

**VOTING BY PROXY
IN
COMMON INTEREST DEVELOPMENTS
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Because most common interest developments are set up as corporations, they have the ability to utilize proxies for some membership votes. For most associations, proxies are utilized just once a year for the election of directors at the annual meeting of the members. The usual scenario is that the management company, at the direction of the board, mails out a form proxy to all association members for the establishment of quorum and the election of directors. The proxy serves as a valuable tool for the establishment of quorum at annual meetings as, without it, many associations would never achieve their initial quorum requirement. Generally, not much thought is given to the annual meeting proxy as management provides its "form" proxy to all members. The biggest challenge usually stems from the inability of some members to properly complete the proxy so that it may be counted. However, proxies do become more important when members conduct active proxy solicitations for competitive director elections and recall elections for the board. Under these scenarios, proxies become very important, and especially when members utilize their own "homemade" proxy as part of a solicitation effort. What follows are some brief proxy pointers and a few proxy "do's and don'ts."

Proxy 101 for California Common Interest Developments

As luck would have it, the California Corporations Code provides a definition for the term "proxy." According to section 5069 "proxy" means a written authorization signed by a member or the member's attorney-in-fact giving another person or persons power to vote on behalf of such member. "Signed" for the purposes of Section 5069 means the placing of the member's name on the proxy (whether by manual signature, typewriting, telegraphic transmission or otherwise) by the member or such member's attorney-in-fact. Unless the bylaws provide otherwise, anyone may serve as a proxy holder, including a non-member. Please note that proxies may not be used for board votes or for the establishment of a quorum of directors (See California Corporations Code Section 7211).

Section 7613 of the California Corporations Code discusses some of the "nuts and bolts" requirements for proxies. A proxy continues in effect until revoked. However, no revocable proxies are valid after the expiration of 11 months from their date unless otherwise provided in the proxy. The maximum term for revocable proxies is three years from the date of execution. A proxy revocation can be accomplished by a written notice delivered to the corporation, by subsequent proxy executed by the same person, or by personal attendance.

As a general rule, it is a good practice to include in the proxy a description of the general nature of the matter(s) to be voted on. By statute, some specific topics of voting must be generally described in a revocable proxy (California Corporations Code Section

7613(g)). Further, any form of proxy distributed to 10 or more members of a corporation with 100 or more members must afford an opportunity on the proxy to specify a choice between approval and disapproval of each matter or group of related matters (California Corporations Code Section 7514(a)). In addition, the proxy must provide that where the member specifies a choice, the vote must be cast in accordance with that choice (California Corporations Code Section 7514(a)). Finally, the proxy form should be dated even though there is no requirement to do so. By incorporating all of these elements into a proxy, the proxy should withstand scrutiny and be accepted as valid. Set forth at the end of this article is an exemplar proxy that incorporates these elements.

Can I Use My Own Proxy Instead of the Association's?

The answer is "yes." All members are permitted to use their own proxy form even if it differs in some respects from the proxy utilized by the association. However, the association typically supplies its own form well in advance of any vote, and there is really no reason why a member would need to draft her own form when the association has or will provide one. After all, if the association's "form" proxy is utilized it is likely to be Code compliant and not open to challenge. If a member uses her own "homemade" proxy it may be defective and open to challenge. Thus, unless a member is absolutely sure that her proxy is Code compliant, it may be best to utilize the association's proxy to avoid possible challenges. Unless, of course, the member believes that the association's form proxy is open to challenge, or for tactical reasons the member does not want to wait for the association proxy to be distributed. While the approach of waiting may be problematic in the context of some aggressive proxy solicitations or recall elections, it is still the safest approach to avoid possible rejection or challenge by the association.

It should be noted that when a proxy solicitor fails to prepare a proxy as dictated by the Corporations Code, it does not invalidate corporate action approved, in part, through votes cast by such proxies, but the noncompliance may serve as a basis for challenging the proxy at a meeting. A challenging member or association may also seek an order from the Superior Court compelling compliance with Section 7514. Further, at an annual meeting or other membership meeting, the inspectors of election will be tasked with the job of determining the "authenticity, validity and effect of proxies." Presumably, if the proxy passed muster with the inspectors it is valid for all purposes and should be counted. In final analysis, use the association's form proxy, if possible, to avoid challenges. If for whatever reason it is impracticable to use the association's proxy, carefully draft your own and perhaps get some input from an attorney to avoid any possible pitfalls. After all, you do not want to spend your time going door to door collecting proxies only to later have them determined to be invalid because your form was defective.

Alternatives to Member/Proxy Voting – Mail-In Ballots

The Corporations Code also permits ballots to be used in lieu of voting at a meeting by proxy or in person. Unless prohibited by the Articles or Bylaws, any action which may be taken at any regular meeting or special meeting of members may be taken

without a meeting if the corporation distributes a written ballot to every member entitled to vote on the matter. (Cal. Corps. Code § 7513). The ballot shall set forth the proposed action, provide an opportunity to specify approval or disapproval of any proposal, and provide a reasonable time within which to return the ballot to the association.

Proxies and written ballots should not be confused as they are different documents. The proxy empowers another to act on behalf of a member whereas the ballot only empowers a specific member to act. Unlike proxies, a written ballot may not be revoked unless the articles or bylaws permit it. Also, the use of ballots eliminates the whole proxy solicitation issue where one or more persons seek to represent and act on behalf of numerous owners at a member meeting. Thus, in some cases it may behoove the association to use ballots in order to avoid the proxy solicitation issue and the need to hold a meeting of the members. Further, in some cases where a vote of the membership is required (e.g., special assessment above five percent , CC&R amendment, etc.), the use of ballots may be more cost effective and less time consuming. Thus, when faced with the need to obtain membership approval of a matter, associations should look at the pros and cons of using mail-in ballots versus member/proxy voting at a membership meeting. Often times, the use of a mail-in ballot is more efficient.