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Has Your Condo/HOA Board Done the Necessary Continuity Planning?

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One of our experts recently suffered the loss of a community's president to COVID-19. It was a sad loss and one made more difficult because the community had done no planning for the what-ifs. What if a leader suddenly becomes unavailable to serve? Are there documents and information in that leader's possession others will need? If so, how will you gain access to them?

Here's why you should plan for the what-ifs, along with tips on how to get the process started.

Is It a Self-Managed Issue?

For the most part, given where we are with technology, this doesn't happen as often as it might have just five years ago. If it does, however, it may be something more common in properties not professionally managed.

"That's really awful," laments Bruce Masia, LCAM, the Broward/Palm Beach County, Fla.-based vice president of the southeast region for KW Property Management. "I've seen this happen in self-managed properties. I see this where the information is hoarded. Some people have been sitting on boards for years and years, and then something happens. Then the rest of the board is backtracking and trying to figure something out."

Self-management might indeed be a risk for this issue, agrees Andrea L. O'Toole, a Walnut Creek-based principal at Berding Weil, a law firm that does only community association law throughout the state. "I haven't really seen that," she notes. "My first instinct is to assume this is a self-managed association, and that's one of the risks you have being self-managed—who's the keeper of the records?"

"We do sometimes get into a situation where the prior manager hasn't been very good at recordkeeping, and a new manager asks for the records but can't get them," she adds. "Then the manager is going to prior members of the board to get their records. But I've not had the issue where someone who was the gatekeeper of the records no longer has the ability to serve, though I could see how it be a big problem."

Luckily, Masia hasn't experienced the loss of access to association materials in his management role. "But we always tell our boards that it's very dangerous putting information in only one person's hands," he explains. "This is why, as a management company, we do that. We have the ability to safe keep the information in one central location and access it at any time. We can also refer to past events that could go back many, many years."

This isn't just a good idea to help future boards. Your state law may require it. "A better plan for boards is to preserve the association's records," advises O'Toole. "It's a big responsibility, and in California, there are statutes that tell you the records you have to maintain and for how long. And if you don't provide the records when requested, there are penalties in small claims court that can add up quickly."

If your state doesn't require you to do some planning to ensure you can access all records no matter what happens, it's still a good idea. "I highly recommend that boards save records on a drive that's centrally located in the office or held by the manager," suggests Masia.

Not the Same, But Similar

Ironically, a board member's passing recently raised an issue, but a different one, in one of the community clients of Joe Wloszek, a member at Hirzel Law in Farmington, Mich., which represents more than 100 community associations; he lived in a condo for seven years and now lives in an HOA.

"I just had this circumstance happen, where a board member passed away," he recalls. "We were going through a potential board overthrow. The board was divided three-two on a lot of issues, and one of the individuals who was in the majority unexpectedly passed away, though not due to COVID.

"The board was devastated," states Wloszek. "Then it got to the issue that it was divided two-two on all decisions concerning how to appoint a new director. That's not related to continuity in terms of access to documents, but it's related in terms of control of the board and decisions over things like a lawsuit and what to do about it. So it's kind of similar."

According to Wloszek, that board realized it wasn't going to be able to come to any agreement on the issues before it. It chose to fill that seat at an upcoming annual meeting election rather than by attempting an appointment. One board member from each of the factions was also up for reelection at that meeting.

"The community was going to have a say in which side they'd vote for," he says. "We did the annual meeting by Zoom and ended up getting half the community to cast ballots. The group previously in the minority had more support and ended up taking control of the board. It was a prudent decision, leaving the decision to the community. It was a democratic solution to the problem."

Wloszek mentions this situation because it actually prompted him to begin thinking about continuity challenges. "I have been thinking of these issues of

continuity—and based on my own experience, too," he says. "I'm president of my own HOA. We recently had to remove our treasurer for not responding to emails, not providing financials, and generally not doing what needed to be done. So I created a cheat sheet. What are the things we have? Where are they located? And who has access and control?"

"Then I thought: What about information that isn't physical, such as passwords and where we bank?" Wloszek adds. "We were banking at two different banks, and on one account, we had names of people who hadn't lived in the community for 15 years. I stared going through this assessment of what you have, who has control of stuff, and where it's located."

A Step-By-Step Plan

By working through that process, Wloszek came up with the following steps for boards to take to ensure continuity:

Step 1: Analyze where the following items are located

Banking records, including:

- Names of banking institutions
- Passwords
- Debit cards
- Checks
- Financial records

Association records, including:

- Modification requests, approvals, and denials
- Meeting minutes (including closed session meeting minutes)
- Communications with the association's attorneys
- Keys to any pool, clubhouse, community storage area, or association mailbox

Physical equipment, including:

- Pool items like lawn chairs, umbrellas, benches, community holiday lights, shovels or other lawn equipment, etc.
- Clubhouse furniture
- Storage items like cleaning supplies and toilet paper for community bathrooms
- Sandwich boards

Step 2: Determine who has passwords to key records

- Association email accounts
- Online banking accounts
- Security systems

- Regulatory filings, such as annual reports (in Michigan, this is done through Michigan's Department of Licensing and Regulatory Affairs)

Step 3: Determine who has possession of and access to all the above items

Step 4: Analyze the data. Once everything is catalogued and identified, complete a continuity plan analysis identifying what happens if something happens to the individuals with access or possession of these items.

Step 5: Check in. Evaluate the continuity planning on a routine and consistent basis. "Doing a plan once doesn't help if things change over time," Wloszek says.