

The National Association of Housing Cooperative

Untangling Messed-up Elections

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1. Types of Elections:

The scope of today's topic is broader than simply the typical annual election of board members; rather it deals with any vote that takes place within the Cooperative. This includes:

- A. Board of Directors
- B. Bylaw Amendments
- C. Proposals to Sell, Convert the form of the Corporation, etc..
- D. Amendments to Articles of Incorporation

Caveat & Disclaimer:

First, it is important to accept this material as educational but it is not the Holy Grail. Not only do articles and bylaws vary (and one word or comma may make cause different results) but each state has its own laws, so you cannot rely on this information as correct in your jurisdiction. And what may be the law today may not be tomorrow. Courts and legislatures are hard at work changing the rules. Even Roberts Rules of Order has undergone evolution. So use this class as a means of becoming alert to the process of evaluating the issues we are discussing, but don't blindly take solutions we offer here as Gospel.

Next, we are offering opinions and thoughts here. There is plenty of room for different solutions. This is just the beginning; thinking out of the box is to be encouraged.

Finally, there is no substitute to assembling your Cooperative's "brain trust" to address these challenges. Your Coop Attorney and Management Agent are key players and since these issues are of extreme importance on many levels (legal; the board's credibility; confidence of the membership; etc.), it is no time to try to save money but not bringing them into the discussion.

2. Types of Problems: [not an exhaustive list but merely illustrative]

A. Lack of Quorum at the time of the Election

[1] Noticed during the Meeting

[2] Noticed after the Meeting

B. Improper Notice of the Meeting

[1] Not Timely

[2] Not in Conformity with Special Meeting Requirements

C. Not in compliance with the Agenda

[1] Out of the Prescribed Order

[2] Outside the Scope of the Meeting

D. Disqualified Voters

[1] Delinquent in carrying charges

[2] Not on Membership Certificate

E. Disqualified Candidates

F. Lack of HUD Approval, if required

G. Following an Incorrect Set of Bylaws

H. Tie Votes

I. Misuse of Proxies

J. Misuse of Absentee Ballots

K. Failure to Follow Proper Nominating Procedure

L. Inconsistent Tallies from Election Inspectors

M. Insufficient Number of Votes to Pass a Proposition

3. Sources of Law & Authority:

A. The Cooperative's Governing Documents

[1] Articles of Incorporation

[2] Bylaws

B. Statutory Law (as interpreted by the Courts)

Example: in Michigan there is a chapter at the end of the Nonprofit Corporation Act that deals specifically with Cooperatives which opt in to it. MCLA 450.3100 et seq.

C. Robert's Rules of Order

[1] What if the specific edition of Robert's is not given?

[2] What if Robert's does not furnish clear advice?

D. The HUD Factor

If the Cooperative is subject to a Regulatory Agreement, HUD may try to dictate the result.

4. An Analytical Approach of the Legal Consequences & Remedies:

Analyzing these situations is a lot like driving along and seeing a dog in the road: it is a lot better if you are seeing the dog before you hit it than if you are looking at it through your rear view mirror.

A. Seeing the Problem Beforehand:

Like our dog down the road example, it may be noticed well enough in advance to be proactive - such as swerving or hitting the brakes.

[1] Several members have designated the same person to serve as their proxy but bylaws limit it to one only: either give proxy the option to represent one member; or go with the first in time based on the date the proxy form was executed

[2] You discover that there was not enough notice given according to the bylaws: re-notice the meeting if the date is flexible in the bylaws; otherwise, convene the meeting and ask the membership to either waive the notice requirement or to adjourn the meeting so that there can be a new proper notice given (Beware: if someone does not waive, they can object)

[3] You discover that you may not have a current version of the bylaws: get what HUD has in its file and use those on the assumption that since the Regulatory Agreement requires approval of any bylaw amendments, what HUD has must be correct

B. Seeing the Problem During the Meeting:

Using our dog example, if you are in middle of the meeting and have hit the dog, you may still have time to react and save the animal.

[1] A member has been registered but is ineligible to vote: advise that person and do not count his vote

[2] You don't have quorum: most bylaws allow less than a quorum to set an adjourned meeting date and then to adjourn

[3] The inspectors come up with different results: count again (This is why it is useful to display the count on a black board as the votes are tallied)

[4] The bylaw-prescribed order of business is not being followed: ask the membership for a motion to waive the order of business and to proceed with the (*whatever you have advanced out of order*)

C. Seeing the Problem Afterwards:

Finally, if the meeting is over and issues are raised, it is like seeing the dog in your mirror. It becomes much more challenging, if not impossible, to fix it.

[1] You didn't have quorum - actions are void

[2] You didn't notify HUD - breach of Regulatory Agreement?

[3] You didn't get HUD approval on bylaw amendments - the Membership action may be voidable by HUD, or may be in breach of Regulatory Agreement

[4] Successful candidate is ineligible - go to next highest vote recipient if there is one; otherwise, Board should appoint

5. Practical Advice to Take Home:

A. Anticipate & Plan

“An ounce of prevention is worth a pound of cure.” Spending time as a Board thinking through these issues in advance gives you the chance to avoid mistakes. Thus, it is wise to:

- [1] Study your bylaws in advance. Know the details of
 - how much notice is required?
 - what constitutes a quorum?
 - are proxies allowed?
 - are absentee ballots allowed?
 - what disqualifies a Member?
 - what disqualifies a Candidate?
 - what is the vote required? simple majority or more?
- [2] Is HUD still in your life? If so, check out the Regulatory Agreement for its impact on the election - especially if Bylaw amendments or changes to the Articles of Incorporation are proposed.

B. Establish & Promulgate Rules:

An outgrowth of the “anticipate & plan” step is addressing the gray areas. Where the Bylaws allow for a procedure but do not spell out the process, it rests with the Board to determine the rules, subject to statutes and other governing law such as the Regulatory Agreement. Examples of areas where there may need to be such rules are:

- [1] Proxies:
 - what is the form of the proxy?
 - when are they available?
 - shall they be delivered before the Meeting?
 - if the bylaws state that a person can only carry one proxy,
 - what happens if there are multiple proxies naming the same person?
 - what if the person designated to carry the proxy is not eligible to vote?
 - who will count the proxies?
 - is that done in an open meeting? who may attend?
- [2] Nominations:
 - how does a Member become a candidate?
 - will there be a “meet the candidates” night?
 - will there be nominations from the floor?
 - will there be a publication of each Candidates’ bio and statement of why they are running?

If the Board “fills in the gaps” by adopting rules, they should be published

well in advance of the Meeting so the Membership is fully aware of them and everyone has a “level playing field.”

C. Rely on your Professionals

This is no time to be cheap. Involve the Cooperative Attorney and the Management Agent in the anticipatory planning stage, establishing rules, counting the proxies, registration of Members and the actual Meeting.

The benefits include:

[1] The obvious: getting help from trained experts

[2] They are [or should be] independent and objective, since their professional reputations are at stake - they are not as close or affected by the election results as a Board Member or an Officer so their judgment is likely to be less biased

[3] There is a cloak of authority present that generates a presumption of validity

D. Remember the Premise of Roberts Rules of Order:

“Honor the will of the Majority - while respecting the rights of the Minority” Translated, this means that the ultimate objective of Parliamentary Law is to allow Due Process and then let the Majority prevail.

E. When in doubt, use Common Sense.