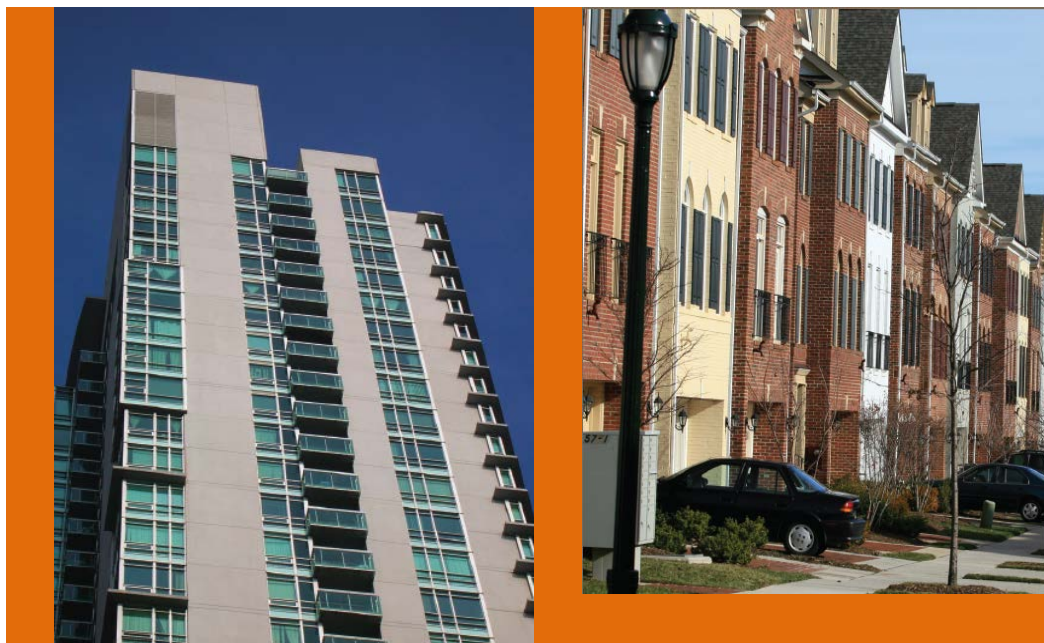


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Navigating Electronic Notice and Voting

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Basics of Electronic Notice and Voting

Generally, associations have the right to adopt reasonable rules and regulations regarding their procedures and the operations of the association. This comes from Section 18.4 of the Illinois Condominium Property Act and general references in the Common Interest Community Association Act suggest that homeowners associations may, too. Both Acts allow associations specifically to adopt rules regarding electronic voting. Interestingly, a savvy opponent could claim that there is no need to adopt specific rules regarding electronic notice only, but we recommend that associations do for a number of reasons.

The Illinois Condominium Property Act and Illinois Common Interest Community Association Act have been amended, as of 2015, to allow both kinds of associations to adopt electronic notice and electronic voting. These provisions give associations the flexibility to catch up with at least the electronic age, and beyond. Both Acts intend that associations may pass reasonable rules and regulations to add electronic voting, and that these changes do not (normally) need to be made in an association's declaration or bylaws, unless those documents specifically prohibit electronic notice or voting.

Do Electronic Notice and Voting Apply for All Actions

Currently, the law addresses electronic notice and voting primarily for owner participation in Association affairs and owner voting. This does not mean that Associations cannot attempt to allow Board members to participate in meetings using telephonic or electronic means so long as the means used allow everyone to participate, hear the discussion and deliberation, and be privy to the information presented. Other applicable laws conceive of directors participating in Board meetings using a telephone so long as all attendees (and owners entitled to be present) can hear.

This does not address a Board's attempt to hold a meeting by email, which is still problematic given the open meeting requirements incumbent on Illinois Associations and should, likely, be avoided if possible due to *Palm II* considerations. If you have the technology to do it, as long as all owners wishing to attend can do so and hear the discussion and all directors may participate, you could theoretically hold a Board meeting using an online meeting program, with some caveats.

Why Enact Rules for Both Voting and Notice?

As noted, a savvy opponent could claim that Section 18.8 and Section 1-85 already mandate electronic notice without the passage of additional rules. However, this interpretation opens a Pandora's box of potentially-viable electronic notice methods and systems that would render the day to day business of an association a practical nightmare. Adopting specific rules regarding electronic notice allows an association to limit the types of electronic notice that can be used and to make specific findings regarding the sufficiency of that notice method, as well as to set the guidelines for how their association will handle electronic notice. Simply put, it is better, in our reading of these provisions, to adopt a reasonable method (such as email) rather than allow owners to receive notice via Facebook, Snapchat, text messages, fax machines, etc. Boards should also, as part of these rules, provide for unit owners to have the obligation to keep

their information up to date, and specify a form that should be used. It is important to put the information updating obligation back onto the owners to avoid extra responsibility (and potential lack of notice issues) for the board or its manager.

Breaking Down the Components

1. These changes allow rules, as passed by Boards, in compliance with the applicable Act and existing governing documents. This normally means a Board vote, not a unit owner vote.
2. Declaration amendments to add electronic notice and voting are usually unnecessary as long as the Declaration or Bylaws do not prohibit electronic notice or voting.
3. Electronic notice and voting are different, you can do one or the other, or both.
4. Keywords “acceptable electronic means” and “verifiable” are important to remember.

What Electronic Notice and Voting Are, and Are Not

1. Electronic notice and voting allow associations to go electronic for owners who opt in to use electronic methods.
2. Electronic notice and voting do not require all owners to use these methods; those who do not opt in still are entitled to receive notice by regular means (paper notice, paper voting).
3. Electronic notice and voting can be extra work for managers and boards, but proper implementation limits this problem with some foresight. Limit the acceptable electronic means and be careful to avoid using “difficult” electronic means like text messages, social networking, etc.
4. Electronic notice and voting cut down on paperwork, but they do not remove an association’s obligation to keep records. Records of notices, ballots, and votes are still kept for the time periods required by the various Acts and are still subject to owner inspection upon proper request.
5. Some associations use voting vendors to handle the electronic vote distribution, tallying, and reporting. This may not replace an actual election in all cases.

Electronic Voting: Ballots, Proxies, and Confusion

Electronic voting raises a whole host of questions about how to actually implement such a change and use it smoothly. Keeping in mind that electronic voting must be by rule change per the Illinois Condominium Act and Common Interest Community Association Act, associations may adopt rules that allow for electronic voting. Electronic voting does not remove (in most all cases) owners’ ability to vote on paper or in person. This can create confusion.

For Condominium Act properties, the law on elections and balloting can be quite confusing. Section 18 of the Illinois Condominium Property Act, included in part with this handout, removes proxy voting for Board elections if an Association has adopted electronic voting. For Condominium Associations, this means that adopting electronic voting rules will suspend the use of proxies in Board elections. It also underscores the timing requirements for changes to voting rules which must be at least 120 days before an election in which they will be used. Further, managers should be careful to make sure that their Boards are soliciting candidate names at least 21 days in advance of the deadline to be included in the ballot, which deadline shall not be less than 7 days before ballots are distributed. Ballots also shall go out not less than 10 and not more than 30 days before the election.

For Common Interest Community Association properties, the statute also removes proxies for Board elections if you have adopted electronic voting. A copy of the relevant statute is included in this handout. This creates an important problem for Common Interest properties: adoption of electronic voting rules appears to eliminate the use of proxies for board elections, which leaves only the use of electronic voting, in-person voting, or absentee ballots. Associations should be careful when adopting electronic rules to make sure that their procedures (and general voting rules and regulations) are congruent both with their declaration and the Act's requirements. Remember, in person voting will void an electronic vote.

Vendors for Voting and Issues

Many associations are turning to vendors to handle both electronic notice and voting. Vendors may be a useful tool to help implement a system that takes a lot of responsibility off of a manager or a board. However, boards should be careful to make sure vendors use methods that comply with state law and should, we think, seek a qualified attorney's opinion regarding their specific vendor's methods.

Using a vendor may not remove the obligation to hold an actual in-person voting meeting. Owners still have an opportunity in both the Condominium Act and the Common Interest Community Association Act to vote in person and to nullify their absentee or electronic ballot by voting in person. There is not, presently, a way to do board elections "in the cloud" without an in-person voting meeting of the ownership.

Vendors must also provide records of the votes received (ballots) and their tally of the votes. Records of ballots and votes cast must be part of the association's records and, we suggest, should be printed and stored with any other regular ballots just as associations have done in the past.

Every vendor will use a different method to collect votes, verify that the right person is getting the ballot, and provide for some security to make sure, in their view, that the ballot is cast by the right person without any "ballot stuffing" happening. However, the statutes make this "verifiability" requirement something that is in the board's discretion. We would suggest that associations discuss with their vendor what specific security features appear to be part of their voting program, how they will verify that only the right person is getting a ballot and voting, and then boards may determine that the method used is secure enough for their purposes. We would suggest that sufficient verifiability would include limiting ballots to being cast only by the person

receiving it, and some means of telling who has submitted which ballot online, such as a unique email to return or a unique link to follow for each person voting or something similar; the possibilities are endless.

Electronic Notice and Voting Checklist

1. Does the association have a desire to convert to electronic notice and/or voting and does it have a significant number of people who would use it to make the (nominal) cost worthwhile?
2. Has the association contacted its counsel for a qualified legal opinion and suggested rules, forms, and procedures for electronic notice and voting?
3. Has the association started the process to implement rules, forms, and procedures with proper notice to owners and full compliance with the existing governing documents?
4. Is the condominium association planning to use electronic voting for an upcoming meeting and if so, are you within the timeline to adopt voting rules? For homeowners associations, what do the bylaws or declaration say regarding timing of voting rules?
5. If the association is using a vendor, has the vendor provided information the board deems sufficient to show that ballots are cast in a verifiable way and that there is some appropriate security procedure?
6. Will the association be able to maintain proper records of the notices sent, ballots cast, and votes tallied?

In conclusion, electronic notice and voting can be useful tools to “go modern” for many associations, but the implementation and process of using these tools is not quite as simple as it may seem for most associations. Boards and managers should be careful to obtain a qualified legal opinion when implementing either electronic notice or voting to make sure that the Association is following the best practices and legal requirements of the applicable Act.

Common Text of Section 18.8 of the Illinois Condominium Property Act or Section 1-85 of the Illinois Common Interest Community Association Act regarding electronic means:

“(a) Any notice required to be sent or received or signature, vote, consent, or approval required to be obtained under any condominium instrument or any provision of this Act may be accomplished using the technology generally available at that time. This Section shall govern the use of technology in implementing the provisions of any condominium instrument or any provision of this Act concerning notices, signatures, votes, consents, or approvals.

(b) The association, unit owners, and other persons entitled to occupy a unit may perform any obligation or exercise any right under any condominium instrument or any provision of this Act by use of any technological means that provides sufficient security, reliability, identification, and verifiability.

(c) A verifiable electronic signature satisfies any requirement for a signature under any condominium instrument or any provision of this Act.

(d) Voting on, consent to, and approval of any matter under any condominium instrument or any provision of this Act may be accomplished by electronic transmission or other equivalent technological means, provided that a record is created as evidence thereof and maintained as long as the record would be required to be maintained in nonelectronic form.”

Section 18(b)(9) of the Illinois Condominium Property Act:

“(9)(A) except as provided in subparagraph (B) of this paragraph (9) in connection with board elections, that a unit owner may vote by proxy executed in writing by the unit owner or by his duly authorized attorney in fact; that the proxy must bear the date of execution and, unless the condominium instruments or the written proxy itself provide otherwise, is invalid after 11 months from the date of its execution; to the extent the condominium instruments or rules adopted thereunder expressly so provide, a vote or proxy may be submitted by electronic transmission, provided that any such electronic transmission shall either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the unit owner or the unit owner's proxy;

(B) that if a rule adopted at least 120 days before a board election or the declaration or bylaws provide for balloting as set forth in this subsection, unit owners may not vote by proxy in board elections, but may vote only (i) by submitting an association-issued ballot in person at the election meeting or (ii) by submitting an association-issued ballot to the association or its designated agent by mail or other means of delivery specified in the declaration, bylaws, or rule; that the ballots shall be mailed or otherwise distributed to unit owners not less than 10 and not more than 30 days before the election meeting, and the board shall give unit owners not less than 21 days' prior written notice of the deadline for inclusion of a candidate's name on the ballots; that the deadline shall be no more than 7 days before the ballots are mailed or otherwise distributed to unit owners; that every such ballot must include the names of all candidates who have given the board or its authorized agent timely written notice of their candidacy and must give the person casting the ballot the opportunity to cast votes for candidates whose names do not appear on the ballot; that a ballot received by the association or its designated agent after the close of voting shall not be counted; that a unit owner who submits a ballot by mail or other means of delivery specified in the declaration, bylaws, or rule may request and cast a ballot in person at the election meeting, and thereby void any ballot previously submitted by that unit owner;

(B-5) that if a rule adopted at least 120 days before a board election or the declaration or bylaws provide for balloting as set forth in this subparagraph, unit owners may not vote by proxy in board elections, but may vote only (i) by submitting an association-issued ballot in person at the election meeting; or (ii) by any acceptable technological means as defined in Section 2 of this Act; instructions regarding the use of electronic means for voting shall be distributed to all unit owners not less than 10 and not more than 30 days before the election meeting, and the board shall give unit owners not less than 21 days' prior written notice of the deadline for inclusion of a candidate's name on the ballots; the deadline shall be no more than 7 days before the instructions for voting using electronic or acceptable technological means is distributed to unit owners; every instruction notice must include the names of all candidates who have given the

board or its authorized agent timely written notice of their candidacy and must give the person voting through electronic or acceptable technological means the opportunity to cast votes for candidates whose names do not appear on the ballot; a unit owner who submits a vote using electronic or acceptable technological means may request and cast a ballot in person at the election meeting, thereby voiding any vote previously submitted by that unit owner;

(C) that if a written petition by unit owners with at least 20% of the votes of the association is delivered to the board within 14 days after the board's approval of a rule adopted pursuant to subparagraph (B) or subparagraph (B-5) of this paragraph (9), the board shall call a meeting of the unit owners within 30 days after the date of delivery of the petition; that unless a majority of the total votes of the unit owners are cast at the meeting to reject the rule, the rule is ratified;

(D) that votes cast by ballot under subparagraph (B) or electronic or acceptable technological means under subparagraph (B-5) of this paragraph (9) are valid for the purpose of establishing a quorum;”

Section 1-25 (h-5) and (i) of the Illinois Common Interest Community Association Act:

“(h-5) A member may vote:

(1) by proxy executed in writing by the member or by his or her duly authorized attorney in fact, provided, however, that the proxy bears the date of execution. Unless the community instruments or the written proxy itself provide otherwise, proxies will not be valid for more than 11 months after the date of its execution; or

(2) by submitting an association-issued ballot in person at the election meeting; or

(3) by submitting an association-issued ballot to the association or its designated agent by mail or other means of delivery specified in the declaration or bylaws; or

(4) by any electronic or acceptable technological means.

Votes cast under any paragraph of this subsection (h-5) are valid for the purpose of establishing a quorum.

(i) The association may, upon adoption of the appropriate rules by the board, conduct elections by electronic or acceptable technological means. Members may not vote by proxy in board elections. Instructions regarding the use of electronic means or acceptable technological means for voting shall be distributed to all members not less than 10 and not more than 30 days before the election meeting. The instruction notice must include the names of all candidates who have given the board or its authorized agent timely written notice of their candidacy and must give the person voting through electronic or acceptable technological means the opportunity to cast votes for candidates whose names do not appear on the ballot. The board rules shall provide and the instructions provided to the member shall state that a member who submits a vote using electronic or acceptable technological means may request and cast a ballot in person at the election meeting, and thereby void any vote previously submitted by that member.”

About Chuhak & Tecson's Community Association Practice

Our attorneys offer a full range of services in the community association field, representing condominium, townhome and homeowner associations, as well as cooperatives. Clients benefit from our longstanding relationships with management companies, insurance companies, accounting firms, lending institutions and other professionals whose services are intertwined with community living.

We counsel clients on all association and board-related issues, from developer transition through day-to-day operations. Our negotiation and litigation capabilities are the result of years of experience representing associations, and we offer a cost-effective approach to dispute resolution. If delinquent assessments are the issue, our team has developed a unique, low-cost collection procedure that ensures consistent and responsive communication between our firm, the management company and the association board.

We assist our clients in many other ways, including preparing and reviewing declarations, bylaw amendments and loan documentation; negotiating contracts; analyzing insurance policies; defending Fair Housing Act and discrimination complaints; answering legal questions as to operations and governance; and defending associations in litigation.

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