

Homeowner Association Q&A

Q: I am on the board of directors in my community and we are currently involved in litigation. One of the directors disagrees with the board's strategy and is telling everyone in the community our strategy and strengths and weaknesses based on our attorneys' opinions. What can we do to stop this?

N.D., Naples

A: This is unfortunate and the board should take immediate action to preserve the confidentiality of this information. In any litigation, strategy and procedure can sometimes be as important (or more important) than the facts of the case itself. Any opinion or communication from your legal counsel intended to convey legal advice is privileged and should not be disclosed outside of the board. The attorney client privilege in a community association exists between the board of directors and the attorney unless there is a higher level of authority than the board, in which case the facts may differ. If a director discloses privileged information outside of the board of directors, the privilege is arguably waived and anything discussed by the board or its attorney may be discoverable and used against you in the litigation. This would likely be a breach of the director's fiduciary duty and could result in serious consequences and possible financial damages. Whether the upset director agrees or disagrees with the legal position of the board, the fiduciary duty does not sway with such predisposition and directors need to preserve the confidentiality of legal opinions and strategies. I would urge you to talk with the director and place your concerns in writing to the upset director to place him or her on notice of the importance and possible liability associated with disclosing confidential information and opinions. The attorney should also be made aware to take possible steps to prevent privileged opinions from being released outside of the board.

Q: What are staggered terms and does our board need them?

J.N., Naples

A: Staggered terms implies an election mechanism whereby some, but not all, of the directors are elected each year. Often times, communities will employ two-year staggered terms. For example, if there are five directors, three directors would be up for election in 2017 and the other two would be up for election in 2018 and the process repeats itself. This staggering allows for the continuity of knowledge and experience so that there is always a director that knows where the board stands with respect to contractual relationships, litigation, management tasks, repairs, etc. The default rule is that terms are one year and therefore, no staggered terms, unless the bylaws or other governing documents authorize the implementation or continued use of staggered terms. Many of my clients are very happy and want to continue annual elections for all directors, but if you want to use staggered terms, I would recommend you consult with legal counsel as an amendment to the bylaws is likely needed.

Q: Our condominium has about 18 months left on its long-term cable agreement. Do we have enough time to provide notice of non-renewal and what is the best way to approach a new agreement?

W.T., Bonita Springs

A: The best way is to start early, and you have enough time. Depending on the age of your community and the cable infrastructure, any new agreement may require significant work and upgrades to the infrastructure. Thus, depending on the expiration date of a new contract, you would want to make sure

that any new infrastructure could be installed and operational to avoid an interruption in cable, telephone or internet service. The first task is to determine the deadline to provide a notice of cancellation and the proper way to provide notice. You should probably have the contract reviewed by legal counsel to advise you on these deadlines and renewal periods.

Because cable discussions can sometimes sound like a foreign language, many clients will form a committee tasked with understanding the technological aspects of the current cable infrastructure and other options in the market. The committee may also conduct polls to determine the percentage of the community paying for internet and premium cable to determine whether such data should be part of a bundled contract. For example, if 90 percent of the community is paying individual internet rates, the community may experience significant savings by adding internet to a bulk rate agreement.

Next, the committee or the board should decide whether it wants to engage a consultant. Negotiation with multiple cable providers can be tiresome and the numbers, acronyms and terms of art can be confusing. Some of my clients have the desire to get up to speed with the industry, and others do not. Also, the providers often take days, weeks or even months to respond to a price counteroffer or contractual negotiation. A consultant can sometimes bridge the gap and handle a lot of the negotiations for the board or the committee.

There are some cable consultants that provide their services on an hourly basis, and others that seek a percentage of savings as compensation. Depending on the size of the contract, the difference can be significant. Either way, I strongly recommend any agreement with a consultant be reviewed by legal counsel in advance.

After the terms of the service and price are set, the next step is reducing those terms to a contract. I would recommend the association use its own independent legal counsel to review the agreement, make recommendations, and discuss the implications of any recommendations with the board. The board can then decide which changes it wants to propose to the contract and which changes are the highest priority and most advantageous.

Q: Our bylaws provide that the treasurer drafts the budget, but our treasurer does not know where to begin. How do most communities do this?

O.M., Marco Island

A: Very few communities have a treasurer that is qualified or has the time necessary in a volunteer position to take on the task. This task of drafting the budget is often delegated to a property management firm or committee that will review prior financials, obtain bids for possible savings, and identify and prioritize maintenance and replacement needs. With respect to reserves, it would be helpful to obtain a reserve study and periodic updates. The reserve study will provide a guidepost for the board for the remaining useful life and replacement cost and provide sample reserve budgets to ensure proper funding. A reserve study is not required by law, but can be helpful and avoid the work involved in consulting with engineers and contractors with respect to each and every reserve item.

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