

ABSENTEE BALLOTS & ACTION BY BALLOT

PART I Absentee ballots

In August of 2005 the state of Arizona changed its laws concerning HOA and other community association voting from proxy to an absentee ballot. One section of the law states the new way election for office will take the place. The second section of the law provides for action by absentee ballot. Those who manage these associations were taken by surprise and now have to rethink how they are going to handle nominations and elections in their associations and set rules that will enable them to handle the process that ensures the rights of everyone.

Before we begin discussing how to solve the problems that the new law presents, here is the new law in its entirety.

33-1812. Proxies; absentee ballots; definition

A. Notwithstanding any provision in the community documents, after termination of the period of declarant control, votes allocated to a unit may not be cast pursuant to a proxy. The association shall provide for votes to be cast in person and by absentee ballot and may provide for voting by some other form of delivery. Notwithstanding section 10-3708 or the provisions of the community documents, any action taken at an annual, regular or special meeting of the members shall comply with all of the following if absentee ballots are used:

- 1. The absentee ballot shall set forth each proposed action.*
- 2. The absentee ballot shall provide an opportunity to vote for or against each proposed action.*
- 3. The absentee ballot is valid for only one specified election or meeting of the members and expires automatically after the completion of the election or meeting.*
- 4. The absentee ballot specifies the time and date by which the ballot must be delivered to the board of directors in order to be counted, which shall be at least seven days after the date that the board delivers the unvoted absentee ballot to the member.*
- 5. The absentee ballot does not authorize another person to cast votes on behalf of the member.*

B. Votes cast by absentee ballot or other form of delivery are valid for the purpose of establishing a quorum.

C. Notwithstanding subsection A of this section, an association for a timeshare plan as defined in section 32-2197 may permit votes by a proxy that is duly executed by a unit owner.

D. For the purposes of this section, "period of declarant control" means the time during which the declarant or persons designated by the declarant may elect or appoint the members of the board of directors pursuant to the community documents or by virtue of superior voting power.

Many associations have covenants or bylaws that state nominations shall be allowed from

the floor at the annual meeting where the election takes place. What this law does is make this a moot procedure because the ballot will have already gone out for people who are absent to vote for a slate of candidates. Those absent will not have the opportunity to vote for any one nominated at the meeting by those present. In fact, it would be out of order to have nominations from the floor because once balloting has begun it is out of order to discuss further or make changes to the motion (in this case nominations).

To solve this problem, associations will need to consider different ways of allowing the membership to nominate candidates. Usually the board selects a nominating committee which then selects who to nominate for office. The board then should provide for members to submit names that will be included on the ballot with those chosen by the nominating committee. In the letter that goes out to the members, it could be stated that the nominating committee nominated the following persons. Then it could state that the following nominations have come in from the members. Then the ballot would list all those nominated for each office. The letter could also state that any member is able to write in a name on the ballot. This would allow for a write in campaign.

By allowing members to nominate by sending in a letter to the secretary, this would be the equivalent of nominations from the floor. In the nominating process from the floor, a nomination does not need a second. Any member can nominate another member. So this also holds true by mailing in a nomination.

After the nomination is received the secretary would need to call the nominee to see if he or she is willing to serve if elected. At that point the nominee could ask that his or her name be removed from nominations.

Associations would then have to adopt rules about how many nominations one person could make, when the nominations had to arrive to be considered a valid nomination, to whom the nomination should be sent and who will call to see if the nominee is interested in serving in the position.

After the nominees are selected, an absent ballot would be mailed to each member, which would include instructions on how to mark the ballot and return it. The important requirement by law is that the absentee ballot is to be returned to the board of directors and that the members have at least seven days to return the ballot. It would be in violation of state law to require that the ballot to be turned in earlier than seven days.

A very big problem with this procedure according to basic parliamentary law is having two forms of balloting in the decision making process. In this case the two forms are including the mail in ballots of those who absent with those who are present and voting. In counting the ballots, it is important to keep and count those sent in by mail separately from those cast at the meeting. If there is no election in an office, then those present can keep voting until someone is elected. Since those absent can't re-ballot, their count will remain the same.

PART II Action by ballot

At the same time the Arizona legislature decided to do away with proxy voting they also decided to allow an action to be taken completely by ballot with out having members

meet in person to discuss the issue. Here is how the law is stated.

10-3708. Action by written ballot

A. Unless prohibited or limited by the articles of incorporation or bylaws, any action that the corporation may take at any annual, regular or special meeting of members may be taken without a meeting if the corporation delivers a written ballot to every member entitled to vote on the matter.

B. A written ballot shall:

1. Set forth each proposed action.

2. Provide an opportunity to vote for or against each proposed action.

C. Approval by written ballot pursuant to this section is valid only if both:

1. The number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action.

2. The number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.

D. All solicitations for votes by written ballot shall:

1. Indicate the number of responses needed to meet the quorum requirements.

2. State the percentage of approvals necessary to approve each matter other than election of directors.

3. Specify the time by which a ballot must be delivered to the corporation in order to be counted, which time shall not be less than three days after the date that the corporation delivers the ballot.

E. Except as otherwise provided in the articles of incorporation or bylaws, a written ballot shall not be revoked.

A basic principle of democratic societies is that members are allowed to meet face to face and discuss issues and then take the vote. This should be no different for Community Associations. What this law could do is take away the right of the members to discuss and amend the proposal.

This process could be used to take a final vote on an issue that was discussed at several meetings where the members had the right to participate, make suggestions and amend the motion. Then the motion as amended could be sent out to the entire membership with the pros and cons on the issue so that those absent from the meetings could read both sides and then make a wise decision.

An important point in this law is that the ballots cast must equal a quorum of members. If the ballots received do not match the quorum requirement then it just doesn't count.

If associations are going to use this method, again they need to adopt procedures for sending out the ballots, when they are to be returned and how they are to be counted. Then members must be notified of the outcome.

A danger in this process is that boards could become lazy or use the excuse "that the members are too busy to come to meetings" to do everything by this mail ballot process. If enough members participated, then it could lead to a government by a few. Or if not enough members sent in their ballots nothing would get adopted and the association

would always be in a stalemate.

We hope that associations will continue to be diligent in preserving the democratic principles and spirit in their associations. The reason why members don't come to meetings is because they don't understand the importance of the meetings or that they are poorly run. The best policy of action for boards in associations is to keep the members informed and build a sense of community so that people will want to participate in the governing process.

Reference:

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