



HindmanSanchez

Who's The Winner? Election Challenges and How To Resolve Them

HindmanSanchez P.C. *Attorneys at Law • Denver & Fort Collins*
5610 Ward Road., Suite 300, Arvada, Colorado 80002-1310 **Tel** 303.432.9999 **Free** 800.809.5242 **Fax** 303.432.0999 **www**.hindmansanchez.com



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Who's The Winner?

The Basic Question That Every Election Should Answer, but Sometimes Doesn't – Election Challenges & How to Resolve Them

As evidenced in the last presidential election, election disputes can be nasty, many-headed beasts. Whether running for President of the United States, for president of the student body and sometimes even president of an association, candidates campaign to win. Additionally, these candidates collect fervent supporters who will also fight tooth and nail to ensure that their candidate emerges victorious from the electoral fray. When it appears that the election has not been run completely above board, chances are high that the parties involved will want to challenge the election and find ways to invalidate it. A nation in turmoil over pregnant chads is bad, but it is worse when the parties disputing an election live next door to each other. This article deals with the delicate and complicated issue of election challenges in the context of homeowner association elections.

Many court practitioners and commentators view community associations as "mini-governments" that are responsible for collecting assessments and providing for the day-to-day needs of their neighborhoods. As in most democratically run bodies, community associations make decisions by holding member meetings and voting on issues of concern. Votes are held for a variety of issues from electing members of the board of directors to approval of budgets or special assessments. Although associations may act as mini-governments, courts have recognized that decisions within the association can take on a great deal of importance to individual homeowners and have the potential to become highly emotional and controversial. Homeowners often have strong opinions that lead to disagreements. When these disputes arise from a decision by an association board, homeowners may wish to challenge the votes or remove members from their board of directors.

Because of constant board member changes, the relative infrequency of elections, and potentially confusing procedural rules, having an efficient and organized election depends on knowing how to handle election challenges. This article provides information on how to raise election challenges, as well as guidance on how to resolve these challenges. The rules applied in this article are primarily derived from *Robert's Rules of Order*.¹ Supplementary rules have been taken from *Riddick's Rules of Procedure*² and *Sturgis' The Standard Code of Parliamentary Procedure*.³ However, an association's bylaws may specify different rules of procedure that apply to that particular association. When association bylaws or adopted procedures prescribe different rules of procedure, those rules will take precedent.

I. PROCEDURES FOR ELECTION CHALLENGES

Association members, the association president or a chairperson may challenge election results by using recognized rules of procedure. Members may challenge elections by 1) requesting that a vote be retaken; 2) calling for a division; 3) moving for a counted vote; or 4) moving to recount the vote. Election challenges must be made before the vote is final or immediately after the vote is announced. Thus, challenges are effective only if made within the proper time restrictions.

Motion to Retake Vote

By retaking a vote, the same question is presented and voted upon using a different method of voting. This process allows the same question a second chance by implementing a different voting method. For example, if the chair initially takes a voice vote that a member believes is inconclusive, the member may call for a rising vote.⁵ This may be done any time before the chair announces the final vote.⁶ An election is deemed final after any of three possible events: 1) if the candidate is present and does not decline the position; 2) if the elected candidate is absent from the election but has previously consented to the candidacy; or 3) if the absent candidate has not previously consented to candidacy but does not decline immediately upon notification.⁷

Motion for a Division of Assembly

A motion for a division is a request for verification of an indecisive vote by asking members to rise from their seats while voting. A member should make a motion for a division after a vote by voice or by show of hands has been taken that the member believes is too close to be conclusive.⁸ In some cases a division may be called for even after the election has been announced, but it must be done promptly.⁹

To make a motion for a division, a member, without obtaining the floor, speaks out, "Division!" or "I call for a division!" Immediately thereafter, the president retakes a vote by asking members to rise. For instance, the president will state, "All those in favor, please rise. Thank you. Please be seated. All those opposed, please rise." The president may then announce the results of the vote, which has been made visible to all members. Because it is a member's right to have a vote verified that he or she believes was incorrectly tallied, a motion for a division does not require a second or a vote and may not be amended or debated.¹⁰ However, a member cannot use this motion to obstruct business by calling for division in an obviously decisive vote.¹¹

Motion for a Counted Vote

If the accuracy of a vote remains in doubt after a division of assembly, the president or a member may request a counted vote.¹² Traditionally, unlike a motion for division, the motion for a counted vote must be adopted by general consent or majority vote.¹³ However, modern usage states that a member's demand for a counted vote will compel one.¹⁴ During a counted vote, the president will ask members on each side of the vote to remain standing. The president may designate members, referred to as tellers, to assist with the vote count.¹⁵ Either the tellers or the president may count the votes, compile the results and establish the final count. If tellers take the count, they must report the count to the president, who then announces the final vote.¹⁶ However, if a member remains doubtful after a motion for division and after a counted vote, he or she may move to reconsider a vote, which reopens discussion of the item.¹⁷

Motion to Recount Vote

If a member or the presiding officer believes the result of a ballot vote is incorrect or inaccurate, the member may challenge the vote before or during the announcement of the results.¹⁸ If the motion is seconded and passes, the ballots are recounted, but not re-cast.¹⁹ A motion for a recount may also apply to an indecisive voice vote which requires a recount of voices or an adoption of a more quantifiable voting method. A member or presiding officer who believes that the result of a voice vote will be difficult to determine may call for a division of assembly.²⁰

II. RESOLVING ELECTION CHALLENGES

Guidelines for challenging and resolving elections are provided by case law, corporation statutes, not for profit corporation statutes and standard rules of procedure. If a challenged election violated bylaws, or applicable statutes, general parliamentary procedure, a new election may be called. Additionally, challenges may result in a new election if members were given inadequate notice, proxy votes were improperly ignored or election meetings were illegally postponed. This section provides an overview of state statutes and common law decisions that help to determine the outcome of election challenges. Many of the

statutes and common law decisions discussed in this section pertain to corporate elections. However, it is important to note that a homeowner's association operates as a business and, excepting express provisions stating otherwise, is governed by the same statutes and decisions as any other non-profit corporation. When determining which statute applies to a question of law arising from an election challenge, an association should first turn towards its state's non-profit or common interest community legislation. If no law addresses the problem within those divisions, an association may then turn towards the state's for-profit corporation law for guidance. The state statutes referenced in this article have been chosen by virtue of the high number of common interest communities located within those states.

Persons Entitled to Challenge a Vote

Procedural rules state that generally only a member may challenge a vote. Recent case law supports these standard procedural rules holding that election challenges are available only to members. In *Dodge v. Cedar-Riverside Project Area Comm.*, a nonprofit neighborhood organization held an election for corporate directors which was challenged as illegal by residents of the area within the organization's control.²¹ The court held that because the residents were not members of the organization, they had no standing to challenge the election.²² Therefore, only members, or if bylaws allow, their agents, may effectively challenge elections in most cases.

Whether a proxy holder has the standing to make a timely election challenge is determined by the form of the proxy that authorized the holder to vote. A general proxy is a common type of proxy which gives the holder the authority to vote on any matter that properly comes before the meeting including election challenges.²³ This type of proxy contains no limitations or restrictions of any kind and confers onto the holder an unlimited exercise of discretion. However, if the parties in dispute decide to seek relief in court, it may be determined that the member giving his proxy is an indispensable party and must be joined to the law suit. Although a general proxy holder may act within his or her discretion concerning regular items of concern that arise out of the election, a general proxy, unless it states otherwise, does not automatically confer the authority for the proxy holder to bring suit on the behalf of the member.²⁴ On the other hand, a directed proxy binds the proxy holder to specific terms, rendering the proxy holder a courier who is responsible for recording the proxy giver's vote.²⁵ A directed proxy limits a proxy holders discretion. Association members do not always recognize the distinctions between a general or directed proxy. To avoid confusion, associations should use a proxy form that clearly spells out the limitations of a proxy holder's authority.

The Role of the Chair

It is the chair's responsibility to insure that the correct will of the association membership is carried out.²⁶ Therefore, it is the chair's duty, before announcing the final results, to verify the outcome of an election beyond a reasonable doubt and to the satisfaction of the members. For example, after taking a vote by voice or by show of hands, if the chair remains uncertain of the result or believes that the vote is unrepresentative, he should call for a rising vote on his own initiative.²⁷ After a member challenges a vote count or the validity of a vote, the chair must determine whether such a challenge is proper and not dilatory. If there exists any room for doubt, the member's challenge should be considered as a valid exercise of a member's right to verify the result of an election, and the chair should grant the member's request (such as a member's motion for a division of assembly).

When counting a rising vote, the chair has the option of counting the vote himself or appointing members of the association (known as tellers) to assist him.²⁸ In a heavily contested election, the tellers should be comprised of members who represent both candidates to assure the membership of fair dealing.²⁹ In a small association, it may be most practical for the chair to conduct the count himself. However, in large associations, tellers should be used to insure accuracy.

The Role of Courts and Statutes in Election Challenges

Additionally, most state statutes grant courts the authority to confirm or reject elections under certain circumstances. For example, section 618 of New York's Not-For-Profit Corporation Law gives

members aggrieved by an election the right to petition the supreme court at a special term held within the corporation's judicial district.³⁰ Section 13.1-861 of Virginia's Nonstock Corporation Act allows members aggrieved by an election the opportunity to apply for relief in circuit court after reasonable notice is given to the corporation.³¹ The Illinois condominium and non-profit statutes do not address the issue of election challenges, allowing an association to look for guidance towards the applicable for-profit statutes. In this manner, chapter 5, section 12.56 of the Illinois Business Corporation Act of 1983 gives shareholders the right to seek relief in circuit court if the shareholders are deadlocked and have not elected a new board for a period of at least two annual meeting dates.³² In California, section 5617 of the Nonprofit Public Benefit Corporation Law allows any person who claims to have been denied the right to vote to file a lawsuit with the superior court of the appropriate county. The court will then hold a hearing at which the court will determine the validity of the election. At its discretion, the court may decide the election's winner or direct any other relief as may be just and proper.³³ Florida's Condominium Act requires a member challenging an election to first submit to mandatory nonbinding arbitration before requesting relief from the court.³⁴ The Colorado Common Interest Ownership Act states that any right or obligation set forth in the Act can be enforced by a judicial proceeding.³⁵

Case law demonstrates that courts will intervene in elections if non-compliance with bylaws or procedures has produced election results that may have differed under proper election procedures. However, courts are generally hesitant to get involved in election disputes and it is advisable for an aggrieved member to exhaust any administrative remedies before petitioning the courts for relief.³⁶ For example, while New York's Not-for-Profit Corporation Law grants members the right to petition, the courts will not interfere in the internal affairs of a corporation unless a clear showing is made to warrant such action. In *Nyitray v. The New York Athletic Club of the City of New York*, the court denied the plaintiff's motion pursuant to § 618 of the Not-for-Profit Corporation Law for an order to grant the plaintiff permission to inspect, copy and recount votes from an annual election of the defendant organization.³⁷ The court held that the plaintiff's allegations failed to demonstrate that the defendants had violated the organization's constitution and were not sufficient to raise a material issue of fact.³⁸ Therefore, if a petitioner can demonstrate that an election was fraudulent or a material fact is at issue, the petition will most likely be granted by the court.

For example, in *Faraldo v. Standardbred Owners Assoc., Inc.*, the New York court denied a member's petition filed under the Not-for-Profit Corporation Law requesting that the court set aside an election of directors and officers.³⁹ The court of appeals determined that the trial court had erred in denying to grant the petition on the basis that the member had not shown on the face of his complaint that he would have won a seat on the Board of Directors had the election been run properly. The court of appeals found that the petition raised material issues of fact that entitled the member to a hearing.⁴⁰

Members may also sue to uphold election results when those in power refuse to yield. For example, in *Rotary Club of Chicago v. Harry F. Shea & Co.*, members brought suit to uphold a recent election after the existing president announced plans to hold new elections.⁴¹ Members, including the board president, unhappy with the results of a recent election for directors appointed a special board to investigate the election results.⁴² Although the committee reported that the election results were valid, the president attempted to hold another election and continued to hold himself out as president of the club.⁴³ As further administrative options would have been fruitless based on the facts, the Illinois court allowed a suit by members of the club to enjoin the president from remaining in office and preventing the newly elected board from taking office.⁴⁴

Additionally, a court will enforce election results despite a showing of election irregularities if the court determines that the irregularities did not alter the election's outcome and that there is no showing of fraud. In the case of *In re. F.I.G.H.T., Inc.*, one coalition of a non-profit organization petitioned the court to nullify a recent election on the basis that their nominees had been illegally excluded from the election.⁴⁵ The court found that the election had been surrounded by much confusion and inconsistency, but that the irregularities did not serve to affect the outcome. The court enforced the election results holding that in the absence of fraud or wrongdoing, a court should not interfere with the internal affairs of a corporation.

In *Boerick v. Weise*, a group replaced in a recent election attempted to argue that the trial court did not have the jurisdiction to decide on the validity of an election on the request of a party seeking to uphold an election.⁴⁶ The replaced group claimed that under section 315 of California's Civil Code, the trial court only had the power to determine the validity of an election in the case where a party was seeking to nullify an election. The court held that section 315 confers power to the court to determine whether or not a board was properly elected regardless of whether the party instituting the suit seeks to uphold the election or invalidate it.⁴⁷ Although section 315 governs for-profit corporations, section 5617 of the California Nonprofit Public Benefit Corporation Law grants the courts similar authority to decide on the validity of an election.⁴⁸ The similar provisions allow the extension of a holding in a case involving a for-profit corporation to a case involving a non-profit corporation. Therefore, courts can be used not only to invalidate elections, but may also function to enforce election results.

Derivative Suits

Law suits challenging an election may be filed directly by an individual member or as a derivative suit. Unless an individual member suffers a unique and specific injury separate from that incurred to the corporation, the action generally must take the form of a derivative suit. A derivative suit is a suit brought by a group of voting members to assert rights or remedies belonging to the corporation, not to individual members. The general rule that an association member has no individual cause of action for injuries sustained to his association works to prevent a plethora of suits against the association.⁴⁹

In *Dunn v. Ceccarelli*, members of an association brought suit challenging the method used for casting proxy votes and alleging breach of fiduciary duty due to self-dealing by the existing board.⁵⁰ The Georgia court held that, save a special individual injury, a suit for breach of fiduciary duty must be a derivative action and that because the plaintiffs were suing as individuals, no derivative action existed.⁵¹ Generally, a member may only sue as an individual if the member has suffered an injury unique to that member and not common to other members due to the actions of the board of directors. Although the plaintiffs maintained that the suit was brought individually and on behalf of "more than 300 proxies" of the association, the court held that the proxies were not made party to the action.⁵² Additionally, the plaintiffs did not maintain that their votes had been invalidated by the board of directors. Therefore, no injury unique to that member occurred because the action of the board did not specifically impede the petitioners' rights more than other members. In this manner, the court held that an individual suit would be justified only if the petitioners had suffered a separate and distinct injury specific to themselves as individual members.⁵³ Unless an association member brings suit to challenge an election claiming that his or her *individual* right to vote had been violated, suits to challenge election results or procedures should be derivative.

III. SPECIFIC ELECTION CHALLENGES

As stated above, lawsuits may be instituted to challenge elections for a variety of reasons. In many cases, the bylaws of an association dictate specific requirements for conducting elections. These may reflect statutory law, recognized parliamentary procedure or may be based on the workings of the specific association. Election disputes commonly concern the legality of the votes cast, whether the organization followed bylaw procedural requirements and enforcement of election results. This section discusses specific election challenges that have been addressed by courts, legislatures, and parliamentarians.

Illegal Ballot Votes

Although most associations are not likely to wrestle with the delicate issues surrounding chads and dimples that were presented to Florida last November, the question of whether certain votes are legal does arise in association elections. As the nation learned last year, a vote must be legal before it can be credited toward a candidate.⁵⁴ A vote is considered illegal in two situations. First, a ballot cast by a person not entitled to vote is illegal.⁵⁵ For instance, a ballot is illegal when cast by a non-member or a member whose voting right has been suspended for failing to pay assessments.⁵⁶ Second, in certain situations, ballots cast by members entitled to vote may also be considered illegal. For example, if at its annual meeting an association

is voting by ballot on new board members as well as an amendment to the bylaws, and a member incorrectly marks her ballot under the amendment question, only that portion of the ballot is illegal.⁵⁷ Her vote for the board of director candidate remains valid and should be counted. Additionally, if two or more completed ballots are inconspicuously folded together each ballot is considered an illegal vote.⁵⁸ A vote is also illegal if a ballot is unintelligible and its meaning cannot be reasonably understood.⁵⁹ If a ballot's meaning is doubtful and would affect the outcome of the vote, the tellers must report this to the president.⁶⁰ If the determination will effect the outcome, the president must then immediately submit the question of how to record the unintelligible ballot to the membership.⁶¹ Illegal votes are not counted towards either candidate. However, if it is known that an illegal vote was cast by a member entitled to vote, the vote will count towards establishing the number of people voting. This number will then determine the number of votes a candidate requires to achieve a majority.⁶²

Situations exist in which a member entitled to vote casts an imperfect, but not illegal, ballot. For example, if a member leaves a blank space on a ballot containing more than one question, the blank space does not affect the validity of the filled spaces.⁶³ Tellers should ignore entirely blank ballots, whether folded or not, as scrap paper.⁶⁴ Likewise, if two or more completed ballots folded together contain one blank ballot, the completed ballot(s) are legal and should be counted.⁶⁵ Additionally, minor technical errors do not make a vote illegal. For example, misspelling a candidate's name is an insignificant error if the meaning of the ballot is clear.⁶⁶ Therefore, flawed ballots can be legal and count toward deciding a successful candidate.

As stated above, tellers should include illegal ballots cast by members entitled to vote when determining the majority. However, tellers should not include illegal ballots cast by persons not entitled to vote. Further, if ballots cast by persons not entitled to vote cannot be identified and a possibility exists that those ballots may affect the vote's outcome, the entire ballot vote is invalidated. In this situation, a new ballot vote must be taken.⁶⁷ However, if illegal ballots are identifiable, a new election is required only when the extra ballots could have affected the outcome of the election.⁶⁸ In the case of *In re. Jackson*, an action was brought under New York's Not-For-Profit Corporation Law to set aside a dental association election.⁶⁹ The petitioner, a candidate for the position of president, claimed that the election was improper. During the vote count, it was discovered that some ballots had been placed in a ballot box for a different election being held at the same time by another dental association.⁷⁰

The petitioner's association recovered the uncounted ballots and held a recount.⁷¹ When the missing ballots were included in the count, it was discovered that the total number of ballots exceeded the actual number of eligible voters, making some unidentifiable ballots illegal. Following the association bylaws which deferred to *Sturgis*, the court stated that a new election would be necessary if the illegal votes affected the outcome. The court ordered a new election because the illegal votes could have altered the outcome of the election.⁷²

An association can take many practical measures to avoid conflict over the legality of ballots. First, an association should chose a method of collecting ballots that is efficient and organized. In meetings comprised only of voters, members can stay seated and drop their ballots into a receptacle passed by a teller, joined by another teller to watch for any impropriety. Another feasible alternative is to have members vote at a central ballot box monitored by tellers. Members can also hand their ballots directly to a teller, who then can judge by thickness whether only one ballot is being cast. Another voting technique is to distribute the ballot during check-in at which time the authority to vote and the adequacy of held proxies can be determined before a ballot is given. The board of directors should determine which method would work the best for the association and establish it by a rule, so that the method is not vulnerable to variation from occasion to occasion.⁷³ Second, to avoid the possibility of having to hold an election again, it is advisable to separate any questionable ballots from the rest. That way, if the election is close, it will be easy to determine whether or not the suspect ballots could have had any effect on the outcome of the election.

Some state statutes grant associations the authority to reject or accept votes. In Colorado, if the secretary or election officer has a good faith reason to doubt the authenticity of the signature or the signatory's authority to sign the ballot, a nonprofit corporation is entitled to reject a vote, ballot or proxy vote.⁷⁴ Further, the officer or agent rejecting the vote is not liable in damages for accepting or

rejecting a vote.⁷⁵ Unless a court determines otherwise, the decision of the officer or agent is deemed valid.⁷⁶ Section 33-708 of the Connecticut Revised Nonstock Corporation Act allows a Connecticut corporation, acting in good faith, to accept a vote or proxy if the name signed on the vote corresponds to the name of a shareholder.⁷⁷

Voting lists

The secretary or any other designated party is responsible for maintaining a complete and accurate membership roll.⁷⁸ In fact, most state statutes require that such a list of members be kept. Unless stated otherwise in the bylaws or unless the member is formally dropped from the membership rolls, members in arrears for payment of assessments retain voting rights.⁷⁹ Even if a member has lost his or her voting rights, most bylaws and statutes require an association to send a meeting notice to each owner on record.⁸⁰ Not only are they required by law but meeting notices can serve to encourage members to clear up delinquencies to regain their voting rights and eligibility to run for office.⁸¹

Associations may not arbitrarily suspend voting rights without specifying the standards used to determine when such rights are terminated. For example, in *Gilman v. Long Island Home Builders Inst.*, members brought suit to nullify a recent election of officers, claiming that a notice was not sent to each person who was entitled to vote at the election meeting.⁸² The evidence showed that over 40 members had not received a notice because the executive director had removed their address cards from the file since they were delinquent in the payment of dues. Further evidence established that another group of 84 delinquent members had not been removed from the file and therefore had received notice of the election. The court noted that the only automatic penalty for delinquency provided for by the by-laws was a 25% increase in dues.⁸³ There was no clear boundary, such as amount or time of delinquency, to explain why some members were removed and others were not. Therefore, the court held that the executive director did not have the discretion necessary to legally terminate notices to members for non-payment of dues. The court stated that unless a member fell under a "closed," "resignation pending," or "in the hands of attorney" category, that all members retained the right to receive an election notice.⁸⁴ If an association wishes to provide for a suspension of voting rights resulting from delinquent dues, it should clearly state in the governing documents when and how such action will be triggered to ensure due process.

Some state statutes require that member lists be available for inspection by any member entitled to vote either at the meeting or at specified times prior to the meeting. For example, Georgia requires non-profit corporations to prepare an alphabetical list of the names of all its members who are entitled to notice of the meeting.⁸⁵ The list must contain the addresses of and number of votes each member is entitled to vote at the meeting. Colorado requires that all nonprofit corporations make member lists available to any member entitled to vote either ten days before the meeting is to take place or two days after the meeting notice is given.⁸⁶

Ballot votes

A written ballot has many advantages. First, unlike taking a rising or voice vote, a ballot protects a member's privacy. Second, a ballot protects a vote's integrity by providing a permanent record if the vote is challenged. Unless specified in the bylaws, ballots do not need to be printed or formal and may simply consist of a small slip of paper that a voter uses to write his or her choice.⁸⁷ After an election by ballot is completed and the period of time allowing election challenges has expired (during or immediately after the election), the ballots may be destroyed.⁸⁸ The decision to destroy ballots may be made by the presiding officer or upon a motion and vote of the membership.

If an association's bylaws require a vote by ballot, this rule may not be superseded by the board, even by a unanimous vote of the members.⁸⁹ Even if there is only one nominee, a ballot must still be taken unless the bylaws provide an exception.⁹⁰ As a result, members still have the opportunity to cast write-in votes for qualified members who were not officially nominated. Therefore, a member without an official nomination may be elected as a write-in candidate.⁹¹ The legal requirement to adhere to the bylaws dictates that if a ballot vote is necessary, an association *may not* take a vote by simple acclamation.⁹² If the bylaws require a ballot vote, any other type of vote will be invalid.

Nominations

In an election by ballot each member may vote for any eligible person regardless of whether he or she has been nominated. Therefore, nominations are usually not legally required in an election by ballot.⁹³ An association's bylaws will sometimes specify the form of nomination to be used. Absent governing documents to the contrary, nominations can be made a variety of ways: 1) by the president; 2) from the floor 3) by a nomination committee; 3) by ballot; 4) by mail; or 5) by petition.⁹⁴ If an association's bylaws fail to mandate a nomination method and no board-adopted rule exists, any member may move to apply a particular nomination method.⁹⁵ The motion to use a particular nomination method requires a second, and if more than one nominating method is proposed, the question should be decided by a vote.⁹⁶ However, an association should take the time to determine which nominating method would suit the association's needs the best. Then to assure continuity, the governing documents should be amended to incorporate the chosen method or the board of directors should adopt an election policy and procedure.⁹⁷ To avoid confusion and provide for smoother elections, an association should choose and adopt a nomination process in advance of meetings before any question or dispute arises.

An association's bylaws may address how to form a nominating committee, so first an association should consult its bylaws for direction. If the bylaws do not prescribe a method for appointing a nominating committee, the board of directors will generally appoint one. The president should not appoint the committee or participate as a committee member.⁹⁸ The elected committee may nominate more than one candidate, provided multiple nominations are not prohibited in the bylaws.⁹⁹ Additionally, members of the nominating committee are not precluded from nomination because of their membership on the nominating committee.¹⁰⁰ Once candidates have been selected, the committee should contact each candidate to secure his or her acceptance before announcing the nominations.¹⁰¹ Verifying a candidate's willingness to run will save an association the aggravation of electing an individual who declines the position, necessitating another time-consuming election.

Nominating From the Floor

The committee's final report should be formally presented at the association's annual meeting. However, if custom allows, the committee may also mail the report to members or present the report at a regular member meeting held before the annual meeting.¹⁰² Once the report is formally presented to the assembly, the committee is automatically discharged. However, if a nominee declines prior to the election, the committee may reconvene at once to agree on another candidate.¹⁰³

Customarily, the president should call for nominations from the floor after the nominating committee's report. Any member making a nomination from the floor need not be recognized by the president to make a nomination.¹⁰⁴ Nominations do not need to be seconded, but members, if an objection is made, are limited to one nomination for each elected position until all members are given an opportunity to nominate.¹⁰⁵ Unless an association's bylaws provide otherwise, a member does not have to be present to accept a nomination from the floor to become a candidate. However, this practice should be discouraged because of the complications that arise if an absentee member is nominated, elected, and then declines to serve. Even if bylaws are silent about floor nominations, they should be requested after the nominating committee presents its report.

In *Norris v. South Shore Chamber of Commerce*, the losing slate of candidates in an election of corporate officers brought suit seeking an injunction to prevent the elected candidates from taking office.¹⁰⁶ At the election meeting, the nomination committee presented its report and announced its slate of nominees. Thereafter, the floor nominated a different slate, which won the election. The plaintiffs, members of the losing slate, challenged the election stating that the bylaws required a slate prepared by a nominating committee and did not address the issue of nominations from the floor. The plaintiffs claimed that the bylaws' silence on floor nominations necessarily precluded them. However, the bylaws also stated that *Robert's Rules of Order* would govern meeting procedure "when not in conflict with these bylaws."¹⁰⁷ The court noted that *Robert's* advises that after the nominating committee presents its report, the chair must call for further nominations from the floor. The court held that because the call for floor nominations did not conflict with the bylaws, the election was proper and regular.¹⁰⁸ Therefore, after the nominating

committee's report, nominations from the floor are proper even if not specifically provided for in the bylaws.

Absentee voting by mail or by proxy

Traditionally, voting is generally limited to the members who are physically present when a vote is taken, and an association's bylaws must state any allowable exceptions to this general rule.¹⁰⁹ However, unless an association's bylaws states otherwise, some state statutes provide an association with the right to determine questions regularly addressed at meetings by a mail vote.¹¹⁰ Exceptions to the requirement that members be present to vote usually provide a way for associations with geographically scattered membership to have members vote on important questions.¹¹¹ One such exception is voting by mail. Proxy voting provides a second exception.¹¹²

So that there is no question of the result in the event of a close vote, voting by mail requires that the mailing list exactly mirror the current official roll of voting members.¹¹³

Although voting by mail allows organizations with a scattered membership to resolve important issues without the need for an annual meeting, voting by mail has inherent disadvantages. When voting in this way, members cannot discuss or amend proposals or nominate candidates from the floor.¹¹⁴ An association should choose between voting by mail and voting at a meeting because it is very difficult to successfully combined the two. For example, if an association allowed members to vote by mail or vote at a meeting in an election, those voting by mail would be disadvantaged because they would not have the opportunity to either make or vote on nominations from the floor.¹¹⁵ To conduct an election by mail, the written ballot should list the nominees who should be allowed to include a brief summary of their platform and experience so that members can make informed choices. It is also necessary to set a reasonable deadline for its return to the association. If secrecy is a concern, each member should be provided with a blank envelope in which the marked ballot is placed. This envelope is sealed and enclosed in another envelope which the member signs so that the member's name can be compared to the list of members eligible to vote.¹¹⁶ Additionally, an association should check with the statutes of its state to determine if further procedures should be followed.

Proxy Voting

A proxy is not a ballot, but a written authorization that appoints a person to cast a ballot (vote) on another's behalf. In the case of multiple owners, each owner should execute the proxy unless a voting certificate has been filed designating which owner is responsible for casting the unit's vote.¹¹⁷ Proxies come in various forms and count towards establishing a quorum. Statutes that create the right to vote by proxy often confer the right broadly and do not include details as to what form the proxy should take and what it needs to include. Since proxies are presumed revocable, a proxy executed by a member who later chooses to attend the meeting will be considered revoked. An association should amend its bylaws to include a proxy procedure so that questions that cannot be answered do not arise during the voting process.

A general proxy, unless restricted by its terms or a statutory provision, confers on the holder an unlimited discretion to vote for the proxy giver.¹¹⁸ Therefore, a proxy holder may abstain from voting as he or she sees fit and is under no obligation to exercise the proxy he or she is holding. However, a directed, or limited, proxy (a proxy which specifically binds the proxy holder to specific terms) carries different obligations for the proxy holder. When holding a directed proxy, the proxy holder is much like a delivery person, charged with transporting the proxy giver's vote to the meeting. For example, in *Bank of New York Company, Inc. v. Irving Bank Corporation*, the limitation of directed proxies became an issue between the two parties during the course of a bank take over.¹¹⁹ Both parties had solicited proxies that provided an option for the proxy giver to direct the proxy holder to abstain from the vote, and the defendant argued that proxies marked "abstain" could be counted to determine the majority.¹²⁰ The court struck down this argument, declaring that a directed proxy gave the proxy holders only the authority to vote the shares only "as instructed below." The court stated that the proxy givers who had checked the "abstain" box had directed that their proxies take no action on the matter at hand. Therefore, the proxy holders did not have the authority to vote or take any other action but only to abstain from taking action.¹²¹ Courts will

disapprove of a proxy holder who does not vote a directed proxy exactly as instructed. In this manner, a director or association member holding a directed proxy should be sure to vote it and not attempt to practice any discretion in deciding whether or not to cast it.

Right to Vote by Proxy

Proxy voting is not permitted unless an association's bylaws provide for it, or the laws of the state in which the association is incorporated allow proxy voting and the association's bylaws do not expressly forbid it.¹²² In *Herning v. Eason*, church members held a vote during a regular business meeting to remove the pastor from the pulpit.¹²³ The member who moved to remove the pastor submitted 57 proxy votes, which the meeting moderator refused to accept because proxy voting was not addressed in the church bylaws. The votes cast by members present at the meeting defeated the motion to remove the pastor. Several church members sued the church for a declaration that proxy voting was permitted per § 71(b) of Alaska's Nonprofit Corporation Act.¹²⁴ The court stated that the church's articles and bylaws, which state "membership present" at a meeting may terminate a membership, do not prohibit proxy voting as a member may be "present" in person or by proxy.¹²⁵

If an association's bylaws provide for proxy voting, the form of the proxy must follow the specifications designated in the bylaws.¹²⁶ In *Wymbs v. Conashaugh Lakes Comm. Assoc.*, the plaintiffs brought suit seeking a declaration that the proxies that they had submitted at the association's annual meeting were valid.¹²⁷ The defendants argued that the proxies distributed by the plaintiffs did not adhere to the association's bylaws, which state that only the board of directors may send out proxy forms with the mandatory notice of the meeting. The court held that the plaintiffs' proxy forms were not authorized and were invalid for failure to comply with the association's bylaws.¹²⁸ Therefore, courts will insist on compliance with association bylaws to avoid chaos and inconsistency between proxy forms.

Additionally, in *Azzi v. Ryan*, members brought an action under the New York Not-For-Profit Corporation Law challenging the validity of an officer election.¹²⁹ The petitioners were nominees selected by the club's nominating committee and the respondents were the candidates nominated by the floor on the day of the election.¹³⁰ At some point after balloting, the president produced papers that he claimed were proxy votes.¹³¹ However, the proxies were not counted in the tallying of votes, which resulted in the respondents receiving a larger number of votes. Had the proxies been counted, one of the petitioners would have been elected and another would have tied for president.¹³² Petitioners claimed that the election should be declared invalid for the failure to include the proxy votes in the tally.

The club's bylaws did not specifically prohibit proxy voting and referred to *Robert's Rules of Order* for any disputed matters not addressed in the bylaws.¹³³ However, New York statute allows proxy voting unless otherwise stated in an association's bylaws or in the certificate of incorporation.¹³⁴ Although the court found that *Robert's* discourages proxy voting, the court stated that *Robert's* was merely advisory. The court held that members cannot be deprived of such an essential and fundamental right as voting and ordered a new election allowing proxy votes, regardless of whether or not the bylaws provided for it.

Soliciting Proxies

The president of an association may solicit proxies as long as he or she complies with the bylaws and applicable statutes. In *Adams v. Meyers*, the plaintiffs contended that the president of a condominium association improperly voted proxies.¹³⁵ The president distributed proxies to members, which if returned with a blank space as to the recipient of the proxy, automatically designated those proxies to him. The court ruled that absent fraud, breach of fiduciary duty or violation of any applicable statutes, the president may properly solicit proxies as long as he is compliant with the Illinois Condominium Property Act, the General Not For Profit Corporation Act and the association's declaration.¹³⁶ Thus, the president, as a member of the association, lawfully solicited proxies because all members are allowed such privilege. Therefore, proxy solicitation is not prohibited merely because a member holds a position on the board.

In the *In Re Application of Vallone* case, the court determined that a board could contact specific members at their actual addresses to solicit proxies from those members.¹³⁷ The court held that if the board

had sent notices to all the members' addresses on record, there existed no legal reason prohibiting the board from contacting members favorable to them at their actual addresses.¹³⁸ If general proxies are given to an association board, the board votes on how to cast them. However, it does not inspire membership confidence in a board if that board uses proxies to control an election in their favor. Therefore, an association may want to consider the use of directed proxies (proxies that stipulate a particular vote) for proxies appointed to board members. If the votes that the board casts in an election have been stipulated by the proxy giver, the board will avoid the appearance of voting in its own best interest, therefore maintaining the respect of the membership.

Secrecy of Proxy Votes

Although, the result of an election decided by proxy votes may be disputed but courts will often employ a balancing test to determine whether the expectation of privacy outweighs the need for a member to know how votes were cast. In *Chantiles v. Lake Forest II Master Assoc.*, a candidate who believed that he had been shorted proxy votes attempted to assert his power under section 8334 of the nonprofit California corporations code to inspect the votes, which qualified as records of the association.¹³⁹ While the court allowed the petitioner's attorney to inspect the ballots (without identifying the voter) to ensure accuracy, it ruled that turning over all ballots to the petitioner was improper.¹⁴⁰ The court believed that the petitioner was motivated not by a legitimate concern as to how the ballots were counted, but was primarily concerned with identifying individuals who did not vote for him. Therefore, courts will allow inspection of ballots, but will generally attempt to preserve the privacy of the individual homeowners who cast the ballots with a legitimate expectation of privacy.

Notification to Members of an Election Meeting

Notification of members is generally required by most association bylaws and courts will generally overturn elections if they are held with insufficient notice to the members. Even where notice is not required in an association's bylaws, courts may vacate an election if the association failed to notify members of the meeting.

In *Azzi*, petitioners brought an action to vacate an election of officers in a not-for-profit corporation for lack of adequate notice.¹⁴¹ At a meeting on November 9, 1982, the corporation's nominating committee announced its nominees for office. Nominations were then closed with no objections, and the election was scheduled for December 27, 1982. Notices for the meeting were later sent out to members, but neglected to mention that an election was scheduled. The court held that even if bylaws do not require notice, elections may be vacated if the failure to notify members is repugnant in the interests of justice.¹⁴² The court ordered a new election with each member receiving a written notice of the place, time, date and hour of the election not less than ten days prior to the election. Therefore, the court established a notice requirement without regard to whether or not an association's bylaws required such notice.

Postponed election meetings

With the exception of meetings that have not achieved quorum, elections conducted at postponed meetings are invalid if bylaws do not allow for such a postponement. In *Strah v. Lake County Humane Society*, a nonprofit corporation's board election was held invalid because, according to bylaws, the board lacked authority to postpone annual meetings.¹⁴³ The bylaws stated that the annual meeting of the voting members must be held on the tenth day of June every year.¹⁴⁴ The bylaws also stated that special meetings of the members may be held at any time upon the call of the president, a majority of the board, or upon written request of at least ten percent of the voting members. At three separate board meetings, the board postponed the annual meeting of voting members, and eventually scheduled the annual meeting on August 13.¹⁴⁵ The court held that the ensuing elections were invalid because the bylaws did not state that annual meetings may be postponed or that special meetings may substitute for annual meetings.¹⁴⁶ The court further explained that an election or reelection of a director can only be done at annual meetings unless a director resigns during his or her term. Because the facts of this case did not involve a resigning director, the court ordered a new election on June 10 the following year with incumbents retaining their positions until

that election.¹⁴⁷ Therefore, board members may not act in excess of their authority as granted in the bylaws. Annual voting meetings must be held as designated in the bylaws and any alteration from the dates specified must be provided for in the bylaws.

Special election meetings

Members waive the right to contest the results of a meeting called without following the exact procedures required by the association's bylaws if notice of the meeting was received and the meeting was attended without protest.¹⁴⁸ In *In re Stylemaster Dept. Store*, former directors moved to set aside an election of new directors claiming that since the board did not formally agree to the special voting meeting, the secretary never had the authority to send out the meeting notices.¹⁴⁹ In response to a stockholders' request that a meeting be held to elect a new board of directors, the secretary subsequently sent out notices to the stockholders specifying the purpose of the special meeting. The board of directors attended and participated at the meeting at which they were replaced as board of directors. The replaced board then brought suit, claiming that they had never approved the special meeting. The court held that by actively participating in the meeting, the former directors impliedly assented to the special meeting and could not subsequently object to election results merely because the board did not formally vote on the decision to hold a meeting.¹⁵⁰ Thus, attendance and participation at a special meeting called without following bylaw requirements will be viewed as assent and will relinquish a member's right to oppose the meeting. To avoid waiving rights inadvertently, an association's board of directors or members should be sure to address controversial questions immediately and attempt to obtain timely relief through the administrative remedies provided for in the bylaws.

IV. SUMMARY

This article has outlined how association members may exercise their right to challenge elections and how to resolve these challenges. Although guides to parliamentary procedure will provide direction for how to conduct association votes, an association's bylaws will take precedence and should be consulted first. If a member or an association president believes that the outcome of a vote needs to be verified, the individual may 1) request that a vote be retaken; 2) call for a division; 3) move to reconsider a vote; or 4) challenge the vote count. Once a valid challenge is made, the president may resolve the challenge by ruling on the issue or by delegating the task to a committee or to the membership. When resolving election challenges, case law, applicable statutes, adopted parliamentary procedure as well as the association's bylaws must be consulted and complied with. New elections may be ordered by the court for any of the following reasons: 1) if the election violated bylaws, applicable statutes, or general parliamentary procedure; 2) if members were given inadequate notice; 3) if proxy votes were improperly ignored; or 4) if election meetings were illegally postponed. However, if the violations would not have affected the result of the original vote, a new election will not be required.

Adversarial association election challenges are more common than most would assume. When they occur, it is of utmost importance that the association board respond to the complaints quickly and fairly to create the perception that the board operates honestly and with the members' welfare in mind. The more confidence an association's membership has in its board of directors, the easier election challenges can be resolved. Above all else, a board of directors should address common election issues before an election is held and implement written election procedures to cover nomination procedures, ballot voting, proxy solicitation, and meeting procedure. In this manner, written election procedures can serve as an impartial authority to determine the answers to challenges that arise during an association election.

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