

PSST!

Is your board heading into another closed session? Few things breed as much suspicion and distrust as the perception that someone is keeping a secret. Before you leave, here are some things you should know.

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Tempers flared in one small East Coast mountain community when the association board decided to exclude homeowners from its meetings. One irate homeowner wrote on his website: “Did you know that in this ‘Live Free or Die’ state of New Hampshire, the board insists on closed-door sessions and that the minutes of these meetings, if distributed, are released often months after each session is held?”

A board member defended the decision, saying that closed sessions were necessary because some homeowners were verbally abusive and threatening. “They were screaming and hollering, and we simply couldn’t get any work done,” the board member was quoted as saying in the local newspaper.

The two sides ultimately ended up in court. Some associations have endured

expensive and lengthy litigation over the issue of closed meetings, whether held for legitimate reasons or not. Such legal and public relations battles should serve as cautionary tales.

Secrecy doesn’t sit well with many Americans. As President John F. Kennedy said, “The very word, secrecy, is repugnant in a free and open society, and we are as a people, inherently and historically opposed to secret societies, to secret oaths and to secret proceedings.”

Yet secret proceedings are not uncommon in the community association world. Homeowners are often asked to leave for all or parts of board meetings. Minutes of these executive sessions are generally kept secret. At times, boards conduct business by telephone or e-mail to avoid public scrutiny.

On one level, it's ironic. For every board that keeps residents out of board meetings, many others are begging for more homeowner involvement.

Without question, your board occasionally will need to do business outside of the public eye. Before doing so, however, it's worth considering whether state laws and your governing documents permit it and how homeowners in your community are likely to react.

Too much secrecy leads to suspicion, distrust and strife within communities. Even a quick Internet search on open meetings will reveal numerous homeowners who are upset over executive sessions. So why would any board want to exclude association members from its meetings? Most often, boards meet in private for one of three reasons. Unfortunately, all three are aimed at avoiding association members. Some boards hold closed sessions to discuss controversial issues. Others develop an us-versus-them attitude and prefer to transact business without members' interference. Or they just don't know they can't.

Not only are these all poor excuses to close a meeting, but most can be resolved by methods that don't involve upsetting the entire neighborhood. For instance, unless there is a rule to the contrary, association members have no right to participate—that is, to make motions or to debate—in board meetings. As a result, a disruptive homeowner can be excluded from a

board meeting without banning all association members from attending.

TOP SECRET

Legitimate reasons for closing a meeting generally concern issues that—if discussed in public—could violate privacy laws or harm or cause embarrassment to the association or another party. A general list of valid reasons for going into closed session includes:

- consulting with the association counsel regarding legal issues;
- discussing litigation or prospective litigation either by the association or against the association;
- reviewing personal information that is confidential or should not be generally known, such as delinquencies in homeowner association dues;
- conferring about contracts or property purchases (after all, it's hard to negotiate if your position is known to all);
- reviewing association employees or personnel issues; or
- handling disciplinary matters or rules violations by association members.

Homeowners regularly ask if parliamentary procedure permits a board to close its meetings. After all, many community associations as a result of statute must follow a particular parliamentary book. In North Carolina, for instance, statutes mandate: “Except as otherwise provided in the bylaws, meetings of the association and the executive board shall be

conducted in accordance with the most recent edition of *Robert's Rules of Order Newly Revised*.” Many more associations follow *Robert's* due to language in their governing documents.

The short answer is that *Robert's* doesn't care whether your meetings are open or closed. In fact, there are no general parliamentary prohibitions on closed meetings or rules for what can happen during the closed portion. *Robert's* allows both discussion and voting during an executive session. In fact, decisions made during a closed meeting don't even have to be revealed to non-board members until the board chooses.

A far more important question is: What do association governing documents and state statutes say about closed meetings? For instance, the declaration or bylaws of an association may limit the circumstances under which a board can go into closed session. At times, the reasons that a board may go into executive session are listed. Other associations simply provide that “all board meetings shall be open to association members.” Generally, such language is too broad and should be changed because there are warranted reasons for meeting in closed session.

A more recent trend is that boards may be restricted from closing their meetings due to state statute. Because such laws vary from state to state, it is important to check with association legal counsel before attempting to close a meeting. Generally, however, such statutes take one of two approaches. In some states, the law

prohibits the board from always meeting in closed session by requiring occasional open meetings. For instance, a North Carolina statute provides that “[a]t regular intervals, the executive board meeting shall provide lot owners an opportunity to attend a portion of an executive board meeting and to speak to the executive board about their issues or concerns.”

In contrast, other states have compared community associations to governmental bodies and drafted the equivalent of “sunshine laws” for board meetings. For instance, the California Common Interest Development Open Meeting Act authorizes any member of the association to attend meetings of the board except when the board meets in closed session “to consider litigation, matters relating to the formation of contracts with third parties, member discipline, personnel matters, or to meet with a member, upon the member's request, regarding the member's payment of assessments.”

Slight alterations of this language can be found in several states. For instance, Virginia's condominium statutes provide that all meetings, including committee and board meetings, are open to all unit owners, but can be closed “to consider personnel matters; consult with legal counsel; discuss and consider contracts, probable or pending litigation and matters involving violations of the condominium instruments or rules and regulations...; or discuss and consider the personal liability of unit owners to the unit owners' association.” To prevent efforts to get around the open-meeting

provisions, the statute also provides that “the executive organ shall not use work sessions or other informal gatherings of the executive organ to circumvent the open meeting requirements of this section.”

A Maryland statute adds as a legitimate basis for meeting in closed session the protection of “the privacy or reputation of individuals in matters not related to the homeowners association’s business” as well as “investigative proceedings concerning possible or actual criminal misconduct.” A catch-all provision is also included: “On an individually recorded affirmative vote of two-thirds of the board or committee members present, some other exceptional reason so compelling as to override the general public policy in favor of open meetings.”

CONFIDENTIAL BUSINESS

Once a board determines that it should and can close its meeting, the next question is how to properly conduct an executive session. Generally, boards do not go into closed session by decision of the chair; instead, the decision to hold an executive session belongs to the full board. While this is sometimes accomplished by a majority vote, it can also be accomplished by unanimous consent. That is, the presiding officer can ask, “Is there any objection to going into closed session to discuss...?” If no one objects, the meeting is closed. If a board member objects, the question should be resolved with a motion and vote.

Obviously, the presiding officer does not detail the specific item of business, which would defeat the purpose of closing the meeting. Instead, the presiding officer should only give the general topic to be considered such as “to discuss delinquent assessments.” For associations in states that mandate open meetings, there is generally a statutory checklist for going into executive session. For instance, a Virginia statute provides that a motion to go into closed session “shall state specifically the purpose for the executive session. Reference to the motion and the stated purpose for the executive session shall be included in the minutes.”

Maryland’s statute goes further and requires that “a statement of the time, place, and purpose of a closed meeting, the record of the vote of each board member or committee member by which the meeting was closed, and the authority for closing a meeting shall be included in the minutes of the next meeting of the board of directors or the committee of the homeowners association.” By statute, the consideration of matters during the closed session is usually restricted to those purposes specifically stated in the motion.

Once the meeting is closed, non-members are asked to leave, but certain guests may remain—the association’s attorney, for example. Again, state statute may permit certain individuals to attend the closed session. For instance, California law provides that “the board of directors of the association shall meet in

executive session, if requested by a member who may be subject to a fine, penalty or other form of discipline, and the member shall be entitled to attend the executive session.”

What boards are permitted to do during an executive session also varies considerably by state and ranges from discussion only to voting on motions. For instance, Colorado law does not prohibit boards from making decisions during an executive session, but does prevent the adoption of rules or regulations. In Virginia, “no contract, motion or other action adopted, passed or agreed to in executive session shall become effective unless the executive organ or subcommittee or other committee thereof, following the executive session, reconvenes in open meeting and takes a vote on such contract, motion or other action which shall have its substance reasonably identified in the open meeting.” In some states, the board must only announce in open session any actions that were taken during the closed session. Other states have no requirement that any information from the executive session be disclosed.

INTO THE DAYLIGHT

Coming out of executive session is very similar to going into executive session. Although a vote can be taken, the decision is usually made by unanimous consent. In states where no votes can occur during a closed session, how does the board vote to come out of executive session? Generally, once the subject of the closed session is completed, the presiding

office simply announces that the closed session is ended and reopens the meeting.

An issue that regularly arises from executive sessions is what record must be kept of the proceedings. Once again, there are general and specific answers that vary by state. Under *Robert's*, minutes are a record of what was done at a meeting, not what was said. That is, unless motions were adopted, there would be no minutes anyway (other than that the board went into executive session and later came out). Minutes should be kept of business transacted during a closed session. However, such minutes are only accessible to those who had a right to be in the executive session. Later, once the subject of the closed session is no longer confidential, the board can choose to open the minutes to the members.

In states that mandate open meetings, there are generally statutes that mandate what records must be maintained. For instance, a California statute provides that “any matter discussed in executive session shall be generally noted in the minutes of the immediately following meeting that is open to the entire membership.” Colorado only requires that minutes be kept indicating an executive session was held and its general subject matter, but the minutes are treated as all other minutes and open to inspection by homeowners.

A distinction also must be made between a discussion held in executive session and a privileged discussion held with an attorney. The purpose of a closed session is to

exclude non-board members and to discuss something in private. However, this does not necessarily mean that the closed-session discussions will remain confidential in the event of a lawsuit. In one Illinois case, a condominium board went into a closed session to discuss a homeowner's grievances as well as a pending lawsuit. A lawsuit was later brought pursuant to the federal Fair Housing Act. The court held that discussions between the association and its legal counsel were protected by the attorney-client privilege and could remain private. In contrast, the executive session alone did not grant protection to all discussions during the closed session.

One final caveat: some boards attempt to avoid open meeting requirements by conducting business through other means, such as by e-mail or Internet discussion groups. Recognize that there may be no authority to support such "meetings." States with open-meeting requirements often specifically prohibit such decisions. Even in the absence of such statutes, most states do not recognize decisions made online as official actions. At best, such decisions have to be later ratified at a meeting at which a quorum is present.

For states that do permit electronic decision-making, there often must also be language in the governing documents that permits business outside of a meeting. *Robert's* frowns upon online voting: "Efforts to conduct the deliberative process by postal or electronic mail or facsimile (fax) transmission—which are not recommended—must be expressly authorized by the bylaws and should be supported by special rules of order and standing rules as appropriate, since so many situations unprecedented in parliamentary law might arise and since many procedures common to the parliamentary law are not applicable."

Numerous statutes and rules can prevent your board from legally meeting in executive session. Approach proposals for closed sessions cautiously and with the advice of legal counsel. Even if permitted by law and your association's governing documents, ask yourself whether it is wise to do so. Not much has changed since President Kennedy noted inherent opposition to secret proceedings. Except for those instances where closed sessions are truly necessary, the cost to the association in terms of controversy and suspicion may do more harm than good.

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