

Board Members and Use of Proxies at Board Meetings

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Owners in a common interest community are allowed to give a directed proxy for a meeting of the owners to a member of his or her immediate family, a tenant of his who resides in the common interest community or another unit owner who resides in the common interest community. Members of Board of Directors often seek to determine whether they can provide a proxy to someone to appear and vote for them at a meeting of the Board of Directors.

The request of a Board member to provide a proxy to someone to serve in his place at a Board meeting raises a number of issues. First, may a Board member give a proxy to someone to vote in his place at a Board meeting? Second, if a Board members chooses to do so, if the law is unclear, what are the possible ramifications and liabilities thereof? Third, if a Board member cannot give a proxy, may he give a power of attorney to someone else to appear in his place and vote?

There is no specific law precluding a Board member from granting a proxy to a third party to appear at a Board meeting in place of such Board member. However, it is basic general corporate law that a Board member cannot give a proxy to someone to appear and vote in his place at a meeting. The reasons therefor include the increased liabilities and the personal responsibility. The liabilities are discussed below. Nevada Revised Statutes, specifically sections of the corporations code, clearly protect directors (not proxy holders) from personal liability as long as they take certain actions. It is clear that directors are exempt from personal liability if they follow the provisions of the Nevada revised statutes. A director should never attempt to transfer this responsibility as he may be breaching his fiduciary duty to the corporation.

For your information, certain sections of Nevada Revised Statutes, Chapter 82, are provided below:

“NRS 82.221 Directors and officers: Exercise of powers and performance of duties; personal liability. 1. Directors and officers shall exercise their powers in good faith and with a view to the interests of the corporation. 2. In performing their respective duties, directors and officers are entitled to rely on information opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared by: (a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented; (b) Counsel, public accountants or other persons as to matters reasonably believed to be within the

preparer or presenter's professional or expert competence; or

(c) A committee upon which the person relying thereon does not serve, established in accordance with NRS 82.206 as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence, but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if he has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted. 3. **A director or officer must not be found to have failed to exercise his powers in good faith and with a view to the interests of the corporation unless it is proved by clear and convincing evidence that he has not acted in good faith and in a manner reasonably believed by him to be with a view to the interests of the corporation.** 4. Except as otherwise provided in the articles of incorporation or NRS 82.136 and 82.536 and chapter 35 of NRS, no action may be brought against an officer or director of a corporation based on any act or omission arising from failure in **his official capacity to exercise due care regarding the management or operation of the corporation unless the act or omission involves intentional misconduct, fraud or knowing violation of the law.** 5. **The articles of incorporation may impose greater liability on a director or officer of a corporation than that imposed by subsection 4.** (Added to NRS by 1991, 1269; A 1993, 1997) [Emphasis added.]

It is difficult to imagine that a director can be exercising his powers in good faith with a view towards the interests of the corporation if he is providing a proxy to a third party to vote in his place. The protections afforded directors of volunteer corporations are based on the directors acting in good faith and relying on professional advice in those areas related to the issues concerned. If a director were to attempt to transfer this responsibility, he would be abrogating his duties and be in breach of the spirit and the letter of the law.

As importantly, many directors and officers' insurance policies only cover the acts or omissions of members of the Board of Directors acting in good faith where such directors were elected or appointed properly. In this day and age of limited insurance coverage, one can only assume that the insurance companies would regularly deny coverage for decisions made by a proxyholder of a Board member thus opening up the Board member, and most likely the proxyholder, to substantial liability for making decisions for the Board of Directors and the Association. There are cases where members of the Board of Directors who are appointed to fill vacancies are not even covered under certain insurance policies which have language in them which limits the coverage to "properly elected" directors. Therefore, you can be sure that insurance companies would attempt, and most likely be able, to decline to provide coverage to

members of the Board and their proxyholders where the proxyholder has acted for the Board member.

With respect to the issue of a power of attorney, there is no reason to believe that a power of attorney provides any more protection than a proxy. By way of example, if a member of the Board of Directors provided a power of attorney to a third party to attend and act in his place as a member of the Board of Directors, it is still likely a breach of fiduciary duty since the member of the Board has not appeared and voted himself. Similarly, all of the issues regarding limited liability provided by the law and the insurance policies remain, even with the use of a power of attorney.

Based on the myriad of issues that can exist with respect to the attempt by a Board member to transfer his responsibility to appear and vote at a meeting, members of Boards of Directors should not provide proxies or powers of attorney to third parties to appear in their place at Board meetings. Additionally, whenever a Board members attempts to do so, the remaining Board members should not accept the proxyholder. If there is not a quorum to proceed with the meeting, without the proxyholder or a person holding the power of attorney, then the meeting should be adjourned until such time as a quorum can be present. Additionally, if for any reason the Board allows a Board member's proxyholder or a person holding such Board member's power of attorney to appear and participate in a meeting, if the vote of the proxyholder is relevant to the outcome of a vote of the Board of Directors, the Association and the remaining members of the Board of Directors will be subjecting themselves to possible liability for making a decision which is subject to challenge. This may also mean that the remaining members of the Board of Directors are not covered by the directors and officer's insurance. Therefore, in short, members of Boards of Directors should not be allowed to or attempt to provide proxies or powers of attorneys to third parties to appear in their place at Board meetings.