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Maryland and District of Columbia Legislative Update

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District of Columbia

The District of Columbia has taken several legislative and regulatory actions this year that will have a meaningful effect on the operations of many D.C. community associations.

Specifically, the District of Columbia amended its pool operation regulations to comply with the requirements of the federal Virginia Graeme Baker Pool and Spa Safety Act of 2007. Under these revised regulations, every new and existing public pool and spa must be equipped with drain covers conforming to the American National Standard ASME A112.19.8-2007 Suction Fittings for Use in Swimming Pools, Wading Pools, Spas and Hot Tubs published by the American Society of Mechanical Engineers. Additionally, the new D.C. Regulations comply with the federal requirement mandating the enclosure of all pools and spas to prevent small children from gaining unsupervised entry in to a pool area and that all pools and spas be equipped with anti-entrapment devices on pool or spa drains. Also, all new and existing pools and spas with a single main drain must have one or more additional devices or systems designed to prevent suction entrapment meeting the requirements of any applicable ASME/ANSI Standard or applicable consumer product safety rule.

In addition, the District of Columbia Water and Sewer Authority ("WASA") has created a new billing program to fund a two billion dollar federally-mandated obligation toward controlling sewer overflow into the Anacostia and Potomac Rivers, and the Rock Creek. The WASA program charges property owners based on the amount of impervious surface present on the property. The impervious surface charge began to appear on May 2009 water bills.

We will continue to monitor pending legislation and regulations regarding the condominium warranty bond regulatory procedures. We will also monitor pending amendments to the D.C. Condominium Act, which, if adopted, will clarify ambiguities in the non-judicial foreclosure process, create requirements that will guarantee the posting of a warranty bond with the D.C. Government prior to the first sale of a unit within a condominium, establish procedures for open Board meetings and holding executive sessions of the Board and clarify the insurance provisions in the Condominium Act, including responsibility for the Association's deductible when an owner's act caused the insurance claim, among other things.

Maryland

The 2009 legislative session in Maryland was rather active this year and while the subjects of manager licensing and lien priority were discussed, both of these measures ultimately were not enacted this session. Instead, bills addressing issues like condominium insurance, fidelity bonds, open meetings and access to books and records were the bills that will ultimately become law in Maryland. Unless otherwise specified below, all of the legislation addressed in this newsletter will take effect on October 1, 2009.

Condominium Insurance

As was reported by our colleague Peter Philbin in the Maryland's Legislative alert that was distributed to our Maryland Condominium clients late last month, emergency legislation took effect on June 1st, which amended Section 11-114 of the Maryland Condominium act to clarify the scope of the insurance that a condominium must provide in the wake of the Court of Appeals decision, Anderson v. Gables at Tuckerman, 404 Md. 560 (2008). The new legislation clarifies that each condominium's master policy of insurance must cover certain developer-installed unit components. The legislation also clarifies that regardless of what a condominium's documents say, unit owners may be held responsible for payment of up to \$5,000 of the master policy deductible for any loss that originates in their units. Per the new legislation, condominium's must include a disclosure in their resale documents about each unit owner's potential liability for the master policy deductible and they must annually advise the condominium's unit owners that they may be held responsible for up to \$5,000 of the master policy deductible.

Fidelity Insurance

In the wake of Virginia's enactment of community association manager licensing, the Maryland General Assembly adopted legislation mandating that all condominiums and Maryland homeowners' associations must maintain a policy of fidelity insurance that: a) covers acts of fraud, dishonesty or criminal acts by any officer, director managing agent, agent or employee who disburses funds for the community; and b) provides coverage equal to three months of the community's gross annual assessment income plus all reserve funds held at the time the policy is issued or \$3,000,000, whichever is less.

Open Meetings

Currently, both the Condominium Act (Section 11-109.1) and Homeowners Association Act (Section 11B-111(4)) require all meetings of the Board of Directors of a condominium or HOA to be open unless the meeting is being conducted for at least one of the following purposes: a) discussion of matters pertaining to employees and personnel, b) protection of the privacy or reputation of individuals in matters not related to the association, c) consultation with legal counsel; d) consultation with staff, personnel, consultants, attorneys or other persons in connection with pending or potential litigation; e) investigative proceedings concerning possible or actual criminal misconduct; f) consideration of the terms and

conditions of a business transaction if the disclosure could adversely affect the economic interests of the association; g) compliance with specific, constitutional, statutory or judicially imposed requirement protecting particular proceedings or matters from public disclosure; or h) on an individually recorded affirmative vote of two-thirds of the board or committee members present, some other exceptional reason so compelling as to override the general policy in favor of open meetings.

Over the years, many of our Association clients approached us with questions about entering into an executive session citing the catch-all provision detailed above. Given this confusion, the general assembly has revised Section 11-109.1 of the Condominium Act and Section 11B-111 of the Homeowners' Association act to remove the catch-all provision listed in subsection (h) above. Additionally, the open meeting statutes were revised to clarify that the Board may: a) consult among itself as well as with outside consultants and legal counsel to discuss issues of pending or probable litigation or other legal matters; and b) discuss any assessment delinquencies in closed session.

Access to Books and Records

Section 11-116 of the Condominium Act and Section 11B-112 of the Homeowners' Association Act, have provided that associations must provide certain association records to their members. Two common issues that arose when an owner submitted a request for records to an association were that the statutes did not detail when the requested association records must be made available to a member and they did not offer much guidance on what the association could charge for copies of the association's records. With the enactment of House Bill 137, associations have clarity on both issues. Specifically, if a member requests in writing financial statements or minutes of meetings of the executive organ of an association, the association must make these financial records available to the requesting member within 21 days after receipt of the member's written request. If the financial records and minutes requested by the member were prepared more than three years prior to the member's written request, then the association has 45 days to make the requested records available to the member.

On the issue of costs, House Bill 137 also clarified that the maximum amount that an association may charge for copies of Association records must be consistent with the amounts set by the Maryland Courts for copies of court records. Currently, the Maryland courts charge \$0.50 per page for copies of any court records. The new legislation also continues to allow associations to adopt a "reasonable" charge for the review of any requested records.

Condominium and HOA Transition from Developer Control

Section 11-109 of the Condominium Act and Section 11-132 of the Homeowners' Association Act, detail: a) when the developer of an association must convene a meeting of the members to transition control of the association from the developer to the association, and b) the books and records that the developer must convey to the owner-controlled Board after the developer control period has ended. The

amendments to both Sections 11-109 and 11-132 require that any notice issued by the developer about the meeting to transition control of the association must be more specific as to the threshold of units or lots that have been conveyed to owners as well as the purpose of the membership meeting to transfer control of the association. The amendments also further clarify common issues related to the transfer of association records by developers such as when the developer must grant an owner-controlled condominium with access to Association funds, whether as-built drawings will be provided to the owner-controlled homeowners association and other areas of potential dispute between a newly transitioned association and its developer.

Elevator Inspections

Effective July 1, 2009, all associations or other private owners of elevators must retain a third party elevator inspector to perform an annual inspection of all elevator equipment. Previously, state inspectors performed periodic annual elevator inspections for the benefit of private elevator owners; however, due to Maryland's significant budget constraints, private elevator owners must pay for and coordinate annual inspections of the elevator equipment that they operate. Any third party elevator inspector retained by an association to inspect its elevator equipment must be approved by the Maryland Commissioner of Labor. A list of approved elevator inspectors may be located on line at: <http://www.dllr.state.md.us/labor/elev.html>.

Montgomery County Multifamily Recycling Initiatives – Enforcement Alert

Since 2006, Montgomery County has mandated certain recycling programs by apartments and condominium developments. Until recently, these county mandates have been enforced on an ad-hoc basis; however, the County recently issued an alert to clarify what recycling programs should be implemented for multi-family buildings in Montgomery County and the alert restated the County's intent to initiate enforcement actions against those developments that do not abide by the County's recycling mandates for paper, commingled materials, and scrap metal. The County's Department of Public Works is available to assist developments in creating a compliant recycling programs. For more information about the County's recycling mandates or to coordinate a site visit by the Department of Public Works, contact the Montgomery County Multi-Family Program Coordinator at 240-777-6446.