COMMON INTERESTS

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PROXY HORROR PICTURE SHOW

by **ROBERT J. SEGAN**

Owners in associations often ask us: Why is it so difficult to vote in community association elections? Why can't I just send in a ballot? Why are confusing, fine-print, legalese proxy forms part of the process?

It is certainly understandable that the community association election system elicits such reactions. Association elections should be easier, and they probably will be in the future. But for now, here are the rules:

1. In almost all associations, the Bylaws require that directors be elected at the annual meeting, not by voting before the meeting, or outside of the meeting.

2. There are two ways to vote at an annual meeting: you can attend the annual meeting personally or you can appoint another person to attend instead of you and cast your vote. In the latter situation, that person is called your "proxy." You appoint such a person by completing and signing a form confirming the appointment. That form is also called a "proxy." The double meaning of this word can make explaining things very confusing. So in this article, I'll call the person the "proxy holder," and the document the "proxy form."

3. If you want to attend the meeting by proxy, rather than personally, you have to fill out and sign a proxy form appointing a proxy holder. You can give instructions to the proxy holder if you want. There are three basic ways the proxy form can instruct the proxy holder:

- You can use an instructed proxy form, which says, in effect: "Please attend the meeting for me and vote for the following specified candidates." An instructed proxy ballot usually accompanies this kind of proxy form specifying how the votes are to be cast.
- You can use an uninstructed proxy form, which says, in effect: "Please attend the meeting for me and vote for whichever candidates you think are best. I trust your judgment."
- You can use a quorum only proxy form, which says, in effect: "Please attend the meeting for me, just to count me present for quorum purposes." This is like abstaining. You want to help the Association achieve a quorum at the annual meeting, but you have no preference for any candidate.

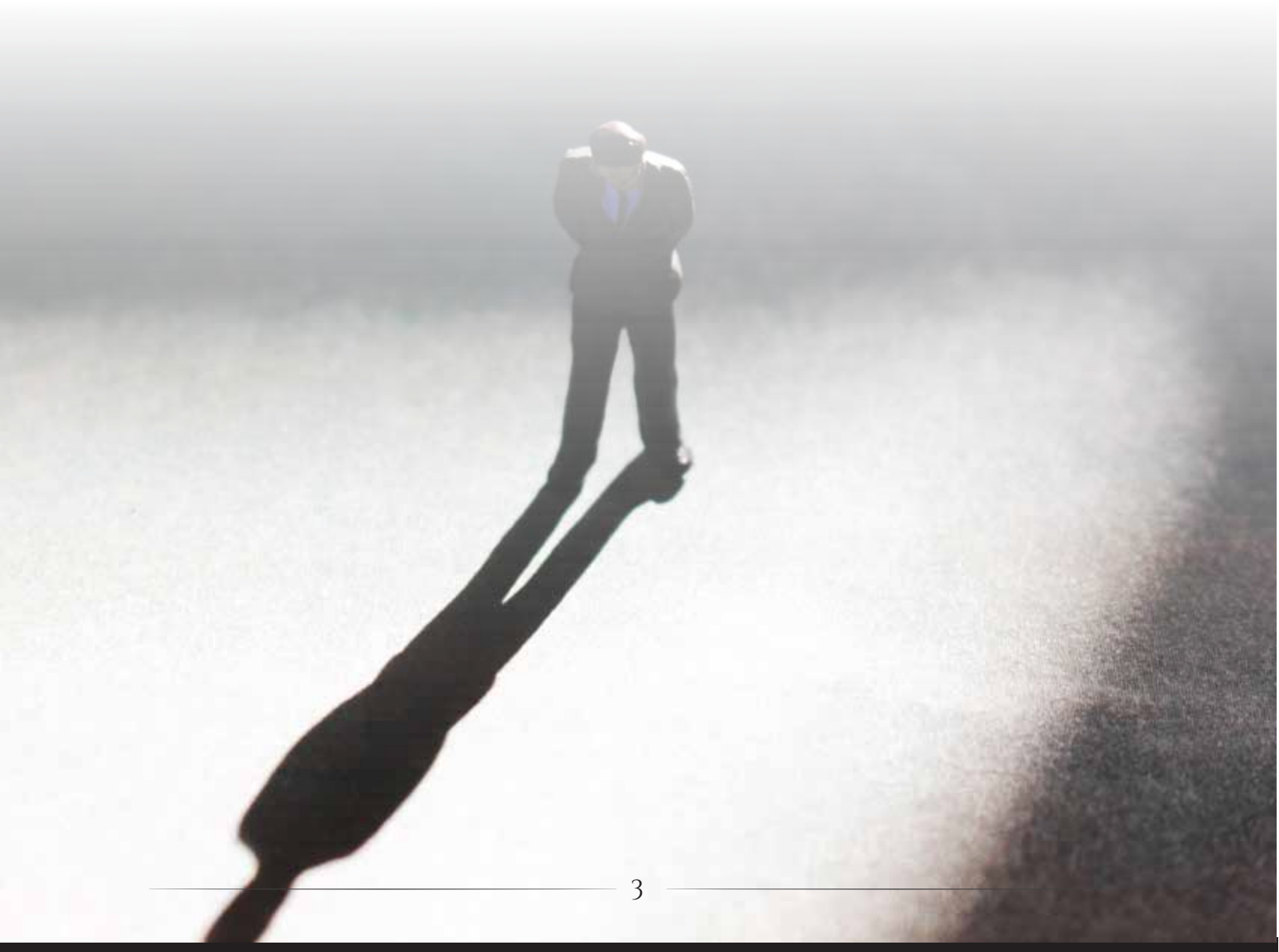
Proxy forms must be completed properly to be effective. Common problems include failure to name a proxy holder, or a proxy holder that the Bylaws allows; failure to include a date; or failure to have the proxy form signed by the unit owner. Some Bylaws require witnesses to a proxy form's signatures, and if they do, these requirements must also be followed.

The Condominium Act, and some condominium and homeowners' associations' Bylaws provide that a proxy form is not effective unless all owners sign. This creates confusion because only one of two owners has to attend the annual meeting personally to cast a vote. But rules can be different for voting by proxy, and if that's what the law or the documents say, the rule must be followed.

An amendment to the Condominium Act becomes effective July 1, 2019 regarding proxies given by condominium unit owners. The

amendment eliminates the requirement that a person who signs a proxy form for an owner must have a Power of Attorney authorizing him or her to sign a Deed conveying the unit. The revision further states that if a unit owner is more than one person, any of the unit's owners can object to the proxy at or before the meeting. Such an objection would revoke the proxy.

As technology advances, we can expect further revisions addressing voting difficulties. Getting owner participation is difficult enough – the law should not stand in the way of the democratic process.



LET'S DO THE TIME WARP AGAIN...

by **AIMÉE T. H. KESSLER**

The General Assembly was busy again this past winter, meeting in a short session but still finding time to reach out and touch several issues near and dear to community associations, some of which will seem very familiar.

Home based child care services (HB 1853/SB 1537) - A second subsection was added to Section 55-513.2 of the Property Owners Association Act expressly classifying home based child care businesses as a residential use where the locality classifies home based child care as an ancillary or accessory residential use. This means that if your recorded governing documents limit use of the units or Lots to "residential purposes only", home based child care businesses are allowed. An exception to this is when the recorded governing documents of the Association expressly prohibit such businesses. This applies to homeowners associations only.

Reserve funding (HB2030/SB1538) – For both condominium and homeowners associations, the next year's budget must be provided to the owners before the fiscal year begins. That budget

must include a statement of the amount recommended to be held in reserves and the amount of cash currently held in reserves. Remember, reserve studies have to be undertaken every five years!

Resale certificates and disclosure packages (HB 2385/SB 1580) – For both condominium and homeowners associations, an additional reason has been added for a purchaser to cancel a sales contract: when the resale certificate or disclosure packet provided does not include all information required by the applicable statute. A regular audit of an association's resale package can make preparation when requested smoother, faster, and ensure compliance with the latest changes to the law.

Notice of membership meetings (HB2694) – For homeowners associations only, notice of membership meetings, such as the annual meeting, can be sent by email if the member so chooses; however, if the email "bounces back", notice must then be sent by mail. While a great convenience, the timing of sending the notice remains the same. This means that associations will have to plan the timing of sending notice so that if the emailed notice is returned, the mailed notice will still be sent in sufficient time to comply with the statute or applicable provision of the governing documents.

With home-based child care businesses now addressed in law, hopefully that issue can be put to rest, at least in Richmond! Look out for more tweaks to resale certificates and disclosure packets next year!

LAST YEAR / TODAY

Just Time for a Quick Re-Cap of the Latest Ombudsman Determinations

by **WILLIAM B. MASON**

Let's begin with…just leave! That's what one board member "yelled" to a member "in front of several other owners" after weathering constant interruptions. The Complaint—it was an attempt to "improperly trick and deny me from attending and participating in an open HOA meeting."

The Common Interest Community Ombudsman ("CICO") noted that no board resolution was passed or vote taken barring the complainant from the meeting. "It seems clear this was spoken in the heat of the moment" and the director was simply "speaking his mind." The CICO concluded that her Office did not have jurisdiction over individual directors or members, but only the actions of the board as a whole.

And if you're thinking this loophole means a director can say a lot of things to irritating members in the "heat of the moment"…think again. A board member should act professionally like a knight of the board table. It's a lot like Dr. Seuss—Marvin K. Mooney Will You Please Go Now! Think of "please" and thank-you" as the potholders of civil discourse.

An association tactic for dealing with troublesome members was also scrutinized. The complainant requested continual notice of board meetings. So, the association gave the member a notice stating that meeting are held the third Tuesday of every month…and maintained that was proper notice. Is it though!? Is it? The complainant correctly argued that the notice provided notice of the date of the meeting, but not the time or place. It's not much good if you don't have all three. The Property Owners' Association Act ("POAA"), ruled the CICO, requires a notice provide "the time, date and place" of board meeting.

Remember, the CICO is responsible for determining whether a final adverse decision of the Association conflicts with the laws or regulations governing common interest communities. The CICO, acting in harmony with the statutes and the apparent wishes of the Virginia General Assembly, does not provide interpretations of the governing documents, such as the declaration or bylaws. It only has authority to require that community associations comply with laws or regulations related to common interest communities. A recent Final Determination even noted that the Virginia Nonstock Corporation Act is not an applicable law within the jurisdiction of the CICB.

The continued failure of some associations to mind certain details continues to be an issue even though the institution of the Complaint Process has long been in the rear view mirror. It's like mistakenly dating your documents "2018." It's a "ha-ha" moment in early January, not so in May. One association's final determination omitted (1) the registration number of the association, (2) the name and license number of the manager, (3) mention of the right of the complainant to file a Notice of Final Adverse Decision ("NFAD") with the CICO and (4) the contact information for filing a NFAD. The association, noted the CICO, is "now on

notice" of the requirements of the Ombudsman Regulations. She warned that "failure to [comply] in the future may result in a referral of the matter to the Common Interest Community Board for enforcement". Really bad things can happen there.

A similar fate was promised by the CICO to another association for "failure" to include "specific citations to applicable laws or regulations" that formed the basis of the association's final determination. The association is normally the party with the paid accountant, manager and lawyer, and therefore, is expected to cite the relevant provisions of the Condominium Act and the POAA when responding to a member.

Leaving out key details is not a problem just limited to associations, however. One Complaint was rejected because the member detailed violations of the POAA, applicable to homeowners associations, against her condominium association, which is governed by the Condominium Act.

Moving right along…executive session (yes, this is still a thing). First, notes the CICO, when the board goes there, it has to state why and this reason should be one of the reasons listed in the POAA or Condominium Act. For example, one board just beamed into executive session—no reason allegedly having been stated in the motion. And once there, they discussed "inappropriate topics" charged one complainant. The association responded that it went into closed session "to consult with legal counsel," which is the only statutory category so broad that it allows you discuss both the appropriate and the inappropriate (for an hourly fee of course!).

Even picking a statutory category—I'll take Personnel Matters for thirty minutes, Alex —is not an appropriate choice if the association has no "personnel," for example. The Board, argued the complainant, used these chat sessions behind closed doors to decide on the appropriate candidates for vacant board positions. "Personnel matters related only to employees", and not potential board members, admonished the CICO.

The main complaints this past year concern communication. The POAA requires associations to establish a "reasonable, effective and free method of communication" between the members and the board and among the members themselves. Bulletin boards are the VHS tapes of our time. Sure, it's good for playing those old Disney tapes when the grandkids visit but "just be kind and rewind," really? Recent CICO Final Determinations have labeled bulletin boards as (1) old fashioned (2) antiquated (3) small, and (4) out of step with today's current technologically advanced options, particularly for larger documents. Wow! However, the CICO acknowledges that bulletin boards may be part of a larger menu of communication options.

The location of the bulletin board was also attacked as being relegated to a sometimes dark and "low-traffic" area. One complaint involved the problems posting multi-page documents on a small bulletin board. The CICO demanded that the association respond with a detailed plan for addressing this dilemma within thirty days. It's like this at the CICO's office…you can't just suffer a "D" on your homework. Oh no! You have to look up all the correct answers, make the changes and turn in the assignment once again.

Open mailboxes permitted an exchange between the members, noted the CICO in one case. Email blasts and bulletin boards were examples of one-way communication. Final Determinations were most unkind were a locked bulletin board was involved. The CICO observed… "a locked bulletin board does not make it a simple matter for someone to post information." She also noted that viewing multi-page documents in a locked bulletin board was a problem and responding to a bulletin board posting was equally as difficult. It's like having the only remaining walkie-talkie left on the planet. Over. Are you there? Over.

Finally, the dreaded f-word: Facebook. The complainant charged that the "Facebook Administrator" improperly removed two members' posting and thus violated the communication provisions of the POAA. Further, the complaint alleged that the association was no "friend" of his since it also posted a "defamatory and factually incorrect email" to the Facebook. The CICO concluded that the "Facebook Group" was operated by a private individual and not the association and dismissed the complaint. Like.

Visiobibliophobia. Apparently fear of Facebook or social media is a thing. The association refused to provide copies of certain books and records relating to an election because it was "concerned" that the documents would be posted by the complainant on social media. The association can require the complainant to state the purpose for the document request, but here, there is no statement that would support a "belief" that the request was for an "improper purpose." The association appears to "jumping the gun," surmised the CICO.

The moral of the story: If it's broke…fix it. If the process could be better…make it better. But do it now and do it voluntarily, rather than waiting to be ordered to do so by the CICO in a Final Determination, which is posted online, made available for all to read, and later, perhaps featured in an article by me.

To illustrate: in one case, the association was attacked for its process of providing access to books and records, however, it voluntarily made corrections prior to the CICO's Final Determination. If there is one message to be gleamed from reading dozens of Final Determinations every year it is in these comments of the CICO, here it is:

> From my perspective, this is an example of exactly how an association complaint process should work. An owner raised concerns…and the association acknowledged errors or imperfection and responded to them by taking action and adopting procedures to ensure adherence with the applicable laws in the future.

THANKS FOR READING!

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2019 Statutory Handbook
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