

MERCERTRIGIANI

RECENT JUDICIAL RULINGS AFFECT ASSOCIATION AUTHORITY FOR RULE ENFORCEMENT

In a growing number of recent cases, the Virginia courts have had occasion to consider the authority of common interest community associations to pursue internal remedies for rule enforcement. The trend of these cases is cause for concern about the long-held view that common interest community associations may rely upon statutory authority to impose monetary charges and suspend ownership privileges.

Shadowood Condominium Association v. Fairfax County Redevelopment and Housing Authority

CASE SYNOPSIS

- The *Shadowood* case involved a challenge to the authority of a Fairfax County condominium association to impose and collect charges for rule violations.
- The association relied upon provisions of Section 55-79.80:2 of the Virginia Condominium Act in imposing charges.
- The Fairfax Circuit Court ruled that the association did not have authority to impose and collect charges – absent specific authority in the recorded condominium instruments.
- The association in *Shadowood* appealed the ruling to the Virginia Supreme Court.
- The Virginia Supreme Court, in an unpublished decision, ruled that the association did not have the authority to impose and collect charges for violations of association rules.

CASE SUMMARY

The *Shadowood* case involved a challenge to the authority of a Fairfax County condominium unit owners association to impose and collect charges for rule violations. The association relied upon provisions of Section 55-79.80:2 of the Condominium Act in imposing charges. The Fairfax Circuit Court ruled that the association did **not** have authority to impose and collect charges – absent specific authority in the recorded condominium instruments. The association in *Shadowood* appealed the ruling to the Virginia Supreme Court.

The Virginia Supreme Court heard the *Shadowood* case in June, and recently issued an order – an unpublished decision – affirming the ruling of the Fairfax Circuit Court. In a footnote in the ruling – the Court offered the following - “by its plain terms, the statute is permissive in nature; it does not confer authority to an association beyond that in the association’s governing documents.”

Although the Condominium Act does not apply to property owners associations, the decision must be given careful consideration because the Condominium Act contains almost identical language to the language found in Section 55-513.B of the Virginia Property Owners' Association Act. And, the Fairfax Circuit Court, in a separate case involving a townhome community, issued a similar ruling in a challenge to the authority of a property owners association to impose and collect charges under those provisions of the Property Owners' Association Act. That case was not appealed to the Virginia Supreme Court, however.

Another case involving rule enforcement authority may be taken up by the Virginia Supreme Court. In September 2011, the Loudoun County Circuit Court interpreted the rule enforcement provisions of the Act, issuing a ruling in *Lee's Crossing Homeowners Association v. Linzie Zinone* consistent with the widely held view that an association does have authority under the Act to impose and collect a charge for a rule violation. In the Loudoun County Circuit Court opinion, the court specifically addressed and disagreed with the conclusions reached by the Fairfax Circuit Court. This case clearly has a very different outcome, and more may come of the issue if the case is appealed.

While the *Shadowood* opinion may not be binding on all common interest community associations, the opinion does offer insight on how the Virginia Supreme Court may interpret similar cases involving Section 55-79.80.2 of the Condominium Act and the comparable provision of the Property Owners' Association Act, Section 55-513.B. Strictly interpreted, this ruling of the Court leads to a conclusion that an association may impose sanctions **only** when the recorded documents expressly authorize an association to assess monetary charges and suspend member privileges or when the governing documents expressly allow the association to adopt rules or regulations which impose monetary charges and suspend member privileges.

CONCLUSIONS AND RECOMMENDATIONS

In light of the developing trend of cases invalidating rule enforcement based solely on statutory authority, common interest community leadership should take the following steps:

- The Board should review current rule enforcement procedures and determine whether the recorded governing documents or condominium instruments establish authority to impose monetary charges or suspend ownership rights.
- If the documents are silent:
 - The Board and Covenants Committee should cease assessment of monetary charges for violation of the governing documents, including nonpayment of assessments.
 - The Board should revise the due process procedure and other Association resolutions to remove language authorizing assessment of monetary charges and the authority to suspend membership rights and use of recreational facilities and Association services.

- If the documents do provide authority to assess charges and suspend membership rights:
 - The Board should revise the due process procedure and other Association resolutions to provide clear references to the authority to suspend membership rights and use of recreational facilities, if such references are not currently included.
- The Association should consider amending the Declaration to establish authority for the Board to impose monetary and late charges and to include the authority to suspend membership rights and use of recreational facilities and Association services.

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