MEETINGS & ELECTIONS:

HOW COMMUNITY ASSOCIATIONS EXERCISE DEMOCRACY

A Guide for Association Practitioners

By P. Michael Nagle, ESQ.

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Meetings & Elections: How Community Associations Exercise Democracy

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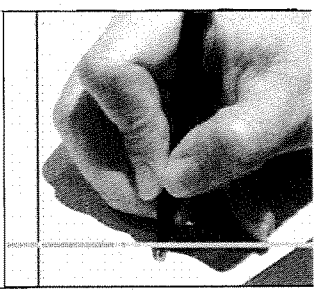

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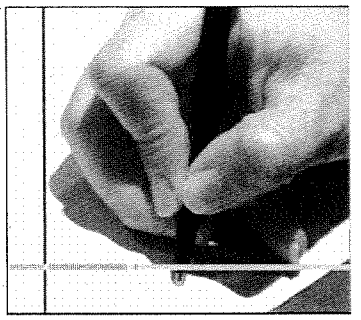
INTRODUCTION:

BACKGROUND AND KEY POINTS



SOME SAY THAT COMMUNITY ASSOCIATION OWNERS' MEETINGS ARE the truest form of democracy, similar in nature to the town meetings held in 17th and 18th century colonial America. However, the democratic process in associations requires order and rules of procedure and behavior to prevent either anarchy or a tyranny of the minority.

This guide provides basic information on the processes and procedures applicable to annual and special meetings. It also provides specific information relating to elections, whether held at an annual or special meeting.

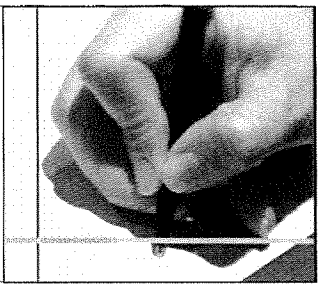
KEY POINTS

- An association operates as a business. As a business, whether incorporated or unincorporated, an association must conduct meetings of its shareholders—the owners. These meetings provide a forum for the election of those who will govern the community and manage its affairs.
- The annual meeting brings owners together so they may elect directors and take any other action not delegated to the board by the governing documents.
- Special meetings provide owners with a forum in which to handle issues that occur between annual meetings.
- The association must obtain a quorum—a minimum number of owners present in person or by proxy—to conduct business lawfully at an annual or special meeting.
- Although subject to a variety of limitations and restrictions, most states allow owners to appoint a proxy to attend the meeting and vote in place of the owner.
- Guardians, trustees, personal representatives, and those holding power of attorney may attend meetings and vote as if they were the owner.

- Members have a right to vote based on the ownership of a unit or lot in the association. However, owners can lose their voting rights under certain circumstances.
- The election process, including nominations, campaigning, balloting, and vote tabulation, is subject to controls established by the association as long as they are implemented according to state law and the governing documents.

CHAPTER ONE:

ANNUAL AND SPECIAL MEETINGS



ALL COMMUNITY ASSOCIATIONS CONDUCT ANNUAL MEETINGS OF owners, and nearly all coincide with the election of board members—making annual meetings and elections synonymous for many associations.

ANNUAL MEETINGS

Conducting a successful annual owners meeting, especially one where an election will be held, requires special knowledge, planning, organization, and preparation. If the association fails to conduct an efficient meeting, owners may lose confidence in the board and manager.

Typically, the administrative document for the association (usually the bylaws) specifies the criteria for the annual owners' meeting, including notice, quorum, voting, and proxy procedures. Often, the bylaws state that the annual meeting is held to elect directors and "conduct such other business as may properly be brought before the meeting."

Other business includes presenting officer and committee reports, approving the annual budget (if owner approval is required), voting on special assessments (if required), and voting on proposed amendments to the governing documents or rules and regulations. It also includes discussing various aspects of association life and taking "straw votes" of the owners that the board can use to determine constituent interests. It is *not* intended to expand the power of the owners.

While owners meet only to perform the limited tasks assigned in the association documents, it's their meeting, nonetheless. The board and manager organize the meeting, and they're able to exercise a certain level of control over the process. There are limits on both the power of the owners to act and the administration's ability to control, and crossing over the line is risky. Accordingly, it's imperative that both the board and the manager understand exactly where those lines are drawn. (See Figure 1.)

FIGURE 1. SIMILARITIES AND DIFFERENCES IN ANNUAL AND SPECIAL MEETINGS

Annual Meetings

- Provide a forum for all business, elections, and officer and committee reports.
- Require the association to notify all owners. Notification must include the time, date, and place of the meeting. The notice must be distributed within the time specified by statute and in association governing documents.
- Meet minimum quorum requirements set by statute or the governing documents.
- Allow owners to attend in person or by proxy, unless proxy use is prohibited by statute.
- Allow a majority of owners who attend the meeting, in person or by proxy, to decide all matters except special issues.

Special Meetings

- Provide a forum for business that was stated in the meeting notice. No other business may be conducted.
- Require notice to be sent to all owners within the time specified, which may be different from that of the annual meeting.
- Meet same quorum requirement as annual meeting.
- Require owners to attend in person or by proxy. Signing the petition to call the meeting does not count toward attendance.

If state law or the governing documents provide that a vote for electing directors may be made only by directed proxy, and if the purpose of the special meeting is to remove and replace one or more directors, proxies that do not direct the giver's vote for the election of directors may be deemed only to give the holder power to vote for or against the removal of directors.

SPECIAL MEETINGS

Special meetings are unscheduled meetings called from time to time by board members or association members for specific purposes—generally to address issues or conduct business that falls outside routine board or annual meetings.

Special meetings are subject to the same requirements that apply to annual meetings—notice and quorum, for example—but they differ in one significant respect from annual meetings: Bylaws usually allow a group of owners to call a special meeting if a minimum number of members sign a petition and present it to the

board president or secretary. The petition must precisely state the purpose of the meeting. The president or secretary then calls the meeting for the purpose contained in the petition.

POWER OF OWNERS TO ACT

Bylaw provisions limit the power of owners to act at an annual or special meeting. For example, the article or section that specifies the board's powers and duties should be regarded as a mandate that cannot be usurped without an amendment to the bylaws. These powers are permanently delegated to the board. However, the board can, in an appropriate situation, voluntarily relinquish a power or avoid a duty by allowing an owner vote on a particular issue. The owners cannot wrest these powers from the board without following appropriate procedures.

The power of the owners is limited for a simple reason: the elected board has a fiduciary duty to act in the best interests of all owners; however, the owners have no corresponding legal duty to act in their own best interest.

The board is legally obligated to act in the best interest of all owners, to be reasonable in its deliberations and choices, and to seek all information necessary to make the best decisions using sound business judgment. This means that the board must do its homework. It must learn about the association's needs, the availability and price of goods and services, the necessity of professional opinions, the association's financial condition, and the risks and liabilities associated with either taking or not taking an action or position.

Owners are protected by the directors' fiduciary duty, by the power to remove directors, and by the power to amend the bylaws. Keep in mind that, although these protections are effective, they do not necessarily mean that the owners can immediately take or reverse an action.

DOCUMENTING ANNUAL AND SPECIAL MEETINGS

The association has an obligation to keep records of annual and special meetings and to safeguard election documentation. Generally, this responsibility resides with the secretary, who records and files minutes for all annual and special meetings. At each annual meeting the minutes of the previous annual meeting and any intervening special meetings should either be distributed to each attendee or read before the body. If the minutes are distributed, the chair may call for a motion to waive reading the minutes and a motion to amend the minutes, followed by a motion to approve the minutes either as read or as amended.

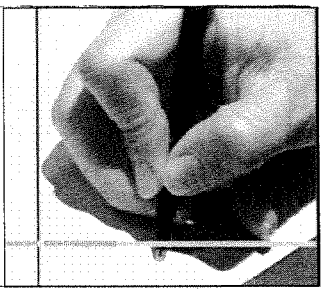
Annual and special meeting minutes will record the date, time, and place of the meeting, the number and percentage vote of those attending, and whether the quorum requirement was met. They will mention all officer and committee reports that were presented, but not include details. Minutes will record any votes taken and present a brief synopsis of the matter voted upon. They will also log the time of the adjournment, and record whether the adjournment was final or for another time. The use of the term "adjournment" to indicate the continuation of a meeting until another time is confusing and unnecessary. Associations may wish to use the word "continuance" instead.

Minutes of special meetings will record the number of members who signed the petition calling for the special meeting, in addition to the items listed above.

Minutes of annual meetings will record election results, including how many positions were filled and who was elected to fill them, in addition to the items above.

CHAPTER TWO:

THE IMPORTANCE OF MEETING NOTICES



WHEN ASSOCIATIONS PROVIDE NOTICE OF ANNUAL OR SPECIAL meetings, they must follow certain procedures that specify how, when, where, and to whom notice should be given. The success of the meeting will depend on complying with these procedures, which are discussed in detail below.

NOTICE CONTENT

Meeting notices should state what type of meeting is being convened (annual or special), the date and time of the meeting, and the complete address including floor and room number, if appropriate. The notice should include the purpose of the meeting, especially if it's a special meeting, stated as precisely as possible. Also, if limits have been set on the time each member may speak at the meeting, specify in the notice what they are, e.g., three to five minutes. If written affirmation is required from nominees who cannot be present at the election meeting, include this requirement in the meeting notice or in the election materials sent with the notice. (See Figure 2.)

WHOM DO YOU NOTIFY?

Virtually all bylaws and state statutes require associations to send a notice of meetings to each owner, even if the owner is ineligible to vote at the meeting. Providing a meeting notice encourages delinquent owners to bring their accounts current so that they're eligible to vote at the meeting or stand for election. *All owners* means each owner or co-owner of a unit or lot whose identity is known to the association.

The association has an affirmative duty to keep an accurate roster of owners and their current addresses. Good state statutes and bylaws require owners to keep the association apprised of their identity and address, and they deny the right to vote to those who do not. The association is responsible for sending notice to all persons who are listed on its roster as owners. If owners fail to receive notice because they did

not notify the association of their ownership or current address, the association is not at fault. If the state statute is silent on this issue, such a provision can be amended into the bylaws.

The developer or builder for the community starts the owner roster; however, the association must keep it current. This can be a challenge, especially for large associa-

FIGURE 2. SAMPLE MEETING NOTICES

Annual Meeting Notice

The annual meeting of the Brookridge Condominium Association will be held at 8 p.m. on [date], in the association recreation center, 245 Green Drive, Hampton, New York. The purpose of the annual meeting is to conduct all lawful business of the association, including the election of three (3) directors to the board for three (3) year terms. Election materials are enclosed with this notice.

In the event that you cannot attend, a directed proxy form is enclosed for your convenience. In accordance with the bylaws, you may appoint any owner as your proxy to vote on general matters that come before the annual meeting. Your proxy may not vote on your behalf in the election of directors. To ensure that your vote is recorded in the election, you must vote in directed proxy form for the candidates of your choice and execute the form as indicated.

We look forward to seeing you at the annual meeting.

Thank you,
The Association Board

Special Meeting Notice

All owners of lots in Lakewood Homeowners Association are hereby notified that a special meeting of the owners will be held on [date], at the clubhouse, 117 Cleveland Street, St. Petersburg, Florida. Registration will begin at 7 p.m., and the special meeting will start promptly at 8 p.m.

The special meeting is called pursuant to a duly filed petition of owners, and the purpose of the meeting is to discuss and vote on the proposed special assessment, which will be used to renovate the clubhouse. Because this is a special meeting, no other business will be transacted. All owners are encouraged to attend, either in person or by proxy. If you are unable to attend, please file your proxy form (attached) with the secretary at least 24 hours prior to the meeting.

Thank you,
The Association Board

tions, and requires constant monitoring of records like parking permits, pool passes, assessment checks, county and city tax records, or real estate listings. Routine association mail should be marked "Do Not Forward—Return to Sender With Address Correction" so that the association is aware of an address change.

What Address Should You Use?

The association should always send notice to the unit or lot unless the owner has specifically designated another address of record. If mail is returned from an alternate address of record with no forwarding address, the association should ask the renter or resident for the owner's current address. If the unit is vacant or the resident will not divulge the address, the association has little choice but to send the notice to the last known address of record.

If a unit has multiple owners, and each has a separate address of record, the association must send separate notices to each owner at the address provided. However, multiple owners of a single unit could, for example, submit a written request asking the association to send one notice. In this instance, the owners have officially waived notice.

There may be some question as to whether an association can send only one notice to multiple owners who have the same address; therefore, the safest course is to send separate notice to each owner of record. This is true even with married persons, although many jurisdictions will regard mail addressed to both and actually received by one to be effective notice to the other as well.

If an owner has designated, in writing, an agent to receive mail and notices, the association can send all communications to the agent and has no further duty. An association may know, for example, that an owner is overseas and that mail sent by the agent cannot reach the owner in a timely fashion. Unless the documents or state law require the association to afford special treatment under these circumstances, the association has no obligation to take extraordinary measures (e.g., owners who are in the military). An association should be wary about making special concessions to any owner, even voluntarily, because it may set a precedent. It would be better, if possible, to extend the outside time limit for notice and to send all notices a little earlier.

DELIVERING NOTICE

Mailing Notices

State statutes and association governing documents often define acceptable means for delivering official meeting notices, and first-class mail is almost always permissible.

Some older documents require registered or certified mail. Associations should consider amending documents with this requirement since many people routinely decline certified mail. First-class mail, on the other hand, does not require the owner to be home, and the law in every jurisdiction presumes delivery if the notice was sent by first-class mail.

Hand Delivering Notices

Other forms of delivery are also acceptable. Documents often allow the association to deliver notices by hand. Some associations prefer this method because it saves postage and seems more personal. This method can pose problems, however. Postal regulations forbid placing anything other than items delivered by the Postal Service in a mailbox or posting notices *on* the mailbox. However the association can post notice on the building around or near mailboxes.

Some associations place notices on the doorknob, stoop, or threshold. Some slide them under the door or wedge them between the door and the frame. However, should the notice be blown away, removed, mutilated, or destroyed, the affected owner(s) may claim that actual notice was not given, which may invalidate the meeting. Even if an association has always delivered its notices this way, it could still be challenged with claims of alleged nondelivery. Hand delivery is truly effective only if one person actually places the notice in another's hand, and even then certification of delivery may be required.

Posting Notices

Some associations deliver notices by posting them on bulletin boards, in common hallways, on entryway doors, and in elevators. If an association has established a pattern and practice of delivering notice in this manner, that evidence would be admissible in court and most likely would be persuasive if someone challenged the method of giving notice.

Unless bylaws specifically allow for posting or the practice is already well-established, it is better to use another method of delivery. Again, owners can claim that the notice was not seen or that they were out of town during that time. Unless the association is entitled to the presumption of delivery that attaches to notices sent by first-class mail, owners can claim that they did not receive the notice and challenge the meeting.

Publishing Notice in the Newsletter

A few associations provide meeting notice via the association newsletter. Associations that use this method should mail the newsletter by first-class mail, and feature the

meeting notice prominently. For example, the notice should be on the front page, or a bold-faced statement on the front page should state that the meeting notice is inside. As with posting, this mode of delivery is advisable only if it is an established practice and if it is common knowledge among the owners that notice will always be made in this manner.

ELECTRONIC TRANSMISSION OF NOTICE

Delivery of official notice may also be made by electronic transmission unless specifically prohibited by statute or the governing documents; but, certain restrictions may apply, and all electronic transmission may not be appropriate.

Facsimile

Facsimile transmission of meeting notice, even if specifically authorized by an owner and by statute, may not be effective notice because the owner can claim he or she did not receive it. Indeed, an owner could make such a claim to invalidate a meeting (and everything that occurred there). It's unlikely that a court would presume delivery by facsimile (as it would with first-class mail) simply because most facsimile machines do not verify whether outgoing transmissions have been successfully received on the other end. Correspondingly, there is often no means of substantiating that a facsimile was sent. This leaves open the possibility that the person delivering the notices could deliberately fail to send notice to, say, a vocal opponent of the board, and still claim that such notice was sent. For these reasons, it is doubtful that delivery of notice by facsimile will be widely accepted.

E-Mail

Delivering notice by other electronic transmission means—such as e-mail—may be acceptable by virtue of statute or other imprimatur. Some states have already passed laws specifically permitting the delivery of notice by electronic means, and many others are either in the process of doing so or will eventually do so. Where state law or the governing documents now merely require that written notice be delivered, the Uniform Commercial Code (UCC) defines "written" or "writing" as "printing, typewriting or any other reduction to tangible form." UCC Section 1-201(46)(1998). Similarly, Section 7(c) of the Uniform Electronic Transactions Act (ETA) states, "If a law requires a record to be in writing, an electronic record satisfies the law."

The difference between an e-mail transmission and a facsimile transmission in this regard is twofold. First, the sender can request confirmation from the recipient

that the e-mail was received. Second, even if receipt is not confirmed, the sender has a record in his or her "Sent Items" folder of when the e-mail notice was sent, what e-mail address was used, and the entire text of the e-mailed notice.

Associations that honor owner requests to be notified by e-mail should do so only if the owner agrees not to block confirmation of receipt. If receipt can be confirmed, then actual delivery is proven, and both statutes and courts should presume delivery similar as they do with first-class mail, as the internet is at least as reliable.

Note that current statutes—such as those in Maryland for condominiums, homeowners associations, and cooperative associations—require prior written authorization from each owner before notice may be delivered to him or her by electronic means. Given the provisions of the UCC and ETA cited above, it should be permissible for that authorization to be delivered to the association by either e-mail or facsimile.

Website Postings

The specific wording of statutory language or documentary provisions may determine whether sufficient legal notice of meetings may be made by "posting" the notice on the official association website. The Maryland laws, for example, allow owners to authorize the giving of notice "by electronic transmission." This language may be deemed to eliminate posting to the website as a means of electronic delivery, as it may be thought that no "transmission" actually occurs. However, the author sees little distinction between the two, as it is the authorization that is important. If an owner authorizes e-mail transmission, he or she must still open the e-mail and read it before cognizance of the notice is achieved, just as first-class mail must be opened and read for that result. If an owner agrees to receive notice by posting on the official association website, he or she must actually visit the site to know about the meeting. Ultimately, then, the responsibility for learning about the meeting from notice sent with proper authorization—by mail, e-mail, or website posting—resides with the owner who must take a positive action to gain that knowledge. Accordingly, an owner should be allowed to authorize the delivery of notice via posting on the official association website and, by so doing, assume responsibility for visiting the website with sufficient frequency to learn of meeting dates.

Double Coverage

Associations that deliver meeting notices by any means other than by hand, through the mail, or by electronic means, should use more than one method. A notice challenge

is more likely to be defeated if the association can show that notice was, for example, both posted *and* put in the newsletter. Until recognition of website posting is more universal, it may also be prudent to deliver electronic notice both by posting on the website and by sending an e-mail.

TIMING OF NOTICE

State statutes and association bylaws dictate the time frame in which associations must deliver meeting notices. If the bylaws and statute specify conflicting notice periods, follow the statute. Thus, if the bylaws state that notice of meetings must be given "no fewer than 10 or more than 60 days prior to the meeting," and the statute requires that notice be given a minimum of 15 days prior to the meeting, the association will be obliged to give notice to the owners no fewer than 15 days and no more than 60 days prior to the meeting.

Most statutes and many bylaws provide only for a minimum time for notice of both annual and special meetings, although some bylaws provide a maximum time for notice of special meetings. However, a maximum time limit can be important as well, since owners may forget the date or lose the notice if it's delivered too far in advance. As a result, the association may fail to achieve a quorum.

The lack of a maximum time limit can also lead to an abuse of power by an incumbent administration, especially in regard to special meetings that must be called pursuant to an owner petition. For example, a group of owners files a petition requesting a special meeting to remove all of the directors because they have indicated that they will allow an important contract to automatically renew. The owners do not want the contract renewed and know that notice of termination must be given to the contractor within 45 days to prevent the automatic renewal. The board, also aware of the timing, sets the date of the special meeting for the day after automatic renewal, knowing that the bylaws do not set a maximum time limit. Because of this gap in the bylaws, the board will probably succeed, since the owners would otherwise have to file suit to move the meeting time forward. Most likely, the contract renewal date will pass and the owners' effort to remove the directors for that purpose will fail. If, in this instance, there had been an outside time limit that was violated by the board, the owners might successfully challenge the contract—even after the fact of automatic renewal.

Associations that provide notice electronically, should bear in mind that even though electronic delivery is virtually instantaneous, delivering notice by electronic means does *not* change the timing of notice.

STATEMENT OF PURPOSE

Statement of Purpose—Annual Meetings

Notices should specifically state the purpose of the meeting. Many people think that annual meeting notices only need to state that the meeting is an annual meeting, and that by definition, any business can be conducted. However, this assumption is not necessarily true. The best example concerns the removal of directors. If a group of owners wishes to vote on the removal of one or more directors, they should not assume that they can just make that motion from the floor, since most documents require the association to notify the directors who may be removed. Accordingly, if this action is to occur at the annual meeting, the meeting notice should specifically note it. Even though annual meetings are general meetings at which almost any business can be discussed and voted upon, an association is better served by a statement in the notice that says "the purpose of the meeting is to elect directors and conduct any other business that may properly be brought before the meeting." (See Figure 2.)

Statement of Purpose—Special Meetings

Most bylaws do not allow the board to take action at a special meeting that is not specifically indicated in the meeting notice, even if a majority of all owners is present. The reason is simple. Owners will base their decision whether to attend the meeting on the purpose stated in the notice. Conducting business that is not indicated in the notice disenfranchises those who did not attend based on what they were told would be the subject of the meeting. Attendance by a majority does not matter because those not attending may have changed the outcome had they known the purpose and argued their viewpoint.

Imprecise language or an unclear purpose in a special meeting notice can render a meeting invalid, so take care when drafting them. Special meetings require a specific statement of purpose in the notice, since meeting content is limited to what is in the notice.

The slightest misstatement of purpose in the notice can prevent the occurrence of what one might naturally assume to be included. For example, calling a special meeting "to discuss the removal of one or more directors" has two potentially fatal flaws. The first is the phrase "to discuss," which limits the meeting merely to discussion of the removal. No vote on the removal can be taken. The second is the phrase "one or more directors." Because most bylaws require the association to notify any director of his or her proposed removal, the association must provide such notice to

each before taking action. However, this bylaw requirement would not pose a problem if the notice proposed the removal of all directors.

Most documents allow the board to expand the purpose of a meeting called by petition. This isn't normally stated as such, but because the board can also call a special meeting it can tack its own purpose onto that of the petition—unless the petition specifically requests that a special meeting be called "*only* for the purpose of..." If the petition contains this clause, the board will be required to call a separate special meeting to consider any issues it wishes to place before the electorate.

The board cannot restrict the meeting's purpose in a valid petition unless the purpose is improper. If the petition calls for a vote of the owners to take an action that is specifically delegated to the board by the bylaws, the stated purpose of the special meeting is improper and the board may refuse to call the meeting. The owners can always file a second petition calling for a vote to amend that delegation out of the bylaws. The board is not responsible for correcting any petition that calls a meeting for an improper purpose. However, it should return the petition to the owners with a statement of explanation.

NOTICE TO MORTGAGEES

Association governing documents usually specify whether notice of an annual or special meeting must be sent to the individuals or lending institutions holding first deeds of trust on the units or lots—the mortgagees. Generally, the documents require notice to mortgagees only when they are affected by something taking place at the meeting. The most common example is a meeting that is called to vote on proposed amendments to the governing documents. It may be permissible for mortgagees to vote by written or mail-in ballot rather than attend the meeting. For example, the Maryland Condominium Act allows condominiums to send proposed amendments to mortgagees and requires them to object within 60 days, or they are deemed to have consented. Pursuant to this provision, they do not need to be notified of the meeting.

Most provisions only require notice to mortgagees if the proposed amendments materially affect rights that are set forth for them in the governing document in question. Even then, notice of the meeting may not actually be required. Keep in mind, that the governing documents will probably specify notice provisions for mortgagees in the article or section that deals with the mortgagees' rights, not the section that deals with meeting notices. Whether mortgagees must get a meeting notice depends on the right guaranteed or the protection afforded to them.

For instance, the right to be notified of a proposed management change does not imply a right to notice of an annual or special meeting, since the board typically takes this type of action at a board meeting. However, the right to approve proposed bylaw amendments may imply the right to a notice of the meeting at which such action will be taken. It's just as likely that the mortgagees will have a separate and distinct right to approve or disapprove the proposed amendments—despite owners' actions. In the latter case, it can be argued that the mortgagees do not need notice of the meeting, just the opportunity to exercise their vote before the association takes final action. If the owners disapprove an amendment, there is no need to seek mortgagee approval. Therefore, the board may not need to seek mortgagee approval until after the meeting and the owners have approved the amendment.

Many developers (or the attorneys who draft governing documents for them) give the mortgagees more rights than they want or need. Sometimes this is done to placate a preset primary lender, or because someone has misinterpreted governmental requirements or has merely chosen to err on the side of being over-inclusive. Generally, mortgagees do not need meeting notices for routine association business.

Accordingly, if the governing documents require the association to notify mortgagees of every annual meeting, the association can probably amend the documents and remove this provision—even if the mortgagees are required to vote on such an amendment. It may be even easier to amend the provision so that the association is only required to send such notice to mortgagees who have requested it in writing. This type of amendment does not have a material affect on the mortgagees, just a procedural one, so their vote on the amendment may not be required. Note, however, that should such an amendment be passed, mortgagees must be given notice of the amendment so that they are aware of the new procedure they must follow if they want to receive notice.

Mortgagee Rosters

Associations whose documents require them to notify mortgagees of meetings often find it difficult to keep an accurate roster of all mortgagees' names and addresses. Although no association has a foolproof scheme for updating rosters, the board can take several steps to ensure that it has the best information possible. Generally, the association should require owners to provide current data to the association. This can be done either as part of the bylaws or as an association rule. If the bylaws don't include such a requirement, the association should add it when the bylaws are amended. If it isn't possible to amend the bylaws, the association can enact a rule

that requires owners to provide correct information. This rule can then be enforced in the same manner as any other rule, or failure to comply can be grounds for denying an owner the right to vote or use recreational facilities.

The association should make it as easy as possible for owners to provide mortgagee information. Meeting notices and materials should remind owners that they must keep the association apprised of their current mortgagee, and proxy and ballot forms should have a space for the owner to provide this information. The association should ask for the mortgagee's name, address, and telephone number, *and the mortgage account number.* Do not ask for the amount of the mortgage or the monthly payment. The association has no need for this information, and requiring its disclosure may be regarded as an invasion of privacy.

If all else fails, the association can hire a title company to research land records for the recorded deeds of trust on units that do not report. This research should not be too costly on a per-unit basis and, if the association's documents allow it, this cost may be charged to the owners. Keep in mind that the recorded deed of trust will only disclose the name of the original mortgagee. It is probable that the mortgage has been sold on the secondary mortgage market, perhaps several times if the mortgage is a number of years old. The association must track the mortgage until it reaches the institution that currently holds or services the mortgage. This may be a painstaking and frustrating process, especially if an association doesn't know the account number used by each mortgagee. Associations may wish to seek federal legislation requiring all subsequent mortgage holders to file a notice identifying themselves in the county where the property is located.

Unresponsive Mortgagees

Despite the effort an association puts into tracking down mortgagees and sending them proper notices, they may not respond. If the mortgagee vote is required, the association must send second and third notices, and make follow-up telephone calls. The association may want to write to the president or to the general counsel to encourage response. If pressed hard enough, most mortgagees eventually will respond.

Do *not*, except on legal advice, send mortgagees a notice or letter that states "failure to respond within 30 days will be counted as a vote in favor of the amendment." This should only be done after every other effort has been exhausted. Even then, the language regarding mortgagee rights in some documents will not allow such a statement. If the association's attorney advises against this course of action, the only alternative may be to abandon the amendment or to seek the aid of a court.

Some states allow associations to include a clause in their mortgagee notification stating that the mortgagees consent to the proposed amendment unless they make a written objection in a given number of days. However, an association may not be able to assume a mortgagee's consent for provisions that materially affect the priority of the mortgage or the free exercise of a mortgagee's rights under the law, the mortgage, or the deed of trust.

The association should deliver such provisions by certified mail and request a return receipt. A return receipt gives the association a specific date from which it may count the days until consent is deemed given.

WAIVER OF NOTICE

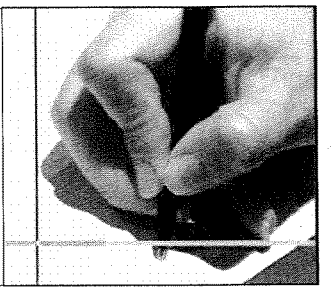
Most governing documents contain a waiver-of-notice provision that deems a meeting notice waived by an owner's attendance at the meeting. By attending, owners are admitting that they had prior knowledge of the meeting.

The waiver provision does not apply when an owner or member attends the meeting to contest its validity because of a lack of proper notice. Because notice must be given to *all* owners or members, the challenge might be valid, even if that owner was the *only* person not receiving notice.

Of course, the challenge might not be valid. If the association notified all members in the same manner and the notification method met statute and governing document standards, the owner's lack of notice might not be the association's fault. The association cannot be held responsible for the vagaries of mail delivery, for the owner's failure to sign for certified mail, or for the owner's failure to read properly posted notices. Associations are required to *give* notice—not to guarantee that it is received or heeded.

CHAPTER THREE:

OBTAINING A QUORUM



THE TERM QUORUM REFERS TO THE MINIMUM NUMBER OF OWNERS who must be present at a meeting, in person or by proxy, before business can be validly transacted. The number of members needed to constitute a quorum is often governed by statute. State statute will always take precedence, if it conflicts with the association's documents.

The best quorum provision in governing documents is one that allows it to be reduced by statute:

> *The presence in person or by proxy of owners having 25 percent or more of the total outstanding eligible votes, or such lower percentage of the total outstanding eligible votes as may be allowed by statute, shall constitute a quorum at all meetings.*

Governing documents often require a majority of the votes (sometimes expressed as 51 percent) for quorum. Most practitioners now regard that number as too high. Many statutes and newer documents allow for a lesser number of votes to constitute a quorum. The quorum should be as low as possible so that the association can conduct its business. Low quorums do not discourage high attendance.

Though associations should encourage all owners to attend meetings, they must be given every opportunity to achieve quorum—even if a relatively low percentage of owners are making decisions for everyone. Those who are not present in person or by proxy are, in effect, delegating association authority to members who attend. If, for whatever reason, a significant number of owners choose to delegate this responsibility, then so be it. Associations should not seek to compel the attendance of those who will not do so, especially when such a constraint denies the association the ability to conduct necessary business.

Many associations erroneously believe that there must be a quorum of the current board present at an annual or special meeting. However, annual and special meetings are held for the owners or members—not the board. If an owner quorum is present,

the association can start the meeting—even if no board members attend. Typically, the documents establish the president as the annual and special meetings chair. However, either the documents or parliamentary procedure will indicate who should replace the president, including the appointment of a chair by the owners, if no officers and directors are present.

REDUCED QUORUMS

Associations that routinely have trouble obtaining a quorum should consider reducing their quorum requirements. If the statutory minimum is lower than document requirements, the association can amend its documents. This, however, is a Catch-22 because the association that cannot achieve quorum will have a difficult time getting the required number of votes to amend its documents. Associations that cannot get the votes they need should consult legal counsel to see if they can use the statutory quorum in lieu of the documentary one. If this is not possible, then the association will need to be more creative.

Associations can also seek a court order to reduce the quorum requirement. However, it may be difficult to persuade a court to take such an extraordinary action. To succeed, the association must show past failures to achieve quorum, as well as an inability to get the vote needed to amend the documents. Inability, in this context, cannot mean that an amendment was attempted and voted down. The association should point out that, because of the whim of the developer or its attorneys, it is prevented from conducting ordinary and necessary business. It also can be argued that the legislature has deemed it appropriate for other associations to conduct business with fewer owners present. Though this option is expensive and is often ineffective, associations that find it difficult to obtain a quorum may have no better alternative.

Associations may be allowed to reduce their quorum by taking the required quorum percentage from only those eligible to vote. Bylaws frequently are drafted to allow the roster of owners or the total number of votes to be reduced by those who are not eligible to vote due to delinquent assessment payments or some other infraction. A 25 percent quorum of 100 owners is 25. However, if there are only 96 eligible owners, the quorum is reduced to 24. This small gain might be enough to make the difference between a valid and an adjourned meeting. The association's attorney should be consulted to determine local law and the proper legal effect of the bylaw language.

Some statutes allow associations to establish a quorum that is lower than the statutory minimum. For example, both Virginia and the District of Columbia have a

statutory quorum requirement for condominiums of 33⅓ percent but allow the bylaws to reduce the quorum to 25 percent. Associations that cannot get enough votes to reform their documents may not reduce their quorum since the legislature has already set a higher minimum.

As a last resort, the association's lawyer can tell it whether it can reduce the quorum requirement at an adjourned meeting. In Maryland, for example, this can be done through the state's Non-Stock Corporation Code, which is referenced in the Condominium Act. The Non-Stock Corporation Code requires the second meeting to be advertised in a local newspaper. Whoever shows up constitutes a quorum. The Condominium Act sets an initial quorum requirement for annual and special meetings, but is silent concerning adjournments. Because of this silence and the general applicability of the Non-Stock Corporation Code, the reduced quorum does not violate the Condominium Act.

The same rationale might be used outside of Maryland, even without a similar provision in a state's corporate code. Depending on the precise language of the applicable statute or documentary provision, it may be possible to deem *adjourned* meetings, especially those adjourned for lack of quorum, as outside the specific regulation. If so, the association can then "supplement" the initial quorum provision with a separate requirement that deals only with adjourned meetings. Keep in mind that this is an *avant garde*, even radical, step to take and should not be taken without the advice and counsel of the association's attorney.

ADJOURNMENT FOR LACK OF QUORUM

Most documents contain a procedure for adjourning a meeting due to a lack of quorum. Generally, a majority of the owners present in person or by proxy must vote to adjourn and reconvene at a later date—even though the meeting was not officially constituted because a quorum was not present.

Often, restrictions state that the second meeting *cannot* take place within 48 hours of the adjournment so association members have time to convince others to attend. But it's not uncommon for fewer residents to attend the adjourned (second) meeting than the first meeting. For this reason, the chair should ask everyone attending the first meeting to execute a proxy before leaving. Unexpected events may prevent owners who planned to attend the adjourned (second) meeting from arriving. Proxies are revocable by the owner when he or she attends the adjourned (second) meeting.

Note that the word adjourn has two separate meanings. In one context, it means to continue the meeting until another time (the second meeting described above). In

the other context, it means to finally close the meeting. The chair should be certain that the proper adjournment is taken.

MAINTAINING A QUORUM

Though few statutes or documents refer to the loss of a quorum during a meeting, many long meetings lose attendees—and the quorum—for any number of reasons. Some attendees may also leave in a deliberate attempt to reduce the quorum so no vote can be taken.

Some statutes and governing documents state that once a meeting is convened with a quorum present, it is an official meeting—even if a quorum is not maintained. If the statute doesn't address this question, but the association documents do, the association can rely on its documents to control. Without such a stipulation, the association must adjourn the meeting until a quorum is present. However, any action taken while a quorum was present is valid.

Though it may not seem fair to allow a few owners to invalidate a meeting by walking out, few association documents prevent this from happening. Some provisions simply state:

1. The presence in person or by proxy of owners having 25 percent or more of the total outstanding eligible votes, or such lower percentage of the total outstanding eligible votes as may be allowed by statute, shall constitute a quorum at all meetings.
2. A quorum is deemed present throughout any meeting of the association if persons entitled to cast 25 percent of the total votes appurtenant to all units are present in person or by proxy.

In the first example, the provision's language is clear: a valid meeting requires the presence of 25 percent of the owners. No attempt is made to provide for the loss of quorum after the meeting is validly convened. In the second example, use of the word "throughout" might be interpreted by some as the legislature intending an initial quorum to validate the entire meeting, even if the quorum was subsequently lost. However, the better interpretation is that the meeting is only valid so long as 25 percent of the total votes are present.

Contrast these two provisions with one that specifically intends to provide for loss of quorum, and the distinction becomes clear. The District of Columbia Condominium Act Section 45-1844 states:

Unless the condominium instruments otherwise provide, a quorum shall be deemed to be present throughout any meeting of the unit owners' association until adjourned if persons entitled to cast more than 33⅓ percent of the votes are present at the begin-

ning of such meeting. The bylaws may provide for a larger percentage, or for a smaller percentage not less than 25 percent.

This provision is clear and unequivocal. If the association obtains a quorum initially, the meeting is valid throughout—even if all but one person walks out during its course.

PROMOTING ATTENDANCE

If an association cannot meet or change its quorum requirement, it must find a creative way to conduct a successful meeting. One of the best methods of ensuring quorum is the aggressive pursuit of proxies. Knock on doors, make telephone calls, and talk to people in common areas. Carry a stack of blank proxy forms and ask owners to turn in a proxy—even if they plan to attend the meeting. If owners do attend, their presence will revoke the proxy. But if they cannot attend, the proxy will count as their vote.

The board can also encourage attendance by scheduling discussions or votes on issues of universal interest to the owners. Hot topics include satellite antennae, drugs and crime, special assessments, and common-area improvements. The trick is to generate interest, even if it's controversial.

For example, one board president included a suggestion in the meeting notice that the board needed community feedback concerning a possible large fee increase. Not surprisingly, at the very well-attended meeting the feedback she received was that such an increase was not necessary. However, the discussion was lively and people were eager to air their viewpoints. The association got what it needed—a quorum at the meeting and a high level of owner interest.

Some associations make the annual meeting something of a social event. Scheduling a party at the end of the meeting, open only to those who attend, helps to achieve and maintain a quorum. Every association should check local law and its insurance policy before offering alcoholic beverages.

Associations may want to plan a party with a theme. Deciding on the theme and working to put it all together creates interest, excitement, and participation, which brings neighbors closer together.

FAILING TO ACHIEVE A QUORUM

Associations that fail to obtain a quorum often wonder how many times must they try to hold a meeting, and what are the legal effect of failing to hold a valid meeting?

The easy answer to the first question is that the association must make a "reason-

able" effort to conduct a valid annual meeting. However, deciding what's reasonable may be difficult. The association will have to review applicable statutes and the association's governing documents, and evaluate its specific efforts to hold a valid meeting. Given the importance of the business normally conducted at annual meetings, associations should make every effort to obtain a quorum before they abandon all hope of conducting the meeting and election.

Virtually every set of governing documents contains some reference to procedures to follow to adjourn and reconvene a meeting if a quorum isn't present. Associations should make at least one other attempt after a failed meeting and preferably generate higher attendance at the second meeting. Simply repeating the original meeting notice will not suffice.

One possible solution to this dilemma might be to pass a bylaw amendment that states specifically how many attempts must be made. The problem with this solution, however, is that an association that cannot obtain a quorum may not be able to get the vote necessary to amend the bylaws.

Associations that make a concerted effort to encourage attendance by canvassing door-to-door prior to the meeting for proxies or by using any of the innovations mentioned above will insulate itself from potential claims that it failed to conduct a meeting or election. For example, an owner could claim that a board made a weak effort to encourage attendance in order to continue in office. However, evidence that a genuine effort was made and that no subterfuges were behind the decision to stop trying will counter such a claim.

The real issue is whether the association has made all reasonable attempts to conduct a valid meeting. The board is responsible for conducting association business, including holding the next annual meeting. This duty must not be taken lightly, but there can come a time when all concerned will agree that enough is enough.

The consequences for failing to conduct an annual meeting are usually covered in the governing documents. Most documents allow directors to serve until their successors are elected and qualified. Absent a valid election, the term of the current directors will be extended until the election takes place. If a holdover director resigns, the remaining directors appoint a successor to serve until the next valid election.

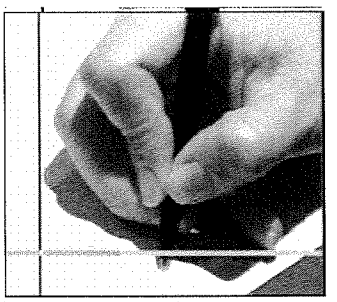
One association conducted a mock election at a meeting that did not have a quorum. The board members whose terms were expiring resigned and the remaining board members were declared the winners of the mock election. Pursuant to the association's bylaws, the appointees only served until the next annual meeting, at which time the owners elected directors to serve the remaining terms of those direc-

torships. (The association was careful to keep track of the term, not the person, so that its staggered director scheme was kept intact.) Even though the association did not achieve quorum that year, the owners who attended were given the opportunity to determine who would act on their behalf on the board.

Similarly, if approving the budget is an issue for the owners, the documents probably allow the current budget to remain in place until properly supplanted. The association may not get the increase it wants, but it will at least have some operating funds.

CHAPTER FOUR:

CONDUCTING THE MEETING



SOME MEETINGS RUN SO SMOOTHLY THAT THEY ARE BORING, WHILE others are doomed from the outset to be a donnybrook between opposing factions. On balance, most people would prefer the boredom over the stress, although nothing enlivens a community and ensures a quorum better than a brewing controversy.

The chair must maintain control, whether the meeting is quiet or chaotic. There are times, of course, when no amount of planning, foresight, and strength of personality on the part of the chair will avert disaster. Nonetheless, all of these elements can affect the meeting. Conversely, the lack of these elements will almost always result in a meeting that is out of control.

REGISTRATION

Good annual meetings begin with an efficient registration system. Begin the process 30 to 60 minutes (depending on the size of the association) before the meeting so attendees aren't forced to wait.

Prepare registration materials, such as rosters, check-in sheets, signature cards, and ballots, in advance for easy access. The association may even want to color code the ballots by percentage interest to make it easier for the registrar to hand out the correct ballot.

The association should appoint a sufficient number of people to serve as registrars as is necessary to ensure an efficient registration process. Put as much thought into preparing the registrars for their task as it puts into preparing written registration materials. Familiarize them with the materials that they will use and how to use them; instruct them to be pleasant, but businesslike. Remind registrars to avoid confrontation or personal conversations.

Set up an appropriate number of registration tables and divide them alphabetically (e.g., A–L and M–Z). Adjust the alphabetical breaks so that each table has approximately the same number of potential registrants. Divide the rosters alphabetically

according to the tables so that the registrars will only work with those names, not the entire roster. It's also a good idea to have duplicate copies of the divided rosters so that another registrar can assist when needed. Flexibility is important.

Designate a troubleshooter to handle anything out of the ordinary—ownership, right to vote, percentage interest, validity of a proxy, or multiple voters for a unit or lot. The troubleshooter should be located away from the registration tables and should have the complete roster, bylaws, election procedures, blank proxies, ballots, and signature cards. The registrars should refer *any* matter that might take more than a few seconds to resolve to the troubleshooter. Even if they're able to handle a problem themselves, they should refer all problems to the troubleshooter, so they can keep the registration line moving.

THE CHAIR

It is crucial to the conduct of any meeting that the chair be composed, organized, soft-spoken, equitable, and obviously in charge without being overbearing. This is a tall order, especially if the chair comes under personal attack. If the chairperson becomes visibly angry, emotional, flustered, or frustrated, the meeting can degenerate. Therefore, if the person who would normally chair the meeting is unable to fill the role for any reason, there are two alternatives: he or she should put aside custom or ego and allow someone else to chair the meeting, or he or she can preside as chair while a neutral meeting facilitator (perhaps the association manager or attorney) conducts the meeting. Although there may be little practical difference between these alternatives, one may appeal more than another depending on the association and the personalities or politics involved.

Though the chair is in charge of the meeting, he or she should not ride roughshod over the members. The chair can diffuse anger and deflect personal attacks by the judicious use of advisors, such as management or legal counsel, or of experts such as architects, engineers, and accountants. The meeting's success may hinge on the presence of the right advisors or experts, depending on the issues that are likely to arise.

The chair should also make good use of committee chairs, officers, and directors who can answer questions or explain issues or actions. The meeting need not and should not be a one-man or one-woman show.

PARLIAMENTARY PROCEDURE

Most association documents require the board to use parliamentary procedure at annual and special meetings. Though the structure of parliamentary procedure often

aids a meeting, it isn't necessary for association meetings to be as formal as the House of Lords. As with many good things, parliamentary procedure can be overdone.

Most documents that require the use of parliamentary procedure specifically refer to *Robert's Rules of Order*, which is available in a variety of forms and editions. Unless the documents specify a form and edition, the association should choose a version of Robert's that it likes and stick with it. This will provide meetings with a degree of continuity from year to year. Because associations rarely need the complicated rules that are contained in complete editions of Robert's, abbreviated editions that focus on the basics can be easier to use and understand.

Even if the documents state that the board must use Robert's, applicable statutes and documents have priority over Robert's when conflicts occur. For example, Robert's might allow a voice vote or a show of hands on an issue, but such voting methods might be inappropriate for associations that vote according to owners' percentage interests.

More and more associations are employing registered professional parliamentarians to attend annual or special meetings and to rule on all procedural questions. The employment of a professional parliamentarian ensures that the meeting will be run according to exacting standards. It is also a good way to allow someone other than the chair to rule on matters that, depending on the ruling, might be controversial or confrontational.

There are, however, a couple of potential pitfalls when using a parliamentarian. First, he or she must understand that the statute and documents control. Second, the parliamentarian must understand that he or she may only rule when instructed to do so by the chair. The parliamentarian should not interrupt the meeting to correct uncontested actions or rulings by the chair.

SPEAKING TIME LIMITS

Loud, strident meetings where one or more persons dominate the agenda can ruin a well-planned meeting. If the board knows that an issue is likely to arise that will generate controversy or emotional response, it should set speaking time limits of three to five minutes and create a sign-up sheet for those who wish to speak. If necessary, the limitation can be announced at the meeting. However, it's better if the decision is stated in the meeting notice.

The rule should also state that no one may speak a second time until everyone has had the opportunity to speak once. If some owners want a second chance to speak, they may do so during a rebuttal period. This time period may be shorter than the

original time limit. If representatives from opposing factions wish to speak, the chairperson may alternate time periods between representatives from each group.

If the association hires a parliamentarian to preside over the meeting, the board should decide whether to adopt a rule prohibiting yielding time. Robert's allows one speaker to yield time to another at the discretion of the speaker. If the object is to prevent a few from monopolizing the meeting and allow no person to speak twice until all have spoken, a rule against yielding is a good idea.

EJECTING DISORDERLY ATTENDEES

If members disrupt the meeting to the extent that the board cannot conduct its lawful business, the association may have the authority to bar them from the meeting and physically remove them if they refuse to leave. However, ejecting a disruptive member is a serious action and may have negative consequences; so, the board should try every other possible recourse before ejecting a member. This is such a serious action that it may be better for the association to adjourn the meeting until a later time rather than eject anyone.

According to Robert's, declaring someone *persona non grata* is within the chair's prerogative, but every association should take steps to determine whether such an action would contravene local law or the governing documents. Merely declaring someone *persona non grata* does not ensure that the person will leave. If the person refuses to leave, the association will be forced to physically enforce the ruling. In today's litigious society, taking physical action against anyone may incur potential liability for both the association and the presiding officer. The person being ejected, those attempting to remove the disorderly person, and even innocent bystanders could be injured.

Some associations routinely appoint a sergeant-at-arms for meetings, but they don't actually expect that this person will be required to take physical action. It's often a formality, and even if the board contemplates ejecting someone, the sergeant-at-arms should calmly escort the member to the door. Some associations hire off-duty police officers, armed and in uniform, to act as sergeant-at-arms if there is the slightest chance that a forcible ejection will be necessary. If a police officer is not present as the sergeant-at-arms and the meeting gets out of hand, call the police to restore order.

Ejecting an owner prior to the vote may be unlawful disenfranchisement. Unless disorderly conduct is a violation of a covenant or rule for which the penalty is the loss of voting rights, the association may be improperly denying the individual's

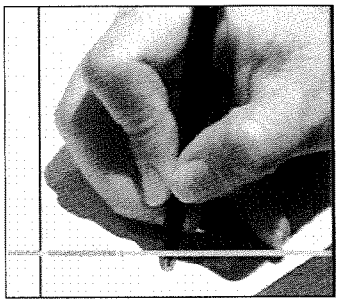
right to vote. One solution is to give the owner the opportunity to cast a ballot before he or she leaves. Another solution is to allow the owner to vote after the meeting has been adjourned. However, such action should be part of the motion to adjourn that is approved by the owners who are present. Otherwise, adjournment is final.

THE PRE-MEETING MEETING

If the annual meeting is destined to be long and controversial, schedule an unofficial meeting prior to the official meeting. For instance, one association held an informal meeting to discuss election reforms. The pre-meeting lasted for nearly five hours and was full of spleen-venting and chest-beating. The annual meeting was held a week later, after the members' wounds had healed. It was a sedate meeting. The pre-meeting had not changed anyone's opinion on the issues, but much of the venom had dissipated. Because fewer people attended the pre-meeting than the annual meeting, some people were spared a potentially nasty annual meeting. By allowing everyone to speak at the pre-meeting, the board defused some personality conflicts and bitterness so that the annual meeting focused on the issues, not their proponents.

CHAPTER FIVE:

NOMINATING CANDIDATES



OWNERS CAN NOMINATE CANDIDATES FOR ELECTION BY FORMING a nominating committee prior to the meeting, nominating candidates from the floor at the meeting, and by writing in candidates' names on ballots and proxies. Many associations are restricted to one of these processes by the governing documents or by established procedure. Many others combine the three processes and use the best of each.

If the statute and governing documents do not specify a nominating method, the board should select a process and implement appropriate procedures and safeguards. To ensure continuity and to avoid confusion among the electorate, the governing documents may need to be amended to reflect the process so that the community can be certain how nominations will be handled in the future. Amending the documents is preferable to merely enacting a rule or resolution, since the latter might be subject to an override vote at the meeting. If an association has been using one of these processes for a number of years without serious problems, however, it should only make a change for compelling reasons.

NOMINATING COMMITTEE

If used properly, a nominating committee can streamline an election because it brings a certain order to the process. It ensures that nominees are ready, willing, and able to serve, and it allows the association to prepare election materials prior to the meeting.

Putting together a nominating committee takes planning and organization. The board should issue an open call for community volunteers. Once formed, the nominating committee will solicit nominations, determine if those nominated are willing to serve, gather the nominees' biographies and platforms, and present a package to the board. Since candidates must be listed on proxies and absentee ballots prior to an elec-

tion, the nominating committee must do its work before these forms are distributed.

All nominating committee activities should be conducted in the open, and the committee should always encourage community involvement. Indeed, the entire nomination and election process should be perceived as completely above-board; there is no place for the smoke-filled back room in community associations.

Some think that a preordained slate of candidates stifles spontaneity at the meeting, but there are two sides to this issue. Too often, the people who are nominated or who nominate themselves spontaneously during the course of a meeting fall into one or more of three categories:

- One-issue candidates
- Those who do not really have the time or inclination to serve, but who are prodded by their neighbors
- Grandstanders

Someone who falls into one of these categories is not likely to make a good addition to the board.

The nominating committee process is not appropriate in every situation. It's possible that good, qualified candidates may be excluded from consideration in the process. Members may think the board is setting up the election because it controls committee appointments. The nominating committee process may also create an opportunity for sanctioned electioneering: "I have been officially nominated, so please vote for me or give me your proxy." However, if the process is completely open and appropriate controls are in place, these arguments can be rendered moot.

NOMINATIONS FROM THE FLOOR

Few documents require the association to obtain candidates only through the nominating committee. Therefore, most associations do not close the nominating process until a motion to do so is passed at the meeting. There is always the danger that announcing the close of nominations at the beginning of a meeting or denying someone the ability to make a nomination at the meeting will have a deleterious effect on the meeting and on community relations. The negative implications may cause the community to continue to accept nominations from the floor, even though there are good reasons for using only the committee process.

Some associations conduct their elections only via nominations from the floor. Although this eliminates the time and effort of the nominating committee process, it imposes some serious limitations on the pool of candidates available for election to the board. If the association requires candidates to agree to serve before they are put

on the ballot, the nominees will be limited to those who are personally present at the meeting or those who have the foresight to send in a written acceptance. Nominations from the floor can polarize issues and create dissent and chaos, especially when one-issue candidates are nominated. The same is true with an anti-establishment candidate.

Still, some think an election is democratic only if nominations from the floor are accepted. There is an inherent fallacy in this view because those voting by directed proxy or absentee ballot are completely disenfranchised. If all nominations are from the floor, those who cannot be present in person are left with the alternatives of filing a proxy for quorum purposes only or writing in candidates of their choice. The latter is not a satisfactory solution because many people in an association have no idea who may be interested in or qualified for a board position. Keep in mind that most people decide how they will vote based on the candidates' biographies and platforms, which are presented in writing through the nominating committee process, verbally at the meeting, at a candidate forum prior to the meeting, so some combination of all three.

WRITE-IN VOTES AS NOMINATIONS

If an association allows nominations from the floor, it is compelled to allow write-in votes to constitute a similar nomination. It is, in effect, the same process, one done in person and the other done by directed proxy or absentee ballot. This process is flawed because there is no guarantee of a second to the nomination or that the nominee is willing to serve, if elected.

Such a candidate is not likely to be elected. In fact, other owners may not even be aware of the write-in vote unless the association opens all directed proxies or absentee ballots prior to the meeting and adds any write-in candidates to the election ballot.

If the association allows write-in votes, several questions will arise:

- If the association adds write-in candidates to the ballot, should it require at least two owners to write in the same person so that there is a second before the nominee is placed on the ballot?
- If there is no second in the write-in process, is the association obligated to mention the nomination at the meeting to see if there is a second from the floor?
- Should the association contact the candidates to determine their willingness to serve?

Even if all of these questions are resolved, the other people voting by directed proxy or absentee ballot will be unaware of the candidacy, and the candidate will not get their votes. This may mean that, even if the association does everything possible

to ensure an even opportunity, the candidacy may fail if a significant portion of owners cast absentee votes.

Normally, the only viable write-in candidacy is one that is done as the organized and concerted effort of a group of owners. This is usually done in response to the slate proposed by a nominating committee; otherwise, there isn't normally a pre-established slate of candidates that owners would know to oppose. If this is done in an association that uses only the nominating committee process, a number of issues will arise. If the documents dictate that the nominating committee process is the sole method of establishing nominees, any write-in candidate can be disregarded. Those owners proposing the candidacy could have participated in the nominating committee process. Denying a write-in candidate under these circumstances is a legitimate, necessary act for the association to take because it must abide by its governing documents.

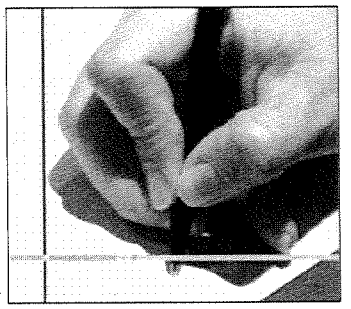
If the association uses a nominating committee process but also allows nominations from the floor, a write-in campaign makes some sense and can succeed. The object is to legitimately oppose a known slate and to reach those owners who will be voting by directed proxy or absentee ballot so that they will know to write in the candidate on their forms. Those owners who attend the meeting in person will be asked to write in the candidate on the ballots. Normally, under these circumstances there won't be a problem with obtaining a second or a confirmation that the candidate is willing to serve.

THE COMBINATION

Many associations successfully combine these processes. A nominating committee can help ensure that there is at least one candidate for each vacancy. When write-in candidates and floor nominations are also allowed, the democratic process appears to be in full working order, even if no additional nominees emerge. The combination process can actually increase the number of nominees, especially if owners perceive that the nominating committee slate is fixed. It can even create a broader range of choices that should allow the true will of the electorate to prevail.

CHAPTER SIX:

CONDUCTING AN ELECTION



CONDUCTING THE ELECTION ITSELF IS A SIMPLE MATTER, AND THERE is no need to complicate it with undue procedures or embellishments. Conduct the election as early in the meeting as possible so the results can be tabulated as the meeting progresses and announced as soon as possible—especially if the election is hotly contested. If the documents set an agenda where the election occurs last, simply entertain a motion to revise the agenda.

APPOINT INSPECTORS OF ELECTION

Many documents specify that inspectors of election be appointed from among the owners present at the meeting. Even if the documents do not require such inspectors, it can be prudent for the chair to appoint them so the election can be certified as legitimate. Three people should be appointed; and, if the group is divided, all factions should be represented. Naturally, no one should be an inspector who has an interest in the election results, such as candidates, candidates' spouses, current officers, or directors. The inspectors should be neutral.

Inspectors can be given the task of merely observing, or they can help with the process. In some associations, the inspectors collect ballots and tabulate votes. The chair should ensure that inspectors clearly understand their function before making appointments. The inspectors certify, by signature, that the election was conducted fairly and that the results were accurate. The election results and the inspectors' certification should be kept among the association records for at least three years.

TAKE NOMINATIONS FROM THE FLOOR

Unless nominations are limited to recommendations from the committee, the chair should call for nominations from the floor. It is customary to require each nomina-

tion to have a second before being validated. The chair should ensure that the nominee is willing to serve either by asking for a verbal affirmation from the nominee, if he or she is present, or by requiring a written affirmation if the nominee is not present. State in the meeting notice or in the election materials sent with the notice that written affirmation is required from nominees who are not present. The chair should remind everyone of this requirement as nominations are opened. Many associations allow the person making the nomination to affirm that the nominee is willing to serve.

Most nominations are for at-large positions. At-large positions are open positions sought by all nominees; the candidates with the most votes will be elected. However, sometimes candidates are nominated for specific positions. In such a case, the board should clearly state at the beginning of the process that all nominations must be for a particular position. This can be important, especially if it's possible that the runner-up for one position might actually garner more votes than the winner for another position. In this situation, the runner-up loses, even though this individual might have won an at-large position.

The number of nominations should not be limited unless required by the governing documents or the association's established election policy. To do so might be interpreted as limiting the democratic process or, worse, as the incumbents trying to limit the number of opposition candidates. Nominations should be accepted until the nominations are closed by motion, second, and a majority vote of those present. A motion to close nominations can be made at any time during the process. All other nominations must be held in abeyance until the motion is decided. If the motion fails, additional nominations may be made. If the motion passes, no additional nominations, no matter how many, can be made. This may seem unfair, but, since the motion must pass by a majority vote, those who wished to make additional nominations are precluded from doing so by the will of the majority.

CONDUCT A CANDIDATE FORUM

Once nominations are closed, the candidates should present their qualifications and platforms to the meeting attendees, even if nominations were closed before the meeting and written materials were sent to all owners. Some associations that close nominations prior to the meeting also have a separate meeting at which the owners are invited to see and hear the candidates. This is perfectly acceptable. The candidates should be allowed to stand up and identify themselves at the time of the election so that those owners not present at the separate candidate forum will be able to identify them.

Allow candidates a limited, but equal, amount of time to speak at the meeting. The norm is usually three to five minutes—for very good reasons. A relatively short time period allows all candidates to speak without making the meeting unbearably long, even if there are a number of candidates. It also limits those who would talk at length and avoids, at least to a certain extent, embarrassing those who do not like to speak in public and find it difficult to say more than a few words.

If one or more of the candidates isn't present at the meeting, the chair may allow someone else to speak on the candidate's behalf. If the candidate has specifically designated a spokesperson, that individual should speak. If a spokesperson is not designated, then anyone who knows the candidate's platform can speak. Should more than one person wish to speak on behalf of an absent candidate, the chair must decide on one person. If the person who makes or seconds the nomination wishes to speak, he or she is the logical choice.

Allowing others to endorse a candidate, whether the candidate is present or not, is not necessary or advisable. Some candidates may have engaged several people to say how wonderful they are, while other candidates are not so egotistical. This form of electioneering should not be condoned within the confines of the official meeting.

TAKING AND TABULATING VOTES

The next step is to take the vote. Attendees should be given ample time to mark their ballots and fold or seal them for collection. Some associations have the inspectors take the ballots from each person or from the person at the end of each row. Others require members to deposit ballots in a ballot box, which is passed around or placed in a particular location. The process should be quick and the security of the ballots should be protected, especially if it is a secret vote.

Methods for tabulating votes range from basic counting by hand, to using sophisticated calculators, to scanning computerized bar codes. The League of Women's Voters will, for a fee, attend the meeting, count ballots and proxies, and certify results. No method is right or wrong. All that matters is that the vote is accurately counted.

The association should set counting procedures beforehand, and make sure the individuals involved understand their tasks, no matter what method it uses. Prepare the people and the materials in advance to ensure that the count is accurate and process is effective. For example, the association may wish to prepare tally sheets in a format similar to that used for counting.

More than one person should count votes, and the job should be split among all who are counting. For example, one person could be assigned all of the proxies and

ballots that are filed by owners with a certain percentage interest. Once the number of votes for each candidate is determined, that total need only be multiplied by the percentage interest of that category. These totals are then recorded on the prepared tally sheet and given to the person who will receive all of the tally sheets for each percentage interest. It is then a simple matter of adding the subtotals from each percentage interest to determine the total vote for each candidate.

Contemporary computer technology offers associations new and interesting ways to tabulate election results. Some companies will, for a fee, bar code all ballots and proxies. Associations that use this method will have election results available within minutes of the vote.

Software and hardware packages are now available that allow associations and management companies to provide identical services. One need only purchase the software, load it on a computer, and rent or buy a bar code scanner (or enter coded information by hand). This technology is a great time-saver and allows associations to achieve a high level of accuracy.

RUN-OFF ELECTIONS

If the open nomination process results in several nominations for each position or numerous candidates for the available open positions, it is possible that there will either be tie votes or votes so close that it is unseemly or impolitic to declare a winner by such a slim plurality. In that event, the association may need to conduct a run-off election. However, a run-off election conducted at that same meeting potentially disenfranchises all owners not present in person, as their directed proxy or absentee ballot votes should *not* be counted.

For example, let's say that out of five candidates for a single position, candidates A and B clearly received the most votes; but, candidate A did not garner so many votes that candidate B might not still win if he or she received a substantial portion of the original votes for the other three candidates. The board thus decides to have a run-off election between A and B. It's safe to say that some of those owners voting by absentee ballot or by directed proxy voted for both A and B, but others voted for C, D, and E. Since only A and B are in the run-off election, it would be unfair to count (in the run-off election) only those absentee ballots or directed proxies originally voting for candidates A and B. This is because those who originally voted for C, D, or E will not have the opportunity to change their votes, whereas those present in person and originally voting for C, D, or E will have the opportunity to influence the election by changing their votes.

Associations attempting to conduct a run-off election at the same meeting should be aware of this problem as well as the potential that the election could be challenged by a person voting by absentee ballot or directed proxy. The better alternative, then, is to adjourn the original meeting to a future date that allows sufficient time to notify all owners of the run-off election, and to give them the opportunity to attend the adjourned meeting in person or by proxy or to vote for candidate A or B by absentee ballot or directed proxy.

MAJORITY OR PLURALITY

In many elections, especially those where there are more candidates than open positions, candidates with the highest number of votes may not earn the majority of the votes. Such a result will not create problems for an association if its documents provide that the candidate with the greatest number of votes, the plurality, will win the election. If the documents do not address this issue, or state that a majority should decide all issues arising at the meeting, the association may face a question about how many votes a candidate needs to be elected.

If an association adopts a conservative interpretation that requires a candidate to earn a majority vote to be elected, it may need to hold an indeterminate number of run-off elections before all positions are filled. For example, if there are five candidates for three positions and they receive 42, 27, 15, 11, and 5 percent of the vote, none has been elected. The association would then be required to drop the lowest candidate and try again. This might happen several times before three candidates are elected by majority vote.

The *election* is the main issue, and as long as it is decided by a majority vote, candidates should be elected based on those receiving the greatest number of votes, even if that is a plurality. It's unlikely that association developers or their attorneys ever intended to saddle associations with the cumbersome process that a true majority vote requires. Associations whose documents require a majority vote should seek a formal opinion letter from their attorney regarding the actual vote necessary for each successful candidate.

ELECTION MATERIALS

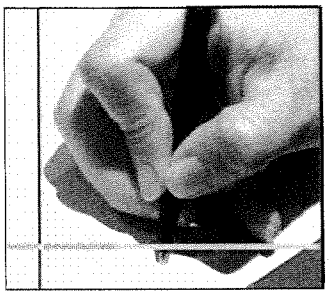
Associations should never favor a particular candidate when preparing election materials. Some states require condominiums to list candidates alphabetically and to show no preference.

Though this rule seems simple, it begs the question: "Is the indication that a

candidate is an incumbent a form of preference?" From a practical standpoint, being an incumbent may be an asset or a liability, depending on how the current administration is regarded by the members. The best bet is not to indicate incumbency. Most owners are going to know who the incumbents are. It should be left to the candidates whether to emphasize their incumbency during the candidate forum or in their written materials.

CHAPTER SEVEN:

OWNERSHIP STATUS



OWNING AN ASSOCIATION UNIT OR LOT GUARANTEES THE OWNER the right to vote unless he or she is delinquent in paying assessments or a lien is in place against the property. Most documents and statutes include this provision; some require the association to wait a certain time before taking away voting rights, others require owners to pay all sums due two or three days prior to the meeting. This allows the association to develop a final list of eligible voters prior to the meeting.

Because voting is a right, the association must take care only to deny that right based on clear authority. For example, a document that allows the association to suspend an owner's right to vote for failure to pay assessments may not allow the suspension for failure to pay other fees or charges. Consider an association that has the right to levy fines for rules violations. If an owner, who has an unpaid fine, shows up at the meeting, it may be necessary to allow that person to vote. A fine is not an assessment unless the documents specifically state that it is. Similarly, if the association requires a lien to be in place, it should document that fact before denying the right to vote. It will not be enough that the attorney has the case or even that the lien has been mailed to the court—the lien must be in place.

Some documents also deny the right to vote to owners who violate the rules and regulations. In this case, the infraction should be documented and the offender found guilty before the right to vote is denied. If that process has not been completed, the right to vote still vests with the owner. And if the violation is verifiably corrected prior to the meeting, the right to vote should be reinstated.

MULTIPLE OWNERS

Often, association leaders are confused about who is entitled to vote when a unit or lot is owned by more than one person. In such a case, votes should not be split. A

vote assigned to a unit or lot must be voted by the owners of that unit or lot in concert or not at all. Similarly, all of the owners should execute a proxy.

Sometimes association documents are helpful and require owners to file a voting certificate prior to the meeting. The certificate is signed by all owners and designates one to vote or execute a proxy. This is the most efficient way to handle the issue. It may be possible to include such a requirement in the rules or in an administrative resolution if the documents don't have such a provision but allow for additional regulation. It's possible, however, to be overly concerned about this question.

Even if the documents require a voting certificate, the association doesn't need to raise the issue unless a vote is contested among the owners who share it. If more than one owner asserts the right to vote at a meeting—and there is no voting certificate on record—the association should require them to agree how to cast their shared vote or deny both the right to vote.

If only one owner attends the meeting, the association need not require a voting certificate. If all of the owners had proper notice of the meeting and only one attends, the association may assume the other owners have waived their right to contest the vote of the person who was present. The association should not deny the vote altogether based on the lack of a voting certificate.

If an association addresses voting by multiple owners in its documents, rules, or procedures, it should be careful not to be overly restrictive. The provision need only state that if a vote is contested among owners and a voting certificate is not on file, the vote will be denied. With such a provision, all owners will be notified that they must attend the meeting or contest the vote prior to the meeting, or the association will be required to allow the vote of the owner who is present.

CORPORATE OWNERS

Unless local law or the association documents have specific requirements, the voting certificate can be useful in determining how votes from units or lots owned by a corporation will be cast. Some jurisdictions have corporate law or case law that may be applicable; usually a ballot or proxy would have to be executed by either the president or the secretary. In a limited partnership, the general partner is usually required to take the action. In a standard partnership, any of the partners can generally act on behalf of the partnership. In situations where the vote is uncontested, the association can allow the vote if there is evidence that the person casting the vote has the authority to do so. If the vote is contested, the association either should rely on the voting certificate or deny the vote.

TENANTS AND MORTGAGEES

Neither tenants nor mortgagees have a right to vote based solely on their status. This issue frequently arises with tenants who attend meetings and want to vote. Even if the owner isn't present in person or by proxy, no such right exists.

Tenants and mortgagees have the right to vote only when a proxy instrument or a power of attorney specifically grants that right. Of course, mortgagees that have foreclosed on a property become the owners and have the right to vote as such. If, however, the mortgagee is only in the process of foreclosure, the right to vote still belongs to the owner.

LAND INSTALLMENT CONTRACTS

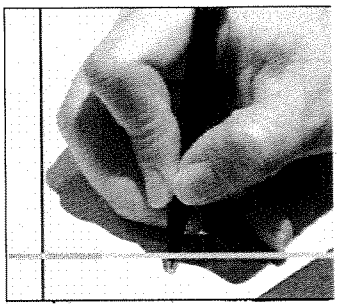
If land installment contracts are valid in the association's jurisdiction, the right to vote may be contingent on the status of the contract at the time of the vote. The issue is equitable ownership versus actual ownership. Unless notified otherwise or unless advised otherwise by its attorney, the association should recognize the contract seller (the legal title holder) as the owner for voting purposes.

CHANGE IN OWNERSHIP

If a unit or lot was recently sold, a question may arise at the meeting regarding when legal ownership transfers. Some jurisdictions consider the transaction complete and title transferred upon delivery of the deed. Others do not regard the transfer as complete until the deed has been recorded. Other jurisdictions may regard the transfer as complete at settlement, whether the deed has been delivered or recorded. Each association should consult its attorney about local rules so that it can resolve such an issue should it arise.

CHAPTER EIGHT:

VOTING PROCEDURES



EVERY ASSOCIATION SHOULD REVIEW ITS DOCUMENTS TO DETERMINE how to count votes. Generally, the voting scheme and the assessment scheme are the same: if every unit or lot pays an equal share, each gets one vote; if the assessment is based on percentage interest, so is the vote. However, there are exceptions. Occasionally, the governing documents will set assessments by percentage interest but give every owner an equal vote. This usually occurs in homeowner associations, but could occur in other community associations.

The association should also be aware of statutory quirks that might affect voting. For example, the District of Columbia Condominium Act states that if 50 percent or more of the votes appertain to 25 percent or less of the units, then a majority vote requirement is only met by having both a majority of the votes (by percentage interest) and of the units.

CUMULATIVE VOTING

Cumulative voting allows owners to cast all of their available votes for one person. In this way, an owner can vote several times for one candidate. For example, if owners are voting to fill three open board positions, each voter will be allowed three votes. Normally, owners would vote for three different candidates. However, cumulative voting allows owners to cast all three votes for the same person.

Many state statutes and association documents prohibit cumulative voting because it is perceived as ballot box stuffing. If both the statute and documents are silent on this issue, the association can amend the documents or rules and regulations to preclude it. It also may be possible to regard cumulative voting as a procedural, rather than substantive, issue in which case it might be prohibited by rule or resolution. An association should only do so, however, based on legal advice.

BALLOTS

All votes, except those on minor or procedural issues, should be recorded on a written ballot. A written ballot allows for continuity, as the vote of those owners filing directed proxies will be in writing. The written ballot also safeguards the integrity of the election because a permanent record is available if the vote is challenged. Keep ballots for at least one year or, preferably, for three years.

A ballot is necessary to precisely determine the outcome of a vote. This is especially true if the members are voting in accordance with a percentage interest assigned to their unit or lot. These numbers can extend as much as four places to the right of the decimal point. Written ballots help ensure precision even if the vote is based on a one-unit, one-vote scheme. At special or annual meetings, it may be difficult to get an accurate count by show of hands, especially since some co-owners forget that there should only be one hand raised per unit or lot.

A written ballot also can have a positive psychological effect. People seem to feel like they are doing something positive and official when casting ballots, as opposed to raising their hands. Filling out a ballot also makes people feel like the association is being efficiently managed. Moreover, putting their vote in writing usually makes people reflect or deliberate on their choice a little longer.

Absentee Ballots

Directed proxies and absentee ballots are similar devices that allow owners to vote *in absentia*. An absentee ballot eliminates the need for the fiction of the proxy holder in the directed proxy scheme. It can even be argued that using absentee ballots is cleaner and simpler than using directed proxies.

Using absentee ballots may present problems depending on specific language in the local statute or the governing documents. The first problem deals with the right to vote by proxy. If an association allowed only absentee ballots, any owner could claim that his or her right to vote by proxy was being abridged. Even though the only means of voting *in absentia* in a public election or referendum is by absentee ballot, what is good enough for America may not be good enough for an association because voting by proxy is specifically allowed by statute or the governing documents. Hence, directed proxies evolved to maintain the owners' right to vote by proxy.

The second problem is that using absentee ballots may impair the association's ability to lawfully conduct its business because of a failure to attain a quorum at the meeting. The statutes and document provisions regulating quorum usually state that a quorum is a certain percentage of the total votes represented at the meeting

in person or by proxy. Absentee ballot voters are not at the meeting in person and do not vote by proxy. Technically, then, owners voting by absentee ballot may not be counted for quorum purposes.

Some might argue that the use of an absentee ballot means that voters are directly casting their vote and that they should be regarded for quorum purposes. Although this argument has some logical merit, case law does not substantiate this position. Given that few associations have legal budgets large enough to warrant testing the issue, it's probably better to eschew the absentee ballot in favor of the directed proxy. The other alternative is to require owners to send in both a proxy, for quorum purposes, and an absentee ballot, for voting purposes. (See Figure 3.)

FIGURE 3. SAMPLE ABSENTEE BALLOT AND QUORUM-ONLY PROXY

I/we, the record owner(s) of unit _____, being unable to attend the annual meeting of homeowners set for [date], do herby submit this absentee ballot to cast my/our vote as follows in the election of directors of the association:

❑ Candidate A ❑ Candidate B ❑ Candidate C ❑ Candidate D

❑ _____ Write-in Candidate

❑ _____ Write-in Candidate

_____ _____
Printed Name Signature

_____ _____
Printed Name Signature

Proxy

I/we do hereby nominate and appoint the association secretary as my/our proxy, for the sole purpose of establishing a quorum of owners at the homeowners association annual meeting held on [date], and all adjournments thereof. In the event that any matter not covered by the absentee ballot above is put to a vote, I/we direct my/our proxy to abstain from casting a vote thereon.

_____ _____
Signature Signature

Electronic Ballots and Proxies

Just as statutes are authorizing the delivery of notice of a meeting by electronic means, owners may now also be authorized to vote using electronic ballots or proxies. Usually, the only caveat is that the electronic ballot or proxy must be verifiable as coming from the owner—or the owner's proxy holder. In effect, the question becomes one of verifying the electronic "signature" of the owner. This can be done in a number of ways.

The Uniform Electronic Transactions Act (ETA) states, in Section 9(a), "An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including the showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable."

Thus, it may be sufficient to determine that the e-mail ballot or proxy was sent from the same e-mail address as is registered with the association as being that of the owner. If an owner will be in circumstances where he or she will not be using the registered e-mail address to send the ballot or proxy, the association should establish a security procedure (e.g., a prearrange code) that the owner can use when sending the ballot or proxy.

With a facsimile transmission, it may be possible to authenticate a ballot or proxy either by verifying the "facsimile signature" at the top of the page as being from the owner's facsimile machine, or merely by verifying the actual written signature of the owner on the facsimile ballot or proxy against a signature on file with the association.

If the statute or governing documents require that proxies or absentee ballots be notarized (an onerous and outdated requirement that should be eliminated, if possible) or witnessed (acknowledged), Section 11 of the ETA provides that such a requirement is satisfied if the electronic signature of the notary or witness is "attached to or logically associated with" the ballot or proxy. For facsimile transmissions, this requirement is easily met, as the signature and stamp of the notary or the signature of the witness will be visible and verifiable. For e-mail transmissions, it may be necessary for the notary or witness to have their indicia scanned into the computer being used and incorporated into the e-mail ballot. Alternatively, separate transmissions may be "linked" to the ballot in some manner as to be acceptable to the association.

The technology already exists to webcast meetings and to take votes during the course of the meeting by executing a ballot provided on the website. Receipt of this type of electronic vote can be verified in the manners discussed above, and associations

can determine with sufficient reliability that the vote is actually that of the owner. Once this technology becomes readily affordable, web voting should be deemed another valid means of electronic transmission. Note, too, that people will also be able to participate fully in webcast meetings if they possess the microphone, camera, and software necessary to transmit as well as receiving voice and image data. Under those circumstances, statutes and governing documents should be revised to allow attendance and voting at a meeting "in person, by proxy, or by web cam," as those attending electronically will have the same presence as those attending in person.

Secret Ballot

Many associations have either a tradition or a requirement to hold all votes in confidence. Implementing a procedural system that ensures the secrecy of a vote isn't difficult, but it requires planning. Obviously, to be secret, a vote must be in writing.

The simplest system for those who will be voting in person or by proxy is to distribute ballots at the registration table. It's easy to check in members, verify their status, and give them a blank ballot marked with their percentage interest. Then the voters merely place the marked ballot in the ballot box. The ballot only contains the percentage interest voted and the vote itself.

If only one owner holds a particular percentage interest, secrecy may be difficult if not impossible. It's imperative that the votes be counted by reference to the percentage interest of all owners. If there is only one voter per percentage interest, the vote counter will know how that person voted. It might be possible, if the people registering voters are different from those counting votes, to limit the vote counter's knowledge to the number of ballots that will be filed for each percentage interest. This way, they don't have access to information that would allow them to make a correlation between a particular percentage interest and a particular unit.

If the secret vote includes mail-in votes, either directed proxies or absentee ballots, using two envelopes is the best system. The ballot or proxy stating the percentage interest is mailed to the owner along with two envelopes: one to be used as the outer envelope and the other as the inner envelope. Owners cast their vote on the form and place it in the inner envelope, which is blank. That envelope is placed in the outer envelope, which contains the owner's name and the unit or lot number. The package is mailed in, and the outer envelope is used for registration purposes, opened, emptied, and discarded. The inner envelopes are placed in the ballot box and counted along with the ballots cast by those attending the meeting in person (unless, as will be discussed below, mail-in votes are counted before the meeting to expedite the tabula-

tion process). As long as the outer and inner envelopes are separated as described, secrecy will be maintained.

Voting by electronic means may be complicated if a secret ballot is required. The Maryland laws deal with this potentially difficult issue by allowing electronic voting so long as the association provides a process by which owners can still vote by anonymous written ballot or proxy. It may also be sufficient if a disinterested party receives the electronic ballot or proxy, verifies its provenance, sanitizes it, and forwards it to the association without attribution.

BALLOT FORM AND CONTENT

The ballot form need not be any more complicated than the proxy form. It only needs to set forth clearly what or whom the owners are voting for or against. (See Figure 4.)

FIGURE 4. SAMPLE SECRET BALLOT

I/we do hereby vote for the following persons to serve as directors of the condominium. Do not check more than three names. A vote for more than three names will invalidate this ballot.

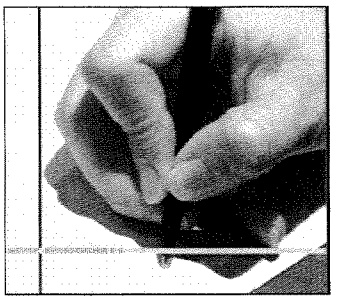
- ❑ Candidate Jackson
- ❑ Candidate O'Brien
- ❑ Candidate Patel
- ❑ _____ Write-in Candidate
- ❑ _____ Write-in Candidate
- ❑ _____ Write-in Candidate

Regarding the proposed **special assessment**:
I/we vote: (check one) ❑ For ❑ Against

Regarding the **annual budget**:
I/we vote to: (check one) ❑ Approve ❑ Disapprove

CHAPTER NINE:

PROXIES



A PROXY IS THE WRITTEN AUTHORIZATION THAT ALLOWS ONE PERSON to appoint another to vote on his or her behalf. In this guide, the term "proxy" refers to the written instrument, while "proxy holder" refers to the person who is designated to vote for another at an annual or special meeting. The proxy giver is the person who authorizes another to vote on his or her behalf.

The use of proxies in community associations is usually determined by state law, the association's governing documents, or both. Voting by proxy usually is permitted, although there are some exceptions. For example, members of District of Columbia cooperative associations may only vote in person.

There are numerous types of proxies. State statutes, governing documents, or corporate law may address the type, form, and content of the proxy. This section will describe several different forms and possible contextual provisions. Do not implement any measure discussed without first consulting legal counsel about relevant local law, restrictions, or prohibitions.

The following discussion relates only to proxies granted by an owner to another owner for use at an annual or special meeting, not to director proxies at a board meeting. This is so because it is a generally accepted principal of community association law (as well as corporate law and the body of law dealing with elected public officials) that there is no such thing as a director proxy. A director cannot give his or her proxy even to another director to vote on his or her behalf at a board meeting.

This principle is based on the fact that directors are elected to give their *personal* attention to association affairs. Directors who are absent from a board meeting forfeit their right to vote as do absent members of the United States Senate and House of Representatives.

GENERAL PROXIES

The most common type of proxy used in community associations is the general proxy. A general proxy allows the holder to vote at a meeting. Blanket general proxies allow the holder to vote on any matter that comes before the owners during the life of the proxy. If the proxy giver executes a general proxy, the proxy holder is authorized to vote as if he or she were the proxy giver. The proxy holder is responsible for voting or abstaining from the vote as he or she sees fit. Thus, a general proxy is an act of trust—the proxy giver must trust the judgment of the proxy holder. (See Figure 5.) The proxy giver may think the proxy holder will vote for a certain candidate, but the proxy holder is not legally bound by that understanding unless it is reflected in the written instrument.

FIGURE 5. SAMPLE GENERAL PROXY

I/we,_____, being a member in good standing, nominate, constitute and appoint as my/our agent and proxy_____, to act in my/our name, place, and stead, and to vote as he/she sees fit on all issues that may arise at the annual meeting of the Manhattan Cooperative Association to be held on [date], at 7 p.m., at the Manhattan Suite, 1000 Wilson Boulevard, New York, New York, and all adjournments thereof. This general proxy shall expire when the meeting is adjourned, unless sooner revoked by me/us.

Given this_____day of,_____, _____,
[month] [year]

_____
Printed name(s)

_____
Signature

_____
Signature

Unit number: _____

Mortgage Company name and address: _____

_____

Mortgage account number: _____

Proxy givers may not understand that proxy holders may vote on any matter that properly arises during a meeting. This may cause problems if the proxy giver has strong viewpoints on several matters. One association attempted to resolve this problem by adopting a procedure that would ensure the personal vote of all owners on all matters. The association used a special ballot at meetings for matters that arose unexpectedly. The meeting would then be adjourned for 24 days. By the third day after adjournment, the election committee mailed similar ballots to all members who were either not present or present by proxy. The association asked owners to return those ballots to the secretary within 21 days of the mailing date. The meeting would reconvene on the 24th day, the issue would be determined based on the vote of all owners, and the meeting would formally close.

Absent such a procedure, general proxy givers have two alternatives: they must either allow the proxy holder to vote on all matters, or the proxy must mandate abstention on all matters not specifically mentioned in the proxy. Neither of these methods is wholly satisfactory. Perhaps the association mentioned above had the right idea—no owner or member should be forced to give away the right to vote on unknown issues.

DIRECTED PROXIES

Directed proxies bind the proxy holder to specific terms, allowing the proxy giver to control the vote. The directed proxy is, in effect, an absentee ballot, which means that the proxy holder is little more than a courier who is entrusted with recording a vote. (See Figure 6.)

A directed proxy can even mandate abstention. The most common example of this is the proxy that is used only to establish a quorum. Such a proxy directs the proxy holder to abstain from voting on all issues that come before the body. Another form of trust is involved with the "for quorum purposes only" proxy—trust that the other voters will act responsibly and decide pertinent issues in the manner most beneficial to the proxy giver. Other than the for-quorum-purposes-only proxy, proxies that purport to be directed proxies are really partially directed and partially general. Typically, the proxy giver directs the vote on some or all anticipated matters, but either grants general powers to the proxy holder for unanticipated matters or instructs the proxy holder to abstain on unanticipated matters. Instructions to abstain should appear clearly on the proxy instrument.

For example, most Maryland condominiums provide a directed proxy for the election but not for other matters, scheduled or not, that may arise. Unless the proxy

FIGURE 6. SAMPLE DIRECTED PROXY

KNOW ALL MEN BY THESE PRESENTS, that the undersigned co-owner(s) in the Hillside Condominium does/do hereby constitute and appoint _____ as my/our proxy to act on my/our behalf at the annual meeting held on _____. My/our proxy shall have full authority to vote on all matters that may be presented at said meeting, except the election of directors of the condominium, as fully with the same effect as if the undersigned had been present at said meeting, and I/we hereby ratify and confirm all that my/our proxy may cause to be done by virtue of this instrument.

This directed proxy is irrevocable except by actual notice by the undersigned to the secretary of the condominium or to the officer presiding over the meeting that is revoked. Unless sooner terminated, this directed proxy should terminate automatically upon the final adjournment of the annual meeting for which it is given.

Express Instructions
I/we expressly direct and instruct my/our proxy to vote as indicated below for the election of directors to the board of directors. My/our proxy shall otherwise have the full right to vote in accordance with his or her discretion on any and all other matters that may properly come before the meeting.

I/we do hereby vote for the following persons to serve as directors of the condominium. Do not check more than three (3) names. A vote for more than three (3) will invalidate this directed proxy for election purposes.

❑ Candidate A ❑ Candidate B ❑ Candidate C ❑ Candidate D

❑ _____ Write-in Candidate

❑ _____ Write-in Candidate

The undersigned has/have executed this directed proxy on _____
(date)

Address: _____

_____

_____ _____
Printed Name Signature of Owner

_____ _____
Printed Name Signature of Owner

giver limits the power of the proxy holder or directs abstention on any other issues, the proxy instrument usually will allow the proxy holder to vote on any issue other than the election as if the proxy were a general proxy.

Unless the association has a voting procedure similar to the 24-day adjournment scheme mentioned earlier, a directed proxy will be its purest in the context of a special meeting. Special meetings, by definition, are limited in scope to the issues noted in the meeting notice. If no other matters may properly be brought before the meeting, a directed proxy may be used with full confidence that the will of the proxy giver shall control.

Given that a directed proxy constitutes the actual vote of the owners, the association may need to implement special controls for receiving and handling them, particularly if a secret vote is required. Proper controls aren't difficult. The section on ballots (pages 46–50) contains additional discussion of this issue and possible methods of ensuring secrecy.

In jurisdictions that do not have a statutory requirement for directed proxies or an outright prohibition on using proxies, the statute usually confers the broad right to vote by proxy. Typical language includes. "At meetings of the association, each member shall have the right to cast the number of votes appurtenant to his or her unit in person or by proxy."

PROXY LIMITATIONS

Most statutes place some form of limitation on this right. For example, a proxy may be valid only for a limited time and for a specified meeting, the association may be required to execute the proxy in a particular manner, or the proxy may be given only to specific individuals or groups. Despite such statutory limitations, the association's power to limit the right to vote by proxy is frequently questioned. Such questions would encompass the association's power to require the use of directed proxies.

To analyze this issue, one must first understand that statutes, not common law, create the right to vote by proxy. No one has the right to assign a vote to another person in public elections or referendums. The common law regards the right to vote as personal and belonging to the individual and provides that those who will not be present for the vote are allowed to vote personally by absentee ballot. The directed proxy is a form of absentee ballot.

Associations must look at the statute to determine whether they may place limits on the right to vote by proxy. If the statute itself has imposed limits, such as those mentioned above, the association may assume that it's subject to the same limits.

Next, one must look at the precise nature of the proposed limitation. Requiring association members to vote by directed proxy does not abridge their right to vote by proxy. The proxy giver is still voting without personally attending the meeting and is still appointing a surrogate to cast the vote. The only difference is that the proxy giver is directing how the proxy holder must cast the vote. If owners are all required to cast their votes as they see fit, the issue will be decided by the true will of the majority.

It's difficult to see how such a limitation on the right to vote by proxy could be regarded as detrimental. If the limitation restricts anything, it is the individual's "right" to let someone else make the decision. Such a limitation only restricts the proxy giver's ability to let the proxy holder decide how to vote. This should not be an issue because they can discuss it beforehand.

The legal validity of an association's requirement to use directed proxies will depend primarily on the association's goals for proxy voting and the will of the members. For that reason, proxy requirements should be included in the governing documents. If the number of members required by statute to amend the documents vote in favor of such a restriction, most judges will find that fact persuasive. The use of directed proxies is an attempt to bring voting in line with democratic principles. Proxy abuse by community associations is perceived when some members attempt to collect many proxies to control an election or vote. Although directed proxies can help curb this abuse, it's possible to implement other controls that limit the power of proxy holders.

Procedural Limitations

Other controls apply to proxy voting that are merely procedural (such as a signature card system) or that do not limit the right to vote by proxy and, therefore, pertain only to the proxy holder, not the proxy giver. For example, these controls might limit who may hold a proxy or how many proxies a single person may hold.

The right to vote by proxy relates to the right of an individual to vote. Statutes do not guarantee anyone the right to be a proxy holder. Accordingly, limitations placed on the proxy holder cannot abridge any right.

Limiting the number of proxies that any single individual may hold can thwart the assertive person who might otherwise offset an election. Such a limitation should also apply to board members and managers. Unfortunately, they're often allowed an unlimited number of proxy votes because policy drafters assumed they'd be neutral. However, board members and managers often have a vested interest in the outcome of an election. In their official capacities, board members and managers should only

use directed proxies or proxies that are for quorum purposes only. Of course, as owners, they may hold the same number of proxies as any other owner.

It's quite common for proxy holders to be limited to other owners. It makes sense that the proxy, especially if it's a general proxy, be voted by someone who has the same interest in the property as the proxy giver. Nonmembers of the association would have little interest in the association's affairs and little knowledge on which to base decisions. Therefore, this limitation increases the integrity of an election or vote.

Some associations allow tenants and mortgagees to vote by proxy. Each of these parties should be concerned, for example, to see that the association was managed well and to vote accordingly. The law in some jurisdictions recognizes the interest of tenants and mortgagees. For example, time limits placed on proxies may be waived when the holder is either a tenant or a mortgagee.

CONTROLLING PROXY ABUSES

Associations can use various controls to prevent proxy abuses, such as forgeries and alterations. However, not all are very effective.

Forgeries

Requiring that someone other than the proxy holder witness the proxy may appear to curtail forgery. But for the forger, it's just as easy to forge two signatures as one. An association might require that proxies be notarized. However, the District of Columbia recently eliminated such a requirement in its Condominium Act because the additional effort necessary to get proxies notarized had a chilling effect on an association's ability to achieve quorum: most people who do not plan to attend the meeting do not care enough about the process to take the time to have the proxy notarized. The same is true, albeit perhaps to a lesser extent, if a witness is required. At least with this requirement, the proxy giver can go to any neighbor or friend to obtain the witness signature.

The best way to control proxy forgery is to require signature cards for each owner, much like those used by banks. The signature cards are executed in person before an association officer or management agent, usually at a time unrelated to a pending meeting. Some associations generate signature cards when they process pool passes. Other associations collect them as part of a welcoming process as each new owner moves in. It may be enough merely to establish a rule that no proxy will be validated unless the owner has a signature card on file.

A possible variation of this scheme requires that both the owner's signature and Social Security number be on file and that each proxy contains the proxy giver's

Social Security number. Because of identity theft concerns, such a scheme should only be used if the association has a secured server and can guarantee protection of the information. Alternatively, the association may wish to ask the individual for a signature and a personal code that can also be used on future communications with the association, including proxies or absentee ballots.

Once residents know the association has signature cards on file, this knowledge can discourage forgeries. Nonetheless, each proxy signature can be checked against the signature on file to determine its validity. One does not have to be a handwriting expert to recognize most forgery attempts.

Alterations

It's difficult to control proxy alterations because many people make mistakes or change their minds when filling out the proxy form. Require members to fill out all proxies in ink, and compare changes to determine if the same writing instrument was used. It may be appropriate to hold up the proxy to a bright light at the meeting to determine if an alteration exists. Also, require the proxy giver to initial any changes. For this to be effective, the signature card should have a space for the owner's initials so a comparison may be made.

Requiring and accepting only one official proxy form is another way to control proxy abuse. An official form can have several advantages. It eliminates the need to check each proxy to determine if it is legally sufficient, although it will still be necessary to verify that each form has been properly executed. Use of an official form also eliminates any potential bickering from rival factions at a meeting regarding the efficacy of the other group's proxies.

If an association only uses one official proxy, the proxy can become a controlled proxy. Controlled proxies are marked, numbered, or printed on special paper to help prevent abuse. For the proxy to be valid, the owner must return the exact proxy form to the association. No substitutions or copies are allowed. Some associations use a variety of colored paper to print controlled proxies, with each color identifying a specific percentage interest. When the proxies are returned, they are separated by color and tabulated accordingly.

Monitoring how proxies are received can also control proxy abuse. Some associations mark the return envelopes to facilitate both identification and tabulation. Others require that proxies be hand-delivered to a specific person or group (the secretary or an election committee) or to a conveniently placed ballot box.

Before implementing controls on how the association receives proxies, check with

the association attorney regarding local proxy law. If proxy control relates to corporate law, the association may have wide latitude. For example, Delaware corporate law allows proxies to be transmitted electronically (e.g., telegraph, facsimile).

PROXY FORM AND CONTENT

A few statutes and governing documents specify proxy form and content. Most, however, do not. A proxy need not be a sophisticated legal instrument full of incomprehensible language. The purpose of a proxy is to assign a vote from one person to another. It's sufficient, then, if the proxy form identifies the proxy giver (and his or her unit or lot, if required), the proxy holder, the meeting or vote for which the assignment is intended (including the date, time, and place, if necessary), the date of the proxy, and the signature of the proxy giver. If a witness or notarization is required, provide appropriate signature lines. If the proxy is directed, the information and blanks necessary for the proxy givers to direct the vote must be provided. It may be necessary to provide written instructions for proper execution of the proxy. These instructions can be included either on the proxy form or on a separate sheet.

SECURING PROXY INSTRUMENTS

In addition to recording meeting minutes, the association secretary will secure all election documentation and may be the repository for proxies that are cast by the proxy giver or that are used only to establish a quorum. The secretary is normally responsible for controlling the association's records and certifying votes or elections. Therefore, the owners should be able to rely on the integrity of the secretary to properly and safely secure the proxy instruments for an appropriate time and in an organized manner. This will be important if a recount or verification is needed for any reason.

APPENDIX. ELECTION POLICY AND PROCEDURES RESOLUTION

Every association should have a written election policy and procedures resolution so that boards, managers, committees, candidates, inspectors of election, registrars, voters, and proxy holders have guidelines within which to act or perform their duties. The following outline sets forth the categories and issues for this resolution.

I. Election Committee
- A. Establish and appoint members and chairperson.
- B. Assign tenure of appointees. The board should determine whether appointees serve for one election, one or more years, or indefinitely until successors are appointed. All committee members, including the chair, should serve at the pleasure of the appointer.
- C. Create appointee restrictions (e.g., no candidates, spouses, current board members, or officers).
- D. Determine a number of appointees.
- E. Determine the committee's power and duties. Include a statement of the nature and extent of board supervision, including approval of forms or procedures. Other than approval of forms, it is recommended that the board have little involvement in the process, especially after it has approved the Election Policies and Procedures Resolution.
  1. Ensure fairness and the integrity of the election.
  2. Publicize the election and related events.
  3. Organize and conduct a candidate forum prior to the meeting.
  4. Organize and conduct owner registration process at the meeting, including necessary forms and materials for registrars.
  5. Verify owner identity and authenticate proxies and ballots. The committee or the board must determine when and how to collect proxies. The committee also must determine whether an owner is of record and what proof of ownership will be sufficient if the person does not appear on the association roster of owners.
  6. Count and verify quorum.
  7. Conduct the election at the meeting, including introduction of candidates, nominations from the floor, announcements, and explanation of ballot and write-in process.
  8. Distribute and collect ballots.
  9. Count ballots and proxies and announce the results.
  10. Certify the election and the results in writing.
  11. Nominate candidates if association has no nominating committee.

II. Nominating Committee
- A. Appoint nominating committee members.
- B. Assign number, tenure, and restrictions on committee members.
- C. Determine committee powers and duties.
  1. Solicit nominations in accordance with the resolution.

Continued on next page

2. Verify nominees' willingness to serve.
3. Solicit biographical information and platform statements from nominees.
4. Organize and publish the slate of candidates.
5. Certify compliance with nomination requirements in the resolution.

III. Nominations
A. Determine the types of nominations allowed.
1. Establish the nominating committee process. The process might require nomination by petition (with a minimum number of signatures), allow self-nomination, or set certain standards for nominees to meet. The latter is not recommended unless the standards are contained in the governing documents (must be an owner, spouses or co-owners cannot serve at the same time, term limitations)
2. Determine how to treat write-in votes on proxies and ballots.
3. Decide how to accept nominations from the floor.
B. Set requirements for nominees' eligibility.
C. Set limits on number of nominees. This is a dangerous area because there is little justification for such limitations, especially if directors may be elected by plurality.
D. Determine whether nominations are at large or are for a particular vacancy.
E. Motion to close nomination (necessity of a second, whether vote will be by voice or show of hands).

IV. Proxies
A. Decide whether to use general or directed proxies.
B. Determine if one official proxy form is sufficient.
C. Decide when and how proxies should be submitted.
D. Determine who may hold a proxy.
E. Develop a signature card system.

V. Ballots/Voting Procedures
A. Create standards for ballot form and content.
B. Create an absentee ballot.
C. Determine how the association will collect and count ballots.
D. Determine the number of votes that can be cast on each ballot and a statement that more than that number will invalidate the ballot.
E. Decide whether cumulative voting is allowed.
F. Do not accept votes, by proxy or ballot, after announcing that the polls are closed.

VI. Additional Election Procedures
A. State that *Robert's Rules of Order* will be used unless in conflict with the document or statute.

Continued on next page

B. Assign inspectors of election.
   1. Determine who will appoint the inspectors and whether appointments are made before or during the meeting.
   2. Determine the number of inspectors.
   3. Decide whether inspectors certify the election or witness the certification executed by the election committee chairperson.

C. Set a policy for poll watchers.
   1. Decide if inspectors will serve in lieu of poll watchers.
   2. Limit poll watchers to candidates or their designees.
   3. Include a statement that poll watchers must observe the counting silently.

D. Establish standards for campaigning and the distribution of campaign literature.
   1. Set beginning and ending time limits (cannot start more than 10 days prior to the meeting and must end by noon the day of the meeting).
   2. Determine appropriate places to put signage (bulletin boards, hallways, elevators, lobby).
   3. Implement restrictions on door-to-door delivery or canvassing (time of day, weekends).