

COMMON INTERESTS



A SEGAN MASON & MASON, P.C. PUBLICATION
SUMMER 2016 EDITION



ANNUAL MEETING PREPAREDNESS

by ROBERT J. SEGAN



After attending hundreds of annual meetings over the years, our attorneys have observed a single truth over and over again: To avoid annual meeting problems, you have to plan ahead. Not just weeks ahead, but months ahead.

Here are some of the most common problems we encounter at annual meetings and how advance planning can alleviate them:

Required Nominating Committee or Elections

Committee is not appointed: We often see Bylaws requiring that a Nominating Committee and/or Elections Committee be appointed months in advance of the annual meeting. Sometimes associations don't realize they are required to do this. We often hear "we've never done this before, and it hasn't been a problem." Those become "famous last words" when an election becomes hotly competitive. It opens the way for a legal challenge by an election loser.

Board terms are confused: When Board seats become vacant in midterm due to resignation, most Bylaws require the owners to elect a replacement for the remainder of the term at the next annual meeting. Therefore, you may have an annual meeting where some candidates are elected to a full term, while others are elected to fill the remainder of a term. It is important to assure that this is done correctly and that the owners are made aware of this when the notice of meeting is sent. Sometimes, problems with Board terms created in past years must be corrected. This may take months before the annual meeting to untangle.

Too few candidates are running: For many associations, finding qualified candidates who are willing and able to serve is a challenge. This is something that cannot be done at the last minute and should not be left to chance. Active recruiting must begin months in advance. The nightmare scenario to avoid is this: Having three seats and only three candidates, one of whom would be a terrible, disruptive Board member whom no one else would vote for. In those circumstances, the horrendous candidate might get elected with only one vote: his/her own. You can imagine what the next three years of Board meetings would then be like.

Meeting notices are inaccurate, sent late or sent incorrectly: Annual meetings are void if notices are not complete and correct, or if they are sent late, or if they are delivered to owners incorrectly. Notices should be drafted and reviewed by counsel well in advance of the deadline to send the notice. It is good practice to send notices at least 10 days before the deadline. Owners often spot errors when they receive notices, which can be corrected if the deadline for the Notice of Annual Meeting has not passed.

which typically includes the member “complaint” and the final decision of the association. She warned...”Failure to hold open meetings, provide proper notice of meetings, or hold executive sessions that comply with the law may result in a referral of this matter to the Common Interest Community Board for whatever enforcement action it may deem appropriate”. This is where the robot on “Lost in Space” cries out, “Danger Will Robinson! Danger!”

To be fair, there are certain subjects that can be discussed behind closed doors. But, “informal executive sessions” only exist in one’s mind and not between the covers of Title 55 of the Code of Virginia. Well, that’s our breaking story for the summer season. Stay tuned for more of our favorite NFAD’s in future editions.

Proxy forms do not comply with Bylaw requirements: Proxy rules can be complex and they vary from association to association depending upon the Bylaws and applicable statutes. A proxy form that does not comply with your Bylaws can be voided, causing votes to be thrown out. The election result, which is the “voice of the owners,” then becomes distorted, which can cause rancor, cynicism and disillusionment among owners. Advance planning to create a proxy that complies with the Bylaws as well as applicable law is essential. Just as important is to have an accompanying explanation letter to owners regarding how to correctly complete the proxy form. Last minute, thrown together forms are often the source of annual meeting problems.

Meeting check-in and ballot security: An election can be impaired if the check-in process is not organized or if ballot security is not maintained. If your voting is by percentage interests, issuing ballots can be complex, and if a large turnout is expected, owners waiting in long lines can get ornery and mistakes can be made by the check-in personnel. Having check-in people who are organized and well briefed on procedures in advance can avoid these problems. Also helpful; prescreening the membership list and noting who is ineligible to vote so that those owners are not provided with a ballot and coding the ballot by percentage interest (where applicable) to speed up vote counting during the election process.

The meeting itself becomes disorganized and chaotic: It is a good practice to have a script or a detailed outline for the presiding officer prepared in advance. We have found that when the presiding officer describes, at the beginning, the order by which business will be conducted, and asks the attendees if they have any questions about it,

owners have a greater tendency to endorse and adhere to the order. Making sure owners understand that the purpose is to elect the directors, but that they will have time to present their concerns during old and new business periods, is also crucial.

It is also wise to let everyone know at the outset if you have a time limit for the meeting, such as when the meeting room must be vacated. Even if you do not have a “drop dead” time for your meeting room, announcing at the beginning of the meeting that you must conclude by a certain time will generally be well received. Then if things drag on, you can cite the deadline to the owners to encourage forward movement of the meeting.

It is also most efficient to have the vote counting occur while other business, such as committee reports, guest speakers or owner comment, takes place.

The vote counting process is impaired: Remember the 2000 Presidential election? Chaotic vote counting and the prolonged examination of questionable ballots can make elections a nightmare. Beware of assuming your election will be uncontested or a landslide. You never know when a hotly contested election will emerge and lax procedures could lead to uncertainty or even litigation. Hiring an experienced vote counter can be a necessity if you have a high volume of votes and many different percentage interests for units.

A quorum is not met: Not meeting a quorum at the annual meeting wastes money and deflates community spirit. Some advance planning can create an event that people want to attend. Food, guest speakers and door prizes can be very enticing, Politicians love

to have a group to address. Police and fire officials are available to speak to owners about the ever increasing concerns of personal security. Local businesses are often eager to contribute gift certificates to be given as door prizes, and some cash contribution to a drawing by the association can save money in the long run by attracting a quorum at your first try.

Preparing in advance for your annual meeting can also save the Association money, as the notices, and even the meeting itself, will not have to be redone. We will be sending you information about how we can help you to plan your annual meeting well in advance, to avoid these pitfalls and to turn the annual meeting into a positive experience for the owners and the Board.

**"PREPARING IN ADVANCE FOR YOUR
ANNUAL MEETING CAN SAVE THE
ASSOCIATION MONEY,**

**AS THE NOTICES, AND EVEN THE
MEETING ITSELF, WILL NOT
HAVE TO BE REDONE."**

SUMMERTIME... AND THE LIVING IS EASY....

by **DONNA MASON**



Summer is a time to wear flip flops and have fun in the sun but if you serve on the Board of your community association, you probably are thinking – “Aww – the time when we get the delinquent accounts paid!” A debt owed to the association that a homeowner may have put on the back burner moves very quickly to the front when the realization hits that someone has to explain to “the kids” why they can’t go to the pool with their friends this summer. As great as this tool is, denying use of the pool is a “suspension of amenities” that has to follow the suspension process the association would follow for denying use of any amenity like parking, tennis courts, etc.

Let’s look at what are the basic requirements for suspending use of amenities, including the pool:

Declaration or Recorded Bylaws must provide express authority meaning it has to say something like “the Board has power to suspend use of pool for nonpayment of assessments”. It cannot be based on general rule making authority.

If express authority exists, the Board needs to vote and adopt a resolution outlining the process for suspending use of amenities.

The Virginia Condominium Act and the Virginia Property Owners' Association Act ("statutes") require that the homeowner be at least 60 days delinquent to even start the suspension process based on non-payment of assessments.

The statutes require that the homeowner receive a notice providing a reasonable opportunity to cure the delinquency before the Notice of Hearing can be sent. "Reasonable" is not defined but 15 days would seem to be a reasonable time to cure. If the homeowner fails to pay by the deadline, a Notice of Hearing outlining the homeowner's rights, including the opportunity to be represented by counsel, must be sent by hand delivery or certified mail, return receipt requested, setting forth the alleged violation and the action the Board intends to take. Notice must be sent at least 14 days prior to the hearing.

Within 7 days of the hearing, the Board must send the Board's decision to the homeowner by hand delivery or by certified mail, return receipt requested. Any additional requirements set forth in the Declaration or Recorded Bylaws of the Association would need to be followed.

I can hear the yelling now. Let me guess what is being shouted: "This great tool to get dues paid quickly is useless since the pool season will be over before all of this can be completed!" In some cases, that is going to be the case when Memorial Day hits and the homeowner demands their sticker even though they are delinquent but the suspension process has not been completed.

But don't throw in the beach towel yet --- there are still certain things the Board can do to use pool suspension as a quick and easy way of getting the assessments paid and comply with the hearing requirements. Here are a few suggestions:

Don't be asleep on the lounge chair! Get a system in place now having the notices all go out at the first possible day. For example, the Notice to Cure goes out the 61st day after delinquency; the Notice of Hearing is sent out immediately after the deadline provided in the Notice to Cure without payment; the hearing is conducted promptly after the required 14 day notice has been sent.

Here's the problem of course – if the homeowner fails to pay the April quarter assessment, for example, it would not be possible to logistically complete the hearing prior to Memorial Day. The Board can still conduct the hearing and suspend as appropriate while the pool season is in full swing but to be able to deny pool access after the pool card was issued may be tricky. It would require a system to be put in place providing the lifeguard with a list of homeowners with revoked pool passes. If that homeowner attempts to go to the pool, pool entry would be denied and the card could be taken by the lifeguard to prevent future attempts to enter the pool. The hearing results notice should include a disclosure to the homeowner that they will be denied entry to the pool and loss of pool card which may result in payment itself without further action.

Additionally, many Associations issue pool cards or stickers way before Memorial Day. When a homeowner is delinquent when attempting to get their sticker early, if the Board could still complete the suspension process before the pool opening, the sticker may be held awaiting the hearing results. However, if the suspension was not completed before the pool opening, the Board would have to release the pool card or sticker so the homeowner could use pool on opening day.

So as the pool season comes to a close, this is a good time to have legal counsel review your authority for suspension. If permitted, the Board should work with legal counsel sooner than later to adopt the best procedures to put in place for your Association so the pool suspension is still a great tool before the next pool season. Enjoy the last few days at the pool!

LAST YEAR TODAY

AND NOW, WE ASK, HOW IS THIS STILL A THING?

by **WILLIAM MASON, JR.**



You may recall that in our “Quick Re-Cap” of the Ombudsman Determinations for 2015, we addressed closed board meetings. More specifically, we focused on the rejection by the Common Interest Community Ombudsman (CICO) of two arguments that the executive session rules of the Virginia Condominium Act and the Property Owners’ Association Act (POAA) somehow did not apply to “work sessions” or “ad hoc meetings” of the Board. Both statutes expressly provide that the board shall not use “work sessions or other informal gatherings” to circumvent the open meeting requirements of those laws.

And now this most recent determination on executive sessions. There is no statutory language—wrote the CICO—that provides for “informal executive sessions”. It’s like this. A rose (or executive session) by any other name would still smell as sweet...but a property owners association must still comply with § 55-510.C of the POAA (so far the subject matter of the executive session and the manner in which the board “moves into and out of executive session”).

The CICO shredded the legal defense presented in the Notice of Final Adverse Decision (“NFAD”) filed with her office,



If you're a condo association,

you know you have to answer questionnaires of various styles and types from lenders. That is changing as a uniform questionnaire has been adopted by Freddie Mac and Fannie Mae. Actually, it's two questionnaires – there's **Form 1076** which is an overview of the association's financial, legal and property status and there's **Form 1077** which will be requested once a Form 1076 is on file for the Association with a particular lender. This should make it easier and faster for Associations to provide the information requested. Check out the Community Association Institute's website to take a look at the forms.

LINK TO FORMS:

<https://www.caionline.org/Advocacy/MortgageMatters/Pages/GSEquestionnaires.aspx>

THANKS FOR READING!

See our Ad in
CAI's *Quorum*
Magazine

