



CONDO ELECTIONS: THE LAST WORD (FOR NOW)

by

Michael C. Kim

MICHAEL C. KIM & ASSOCIATES

ASCO General Counsel

Objective of an election: To provide a fair and efficient selection of persons to serve as directors

Implementation of the objective: Uniform application of legally required or advisable procedures with minimum discretion (cannot realistically eliminate all discretion especially in unusual or emergent situations)

I. General

- A. There must be an annual meeting, one of the purposes of which is to elect directors, per ICPA Section 18 (b) (3). Notice of meeting (including date, time, place, and purpose of meeting) must be mailed or delivered to all unit owners not less than 10 nor more than 30 days prior to the meeting, per ICPA Section 18(b)(6). If there will be an annual Board meeting to elect officers immediately following the annual meeting, notice of that meeting must be posted and it must be an open meeting per ICPA Section 18(a)(9).
- B. Conflicting provisions: A term of office of director cannot exceed 2 years (although a director can succeed him/herself) per ICPA Section 18(a)(11) BUT, for staggered boards at least 1/3 of the directors' terms must expire annually per ICPA Section 18 (a)(1).
- C. Directors are to be elected at large from among the unit owners and only one person of a multiple owner unit can be a director per ICPA Section 18(a)(1). The only qualification is being a unit owner. See special rules for installment sales of units, contract purchaser and contract seller rights in ICPA Section 18(b)(11). Residency requirement is invalid. There is no "good standing requirement"; what would be "good standing" (e.g. current in assessment, no misconduct within a specified prior period, length of residence in condo or term of ownership, prior leadership in the condo community)?
- D. Is there a "record date" (that is eligibility to vote is determined by ownership on a specified date and subsequent owners not eligible to vote) established pre-meeting (for both notice and voting) or is the meeting date the de facto record date. See NFP Act Section 107.25

NOTE: All references to "ICPA" are to the Illinois Condominium Property Act.

All references to "NFP Act" are to the Illinois General Not-for-Profit-Corporation of Act of 1986

- E. Availability of unit owners' list (name, address, weighted vote) per ICPA Section 18.2(b)(1): list must be produced to requesting unit owner within 10 days after request.
- F. Voting by percentage interest but there is a per capita (1 vote per unit) option. See ICPA Section 18(b)(7).

II. Candidate identification/nomination/information

- A. Formal call for nominations (including self-nominations) (see Direct Ballot situation in IV D, below). See also ICPA Section 18(a)(17) which requires reasonable efforts to identify candidates.
- B. No preference to be expressed by Board in any candidate information distributed by the Board. ICPA Section (18)(a)(17).
- C. Write-in candidates must always be allowed per ICPA Sections 18(a)(18) and 18(b)(9)(B).
- D. Use of suggested candidate info/background/position statement should be advisory BUT page limit (for Association distribution purposes) should be imposed.
- E. Nomination "from floor" of meeting: not legally required (unless per Declaration/By-Laws/Rules) and questionable practical effectiveness.
- F. Nominating Committee per Declaration/By-Laws: be wary of slating or endorsement.
- G. Consider confirming ownership status of elected candidates by tract book search immediately after election.

III. Proxies

- A. Permitted by ICPA Section 18(b)(9)(A) and NFP Act Section 107.50. Proxy must be signed and dated, with 11 month life unless proxy itself provides otherwise.
- B. Board can specify an "official" exclusive form.
- C. Board must allow designation of anyone as a proxy (by use of blank line) BUT check Declaration/By-Laws if the proxy must be a unit owner. Secondary/default designation of a proxy is permissible (e.g. Secretary of Board). Avoid proxy to the Board, but Board should decide in advance how such proxies will be voted if discretion is given as to voting. Include power of substitution by proxy.

- D. Board must allow unit owner/proxy giver to express “preference” among known candidates or write-in a name (be sure to allow adequate number of blank lines for write-in candidates). ICPA Section 18(a)(18).
- E. Special proxies, limited proxies, and proxy/ballots are still proxies, not ballots. If properly worded, proxy must be followed by the proxyholder; otherwise, not binding.
- F. Proxies not permitted if Association uses Direct Ballot Method of election (see IV D, below). See ICPA Section 18(b)(9)(B).

IV. Ballots

- A. Secret if required by existing Declaration/By-Laws or by Board-adopted rule. ICPA Section 18(b)(10). Secret ballots must only reflect unit % interest and the vote itself. BUT, the Board must also adopt rules regarding verifying unit owner status as to proxy issuance and ballot casting; for example, double envelope method to prevent fraud or coding to allow verification of the unit owner/unit.
- B. Elections by mail permitted per NFP Act Section 107.50 if in by-laws.
- C. Cumulative voting instructions (use of Arabic whole numbers only; no “x” or “y” marks; overvote voids ballot) if applicable.
- D. Direct Ballot Procedure per ICPA Section 18(b)(9)(B) can be adopted either by amendment to Declaration or By-Laws (by unit owners) or by rule adopted by Board. If a rule adopted by the Board, the rule must be effective at least 120 days prior to the election.

Direct Ballot Procedure:

1. No proxies allowed.
2. Vote by Association-issued ballot in person at election meeting or by submitting Association-issued ballot to Association or its designated agent by mail or “other means of delivery specified in the Declaration, By-Laws or rule” (e.g. mail, facsimile, telegram, or electronic mail) (note if specified method of notification is mandatory or permissive; that is “shall” vs. “may”).
3. Ballots must be mailed or otherwise distributed to unit owners at least 10 and not more than 30 days before the election meeting.
4. Board must give unit owners at least 21 days prior written notice of the deadline for inclusion of a candidate’s name on the ballot, and that

deadline cannot be more than 7 days before the ballots are to be mailed/distributed to the unit owners.

5. Ballot must include the names of all candidates who gave timely written notice to the Board of their candidacy, but must also allow write-in candidates.
6. Ballots received by the Association or its designated agent after the close of voting shall not be counted.
7. A unit owner who submitted a ballot by mail or other authorized means of delivery may request and cast a ballot in person at the election meeting and thereby void the previously submitted ballot.
8. Would apply to any annual meeting or special meeting to elect directors (e.g. removal of director and replacement election).

Note: Can you have an election even though the annual meeting fails to achieve a quorum? Consider possible use of proxy for the annual meeting but not the election voting.

- E. Counting of ballots. Candidate/representative allowed to observe per ICPA Section 18(b)(10) Use of tellers/inspectors permitted/required per NFP Act Section 107.35. Recount procedure or basis specified?

V. Election results/aftermath.

- A. Election materials must be retained by Association for at least 12 months per ICPA Section 19(a)(8) and can be examined and copied by unit owner upon written request stating a proper purpose per ICPA Section 19 (e) (“I can’t believe I lost” or “who voted against me despite their promises”).
- B. One year period to challenge an election.
- C. A duly elected Board is essential to maintain the legitimacy of that Board’s actions and the protection of Board members from potential personal liability.

Copyright 2006. Michael C. Kim & Associates. All Rights Reserved. The foregoing material is intended for general informational purposes and is not intended nor should be deemed to constitute the rendering of legal services for any particular situation. Always consult an attorney for professional legal advice.