COMMON INTERESTS

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Seeking the Truth About Community Association Law

by **DONNA M. MASON**

Happy New Year! Since the universe has completed the transition from the Piscean Age to the Aquarian Age, we want to make sure that you all keep up with the change of thinking. The Piscean Age was all about "knowing because I believe". In contrast, Aquarian Age is about "believing because I know". In other words, there is a shift for us all to take responsibility to seek the truth. So what in the world does any of this have to do with community associations you ask? We have selected 5 common misunderstandings about the truth with community association law.

Belief: A few Board members can get together to discuss community business in a closed meeting so long as there is not quorum.

Truth: All meetings of the Board must be open to the membership unless the Board has voted to adjourn into executive session. Both the Condominium Act and the Virginia Property Owners Association Act prohibit Boards from using work sessions or other informal gatherings to circumvent the open meeting requirements. If Board business is discussed, these gatherings may be deemed to be contrary to law, even if a quorum of Board members is not present.

Belief: The owners have the right to ask the Board questions throughout the Board meeting.

<u>Truth:</u> The owners' opportunity to address the Board is only during the owners' forum. Once the owners' forum has closed, the Board can refuse to allow an owner to interrupt the Board meeting with questions unless first recognized by the presiding officer, in the presiding officer's discretion.

<u>Belief:</u> During owners' forum, the Board cannot limit the amount of time an owner can speak.

<u>Truth:</u> Prior to the commencement of the owners' forum, the Board should announce the amount of time each owner has to speak. The owner is thereby limited to a reasonable time restraint to present his comments.

<u>Belief:</u> The Board is required to respond to an owner's comments made during the owners' forum.

<u>Truth:</u> The Board most certainly should be courteous and thank the owner for the comments and take them under consideration. However, there is no requirement for the Board to provide a substantive response to the owner's comments.

<u>Belief:</u> The Board can vote in executive session.

<u>Truth:</u> Even though the Board can take a straw vote in executive session, the Board must officially vote in an open meeting where it can be recorded in the minutes. CAUTION: As matters discussed in executive session tend to be sensitive topics, the Board should be careful not to reveal private information when presenting the matter to vote in the open meeting.

This is the first of a four part series so look out for "Seeking the Truth" articles throughout the year.

EVERY YEAR IS A GOOD YEAR TO MAX OUT

by **ROBERT J. SEGAN**

It is common for a homeowner association's Declaration to limit the amount the Board can increase assessments without owner approval. Most condominium association documents do not have such limits.

HOA documents usually have a somewhat complex procedure for determining the limit – or "Maximum Annual Assessment" (MAA). Most Declarations establish an initial Maximum Annual Assessment. They then go on to state that the MAA **may** be increased by the Board by a certain percentage each year. Increases above that percentage would require an owner approval vote. Sounds simple enough.

However, Boards do run into challenges under the following circumstances. Let's say your Declaration allows a 3% annual increase in the Maximum Annual Assessment. Let's further assume that for three years, you have not increased assessments. Suddenly, you find you need to impose a large assessment increase. Can you recapture the 3% increase for those three "flat" years and impose a 12% increase in assessments in year 4?

If you do, you may be challenged, unless you have taken the following precaution: The Board should adopt a Resolution each year increasing the Maximum Annual Assessment <u>even if your actual annual assessment is being increased by less than</u>

the Maximum, or not at all. In other words, the Board votes annually to raise the ceiling on the amount that it can assess even if it is not increasing the assessments being imposed on owners.

Why? Because most Declarations with these limits provide that the Board of Directors **may** increase the Maximum Annual Assessment each year. They generally do not say that the ceiling **increases automatically**. So without the vote, the ceiling increase for that year may be lost.

We strongly recommend that Boards that are subject to these limits adopt a specific resolution each year increasing the Maximum Annual Assessment, to avoid having to go to the owners for a vote if you may need to recapture past year ceiling increases. The actual assessment can be set at an amount less than the Maximum, but the Maximum Annual Assessment should annually be increased to give the Board financial flexibility.

HOMES... OPEN FOR BUSINESS?

by **WILLIAM BRADLEY MASON, JR. & AIMÉE T.H. KESSLER**

"The only thing that is constant is change."

Heraclitus, the ancient Greek philosopher, chiseled out that one. Sometime later, the First Law of Thermodynamics also recognized that change was constant, that matter was never created nor destroyed, but only transformed from one form to another.

I have no doubt that the creators of community association documents had all this in mind when they first drafted covenants as very, very general. Prepare for the day after tomorrow…a tomorrow of electric car generators, electronic voting, satellite dishes, solar panels and emailed notices.

But now we are caught betwixt and between a court system and a legislature that insists that restrictions on the free use of land be "express," "specific" and sometimes, even "unmistakable." After all, how are we to know, opined one judge, if a use for "family purposes" is restricted to blood relatives or includes my husband's Uncle Fred?

Use of homes for "residential purposes only" seemed to be fairly specific. But that concept is under assault both by modern developments—many people work at home—and the Virginia

General Assembly. Is it enough to say for "residential purposes only?" "No businesses"? "No short-term rentals?" Or must future documents "specifically" provide "no day-care businesses." And that Latin phrase akin to a Harry Potter spell…expressio unius est exclusio alterius…if we specifically name some businesses, are we going to be found to have left out others?

Home-based businesses can seem harmless on the surface – the medical transcriptionist that works at her home computer, the creative quilter with an Etsy business – their running a business from their homes does not create noise or parking issues in the community. Neighbors don't even know that it's happening.

But what about a dentist, whose patients come and go, perhaps using your parking space in the process? Or a dog walking business that uses up all the doggy doo bags on the walking trail? Or a day care that monopolizes the tot lot every day after school and has cars popping in and out of the neighborhood just as residents are leaving for or getting home from work?

When looking for a home, each person or family has different requirements, some of which usually include parking availability, noise levels, and Common Area amenities such as a pool or walking trails.

The Association's recorded governing documents form the contract between the owners and the Association which may address these requirements. Virginia courts require that the authority of the Association to take an action be expressly stated in the recorded governing documents. When Declarations were first being drafted to create community associations, the language used was broad in order to enable the associations to do what they needed to do when created and what they would need to do in the future. However, over the years, the courts have consistently held that the Declaration (or Declaration and Bylaws for a condominium) is the contract between the owner-members and the association. And that contract has to specify what powers the Board has to govern the association and its owner-members. "Rule making" authority without more doesn't cut it. Courts require that there be language granting the Board a power – to establish a

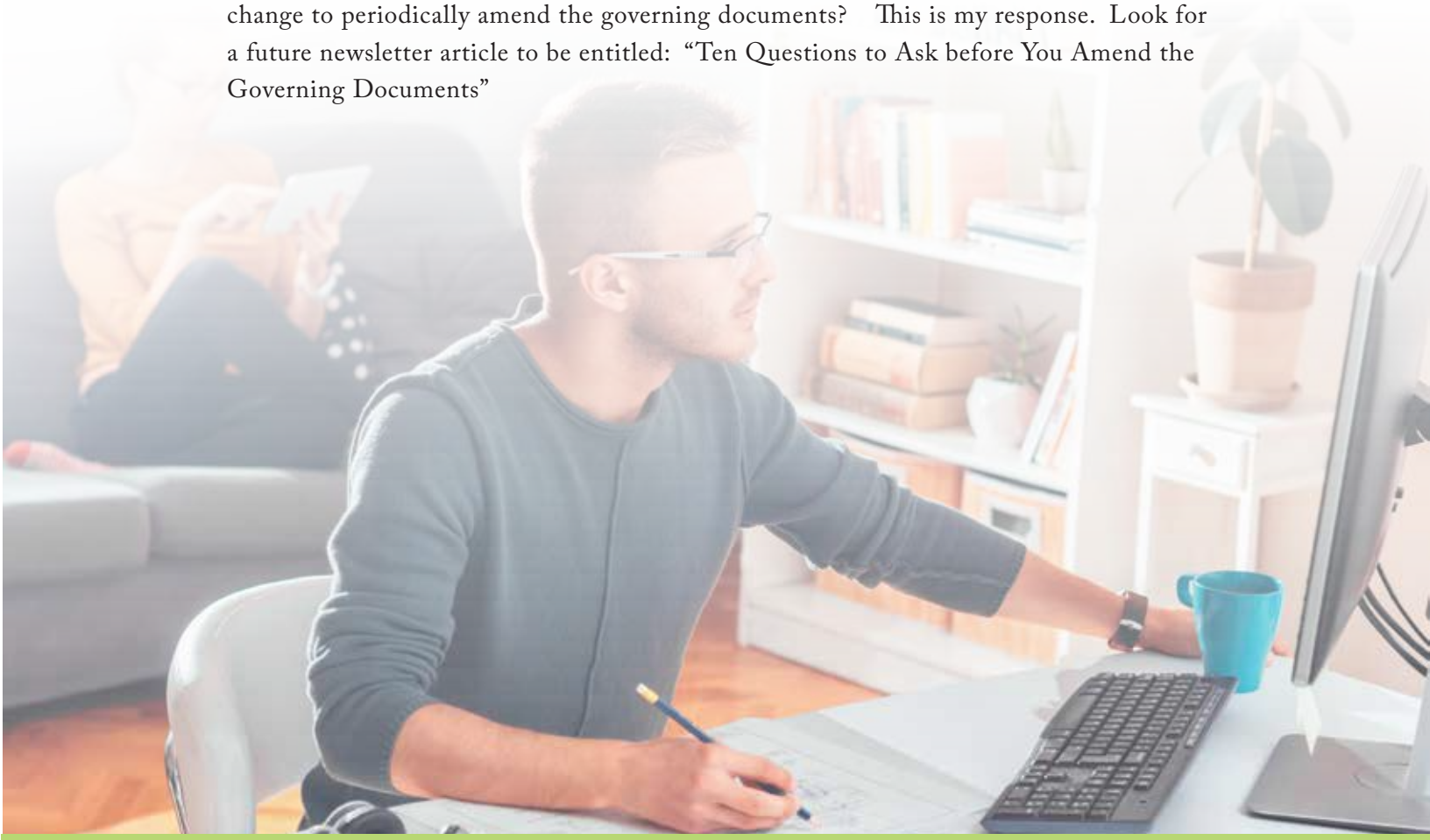
penalty when an assessment installment is unpaid for more than 10 days after its due date – before the Board can take action - make the penalty a $10.00 late fee.
For home- based businesses, the contract may say:

1) NOTHING - in which case current law would allow any home based business unless the Association amended its recorded governing documents OR

2) lots or units will be used for "residential purposes only" - this usually leads to referencing the local ordinances that may consider a day care business a residential purpose whereas a sheet metal workshop may not be OR

3) "no home-based businesses" - in which case either the medical transcriptionist nor the dentist would be able to operate out of their homes

I always thought that community associations were living, breathing things and the general language of documents allowed owners and associations to adapt to the changing world. That great Virginian, Thomas Jefferson, once wrote "We might as well require a man to wear the coat which fitted him when a boy as civilized society to remain under the regimen of their barbarous ancestors." But is the only way to adopt to the inevitable change to periodically amend the governing documents? This is my response. Look for a future newsletter article to be entitled: "Ten Questions to Ask before You Amend the Governing Documents"



OAK GROVE CA CHILI COOK-OFF SATURDAY!... MAYBE

by **AIMÉE T.H. KESSLER**

Flyers go up around the community – Oak Grove CA Chili Cook-Off Saturday! – but the Oak Grove Community Association Board didn't approve the use of the Association's name for the Cook-Off. What can the Board do to stop the use of the Association's name?

If the Association has already registered its name as a trademark or service mark with the Virginia State Corporation Commission, it can demand that the Cook-Off stop using its name altogether. By obtaining a trademark or service mark for its name and/or any logo that identifies the Association, the Association has legal rights to the name that it can assert against an unauthorized user. The Association can sue the user of the service mark or trademark to stop the use, obtain damages for the use, have the offending items seized and destroyed, and be awarded attorney's fees for the filing. Intentional violations could result in criminal charges as well.

The Association would want to register all possible names it wants to protect – such as, Oak Grove Community Association and Oak Grove CA – and such registration lasts five years. For more information, please check out: https://www.scc.virginia.gov/srf/bus/tmsm_regis.aspx and do not hesitate to ask if you would like to apply for a service mark or trademark for your Association!

THANKS FOR READING!

See our Ad in CAI's Quorum Magazine