

# APPENDIX:

## CONTROLLING PROXY ABUSE

**THE USE OF PROXIES IS UNIVERSAL.** The abuse of proxies is nearly as pervasive. Because of apathy and absentee owners, proxies are frequently used by community associations for voting and to achieve quorum. But there is a great potential for proxy abuse in community associations—even to the extent of falsification and forgery.

A proxy is a written authorization by one person giving another person or persons the power to represent and vote on his or her behalf. The primary problem comes when people abuse what is intended to be a beneficial practice in order to control the outcome of an election or a vote.

Community associations do not have to be at the mercy of aggressive vote collectors or expert forgers. Depending on statutes or association governing documents, there are a number of ways to control proxy abuse and ensure the integrity of an election or important vote, while still achieving quorum.

### **THE FUNCTIONS AND LIMITATIONS OF PROXIES**

Given a general proxy, the holder is authorized to vote as if he or she were the person

or persons giving the proxy. The proxy holder's only duty is to vote—or, even, to abstain—as the proxy holder sees fit, not to vote as the giver might have voted had he or she been present. Thus, the grant of a general proxy is an act of trust—trust by the proxy giver in the judgment of the proxy holder. The giver may think that he or she has an arrangement with the holder that the holder will vote in a certain way, but the holder is not legally bound by that “understanding” unless it is reflected in the written proxy instrument.

A proxy holder can be bound to cast the proxy vote in a certain manner by use of a directed proxy. 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 the task of recording the vote of the proxy giver. A directed proxy can even mandate abstention. An example is a proxy that is designated to be used only for the purpose of establishing a quorum: such a proxy directs that the proxy holder abstain from voting the proxy on any and all issues that come before the body. Be careful, though, as abstention always means that one

is giving the right to decide to someone else.

Most directed proxies are really partially directed and partially general. It is typical for the proxy giver to direct the vote on some or all of the matters that are expected to come before the body, but to grant general powers to the proxy holder for all other matters. The only way the proxy giver can control his or her proxy on unanticipated matters is to direct abstention on all matters not specifically covered by the directed proxy.

Many associations confuse the issue by distributing what they label a "proxy/ballot." Although it is sometimes difficult to tell exactly what the association intends to do with this instrument, the drafters usually intend to create either a directed proxy or an absentee ballot. The only practical distinction between the two is that the latter is normally accepted by the association without the necessity of a middle man, the proxy holder. There may be a legal distinction, however. Depending upon local law and the governing documents, an absentee ballot may not be useable to establish a quorum at the meeting, whereas a proxy would.

The one other factor that might dictate the use of both a proxy and an absentee ballot is that proxies usually have a time limitation unless a tenant or a mortgagee, in which case the time limitation is sometime waived. If an association must hold a meeting, it may be better served by use of both a proxy (for quorum purposes) and a ballot (for voting purposes). These two instruments should be separate and distinct, with the

appropriate execution of each instrument required, but may be contained on a single sheet of paper. Keep in mind that a ballot may have its own set of limitations imposed by statute or the governing documents, however, and may be revocable like a proxy. Most proxies may be revoked in writing prior to the time when the vote is cast or by attendance of the proxy giver at the meeting for which the proxy was granted.

Although not a panacea, requiring the use of directed proxies can greatly reduce the incidence of proxy abuse and election skulduggery. It nonetheless allows the "proper" solicitation of proxies so that a quorum is had and the association is permitted to conduct its lawful business. If the proxy giver indicates his or her preference via the directed proxy in the election of directors, for example, it will enhance the election of those candidates whose views most closely coincide with those held by the voters, and no individual or group can show up at the meeting with the power to decide the election unless they have actually convinced enough proxy givers to vote for those candidates. Use of directed proxies for a meeting at which an election will be conducted virtually requires that a slate of candidates exist prior to distribution of proxies. This, in turn, requires that the process be thought out and organized well before the date upon which notice of the meeting is sent. Many associations establish formal nominating committees that solicit nominations, determine the nominees' willingness to serve if elected,

procure from the nominees their biographies and platforms, and present the board with a neat package for delivery to the owners. Unless the election process limits nominations only to those made through the nominating committee—which may be perfectly acceptable with proper authority—owners should be allowed to submit write-in candidates on their directed proxy. Note that the single greatest disadvantage to the use of directed proxies is that those candidates nominated from the floor at the meeting cannot be considered by those voting by proxy.

#### **ESTABLISHING CONTROLS**

Requiring and accepting only one “official” proxy form is another means of curbing proxy abuse. Use of an official form eliminates the necessity of checking each proxy to determine if it is legally sufficient, although it will still be necessary to check each official form for proper execution. The official form can also be marked, numbered, or printed on a special colored paper to help prevent abuse. Some associations use a variety of labels or colors to identify specific percentage interests so that the tabulation process is easier and more error-free. Finally, use of an official form can help eliminate proxy challenges by rival factions at a meeting. Another control is to limit those to whom a proxy may be given. It is quite common, for example, for proxy holders to be limited to other unit owners. Other limitation schemes include unit owners, tenants, and mortgagees. Some only allow the board and management to hold

proxies on the assumption that the board and management will be neutral. This, of course, is fallacious reasoning, as the board and management often have a vested interest in the outcome of an election or vote.

Limiting the number of proxies that any single individual may hold can thwart the person who otherwise would show up at the meeting with the election in the bag. If, for example, a person may only control his or her own vote plus two proxies, and 100 votes are necessary to win the election, then at least 34 persons must actually vote for a successful candidate.

#### **PREVENTING FORGERIES AND ALTERATIONS**

Although directed proxies will ensure that the proxies reflect the opinions of their original holders, that is not the end of proxy abuse. Often people will attempt to accumulate proxies by forging or altering them.

So how do you prevent forgeries? There are numerous types of controls. For example, some associations require that proxy signatures be witnessed by someone other than the proxy holder. This would seem to discourage forgeries, but for the forger, two signatures are just as easy to forge as one. Some associations impose a requirement that proxies be notarized, but this can have a chilling effect on an association’s ability to achieve a quorum. Most people who do not plan to attend the meeting in the first place certainly will not make the extra effort to have their proxy notarized.

The best way to limit forgeries is to establish signature cards for each owner, much like those used by banks. With the card system, each proxy signature can be checked against a signature on file to determine its authenticity. Some associations also require that both the owner's Social Security number be on file, and that the proxy contain the Social Security number as well. Usually, however, the signature is enough: one does not have to be a handwriting expert to recognize most forgery attempts. And once the signature card file is established, its mere existence discourages forgeries.

The signature cards are executed in person before an association officer or the management agent, usually at a time unrelated to a pending meeting. For example, some associations generate signature cards at the same time they process pool passes. They may even have the pool pass double as a signature card. Another way of generating the cards is by making it part of a "welcome wagon" process as each new owner moves in. Signatures may be obtained simply by establishing a rule that no proxy will be validated unless the owner has a signature card on file. Establishing controls against altered proxies is somewhat more difficult, as many people make mistakes in filling out the proxy or change their minds halfway through the process, resulting in erasures or cross-outs. It is simple enough to require that all proxies be filled out in ink, and an easy matter to compare changes to determine if the same writing instrument was used. It may even be

appropriate to have a bright light available at a meeting so the proxy can be held up against it to determine if some other type of alteration exists. Many types of alterations can be discouraged by the one official proxy scheme discussed earlier, especially if special papers or numbering systems are used.

#### **CHECK THE BOOKS**

The use of some or all of these proxy abuse controls may depend upon local statutes and the association's governing documents. The provisions governing the use of proxies vary widely. It is also important to make sure the laws have not changed, as the document provisions that you may be relying upon may have been overruled. Every association contemplating the adoption of proxy controls should seek legal counsel to determine its authority to do so and the proper vehicle to be used.

It is an unfortunate fact that most associations are forced to use a proxy system to conduct business. It is also an unfortunate fact that abuses will occur. With a little thought and proper planning on the part of the board and management, however, most abuses can be controlled so that the system retains a high level of integrity.

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