

# COMMON INTERESTS



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Counseling Virginia's Communities since 1995

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# I DIDN'T KNOW THAT!

by DONNA M. MASON

The women's Maryland Terps basketball team is my husband's all-time favorite sports team. He knows every detail about every player or even potential players. Me, not so much. Don't get me wrong. I love the team but I'm more of a "Bill, just tell me what I need to know!" and he usually revels in telling me as we are driving to the game. In our hectic lives, trying to find that elusive work life balance while trying to keep up to date with the latest and greatest with community associations, wouldn't it be great to have someone give the "hotel" summary version of the news once in a while. Enjoy this first edition of "I didn't know that!"

## **Did you know a Board of Directors cannot vote in Executive Session?**

Executive session permits the Board to freely discuss sensitive topics without members present. Because the law favors open meetings, the relevant laws in Virginia restrict when a Board is permitted to go into executive session. Even though an

informal poll of the Board can be taken in executive session, the formal vote of the Board on any matters discussed in executive session must be made in open session.

**Did you know that denying a proficient swimmer the right to lap swim during a pool break based on age alone may violate the Fair Housing Act?**

Familial status is protected under the Fair Housing Act. It's okay to have a rule that requires a break period to be reserved for anyone who is lap swimming or walking, for example, but the Association may be swimming in dangerous legal waters preventing a ten year old member who is a proficient swimmer from lap swimming during break.

**Did you know that the Condominium Act or the Property Owners' Association Act cannot be the sole basis for a community association to assess charges for rules violations?**

Based on Virginia Supreme Court cases in the past years, relying on charge authority solely from the Virginia statutes is not enough. The Courts are requiring that the recorded Declaration or recorded Bylaws clearly state the ability of the association to assess charges to a member for rules violations.

**Did you know that a member must be given "due process" before invoking suspension, including the right to use recreational facilities like the pool?**

Remember the days when the member with the kids would come to the community office to get their picture and pool pass only to be told that unless they pay up their overdue assessments, no pool pass for them! Things are not that simple anymore. Assuming the Association has the ability to suspend a member's right to use the pool for nonpayment of assessments, Virginia law requires as a minimum that the member be given (1) opportunity to cure the violation; (2) opportunity for a hearing and (3) a hearing results letter.

**Did you know that the statutory due process “opportunity for hearing” and “hearing results letter” mailing deadlines are based on calendar days and not business days?**

When the Condominium Act and Property Owners' Association Act refers to notices going out “within 14 days” for opportunity for hearing and “within 7 days” for hearing results notice – it’s calendar days, not business days. If 7th day falls on Sunday, better get notice out the Friday before.

**Did you know that every rule has an exception?**

Since circumstances and governing documents are unique to every community, always check with legal counsel before implementing changes to a community policy or we may be the one's saying “I didn't know that!”.





## ATTENTION HOMEOWNERS ASSOCIATIONS

it's time for  
a POP QUIZ!

by AIMÉE T.H. KESSLER

The following placement test will determine what additional steps to take in light of the revisions to the Home Based Businesses statute (Section 55-513.2).

**#1** Does your Declaration expressly prohibit home-based child care services?

If so, you have completed this test. You get an A+!

If not, please continue to question 2.

**#2** Does your Declaration contain restrictions regarding time, place and manner of operation of home-based businesses?

If so, you have completed this test. You get an A+!

If not, please continue to question 3.

**#3** Does your Association have a resolution in place regarding the time, place and manner of operation of home-based businesses?

If so, you have completed this test. You get an A+!

If not, please turn your placement test into counsel for the Association for assistance in drafting such a resolution.



# GAME OF HOMES

*With tongue planted sincerely in cheek &  
all credit to George R. R. Martin*

by WILLIAM B. MASON, JR.

## QUALIFYING FOR THE GAME

So you want to sit upon the iron throne as president of your community association...which sometimes is a small chair at the center of a cafeteria table?

A candidate for the board must have the proper “bloodline” that satisfies the qualifications set forth in the governing documents. The only “title” normally required may be the recorded deed proving you are an owner of property in the association.

Some seats on the board must be occupied by a member from a certain cluster, section or kingdom, while others are open to any member at large. Candidates rarely run for a particular office such as vice-president or treasurer (“hand of the king” or “master



of coin”) but are elected to the board as a director by the membership with the board electing officers from among themselves thereafter.

Not all documents require directors (or even certain officers) to be land owners. Watch for documents that expressly limit the number of directors from any one house (House Mason, for example).

## COMMITMENT

Candidates should be aware of the tremendous commitment needed to serve on the board. Many documents permit a board member to be removed for missing three consecutive meetings. Of course, the director is entitled to notice and a board hearing before embarking on the walk of shame.

Members have the luxury of voting for their wallet or for a pet project, such as more social events or flowers for the Common Arya, or seeking vengeance for the past acts of the current board, whereas directors must be concerned with the community purse and acting in the good faith best interests on the association.

## CODE OF ETHICS

The right to serve on the board is a fundamental property right. Members not in “good standing” are sometimes prohibited from serving on the board. If one encounters such an obstacle, candidates might have their document maester review the instruments for express language regarding suspension (or get into good standing).

Candidates may be asked to sign a code of honor prior to the election. This is sometimes not as clear as black and white. While providing such an oath may be the noble choice, a community association cannot prohibit a candidate who refuses to give such an oath from running without express language in the proper governing document.

## NOMINATION

A candidate may be required to make application by a certain date and also to be vetted by a nominating committee. There may be documented limits on the

number of nominations per open seat. Some documents mandate a petition signed by a fixed number of members prior to nomination.

Nominations are normally also permitted from the floor at the annual meeting of the membership—but a minority of documents expressly prohibit such nominations. Robert’s Rules of Order provides you can even nominate yourself from the floor, but if no one will sign your petition to run prior to the meeting, guarded optimism before you set sail at the meeting is advised.

Regardless, if the ballots or proxies are “instructed” and your name has not been timely submitted for inclusion on the pre-printed ballot, a successful bid will likely require a write-in campaign that spreads like wildfire and rivals that of Disney’s Mickey Mouse (now that’s a castle).

## SEND OUT THE RAVENS

And now...the campaign. The association is required to provide you with the names and addresses of members should you make a books and records request. However, there is no statutory right to the members’ phone numbers or email addresses. Community associations are charged by statute with establishing a free method of communication between the members. This should present another opportunity to publicize your candidacy.

## GOT VOTES?

Voting is also a fundamental property right bestowed on a member by virtue of owning property in the community association. Watch for express authority in the same or superior document creating the voting right—like a three-eyed raven—before suspending the right to vote.

A council of co-owners is often staggered—not just because they often have incredibly long night meetings—but to allow for new directors to be elected each year while some of the old guard remains to pass along wisdom—to provide new blood to serve the realm. However, if a Board of five has four openings one year, and none the next, the terms of the old directors and the new need to be examined as something may be amiss.



Voting rules provide guidance to the candidates and the association. For example, a written policy should address (1) whether candidates may address the members at the annual meeting, (2) how voting inspectors are appointed, (3) if there may be nominations from the floor and (4) when the polls are closed.

## SNOW DATE

Urge the association to include a snow date and location in the original meeting notice to members in case of inclement weather and to shield against future criticism. As a candidate, watch that proxies are not limited to the exact date of the annual meeting or an adjournment of a meeting of that exact date. Do you want to knock on all those doors again should the original meeting date fail?

Even with a November or March annual meeting, a community association that fails to plan for the worst knows nothing about snow in the Washington area. Schools close upon a mere whisper of snow and ice. What happens if the annual meeting was scheduled to be in the school cafeteria and must be cancelled? What never happened cannot be adjourned to fight (vote) another day.

## TERMS AND VACANCIES

“And now his watch is ended?” What happens at the end of a director’s term varies. Some documents provide that a director serves until a successor is elected. If there is no quorum at the annual meeting, and therefore no election, that director’s term could drag-on and drag-on and the member remains a director for all those board meetings to come.<sup>1</sup>

Terms of directors are often three years, however, some documents provide for director terms of only one year. The entire board may face a challenge every year. Every annual meeting is a chance to overthrow the old board and stage a virtual “red wedding.” What if something happens during the director’s term—the director sells their land or becomes ill (poisoned or beheaded, for example). Some may believe that “what is dead may never die.” Perhaps. But death invariably creates a vacancy, and for an aspiring future candidate, a possible opportunity.

<sup>1</sup> That’s how they get you.


There are normally two choices at this cross-roads. First, is the replacement appointed by the remaining directors, or in stark contrast, elected by the members? And if appointed, does the replacement serve until the next annual meeting's election or for the balance of the departed director's term? If an election is required for the unexpired amount of the term at the next annual meeting, the candidate with the least amount of votes is normally elected to the shorter term.

There may not be a need to pay the "iron price" by defeating an incumbent director in an election. A vacancy presents an opportunity to remind the remaining board members that you are available to serve and want to be on their list. You may discover that they are all eager to accommodate you.



# Print & cut-out an EXECUTIVE SESSION CARD


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*The Procedures* for executive "closed" session

- ✓ "I hereby move that the Board go into executive session for the purpose of discussing and considering <insert topic of discussion>"
- ✓ The motion should be seconded, passed, recorded in minutes
- ✓ Discussion in executive session must be limited to subject(s) covered by the motion
- ✓ Any decisions relating to the topic discussed must be made by motion, made and voted on in open session

Perfect for your wallet or purse!



*Can we meet?* in executive "closed" session

The board of directors or any subcommittee or other committee thereof may convene in executive session:

- ✓ to consider personnel matters
- ✓ to consult with legal counsel
- ✓ to discuss and consider contracts
- ✓ to discuss and consider pending or probable litigation
- ✓ to discuss and consider matters involving violation of the declaration or rules and regulations adopted pursuant thereto

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## Annual Meeting Checklist

*Are you prepared?*

A few questions every Board should be asking themselves before their Annual Meeting to ensure they are adequately prepared. To view a PDF of the video, please click the button below.

PDF VERSION



## The Collection Process

*Legal actions we can take*

A breakdown of some of the collection processes & legal actions our firm could undergo in order to resolve a delinquency for your community.

PDF VERSION

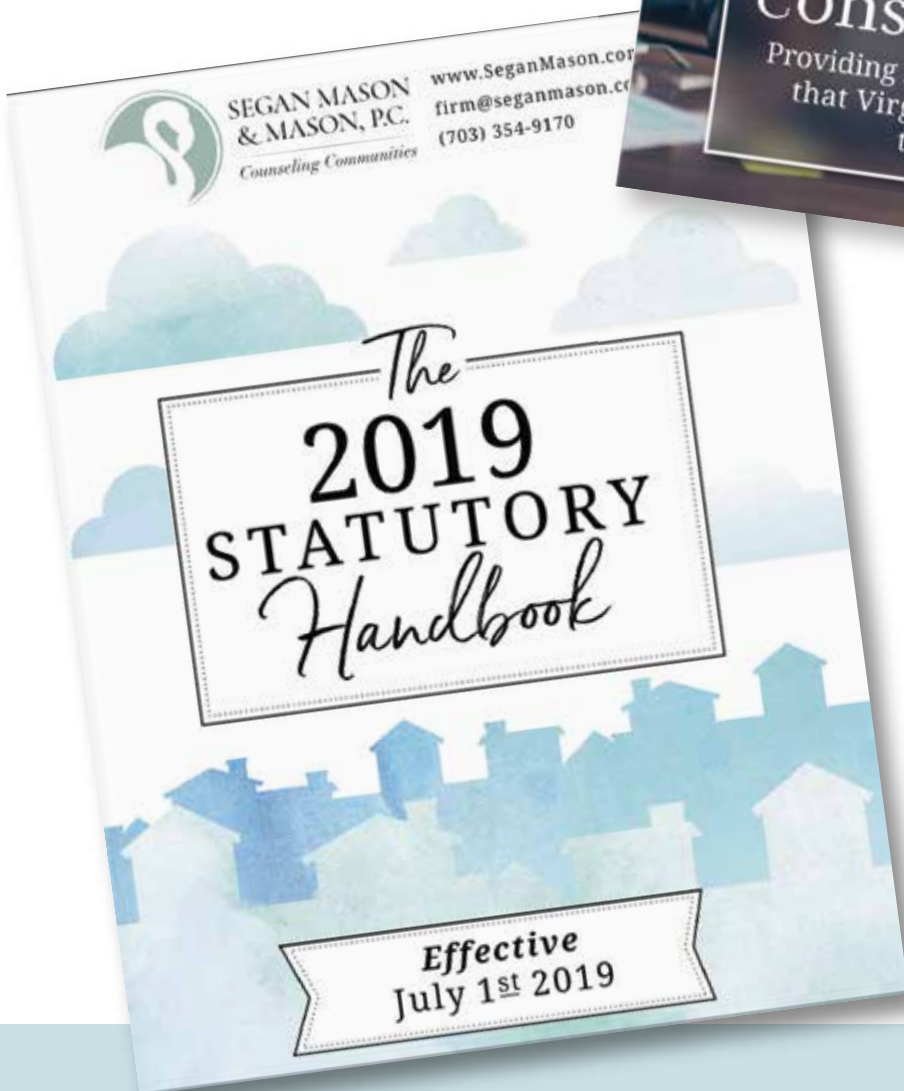


# THANKS FOR READING!

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See our Ad  
in CAI's  
Quorum  
Magazine

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Please Note: An updated version  
of this Statutory Handbook will  
be released October 2019