The Unexpected Can Happen When It Comes to Elections For Board Members of Cooperatives and Condominiums

COUNSELS' CORNER

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WHITE PLAINS - Every Board of Directors, for a Cooperative, or Board of Managers, for a Condominium, has an election for its members on an annual basis.

While the procedure would seem simple and lead to the election of the Board Members—provided, of course, that a quorum is present—one Board recently found itself with a problem that seemed easily correctible. Not so fast, said the Court!

An Election

The facts are that the Cooperative sent out a notice for the Annual Election of Board Members. As with many Co-ops, the terms of the Board Members were staggered and three members were up for election. The By-Laws of this Co-op provided, as also with many Co-ops, that voting can be either in person or by proxy.

The By-Laws also provided that "ballots and proxies shall be voted and counted at one and the same time." The By-Laws also provide for Inspectors of the Election. The By-Laws are silent as to miscounting or recounting of ballots. The Annual Meeting of the Directors is to take place immediately after the shareholders' Annual Meeting.

The Annual Shareholders' Meeting took place and three Board Members were elected and the results announced. Shortly after the meeting, a shareholder asked to examine the proxies and did so the next day.

An Exam

Upon the examination of the proxies he found that one proxy was not counted. The Board was notified and, due to the inclusion of the proxy erroneously omitted and not counted, the election results changed and the Board changed the results and the "certificate" of the results of the election were signed with the changed Board Members.

Within three days of the election, a letter was sent to all shareholders advising of the changed election result due to the mistake and the recount (as he said he did in all cases, particularly in close elections). The Board Member who was not elected brought a lawsuit challenging the action of the Board (and the Election Inspector) in changing the election results.

The Board argued that the proxy was timely submitted and omitted from the count due to an error. The "petitioners" argued that the announced results of the election should be confirmed regardless of the mistake and that by changing the results the Board breached its fiduciary duty.

The Court reviewed the case and issued a lengthy decision stating, among other things, that: "A corporation's (the co-op's) scope of authority is defined by the Business Corporation Law (BCL) and the corporate By-Laws. Where a Co-op's By-Laws are clear, they must be followed." The Court, citing the BCL, said a court has the authority to confirm an election, order a new election or "take such other action as justice may require."

It then stated that "however, the election may be set aside only where it is so clouded with doubt or tainted with questionable circumstances that the standards of fair dealing require it." A lack of proper notice of the election is one such ground.

The Court cited prior precedent that, as to balloting, absent any By-Law or statute to the contrary, votes cannot be added after the "polls have closed and the results formally announced." The Court went on to opine that a crucial action is the announcement of the final vote.

A Citation

Citing the BCL, the Court also said that "no ballots, proxies, consents, nor any revocation thereof or changes thereto, shall be accepted by the inspectors after the closing of the polls and that the polls shall close at the end of the meeting and the inspection shall determine the result of the meeting."

Moreover, a certificate of the results is not a legal requirement to finalize the election, but is required if requested. In this case, the By-Laws were silent as to a miscount or a recount. However, the Court believed that the intent of the By-Laws was that the votes are counted "at a single point in time, and that that time be at the Annual Shareholders Meeting, and not some time after, and not twice."

What do we learn from this case? Among other things, compliance with the By-Laws is essential and consistency with precedent is significant.

The Court affirmed the practice of this Board to announce the results at the end of the Annual Meeting and that was the 'common practice' of this Board, which also should be respected.

The Court found that even though there was an "overlooked proxy," that did not violate the "fair dealing" requirement and that this mistake did not cloud with doubt or taint the election with questionable circumstances so that the election had to be set aside.

Concluding that "like any other corporate board, the board of a residential cooperative has a fiduciary duty to the shareholders" and the Court found that the respondents (the Board) did not violate their fiduciary duty, nor were any monetary damages caused the petitioners. The Court found and held that the initial results held up and the count the next day was invalid.

What do we learn from this case? Among other things, compliance with the By-Laws is essential and consistency with precedent is significant. We recommend to our clients that the Inspectors of the Election sign a certification as to the count and the count be closed and verified at the end of the Annual Meeting. Doing so should confirm the election and avoid later disputes.

Editor's Note: The authors are with Finger and Finger, A Professional Corporation. Finger and Finger is chief counsel to The Builders Institute (BI)/Building and Realty Institute (BRI) of Westchester and The Mid-Hudson Region. The firm is based in White Plains.

SERVICES PROFILE:

Professionals Serving Professionals Defines the Commercial Real Estate Financing Solutions from Sterling National Bank

YONKERS—Commercial real estate developers, property owners and managers, and co-op and condominium boards looking for real estate financing from a seasoned professional team can find a one-stop solution to their needs at Sterling National Bank, officials recently said.

Sterling offers a wide range of fixed- and variable-rating financing options at competitive rates and terms.

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Case Study:

Something Borrowed, Something Blue, Something Old and Something New: A New Look at Mediation

By Dorothy Finger, Esq.

WHITE PLAINS—Mediation as an alternative dispute resolution method is not new, but it is currently having a renaissance.

There are multiple reasons for this renewed interest and the techniques have evolved so that mediators are better trained and, to some degree, regulated by the courts.

There are some cases in which the courts mandate mediation and some in which it is simply offered. The courts are more interested in the alternative dispute resolution process because of the enormous numbers of cases that are on the calendar, the length of trials (which impacts jurors as well), and because some cases, as matrimonial and partnership, among others, demand the resolution of issues beyond the economic sector and have consequences that go beyond the litigation.

It is important before elaborating on all of these issues to distinguish between litigation in the court system, arbitration, and mediation as forums for the settlement of disputes, whether they are commercial or family in nature, or any combination thereof.

Litigation

Most people are familiar with litigation in the court system even if they have not personally been involved in a lawsuit. The court system is designed not to "settle disputes" but to resolve them within the confines of law as it is applied to the facts.

That means that the court is equipped to decide cases that run the gamut from car accidents to divorces to contract to libel to fraud, etc. The process for all of these types of cases is essentially the same in that one party initiates a lawsuit by filing a summons and a complaint following that there is a period for discovery, including documents and depositions by both parties to obtain information from each other.

One party or the other may ask the court's assistance in securing such information and eventually the case gets tried in court, either before a judge and a jury, or just a judge. In either case the parties present their evidence with rulings from the court as to the admissibility of that evidence. Based on the law as applied to the facts there is a decision either by the judge or the jury.

When there is a jury the judge explains what the applicable law is and how it is to be applied by "charging" the jury. This can be a long and expensive process, with the party that loses the case often feeling that the system was not fair or, for one reason or another, did not work. Even the "winner" may feel that although there was a decision in their favor, the damages were not enough.

Arbitration

As a legal forum in a civilized society the court system is probably the best that we have, but it is not perfect.

It is an alternative that has been favored in corporate/commercial litigation and labor disputes (labor disputes are most often due to a breakdown in negotiations or the result of a member's grievance).

Arbitration may be offered to the parties in Small Claims courts as well. Binding Arbitration offers the parties an opportunity to have an unbiased third party (or neutral party, as they are sometimes referred to) decide the case but at substantially less cost and time than in court. There is a greater opportunity to present evidence without the restrictive rules of evidence. Arbitration is usually binding as it would be unproductive to go through that process and have a neutral determination and then still be left with a lawsuit or appeal. It is akin to a court proceeding in that the ultimate decision is in the hands of a third party.

Mediation

Mediation is a process that goes a step further. Like arbitration it is a process that permits the parties to select the neutral third party themselves and it takes less time and is less costly.

The first step of selecting the neutral party is in itself an important element in gaining confidence in the process. Mediation actually requires the parties to talk, with an underlying agreement that the goal is to resolve the matter. The mediator's role is to guide the discussion in an effort to find the areas of agreement and to find solutions to the more disputed issues.

Although it is not binding there is an understanding that the parties are going into the process committed to coming to a resolution that is acceptable to both parties. This understanding underlies the fact that mediation is not a "winner take all" mentality. It is frequently said that if both parties are a little unhappy but settle, that is a good result. There is a consensus that mediation is private, voluntary, confidential, and informal.

Mediation is an option that should be considered by litigants who seek a resolution that is not imposed upon them, but in which they can participate and do so at a great savings in time and money.

The mediator has no power to impose a decision on the parties and is charged with assisting the parties to reach their own agreement. As in many fields the manner in which the mediator conducts the process is individual but, in general, there are three typical approaches: evaluative, facilitative, and transformative.

The spectrum concerns the degree to which the mediator is involved in helping each of the parties understand the strengths and weaknesses of their respective positions and possible outcomes if litigation ensues. Confidentiality is key to all of the proceedings and the effectiveness of the mediator.

The actual process of a mediation is significantly different from either court or arbitration. The mediator meets with the parties jointly so that they can present their cases and can gain an understanding of the facts, evidence, and legal positions of all sides, together with an outline of the issues that are to be resolved.

The real work usually gets done in caucuses, with each of the parties separately, at which time they can share confidential information (either pro or con in their case) that the mediator will not share with the other side unless specifically instructed to do so.

The purpose of the caucus is to identify and narrow the issues, get bottom-line positions, convey messages, find areas of agreement between the parties, probe strengths and weaknesses of each of the parties, give some feedback, talk about the alternatives to settlement, and most importantly to encourage parties to come up with reasonable proposals for settlement, seemingly on their own. The last item is the result of the entire process and is the goal of the mediation.

Mediation is an option that should be considered by litigants who seek a resolution that is not imposed upon them, but in which they can participate and do so at a great savings in time and money.

Editor's Note: Dorothy Finger is a principal of Finger and Finger, A Professional Corporation. The firm, based in White Plains, serves as Chief Counsel to The Builders Institute (BI)/Building and Realty Institute (BRI) of Westchester and The Mid-Hudson Region.