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Electronic Voting & Proxies

The different ways to cast a vote and what condos should be aware of

It's safe to say that this past year has been a huge learning curve for anyone working within the condominium industry. The updated *Condominium Act* has introduced new forms, notices and procedures for condominium property managers to follow when it comes to meetings, distribution of notices, and voting. Navigating through the changes to the Condo Act and the new requirements under the *Condominium Management Services Act* ("CMSA") have provided property managers and property management companies additional items to consider beyond the day-to-day activities of managing a condominium.

The updates to the *Condominium Act* have materially changed the way condominium owners cast their votes at owner

meetings. First, there has been a wholesale change in the proxy form that the Government of Ontario now requires that condominiums use. Second, the amendments now permit for the submission of votes via "telephonic and electronic means" (provided that a condominium corporation first passes a bylaw adopting its use).

We'll provide an overview of two "electronic" ways that condominium owners can participate in the governance of their corporation, that is voting by way of electronic ballot or by electronic proxy, as well as outline the differences between the two methods.

Prescribed Proxy

One of the major changes that was unveiled in the updated *Condominium*

Act was the release of the Prescribed Proxy. The Prescribed Proxy is a departure from what many property managers are used to and this fall will be the first time they will be working with the new form.

Prior to the advent of the Prescribed Proxy, proxy forms were paper based. There have been many reported incidents of unscrupulous owners showing up to a meeting with a large stack of proxies to abuse the system for their own personal gain. And, the difficulty in verifying the legitimacy of paper-based proxies allowed these shady individuals to commit proxy fraud. In response to this, the Ministry of Government and Consumer Services (MGCS) introduced standardized proxy language and inclusion of fields for signature and initials





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provides protection against proxy tampering and proxy fraud.

The Prescribed Proxy now provides owners with three choices with regards to the role a proxy holder may play on their behalf. The first option directs that the proxy count only towards quorum and not towards any voting matter. The second option directs that a proxy count only towards quorum and provides that the proxy holder may vote on routine matters (such as adjourning the meeting or appointing an auditor). The final option directs that a proxy count towards quorum and provides the proxy holder with the discretion to vote on any matter (subject to the instructions provided by the owner). It's not clear why MGCS provided these three options; one can only speculate that they drafted the first two options as a means to prevent proxy tampering and misuse of proxies for unethical purposes.

Corporations can now customize the proxy form according to the specifications of their meeting now that the Prescribed Proxy is modularized. The first section allows for votes for the election of candidates for board positions. The second section is for election of candidates by owners of owner-occupied units. The third section handles votes for specific matters such as change in bylaws or institution of a new rule in the condominium declaration. The fourth section deals with votes to remove directors from the board.

It should be noted that with new legislation under CMSA, property managers are no longer able to solicit for prox-

ies, but this does not prohibit them from distributing the proxy, collecting completed proxies, and even promoting the use of the proxy.

Electronic Voting

Under the *Condominium Act*, a condominium corporation is permitted to allow "owners to cast a vote by "telephonic and electronic means" if it first passes a bylaw adopting its use. This "electronic voting bylaw" resolution must receive a simple majority of votes in order to pass (assuming quorum for the meeting is first reached). Once the bylaw is passed, electronic voting can be used for future meetings. It is important to note that the *Condominium Act* has not set out any rules for electronic voting, so it is up to the corporation to set the rules in their bylaws. In the absence of any MGCS guidance on this matter, condominium corporations should confer with their legal counsel to ensure that the rules for electronic voting are not in conflict with the corporation's existing bylaws and abide by what is set out in the Condo Act.

So, what's the difference between electronic proxies and electronic voting?

Well, not much. Although electronic proxies and electronic voting allow an owner the convenience to vote ahead of the meeting, there are some key differences between the two voting methods. First, electronic voting requires the passing of a bylaw, whereas proxies and electronic proxies are already allowed under the Act.

Second, proxies can be revoked or changed by the owner at any time before the meeting commences. Electronic votes, however, cannot be revoked once submitted (which leads to problems in circumstances where owners become aware of new information after their vote has been submitted causing them to want to change their vote). Third, proxies allow owners to defer their vote to a proxy holder, which provides flexibility in circumstances where owners are unsure how to vote and feel that their chosen proxy holder is more educated on the issues and therefore in a better position to vote. Fourth, proxies, by default, remain valid for a meeting and any related adjournments. So, if a meeting is postponed, rescheduled or adjourned, then all proxies collected for that meeting can still be used when it's reconvened. This can save management considerable time and effort rather than having to restart the solicitation process for a meeting. Conversely, electronic votes are only permitted to be used at meetings for which they were collected.

Perhaps most importantly, however, is that no matter how votes are submitted by owners, proxies and electronic voting can and should be used together. ■

Trevor Zeyl is a lawyer and one of the co-founders of GetQuorum, a condominium governance notice and online electronic voting platform for condos. See GetQuorum.com for more information.

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