

HABITAT MAGAZINE

DO WE KEEP IT SECRET? :THE PROS & CONS OF HOW PUBLIC YOUR BALLOTING SHOULD BE.

YOU WANT TO COMBINE your apartment with your neighbor's, which you have contracted to purchase, and you know that your application needs board approval. You just voted against the incumbent president at the most recent election, and because the ballot was not secret, the president, everyone else on the board, and the managing agent all know it. Will your application receive a fair hearing?

When shareholders of a cooperative or unit-owners of a condominium vote to elect members of a board, balloting may be done in secret or in the open. Secret ballots, as the term implies, are private. The vote itself may be a matter of public record, but no one sees the ballot except those charged with the responsibility of tabulating the votes (and they keep that information confidential). In open balloting, both the fact of voting and the person for whom the ballot is cast are public knowledge (in co-ops and condos, "public" refers to fellow shareholders/unit-owners and management, not to the public at large).

Shareholder voting in a co-op is provided for in the bylaws and the New York Business Corporation Law. The Business Corporation Law is silent as to whether ballots should be secret or open; it says that the bylaws may include any "reasonable" provision for balloting. In a condo, the Condominium Act, which is contained in the New York Real Property Law, regulates voting. As with co-ops, the act contains no requirements as to secret or open balloting, merely permitting "reasonable" provisions. Many – although by no means all – "standard" bylaws of both co-ops and condos provide that voting shall be viva voce (i.e., verbal) unless a shareholder requests a written, presumably secret, ballot.

In both co-ops and condos, when there are more nominees than the number of slots to be filled, voting is almost always done secretly. This allows one to vote his or her conscience without fear of retribution. No shareholder or unit-owner

wants to incur the wrath of a board if the members know that he or she has tried to vote one or more of them out of office. For instance, the unit-owner who plans to renovate his/her apartment or to sublet shouldn't have to worry that the plans will be rejected based on anything other than the merits.

By custom and tradition, Americans prefer secret ballot. But unless the bylaws specifically require them, they are not required. I have never heard of any situations where secret versus open balloting has become an issue and I advise boards to use secret ballots except when the technique of a vote "by acclamation" is employed.

When there are the same number of nominees for the board as the number of slots open, many co-ops and condos encourage a vote by acclamation. This saves a lot of time in situations where no positions are contested. Following Robert's Rules of Order, the meeting chair announces that there are "x" number of board slots up for election and that the same number of people have agreed to run. The chair then asks if there are any nominations from the floor. If there are none, the chair asks if there is a motion for a vote to elect all the candidates by acclamation. Any shareholder/unit-owner may make the motion. if the motion is seconded (again, by any shareholder/unit-owner), the chair asks for a show of hands "for" and "against" the motion. If there is no opposition, which is the typical case, the candidates who have announced their willingness to run are thus voted in without formal balloting.

However, if there is even one vote against the motion for a vote by acclamation, then formal balloting must be undertaken. Typically, in formal balloting situations, the managing agent tabulates the ballots, announces and certifies the results, and seals the ballots inside an envelope. This process often takes a day or two. The directors do not learn of the individual votes cast.

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(continued from previous page)

Most bylaws provide for the appointment of one or more inspectors of the election when any shareholder/unit-owner requests it, although this is not frequently done except where the situation is especially contentious. Inspectors count the ballots under the supervision of the meeting chair, usually with the assistance of the manager. When used, inspectors are typically required to orally (or, in cases of severe contention, in writing) swear or affirm to faithfully discharge their duties to fairly and accurately count the vote and to maintain voter confidentiality.

Another method of counting secret ballots used by some buildings is to hire an outside balloting company that essentially acts as the inspector of the election. By contract, the firm agrees to perform its duties accurately and confidentially. This service is usually used in situations where there is a history of contentious elections in a building.

There is ample justification and historical basis for secret balloting in elections of board members, even though the governing documents and statutes do not mandate it. The potential harm from open balloting is real. Secret balloting is the norm and should remain so.

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