

E-NEWSLETTER

Summertime Board Meetings and the Issue of Board Proxies

By J. Roger Wood, Esq.

Phoenician Alice Cooper crooned it best.... "School's out for summer!" High temperatures, San Diego vacations and less freeway traffic all herald the arrival of the season. In addition, our office is bombarded with questions about absent board members, meeting quorum and the legal requirements for a board's unanimous written consent. This summer's sizzler (so far) is can a vacationing Board member send in an email vote by proxy? The lawyer answer is that "it depends."

Arizona law is very clear about how Association Boards must make decisions. Arizona's Condo and Planned Communities Acts require that an Association notice a board meeting and that the meeting (hence the voting process) be open to the Association membership. Subject to a few exceptions, a vote of a majority of the quorum of the Board at that open meeting authorizes Association corporate action. This decision-making method is legally and politically prudent.

In addition, Arizona non-profit corporation law does allow a Board to take Association action by unanimous written consent (ARS 10-3821). If all Board members consent in writing to a Board resolution, then that unanimous decision (outside of a meeting) is deemed proper corporate action. Our view is that an email consent could contribute to unanimous written consent.

But what about that beach-bound Board member that wants to send in an email "yes" vote to renew the landscape contract in connection with an actual meeting with a quorum present? In the law, this *could* constitute a directed proxy and the law is clear for non-profit corporations: "a director" may vote in person or by proxy *if the bylaws or articles of the Association allow for directors to vote by a proxy* (ARS 10-3824). Then the vacationing Board member could send in that "yes" vote on the landscaping contract, if the email also "appoints" another director to cast the vote and is "signed", which could be an electronic signature. There are some other specific requirements as to the form and timing of the delivery of the proxy, but in these circumstances and in meeting proper requirements, it is acceptable under Arizona law.

However, just because something is legal does not make it politically prudent. Some would argue that the board proxy authorized in the non-profit act is at odds with the planned communities and condo acts. Others would simply be concerned about the lack of commitment by the unavailable board member. In sum - check your documents for the specific authorization of a board proxy vote. If the documents allow for it, then the vacationing member may send his or her vote in advance of the upcoming Board meeting by enlisting another Board member as proxy (subject to those specific delivery requirements). But given the legal requirements of the statute and perhaps of the governing documents themselves, it is best to check with the Association's counsel before giving the proxy go-ahead to the beach combing Board member. Sing it Alice - "School's out forever!"

