



E-NEWSLETTER MAY 28, 2010

## Summer Meetings and the Proxy Issue: How do I cast my vote while I'm on vacation?

Kellie J. Callahan, Esq.

It's summertime, and with the inevitable increase in the temperature outside, many associations experience what can only be described as an annual exodus. This creates problems when issues arise that require a vote of the membership. Take, for example, a proposed amendment to the Association's CC&Rs. Can Homeowner 'A' (vacationing in Hawaii for the month of June) designate Homeowner 'B' as his proxy, to attend the next membership meeting and vote on the proposed amendment? Not if the association is a planned community or condominium association.

The Condominium Act at § 33-1250 (C) and the Planned Community Act at § 33-1812(A) provide as follows (since 2005):

Notwithstanding any provision in the [condominium/community] documents, after termination of the period of declarant control, votes allocated to a unit may not be cast pursuant to a proxy. The association shall provide for votes to be cast in person and by absentee ballot and may provide for voting by some other form of delivery.

So, what is a proxy, and what does the statute mean? A proxy is nothing more than a form of corporate agency whereby one member designates another person, in writing, to appear, represent and vote on behalf of the member at a membership meeting. The use of proxies at condominium and planned community membership meetings is prohibited, regardless of any provisions in the governing documents that provide otherwise. The association must provide for votes to be cast by an absentee ballot, and may provide for voting by some other form of delivery.

The "Absentee Ballot" must:

- Set forth each proposed action
- Provide a space to vote 'for' or 'against' each proposed action
- Specify the date and time for the ballot to be delivered in order to be counted (must be at least 7 days after the ballot is delivered to the owner) and
- Only be valid for one meeting.

The "other form of delivery" allows a community association to use a 'mail ballot,' specifically authorized by the Arizona Nonprofit Corporation Act at A.R.S. § 10-

3708. The requirements for a written ballot by mail pursuant to A.R.S. § 10-3708 are identical to the requirements for an absentee ballot, with the exception that a mailed solicitation for a written ballot (the cover letter) must indicate the number of ballots that must be returned to meet the quorum requirement. Some associations are also starting to move toward voting by other delivery methods such as email or online voting.

The prohibition on the use of proxies at membership meetings may come as a surprise to some condominium associations that were created prior to 1986, when the Condominium Act became effective. The Condominium Act only applied to pre-1986 condominiums to the extent that the Act did not conflict with the condominium's declaration, articles or bylaws. If a pre-1986 condominium's governing documents authorized the use of proxies, then the Condominium Act's 2005 prohibition on the use of proxies did not apply. Then, as of January 1, 2009, the Legislature made the Condominium Act apply to all condominiums, regardless of the date the condominium was created, and regardless of any conflicts between the Act and the governing documents.

This means that the prohibition on the use of proxies at membership meetings applies across the board to all associations. To put it simply, members who will not be present at a condominium or planned community membership meeting must cast their votes either by absentee ballot or mail ballot, or some other method where applicable.

If you have any questions regarding the use of proxies or absentee ballots in your community, contact Kellie Callahan or another attorney in our office.