

One of These Things Is Not Like the Other: Proxies, Written Ballots, and Electronic Voting

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June 22, 2022



All community associations, at least annually, are faced with action items requiring a vote of their membership.

For example, community association membership participation is necessary on an annual basis to elect the Board of Directors and for ratification of the upcoming year's annual budget.

There are many challenges surrounding member voting at association meetings, but the most challenging is often organizing in-person voting by hundreds, or even thousands, of members. It may be practically impossible to find a space that can accommodate the entire membership if they were all to attend in person. On the other hand, some associations have the reverse problem of not being able to garner enough member participation to satisfy the associations' quorum requirements.

Voting Tools

Proxies, written ballots, and electronic voting, if used properly, can be valuable tools for an association looking to encourage member participation at annual meetings, as well as providing the option of avoiding the hassles and costs of in-person voting. But, if used incorrectly, they can do the exact opposite. Misunderstandings regarding the proper use of these tools can lead to improperly conducted votes which can cost an association time and money, as well as erode member confidence in the Board of Directors. A solid understanding of the differences among these tools allows an association to make the best use of its time and resources.

Meeting or No Meeting - Pick the right voting vehicle

First things first, the Board of Directors needs to determine whether the member action should take place at a membership meeting **or** if the action will take place without a meeting. This is an extremely important distinction. Proxies may be used at meetings held in-person, virtually, or both. Written ballots and/or electronic voting may be used in place of a membership meeting. An association cannot simultaneously hold an in-person meeting utilizing proxies and then allow members to also vote via written ballots/electronic vote.

Simply put, a proxy is a tool to be used for voting purposes **AT** a meeting when a member cannot attend, and a written ballot and/or electronic voting is to be used when the member vote is taking place **WITHOUT** holding

a meeting.

Proxies

The only way a member is permitted to vote at a membership meeting is if either the member:

- Is personally present at the meeting (either in-person or attending virtually), or,
- The member has designated someone as a proxy in an appointment of proxy form, usually returned or communicated to the association's secretary prior to the meeting, **AND** the proxy holder is personally present at the meeting (either in-person or attending virtually).

The concept of a proxy is pretty basic; a member who has the power to cast a vote authorizes someone else to cast that vote for them. But that simple concept can lead to all sorts of trouble when a proxy is improperly authorized.

There are three important things a member who wants to participate in an association meeting by proxy must first do:

- Determine if the association's articles of incorporation or bylaws restrict the use of proxies. If they don't, the member is free to appoint a proxy to vote or act at any membership meeting.
- Decide what type of proxy the member wants to create (i.e., general, directed, quorum purposes, or combination proxy).
- Fill out and sign and date an appointment form of proxy consistent with the requirements of the North Carolina Nonprofit Corporations Act and the association's governing documents.

Absent express requirements under the association's governing documents, there are two (2) surefire ways by which a member can properly appoint a proxy:

- By signing a written appointment form and delivering it to the association
- If the member has designated an email address to be used for communication and business with the association, the member may submit an electronic record that either bears the member's electronic signature or is sent from the member's designated email address

The four (4) most common types of proxy are:

- General, when the member appoints the proxy holder to cast the absentee member's vote on all action items properly brought before the membership, however, the proxy holder desires;
- Directed, which instructs the proxy holder to vote in a specific way and may limit the proxy to voting only on certain action items;
- Quorum, which means that the proxy only counts towards obtaining quorum, but the proxy holder cannot vote on any items at the meeting, and,
- A combination of a general and a directed proxy, which can only be applicable when there are going to be votes on multiple issues during the meeting. The member instructs the proxy to vote a certain way on one or more issues (i.e., directed proxy) but gives the proxy holder the freedom to vote as the proxy wishes on any other matters (i.e., general proxy).

On matters for which the member uses a general proxy, the member is trusting the judgment of the proxy holder to vote in the best interest of the proxy giver without directing the proxy holder on how to cast the member's vote. On matters for which the member uses a directed proxy, the member is trusting the proxy holder to vote the way the member instructs on the face of the proxy. It is important to understand that a proxy is an agreement between the proxy giver and the proxy holder, accordingly, the association has no

responsibility to make sure the proxy holder votes consistent with the directed proxy giver's instructions. Consequently, it is very important that the member giving the proxy appoint a trustworthy proxy holder.

Again, regardless of the type of appointment, for the proxy to be effective, the appointed proxy must attend (either in-person or virtually) the association meeting and actually cast a vote (unless a quorum proxy is appointed). A proxy is NOT an absentee ballot and cannot be counted as such, even if it is a directed proxy, there is no guarantee that the proxy holder will cast the ballot consistent with the proxy giver's instructions.

Written Ballots and Electronic Voting

Written ballots and electronic voting are tools that associations can utilize to obtain member approval without the necessity of holding a membership meeting. If an association decides that it wants to use written ballots or electronic voting, it's important for the association to understand that the written or electronic ballot will be in lieu of, and NOT in addition to, a vote at a membership meeting.

Written ballots are most commonly mailed or emailed to all eligible voting members to be filled out and returned to the association by a certain date. Electronic voting may be used where a member has already designated an email address to be used for communication and business between the member and the association. Once a member has designated such an email address, the association may provide the member with an electronic ballot or electronic notice to cast their vote for or against each proposed action via the electronic ballot or via an electronic voting system. The association may not require that member action be taken solely by electronic voting unless every member who is entitled to vote on the proposed action has designated an email address to be used for communication and business between the member and the association. All written ballots, electronic voting notices, or electronic ballots must state a deadline by which the written or electronic ballot or electronic vote must be received by the association. The deadline return date must be identical on both the written ballot and electronic voting information if more than one method of voting is utilized.

A large part of these two tools' usefulness is the broad range of actions for which they can be used. Unless the association's governing documents specifically prohibit voting by written ballot or electronic voting, any action that can be taken at a member meeting can be taken outside of a meeting by these two voting tools.

Once a written ballot or electronic vote is transmitted to the membership, the return deadline cannot be changed. Accordingly, if the Board of Directors decides it wants to conduct a member vote via written ballot or electronic voting, it should pick a date that it believes will provide the members with enough time to receive, vote, and return the ballots prior to the deadline. Just like with a membership meeting, in order for the action to be legitimate, the same number of members that would be required to meet the quorum at a meeting is necessary to participate in a member vote by written ballot or electronic voting.

Conclusion

Proxies, written ballots, and electronic voting are useful tools for an association that fully understands the differences and mechanics of each method. These voting tools each contain their own nuances, which if not followed properly can result in pitfalls.

Just remember: proxies cannot co-exist with written ballots and electronic voting—it is an either-or proposition. The consequence of unauthorized association action has the potential to open an association up to liability and/or invalidate association action, so it is critical that an association work with its attorney to ensure whatever member voting method is selected, complies with the association's governing documents and NC Law.

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