
NEW YORK COOPERATOR / PROXIES & PROCEDURES / ASSN#2014.09.12NY
EVERY VOTE COUNTS: BOARD ELECTIONS AT WORK

The candidates. The issues. The campaigns. Excitement and suspense are built ~~into~~ just about every election, including those of co-op and condo board members. In fact, those elections can stir even more emotion given the impact they may have on the daily lives of the men and women casting the votes.

Board member elections take place regularly and invite the participation of all who wish to help shape the future of the community in which they live. They present a chance each year for the voices of shareholders and unit owners to be heard.

“Under law, a building is required to hold an annual meeting to elect directors,” says Barry Mallin of Mallin & Cha PC based in Manhattan. “Although not typical, it is permissible to elect directors with staggered terms of one to four years, as long as there is an annual meeting to elect directors of at least one class.”

This means, for example, that “instead of having all seven board members up for election at once, you would always have some sort of continuity on the board,” says Ronald A. Sher, Esq., of Himmelfarb & Sher, LLP, based in White Plains. One year, residents may elect four people for a two-year term and then the next year, elect three people for a two-year term with the process alternating each year after that. This method ensures the presence of institutional knowledge as well as experience, potentially providing both continuity and more stability to the building or community.

Getting the ducks in a row:

In order to make both residents and potential candidates aware that an election is on the horizon, the Board is required to send out a notice of the annual meeting. “It generally must be sent no less than 10 days before and no more than 40 days in advance, pursuant to the specific provisions of the By-Laws” says Sher. “It must be a reasonable time period.”

The notice must be sent to all shareholders and unit owners and include information on the date, place and time of the meeting as well as the purpose, which in the case of an annual meeting will include the election of directors. The notice also must include a proxy form.

What is a proxy? “If a shareholder cannot attend the meeting, then a shareholder can appoint another person to vote for him or her at the meeting,” says Mallin. “The proxy authorization must be in writing and signed by the shareholder. It does not have to be notarized. The proxy must be submitted to the secretary or managing agent prior to the start of the meeting.”

There are several types of proxies, says Sher. The general proxy says “I appoint you as my proxy with the right to vote and voting decision-making power,” while a specific proxy says “this is how I want you to vote and please vote this way.” In addition, there are proxies just for quorum purposes only, which amount to “don’t vote for me, just use this to reach a quorum.”

Early on in the process, the board also will encourage anyone interested in running for a seat on the board to make themselves known by submitting their name, resume and qualifications. They may also form a nominating committee to propose a slate of candidates or host a “meet the candidates” night to help unit owners and shareholders get to know the men and women in the running. It is recommended that candidates submit their names in advance so that it appears on a pre-printed ballot, albeit nominations may be taken from the floor, unless prohibited by amendment to the By-Laws.

“To not call an annual meeting and not elect directors would violate the by-laws and business corporation law. “It’s not proper governance,” says Sher. Although it is a rare occurrence, there can be times when a sponsor, for example, may attempt to bypass elections after his or her term on the board should have concluded. It is not a good situation, one that brings inevitable trouble in the near- and long-term.

The process of holding an election can involve a lot of preparation by a lot of different people, including management, the board itself, attorneys, and accountants. "Typically, the board delegates to the managing agent the responsibility of preparing the meeting notice, ballot and proxy forms, delivering them to the shareholders or unit owners and organizing the annual meeting," says Mallin. "The board, however, as the representative of the shareholders or unit owners, bears the ultimate responsibility for assuring that the process is done correctly."

Casting the ballot:

For an election to take place at the meeting, a quorum must be met. Before the meeting begins, the managing agent or accountant will conduct a roll call, usually by sign-in sheet. The attendees will receive their ballot at check-in or have their proxy checked. "In order to have the meeting, you have to have a quorum, usually of 50.1 percent of unit owners or shareholders in person or by proxy," says Sher.

Depending on the size of the building or what the specific situation is, the board may hire an outside firm to conduct the actual election itself. "In larger buildings and where there has been a history of contentious elections, it is not unusual for buildings to hire a professional election organization to conduct the process," says Mallin.

That is what Brien Gittens and his company The Voting Group, based in Queens Village, do on behalf of co-op and condo boards. And sometimes the hiring of an outside firm can even help motivate more residents to take part in the vote.

"It's in (the board's) interest to drum up the elections," Gittens says. "If they pay an organization like ours to hold elections and no call is made to drum up the elections, they might not meet quorum and then have to do it all over again." This adds extra cost and also extra time and effort on the part of all involved.

After being contracted by the board and meeting with directors and management, Gittens says his firm will conduct as much or as little of the election itself as request. "There are times when they want us there from start to finish, which is best for certification because we know exactly what has happened," he says.

The firm will supply the means to vote. "Some boards want internet voting or electronic machines or paper ballots," Gittens says. "What they need, we'll provide." No matter the method, though, Gitten says "everyone still has to be mailed a paper ballot. It's like an absentee ballot."

On the night of the meeting, "we don't run the meeting," Gittens says. "We just make sure everyone has handed in a ballot, that everything is tallied correctly and the results are returned." And those results are usually returned as quickly as possible, most often the next day. Although extra time could be needed should be board want an extra element of verification added to the process, such as the verification of all signatures.

Many buildings, though, manage and oversee their own elections rather than hire an outside firm. "The process varies from building to building, depending upon the size of the cooperative or condominium," says Mallin. "Most buildings still use ballots filled in by hand and some provide for depositing of the completed ballots into a locked box."

When it comes to tallying the votes, those are typically counted by the building's attorney and managing agent. "(T)he Board can designate an independent shareholder(s) and/or more than likely appoint the accountant and management agent, together with the attorney, to serve as an inspector of the election to determine the quorum, resolve any disputes and count the votes." Says Sher, "As the attorney, we'll monitor the election procedure. We'll ask the candidates to step away and we'll tabulate the ballots. Inspectors of the election, whether it's the building's attorneys or other individuals selected to fill the role, all must sign an oath that guarantees, for example, that they will fairly and impartially perform their duties and keep confidential who voted for whom.".

A contentious result:

Although the majority of elections take place without a hitch, there can be occasions when candidates or voters are dissatisfied or skeptical over the results of the election. Sometimes that angst can be nipped in the bud very early. "I prefer to have election results available that night because I don't want anyone contesting its validity based upon the failure to produce the results," says Sher. And "if it's a close election, we'll do an internal recount, no matter what."

Says Mallin, "shareholders aggrieved by an election may file a petition in the local State Supreme Court to contest the results. Although covered by a different governing statute, condominium unit owners possess similar rights to contest an election."

While the right to contest the election may exist, Gittens says it's rare that disputes get that far. "You have four months to contest the election, but usually in that time, they talk to management and the attorney and the problem is handled before the time period has passed." Although his firm will release results if ordered by a court, "we've never gotten that far." _ As with any election, once the results are in, most people embrace them, And then start preparing for next year's election, ready to embrace the democratic process all over again.

With the economy sinking many co-ops and condos are

Tightening their Belts

No More Mr. Nice Guy

Tough times demand tough actions. Ronald A. Sher, an attorney who specializes in co-op and condo law, urges boards to get hard-nosed if the economy continues to worsen and more co-op and condo residents fall behind on their monthly payments.

"Boards have to make sure they're vigilant that shareholders and unit-owners are current in their monthly payments," says Sher, a founding partner in Himmelfarb & Sher. "There's no more permitting shareholders to be carried, and then collecting a late fee."

Instead, Sher advises his clients, who are sprinkled

throughout the metropolitan area, to take prompt and decisive action.

"Plenty of boards wait three, four, five months before they refer [arrears] to counsel," he says. "But boards are going to suffer hardships if they do that. There's something inherently unfair in the concept of being neighborly and accommodating to your neighbors. By being a 'good' neighbor, you're potentially being a fiscally irresponsible board member."

By letting arrears build up, you're being a merciful neighbor but an irresponsible board member.



Dial "L" for Lawyer

YOUR SUPERINTENDENT is suddenly hit with a stroke. An owner's teenage son lives alone in an apartment and holds wild parties. The sponsor refuses to give up control.

Different dilemmas with a common solution: call your attorney. From headaches to crises, your lawyer should be among your first line of defense (right up there with your manager). But when should you call and when can you go it alone? And what can a board learn from the experiences of co-op/condo attorneys that will help it make that decision?

As part of our annual attorney survey, we found out, asking New York City's premier co-op/condo counsellors this question: "Tell us about a legal problem you have encountered (in the last two years) in a co-op/condo association that provides a lesson for how other boards of directors should conduct themselves. What is the lesson?" Thirty-seven lawyers offered insights and information about how to stop minor troubles from becoming major problems. Their responses follow.

Himmelfarb & Sher

RESPONSE BY Ronald A. Sher, Partner

This legal problem involves effective labor relations with the building staff, in conjunction with the implementation of employee disciplinary proceedings. The lesson learned is that a board of directors and its managing agent must maintain detailed records and properly document staff problems and impose progressive punishment that is both fair and reasonable. The board of directors should require that the managing agent document employee performance problems and/or chronic improper conduct so that there is a record noting the incident, date, time, place, and reason for the write-up. The range of discipline can vary, including written notice, informal meeting with union rep-

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resentative, suspension, or termination. Accordingly, the extent of discipline should have a logical progression based upon the lack of performance and/or conduct. The employee should be spoken to by the managing agent and receive a copy of a write-up, along with any requirements and/or recommendations to improve such performance, with a copy to the union. Moreover, it is important to emphasize that the lack of documentation and/or the failure to maintain records can significantly undermine and substantially weaken an employer case establishing adequate grounds for disciplinary action.

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March 23, 2014

RE: RESPONSE TO RESPONSIBILITY FOR REPAIRS COOPS/CONDOS

This Memorandum is written in response to your recent inquiry regarding the article you are writing for *The Cooperative* with respect to the delineation of responsibility for the performance of repairs in a cooperative apartment or condominium unit. Please note that in furtherance of this article, we have also conferred with both John A. Bonito, President and Brian Scally, Executive Director of Management of Garthchester Realty Ltd., and included their joint responses, along with a detailed Memorandum.

Scope of Responsibility for Repairs:

The scope of responsibility for repairs is different for cooperatives and condominiums due to the very nature of the type of ownership. A shareholder is a tenant of a cooperative apartment and has the exclusive right to occupy same based upon a Proprietary Lease. As a shareholder of a cooperative corporation the repair protocol is based upon the leasehold interest of the shareholder, as a lessee, with the Corporation, as lessor, pursuant to the terms of the Proprietary Lease. We refer you to the relevant provisions of the Proprietary Lease regarding this topic, usually contained in ¶18 entitled, "Repairs by the Lessee" and/or as set forth in ¶4 entitled "Repairs by Lessor", which are set forth below.

In contrast to a cooperative, the unit owner of a condominium has lawful title to the Unit as set forth in a deed and the rights and responsibilities for repairs are based upon the provisions of the By-Laws of the condominium, which provides for a specific definition of the relevant terms and responsibility for each: unit, common elements and limited common elements, as well as specific provisions for responsibility for Repairs by Board of Managers and Repairs by Unit Owner.

The general rule to the basic question:

Question: Who is responsible for repairs?

Answer: If it's outside the wall, it's yours; if its inside the wall it's the buildings.

Simply said: If you can see it, you own it and required to fix it, otherwise call the Super.

Condo: If it's not included in the definition of Unit, it's excluded and represents common elements or limited common elements; whatever is defined as contained in the Unit is the responsibility of the Unit Owner, everything else is basically common elements or the responsibility of the Condominium, unless the condition is due to the fault of the Unit Owner.

Exceptions:

Windows: Cooperatives - Building / Condos - Unit Owner

Electrical Wiring: Generally the shareholder and unit owner are responsible from the wiring from junction box in, albeit being contained inside the wall.

HVAC: Cooperatives - Building / Condos - Unit Owner [responsible from the horizontal connections into the unit and the heating and cooling equipment

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Warranty of Habitability:

A landlord is generally responsible for repairs, maintenance and upkeep of the premises, as set forth Multiple Dwelling Law and has a duty to maintain a safe and habitable premises, pursuant to NYS Real Property Law at §235(d), commonly referred to as the "Warranty of Habitability". Therefore, a Landlord is required to provide a tenant with a, habitable, liveable, safe, secure, and sanitary apartment, inclusive of heat and hot water, free of insect infestation.

The Warranty of Habitability is specifically applicable to cooperative apartments, but not to condominium units. A breach of the Warranty of Habitability by the Landlord could result in a court awarding a rent reduction or abatement due to the violation but any uninhabitable condition resulting from the actions or fault of the tenant or otherwise caused by the shareholder/tenant does not constitute a breach of the Warranty of Habitability. Accordingly, the shareholder/tenant will be held to be responsible to cure and remedy the aforesaid non-compliant condition.

Please find the provisions of Proprietary Lease at ¶2 entitled "Repairs by Lessor", and at ¶18 entitled, "Repairs by the Lessee" which provides in relevant part, as follows:

Repairs by the Lessee

2. The Lessor shall at its expense keep the building in good repair, including all of the apartments, the sidewalks and courts surrounding the same, and its equipment and apparatus except those portions the maintenance and repair of which are expressly stated to be the responsibility of the Lessee pursuant to Paragraph 18 hereof.

Repairs by Lessor

18. (a) The Lessee shall take possession of the apartment and its appurtenances and fixtures "as is" as of the commencement of the term hereof. Subject to the provisions of Paragraph 4 above, the Lessee shall keep the interior of the apartment (including interior walls, floors and ceilings, but excluding windows, window panes, window frames, sashes, sills, entrance doors, frames and saddles) in good repair, shall do all of the painting and decorating required to his apartment, including the interior of window frames, sashes and sills, and shall be solely responsible for the maintenance, repair, and replacement of plumbing, gas and heating fixtures and equipment and such refrigerators, dishwashers, removable and through-the-wall air conditioners, washing machines, ranges and other appliances, as may be in the apartment. Plumbing, gas and heating fixtures as used herein shall include exposed gas, steam and water pipes attached to fixtures, appliances and equipment and the fixtures, appliances and equipment to which they are attached, and any special pipes or equipment which the Lessee may install within the wall or ceiling, or under the floor, but shall not include gas, steam, water or other pipes or conduits within the walls, ceilings or floors or air conditioning or heating equipment which is part of the standard building equipment. The Lessee shall be solely responsible for the maintenance, repair and replacement of all lighting and electrical fixtures, appliances, and equipment, and all meters, fuse boxes or circuit breakers and electrical wiring and conduits from the junction box at the riser into and through the Lessee's apartment. Any ventilator or air conditioning device which shall be visible from the outside of the building shall at all times be painted by the Lessee in a standard color which the Lessor may select for the building. Lessee shall be solely responsible for the maintenance, repair and replacement of doors leading from the apartment to any maids room, penthouse, terrace or balcony or any solarium.

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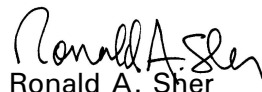
Damage to Apartment or Building

4. (a) If the apartment or the means of access thereto or the building shall be damaged by fire or other cause covered by multiperil policies commonly carried by cooperative corporations in New York City (any other damage to be repaired by Lessor or Lessee pursuant to Paragraphs 2 and 18, as the case may be), the Lessor shall at its own cost and expense, with reasonable dispatch after receipt of notice of said damage, repair or replace or cause to be repaired or replaced with materials of a kind and quality then customary in buildings of the type of the building, the building, the apartment, and the means of access thereto. including the walls, floors, ceilings, pipes, wiring and conduits in the apartment. Anything in this Paragraph or Paragraph 2 to the contrary notwithstanding, Lessor shall not be required to repair or replace, or cause to be repaired or replaced, equipment, fixtures, furniture, furnishings or decorations installed by the Lessee or any of his predecessors in interest nor shall the Lessor be obligated to repaint or replace wallpaper or other decorations in the Apartment or to refinish floors located therein.

We hope this Memorandum is of assistance and provides helpful information and clarification. Please note as a caveat that not all Offering Plans, By-Laws and Proprietary Leases are the same and each must be read, albeit they contain similar provisions.

We appreciate your utilization of our submission and favorable consideration relative to the writing of your article. Should you have any further questions or comments, please feel free to contact the undersigned at your earliest convenience.

Very truly yours,
HIMMELFARB & SHER, LLP


Ronald A. Sher

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Garthchester Realty Memorandum

June 1999 Cooperator Article, "Who is Responsible"