

Community Associations Update

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Welcome to another issue of the Community Associations Update, a bulletin published periodically by the Community Associations Practice Group at Lerch, Early & Brewer as a service to our clients. Here, you will find articles written by our attorneys covering a variety of current issues that affect the management of your Community Association.

This newsletter is sent via email in HTML format. If you wish to print a copy of the newsletter, you may access a .pdf version by following the "Printer-Friendly version" link below.

We appreciate any feedback and invite you to contact us via email at bjharris@lercheearly.com. If you do not want to receive any further newsletters from us, follow the link at the bottom of this email to be removed from our list of recipients.

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In This Issue:

Feature Article: Cyber Issues for Community Associations

With the boom of cyber technology, community association boards, members, managers, and others that work with associations have sought to modernize and use technology to their advantage, including using electronic notices and voting for conducting business. This article explains how and why an association may wish to take advantage of technology to enhance its effectiveness.

Stormwater Facility Maintenance: Structural vs. Non-Structural Maintenance

Although the Montgomery County's Stormwater Management Maintenance Program has been in existence for years, there remains much confusion amongst associations as to the differences between "structural" and "non-structural" maintenance.

Shovels and Snowblowers: Why Your Association Needs a Snow Removal Policy

Though picturesque, the arrival of snow triggers certain legal requirements for all property owners within the Washington, DC region that, if not properly followed, can lead to fines or penalties assessed against the property owner.

Case Law Update: The Importance of Clear Declaration Provisions

A recent Maryland decision highlights the importance of drafting clear and unambiguous provisions in all association-related documents.

Lerch, Early & Brewer Community Associations Group News and Notes

The latest news and information about the Community Associations Group at Lerch, Early & Brewer.

Electronic Voting & E-Proxies: Cyber Issues for Community Associations

WITH THE BOOM OF CYBER TECHNOLOGY, COMMUNITY ASSOCIATION BOARDS, MEMBERS, MANAGERS, AND OTHERS THAT WORK WITH ASSOCIATIONS HAVE SOUGHT TO MODERNIZE AND USE TECHNOLOGY TO THEIR ADVANTAGE, INCLUDING USING ELECTRONIC NOTICES AND VOTING FOR CONDUCTING BUSINESS.

As attorneys, we are often faced with questions concerning the use of technology in conducting association affairs, such as:

- Can members vote and submit proxies by email?
- Can members vote for the Board electronically?
- Can we post the notice for the meeting on our website instead of incurring costs for mailing the notices?
- Should we allow electronic bulletin boards or unrestricted access?



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Depending upon the association documents and state law, the answers to the above questions varied, but until the recently were frequently "No"!

However, over the past several years, many states have looked to introduce or have passed legislation to accomplish these goals. In addition, associations have sought to modernize the old standard bylaws to allow for the incorporation of email, the internet and other technologies in association operation and governance. This article will examine how electronic notices and

voting works, some reasons why an association may wish to transition to this new technology, and a list of pros and cons to consider.

The Problem With Existing Documents

Even with the advent of legislation, some documents may not go far enough in allowing associations to meet this goal. Conversely, even where association documents provide the ability to provide notice electronically, or the use of electronic ballots, such language may be in conflict with existing law and require some clarification by rule or amendment.

Notices & Document Disclosures

Most association documents or state legislation provided that notices and/or information were required to be provided to owners in "writing", were required to be "mailed" and/or required hand delivery. This included notices of meetings, dissemination of minutes, amendments, budgets, assessment notices, notices of violation and resale disclosures.

New legislation and modern document drafting is leading to the implementation of e-voting, message boards and downloadable document disclosures. These advents are allowing more owners to participate and/or have a means to participate in association affairs by opting-in to receive association notices and information by electronic means, and it allows them to vote by electronic ballots.

An association board of directors must first give authority for the use of "electronic transmission" and permit an owner to opt-in to take advantage of the process created. While associations would have to implement a system for setting up electronic voting, a simple process can be set up to allow owners to submit proxy ballots electronically through email. (In Maryland, for example, a properly adopted resolution by a board could allow such a process for an association. In Virginia, the law allows for electronic proxies if the Board establishes a system for doing so. And, in D.C., incorporated associations can also take advantage of such mechanisms.)

Implementation: The Rules & Procedures

Because there are varying modes and methods of cyber communication, and because the statues do not go so far as to prescribe the manner and method of using cyber technology, most association boards will need to specify how it will operate in its community. In doing so, the Board will need to address, among other items, the following in drafting such procedures:

- Define and explain the key terms
- Provide implementing authority for voting in that format
- Specify how it will work

Why Permit Use of Electronic Voting or Proxies?

Do the negatives outweigh the benefits that can be realized by allowing your community association to move toward substituting an email for a handshake? Does the loss of personal interaction undermine the whole concept of "community"? Below are some "pros" and "cons" to consider before moving ahead with the establishment of an electronic voting system:

THE PROS

- Decreasing postal and copy expenses of associations
- Easing administrative burdens on managers by allowing computerized, one-touch distribution of information as well as electronic tabulation of votes when done by electronic means
- Allow for quicker dissemination of information to your members and quicker response time
- Increase member participation in association voting since they do not have to appear in person at a meeting or mail a response--the mere push of a button results in a counted proxy or vote

THE CONS

- Owners that do not have access to email or the web, or those who simply do not trust such methods (a/k/a the skeptics), will not participate or will oppose such

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State of Maryland

MD Judiciary

MD Condo Act

DC Condo Act

VA Horizontal Property

VA Property Owners Association Act

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efforts

- Increases owner apathy--fewer people attending meetings
- Using technology requires someone to set it up and know how to use it
- Costs of set up and maintenance of web-based tools or software can be costly

Despite some negative aspects, those communities that have implemented such a process have typically found that the "pros" outweigh the "cons" and the association continues to operate successfully. If your community is interested in pursuing such avenues, you should consult with its legal counsel to review the actions necessary to explore and/or implement such a process for your community.

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Stormwater Facility Maintenance -- Structural vs. Non-Structural Maintenance

EVER SINCE MONTGOMERY COUNTY INSTITUTED THE 2002 PROGRAM ALLOWING RESIDENTIAL COMMUNITY ASSOCIATIONS TO TRANSFER THE STRUCTURAL MAINTENANCE RESPONSIBILITIES OF THEIR STORMWATER FACILITIES TO THE COUNTY, APPROXIMATELY 30% OF RELEVANT FACILITIES WITHIN THE COUNTY HAVE BEEN TRANSFERRED.

Although the SWM Maintenance Program has been in existence for years, there remains much confusion amongst associations as to the differences between "structural" and "non-structural" maintenance. Under the program, the County, after transfer, will only be responsible for structural maintenance, thereby leaving the non-structural maintenance to the association.

This is an important issue for many associations, as annual budget preparations are in full swing and budget preparers need to know how to allocate the association's funds accordingly. Here, we will attempt to briefly clear up at least some of the confusion regarding this issue, thanks in part to a report recently issued by the County.

To begin, it would be helpful to review the existing code concerning this issue. Section 19-21 of the Montgomery County Code defines structural maintenance as:

The inspection, construction, reconstruction, modification, or repair of any part of a stormwater management facility undertaken to assure that the facility remains in proper working condition to serve its intended purpose and prevent structural failure. Structural maintenance does not include landscaping, grass cutting, or trash removal.

By defining non-structural maintenance partly as "any other non-structural maintenance," as Montgomery County's code does, the definition does not provide much information. Nonetheless, non-structural maintenance clearly includes landscaping around the stormwater facility and trash removal. What remains unclear is the potential gray area between the landscaping, construction, reconstruction, modification or repair of the facility, such as the clearing of sand from a sand filter-type stormwater facility.

In an effort to clarify the definition of non-structural maintenance, the County has created a detailed report setting forth specific examples of non-structural maintenance for the various types of stormwater facilities with the County. This report provides that non-structural maintenance includes the monthly removal of all trash and debris from all areas in and around sand filters, and the bi-annual grass cutting and mowing of the downstream slope of the dam and the top of the dam. (You may [click here](#) to view the report.) Though the report is far more detailed than what was previously available, it is not all inclusive, and issues will likely continue to arise concerning differentiating between structural and non-structural maintenance.

In the meantime, it remains advisable that if questions arise regarding what is considered structural maintenance, the Association should contact its attorney or an official at DEP.

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Shovels and Snowblowers: Why Your Association Needs a Snow Removal Policy

WITH WINTER NOW UPON US, IT'S ONLY A MATTER OF TIME UNTIL AN ACCUMULATING SNOW STORM ARRIVES, TO OUR CHILDREN'S JOY AND OUR AGING BACK'S DISMAY. THOUGH PICTURESQUE, THE ARRIVAL OF SNOW TRIGGERS CERTAIN LEGAL REQUIREMENTS FOR ALL PROPERTY OWNERS WITHIN THE WASHINGTON, DC REGION THAT, IF NOT PROPERLY FOLLOWED,

CAN LEAD TO FINES OR PENALTIES ASSESSED AGAINST THE PROPERTY OWNER.



Generally, each property owner within the region is required to remove snow and ice from the portion of the sidewalk adjacent to his or her property, irrespective of whether the sidewalks are on County or municipal property. Different jurisdictions, however, frequently have slightly varying requirements concerning such specifics as how soon after a snowfall the snow must be cleared, how wide a pathway must be created, and what areas surrounding a property must be cleared. What follows are a few examples from around the region of the various requirements of property owners concerning the removal of snow.

Montgomery County's requirements are fairly straightforward: a property owner is responsible for removing snow and ice on any sidewalk, other walkway, or parking area on or adjacent to property that the person owns, leases, or manages, to provide a pathway wide enough for safe pedestrian and wheelchair use within 24 hours of the snow storm. (See Section 49-25A of the Montgomery County Code.)

The City of Rockville, however, has requirements that are a bit more specific. Snow must be removed from sidewalks, steps, driveways, parking spaces and other paved areas for public use, and from the paved sidewalk immediately in front of or next to the property (including access ramps and curb cuts designed for use by persons with disabilities) within 24 hours after the end of a snowfall resulting in three inches or less of accumulation, and within 48 hours after the end of a snowfall resulting in more than three inches of accumulation. These areas must have at least a 36" path cleared in order to provide a safe path of travel between and within properties. (See Section PM-303.3 of the Rockville City Code.)

For properties that lie within the City of Gaithersburg, the requirements are again rather simple: any occupant or owner of a home or business, or a condominium or homeowner's association, must remove snow or ice from sidewalks abutting their property within 12 hours from the last snowfall or freeze. (See Section 19-1 of the City of Gaithersburg Code). The City of Frederick, however, is much more specific, and requires that all owners of any land or buildings situated on any street within the city where sidewalks are laid are responsible for removing the snow and ice from the entire length of the sidewalk in front of their property. A pathway at least 4 feet wide must be created within 6 hours after the snow has stopped falling and drifting, unless the snowfall occurred between the hours of 5:00 p.m. and 7:00 a.m. (In these instances, the snow must be removed before 1:00 p.m. the next day--see Section 22-16 of the City of Frederick Code.)

Our final example comes from the District of Columbia where, on land not adjacent to Federal buildings, every person or business must remove and clear away any snow or sleet from the entire sidewalk that is in front of or next to their building within eight hours of the end of the snowfall. (See Section 9-601 of the District of Columbia Code.)

The penalty for failing to remove the snow from the sidewalks as required varies depending on where the sidewalk is located. Potential penalties range from the property owner being assessed a fine of up to \$100, being cited with a civil violation, or having the appropriate governmental entity clear the snow and assess the property owner the associated costs.

Thus, as evidenced by the requirements discussed above, it is not only helpful to the residents of your association to have a snow-removal policy in place, it is legally required. If your association does not currently have a snow removal policy, it is recommended that one be drafted. If your association does have a policy, it is wise to review it to ensure that it conforms to the requirements of the geographic region the association is located in.

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Case Law Update

The Importance of Clear Declaration Provisions

A RECENT MARYLAND DECISION HIGHLIGHTS THE IMPORTANCE OF DRAFTING CLEAR AND UNAMBIGUOUS PROVISIONS IN ALL ASSOCIATION-RELATED DOCUMENTS.

The plaintiffs in this case, James and Angela Lowden, purchased two lots in the Stilwater subdivision surrounding Deep Creek Lake in western Maryland. The Lowdens purchased their lots for the purpose of building one large vacation home. The defendants, the Bosleys, the Clines and the Danseys, all purchased lots in the subdivision and built large homes on the lots as well. However, the defendants then entered into agreements with Railey Mountain Lake Vacations, LLC to rent the properties. These owners turned over control of the rental rates, management and maintenance to Railey. The Lowden's filed suit seeking an injunction, damages and declaratory relief stating the short-term rental use of the other properties was a violation of the residential use provision of the Declaration. The Declaration specifically stated:

"All lots shall be used for single family residential purposes only. No structure of a

temporary character whether a basement, tent, shack, trailer, camper or other out-building will be placed on any Lot at any time as a permanent structure."

At trial and as affirmed on appeal, the Court held in favor of the defendants, finding that there was no violation of the provisions of the Declaration in using the properties for short-term rentals. The Court found that the character of the use was still for single family residential purposes, since even as rental properties people were still "residing" there, and thus was not in violation of the Declaration.

This case highlights the importance of drafting clear and unambiguous provisions in the association declaration in order to avoid these types of disputes. If an association wishes to control the amount of rental properties within a subdivision or condominium development, one way to accomplish this is to consider enacting leasing restrictions. If you have any questions regarding the different types of lease restrictions that can be enacted in your community, contact your legal counsel to discuss it in more detail.

This case is cited as *Lowden v. Bosley*, No. 78 September Term, 2005 (Md. App. 10/17/2006)(Md. App. 2006).

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Lerch, Early & Brewer Community Association Group News and Notes

THE LATEST NEWS AND INFORMATION FROM OUR GROUP.



Two attorneys in Lerch, Early & Brewer's Community Associations Group will be involved in next month's Community Associations Institute's Law Seminar, presented by the College of Community Association Lawyers. **Jeff Van Grack**, a member of the College's faculty, will be chairing the Seminar, which will be held on February 23 - 24, 2007 in New Orleans.

Additionally, **Jason Fisher** will be a featured speaker at the event, co-presenting a session entitled "Cyber Issues and Electronic Voting." His presentation will deal with technology issues currently being implemented by associations, such as electronic voting and notices. For more information about this topic, see the related article in this issue of the *Update*.

The Law Seminar is an annual event is developed by the College of Community Associations Lawyers as a way to advance the knowledge and practice of community association law. Additional information about the event can be found by [clicking here](#).

Jason Fisher was recently re-elected to serve on the Board of the Washington Metropolitan Chapter of the Community Associations Institute during 2007, a position he also held during 2006. The Washington Metropolitan Chapter serves the educational, business, and networking needs of the community associations industry in 20 cities and counties in Maryland, Virginia, and the District of Columbia. Additional information about the Institute can be found online by [clicking here](#).

Additionally, Mr. Fisher recently appeared on the television program "Law School for the Public," to discuss HOA and condominium association issues. "Law School for the Public," produced by the Montgomery County Bar Association, airs frequently on Montgomery County Television Channel 21.

Jeremy Tucker, an associate in the Community Associations Group, was recently admitted and sworn-in to the District of Columbia Bar.

The Community Associations Group would like to welcome **Christi Hoag**, who recently joined the Group as a paralegal. Ms. Hoag comes to the firm from the Clermont, Florida-based Law Office of Edward P. Jordan II, P.A. She graduated *magna cum laude* from the University of Florida in 2004, where she majored in Marketing and received a B.S. in Business Administration.

Save the Date!

On Tuesday, March 13, the Community Associations Group will present a seminar for managers and board members on "Hot Topics in Amending Governing Documents" and "Tips on Being an Effective Board Member." Registration and breakfast will begin at 8:00 am, and the seminar will commence at 8:15, ending at 9:30 including time for questions and answers. A formal invitation will be sent in the coming weeks. To RSVP, or for additional information, contact Benjamin Harris at bjharris@lercheearly.com.

We Would Like To Hear From You

We publish this newsletter as a service to our clients as a means to make them aware of certain aspects of the law. As always, we would like to hear feedback from our readers regarding the content of the newsletter. If there are items or topics you would like to see covered in future issues, or you have a suggestion concerning the newsletter itself, you may send them to Ben Harris at BJHarris@lercheearly.com, or via phone at 301-961-6096.

Additionally, a number of the Firm's other departments periodically issue highly informative newsletters on a variety of other subjects, including Employment and Labor, Commercial Lending, and Real Estate. If you would like one or more of these newsletters, you may access them through our website, www.lercheearly.com. To be added to the mailing list of any of the above-mentioned practice groups, simply send an email to Mr. Harris at BJHarris@lercheearly.com.

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