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Going “Green” in Communities

By: Kathleen Machado, Doug Levy and Todd Sinkins

There has been a growing trend in recent years among community associations to “go green” and reduce the amount of paper, waste and energy communities generate. Many community associations have already begun taking steps to become more environmentally friendly, and more are likely to join this effort in the coming years. While these associations should be commended for their intentions and their efforts, it is important to keep in mind the legal issues that may arise when communities try to act in a more environment-friendly manner.

One of the efforts being undertaken is to reduce the amount of paper generated and used by the association and its membership. While there are some aspects of governance that lend themselves to going “paperless,” there are also certain actions that must be performed in a way that leaves the association with no choice but to use paper.

Ultimately, an association’s ability to reduce the amount of paper it generates will come down to the laws of the state where it is located and whether its governing documents or condominium instruments permit notices or information to be transmitted to members using something other than the traditional paper format. As always, it is critical for a board of directors and its managing agent to check the governing documents or condominium instruments first in order to determine the requirements for notices and the conveyance of information to members. And, the governing body should heed the wishes of the membership when deciding just how “green” the community should go.

In Virginia, there are statutory requirements that certain notices be hand-delivered or sent to an owner via certified or registered mail. For homeowner associations, notices of meetings such as annual or

special meetings must be sent either via hand-delivery or by mail. For meetings of the homeowners association’s executive organ, however, notices of such meetings must merely be published where they are reasonably calculated to be available to a majority of the lot owners. Lot owners can request that notice of meetings of the board of directors be provided via electronic mail. Thus, for meetings of boards of directors of homeowners associations in Virginia, it may be possible to avoid having to send paper copies of notices, depending on whether the governing documents allow it.

The notice provisions that pertain to condominium associations in Virginia are, however, slightly different. Notice of association-wide meetings or executive organ meetings may be sent via mail or electronic mail. However, in order to send notice via electronic mail, the association must first obtain the consent of the person to whom the electronic mail notice is to be provided. More importantly, the sending of notice to members via electronic mail must be allowed under the condominium instruments or duly adopted rules and regulations.

As for notice to owners in Virginia regarding possible covenant violations, the notice requirements are more stringent and do not specifically authorize the use of electronic mail to notify owners of hearings or the results thereof. This is true for both condominium associations and homeowner associations alike.

In the District of Columbia, associations are required by law to provide notices to members using a paper copy of the notice. Notices of association meetings must be mailed to members or, in the alternative, hand-delivered. There is no provision under the statute that permits notices to be sent electronically.

In Maryland, the electronic transmission of notices and information is allowed under certain circumstances. If the governing documents of the association or council of unit owners so permit, then under the applicable statutes, notice or information may be provided to an owner electronically if: (1) the governing body of the council or association gives authorization to provide the notice or information electronically; (2) the owner gives prior written authorization to provide such notice or information electronically; and, (3) an officer or agent of the council or association certifies in writing that it has provided notice of a meeting or delivered material or information as authorized by the owner. And, although electronic transmissions are permitted, the council or association must be certain that the transmission is delivered, as the statutes address what constitutes an ineffective electronic transmission.

Generally, when it comes to voting, paper ballots and proxy forms should be used by an association. Retaining hard copies of the ballots and proxies is important to ensure the accuracy of the voting process and to retain proper records in the event a vote is challenged.

In Maryland, however, votes or proxies may be transmitted electronically if authorized in the governing documents. Notwithstanding language in the governing documents, the governing body may authorize owners to submit a vote or proxy electronically if the electronic transmission contains information that verifies that the vote or proxy is authorized by the owner or his or her proxy. However, if the governing documents require voting by secret ballot and the anonymity of voting by electronic transmission cannot be guaranteed, voting electronically is permitted if owners have the option of casting anonymous printed ballots. Of course, if an association or council uses electronic votes or proxies, records of such electronic transmissions should be retained.

Even if an association is unable to avoid the use of paper notices, ballots and proxies, there are a number of other areas in which the amount of paper can be reduced significantly. For example, if an association has a newsletter, it may be possible to create and send the newsletter to members electronically. Similarly, creating and using a website can be helpful in conveying information to members. By placing copies of the governing documents, resolutions and rules and regulations on the website, this may help reduce the reliance on paper copies. However, it is important to remember that storing copies of documents electronically on a website does not negate an association's obligation to provide hard copies of resale packets or disclosure requirements.

Additionally, associations can encourage members to pay their assessments via automatic electronic debiting methods. Not only does this reduce the amount of paper involved in paying assessments, but it has the added benefit of helping to ensure that assessments are paid in a timely fashion.

Another approach to reducing the amount of paper is to make certain documents available upon request. For example, depending on the specific requirements noted in the governing documents or condominium instruments, it may be possible in some instances for the board of directors to notify the membership of the adoption of a policy or rule or regulation, without having to print and send copies of the adopted document in its entirety. Of course, the members would need to have easy access to obtaining full copies of the document and be able to print copies if they so desire. By taking this approach, if permitted, the association may be able to cut down on the amount of paper it produces, thereby reducing the impact on the environment.

In addition to the aforementioned "green" initiatives that community associations may take on their own, potential eco-friendly federal and state legislation which impacts the scope of authority of associations to regulate homeowners' individual green practices

may be headed your way in the near future. For example, in Virginia, the legislature enacted a law that bars community associations from prohibiting owners from installing or using solar energy collection devices on their property. While associations are still empowered to establish “reasonable restrictions” such as size, place and manner limitations, the ability to outright prohibit such devices is now expressly beyond the reach of associations. It is important to note that this prohibition does not invalidate existing covenants that restrict or ban solar collection devices and which were in effect before July 1, 2008.

It is certainly recommended that each association strike a balance between aesthetics and eco-friendly initiatives such as time, place and manner restrictions for solar collection devices, as well as any other types of technologies, methods and practices that develop. It is a good idea to periodically review your rules and regulations to ensure compliance with your state and federal regulations, as well as your community’s needs and desires.