

COMMUNITY ASSOCIATION CONNECTION

SUMMER 2020

Considering E-Voting?

Why your community may be ready for a change

by Kris Fulmer, Chapter Executive Director

As many communities have turned to online meetings they have also explored e-voting. Electronic voting is legal in New York state and is a safe, secure, and convenient way for homeowners to vote. Associations who have engaged in electronic voting report a 90% participation rate or higher. This increased participation ensures a quorum is easily reached.

Electronic voting is less labor intensive, and may even be cheaper than the cost of printing and mailing paper ballots. It also does away with the need for voting by proxy if an association or condominium's governing documents dictate such.

A proxy vote is assigning someone to vote on your behalf. Denise Lash of CondoVoter states, "Experience has shown that proxy votes may entrench incumbent directors by concentrating power and decision making in the hands of a few—resulting in low director turnover, minimal accountability, and conflicts of interest that favor the few at the expense of the many. Some U.S. states are now discussing whether the ban on proxies should include any type of election the association holds."

With that being said, communities may wonder how to begin the search for a reputable e-voting platform or service? I recently did a search on CAI Exchange for "e-voting" and found responses from several board members and property managers recommending companies, and sharing their experiences with e-voting. I would suggest starting there or creating a new post of your own on Exchange.

I found the majority of people had positive things to say about e-voting. Such as...

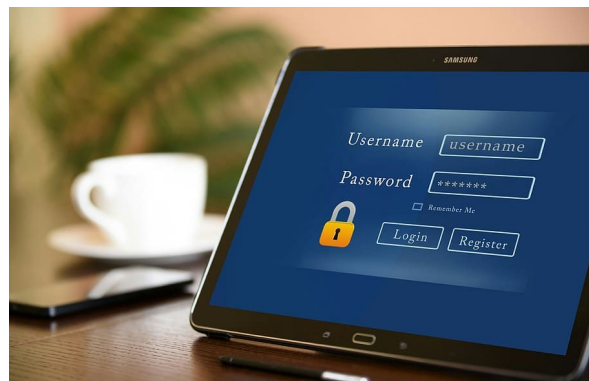
"The other nice thing about e-Voting is that you are not tallying or counting results but rather simply reporting the outcome."

"Inexpensive to set up & sure makes voting easier for everyone."

"After implementing the online voting process we did notice our participation numbers go up, as well as the number of valid votes go up since it is much harder to mess up something online rather than all the envelopes and signatures with paper."

"Since we started doing this, we have had quorum both years and have been able to take care of business."

It is always wise in these challenging times to explore your options and be informed as a Board member. What may be right for one community may not be right for yours. But it never hurts to be educated!



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SUMMER 2020

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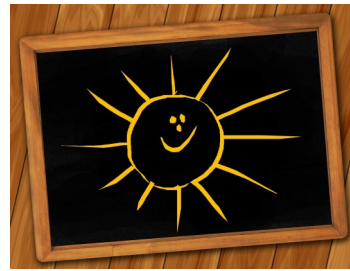


President's Corner



Moving Forward!

Bonnie Gionta, Chapter President



As I reread my column from our Winter edition of Community Association Connection entitled "Looking Forward!" I remembered how excited I was to share our Calendar of Events for 2020 with all of you. We had many new programs in beautiful venues planned throughout the year with engaging speakers and great opportunities for networking. CAI WNY was on track for a banner year, not only in terms of programming, but sponsorship and membership, as well. Of course, much of that changed with the onset of COVID-19. And while it is easy to dwell on those lost opportunities, I find myself energized by all we are doing to keep moving forward!

Our chapter has been able to offer webinars free of charge to members. These programs have offered an opportunity for people from throughout the chapter to attend from the comfort of their own homes and to share a video of the webinar with fellow board members or colleagues. The webinars have allowed us to bring in speakers that we would normally not have access to for in person events due to the cost of travel or scheduling constraints. Most importantly, they have allotted more time for participants to ask questions!

This fall we have some fun social distancing surprises planned for you! These will be in addition to our Board Leadership Workshop and a couple more educational and high interest webinars. We continue to explore ways we can safely network and learn as a chapter.

Be sure to register on our website to participate in CAI WNY Exchange. Many members have posted questions and are looking for input from fellow Board members. This is a great way to share information. Just click on **login** in the top righthand corner of caiwny.org to create a username. As always, if you have suggestions or ideas, please forward them to our Executive Director, Kris Fulmer at cai.wny@gmail.com. Let's stay positive and keep moving forward!

Welcome!



We are pleased to welcome the following new members to CAI WNY:

Chad Fetterman, CMCA, AMS

Realty Performance Group, Rochester, NY

Dan Bresnan

Cornhill Common Homeowners Association, Rochester, NY

Julie Ambrose

St. Elmo Condominium, Sherman, NY

Michael James,

Bluffs Homeowners Association, Derby, NY

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Underground Water Issues Rentals & Voting

Ronald Shubert, Esq.

QUESTION:

I am the President of a Homeowners Association and have the following questions regarding voting and our Annual Meeting:

1. At an Annual Meeting does the Association have to allow for nomination from the floor?
2. If there are three Board positions available, and four candidates running, can we require Owners to vote for three on the ballot or would it be deemed void?

ANSWER:

Your Bylaws govern whether or not the nominations from the floor are allowed. If you wish to require Owners to vote for three positions on their ballots, or their ballots will be deemed void, you must amend your Bylaws accordingly.

QUESTION:

How do Roberts Rules of Order affect the governance of an Association?

ANSWER:

The Board can elect to follow Roberts Rules of Order. However, the Board must remember the Bylaws and the not for profit corporation law govern the operation of the Association.

QUESTION:

What restrictions can a Board legally place on Homeowners regarding rental of their homes and can the Board set a limit on the number of rentals in a community?

ANSWER:

The Association Declaration and Bylaws can be amended to place rental restrictions on the Units. I recommend that current Owners be grandfathered and allowed to continue renting their units. There are many variations on how rental restrictions can be implemented. Associations can prohibit rentals altogether or set a limit of approximately 10% of the Units that can be rented. Exceptions can be made for extenuating circumstances, etc.

The growing desire for rental restrictions has been the result of the secondary mortgage market which is uncomfortable with lending to communities where more than 10% of the Units are not owner occupied. In addition, the insurance market has made it clear that they too are concerned about Associations where more than 10% of the Units are occupied by tenants.

QUESTION:

Our Association has an "underground water problem." At times water seeps to the surface of the ground. In some cases, it has caused exterior and interior damage to a Unit basement, mold, wet drywall, basement window wells filling with water going into the basement, carpet damage, etc. All Units have working sump pumps. Does the Association bear any responsibility for the damages?

ANSWER:

This is a difficult question to answer and it requires consultation with your attorney. You should first retain an engineer or other consultant to establish the source of water infiltration, and then review the appropriate section of the Declaration.



Typically, the Association is responsible for storm sewers, water conductors and pipes that service more than one Unit, but not for water conductors and pipes that service only one Unit. In addition, the Association is, in most cases, never responsible for foundation walls. If water infiltration through the foundation walls is not the result of negligent maintenance of pipes which the Association has the responsibility to maintain, said expense to repair will be the responsibility of the individual Unit Owners.

Please note, however, that the Association is also responsible for the grading of the exterior topsoil away from the Unit. If the infiltration is the result of poor grading, it might be possible that the Association would be liable for the damages that occur as the result of the grading.

Ronald S. Shubert is a partner in the law firm of Phillips Lytle LLP and presently represents more than 400 community associations in New York State.



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Member Spotlight: Rick Skovenski, HOVL

**Board Member, Villas at Brierwood Condominium
Hamburg, NY**

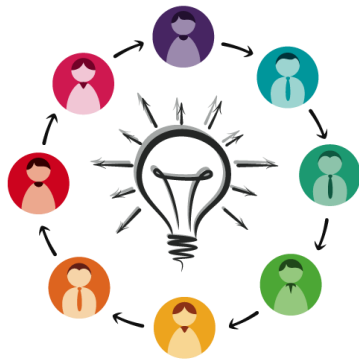
Rick Skovenski moved to the Villas at Brierwood Condominium in Hamburg, New York in 2014. He quickly got to know many of his new neighbors while walking his dog. When it came time for the Annual Meeting and elections he was encouraged by several homeowners to run for the Board. They liked how approachable he was and thought he would be an asset to the community. Ever since, Rick has diligently served on the Board, holding the positions of Vice-President, Secretary, and Treasurer. He was nominated for our Member Spotlight by Brierwood's Property Manager, Holly Sajda, of Clover Management.



Holly stated that "Rick has great ideas that are helpful for the community and wants to see the best for the community. He goes above and beyond by helping me with any complaints I receive. Rick will go check on work orders and helps keep the pool functioning properly. But he isn't just another board member he has done a lot for the Hamburg community. " Rick taught middle and high school biology in the Hamburg schools for 35 years. His dedication and enthusiasm made him a favorite among students and fellow staff members, alike, and he has carried that over to his work at the Villas at Brierwood.

Rick oversees the maintenance, repair, and daily monitoring of the pool, in addition to the plowing contract, and assisting with all things landscape related. His biggest challenge as a board member is finding a contractor who meets the needs of the community, satisfies the homeowners, and fulfills their contractual obligations. A lot of his time goes to his work as a board member, and CAI WNY thanks Rick for his volunteer service and commitment to his community. We hope Rick and his wife will be able to enjoy travelling again sometime soon. He deserves a vacation!

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New York Law Allows Annual Meetings to be Held Virtually, but for How Long?

Nicholas A. Pusateri, Esq.

Temporary amendments to New York State law may create a trap for New York Homeowners Associations and Condominium Associations. In mid-June, the New York State Legislature temporarily amended the New York Not-For-Profit Corporation Law (N-PCL). The amendment permits annual (and special) meetings of HOA and condominium association membership to be held electronically. The amendment piggy-backs on Executive Orders issued during the pandemic that suspended a requirement that such meetings be held at a physical location. The amendment to the law, however, is effective for an uncertain period of time.

Boards of Directors of HOAs and condo associations have long been permitted under the N-PCL to hold meetings virtually. Prior to the pandemic, however, meetings of HOA and condo association membership were required to be held at a physical location. The N-PCL's meeting requirements coupled with social distancing measures effectively prohibited HOAs and condo associations from holding their annual membership meetings. The result led to the temporary amendment to the law.

The amendment states it will remain in effect "for the duration of the [COVID-19] state disaster emergency." In other words,

HOAs and condo associations can effectively hold virtual membership meetings for only as long as COVID-19 remains a persistent threat in New York. The uncertain *end date* of the amendment, however, creates a scenario wherein actions taken at annual meetings could be challenged as unenforceable, if the meeting was held electronically after expiration of the amendment. The argument is, of course, that the meeting was not properly held in accordance with New York law.

As a result, it's critical now, more than ever, for HOAs and condo associations to keep a watchful eye on newly issued State Executive Orders, acts of the Legislature and other state guidance to determine how (and when) to hold their membership meetings in a manner consistent with State law. We suggest speaking with your association counsel. Collectively, you should determine an efficient and effective method to track changes in the law applicable to your association arising out of COVID-19.

Nick Pusateri is an associate in Hurwitz & Fine, P.C's Business and Corporate Law practice area. He regularly assists the firm's clients with corporate governance matters.



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Risk Prevention COVID-19: Impact on Your Personal Insurance

Bonnie Gionta, CIC

Q: Am I responsible for damage or theft to business property, such as a company laptop, while working from home? Is there any coverage on my homeowner's policy?

A: Any questions you have regarding your responsibility for damage to property provided to you but owned by your employer should be answered by your company. Your homeowner's policy does include some limited protection should business property get damaged while in your home. This coverage limit can range from \$2,500 up to \$25,000 depending upon the insurance company and state in which you reside. If the property is away from your insured location the limit for business property can be excluded or even further limited. In most cases, your employer will have included this property under the commercial property policy for the business, but you should confirm this information with your manager.

Some homeowner's policies also include protection for data that is lost due to a covered loss. The coverage would provide funds to replace or recreate lost information for certain causes of loss. Just as with direct damage to business property, you should confirm with your employer what, if any, protection the business insurance has for loss or damage to company data.

Q: Does my personal auto protect me for losses that occur in the course of my work duties?

A: Most personal automobile policies include protection for an entity that you operate your car on behalf of, such as an employer. An accident that occurred while taking a package to a shipping location would include protection for your employer if the business was named in the lawsuit.

If you are employed in the service business and are now running deliveries in your personal vehicle due to COVID-19 restrictions, you should discuss this change with your insurance agent and confirm that coverage is provided.

Q: If I am injured while working from home will my company's Workers' Compensation policy cover my injuries and lost wages?

A: Workers' Compensation coverage would be extended to include work related injuries that occur in the course of your duties. If you suffer a work-related injury while working remotely, your employer's human resource can instruct you on the process to report the incident and initiate a workers' compensation claim. Please note that the injury must occur in the course of your work-related duties or the workers' compensation coverage does not apply.

Q: Could I be held personally liable for damages from a data breach or violation of the corporate privacy agreement related to client information when I am working from home?

A: All employees are expected to adhere to the code of conduct and technology requirements of their employer. The pandemic does not void any of those requirements. In fact, given the widespread use of remote access during the COVID-19 crisis, one could argue the pandemic heightens the importance of observing the protocols for accessing your company's data. We recommend reviewing your remote access and code of ethics policies to ensure you are complying. Your manager or IT team can assist with any questions. At a basic level, all staff working remotely should not use public or unprotected or unencrypted Wi-Fi for work purposes.



There is widespread reporting of breaches involving Zoom conference services. The Zoom security team is sending updates daily to close these security gaps. It is important to follow the basics of safeguarding yourself during conferencing. Use secured access, password protection, and limit access only to invitees once the call has started.

Utilizing your own router with guest networks is a best practice to avoid or mitigate breaches that can expose your personal information and client data. An employer provided computer will most likely have a higher level of security than a home computer and should be the first choice of equipment for work related activity when operating remotely.

Q: Can I make a claim for lost income on my rental property due to COVID-19 restrictions?

A: Rental properties are subject to a loss of rents due to COVID-19. The government directives due to COVID-19 are designed to slow down the movement of populace to reduce the spread of the virus. The restrictions limit the chance of securing tenants for a rental property. Most property insurance policies exclude coverage for lost rents due to a communicable disease like COVID-19. The U.S. Congress is pressing insurers and industry associations to treat COVID-19 as a covered cause for loss for small business under business interruption. At this point, the insurance companies have not agreed to cover these losses. If that exception is eventually made for businesses, there is a chance the same exception may be made for lost rental income. It is important to track the reduction in revenue from shelter at home and work from home directives due to the pandemic, as that would be the basis of the financial loss on a claim.

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Stars and Barred: Community Associations May Preclude Flying the Confederate Flag

In some ways, living in a community association is a microcosm of the principles of the United States: total freedom is limited in exchange for reasonable restrictions that benefit everyone. In the United States, laws and regulations can limit the ability to do whatever one wishes, and these laws are intended to protect the greater good. In a community association, including a condominium or homeowners' association, (collectively "associations"), governing documents and rules impose limits on unit owners' rights in exchange for the benefits of common ownership, like maintenance of common facilities and preservation of aesthetic quality. Given the similarities, issues that impact the entire United States also impact associations.

The Confederate flag, which went through several iterations during the US Civil War (1861-1865), has reasserted itself in the United States' current discussions on freedoms sparked by the social justice movements and increasing divisiveness. For example, NASCAR banned the flag from being displayed at its races in early June.¹ After intense debate, Mississippi voted to remove the Confederate flag from its state flag at the end of June.² United States military installations around the world won't be allowed to display the Confederate flag after the Department of Defense issued a new policy in mid-July.³ The Confederate flag debate is merely one debate in a larger national reckoning with racial inequities and racist ideology in the United States.⁴

Associations may also ban flying and displaying the Confederate flag.

Well before contemporary debates, Congress passed the Freedom to Display the American Flag Act in July 2006.⁵ The act defines "flag of the United States" as any flag or image bearing the "stars and stripes ... by which the average person seeing the same without deliberation may believe the same to represent the flag, colors, standard, or ensign of United States of America."⁶ In other words, a

person will know the flag when they see it. Under this definition, the act states: "A condominium association, cooperative association, or residential real estate management association may not adopt or enforce any policy or enter into any agreement that would restrict or prevent a member of the association from displaying the flag of the United States on residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive possession or use."⁷

Nevertheless, "reasonable restrictions" limited to "time, manner, or place" of display are allowed.⁸ Associations generally apply the directive of the act through reasonable limitations on size and location of the United States flag.⁹

By statutory definition, the flag, colors, standard, or ensign of the United States **is not** the Confederate flag.¹⁰ Since the Confederate flag is not the flag of the United States, associations may take more direct action, including an outright ban. Any regulations should be applied evenly and equally enforced.

In the short term, reasonable restrictions may be adopted as a rule or regulation, subject to the authority set forth in the association's governing documents. Long term, amending the declaration and by-laws could be considered if there's support from within the association. Consultation with the association's legal counsel is strongly advised.

As conversations on racial inequities and racist ideology continue in the United States, associations should carefully consider policies, including the display of flags or symbols and how they may impact residents and the community. This moment in time presents a unique opportunity for reflection about how the rules and regulations of the association reflect the will of the community and the nation as a whole.



If you have any questions regarding reviewing or amending association governing documents, please email Corey at cauerbach@barclaydamon.com or Ari at agoldberg@barclaydamon.com.

¹NASCAR statement on confederate flag," Jun. 10, 2020 available at <https://www.nascar.com/news-media/2020/06/10/nascar-statement-on-confederate-flag/>.

² See e.g., Giacomo Bologna and Luke Ramseth, Changing the state flag: How Mississippi legislators made history in 4 hours on a rare Sunday session," THE CLARION LEDGER, Jun. 27, 2020, available at <https://www.clarionledger.com/story/news/politics/2020/06/28/live-mississippi-lawmakers-take-up-state-flag-bill/3275024001/>.

³Public Display or Depiction of Flags in the Department of Defense," Defense Sec. Mark Esper, Jul. 16, 2020, available at <https://twitter.com/EsperDoD/status/1284145836100857863>.

⁴On July 13, 2020, the Washington Football Team officially removed "Redskins" from its team name because of the term's racial implications. Statement From The Washington Football Team, Jul. 13, 2020, available at <https://www.washingtonfootball.com/news/washington-redskins-retiring-name-logo-following-review>. Likewise, the Cleveland Indians have committed to "determine the best path forward with regard to [the Indians] name." "Statement From The Indians," Jul. 3, 2020, available at <https://twitter.com/Indians/status/127921112769216512/photo/1>. The US Senate recently approved the National Defense Authorization Act with enough support to override a presidential veto, and the bill would rename 10 Army based named after Confederate military leaders. See Helene Cooper, "Pentagon Sidesteps Trump to Ban the Confederate Flag," NY TIMES, Jul. 17, 2020, available at <https://www.nytimes.com/2020/07/17/us/politics/pentagon-trump-confederate-symbols.html>.

⁵109 PL 243, available at <https://www.congress.gov/109/plaws/publ243/PLAW-109publ243.pdf>.

⁶109 PL 243 § 2(1), citing 4 USC § 3; see also 4 USC §§ 1, 2.

⁷109 PL 243§ 3 (emphasis added); see *id.* § 4; see also 15 USC § 3603 (defining "condominium association," "cooperative association," and "member"); 26 USC § 528 (defining "residential real estate management association"); 4 USC § 5 (permitting certain executive department to regulate civilians or civilian groups regarding display of the flag of the United States).

⁸109 PL 243§ 4(2).

⁹See e.g., "Display of the American Flag: Guidelines for Displaying Old Glory," COMMUNITY ASSOCIATIONS INSTITUTE, available at <https://www.caonline.org/Advocacy/PublicPolicies/Pages/Display-of-the-American-Flag.aspx>

¹⁰See 4 USC § 1 *et seq.*

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Scottsdale, AZ 85255-6355
480.352.1206
Phil Lamb



The Benefits of Professional In-House Water Quality Testing

**Sam Sardes, Laboratory Manager and Weed Science Director
SOLitude Lake Management**

If you were sick, would you perform an at-home blood test or would you count on an experienced medical professional? Most of us would choose the expertise of a doctor or nurse. Water quality testing should be viewed in the same vein.

Picturesque lakes and ponds don't occur by accident. Often, they are the result of comprehensive management plans, with water quality testing as the backbone. Like a blood sample, water samples can reveal a plethora of information about a waterbody.

To a "do-it-yourselfer," conducting an amateur water quality test might seem like a way to cut costs, but sampling is complex and can be impacted by many factors, including time of day and the type of bottle used. And when you send those samples to an independent lab, they will return a sophisticated data re-port, but probably won't interface with you or explain (in layman's terms) how the results impact your waterbody.

Working with an aquatic management company means knowing that all testing is completed properly by a scientific team in an in-house laboratory, that the data is interpreted in a way you understand, and all factors are considered to develop a customized, premium management program for your waterbody.

Water quality management is a complex and dynamic scientific field. If you truly care about the health and longevity of your aquatic ecosystem—as well as using your budget efficiently—you will invest in a company that cultivates the relationships beyond the water sample.



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Ask the Experts: Pest & Wildlife Control

Webinar - Thursday, September 24th 6-7 p.m.



The owner of Town & Country Pest Solutions, Caleb Fabry, will be answering your questions about pest and wildlife control, and sharing entertaining stories about his experiences in the field!

Bonnie Gionta, Vice President with USI Insurance Services will be answering questions about hiring contractors and risks associated with pests and wildlife.

Attorney Ron Shubert, a partner with the law firm Phillips Lytle, will be answering questions you may have about gaining access to units infested with pests and the legality surrounding wildlife control.

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