

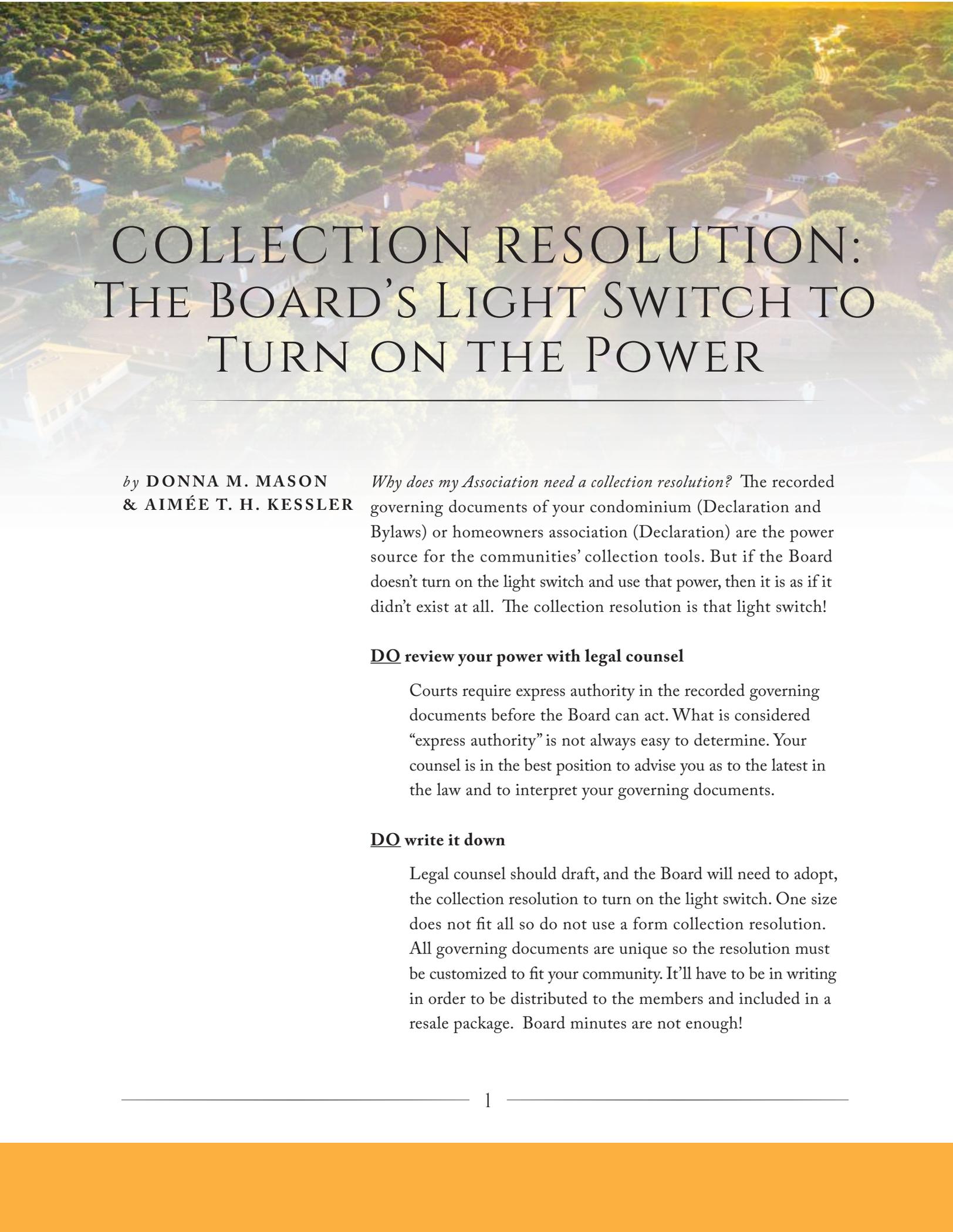
# COMMON INTERESTS



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Counseling Virginia's Communities since 1995

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# COLLECTION RESOLUTION: THE BOARD'S LIGHT SWITCH TO TURN ON THE POWER

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by **DONNA M. MASON**  
& **AIMÉE T. H. KESSLER**

*Why does my Association need a collection resolution?* The recorded governing documents of your condominium (Declaration and Bylaws) or homeowners association (Declaration) are the power source for the communities' collection tools. But if the Board doesn't turn on the light switch and use that power, then it is as if it didn't exist at all. The collection resolution is that light switch!

## **DO review your power with legal counsel**

Courts require express authority in the recorded governing documents before the Board can act. What is considered "express authority" is not always easy to determine. Your counsel is in the best position to advise you as to the latest in the law and to interpret your governing documents.

## **DO write it down**

Legal counsel should draft, and the Board will need to adopt, the collection resolution to turn on the light switch. One size does not fit all so do not use a form collection resolution. All governing documents are unique so the resolution must be customized to fit your community. It'll have to be in writing in order to be distributed to the members and included in a resale package. Board minutes are not enough!

**DO clearly communicate to members the collection policy**

Let members know what to expect if delinquent. Have a summary of key provisions in newsletter or on the website. The more advertisement, the better.

**DO be specific in the collection resolution**

It is critical that the resolution details the collection policy. Good: late fee of \$25.00 after 10 days. Bad: late fee as determined by the Board.

**DO establish the order of application of payments made on delinquent accounts**

Requiring payments to be applied to legal fees and cost before assessments optimizes the Association's recovery of collection expenses.

**DON'T discuss the assessment account with delinquent owner once turned over to legal counsel**

Once an account is turned over to legal counsel, neither Board members nor management should discuss the delinquent account directly with owner. Owner should be directed to legal counsel. This will prevent confusion and help ensure collection of all amounts due to the Association. No Board Member wants to be a witness for the delinquent owner in Court!

**DON'T pass it and forget it!**

Your collection resolution needs to be reviewed every couple of years to ensure it still comports with the law. What the courts were accepting in 1995 bears little resemblance to what they are accepting now!

Any change to your collection procedures, i.e. an increased late fee, requires a Board vote and an update to the collection resolution. Regular review ensures that your collection resolution matches your practice.

**DON'T attach form letters**

Courts have already created enough obstacles for the Board to collect. Don't adopt unnecessary restrictions like mandating a certain form be used. If forms change without the resolution being updated, the failure of the Association to follow its own resolution could result in a loss to the Association.

**DON'T include hardship clauses**

As the expression goes, no good deed goes unpunished. Including hardship clauses puts the Board in the dangerous position of subjectively deciding what hardship bears exceptions. Although the Board may have the power to waive a late fee, including a hardship clause in the resolution can be viewed as a right not to pay when an owner feels their situation warrants a waiver.

**DON'T enforce suspension if an owner files bankruptcy**

When an owner files for bankruptcy, continuing to suspend use of facilities, parking, services, etc. is considered a violation of the federal Automatic Stay that could result in sanctions against the Board. Legal counsel should be consulted as to what is permitted.





# TO INCORPORATE OR NOT TO INCORPORATE, THAT IS THE QUESTION...

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by **ROBERT J. SEGAN**

Many condominium associations are not incorporated. Instead, they exist as “unincorporated associations.” This confuses many banks, insurance companies and other vendors, who are not used to such things.

If yours is one of these unincorporated associations should you incorporate?

Incorporating a business can shield the owners from personal liability. Incorporating a condominium association can shield owners only to a limited extent, because their units could still be exposed to claims of the Association’s creditors if the Association ran out of money.

However, there are other reasons to consider incorporating. It can make vendors more comfortable dealing with the Association entity. It can subject the Association to certain rules in the Virginia Nonstock Corporations Act, which will make duties and obligations clearer.



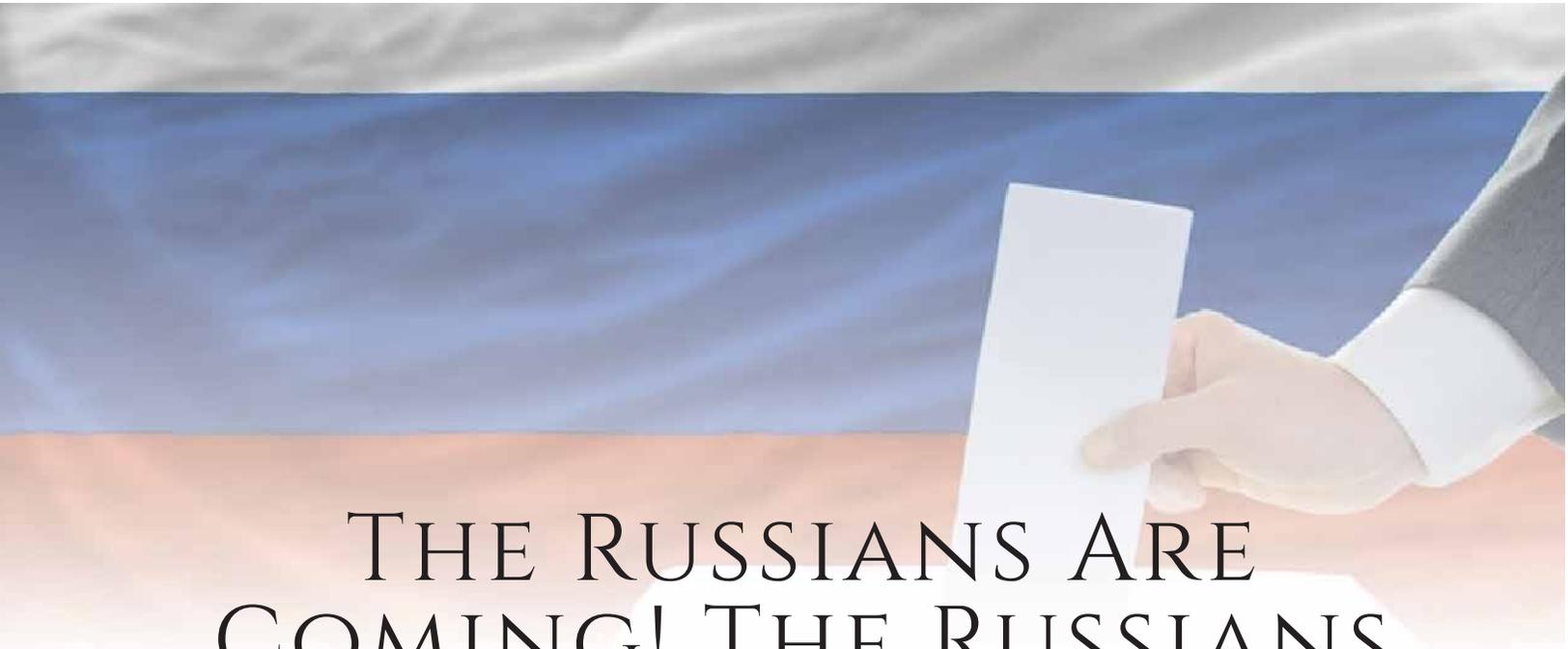
Before thinking about taking that step, you should determine whether the Board has the authority to incorporate the Association, or whether the question must be presented to the owners for a vote.

This was the subject of a Virginia Supreme Court case decided on June 21, 2018. The Board of Directors of that Association converted it to a corporation without obtaining a vote of the owners. The Bylaws of that Condominium stated that the Association was “the unincorporated, nonprofit association of all the Co-Owners owning Condominium Units” in the Condominium. Therefore, the Supreme Court held, changing the status to an incorporated association required amendment of the Bylaws, which in turn required approval by the owners. The Supreme Court therefore upheld a unit owner’s suit, claiming that the actions of the Board breached the Board’s contract with the owners that is encompassed by the Association’s Bylaws.

What if your Association was incorporated, but the corporate status lapsed because the proper annual fees and reports were not filed? Must the Board go back to the owners to authorize reinstatement of the corporation or re-forming it the State Corporation Commission purged its records? It is our opinion that the Board has the right and the duty to reinstate or re-form a corporation when the Association was originally incorporated, but its corporate status lapsed due to failure to meet the state’s filing and fee requirements.

Please contact your counsel for a review of your recorded Declaration or Master Deed and Bylaws if your association is considering incorporating.





# THE RUSSIANS ARE COMING! THE RUSSIANS ARE COMING!

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by **WILLIAM B. MASON**

An ominous June, 2018 report from The Daily Newsletter (Bloomberg/Quint) warns us that state and local elections are “becoming a more popular target for hackers.” FireEye Chief Executive Officer Kevin Madria is quoted in remarks about the Russians: “There’s a moment of uncertainty of what they’re going to do next.”

So why not attack America’s Achilles heel—the election of the leaders for the governmental system closest to many people - Community Associations...the so-called fourth level of government?

With the mushrooming of electronic voting for board candidates inevitably comes concerns about cyberattacks. (“Cyber” is from the Greek and coincidentally means “skilled in steering or governing.”) But why worry about interference with an election to the board of directors of a community association as compared, for example, to the election of a member of the Congress of the United States? One motivation for previous outside interference with federal elections was to undermine the credibility of the system.

I reported in *Common Elements* over twenty years ago that a Russian delegation toured Northern Virginia to study the operation of local community associations. True story (but we did not sell them any rope).

Wouldn't a foreign instrument of chaos—such as the Russians—get more bang-for-the-buck by toying with board elections? A community association director is the judiciary, legislative and executive branches packaged as one—and usually—one of five, not 435. These community associations not only control millions of dollars, but affect us in the most intimate of ways, like whether we can build a deck of trek materials or paint our shutters a color other than “Williamsburg Blue.”

Would it be that difficult to interfere with a “local” board election, particularly one with electronically transmitted ballots or proxies? Let's put it this way...a recent study concluded that the second most common password used by American in 2017 was the word “password” (second only to “123456”). It also concluded that millennials are the age-group that was the worst in 2017 at periodically changing their passwords, so as they take over governance of community associations, the potential problem will only worsen.

The Community Associations Institute (“CAI”) just published the first of a three-part study, “Wired: 2018 Survey of Cybersecurity,” as I was penning this article (I must have been hacked!). In a survey of over 600 board members, community associations, and related professionals, CAI first identifies a yawning problem with cybersecurity and associations and then outlines possible solutions.

Let's start by looking at what the statutes governing community associations require regarding cybersecurity. The Virginia Nonstock Corporation Act (the “Nonstock Act”), Property Owners' Association Act (the POAA”) and the Condominium Act all permit electronic transmission of ballots and/or proxies, but require certain protections and verifications.

Unless the declaration expressly provides otherwise, homeowner associations are permitted electronically transmit documents, including those for voting, so long as the use of the technological means provides “sufficient security, reliability, identifications, and verifiability.” Section 55-513.3 of the POAA may permit

documents to be signed without acknowledgment and the use of a public notary if the identity and signature of the member can otherwise be authenticated.

The Nonstock Act may also permit the electronic transmission of ballots or proxies as long as information is provided that “may be determined that the electronic transmission was authorized by the member or the member’s proxy” (Section 13.1-847.1.E of the Nonstock Act).

Unless the condominium instruments expressly provide otherwise, condominium unit owners may cast their vote by electronic transmission of a proxy provided the proxy submits information “from which it can be determined that the electronic transmission was authorized by the unit owner or the unit owner’s proxy” (Section 55-79.77.C of the Condominium Act).

By coupling certain security requirements with the convenient use of electronic voting, the Virginia General Assembly has tasked community associations with acting to protect the integrity of its elections in the digital age. This may mean consulting with professionals to get access to the best methods. Or at least refraining from using a User Name that is the Lot or Unit Number and a password of “Password”!

As far as impartiality is concerned, one non-electronic suggestion is to retain an independent vote counter, such as the League of Women Voters. (However, stay away from inspectors wearing buttons adorned with “NHcnektop”). This allows the community association manager to focus on running the annual meeting of members and maintaining ballot security—which can fly around like extra bingo cards if not carefully guarded. It also may serve to remove the yoke of suspicion that sometimes accompanies counting by “their guys”.

Maybe we will still suspect the election was fixed, rigged or hacked. How else can we possibly explain the front-entrance landscaping, the lobby renovation or why the dues are going up again? Most governing documents are replete with “don’t do this” or “don’t do that” provisions. There are usually few member rights. But most documents explicitly recognize that a member in good standing has a right to vote. It is important to safeguard the integrity of the process and to be able to believe the wizard behind the curtain is just an elected volunteer acting in the best interests of the community.

# THANKS FOR READING!

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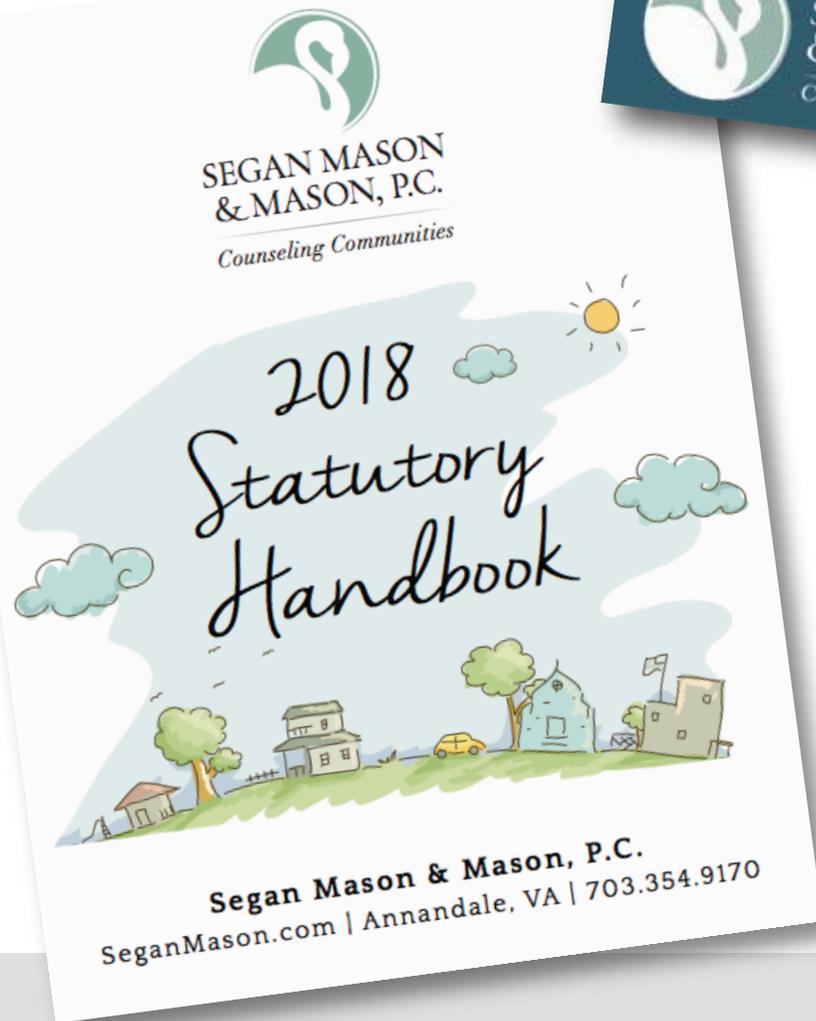


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