

COUNSEL'S COMMENTS

By Wendell A. Smith, Esq.
Greenbaum, Rowe, Smith & Davis, LLP



OBTAINING UNIT OWNER APPROVAL - AN EASIER AND MORE EFFECTIVE APPROACH

As community associations mature, it becomes increasingly necessary for their governing boards to obtain unit owner approval for a variety of reasons. These include amendments to the governing documents, special assessments for repair and replacement of the common property, capital improvements, and authorization to borrow money to fund association projects.

It has been my experience over the years that many board members, managers and other professionals tend to throw up their hands in frustration when faced with the daunting task of having to obtain the approval of the required majority of unit owners in order to accomplish the objective at hand. More often than not, unit owner apathy or pocketbook issues make this task even more difficult.

It goes without saying that communication with the unit owners is the key element in obtaining unit owner approval so that they fully understand the rationale for the proposal(s) upon which they

are being asked to vote. However, the method by which the approval is sought is also an important key to success and requires strategic thinking on the part of the association board and their professionals. Specifically, it may not be enough to convene a special meeting and to solicit proxies especially where a super majority is required. Accordingly, I would strongly urge consideration of an alternative method authorized under the New Jersey Non-Profit Corporation Act, N.J.S.A. 15A:1-1, et seq.

Specifically, N.J.S.A. 15A:5-6b expressly authorizes a non-profit corporation to take action without a membership meeting if it obtains the written consent of those members mandating the minimum number of votes which would have been required to authorize the action had the meeting been held. However, the election of trustees is expressly excepted. This section provides in pertinent part:

"Except as otherwise provided in the certificate of incorporation or bylaws and subject to the

provisions of this subsection, any action required or permitted to be taken at a meeting of members by this act, the certificate of incorporation, or bylaws, other than the annual or biennial election of trustees, may be taken without a meeting upon the written consent of members who would have been entitled to cast the minimum number of votes which would be necessary to authorize the action at a meeting at which all members entitled to vote thereon were present and voting, if (1) the corporation provides to all other members advance notification setting forth the proposed action consented to, (2) the proposed action is not consummated before the expiration of 10 days from the giving of the notice and 20 days from the giving of the notice in the case of any action taken pursuant to chapter 10 of this act, and (3) the notice sets forth the existence of such 10-day period."

At first glance one might question why this provision is preferable to a proxy or mail ballot. The answer lies in the fact that (i) the proxy ballot would require a meeting to be held in order for a vote to be cast and (ii) both the proxy ballot and the mail ballot arguably would require the opportunity for the member to cast either an affirmative or a negative vote. In either case, once the ballot is cast, they cannot be withdrawn thereby eliminating any opportunity for negative voters to change their minds.

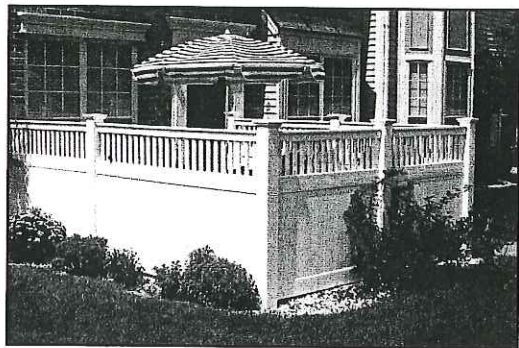
On the other hand, a consent, as contemplated by the statute is inherently an affirmative vote of approval for the proposed action. Therefore, after the initial consent forms have been returned, the association is afforded an opportunity to reorganize and mount a solicitation effort to obtain the required number of additional consents from those members who have not previously consented. Commonly, this is accomplished by a variety of techniques such as additional mailings, the organization of teams to request consents from individual members who have not previously voted and/or the convening of additional educational forums at which individual consents will be solicited. Importantly, the board and its counsel must make sure that the deadline for the return of all consents is properly extended by the Board, the authorization for which should be incorporated into the initial resolution and notice by the Board.

Although the foregoing consent technique may not be necessary or appropriate for all associations, I have seen it work well in large retirement communities, high-rise condominiums and a variety of other situations where holding a meeting of all the unit owners with only one change to vote is not feasible. ■

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