
November 2022

Community Associations Newsletter

Motion to Move into Executive Session

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There are times when it is necessary for a community association's board of directors to meet in closed session, also known as executive session. The Condominium Acts in Maryland, Virginia, and Washington, DC each have specific provisions describing under what parameters a board may go into executive session, and thereby exclude all non-board members from that portion of the meeting. The Homeowners Association Act in Maryland and Property Owners' Association Act in Virginia also govern the circumstances under which executive session are allowed. Unlike the Maryland statutes, Virginia requires committees to observe the same legal requirements pertaining to executive sessions as boards.

The language of each jurisdiction's laws with respect to executive session are described in detail below. But first, a practice point based on a common question: Must/should a board or committee take and keep minutes of their discussions during executive sessions? There is no obligation to keep minutes of executive session since it is merely discussion. As such, since votes must occur outside of executive session, we generally recommend against keeping minutes of executive session.

Onto executive session mechanics. The following paragraphs describe each jurisdiction's statutory requirements for using and going into executive session during a board meeting. Follow these to avoid giving your opponents the opportunity to attack.

Maryland. Under the Maryland Condominium Act §11-901.1 and the Maryland Homeowners Association Act § 11B-111(4) and (5), boards of directors for community associations may hold closed sessions for the following purposes:

1. To discuss matters pertaining to employees and personnel;

2. To protect the privacy of an individual in matters unrelated to the council's business;
3. To consult with legal counsel on legal matters;
4. To consult with personnel, consultants, attorneys, board members, or other persons in connection with pending or potential litigation or other legal matters;
5. To hold investigative proceedings concerning possible or actual criminal misconduct;
6. To discuss the terms and conditions of a business transaction in the negotiation stages if the disclosure could adversely affect the economic interest of the council;
7. If the matter discussed requires complying with a specific constitutional, statutory, or judicially imposed requirement protecting particular proceedings or matters from public disclosure; and
8. Discussions of individual owner assessment accounts.

During a closed session, the board may not take any action or discuss a matter if it does not fall within an exception and a statement of the time, place and purpose of the closed meeting, a record of the vote by each board member and the authority allowing the closed meeting is required to be included in the minutes of the next meeting of the board.

Virginia. The Virginia Condominium and Property Owners' Association Acts has similar requirements pertaining to when a board may use executive session, stating:

The board of directors or any subcommittee or other committee of the board of directors may (i) convene in executive session to consider personnel matters; (ii) consult with legal counsel; (iii) discuss and consider contracts, pending or probable litigation, and matters involving violations of the declaration or rules and regulations adopted pursuant to such declaration for which a member or his family members, tenants, guests, or other invitees are responsible; or (iv) discuss and consider the personal liability of members to the association, upon the affirmative vote in an open meeting to assemble in executive session. The motion 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. The board of directors shall restrict the consideration of matters during such portions of meetings to only those purposes specifically exempted and stated in the motion. No contract, motion, or other action adopted, passed, or agreed to in executive session shall become effective unless the board of directors or subcommittee or other committee of the board of directors, 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. The requirements of this section shall not require the disclosure of information in violation of law.

Section 55.1-1816.C of the Va. POA Act, Section 55.1-1949 of the Va. Condominium Act

Washington, DC. DC has a Condominium Act, and does not yet have a homeowners association or property owners association act (but we are working on getting one enacted!)

The DC Condominium Act states as follows about executive session portions of board meetings:

(5)(A) The executive board, upon a motion and an affirmative vote in an open meeting to assemble in executive session, may convene in executive session to consider:

- (i) Personnel matters relating to specific, identified persons who work for the unit owners' association, including a person's medical records;
- (ii) Contracts, leases, and other commercial transactions to purchase or provide goods or services, currently in or under negotiation;
- (iii) Pending or anticipated litigation;
- (iv) Matters involving state or local administrative or other formal proceedings before a government tribunal for enforcement of the condominium instruments or rules and regulations promulgated by the executive board;
- (v) Consultation with legal counsel;
- (vi) Matters involving individual unit owners or members, including violations of the condominium instruments or rules and regulations promulgated pursuant to the condominium instruments and the personal liability of a unit owner to the unit owners' association; or

(vii) On an individually recorded affirmative vote of two-thirds of the board members present, for some other exceptional reason so compelling as to override the general public policy in favor of open meetings

(B) For the purpose of subparagraph (A)(iii) of this paragraph, the term “anticipated litigation” means those instances where there has been a specific threat of litigation from a party or the legal counsel of a party.

(6) The motion to assemble in executive 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. The executive board shall restrict the consideration of matters during an executive session to those purposes specifically set forth in the motion. A motion passed, or other formal action taken, in an executive session shall be recorded in the minutes of the open meeting, but this shall not require disclosure of any details that are properly the subject of confidential consideration in an executive session. The action or actions authorized by a motion passed in an executive session shall be reflected in minutes available to unit owners in good standing. The requirements of this section shall not require the disclosure of information in violation of law.

DC Condominium Act Section 42-1903.03.

These statutory requirements limit the Board to discussing only the topics in executive session that are expressly permitted by statute. A Board cannot enter executive session to discuss topics not expressly allowed by statute or continue to meet in executive session to discuss other topics after the Board has completed its discussions on the topic for which it originally entered executive session.

Indeed, we have observed a misperception within the common interest community industry that boards can meet in executive session for purposes that go beyond those expressly allowed by law. One common misperception is that boards can meet in executive session to discuss proposed changes to the association’s rules or policies. Simply put, they cannot.

Similarly, we also often hear from boards that they intend to meet privately in a “working session”, which board will try to distinguish from a board meeting. In each of the local jurisdictions, a “working session” falls within the definition of a board meeting, and are subject to the same executive session laws as a regular monthly meeting of the board. In fact, executive

session is always a part of a board meeting. There needs to be a motion and vote during open session in order to convene into executive session.

These statutes are detailed with what is allowed and not allowed with regard to using executive session, and we recognize that these restrictions can be frustrating to boards that wish to act quickly on issues. We are happy to discuss with any of our clients various techniques to address the executive session requirements created by these statutes. If you would like our assistance in addressing these issues, please do not hesitate to contact your community association attorney at Rees Broome if we can help navigate any executive session or other matter.