“Directors May Abstain From Voting,” News-Press

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By: Joseph E. Adams

Q: In your column of August 5, 2018, titled “Board President Should Vote,” you state that “[u]nder previous law, directors could only abstain from voting if they had a conflict of interest” and “[u]nder current law, directors are permitted to abstain from voting without articulating a reason, though the abstention must be noted in the minutes.” What law was changed and when was it changed? (L.C., via e-mail)

A: Prior to July 1, 2008, directors on condominium boards could only abstain from voting in the event of a conflict of interest. Otherwise, the director was deemed to have voted with the majority of the board. The version of Section 718.111(1)(b) of the Florida Condominium Act which existed from 1977 through 2007 stated that a director who was present at a meeting was presumed to have assented to the action taken “unless he or she voted against the action or abstained from voting in because of an asserted conflict of interest.”

The July 1, 2008, amendment to this section removed the conflict of interest requirement for directors to abstain from voting. The law now states that a director who is present at a meeting is presumed to have assented to the action taken “unless he or she votes against such action or abstains from voting.”

As such, condominium association directors are permitted to abstain from voting without stating a reason and even if there is not a conflict of interest, although the abstention must be noted in the meeting minutes. However, directors also owe a fiduciary duty and in my opinion should take a stand on matters before the board, even if highly controversial, unless there is a conflict or other good reason to abstain.

By comparison, the homeowners’ association abstention law has always been more liberal than the earlier versions of the Florida Condominium Act. The Florida Homeowners’ Association Act provides that a director’s abstention must

be noted in the minutes, but does not (nor did it ever) limit abstentions to conflict of interest situations. Section 720.303(3) of the Homeowners' Association Act provides that "[a] vote or abstention from voting on each matter voted upon for each director present at a board meeting must be recorded in the minutes."

Q: Recently, our management company informed the board of directors that proxies may not be used for the election of directors pursuant to Florida condominium law. Is this correct? (P.B., via by e-mail)

A: That is correct. Proxies have not permitted in condominium elections since 1992. Condominium elections are governed by Section 718.112(d)2, of the Florida Condominium Act, which provides that the election of directors must be by secret ballot. The law does permit condominiums with 10 or fewer units to adopt a custom election process, which could include the use of proxies.

Rule 61B-23.0021 of the Florida Administrative Code requires that the ballots be returned in an unmarked ballot envelope which must be placed in a signed outer envelope which includes the eligible voter's signature and unit identification.

Proxies may be used to vote on other matters, such as amendments to the document or votes to waive or reduce reserves. In general, a "limited proxy" form must be used, which is for all intents and purposes a signed absentee ballot.

This is one area where the law for homeowners' associations is quite different. Because the election of directors is mainly governed by the procedures contained in the association's bylaws, it is common for a homeowners' association to be able to use proxies for elections. While some homeowner associations' bylaws adopt the condominium procedure, many don't. Further, nominations from the floor must be permitted in HOA elections (unless the election procedures allow any owner to nominate themselves in advance) while nominations from the floor are prohibited in condominiums. Also, there is no statutory requirement for the use of limited proxies in homeowners' associations, although that is common and preferred practice.

