificated manager (employee) is discharged or terminates active status with the firm.

## Association Insurance Requirements

In addition to coverage required in the governing documents for a community association, associations will be required to maintain blanket fidelity bond or employee dishonesty policies to cover losses resulting from theft or dishonesty by association officers, directors, employees, or the managing agent or management employees. The insurance must be in an amount equal to the lesser of \$1,000,000 or reserve balances plus one-fourth of the average annual assessment. The minimum amount of such coverage is \$10,000, as currently required in the law.

## Resale Disclosure

The 2008 General Assembly again made substantial revisions to the Condominium Act provisions concerning certificates for resale and the Property Owners' Association Act provisions concerning association disclosure packets. Issues in the implementation of 2007 amendments prompted legislators to focus again on the fee amount and the manner of delivery of the resale certificate and association disclosure packet. The 2008 changes affect communities managed by management firms and communities with management staff and include new methods for delivery, revamped fee structure, and additional disclosure statements. The resale provisions remain unchanged for self-managed communities.

**Delivery** – The resale certificate or the association disclosure packet must be delivered in the format requested by the seller or the seller's agent – whether hard copy or electronic format. The request must be in writing and provide complete contact information for the parties to whom the resale certificate or association disclosure packet is to be delivered. The parties may request a hard copy in person at the principal place of business of the association. No extra fees may be charged for the use of an electronic network through which the disclosures may be provided. Also, two copies – whether electronic or hard copy – must be provided to the requesting parties.

**Fees** – The association and management firm may charge a fee

for inspection of the unit or the lot not to exceed \$100. If the resale certificate or association disclosure packet is in paper format, the fee may not exceed \$150; if the resale certificate or association disclosure packet is in electronic format, the fee may not exceed \$125. At the option of the seller or the seller's agent, the disclosures may be delivered in expedited format for the additional fee of \$50 – within five business days. A fee of \$25 may be charged for an additional hard copy. Delivery charges are a direct pass through of actual costs incurred. The statutes are also amended to provide for a post-closing fee to the purchaser, collected at settlement in an amount not to exceed \$50.

The fee schedule for preparation of the certificate of resale or association disclosure packet must be published. Fees cannot be collected at the time the request is made; fees are collected at settlement, paid out of settlement proceeds. The seller is responsible for the cost of the certificate or packet. If settlement does not occur within 90 days of delivery or funds are not collected at settlement, the fee becomes a charge against the property and is collected like any other assessment – from the unit or lot owner. The fee for preparation of the resale certificate or association disclosure packet may be adjusted every five years based upon annual increases in the Consumer Price Index (all urban consumers).

**Updates** – The purchaser or seller may request an update for any resale certificate or association disclosure packet issued in the preceding 12 months. The association or the management agent has ten days to deliver the update, which must include a copy of the original. A settlement agent may request a financial update that must be delivered within three business days. The fee for the financial update may not exceed \$50; the inspection fee for an update is \$100.

**Self-Managed Property Owners Associations** – Those property owners associations which do not have professional management (that includes paid staff) may only charge the actual cost of preparation of the association disclosure packet with a fee not to exceed \$100. The provisions of these statutes otherwise remain unchanged, allowing copy charges to be only \$.10 per page. Charges for an update are not to exceed \$50.

**New Disclosure Statements** – Two new disclosure statements are added to the certificate for resale and the association disclosure packet. The resale certificate and association disclosure packet must include a disclosure of any known post-closing fee charged by the management firm. The certificate and packet must now include copies of approved minutes of the board of directors or association meetings for the preceding six calendar months.

**Penalties** – As both the Condominium Act and the Property Owners' Association Act currently provide, the association is bound by the statements in the certificate for resale and association disclosure packet. Failure to provide the certificate or disclosure packet substantially in the form required by the statutes remains a waiver of any claim for unpaid assessments or violations of the condominium instruments or governing documents. However, the preparer of the certificate or disclosure packet may now be responsible to the seller for actual damages sustained in an amount not to exceed \$1,000. The limit is currently \$500.

## Ombudsman

The General Assembly established the Office of Common Interest Community Ombudsman. The Ombudsman replaces, with an expanded scope of responsibility, services currently offered by the Common Interest Community Liaison. The legislation requires

## COMMUNITY MANAGER LICENSING EXEMPTIONS

- Association employees
- Community association resident – uncompensated
- Community association board member – uncompensated
- Receiver or trustee
- Licensed attorney
- Licensed certified public accountant
- Licensed real estate broker or sales agent
- Time-share managing agent

## COMMON INTEREST COMMUNITY MANAGEMENT SERVICES DEFINED

- Acting with the authority of an association in its business, legal, financial, or other transactions
- Executing resolutions and decisions of the association
- Enforcing the rights of the association secured by statute, contract, covenant, rule, or bylaw
- Collecting, disbursing, or otherwise exercising dominion or control over association money or property
- Preparing budgets, financial statements, financial reports
- Arranging, conducting, or coordinating association or board meetings
- Negotiating contracts or otherwise coordinating or arranging services or purchasing goods

## COMMON INTEREST COMMUNITY BOARD

Appointed by Governor

- Three common interest community managers
- One community association attorney
- One community association accountant
- One representative of the time-share industry
- Two developer representatives
- Three citizens:
  - Two residents
  - One current or former board member



that the Ombudsman is a member in good standing of the Virginia State Bar. The Ombudsman is responsible for assisting members in understanding rights and the processes available under the declaration and bylaws of the community association. The Ombudsman will:

- Answer inquiries.
- Provide information concerning common interest communities.
- Make information available via a Web site and receive notices of complaint.
- Maintain data on inquiries received, the types of assistance requested, notice of complaints, actions taken, and the disposition of each matter.
- Assist members in using procedures and processes available in the association.
- Provide non-binding explanations of the laws and regulations by the board.
- Refer people to public and private agencies offering alternative dispute resolution.

Upon the request of a member of the General Assembly, a standing committee of the General Assembly, or the Virginia Housing Commission, the Ombudsman is also responsible for providing an assessment of proposed and existing laws and to conduct other studies of common interest communities. The Ombudsman will also monitor changes in federal and state laws relating to common interest communities and provide information for an annual report by the director.

### Complaint Resolution

The Common Interest Community Board shall establish by regulation a requirement that common interest community associa-

tions establish a procedure for resolving written complaints by individual association members or others. The complaint system must provide that a record of each complaint is maintained for at least one year. The association must also provide complaint forms or written procedures for persons who wish to make a complaint. The complaint forms or procedure must include contact information for the association or manager, contact information for the Office of Ombudsman, and a clear understandable description of the complainant rights to give notice of adverse decisions.

The complainant may give notice of the final adverse decision in accordance with the Common Interest Community Board regulations. That notice must be filed within 30 days of final adverse decision on forms prescribed by the Board. Accompanying those forms must be copies of all records pertinent to the decision and a \$25 filing fee.

The Director of the Department of Professional Occupational Regulation may request additional information from the association concerning the complaint and the association must provide information within a reasonable time frame. The Director may determine whether the final adverse decision from the association is in conflict with the laws or Common Interest Community Board regulations or interpretations of the law and regulations by the Board. The Director's determination is final and not subject to further review.

### Solar Panels

In the development of an energy plan for Virginia, in a prior session of the General Assembly, legislation was introduced to abrogate restrictive covenants prohibiting the installation of solar panels. A similar bill was introduced in the 2008 Session, but the



bill was modified to be prospective in application – effective only after July 1, 2008.

The bill provides that a community association shall not prohibit an owner from installing or using any solar energy collection on the owner's property; but the association may establish reasonable restrictions concerning the size, place, and manner of placement of the solar energy collection devices. The bill allows a community association to prohibit or restrict the placement of such devices on the common areas.


The bill provides that nothing shall be construed to (i) invalidate any provision of a restrictive covenant that prohibits or restricts the installation or use of any solar collection device if the provision was in effect before July 1, 2008, or (ii) prohibit the amendment of a restrictive covenant on or after July 1, 2008, to prohibit or restrict the installation or use of any solar collection device if such amendment is adopted by the membership of the community association in accordance with such association's governing documents.

Governor Kaine recommended amendments to the bill that were accepted by the Senate, but rejected by the House of Delegates. The bill has been sent back to Governor Kaine, but no action had been taken as of our publication deadline. Please consult association legal counsel before proceeding to enforce such covenants and restrictions.

## Real Estate Cooperatives

The General Assembly passed two bills in the 2008 Session to amend the Real Estate Cooperative Act. The first of the bills authorizes a real estate cooperative, where permanent residency is generally restricted to individuals age 55 and over and the primary purpose of the cooperative is to provide services typically provided to residents of full service senior housing communities, to amend the declaration by a two-thirds vote to authorize assessments based on usage of services rather than the square footage of the units. The second bill provides that the declaration may be amended by two-thirds vote to extend the time limit within which special declarant rights imposed by the declaration may be exercised. Currently such an amendment would require unanimous consent.

## Conclusion

The 2008 Session of the Virginia General Assembly produced significant new laws that are certain to affect the operation of community associations. Community association leadership should work with association legal counsel and community managers to seek guidance on how the new changes to the law affect community operation, administration, and governance. And, the industry should be prepared to participate in on-going discussions about refinements to the laws passed in this session as the Virginia Housing Commission continues work during the recess. Join with the Chapter's Virginia Legislative Committee to identify issues and concerns on these and other laws affecting your community. 



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## 2008 VIRGINIA LEGISLATIVE CHECKLIST

It is essential to be aware of actions taken by the Virginia General Assembly to amend the laws that govern community associations. Following is a checklist of actions your community association should consider in order to prepare for changes to the Virginia laws that become effective July 1, 2008.

- Budget for increased fees for filing an annual report with the Common Interest Community Board.
- Develop a process for handling unit or lot owner complaints.
- Review restrictive covenants and develop rules to address the installation of solar panels.
- Check current insurance coverage to make certain that the association has a blanket fidelity bond or employee dishonesty policy in the amount prescribed by law, a minimum \$10,000 coverage.
- Develop a request form for parties requesting certificates for resale and association disclosure packets to include delivery instructions and address other variables.
- If your community is professionally managed, whether by an independent management firm or by association staff, the fee for the preparation and delivery of a certificate for resale or association disclosure packet may be adjusted:
  - \$100 for unit or lot inspection fee.
  - \$150 for up to two hard copies.
  - \$125 for up to two electronic copies.
- Publish the amount of the fee charged for inspections of the unit or lot and preparation of the certificate for resale or association disclosure packet.
- Review and be familiar with new requirements for resale certificate and association disclosure packet updates.
- Update the certificate for resale and association packet form to include:
  - Any known post-closing fee charged by the manager.
  - A copy of approved minutes of the board or association meetings for the preceding six calendar months.