



# WEINBERG LAND USE FORUM

# NEWS

**SPRING 2008**

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## Fredericksburg Hotel Project

**BY: CHARLES W. PAYNE, JR., ESQ.**



The City of Fredericksburg, Virginia, considered one of the most historic cities in the country, recently approved the development and construction of a ninety-nine (99) room Courtyard by Marriott hotel to be located in Fredericksburg's historic downtown area. This will be the first national flagship hotel to locate in Fredericksburg's historic district, as well as the first hotel to locate within the historic district since 1972.

Hirschler Fleischer played a significant role in assisting the owners of the hotel franchise, the Inns of Historic Fredericksburg, LLC ("IOHF"), in obtaining several land use permits, including (i) a special use permit to construct a hotel in the historic district; (ii) a special use permit to construct a hotel within a flood plain; (iii) a special use permit to park offsite; (iv) a special exception to exceed the floor area ratio; and (v) architectural review board approval as to mass, scale and architectural design for the hotel.

In addition, Hirschler Fleischer assisted IOHF in submitting a Request for Proposal ("RFP") to purchase City land for purposes of developing the hotel. IOHF was awarded the right to purchase the hotel site in February of 2006, and thereafter Hirschler Fleischer assisted IOHF in negotiating the final agreement for sale and off-site parking agreement. The city and IOHF finally closed on the hotel property in December of 2007, and construction began in January of 2008. The hotel is scheduled to open in the spring of 2009.

The City foresees the hotel as being a catalyst to increase sales and real estate tax revenues, along with new investment in the downtown area. It is hoped that the hotel will attract both business and leisure travelers. The IOHF and City are excited about Marriott's marketing prowess and are hopeful that this will assist Fredericksburg in becoming a greater destination site.

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# New

# COMMUNITY ASSOCIATION MANAGERS

## And Manager Regulations And Association Disclosure Packet

**E**xtensive regulation of community association management companies and changes to the disclosure packet provisions of the Virginia Property Owners' Association Act are set to become effective on July 1, 2008. The full text of the new statutory provisions can be found at <http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+HB516ER2>. Following is a summary of the new legislation.

### **I. Community Manager Regulations.**

Community association management companies will now be regulated pursuant to an entirely new section of the Virginia Code, Title 54.1 Chapter 23.3, entitled "Common Interest Communities." By enacting this legislation, the Legislature is attempting to bring a new level of professionalism to the community management industry in Virginia. The law requires that any person or entity engaged in management services for a common interest community in Virginia acquire a license and demonstrate that employees with supervisory responsibility obtain certification from the Common Interest Community Board (the "Board").

The Board will issue provisional licenses to any person or entity offering community association management services in Virginia who applies for a license on or before January 1, 2009. Provisional licenses expire on June 30, 2011. After June 30, 2011, issuance of a license will be conditioned upon the following: (i) certification of all

supervisory employees with the Board and certification from the community manager that it is in good standing and authorized to transact business in Virginia; (ii) that it has an established code of conduct; (iii) that all community management services are provided pursuant to written contracts; (iv) that the community manager has established internal accounting controls; and (v) that an independent certified public accountant audits the financial statements of the community manager annually.

The Board is charged with the responsibility of determining the educational requirements for certification of community managers and their supervisory employees. The statute expressly provides that any one of the following designations meet the Statutory Certification requirements: Accredited Association Management Company, an Association Management Specialist, and a Professional Community Association Manager by the Community Association Institute, or designation as a Certified Manager of Community Associations by the National Board of Certification for Community Association Managers.

The statute also grants broad powers to the Board to supervise and investigate the solvency of community managers. Procedures have been established, which include petitions to the Circuit Court, in order to effectuate Board review of community manager files and appointment of a receiver to take possession of the funds or property of the community manager under

specified circumstances. The Circuit Court may issue an order authorizing the Board to inspect the records of a community manager upon an ex parte petition from the Board supported by affidavits and other evidence which demonstrates reasonable cause to believe that such action is required to prevent immediate loss of property of one or more of the associations to which the community manager provides management services.

Va. Code § 55-530 has been amended to provide that the Board is to appoint a Common Interest Community Ombudsman (the "Ombudsman") and establish the Office of the Common Interest Community Ombudsman. The Office of the Ombudsman will be funded through fees collected from community managers as part of the licensure process. The Office of the Ombudsman is charged with providing community association members and managers with information and guidance on community management related issues. The Board is also to promulgate regulations that will require community associations to establish procedures for the resolution of written complaints from association members. The procedures must, at a minimum, include the following: (i) maintenance of written complaints for no less than one year and (ii) complaint forms or written procedures for lodging complaints must be created. Aggrieved association members may, within 30 days after any final adverse decision by an association, notify the Board of the adverse decision, whereupon the Board may request additional information

# ER REGULATIONS

## Requirements

BY: MARSHALL L. JONES, ESQ.

concerning the notice of complaint from the association that rendered the final adverse decision.

The Legislature has also established the Common Interest Community Management Recovery Fund, codified at Va. Code § 55-530.1 (the "Fund"). The Fund will be financed through fees charged to community managers at the time of initial application for licensure and fees charged to each association filing its first annual report after July 1, 2008. The purpose of the Fund is to provide a pool of funds available to associations in those cases where a community manager does not have sufficient funds to restore all funds that were or ought to have been held in a fiduciary capacity. If disbursements from the Fund are required pursuant to the statute, the Board is required to revoke the license of the community manager whose actions resulted in the payment from the Fund. Once the community manager's license has been revoked under this provision, the community manager will not be eligible to apply for a new license until the community manager has repaid in full the amount paid out from the Fund.

### **II. Property Owners' Association Disclosure Packets.**

The Legislature has also made several revisions to the Virginia Property Owners' Association Act, Va. Code § 55-508 et seq. (the "Act"). The most noteworthy changes concern the delivery and fees associated with disclosure packets.

The Act now requires that the association is to deliver the disclosure packet within 14 days after receipt of a written request and delivery instructions from a seller. The former language required that the association was to "make available" the disclosure packet within 14 days after receipt of a written request and receipt of the appropriate fee. Of particular note is that the requirement of payment of the fee up front has been removed.

The fees for preparing and issuing disclosure packets are now divided between fees that may be charged by associations managed by a community manager versus those not professionally managed. Where the association is managed by a community manager, the following fees may be charged: unit and lot inspection -- not to exceed \$100.00; preparation and delivery of the disclosure packet (i) paper -- not to exceed \$150.00 for up to two copies, (ii) electronic format -- not to exceed \$125.00 for up to two copies; expedited fee -- not to exceed \$50.00; if delivery is requested via hand or overnight delivery -- a fee not to exceed the actual cost paid to a third-party service; post-closing fee (to establish the purchaser as the owner of the property in the records of the association) -- not to exceed \$50.00; disclosure packet update or financial update -- not to exceed \$50.00. The statute also provides that the association or its community manager must publish and make available in paper or electronic format a schedule of the applicable fees that will be charged in connection with the preparation and delivery of disclosure packets.

The disclosure packet fees authorized by the statute are to be collected from the settlement proceeds at the time of settlement for the lot. The seller is the party responsible for all costs associated with the preparation and delivery of the disclosure packet, except for updates which are the responsibility of the requesting party. If settlement does not occur within 90 days of the delivery of the disclosure packet, or funds are not collected at settlement for disbursement to the association or community manager, all fees, including those that would have otherwise been the responsibility of the purchaser or settlement agent, will be assessed against the seller and will be a personal obligation of the seller as well as constitute an assessment against the lot. The maximum penalty for failing to provide the disclosure packet has increased from \$500 to \$1,000.

The fees which may be imposed by associations not managed by community managers are quite different. For these associations, the fee must reflect the actual cost of preparation of the disclosure packet, not to exceed \$0.10 per page of copying costs or a total of \$100.00. The maximum penalty for failing to provide the disclosure packet is \$500.00.

The contents of the disclosure packet remains unchanged, except for the addition of the approved minutes of meetings of the board of directors and the association for the six month period preceding the request for the disclosure packet.

## Access Management Regulations

BY: JEFFREY P. GEIGER, ESQ.

The Virginia General Assembly recently enacted new legislation providing for the phased implementation of the Access Management Regulations and Guidelines (“Access Regulations”) promulgated by the Virginia Department of Transportation (“VDOT”). Last year, legislation was enacted authorizing VDOT to promulgate access management regulations for state roads and permitted “fast-track” review of VDOT’s proposed regulations. VDOT drafted the Access Regulations and made them available for public comment last fall. The planned effective date was July 1, 2008. Under VDOT’s initial draft, the Access Regulations would have been applicable to all state roads starting July 1, 2008.

The new legislation now requires implementation of the Access Regulations in two phases based on a state road’s federal functional classification. “Phase I” starts on July 1, 2008 and subjects only state roads with a functional classification as a principal arterial to the Access Regulations as of this date. The Access Regulations applicable to principal arterial roads remain on the “fast-track” approval process.

“Phase II” starts on October 1, 2009 and subjects state roads with a functional classification as a minor arterial or collector road to the Access Regulations as of this date. The Access Regulations applicable to arterial and collector roads have been removed from the “fast-track” process and will be subject to the standard Administrative Process Act requirements.

VDOT will be publishing a map to identify which state roads meet the federal functional classifications of principal arterial, minor arterial, and collector roads. The federal functional classification assigned to a state road by VDOT may differ from the classification assigned by the locality. This difference will arise if a locality does not use the federal functional classification system or nomenclature for the state roads located within the locality. As a result, applicants seeking entrance permits from VDOT should not rely on local classifications. Applicants who will be seeking entrance permits after July 1, 2008 should periodically check VDOT’s website for the Access Regulations (<http://www.virginiadot.org/PROJECTS/accessmgt/default.asp>)

to determine whether an applicable state road will be classified as a principal arterial by VDOT.

In addition to the phased implementation required by the recently-enacted legislation, VDOT has indicated that changes have been made to its initial draft of the Access Regulations in response to public comments submitted to VDOT. The public comments and VDOT’s responses may be found at <http://www.virginiadot.org/projects/accessmgt/ResponseAccessMgtPublicComments11.20.07.pdf>.

Some of the changes VDOT has indicated it will make in the final version of the Access Regulations include:

1. removal of the requirement for frontage/reverse frontage roads at new signalized intersections;
2. removal of the requirement for a commercial entrance traffic impact analysis; and
3. removal of language related to reductions in levels of service for rural and urban roads.

Even though the requirement for a commercial entrance traffic impact analysis will be removed, VDOT has indicated that the Access Regulations will still give VDOT the option to require an engineering study related to the functional design of a proposed commercial entrance and its impact on the road. In addition, VDOT has indicated that the requirement regarding shared entrances will remain in the Access Regulations. Pursuant to this shared entrance requirement, VDOT will require applicants to enter into agreements with an adjacent property owner(s) for a shared entrance, unless the applicant can produce evidence that such agreement could not be reached.

Once the final version of the Access Regulations is released by VDOT some of the information provided here may change.

# Pending ZONING CASES

## THE COUNTY OF Chesterfield

**Jim Theobald** is filing a rezoning request for Charlie Primm on Hull Street Road across from Price Club for a mixed-used development of TND design. The property is currently zoned for retail purposes and the development would have a combination of stand-alone retail, retail with residential above, and stand-alone multi-family residential transitioning from Hull Street.

An amendment to a 20 year old zoning case is being handled by **Jim Theobald** on behalf of The Rebkee Company at Route 10 and Chalkley Road. The old commercial zoning did not permit drive-throughs associated with drug stores, therefore an amendment has been requested to provide a drive through for a proposed CVS.

## THE COUNTY OF Hanover

**Glenn Moore** and **Caroline Nadal** are processing a conditional use permit in Hanover County to allow the construction of a new Episcopal Church on U.S. Route 301.

**Jim Theobald** intends to file a second request for Hopkins Properties, LLC on five parcels on Route 1 at the Henrico County line. Retail uses are planned.

**Jim Theobald** has a rezoning of approximately 22.5 acres pending for Hopkins Properties, LLC on the east side of Route 1 and the north side of Sliding Hill Road. Retail uses are planned.

**Jim Theobald** has a rezoning request pending for approximately 6.2 acres on the north side of Route 360 and Compass Point Road. A self-service storage facility and other retail uses are contemplated.

## THE COUNTY OF Henrico

**Glenn Moore** is representing an automobile dealer on West Broad Street in a rezoning and street vacation of property adjacent to the existing dealership.

rezoning request on approximately 77.5 acres off Pouncey Tract Road adjacent to the Collinstone and Bradford communities within Wyndham. The request is for RTH-C zoning for single family detached condominiums and R-3C for single family homes, ultimately to be annexed into Wyndham.

**Jim Theobald** is representing long-time client HHHunt in its

## Miscellaneous

**Jenn Rosen, Jeff Geiger, Caroline Nadal** and **Chuck Rothenberg** represent Verizon Wireless in a number of requests for communication tower locations in the Cities of Richmond and

Colonial Heights, and in Chesterfield, Henrico, Hanover, New Kent, Prince George, Lunenburg and Caroline Counties.

## THE TOWN OF Purcellville LOUDOUN COUNTY

**Chandra Lantz, Farrah deLeon** and **Glenn Moore** have been representing the Town of Purcellville in a comprehensive plan dispute with Loudoun County which impacts the location of a high school

proposed for construction just outside of the Town. The dispute has led to several lawsuits, a number of which are scheduled to be considered by the Virginia Supreme Court in early June.

## THE COUNTY OF Stafford

**Charlie Payne** recently obtained an amendment to the Stafford County Comprehensive Plan and rezoning approval for our client Smith Packett, (Stafford Health Investors, LLC) to develop a full continuum of care project, including 240 independent living condominiums, a 76 bed assisted living facility and 120 bed nursing home. Smith Packett is a Roanoke-based company that specializes in the development of continuum care facilities.

**Charlie Payne** also obtained a waiver to Stafford County's urban service area requirements for residential builder client Stacy Construction Co. for purposes of allowing it to construct residential single family homes without the requirement of connecting to public sewer.

# Jurisdictional UPDATES

## THE TOWN OF Ashland

The Town's Comprehensive Plan update process continues. With the recent resignation of the Town's Director of Planning, the Town has decided to hire a consultant to assist with the update process. The current update is anticipated to result in a major overhaul of the Town's Comprehensive Plan. It is anticipated to contain more in the nature of specific recommendations for land uses within the Town,

followed by policy statements. The Town will also be taking another look at the mapping under the Land Use Plan. Consequently, if you have an interest in land in the Town of Ashland, you should be aware of how the mapping could affect the future development potential of your property. It is reported that the update process is likely to be completed in the Spring of 2009.

## THE COUNTY OF Chesterfield

Chesterfield County continues to confuse with its numerous initiatives promulgated by the administration, Board of Supervisors, Planning Commission or individual members thereof. Support for these initiatives does not appear to be uniform among the foregoing. Initiatives regarding the Upper Swift Creek area, water quality, levels

of service, County-wide land use plan amendment, increase in fees of all sorts continue to be introduced. One of the more significant initiatives is consideration by the Board of raising the "voluntary" residential cash profit amount from \$15,600 to over \$23,000. Stay tuned!

## THE COUNTY OF Henrico

Henrico County has recently begun a series of open houses for the public to view the initial draft of the 2026 Land Use Plan. County staff will be present at the meetings to answer questions relating to the maps. New classifications relating to "Traditional Neighborhood Development", "Suburban Mixed-Use Communities" and new urbanism concepts have been included, reflecting a willingness by the County to consider well planned, mixed-use vertical development on appropriate sites. Go to

the County's website at <http://www.co.henrico.va.us/planning/> to view a draft of the plan, as well as times and dates for meetings. If you are contemplating a change in land use in Henrico County, participation in the Land Use Plan process could be extremely beneficial by perhaps amending the Plan to be consistent with the proposed use.

## THE CITY OF Richmond

Roy Benbow of the Planning Department reports that the City is working on amendments to the City's Zoning Ordinance to create more flexibility for the Board of Zoning Appeals to grant special exceptions for such matters as the non-residential floor area requirements for mixed use buildings in zoning districts where mixed uses are allowed, and building setbacks for new construction. The Planning Department is also studying whether the B-4 zoning district should be amended to incorporate some benefits for providing desirable development features and perhaps require some active pedestrian uses other than parking at the street level.

Work continues on updating the downtown portion of the City's Comprehensive Plan. After a number of workshops, a second draft was presented to the Planning Commission on May 5, 2008. When the Plan is recommended for approval by the Planning Commission, it will be forwarded to City Council for consideration. Final approval of the update for downtown could come in late Summer or early Fall.

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# The American Institute of Architects Releases New A201 Family of Documents and Owner/Contractor/Subcontractor Groups Release ConsensusDocs

BY: COURTNEY MOATES PAULK, ESQ.

**M**ost owners, architects, contractors and subcontractors are intimately familiar with the “AIA Contract Documents”. Approximately every ten years, the American Institute of Architects (“AIA”) revises the standard form AIA Contract Documents. Last year was one of those lucky (or some may think unlucky) years. The primary changes to the AIA Contract Documents impact agreements between owner-contractor, owner-architect, architect-consultant, and contractor-subcontractor. The AIA refers to this series as the A201 Family of Documents. After hundreds of comments to the 1997 A201 Family from attorneys, owners, architects, engineer and contractor groups, the AIA released the new A201 Family of Documents in late 2007.

The bulk of the comments to the 1997 A201 Family related to dispute resolution on such things as the architect’s initial decision on claims, arbitration, consolidation of arbitrations, time limits on claims, consequential damages, and additional insured provisions. There were also comments on financial matters such as the owner’s right to obtain information about the contractor’s payments to subcontractors and to remedy non-payment and the right of the contractor to get financial assurance from the owner. And, of course, architects raised the issue of ownership of the instruments of service.

One of the biggest changes to the A201 Family is a shift from the architect as the initial decider of disputes between the owner and the contractor. This provision had been in place since 1911. The change was in response to complaints by owners and contractors

that they did not always want the architect to serve as an initial decision maker, especially since the architect was being paid by the owner. The new 2007 A201 replaces the architect as the initial decider of claims with a person called the “Initial Decision Maker” or “IDM”. During contract negotiations, the parties may elect to appoint anyone to be the IDM. However, interestingly, if no particular IDM is selected, that person, by default, is the architect.

Another significant change to the A201 Family is “check-the-box” dispute resolution. Since 1888 the AIA Contract Documents have required mandatory arbitration in the owner/contractor agreement. However, over the last ten years there has been a demand for choice between arbitration and litigation. The result – owners and contractors can now select a box for either arbitration or litigation. Ironically, however, if the box for litigation is not selected, the form automatically selects arbitration. Owners and contractors should be certain that their agreement reflects the true intentions of the parties and not the “automatic selection” of arbitration.

Additionally, over the last ten years there has been significant controversy regarding the mutual waiver of consequential damages provision which eliminated each party’s potential recovery of consequential damages. This provision was added in the 1997 A201 Family of Document and many expected this provision would be significantly amended or removed entirely. Unfortunately, however, this provision remains effectively unchanged in the 2007 A201 Family.

In recognition of the increased use of electronic documents, the AIA also added a new form E201 to the A201 Family. The E201 helps the parties in establishing protocols for dealing with all electronic forms of communications, including the transmission of drawings.

In response to the AIA’s release of the new A201 Family, a number of owner, contractor and subcontractor groups, including Associated General Contractors, endorsed an new “brand” of documents called ConsensusDocs. ConsensusDocs is being marketed as “a new generation of contract documents...born from a chorus of industry representatives working in a truly collaborative atmosphere”. The general theme of the ConsensusDocs is that they attempt to allocate risk to those who control the risk. The ConsensusDocs are extremely new and only time will tell whether they take-hold in the industry as an alternative to the traditional AIA documents.

The bottom line – whether using the AIA Contract Documents, ConsensusDocs or another form document, the parties should always negotiate the terms of a contract to have it reflect the concerns of the parties relative to the particular project. Also, many of the provisions included in these forms impose mandatory obligations on the parties which, if overlooked, could result in significant losses to both parties. As a result, it is always advisable to negotiate the terms of any contract and have it reviewed by counsel prior to signing. That way, you are sure to understand the risk you are assuming and the obligations imposed on you by the contract.



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# Legislative ALERT

The Virginia Department of Transportation (“VDOT”) is proposing new requirements for VDOT’s acceptance of new secondary streets. One of VDOT’s objectives in developing the proposed requirements is to promote connectivity among secondary streets, both within new secondary street networks and between existing and new secondary streets. Two concerns related to connectivity merit attention.

Under these proposed requirements, developers will be required to provide and/or connect stub roads before VDOT will accept new secondary streets. VDOT’s proposal, however, does not require localities to promote or require connectivity during the land use approval process. Without such a requirement, it is not clear whether localities will make VDOT’s connectivity policy a priority over neighbor opposition to connectivity. If localities do not, how will neighborhood opposition be reconciled with VDOT’s connectivity requirements for road acceptance? Will private roads become more prevalent or will neighbor opposition to connectivity jeopardize a project’s viability?

VDOT’s proposal will also impact the design of secondary streets within subdivisions. Engineers have expressed concerns that the proposed regulations will require a grid-like design for subdivision streets, as opposed to the popular cul-de-sac design. This grid-like design is intended to promote connectivity within subdivisions. If this proposal becomes final, developers may be limited in their ability to design subdivisions to meet market demands.

If you would like a copy of VDOT’s proposal, please contact Jeff Geiger at [jgeiger@hf-law.com](mailto:jgeiger@hf-law.com). VDOT is accepting public comments on the proposed requirements. You can e-mail comments to [SSARComments@vdot.virginia.gov](mailto:SSARComments@vdot.virginia.gov) or you can mail comments to SSAR Comments, c/o VDOT Policy Office, 1401 E. Broad St., Richmond, VA 23219. A public hearing on VDOT’s proposal has been scheduled for May 21 at 5 p.m. in the VDOT Central Auditorium in downtown Richmond. We encourage all interested parties to submit comments addressing these concerns and any other concerns related to VDOT’s proposed requirements for secondary street acceptance.