

“A Night at the Proxy”

Now that summer is upon us, many condominium corporations are planning their Annual General Meetings for the fall. Therefore, I thought this would be the most appropriate time to discuss proxies, because it never fails, that I get numerous questions concerning the validity of proxies and whether a proxy should be counted towards the pending vote that is about to take place.

Most times, these questions of validity arise for votes taken to either remove directors or elect directors. The purpose of the proxies is to allow unit owners who cannot attend a meeting to still be able to participate in the meeting and cast their vote in the pending election or removal of directors. The proxy allows the unit owner to select someone to attend the meeting in their place and submit the proxy, which contains the name of the person they wish to vote for or against at the meeting.

Disputes arise as to whether or not these proxies contain the correct information and have been validly executed by the actual unit owner. Section 52 of the Condominium Act, 1998 (the “Act”) specifically states that:

- (4) an instrument appointing the proxy shall be in writing under the hand of the appointer or the appointer’s attorney and shall be for a particular meeting of owners.

In situations where the meeting is for the removal or election of a director:

- (5) ...shall state the name of directors for and against to whom the proxy is to vote. More importantly it states that the instrument appointing a proxy may be in the prescribed form. The use of the word “may” is very important. Under the regulations of the Act, a prescribed proxy form is provided for use in the removal or election of a director. However, because of the use of the word “may”, it means that the proxy does not have to be in the form that is provided for in the Act and can simply be prepared by the owner or anybody else on the owner’s behalf. The only requirement is that the form must contain the requisite information and is signed by the unit owner. Therefore the proxy must state the unit owner’s name, the unit, the date of the meeting and the purpose of the meeting. The proxy must specifically state the name of the directors for and against to whom the proxy is to vote. As long as that information is contained in the

proxy form, and is signed by the unit owner, that form must be accepted as valid. It does not have to be in the form provided by the property management company when they send the notice of meeting around to all the unit owners. Therefore, if the board of directors or somebody chairing the meeting refuses a form of proxy because it is not in the prescribed form, nor on the form provided by the property management company, the chairperson would be incorrect in denying the proxy.

In the prescribed form, there is space provided to allow owners to write in the names of the individuals they wish to vote for or the individuals they wish to be removed from the board. The disadvantage of the proxy form is it does not permit the unit owner to vote for any candidates who are nominated from the floor at the meeting despite the fact they would have liked to have voted for that individual. In addition, if the candidates listed on the proxy form choose not to run, then the proxy form is invalid for the purpose of the election or removal and will simply only be counted towards the quorum for the meeting.

Many times there are complaints that there is different hand-writing on the proxy. In most cases, a difference in handwriting is irrelevant with respect to the validity of a proxy. The most important thing that has to happen to ensure the validity of the proxy is the last thing that should be completed on the proxy is the signature of the unit owner. Therefore, even if the proxy contains different handwriting throughout the body of the proxy, as long as the signature of the owner is the last thing entered on the proxy, it is valid. It does not matter if someone other than the owner completes the proxy or fills in the names of candidates,, date of the meeting, name of the owner etc., as long as the owner signs it afterwards, it is valid. In a situation where an owner signs a blank proxy and leaves it up to the proxy holder to complete, in that case the proxy is invalid and should not be counted.

For new condominium corporations that have just recently been registered, many times the declarant will still own a number of units in the building. These would be the unsold units. Since the condominium is registered, the Declarant is a unit owner like everyone

else in the condominium corporation with respect to these unsold suites. Therefore, like all other owners, they are entitled to one vote per unit and can exercise this right in the election or removal of directors. In most cases, the declarant will send one person as proxy holder for all of their units. As long as the declarant's authorized signing officer executes the proxies, these proxies must be counted in that evening's election. In other words, if the Declarant still owns 25 units, they have 25 votes. Some may say this is unfair, and that this is a way for the Declarant to control who gets on the Board. Unfortunately, while that may be true in certain circumstances, it is important to keep in mind that the Declarant is in the business of selling units and would rather have no votes because it would mean they have sold all their units. Obviously, in each subsequent year, as the Declarant sells their remaining inventory, they will have less and less votes and less of an impact. Although it may seem undemocratic, in fact, it is very democratic because the Act treats the Declarant like any other owner in the corporation.

Finally, the proxies, unlike the ballots must be kept as part of the condominium corporation's records. Normally, at the meeting, a motion is made to destroy the ballots. However, the Act specifically states that the proxies must be maintained as part of the Corporation's records. Therefore if anybody disputes the validity of the proxies or the signatures at the end of the proxies, they can request to examine the proxies under section 55 of the Act. However, this can only be done after the meeting. Many times during the election itself, owners may question the validity of the signatures on the proxy. Unfortunately, without the owner actually being there to confirm that they did indeed sign the proxy, there is nothing the chair can do but accept the proxy as validly signed and proceed to allow the proxy to be counted. There is obviously a level of trust that must be accepted by the person running the meeting that the proxies have been validity executed by the owners. It is only after the meeting has taken place, at which time inquiries can be made to determine whether or not an individual unit owner personally executed the proxy. At that point, if there is an issue concerning the validity of the proxies that would have affected the outcome of the election, certain steps can be taken to invalidate the election and have a new election. There is no advantage or utility in

challenging the validity of proxies at the meeting because unless those individuals are present to state they did not sign the proxy, there is no way to determine same.

The concept of the proxy is to allow the unit owner to participate in the condominium process when they cannot attend the meeting. Elections and removal of directors can be highly emotional and very confrontational. It is critical that the owners take the time to properly complete the proxies to ensure that there will be no question as to the validity of same. It is also critical for those attending the meeting that wish to challenge proxies to do so using the procedures available to them in the Act, rather than disrupting the meeting with allegations that the proxies are invalid or not signed by the actual owners. Those individuals will have their chance to investigate that issue after the election. It is not too late. At the end of the day, the condominium corporation just wants to make sure that the election was handled properly and that all owners who wished to vote, got their chance whether they attended or not.