COMMON INTERESTS

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Counseling Virginia's Communities since 1995

Shhh... be very very quiet... we're meeting in SECRET

by **AIMÉE T. H. KESSLER**

Board meetings are required to be open so that the membership can see just how the sausage gets made so to speak (or how the begonias get picked for the front entrance to the community!). However, some topics are not open for all to hear – and those are detailed in the Code of Virginia, Section 55.1-1949(C) for a condominium association and Section 55.1-1816 for a homeowners' association. The list is exclusive, so if the issue in question is not on this list, then it has to be discussed in open session.

The Board of Directors of the Association can meet in executive session:

1.) to consider personnel matters;

2.) to consult with legal counsel;

3.) to discuss and consider contracts, probable or pending litigation, and matters involving violations of the governing documents or rules and regulations for which an owner, his family members, tenants, guests, or other invitees are responsible; or

4.) to discuss and consider the personal liability of owners to the association.

A couple of important things to remember about executive sessions:

1.) A motion needs to be made to go into executive session stating why, which is then voted on by the Board and recorded in the minutes, and a motion needs to be made to come out of executive session, which is then voted on by the Board and recorded in the minutes of the open Board meeting.

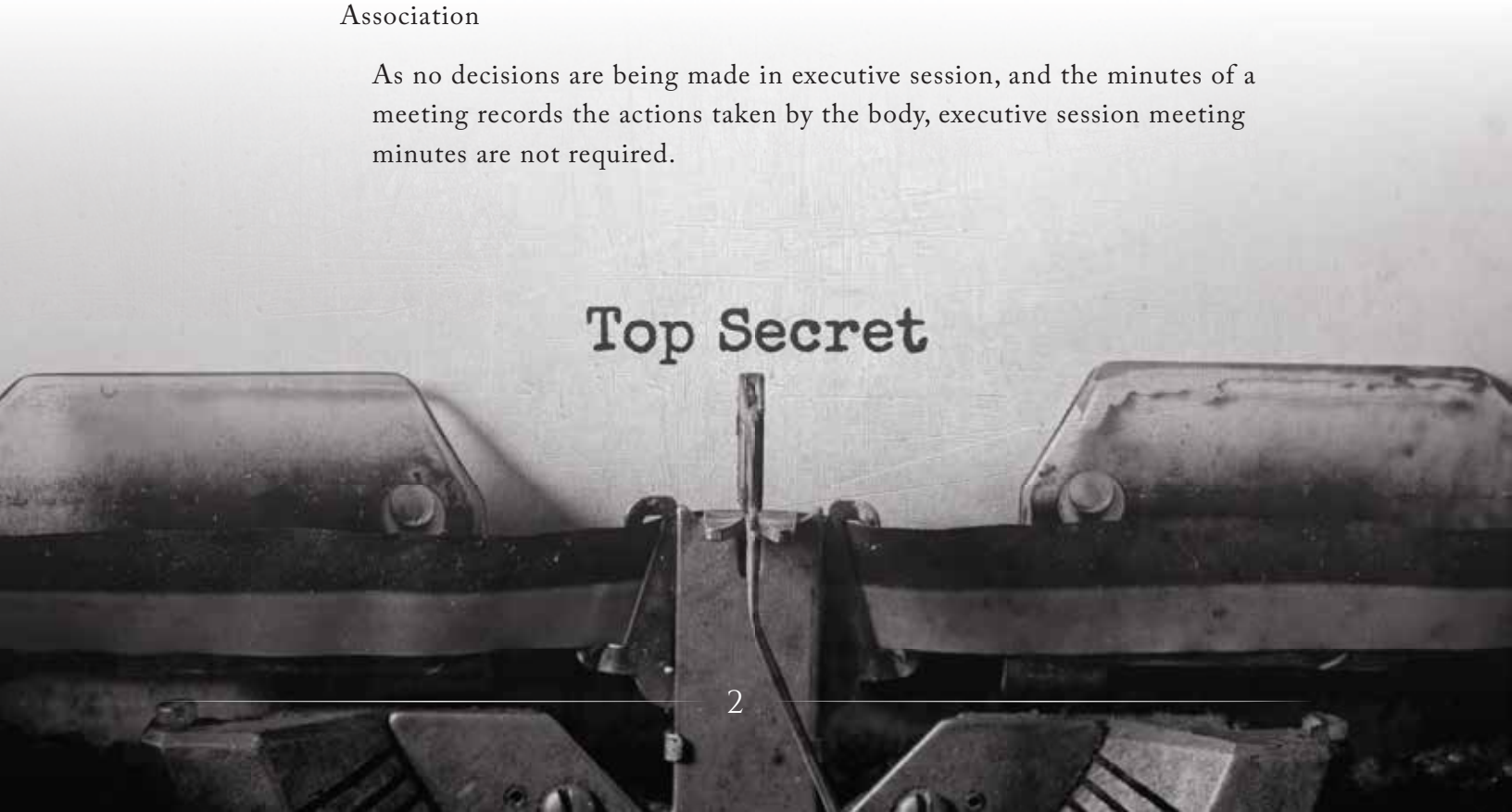
2.) No decisions can be made in executive session

The Board must exit executive session and reconvene in open session to vote on any issues discussed in executive session. The Board can, of course, take a straw poll of the directors prior to moving out of executive session to determine if further discussion is necessary. However, the Board's decision making vote must be made in open session.

That vote in open session, and the record of it in the Board meeting minutes, must be discussed in a manner that preserves its confidentiality. If an issue being decided was the settlement in a collections matter, the Board could refer to the matter by its account number with our office, for example.

3.) Minutes of executive sessions are to be kept separate and apart from those of open Board meetings and are not a disclosable book and record of the Association

As no decisions are being made in executive session, and the minutes of a meeting records the actions taken by the body, executive session meeting minutes are not required.

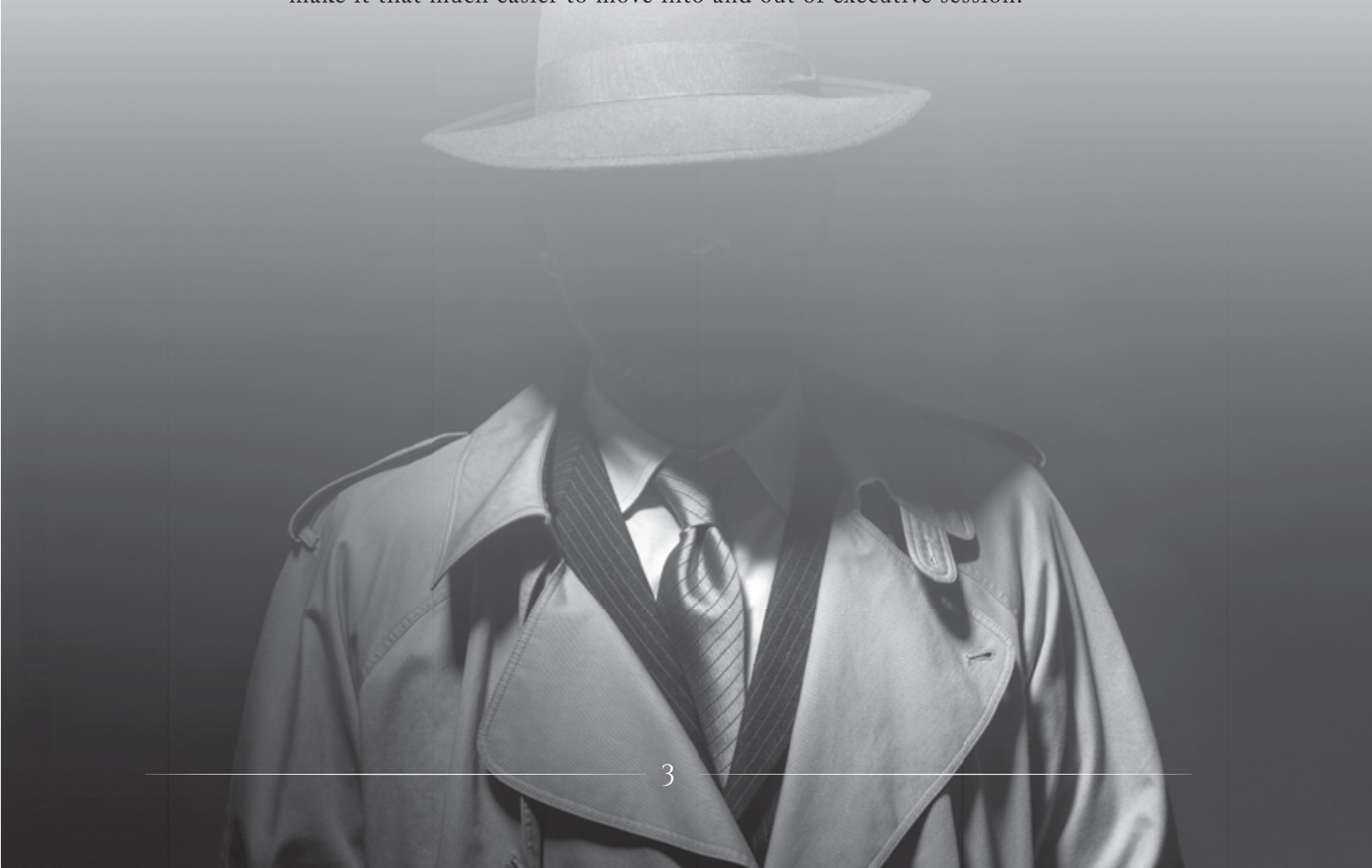


4.) You can only discuss what you said you would

When the Board moves during its open meeting to go into executive session, it has to say why. Again, as the confidentiality of the matter needs to be preserved, a general description can be provided such as "to discuss matters upon which a legal opinion was provided by counsel". You cannot then get into executive session and start discussing the bids on the landscaping contract too – you did not mention those in your motion! Multiple categories can be included in one motion to move into executive session.

Executive session is an important tool for the Board of Directors to discuss sensitive issues while balancing the right of the members to understand what their governing body is doing with their money and their property.

We have Executive Sessions cards available for download on our website. **Just click here** or on the Resources tab and scroll down. These should make it that much easier to move into and out of executive session.



Meeting in the Cloud

by **ROBERT J. SEGAN & WILLIAM BRADLEY MASON JR.**

We have written about sunshine laws and solar panels. Now it is time to head into the clouds to discuss whether annual owners' meetings can happen there.

Can a community association have a totally "virtual" annual meeting? This past April, the Virginia General Assembly directly addressed the issue of virtual Board meetings, giving them the green light, but they failed to adopt a similar law regarding owners' meetings, such as the annual meeting.

If an Association is incorporated, in addition to the provisions of the Condominium Act or the Virginia Property Owners Association Act, it is also subject to the Virginia Nonstock Corporation Act. Almost all homeowners' associations are incorporated and subject to the Nonstock Act, but many condominium associations are not. The Nonstock Act appears to give some help to incorporated associations by stating that "Unless the articles of incorporation or bylaws require the meeting of members to be held at a place, the board of directors may determine that any meeting of members shall not be held at any place and shall instead be held solely by means of remote communication."

This would appear to allow incorporated associations to hold totally virtual annual meetings, except that nearly all Bylaws say that meetings are to be held at a place. Usually, they state that meetings shall be held "at any place designated by the Board of Directors."

Could one argue that the Board can designate "cyberspace" as the place of the meeting? Sure, one could argue that, but if courts

continue to strictly construe association documents, the risk of a successful legal challenge to that argument is significant. This is especially true since the statute itself says that deciding to have a meeting by remote communication means that the meeting "shall not be held at any place."

Another problem is the very common statement in association bylaws requiring that the directors be elected at the annual meeting, and that votes in that election must be cast "in person or by proxy." If the meeting must be at a place, if the election is to occur at the meeting, and you can only vote in person or by proxy, then a vote is only valid if: (1) it is cast by an owner who is physically present at the meeting place; or (2) the owner completes a proxy form, complying with the Bylaws, appointing someone else to be physically present at the meeting to cast his/her vote.
Both the Condominium Act and the Virginia Property Owners Association Act have provisions stating that, unless the documents say otherwise, "any signature, vote, consent, or approval required to be obtained under any condominium instrument or any provision of this chapter may be accomplished using electronic means." Strictly interpreted, this would allow an owner to vote electronically, but if the owner is not physically at the meeting, or if the owner did not appoint a proxy to be physically at the meeting to vote electronically for the owner, does the vote comply with the requirement that a vote be in person or by proxy?

A totally virtual voting process could thus be subject to a successful challenge.

Would Virginia courts give a strict interpretation to these laws and document provisions? A look through the lens of a recent case examining community association procedures should scare associations into being very conservative in their approach to this. In Tvardek v. Powhatan Village Homeowners Association (2016), the Virginia Supreme Court struck down an amendment adopted by owners for failing to adhere to the strict procedures for amending detailed in the Virginia Property Owners Association Act. We highlight some of the language in the opinion that should cause great concern for associations relying upon a broad interpretation of laws or governing documents:

- Virginia courts have consistently applied the principle of strict construction to restrictive covenants;
- Adhering closely to statutory texts, Virginia courts "presume that the legislature chose, with care, the words it used when it enacted the relevant statute." Under this

view, the question . . . is not what the legislature intended to enact, but what is the meaning of that which it did enact;

- We must determine the legislative intent by what the statute says and not by what we think it should have said;
- [w]e do not inquire what the legislature meant; we ask only what the statute means;
- We have no constitutional authority to judge whether a statute is "unwise, improper, or inequitable."

One fix for this dilemma would be to amend your bylaws to state that notwithstanding any other provision of the bylaws, a meeting of members need not be held at a "place", but may be held solely by means of remote communication.

Another would be convincing the General Assembly to step up and help associations – and their owners -- out of this difficulty. Remotely conducted meetings of the board of directors, town hall meetings and partially remote meetings of members seem to have revealed a common denominator. Community members have repeatedly expressed support for this remote option and implored boards to offer remote participation as at least an alternative for the foreseeable future. Perhaps the pandemic has taught us that we can be stronger together, but we just don't have to all be in the same room!

In the meantime, associations can cope by having members appoint a proxy to physically attend the meeting for them and to cast their vote as instructed on the proxy form. In this way, a meeting can actually be held with only one person (the holder of the proxy for the owners) being physically present. While this may seem like a charade, charades are much more fun – and much less expensive -- than litigation.

As with any issue this legally tangled, we strongly recommend that you consult your association's counsel before proceeding with your annual, or any other owners', meeting.

Sun et al. *versus* Braddock Place Townhouses Association et al.

In a case that was featured in the September issue of the Community Association Law Reporter, the U. S. District Court in Alexandria held that an association did not violate the Fair Housing Act when it refused to supply an Asian-American owner with a common area reserved parking space in violation of its recorded Declaration.

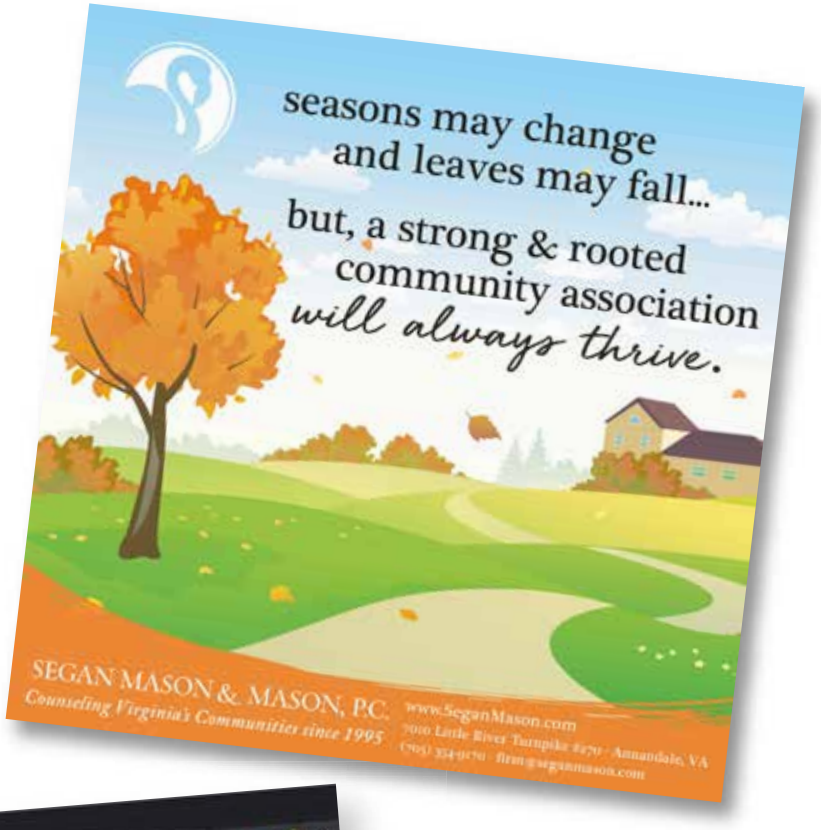
A previous Board had reserved spaces in the common area for the two owners in the community without garages, after which the Board sought an opinion from Bob Segan of our firm, regarding whether the right to a reserved space had to convey to a subsequent owner.

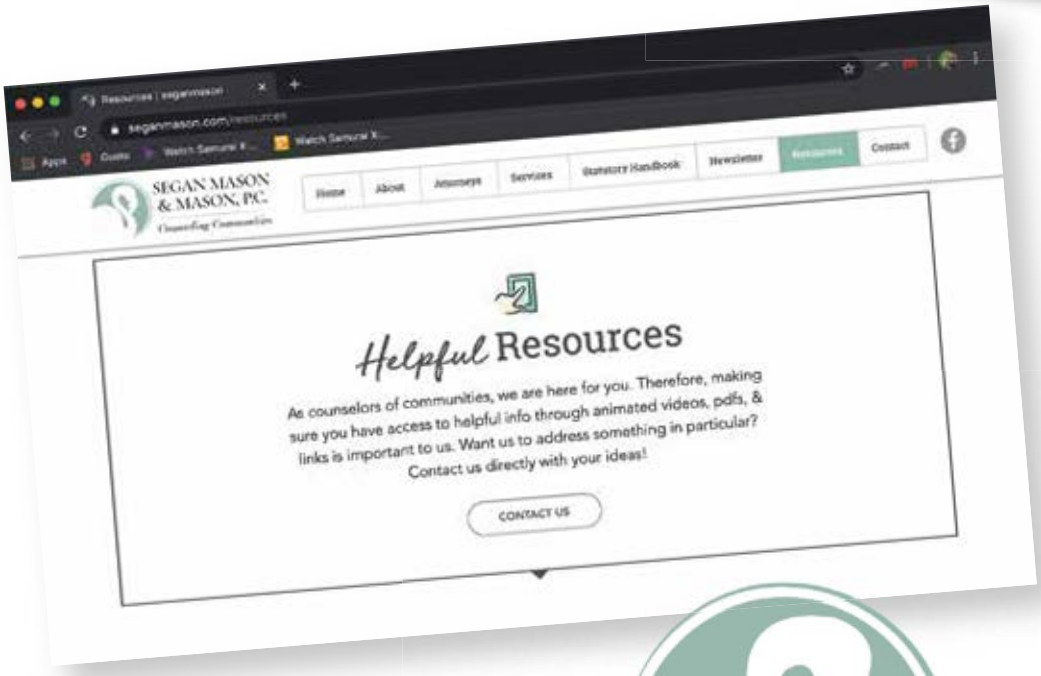
Bob gave an opinion that the Board did not have authority to reserve common area spaces only for non-garage owners. Relying on this opinion, the Board stated that, when the home sold, the spaces would no longer be reserved for these homes. One of the non-garage owners then claimed that the Board's decision discriminated against her because she was an Asian American.

Bob's opinion was cited with approval by the Court in holding that the Board was merely following a correct interpretation of its Declaration and Virginia case law. The Judge specifically endorsed Bob's opinion as a correct statement of the law, concluding that the Board was motivated by a desire to follow the law, not by anything related to the owner's ethnicity.

Thanks for Reading!

Check out our Ad in Quorum Magazine this Fall!





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