voting

Rights, Requirements and Proxy Priviledges

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The purpose of this article is to examine the principal rules and regulations in the Condominium Act, 1998 (the "Act") which govern the nature of the right to vote and the exercise of that right including through the use of a proxy.[1] All section references herein are to the Act.

Necessity of Voting at a Meeting

One must begin with the general proposition that, with few exceptions, whenever the Act requires approval of the owners this is to be done at a meeting of the owners (subsection 45(1)).[2] Attendance at a meeting of owners can only be satisfied by attendance in person or by proxy (subsection 50(2)). Therefore, in all such cases, mail-in ballots, phone-in votes or the like are not sufficient to obtain quorum at the meeting or the unit owner approval to authorize those corporate acts for which unit owner approval is a requirement. A properly constituted meeting, with appropriate notice and agenda provided, and duly attended, are the rule.

Majority Voting

A second general proposition to note is that, unless otherwise stated in the Act, all questions proposed for the consideration of owners at a meeting of owners are to be determined by the majority of votes cast by owners present at the meeting (whether attending in person or by proxy). (See section 53.)

There are exceptions to this general rule as well. The most commonly encountered exception is that of voting on by-laws. The Act states that a by-law, to be effective, must in part be approved by a vote in favour of it by "the owners of a majority of the units of the corporation" (subsection 56(10)(a)). Thus, when voting for a by-law, it is not sufficient if the majority of owners in attendance at a meeting vote in favour of it; the board must confirm whether the owners voting in favour of the by-law actually represent a majority of all of the units.

Another typical exception is voting to elect someone to the reserved position on the board of directors to represent "owner-occupied units" (as defined in subsection 51(5)). In this case, only owners of the owner-occupied units are entitled to vote. It would appear that only a simple majority of such owners who are in attendance at the meeting is required to elect the "owner-occupied" director; however, the removal of a person from that position on the board may only be effected by a vote by those owners who represent more than 50% of the owner-occupied units (subsection 51(8)).

Entitlement to Vote

There are two principal prerequisites for a condominium unit owner to exercise the right to vote (subsection 51(1)).

First, that person must be entitled to receive notice of the meeting at which the vote is to take place.

To determine who is entitled to receive notice, resort must be had to section 47. Pursuant to this section, every corporation is required to keep a record of the names and addresses for service of unit owners and those mortgagees who have notified the corporation of their right to vote. Only those owners and mortgagees who have provided this information in writing to the corporation are entitled to receive notice of a meeting. Notice of the meeting is to go to those persons so recorded on the day which is twenty days before the day of the meeting.

Two consequences of this first prerequisite are noted.

The first is that it is vitally important for a unit owner, or a mortgagee, to inform the

corporation of its name and address for service in order to ensure that it will be entitled to receive notice of a meeting and, in turn, to exercise a right to vote at the meeting. The Act implicitly places the responsibility on the person seeking to exercise the right to vote to expressly provide this information in writing to the corporation: the corporation is not able to extract the information from any other source in order to make its section 47 record (including cheques, letterheads and envelopes). So, gone are the days when a corporation ordered a title search to determine voter entitlement.

The second consequence is that a new unit owner who purchased a unit on a date which is less than twenty days before the day of the meeting is unable to simply show up at the meeting and expect to vote. The obvious reason for this is that it would be difficult for a corporation to determine voter entitlement otherwise.

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The second prerequisite to exercise of the right to vote is that the owner cannot have been in arrears with respect to payments due to the corporation (i.e., common expenses) for a period of more than 29 days on the day of the meeting.

There is a right for a unit owner to cure this defect by paying the amount in arrears, but this must be done before the meeting is called to order. Furthermore, such payment should be either in cash or certified funds; otherwise it could not be assumed that the debt has actually been cured by the time of the meeting.

Note that a mortgagee who is exercising a right to vote in the stead of the unit owner must also meet this condition, since the mortgagee essentially "steps into the shoes" of the unit owner.

It is from these two principal prerequisites that a corporation must take its cue in developing its practices for conducting a proper vote at an owners' meeting. The list of unit owners and mortgagees used to comply with section 47 could be used as a sign-in sheet at the entrance of the place of the meeting where ballots (if used) are handed out. On this list, the names of owners who are in arrears for 30 days or more as of the date of the meeting should be marked (in a manner that is obvious only to the person taking attendance, to ensure individual privacy is protected to the extent possible), and a chance to bring the account into good standing could be provided at the outset.

In addition to the foregoing requirements, for a mortgagee to be able to exercise its right to vote in place of a unit owner, in addition to notifying the corporation of its address for service at least 20 days prior to the meeting it must also give further notice at least four days in advance of the meeting of its intention to exercise that right. In a case where there is more than one mortgagee seeking to exercise a right to vote for a particular unit, it is the mortgagee who has the highest priority and has satisfied these requirements who is entitled to vote. The only way for a corporation to determine which mortgagee has the greater priority is to conduct a search of title. It may be advisable to have the assistance of legal counsel for this purpose.

One Unit, One Vote

It is easy to state that only one vote can be cast for each unit and that all voting by owners shall be on the basis of one vote per unit (subsection 51(2)).[3] However, without some degree of organization, this principle is far more difficult to administer, particularly if voting is to be done by a show of hands rather than per-unit balloting.

According to this principle, even if there are multiple owners

of a single unit, they have only one right to vote that can be exercised. Problems may arise when the co-owners are unable to agree on how to vote.

Owner-occupied residential condominium units typically have more than one unit owner, as it is very common for couples to own property as joint tenants (or as "tenants in common", which makes no difference for the purposes of these provisions of the Act). One would hope it would be the rare case, indeed, (and is perhaps a symptom of greater issues) where such co-owners do not agree on how to exercise the vote. Nevertheless, if such co-owners of the same unit do not agree on how to vote, neither of their votes can be counted.

Where there are more than two owners of a unit, the majority of them may exercise the right to vote. Therefore, if there is a majority consensus, the vote is to be exercised according to the will of the majority. This seems straightforward enough, but some cautious consideration is also required here. For example, if there are four co-owners of a unit, two of which vote for candidate A, one for candidate B and one for candidate C, no vote is counted from this unit, as there is no majority amongst the co-owners that agrees on how to vote.

In order to conduct a proper meeting, the board should determine in advance how it will count and record votes to ensure that only one vote is counted for each unit regardless of the number of persons who attend the meeting. Also, the chairman of the meeting should communicate explicit instructions to the owners on how to exercise that unit's vote. It may be helpful if the co-owners of a unit decide in advance who will represent that unit in actually casting their vote.

Voting by Non Residential Units

Subsection 49(3) of the Act provides that no owner may vote in respect of a parking unit or storage unit or a unit which is reserved as a mechanical space, unless all of the other units in the condominium are used for one or more of such purposes. This means that an owner who owns both a residential unit and a parking unit can only vote on account of the former and not the latter. That is, the owner would have only one vote.

This is an area where the manner in which the Act is drafted creates some potentially awkward issues. For example, as noted above, in order to pass a by-law it must be approved by a vote of the owners representing "a majority of the units of the corporation". This statement does not exclude parking, storage or mechanical space units; they are clearly "units of the corporation." Thus, in a residential condominium where parking and storage units are the majority of units (i.e., if there is a ratio of one of these units each to every residential unit), if they are not also individually owned by the owners of the residential units it could become technically impossible to approve any by-law. While it is arguable this was not the intention of the drafters of the Act (and is likely often ignored in practice), it is one of the results of applying the provisions of the Act as they were written.

A Comment on the Election of Directors

Where the vote is for the election or removal of board members, the Act requires that a unit holder has the right to vote for each position on the board. Therefore, a regime which purports to reserve a position on the board for certain categories of unit owner is void. (This has been attempted in some condominium corporations where there are various types of unit, such as a condominium including both a high rise and row houses.)

The obvious exception to this rule is section 51(5) which, in cases where at least 15% of the units are owner-occupied, reserves a position on the board to be elected by owner-occupied units. In this situation, two separate elections might be required to be conducted.

Proxies

Although personal attendance at owners' meetings is strongly recommended in all cases, the Act allows a unit owner to vote while not personally present at a meeting via proxy.

A "proxy" is a person authorized to stand in as a substitute

for another person and to exercise certain of that person's rights. The term can also refer to the form of document used to evidence such authorization. In principle, a proxy is similar to (and is sometimes referred to as a form of) power of attorney. In this article, we will refer to the form as a "proxy" and to the authorized person as a "proxy holder". The unit owner giving the proxy is called a "granter".

The person appointed to be the proxy holder need not be a unit owner or a resident of a unit.

Unless other requirements are set out in the by-laws of the corporation, any person seeking to act upon the authority of a proxy form must bring the executed form to the meeting and deposit the form with the secretary of the corporation. It is usually required that this be done prior to the commencement of the meeting.

The Act provides three template forms to use for proxies, depending on the subject matter of the meeting, but it does not require that those forms be used. Subject to the provisions of the corporation's by-laws, which may specify a required form of proxy, so long as the proxy contains the basic elements required by the Act, it will be sufficient. The mere fact that the corporation sends out a form of proxy with its notice of meeting does not mean that is the only valid and acceptable form.

Subsection 52(4) requires that the proxy be signed by the unit owner and that it relate to a specific meeting. Thus, a form which purports to appoint a proxy for all meetings is not acceptable. (However, a power of attorney could be granted which does this.)

The unit owner who signs the proxy must be the same as shown on the records of the corporation (see above) and cannot be in arrears for more than 29 days. Where a mortgagee is entitled to vote, the mortgagee may also do so by proxy. If the unit owner or mortgagee entitled to vote comes to the meeting seeking to vote, the proxy is null and void.

There are additional requirements where the meeting includes the election and/or removal of directors. The proxy in such cases must state the name of the directors for and against whom the proxy holder is to vote (subsection 52(5)). In the event that there are more candidates listed on the proxy for the proxy holder to vote in favour of than there are positions available on the board, the proxy should include a rank order (as the recommended statutory form indicates), otherwise the proxy holder may not know how to vote or should vote for the candidates only in the order they are listed on the proxy.

To use a proxy form for the election or removal of an owner-occupied position, the proxy form should indicate this purpose (presuming the granter is entitled to participate in such a vote). Prudent practice would require a separate form for this proxy, just as prudent practice dictates a separate election. However, this is not an actual requirement and may be done at the discretion of the board. Unless a requirement for a separate proxy is set out in the notice of meeting, it is not likely to be a valid requirement if imposed at the meeting. The corporation should mail out these proxy forms only to owner-occupied units.

It must also be noted that a granter cannot give more authority than he, she or it has. Therefore, if the granter is only one of a number of co-owners of a unit, the proxy will not grant authority to the proxy holder to represent the other co-owners or to vote contrary to the will of the majority of all the co-owners of that unit. Co-owners of a unit who will all be unable to attend a meeting can, and likely should in most cases, jointly grant a proxy to one person. There is no limit to the number of proxies an individual can hold.

The proxy can be specific in the purpose for which the decision making power is delegated, or it can be a general appointment. Where general, it can also include some specific instructions. For example, the granter can at the same time (a) give the proxy holder authority to make decisions in any manner in respect of issues arising at the meeting that the granter could decide at the meeting, and (b) specifically instruct the proxy

holder to vote for or against specific proposals that are known to the granter beforehand (such as approval of by-laws or for an election).

Where permitted by by-law, proxies can be used as ballots for certain votes. However, even where this is done, the corporation is under an obligation to retain all proxies for a period of ninety days following the date of the meeting.

In general, the use of proxies should be limited. Although proxy use should not be altogether discouraged, all unit owners who are physically able should be strongly encouraged to attend meetings and fully participate in the governance of their condominium.

Footnotes

1 This article contains only general statements and our views on the law relating to voting rights, procedures and proxies for condominium administration in Ontario. It is not legal advice. In all cases, where there are specific questions relating to these and other legal issues, it is best to obtain your own legal counsel.

2 Exceptions include where approval is implied through non-complaint or inaction by unit owners, as in the case of approving new or amended rules issued by the Board of Directors (see subsection 58(7)(b)) or certain changes to the common elements (see subsection 97(3)(b)1.), and where only written consents are required to evidence approval, as with declaration amendments and amalgamations. In the latter cases, owners' meetings are still required, but not for the purposes of voting on or approving the proposed action of the corporation.

3 We note that this principle appears contrary to section 53 of the Act, which indicates that votes at owners meetings are generally to be determined in accordance with the will of the majority of owners attending the meeting, which does not suggest voting on a per-unit basis. It is the wording of section 53 that presents this apparent contradiction. However, since section 53 is subject to the other provisions of the Act, in effect the interplay of these two provisions of the Act should simply mean that while all voting by unit owners must be counted on a per-unit basis, most questions do not require approval by owners representing a majority of the total (overall) number of units of the corporation but will be determined by the vote of those representing a majority of the units that are represented by owners at the meeting.