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Community Association Voting: Evolving Trends in Membership
Elections of Directors and the Authorization of Corporate Action

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Community Association Voting: Evolving Trends in Membership Elections of Directors and the Authorization of Corporate Action

**David J. Graf, Moeller Graf, P.C.
and
Steven S. Weil, Berding & Weil LLP**

I. INTRODUCTION

Voting is one of the most important rights reserved to the members of a community association. The action most commonly voted on by members is the election of directors. Once the directors are elected they have tremendous latitude and power to operate the business of the association so the integrity of their election is especially important. For practitioners, all elections are important because the legal, political and financial stakes for our clients can be high.

This article, drafted by a Colorado attorney and a California attorney, is intended as an overview of statutes and cases throughout the country addressing a wide range of voting issues: those relating to board operations with an emphasis on the election of directors, votes to authorize amendments to the governing documents, or of votes to increase assessments. What emerges from the authorities cited is that each state has its own way of approaching voting requirements, challenges associated with voting, and mistakes that may have been made in the voting process. Some courts apply restrictive statutes literally; others are more liberal and will lean towards sustaining a vote when supported by a majority of the members. Also interesting is how the different states have different membership approval requirements; sometimes they are obvious and other times they are less clear. One thing that is clear is the need for legal counsel to help guide a board about these issues before a vote happens so that the voting requirements can be known and met. Before delving into an analysis of membership votes, we start with a discussion about board powers relative to issues that traditionally are adopted by a member vote.

II. DECISION MAKING AND AMENDMENTS WITHOUT MEMBERSHIP CONSENT

We are all familiar with the rule that except as otherwise provided by statute or the governing documents of an association, its decisions are made by its board. Restatement (Third) of Property: Servitudes § 6.16 (1998); the rule is the same in Nevada and California. See NRS § 116.3103; California Corporations Code (hereafter "Corporations Code") § 7210. A board will usually have authority over enforcement, discipline, rules-adoption, construction, repairs, loans, contracts and dispute resolution. This authority does not generally include amendments to the governing documents which typically require the consent of sixty-seven percent (67%) of the membership. See Uniform Common Interest Ownership Act ("UCIOA") § 2-117(a) (2008) and UCIOA § 3-103 (2008). California has different rules. Generally, the declaration can be amended as authorized by its own terms *or* as permitted or as required by the Davis-Stirling Common Interest Development Act (California's statutory scheme that regulates condominiums, "planned developments", housing cooperatives and community apartment projects). The Act,

and California Civil Code (hereafter “Civil Code”) §4000 et seq. *requires* a board, on its own vote, to eliminate discriminatory covenants. Civil Code § 4225. It *permits* a board, with the approval of a “simple majority” of members, to delete declarant marketing and construction provisions when those activities have concluded. Civil Code § 4230. The Act does not prohibit a board from adopting amendments to a declaration without the approval of the members. The following is an example of a provision that would create that power:

“Subject to any applicable (Mortgagee consent) requirements...upon advice of legal counsel licensed to practice law in the State of California and further provided such counsel drafts appropriate amendatory provisions, the Board shall have the authority without the requirement of Member approval to amend any provision of the Declaration (i) to resolve any conflict between the Declaration and applicable law which may arise due to the enactment or amendment of a statute or due to a development in applicable case law or (ii) to conform the provisions of the Declaration to changes in applicable statutory law that impose requirements that are non-discretionary in nature.”

The validity of this provision has not been tested. Nevertheless, in states where the adoption of new legislation frequently results in conflicts between legal requirements and a community’s governing documents, this type of flexible and cost-efficient amending provision should be considered to reduce disputes concerning membership rights or board responsibilities.

III. **VOTING PERCENTAGES NEEDED FOR MEMBERSHIP APPROVAL**

Throughout the country there are numerous formulas applied in determining whether action voted upon by the members has been approved. They include:

A. Specified percentage/super majority: This is analogous to the UCIOA requirement that amendments to the declaration require the approval of sixty-seven percent (67%) of the votes in the association. In an association with 500 units, this would be 335 affirmative votes.

B. Absolute majority: This is more than fifty percent (50%) of the members or number of units or lots in an association (depending on how the voting provision is defined). The “denominator” of a fraction of votes required is based on the total votes in the association as opposed to those votes “cast” at a meeting or that number of owners appearing at a meeting at which a quorum is present. In that same association with 500 units, this would be 251 affirmative votes required. Corporations Code § 5033.

C. Majority of a quorum: This can refer to a majority of votes cast once a quorum has been established. Corporations Code § 5034. If in that 500 unit project, the quorum was twenty-five percent (25%) of the units, the minimum affirmative vote needed to authorize action would be 63 ($.25 \times 500 = 125/2 + 1$). Care must be taken to determine whether the voting requirement is votes *represented* at the meeting or votes *cast* at the meeting.

D. Majority of a class: UCIOA § 2-107 (2008) states that a declaration may provide for class voting on specified issues affecting the class to the extent necessary to protect the

valid interests of that class. This statute also addresses rules that minimize the declarant's power to use class voting to unreasonably interfere with the rights of the non-declarant owners.

E. Majority of all "owners": (more than one vote per unit when the unit has multiple owners on title) this situation would typically only result with sloppy drafting and the utter failure to state somewhere in the governing documents that there would be one vote (or one weighted vote) per unit. Incredibly, this sometimes does occur. It can result in unfair results in voting when the unit that happens to have multiple owners has more voting power than the owners of other units. The following language in the Restatement may be of value in this rare circumstance: Except as otherwise provided by statute or the declaration, votes are allocated to members on the basis of the number of units owned that are subject to an obligation to pay assessments. One vote is allocated to each unit. Unless a contrary interpretation is required by statute or by the governing documents, the requirement for approval by a certain percentage of "owners" means approval by that percentage of votes. Restatement (Third) of Property: Servitudes § 6.17 (1998).

F. Delegate voting: Depending on the nature and size of a community, delegate voting may be appropriate. The community may be divided into specific "delegate districts" that will elect one or more delegates to vote on matters affecting the community. There are several ways of determining the voting authority each delegate will have. For example, a delegate may simply be authorized to vote in accordance with the votes cast for or against a particular candidate or action in the delegate district meeting at which the delegate was elected; or the delegate may be authorized to vote as he or she thinks best on behalf of the number of votes cast in the delegate election or, on the other hand, based on the total number of votes in the district.

The system is advantageous because it provides a streamlined association voting procedure where a typically well-informed group of delegates are able to vote in a manner they believe represents their delegate district. It also creates a liaison between the Association and the Board of Directors of a sub association, if there is one that acts as a delegate district, or the delegate district members. The disadvantage of such a system is that it can be complex for numerous smaller delegate districts to administer and may cause residents to believe that their vote is diluted or distant from the decision-making group at the Association Board level.

G. Quorum. A quorum is the minimum number of votes required to authorize official action. Under UCIOA § 3-109 (2008) owners entitled to cast twenty percent (20%) of the Association's votes are present in person or by proxy or have cast absentee ballots constitute a quorum. The 2008 amendments to UCIOA § 3-109 contain significant latitude for associations to use a mixture of in-person voting, proxies, and absentee ballots for voting and to establish quorum. This latitude also exists in the quorum provision of UCIOA, UCIOA § 3-109 (2008), to account for the use of absentee ballots. In many states and in the above – cited provision of UCIOA regarding quorum, a statutory default quorum is provided but is usually subject to whatever might otherwise be provided in an Association's governing documents. In Florida, the minimum statutory quorum for condominium associations is a majority of the voting interests and in homeowner associations it is thirty percent (30%), and in both cases, it is subject to whatever lower percentages are set forth in the governing documents. Florida Statutes § 718.112(s)(b)(1); § 720.306(1)(a). For incorporated nonprofit associations in California, the statutory default is one third (1/3) of the voting power (Corporations Code § 7512) but to impose

member-approved assessment increases or special assessments, the minimum quorum is an absolute majority of the owners. Civil Code § 5605.

H. Pitfalls. Advising our clients to assure a proper vote requires our understanding of what quorum and voting requirements apply for what votes and under what codes. Lack of attention or sloppy drafting can lead to harsh results. In *Baker v. Berryhill Farm Estates*, 125 P.3d 1090 (Kansas App. 2006), the association's bylaws required 25 "present active members" to attain quorum. The bylaws also provided that voting could be cast by owners present in person or by proxy. At that meeting, while there are over twenty-five (25) owners present by proxy, the Court determined they did not count towards attaining quorum and the meeting was held to be invalid.

Strict judicial compliance with voting requirements is not uncommon even where it may seem counter-intuitive or harmful to addressing sensible community needs. *Levanger v Vincent* 3 P.3d 187 (Utah App. 2000) proves the point. The association conducted a vote to update its CC&Rs which were over twenty (20) years old. The revised documents were submitted to members at the 1994 annual meeting. All of those attending approved the amendment but this was less than a majority of all association members. The vote was extended and counsel prepared a letter to all members urging them to vote. The letter contained a copy of the amendment and a ballot. At the 1995 annual meeting, the association announced that a majority of the ballots were cast in favor and the amendment was recorded. Plaintiffs sued, seeking to set aside the amendment arguing approval could only be achieved by a vote taken at a meeting. The CC&Rs themselves did not specify a voting procedure. The state's corporation code required action by members at annual or special meetings of members; it authorized action by written ballot but only upon the written consent of all members. The trial court found that the meeting/balloting procedures "substantially complied" with the statute. Citing an earlier case, the appellate court disagreed, stating the following:

"When determining whether substantial statutory compliance as opposed to strict statutory compliance should be permitted, we must...ascertain whether full protection under the statute would still be enjoyed by the party the statute seeks to protect. If 'substantial...compliance satisfied the policy of the statute[.]' then strict compliance is not in order."

The appellate court determined that the statute requiring that association members act only at a duly called meeting protected the interests of the members "where free discussion and dissent can be heard. Absent a meeting, the homeowners' consent must be unanimous."

A Utah court reached a different conclusion in *Park West Condominium Association v Deppe*, 153 P.3d. 821 (Utah App. 2006). The Utah court applied the same rule to set aside a mailed ballot vote to approve a special assessment even though it was authorized by the CC&Rs. The Court reasoned that the CC&Rs cannot trump the corporate statute that required action at a meeting or by unanimous consent.

IV. VOTING METHODS

A. Voting in-person or by Proxy

Depending on the state, the applicable statute and the specific provisions of an association's governing documents, voting can often be conducted in person at a meeting, by proxy, written ballot or some other combination.

Many state statutes appear to follow long standing corporate law and permit voting to be conducted at a meeting in person or by proxy. Section 7.2 of the Model Nonprofit Corporation Act (Third Edition, 2008) indicates that unless the Articles of Incorporation or Bylaws provide otherwise, a member may vote in person or by proxy. Also see UCIOA (2008) §3-110. The proxy may be directed or undirected under UCIOA § 3-110(c)(1).

UCIOA was amended in 2008 to say that unless otherwise set forth in the declaration or bylaws, no one person may cast undirected (general) proxies representing more than fifteen percent (15%) of the votes in an association and such proxy is only valid for that one meeting or any adjournment of that meeting. UCIOA § 3-110(d)(5, 6) (2008). "Proxy voting has been the subject of some controversy in the states, primarily as a consequence of some unit owners seeking to collect very large numbers of undirected proxies to be cast at meetings or contested matters are to be voted upon." UCIOA § 3-110 (2008), comment # 4. This change is helpful because it encourages owners to direct their proxy to the extent that voting issues are known at the time the proxy is distributed. The problem with this restriction is that the homeowner contemplating giving a proxy has no assurance that their designated proxy will have proxies representing less than fifteen percent (15%) of the votes in the Association at the time of the meeting. Therefore, the owner has no way of determining whether their proxy will ultimately be valid. Furthermore, if the proxy provides that there is full power of substitution, then the proxy holding more than fifteen percent (15%) of the votes in the Association may easily assign proxies and defeat the attempted protection from the fifteen percent (15%) limit.

Arguments about proxies have led to some interesting cases. In *Barcia v. Fenlon*, 37 A.3d 1 (Pa. Cmwlth. 2012), the bylaws did not address proxy voting one way or another. Applicable state law allowed proxy voting only if authorized in the bylaws. Therefore, the court held proxy voting was not properly exercised by the members of this Association. However, because those challenging the vote solicited and voted proxies for a meeting held to remove certain directors, the court held that equitable principles prevented them demanding that the proxy votes be voided. This case is one to cite when facing a "strict constructionist" court that would be inclined to literally apply the voting requirements that otherwise apply (like the court in *Trusteeship of Woodland Lakes Inc. supra.*).

B. Concerns with Voting by Absentee/Written Ballot

In-person voting and proxy voting is extremely common in association elections throughout the country. What is less common, though, is for an association to mix the use of proxies, in-person votes, and absentee (mail-in) ballots to be used at a meeting. The Model Nonprofit Corporation Act, § 7.09 (2008), says that unless otherwise "restricted" by the Articles of Incorporation or Bylaws, any action that may be taken at any meeting of members may be taken *without* a meeting provided that the ballot contains the specified voting information and the ballot otherwise complies with applicable statutes. Additionally, § 7.22 of the Model Nonprofit Corporation Act states that, unless otherwise provided in the Articles of Incorporation or the Bylaws, a member may vote in person or by proxy.

The question is whether a member may be “present” by written (absentee) ballot without an enabling statute authorizing this type of voting practice. If the applicable state statute is modeled on § 7.09 of the Model Nonprofit Corporation Act (which contemplates action taken by written ballot where no meeting is held) then there is a decent argument that voting by absentee ballot would only be appropriate where there is no meeting held where votes may be cast (other than a meeting held only to count ballots). The better practice where there is no clear statutory authority is not to use absentee written ballots at a meeting where votes may be cast.

The California process presents an “either/or” voting scenario. Either a meeting is held, with voting permitted in person or by proxy or there is no meeting and members vote by mailed written ballot. When voting is by mailed written ballot, there is no meeting, no member attendance and no proxies. The written ballots must contain specified information to serve as a substitute for what would otherwise be obtained in the notice of meeting or at the “check in” table at a meeting: the name and address of the member and the quorum and voting approval requirements. Corporations Code § 7513. Since 2006, these two voting options do not apply to the most important of association votes; the election and removal of directors, governing document amendments, member-approved assessment increases; or conveyance of certain easements. In those cases, voting is required by secret “double envelope” written ballots although proxies may also be used. Civil Code § 5115.

C. Enabling Authority for Absentee/Written Ballot

Some states such as Virginia, Washington, and Texas have statutes, whether for planned communities, condominiums, or both, to authorize electronic voting and/or absentee ballots to be cast electronically. UCIOA was amended in 2008 to expand “the available procedures for voting, to include absentee ballots and voting without a meeting by electronic means or paper ballot.” UCIOA § 3-108, comment #4 (2008). “The 2008 amendments acknowledge in several places that the ‘town meeting’ model for unit owner meetings – in which only those in attendance may vote - is no longer suited to a considerable number of communities, particularly larger communities and communities made up largely of second homes.” UCIOA § 3-108, comment #4 (2008).

UCIOA’s § 3-110 was notably amended in 2008 to provide that unless prohibited or limited in the declaration or bylaws, unit owners may vote at a meeting in person, by absentee ballot, by proxy or, when a vote is conducted without a meeting, by electronic or paper ballot. This statutory language is certainly designed to promote inclusiveness and convenience in voting. Having a mix of in-person votes, proxies, and absentee ballots can cause some confusion among those homeowners who have cast their ballot based on information that was complete when the ballot was cast but later becomes incomplete based on events occurring at the meeting. Roberts Rules of Order (“RONR”), 11th Edition, addresses this at page 423 as follows:

"An organization should never adopt a bylaw permitting a question to be decided by a voting procedure in which the votes of persons who attend the meeting are counted together with ballots mailed in by absentees. The votes of those present could be affected by debate, by amendments, and perhaps by the need for repeated balloting, while those absent would be unable to adjust their votes to reflect those factors. Consequently, the absentee ballots would most cases be on

a somewhat different question than that on which those present were voting, leading to confusion, unfairness, and inaccuracy in determining the result."

This issue, though, is no different than when an owner would direct their proxy to vote for a specific issue in a certain way. To the extent that the measure is amended at the meeting, owners who are not present lose the ability to change their vote based on such amended measures.

The Texas statutes cited below appear to handle this issue reasonably clearly, although the statute relative to this specific issue results in the absentee ballot being disqualified if the issue being voted on was amended at the meeting or was otherwise not identical to the issue as presented in the ballot. This raises the question of the ability of a majority of owners present at a meeting being able to amend an item before the owners for a vote, resulting in the possible disqualification of all of the votes that had been cast by absentee ballot. The possibility of such tactics makes proxy voting, which is authorized with absentee ballot voting in the Texas statute, seem relatively attractive in comparison. At least with a proxy, there is a human being (the proxy) who is able to attempt to carry out what the proxy believes is the desire of the appointing member when the measure is amended at the meeting. For an association where numerous votes by absentee ballot would be cast, it might be sensible to prohibit amendments to measures after the notice of the meeting and absentee ballots have been distributed. Whether this can be done in any particular case will depend on the state's corporate statutes.

Florida has relatively recent amendments to its statutes regarding the election of directors. In Florida, condominium association directors may, as in California, only be elected by written ballot using the "two envelope system" described in Robert's Rules where the inner envelope contains the voted ballot with no identifying owner information. [See RONR (11th ed.), pp. 424-425 for a general description of the two envelope system]. Two notices of the meeting must be sent to all members during specified time frames; during those periods, the Association obtains candidate information sheets from all interested candidates which are then mailed out to the membership with the ballot containing the names of those candidates. At the annual meeting, the outer envelopes, which have owner identifying information, are compared with the Association's owner roster before they are opened to obtain the inner envelopes containing the ballots.

This system has several benefits. Members are virtually guaranteed that their votes will be secret; all members receive the same information at the same time; and there is a durable and verifiable process for eliminating duplicate votes. But this system also has drawbacks: it does not automatically result in the members being in one room to discuss the candidates, their qualifications, and beliefs; the number of deadlines could cause some Boards to administer the voting incorrectly and create uncertainty as to the validity of the election; and it is unclear what happens when a candidate presents a fictitious or erroneous candidate information sheet. The statute states that the association is not liable for the contents of the candidate information sheet but that would not remedy the fact that candidate may have been elected under false pretenses. In some states, the teller (known in other states as the "inspector of election") can (or must) determine voter qualifications (e.g. Civil Code § 5110) but this should be done prior to the distribution of ballots or proxies or initiation of the voting process. Declaring a candidate unqualified after the election undermines membership confidence in the fairness of the election and invites challenges.

D. Electronic Voting by the Board

Laws regulating association voting procedures universally lag behind advances in technology. Still, there is some movement toward electronic voting for decisions made by Board and those made by members.

The Colorado Revised Nonprofit Corporation Act, C.R.S § 7-128-202, was amended in 2009 to authorize board action without a meeting provided certain conditions are met. Notice must be “transmitted” to each director; the action must be authorized by the time stated in the notice and by the same number of approvals as would have been required had the action been proposed at the meeting; and, no director objects to action by written consent. The notice must contain specific information relative to the vote and the time by which a response is required. The 2009 amendment eliminated the requirement that the action be approved by all directors. However, nearly all association bylaws written prior to this amendment still require unanimity in voting without a meeting and the amended statute allows the bylaws to “provide otherwise” regarding this issue. While the statute is helpful for Boards to do business expeditiously, it does not promote transparency or allow owner input prior to the vote being taken.

Other states have addressed this issue differently. The Texas Residential Property Owners Protection Act, § 209.0051, entitled “Open Board Meetings,” first defines what a Board meeting is and is not. It states that a “board meeting” is a deliberation between a quorum of the voting board of the property owners association (“POA”) or between a quorum of the voting board and another person during which POA business is considered and at which the Board takes formal action. It also states that a “board meeting” does not include the gathering of a quorum of the board at a social function unrelated to the business of the Association or the attendance by a quorum of the board at a regional, state, or national convention, ceremonial event, or press conference, if formal action is not taken and any discussion of association business is incidental to the social function, convention, ceremonial event, or press conference. The statute provides that regular and special board meetings shall be open to the members. The Texas law allows a Board to vote “electronically” (meaning, probably by telephone or video capability) so long as each director can hear and identify each other. And, as in the traditional corporate context, a Board in Texas may vote by unanimous written consent (which presumably would include in response to a proposed motion sent via email, the vote “Yes” or “I agree” or even “Me too”) but only for “routine and administrative matters or a reasonably unforeseen emergency or urgent necessity that requires immediate board action.”

California formerly permitted association directors to vote by unanimous written consent without a meeting until adoption of a “sunshine law” substantially based on principles contained in laws relating to the holding of local public agency meetings. Under the “Common Interest Development Open Meeting Act” (included within the Davis-Stirling Common Interest Development Act) a board can only act at a duly noticed meeting except that written (including electronic) consent may be used in the case of a bona fide emergency. Civil Code § 4910. The emergency must be one that requires action sooner than notice of a board meeting can be posted or given to the membership at large, meaning, sooner than two (2) days (for action authorized in executive session, like a litigation decision or contract formation) or four (4) days (for anything else).

E. Electronic Voting for Action by Members

This is a hot issue, as many states' corporate statutes contain language that provides that action to be taken by members without a meeting may only occur with their unanimous consent. In those states, it would be prudent to use electronic voting methods in conjunction with a physical meeting held where votes may be cast. To conduct a wholly online election in a state that requires unanimity of votes gives rise to the potential for challenge. However, used in conjunction with a meeting where votes may be cast, and where allowances can be made for owners without technological ability, electronic voting can reduce association voting costs and increase owner participation. It is important that the state statutes be examined carefully for authorization for electronic voting. The Model Nonprofit Corporation Act (2008) provides at § 1.40(62) that a "vote" includes the giving of consent in the form of record without a meeting. Section 1.40(53) defines a "record" as information that is inscribed on a tangible medium or that is stored in an electronic or other medium that is retrievable in perceivable form.

Virginia's common interest community statutes (both the Condominium Act and Property Owners Association Act, Va. Stat. §§ 55-79.71:1 and 55-513.3) allow the "use of technology." These statutes generally say that unless the association's documents expressly provide otherwise, any notice required to be sent or any signature, vote, consent or approval required to be obtained may be accomplished using the "most advanced technology available at the time" if such use is a generally accepted business practice and the vote can be recreated in a writing. The statutes expressly authorize electronic transmission over the Internet, a computer network, a facsimile machine and by email. An electronic signature satisfies any requirement for a signature under any declaration or bylaw provision.

The Virginia statutes also have required "non-technology alternatives" for those members who do not have the "capability or desire" to conduct business using electronic transmission. In such case, the Association shall make reasonable accommodation for such members, at the Association's expense, so that the members not using technology may be included without the use of technology.

Electronic voting is permitted in other states including Washington and Texas. For example, the Texas Residential Property Owners Protection Act contains several provisions regarding electronic voting. Section 209.0058 states that electronic votes cast under section 2.09.00592 constitute "written and signed ballots."

Texas Property Code, § 209.00592, indicates that the voting rights of an owner may be cast or given:

1. In person or by proxy at a meeting of the POA;
2. By absentee ballot in accordance with the statute;
3. By electronic ballot in accordance with the statute; or
4. By any method of representative or delegate voting provided by dedicatory instrument.

This statute states that an absentee or written ballot:

1. May be counted as an owner present and voting for the purpose of establishing a quorum only for items appearing on the ballot;
2. May not be counted, even if properly delivered, if the owner attends any meeting to vote in person, so that any vote cast at a meeting of a property owner supersedes any vote submitted by absentee or electronic ballot previously submitted for that proposal; and
3. May not be counted on the final vote of a proposal if the motion was amended at the meeting to be different from the exact language on the absentee or electronic ballot.

A solicitation for votes by absentee ballot under the statute must include:

1. An absentee ballot that contains each proposed action and provides an opportunity to vote for or against each proposed action;
2. Instructions for delivery of the completed absentee ballot, including the delivery location; and
3. The following language: *“By casting your vote via absentee ballot you will forgo the opportunity to consider and vote on any action from the floor and these proposals, if a meeting is held. This means that if there are amendments to these proposals your votes will not be counted on the final vote of these measures. If you desire to retain this ability, please attend any meeting in person. You may submit an absentee ballot and later attend any meeting in person, in which case the in-person vote will prevail.”*

The nullification of ballots cast prior to an amendment on the measure gives rise to the potential for gamesmanship to cause the invalidation of votes. This is a difficult proposition to accept. Some will argue that it is the trade-off that an owner suffers for the convenience of not attending the meeting. Furthermore, the Texas statute does not require voting by absentee ballot and owners are still free to designate a proxy of their choosing. However, any time that a more-than-inconsequential number of legitimately-cast owner votes are invalidated, the credibility of the vote and the integrity of the process are severely jeopardized.

The Texas statute defines an “electronic ballot” as a ballot:

1. Given by:
 - a. Email;
 - b. Facsimile; or
 - c. Posting on an Internet website;
2. For which the identity of the property owner submitting the ballot can be confirmed; and
3. For which the property owner may receive a receipt of the electronic transmission and receipt of the owner’s ballot.

F. Confidential Voting

The issue of confidentiality in voting is on the rise. Given the potential for interpersonal conflict in a community, the members' belief that their votes will be known only to them is extremely important for free and fair elections. This need for secrecy, though, must be balanced by the need to verify the accuracy of the election. As discussed above the double envelope ballot system of voting used in Florida and California allow for secrecy in voting and verifiable election results because the voter's identifying information is separated from the ballot.

Additionally, votes that are cast at a meeting without identifying information are also able to be kept secret. The problem arises when a proxy, or even a directed proxy, are given by the non-appearing member. In such case, there is the potential that the member's vote will be made known.

For example, Colorado's version of UCIOA requires that votes for contested positions on the board, among other things, must be taken by secret written ballot. However, the statute also requires that an association keep and produce ballots, proxies, and other records related to voting by members for one year after the vote. Colo. Rev. Stat. § 38-33.3-310, 317. While the vote in such circumstance may be taken by a "secret ballot," that issue is rendered irrelevant if a member can review the directed proxies that were exchanged for ballots at the meeting.

Texas handles the issue of secrecy a little differently. Section 209.0058 states that any vote cast by a member in a Texas POA must be in writing and signed by the member. This means that as a practical matter, there is no secrecy in voting in Texas property owners associations.

V. WHO CAN VOTE? WHO CAN RUN?

A. Statutory Ban on Suspension of Voting Rights

In Texas, the right to vote is, for members of some associations in that state, sacrosanct. "A provision in a dedicatory instrument that would disqualify a property owner from voting in a (defined) property owners' association election of Board members or on any matter concerning the rights or responsibilities of the owner is void." § 209.0059(a). In other types of Texas associations, the association may not bar a property owner from voting "solely" because there is a pending enforcement action against the owner or if the owner owes the association assessments, fees or fines. Id. § 209.0055(b).

In other states, voting rights are not inviolate. An early New York case says:

"FREEDMAN, P. J.

"The plaintiff, the widow of one William Hughes, brought this action to recover the sum of \$100, alleged to be due her under the by-laws of the defendant association, which provided that said sum should be paid upon the death of a male member thereof in good standing. The plaintiff's husband died on the 4th day of February, 1899, and at the time of his death was a member of the defendant society. Section 11 of the by-laws of the defendant provides that, "on the death of a member in good standing, the sum of \$100 shall be appropriated

for his funeral expenses”; and further provides that this sum shall be paid by the society, through its officers or committees, to the “proper parties,” so as to “insure a decent and Christian burial.” Under this section, the plaintiff claims to be entitled to the sum therein specified.

It will be observed that the widow of a deceased member in good standing is not specially designated as the beneficiary, and also that the sum mentioned is expressly made applicable to funeral expenses. The record in this case is silent as to who defrayed the funeral expenses of the husband of the plaintiff, and, in the absence of such proof, the plaintiff is not entitled to recover (citation omitted). Moreover, the testimony is clear, as stated in the opinion of the trial judge in the court below, that the deceased was not a member in good standing at the time of his death, as prescribed by the by-laws of the defendant society, by which by-laws and rules the deceased must be regarded as having been bound (citation omitted). The judgment must therefore be affirmed.”

Hughes v Journeymen Horseshoer’s Protective Union and Benevolent Soc. of City and County of New York (1899) 29 Misc. 327.

In *How v Mars*, 513 N.W. 2d 511 (Neb.1994), association members claimed that the Nebraska Nonprofit Corporation Act statutes that permitted articles and bylaws provisions to deny voting rights to those who failed to pay dues were unconstitutional. With virtually no analysis, the state Supreme Court rejected the argument. The members would have had better luck in a “pure” UCIOA state, as the Act prohibits a Board from suspending the right to vote (or run for office) for non-payment of assessments. UCIOA § 3-102(a)(19) (2008). This prohibition does not exist in all UCIOA states. For example, in Nevada, the board may suspend a member’s right to vote without a hearing if suspension is based on nonpayment. Otherwise, the suspension requires the member be given the right to a hearing. NRS § 116.31031.

B. Suspension of Voting Rights Issues

In California, a due process hearing must be offered before the imposition of “discipline” (Civil Code § 5855) and if a *membership* is “suspended” (Corporations Code § 7341). No case yet analyzes the enforceability of bylaws which do not require a hearing for a suspension based only on nonpayment of assessments or fines. The argument that a voting suspension hearing is not required in the case of a delinquency succeeded in *Lynn v Windridge Co-Owners Association* 743 N.E. 2d 305 (Ind. App. 2001). Plaintiffs obtained architectural approval to expand their home. As permitted by the governing documents, the board then recalculated the plaintiff-members’ assessment based on the new larger size of the home. The members refused to pay the increase and the board suspended their voting rights as additional assessments kept piling up unpaid. The members argued that the suspension of their voting rights occurred without due process or a hearing as (was in fact) required by statute and thus the subsequently imposed assessments were therefore unlawful. The court rejected the connection (between suspension of voting rights and assessment liability) and specifically overruled the due process attack. The court said the members “cannot be allowed to benefit unjustly from their nonpayment of assessments” and, with what some might say was imaginative flair, observed that notice was provided because the articles of incorporation stated that members “shall” be suspended by majority vote of the Board for non-payment of dues.

The question of whether a hearing is required prior to suspension of rights can raise thorny issues for the practitioner. If the voting provisions say members *must* be in “good standing” to vote, is a Board *obligated* to suspend rights if they are not? What if the bylaws state that the board has the “power and duty” to suspend a member? Is that discretionary or mandatory? Must findings be made and hearings held prior to the date upon which voting rights are established (the “record date”)? Is a close membership vote vulnerable to attack if everyone may vote regardless of the status of their membership? These are the kinds of questions we must evaluate in helping a Board frame a voting strategy. Sometimes, the right to suspend might be useful to help achieve an objective reasonably deemed important by the board. In other cases, the board might not have the flexibility to permit or not permit members to vote. In any case, the analysis, advice and the board’s final decision should be made well prior to a voting campaign, the distribution of voting documents, preparation of proxies or the holding of a meeting to vote or elect directors.

C. Director Qualification Issues

In some states, director qualifications are dictated by statute. Under Florida law, for example, a member is precluded from seeking election to the board if delinquent in the payment of a “monetary obligation...for more than 90 days” although the validity of Board action is not affected if it is later determined the director was ineligible for Board membership. § 720.306(9)(b) Florida Statutes. Nevada, following UCIOA, takes a different tact. Under NRS § 116.31034 (8)(b), a member is not disqualified from seeking election but must disclose whether he or she has any unpaid and past due assessments or construction penalties required to be paid to the Association. The information must be provided with the other candidacy information and is distributed for the candidate to the association.

A recent California case permitted a board, without membership approval, to change the candidate and director qualifications. *Friars Village Homeowners Association v Hansing* (2013) 220 Cal. App. 4th 205. The board adopted a “relationship rule” that disqualified a candidate if they were related by blood or marriage to an existing director or candidate. The disqualified candidate claimed the relationship rule was unlawful because it violated a state law that permitted any member to self-nominate and was contrary to the governing documents which did not limit board service based on director relationships. The court sustained the rule asserting it was consistent with the board’s unilateral power to adopt rules concerning the business and affairs of the association and was intended to improve the performance of the board thus advancing the best interests of the association. By contrast, statutes based on the UCIOA rule, prohibit a Board from determining the qualifications, powers, duties, or terms of office of board members. See, e.g., 27A V.S.A. § 3-103 (Vermont).

VI. STATUTES OF LIMITATIONS APPLICABLE TO CHALLENGES TO GOVERNING DOCUMENT AMENDMENTS

Under UCIOA § 2-117(b) (2008), a challenge to the adoption of an amendment to a declaration must be brought within one year of recordation of the amendment. See e.g. W. Va. Code § 36B-2-117. This rule gives association leaders, members, managers and prospective purchasers a needed level of certainty in the conduct of association and personal affairs. In Florida, an action setting aside an amendment must be brought within five (5) years of recordation or five (5) years from discovery if the amendment limits certain specified mortgagee rights. § 720.306(1)(d)(6) Florida Statutes.

In California, an action to set aside an amendment must be brought within four (4) years of recordation. *Costa Serena Owners Coalition v Costa Serna Architectural Committee* (2009) 175 Cal. App.4th 1175. In this factually convoluted case, homeowners seeking to set aside amendments adopted in the 1980s and 1990s argued that the recordation “trigger” did not apply when an amendment was not authorized as required by the declaration. They argued that a writing confirming the vote recorded by the architectural committee (the body authorized to enforce the declaration) was inadequate. This “*void ab initio*” argument was rejected there and in *Schuman v Ignatin* (2010) 191 Cal. App. 4th 255, with both courts essentially holding that a flawed process at best made the amendment voidable (not void) and thus subject to the four (4) year rule applicable to the setting aside of written instruments. These cases stand for the proposition that the “recordation trigger” will not be applied if the challengers can show that the amendment itself was based on fraud in the inducement of the type that would be adequate to set aside a contract. The standard will typically be hard to meet. Also see the unpublished decision in *Reynolds v Auburn Country Villa Homeowner Association* 2013 WL 5838118 (2013) applying the same rule in a case challenging a rental restriction amendment.

A different conclusion was reached in *In America Condominium Association v IDC, Inc.* 844 A.2d 117 (R.I. 2004). There the Rhode Island Supreme Court determined that the amendment at issue was *void ab initio* and thus the traditional one (1) year statute of limitations for claims challenging an amendment did not apply. The state statute required every member to approve amendments that included declarant preferences; the amendment was approved by all master association members and the Boards of all the sub-associations. The court rejected the declarant’s argument that this constituted the required statutory unanimity and deemed the vote void, thus allowing the suit challenging it be brought under the state’s ten (10) year limitations period for civil actions.

In some courts, it may not matter whether the amendment was void or merely voidable. In *Godwin v Board of Directors of Bay Point Association* 82 Va. Cir. 215 (VA Cir. 2011), the Board adopted a resolution relating to physical damage and flood insurance. Thereafter the Board certified an amendment incorporating the terms of the resolution (the basis of which apparently resulted in an increased or additional assessment which was the subject of Plaintiff’s lawsuit). More than a year later, suit was filed. The objecting member argued that the amendment was not subject to the one (1) year statute of limitations because the amendment was “null and void”. The court disagreed saying that “[N]othing in the statute suggests that only *valid* bylaw amendments are subject to the one-year statute...the statute allows one (1) year to challenge the validity of *any* amendment, not just valid ones.” (italics in original).

VII. STATUTES OF LIMITATION APPLICABLE TO CHALLENGES FOR ELECTION OF DIRECTORS

UCIOA does not specify a limitations period for filing a challenge to an election of directors or the approval of other corporate action. In California, an action to challenge a vote (including whether balloting, timing, noticing and counting procedures were lawful) must be brought within one (1) year of the election. Civil Code § 4605. This creates some confusion because under § 7527 of the California Nonprofit Corporation law, an election or removal of a director is presumed valid, absent fraud, unless an action is commenced within nine (9) months.

Florida's condominium statute for the election of directors requires a challenge to an election be commenced within sixty (60) days after the election results are announced. § 718.112 Florida Statutes. In 2011, Texas law was amended to permit a member to demand an election recount within fifteen (15) days after the meeting. This statute, Texas Property Code § 209.0057, applies only to property owners associations in Texas. It requires that the association, *at the expense of the owner requesting the recount*, retain a qualified person - such as a current or former county judge, county elections administrator, justice of the peace, county voter registrar, or anyone else agreed to by both sides, to tabulate votes. The election recount must be completed within thirty (30) days after receipt of the request. If the recount changes the result of the election, the property owners' association must reimburse the requesting owner for the cost of the recount. This appears to provide an association with the latitude to choose the party who will recount the votes, even over the objection of the requesting owner, if the party has the qualifications set forth in the statute. Furthermore, given that an owner may not have a response to a records inspection request within ten (10) to fifteen (15) days after making the request, requiring a recount be demanded within fifteen (15) days after the meeting appears to be strict. Florida's condominium statute for the election of directors requires a challenge to an election be commenced within sixty (60) days after the election results are announced. § 718.112 Florida Statutes.

VIII. JUDICIAL POWER TO EXCUSE COMPLIANCE WITH VOTING APPROVAL REQUIREMENTS

In a tight economy and with the extensive use of online communications, we might assume that member participation in the community governance would be at an all-time high. While reasonable, this assumption is probably not accurate. It remains difficult to obtain requisite quorum or membership approval for all sorts of action, including the election of directors, authorization for loans, or the amendment of an association's governing documents. In some cases, judicial relief is available.

The Restatement (Third) of Property: Servitudes § 6.12 (2008) authorizes a Court to excuse compliance with membership participation provisions if compliance is not necessary to protect the "legitimate interests" of members or lenders with secured interests. Under the Restatement, judicial intervention is appropriate if a provision "unreasonably interferes" with the community's ability to manage the common property, the "servitude regime" or to carry out any other function provided for in the declaration. The requirements which may be excused are for limitations on the ability to raise assessments; "supermajority" membership approval or lender approval of proposed amendments; that an amendment be signed by the members; and quorum requirements for meetings.

Relief is possible under the Restatement when the members will not vote to approve an increase in assessments that the board deems necessary to properly manage the common property or to effect amendments creating higher thresholds for the board to raise assessments without a membership vote. The Restatement does not say what type of showing must be made to support judicial approval but the mere allegation of need is inadequate. *Becker v Cold* 619 N.E. 2d 765 (Ill. App 1993) (Association fails to show why a 2/3rds approval requirement to raise assessments is "unreasonable" and "unworkable"). Compare: *Big River Hills Association, Inc. v Altmann* 747 S.W. 2d 728, 743 (Mo. Ct. App. 1988) (affirming amendment increasing assessments without a showing they were necessary or reasonable.)

The Restatement is based on Civil Code §1356 (renumbered as §4275). Under § 4275 a court may, but is not required, to grant a petition for an order reducing the percentage of votes needed to authorize amendments to the declaration so long as certain requirements are met. The process entails the filing of a petition and supporting documents, the “ex parte” scheduling of a hearing “on the merits”, distribution of all pleadings and exhibits to the members and the hearing itself. Complying with this process typically takes sixty (60) to ninety (90) days.

Under § 4275, the Association must describe in detail what steps it took to try to obtain membership approval of the proposed restated declaration (or the more limited “spot amendment”). Counsel should be involved from the outset of a vote to assure that the statutory requirements for later judicial relief can be met should the required membership consent requirements prove unattainable. A “campaign” should be developed which will include the noticing of one or more meetings, including one attended by counsel who drafted the amendments; while a “redline” will often be impossible to create, counsel should prepare for distribution to the members a comprehensive statement discussing the reasons for the proposed amendments; and, where necessary, voting should be extended to permit a larger turnout. Relief can be granted if the proposed amendment is reasonable, does not unreasonably interfere with lender rights and all voting procedures were properly implemented. The petition must also show that the Declaration required the approval of a “supermajority” (typically 67% or higher) of the votes in the Association and that, while these high thresholds were not obtained, a majority of members did consent.

Several California cases have affirmed the validity of the § 4275 petition procedure (under former Civil Code §1356) and granted the petitioning association’s request to approve amendments. See e.g. *Seith v Fourth La Costa Condominium Association* (2008) 159 Cal. App. 4th 563,570 (trial court order granting petition affirmed where the amendment was approved by fifty-two percent (52%) and opposed by twenty-three percent (23%) and the balance failing to cast a ballot). Citing *Blue Lagoon Community Association. v. Mitchell* (1997) 55 Cal.App.4th 472, 477, the Court said:

“Viewed objectively the purpose of ... (the statute) is to give a property owners association the ability to amend its governing documents when, because of voter apathy or other reasons, important amendments cannot be approved by the normal procedures authorized by the declaration...In essence, it provides the association with a safety valve for those situations where the need for a supermajority vote would hamstring the Association.”

Colorado law provides for a court petition to amend an association’s declaration if the statutory process is followed and members representing at least half of the number required to amend the declaration have approved of the proposed amendment. Colo. Rev. Stat. § 38-33.3-217(7).

Section 6.12 of the Restatement goes further than the California law and permits judicial intervention for assessment increases or to meet quorum. It does not explicitly authorize reduction of votes to approve other types of corporate action. But, when the voting requirement is a “simple majority”, reduction of the quorum may result in approval of the proposed action.

Corporations Code § 7515 and § 1.60 of the Revised Model Nonprofit Corporation Act (1987) provide a basis for even broader judicial relief than is available under the Restatement

and Civil Code § 4275. Under § 7515, a court can dispense with quorums or the percentage of votes needed to approve corporate action (or can order a “revote” with the reduced quorums and voting requirements). The Court’s determination is made at a hearing after specifying the method of notice given the membership; typically, mailed notice (not personal service) is all that is required. Relief may be given “[i]f for any reason it is impractical or unduly difficult” to call or conduct a meeting or obtain the consent of the members as provided for in the Articles or Bylaws.

Notwithstanding these authorities, some courts are reluctant to reduce voting requirements. We are all familiar with the general admonition that courts are reluctant to in the internal operations of a corporation. Cf. *California Trial Lawyers v Superior Court* (1986) 187 Cal. App. 3d 575 (court defers to Board’s interpretation of bylaw provisions specifying candidate qualifications); this concern about “interference” must be overcome when seeking relief or attempting to defend a disputed vote. Trial judges may believe that the members and directors acquired their title “with notice” of the voting rules and procedures and if those requirements are too severe or unreasonable, so be it. These are the courts likely to strictly apply corporate procedure when barring relief. In *National Development Co. v Trusteeship of Woodland Lakes, Inc.* 643 F. Supp. 561 (E.D. Mo. 1986) the court, applying Missouri law, rejected the Association’s contention that its members had properly amended the quorum requirements of the bylaws. What appears to be the association’s lack of respect for corporate procedure did not help:

“Poor recordkeeping and informal procedure precipitated this lawsuit. The parties cannot agree on the events of the April 9 meeting because they did not conduct themselves with proper regard for the consequences of their actions. Amendments were passed but not reduced to writing. Votes were taken but tallies were not kept. The best notes of the meeting are scant, the official minutes wholly inadequate. Thus, the Court must rest its decision on the testimony of the witnesses at trial...” 743 F. Supp. at 654.

A court is far less likely to afford relief if doubts that voting procedures were unfair. Thus, a co-op member was able to show that the Association failed to properly adopt amendments requiring a “flip tax” (transfer fee), the Court noting that:

“[T]he court must conclude that either plaintiff is correct in her contention that the by-laws were never amended, or that the officers of the co-operative are so derelict in their duties and dismissive of their obligations under the by-laws that any action taken by them is meaningless. In examining the board's conduct with respect to the flip tax, the court is mindful that there are only seven units in the building, and that this presents an apparently irresistible temptation for the board to forego adherence to the corporate documents and instead run the building on an informal basis. However, while this may be understandable, it is not acceptable.”

Pello v 425 E. 50 Owners Corp. et al. (2008) 19 Misc. 3d 1125(A); 2008 WL 1869651 (N.Y.Sup.)¹ And, even when there is no dispute over whether the requisite number of members

¹ In a classic note of understatement about how vituperative association politics can become, the court concluded its opinion thus: “On a last note, the ‘flip tax’ issue appears to be the final impediment to plaintiff’s sale of her unit and severance of her connection to defendants. This court has already ruled in

approved an amendment, it will not be enforced unless the amending provision was strictly complied with. *Morris v Tewksbury Junction Condominium Association* 2006 WL 2620583 (Mass. Land Ct. 2006) (approval at meeting insufficient when Master Deed required all owners to sign the amendment). Likewise, the form and method of voting and attestation must comply with the voting procedures contained in the Articles, Bylaws, the Declaration and the applicable statutes. See *Village of Brown Deer v. City of Milwaukee*, 114 N.W.2d 493, 497 (Wis.1962) (requiring corporation to follow statutory procedures for action in absence of directors' meeting and noting: "Those who would enjoy the benefits that attend the corporate form of operation are obliged to conduct their affairs in accordance with the laws which authorize them.").

IX. ADVOCATING FOR CANDIDATES, AMENDMENTS AND RESOLUTIONS

Our clients' directors are frequently passionate about their service on the Board. Those who oppose them can be just as passionate in their opposition, whether manifested in elections to serve or on referendums to authorize amendments (or assessment increases or other action) or removal votes. There is a surprising dearth of authority on the issue of advocacy. Two (2) exceptions are notable.

In *Adams v Meyers and the Carl Sandburg Village Condominium Association*, 620 N.E.2d 1298 (Ill. App. 1993) a series of election disputes involving two (2) candidates, the Board and its President culminated in what appears to be nasty litigation. The decision is about the election challenges (and not the underlying issues that spawned them) including the following: that the board's proxy notice failed to explain that members could cumulate their votes; that the President cast undesignated proxies; and that a Director authorized distribution of official information without formal Board approval.

The court applied the Illinois Condominium Act and noted it only contained three (3) applicable requirements: that a proxy give members a choice to designate their preferred proxy holder; that the proxy allowed the member to designate how their vote would be cast, and that the proxy must be dated and would be invalid after eleven (11) months. The court rejected plaintiffs' argument that "no omissions of material facts should be tolerated", or, to put it another way, that the board had a fiduciary obligation to explain to members what specific voting rights they had under the declaration.

With regard to the attack on the casting of undesignated proxies by the President as authorized by the board, the court pointed out this procedure was explained to members in the voting documents, documents which also reminded members that they could designate anyone as their proxy holder. The court appears to have accepted the reasoning proffered by the Association: that some members "may prefer ... this voting option if satisfied with the Board's handling of the affairs of the Association ... (and) believes the board is in a better position than the owner to evaluate the slate of candidates".

an earlier skirmish between the parties that if the board takes any action to prevent plaintiff from finally severing her relationship with the co-op, it cannot be said to be "acting fairly, impartially or in the best interest of the [b]uilding". . . . Refusing to approve the transfer of her shares, even with a reservation of rights, would seem to be such an action. Thus, it is clearly in the best interests of all parties to allow plaintiff to sell her shares and sever all connections to the co-op."

The *Adams* court also rejected the claim that the President's authorization to use association funds to pay election related expenditures was wrongful on the ground that the claim was "derivative" and Plaintiffs had not made the requisite pre-litigation demand that the board take action for the alleged improprieties. Finally, the court, applying the business judgment rule, also rejected the "general claims" that the President had impermissibly used his power as an incumbent to manipulate elections.

A recent California decision was far less generous to a board accused of improperly denying members the right to campaign. *Wittenberg v Beachwalk Homeowners Association* (2013) 217 Cal. App. 4th 654. The underlying dispute concerned a proposed CC&R amendment giving the board more unilateral authority to incur capital improvement expenses without membership approval.

The use of association funds and media in a political campaign involving the election of directors or any other matter submitted for membership approval is strictly regulated by Civil Code § 5135. It prohibits use of association funds for "campaign purposes" in connection with "any board election". It also prohibits use of association funds in connection with any other vote of the members "except to the extent necessary to comply with duties imposed on the association by law". Some read this caveat to mean that association funds – sometimes many thousands of association dollars – can be used to educate, explain and promote a voting outcome, like the approval of a large reconstruction project – that is supported by the Board.

The California statute does not prohibit use of association funds if the Association complies with its statutory equal campaign access rules contained in Civil Code § 5105 (discussed below) or using a candidate's picture or the prominent featuring of their name (except on ballot materials) within thirty (30) days of the election. (This would mean that if there was a "President's column" in the regular monthly newsletter, her picture could not be published in that newsletter during the thirty (30) day minimum voting period required by Civil Code § 5115).

California's voting requirements are far reaching. Under Civil Code § 5105, an association *must* adopt rules that ensure any "candidate or member" advocating a "point of view" is given equal access to association media for purposes relating to the campaign and that if one is given access it must be extended to all. "Media" includes a website and newsletter. Further, the association must ensure access to a common area meeting space (if any) at no cost to a candidate for the board. All these same rules apply to votes other than to the election of directors when those who seek access to media or common area advocate a "point of view" reasonably related to a pending vote.

Wittenberg is the first California case to test these "equal access" rules. The membership was given an opportunity to vote on an amendment that would have increased the money the Board could spend on capital improvements without membership approval.

The issue was very political; fliers were distributed throughout the community. Two (2) owners who opposed the amendment asked for the right to use common areas (the clubhouse and a greenbelt) and their requests were in one case denied and in the other conditioned on payment of a fee. The Board sent a letter to the membership with "pro" and "con" arguments but did not invite those opposed to submit their own arguments. A director later testified that a

Board letter discussing the vote “made a strong case in favor of the amendment” and that it encouraged members to vote “yes”.²

Ultimately, the vote passed and the dissidents sued. The trial court found no voting act violations but the appellate court disagreed. It refused to treat the board as immune from the equal access media requirements and stated the following: “while in the midst of an election, the Board must either give equal access to opposing viewpoints, or forego the use of association media to advocate its viewpoint.” The court rejected the argument that the board’s campaign was simply “informational” and instead determined board’s efforts were advocacy. This triggered a right to access rules including the right of those opposed to the amendment to use the newsletter and bulletin board and common areas for campaign purposes.

Notwithstanding its findings, the court did *not* set aside approval of the CC&R amendment. Instead, the case was sent back to the trial court to determine if the violations warranted voiding the election upon which the amendment was based. The result is interesting and contrasts with the cases discussed above which required “strict compliance” with state election statutes. *Wittenberg* suggests that statutory requirements aside, how the campaign was conducted could make a difference as to whether a vote will be sustained.

X. VOTING TIPS AND STRATEGIES

The use of new voting methodologies and the scrutiny brought on by the internet suggest an important role for association counsel: serving as the architect of fair elections and to help promote decisions of the Board adopted in good faith and consistent with its authority. Here are some observations.

A. Timing: Work backwards from when the vote will occur; determine what tasks need to be done, who will do them, what information is needed, from whom and what things can the Board control and what things are in the control of others. If the vote authorizes a large special assessment to finance construction, work hard to fully complete the bidding process

² The Court notes: “*The association had a newsletter that went to all members on a monthly basis. The board exclusively drafted all of the content of the newsletter. In the February 2011 issue of the newsletter, the board included a section entitled “Update on the Proposed 8th Amendment to the Beachwalk CC&Rs,” which listed a number of arguments in support of the amendment. For example, it asked, “Why is this so important and why does the proposed amendment benefit the community?” It answered by claiming paragraph nine was ambiguous, the proposed alternative was more modern and adaptable, and the amendment would help resolve the pool litigation. It also asked, “What will happen if the 8th amendment does not receive 227 yes votes?” It then listed several consequences, including the lawsuit regarding the pools would “drag on, generating huge legal bills,” any homeowner “with the will and financial resources to sue the” association would do so on the basis of paragraph nine, the association’s insurance rates would go up, otherwise willing homeowners would stop volunteering their time to the association, and operating costs would increase. As a result, the board promised to continue holding elections until the measure passed: “Therefore, we will be asking homeowners to vote on this issue again on the March ballot. And if we cannot get 227 yes votes in March, there will be another ballot on the same issue shortly thereafter.” The article concluded with an exhortation to the members to vote yes on the amendment: “Vote YES on the proposed 8th amendment to our CC&Rs so we can put our money to use on physically improving Beachwalk.” One of the board members who was in favor of the amendment testified this article was encouraging the homeowners to vote yes. Nonboard members were not invited to provide opposing viewpoints in the newsletter “.*”

before submitting the issue to the membership. Guessing about construction costs can doom a project.

B. Candor: The voting materials should not exaggerate or overpromise financial or other outcomes. The credibility of counsel and the directors is essential to pass any vote. Credibility is hard to earn and easy to lose. It can be destroyed by the exaggeration of a problem or the supposed efficacy of a solution. If there are cost, construction, permitting or other contingencies, these should be explained and addressed. Identifying problems and solutions can enhance the Board's credibility even when a project has some risk attached to it.

C. Clarity of Communication: Lets help our clients "mean what we say and say what we mean". Some of the cases cited in this article rely heavily (to reverse or uphold board conduct or decisions) on the actual words used by the association in communicating with the members. Sometimes it takes a great deal of work to adequately explain a proposed course of action. Sometimes "less is more" and other times "more is more". The goal is not to impress but to educate. The ballot measure or proxy options should be clear.

D. Required and Discretionary Actions: A CC&R amendment or a building change or the need for a special assessment may be a combination of something required by law and other things that are "good ideas." Membership communications should specify which is which and the basis for the conclusion that some things are required should be clearly spelled out.

E. Media and Meetings: In some communities, the best approach may be going "door to door". In others, it might be a "Q&A" letter. One (1) or more "town hall" meetings can also be effective. Decisions should be made as to which forums will be used and by whom: it might be a local fire marshal or building inspector; or an engineer or contractor; a realtor or a banker. The skill set required to analyze a problem or prepare a cost estimate may not be the skill set needed to educate the community and enhance the chances that a vote will succeed. Counsel, in his or her role as quarterback, should help a Board that needs it, identify who is best suited to lead which part of a presentation. The presentation might include PowerPoint, video, website clips; use of the website to download information too expensive to copy.

F. Be Open to Change: Before the Board makes a final decision on what plan to promote – be it a restatement of covenants, amendment, capital improvement project or other – it should vet some ideas to the members and be receptive to different approaches.

G. Be Respectful of Disagreement: Not every objection must be addressed; some will have no merit or be impractical. But, every member who raises an objection should be treated with respect. It may not be possible to satisfy their objections but misreading them will raise red flags with others in the community unsure about whether the directors can be trusted with implementing their proposed plan.

H. Admit Mistakes: Sometimes, those objecting to a proposed plan will cite prior mistakes by the Board or management that occurred previously, including those that are completely unrelated to the matter being voted on. Or, the mistakes may be in the balloting material. No matter: if mistakes were made, the Board will be better off acknowledging them and "moving on" instead of defending the indefensible. When material mistakes are made in

the balloting material, the Board may gain more credibility by cancelling the vote and starting over than by moving forward.

I. **Typos:** Work hard to eliminate typographical or arithmetic errors. Especially when making assumptions short and long term costs, check with the CPA or a friendly banker to “run the numbers”. Cite in membership communications the basis for all assumptions and “statements of fact”.

J. **Surveys** can be useful or harmful. They may reveal what would be supported by the members or reveal nothing at all. Extreme care should be used in determining when and what type of survey or questionnaire will be used. If the Board has an obligation to go forward with the project, asking members how they feel about it and getting an overwhelmingly negative reaction only makes going forward more contentious.

K. **Confidentiality:** Rightly or not, members will want access to the same information the Board used in reaching the conclusions it did. Serious consideration should be given to revealing documents that might otherwise be subject to confidentiality; at the outset of a project, those who assume their information will be confidential should be advised otherwise. If they insist on confidentiality, the Board and counsel will need to consider how this will impact a vote and the perception of candor and fairness.

L. **Know the rules and follow them:** Help the Board understand and urge them to allow the qualified practitioner to assist in developing the voting procedures and forms to “bulletproof” the vote. The importance of this cannot be overestimated.

XI. **SUMMARY**

There are many issues relating to voting. Our clients rightly expect us to understand and apply the appropriate statutes, statutory schemes (property and corporate) and the idiosyncrasies of their own governing documents. The voting issues surveyed here tend to be technical. While some statutes and some courts may provide some flexibility and even some deviation from established rules, it would be unwise to count on that to rescue a vote otherwise flawed. Advance preparation and clear communication are essential to achieving a successful voting outcome.

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