

## Proxy Voting: manipulating referendums or encouraging participation

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The topic of HOA home owner voting via a proxy ballot surfaces inconsistencies, abuse, and diverse opinions among those involved in HOA governance including lawyers. A proxy is a document authorizing a person to act on behalf of another person. When it comes to HOA voting, this means that a unit or homeowner may authorize someone else to represent them at an HOA meeting and to vote on their behalf.

The primary authority for the legality of proxy voting is stated in State law: Colorado Common Interest Ownership Act. In Colorado proxy voting in HOAs is legal. The law doesn't define how the proxy process should be implemented. Next, an HOA's Declaration and by-laws may also address the use of proxy voting but can't contradict State law. HOA by-laws are frequently more definitive on the use of proxies.

Proxy voting can encourage voting by those who can't otherwise attend a meeting to vote, drop off a ballot at a designated location, or who wouldn't otherwise vote. The flip side of the benefits of **proxy voting** is that it can **be used by HOA Boards to manipulate voting results** when a "default" process is implemented. Specifically, the practice of "defaulting" signed proxies that inadvertently are missing a named individual to act in behalf of the home owner to an HOA official or provides an option to default to an HOA official results in undue influence (and more votes) to an HOA Board on any issue requiring a vote including elections. Often defaulting occurs without the knowledge of the person sending in the incomplete proxy because when such information is missing the home owner is not notified or provided the opportunity to correct the ballot. Further, when defaulting exists (through no named proxy recipient or when a designated HOA official is assigned via a check box on the ballot or when home owners are instructed on the ballot that they don't have to designate a proxy person to have an HOA official represent them ), home owners don't understand that their voting privilege will be executed by a Board official who may vote against their wishes or they may never know how the official voted on the issue or in an election. Thus, the impact of defaulting proxies to HOA officials is misunderstood and/or unknown to home owners and if known would otherwise object to the process.

Problems/abuse with defaulting proxy votes to HOA officials are further complicated and tolerated by the lack of standards and requirements in designing ballots (unless stated in by-laws), administering proxy voting procedures, and a lack of information on the home owner's part. Basically, defaulting diminishes home owner's ability to administer the affairs of the community by directing, intentionally or not, votes to the HOA Board. There are basics that are generally presented on ballots such as the issue for which the vote is to be cast, home owner personal identifying information, due dates, etc.

However, explanations on the ballot concerning what happens to a home owner's voting privilege when the proxy is completed with missing information are missing or vague at best. A ballot may have a statement indicting the voting privilege will be defaulted to an HOA official in the event an identified person is not written on the ballot or none of the check boxes are marked. There is no legal requirement to include any explanation of the default process on a ballot. No requirement to explain to the person using the proxy that in the event of no designated person or designating an HOA Board official to represent them that their vote can be cast for or against an issue or to any candidate for office. Thus, the understanding by a home owner of the default process is severely lacking and can

result in unintended consequences for the home owner and votes for use by HOAs that would otherwise not be committed to a cause or candidate.

Defaulting a signed proxy to an HOA official can happen when there is an accidental omission by the home owner of the person to which they want to assign the proxy, not understanding the proxy process, mailing their signed proxy to confirm to the HOA they recognize their right to vote but don't wish to participate in the current referendum (the proxy thus doesn't include the name of an individual to whom the proxy was assigned) or the home owner simply feels they must sign a proxy ballot form as their obligation as a home owner (without completing the area on the ballot to designate the person who can represent them in the vote). Thus, many reasons resulting in mail in ballots (proxy ballots) that have name assignment blank. The number of these ballots can most certainly affect and sway voting and election results due to unintended consequences.

Proxy votes without assignment of rights to vote in behalf of a home owner can be used to establish a quorum and allow the business of the HOA to move forward but should not be used to influence a referendum or election.

There is also a practice of "hoarding" proxies whereby an individual personally contacts home owners and convinces them to sign a proxy assigning their voting rights to them on an issue and/or election of Board members. The practice is legal providing the HOA's by-laws don't restrict this practice. The right to execute the proxy generally expires within 11-12 months and must be renewed at the approval of the home owner. Some HOAs limit the number of proxies that can be assigned to an individual to preclude abuse with hoarding and limit proxies to single issues/elections after which the proxy expires.

All proxies generally have an expiration date or are limited to a single issue or election. Most proxies that are not single issue generally expire within a year. All proxy votes should be reviewed by the Board for expiration dates, especially with the practice of hoarding.

Some would argue that defaulting a home owner's right to vote to an HOA official when a proxy is received without assignment to another home owner is proper as long as the HOA's by-laws don't prohibit the practice. Further, as long as the ballot (proxy ballot) indicates in some area that unassigned proxies will default to an HOA official this practice is legal and allows those most knowledgeable of an issue (Board officials) to vote for the greater benefit of the community. However, allowing this practice does bring into question the ability of an HOA Board to unduly influence the outcome of any vote with a deceptive practice that ensures additional votes from home owners that would otherwise not be counted. Also, since the voting results don't identify the number of defaulted votes in a referendum, home owners will not understand the factual impact of proxies and how to evaluate the actual will of the home owners vs that of an HOA Board.

To mitigate or end any confusion or abuse in proxy voting, HOA Boards should develop a ballot that clearly explains what is involved in a proxy ballot/vote and also state that it is not required for a home owner to submit any ballot of any type and no repercussions will result. Ideally and to avoid abuse, a ballot should include and clearly explain the option and use of a proxy ballot including: that it is not mandatory to participate in the voting process; one can vote by proxy should they not be able to attend the meeting; that when using the proxy option it is mandatory for the home owner to actively/clearly include an authorized person's name empowered to represent the home owner; explain that in the absence of indicating a person receiving the proxy (authority to represent the home owner) that such a

proxy ballot will only be counted in determining a quorum and not in counting votes in any referendum or election (unless stated otherwise on the ballot); explain that in the absence of a named representative or without a default process the proxy ballot will only be used to determine a quorum to proceed on a vote; when a default process is in affect it should require the home owner to check a box agreeing with this process and explain that there is no guarantee on how the official will vote on their behalf on an issue/election; and that the ballot should indicate that the proxy is for a single issue and expires after the vote takes place or that the proxy extends the privilege for the next 12 months on all HOA voting issues.

The easiest solution to avoid abuse in proxy voting is end the practice of defaulting proxies to an HOA Board official and hoarding proxies. If the default practice is included there should be a clear explanation of how the Board official intends to vote: for or against or who will gain the vote in an election. Also, the practice of hoarding votes should be addressed by limiting the number of home owners one person can represent.

Proxy voting can serve the community by encouraging and increasing home owner voter participation. Proxy voting is legal in Colorado but the requirements to execute such a process are vague at best and open the process to abuse. Proxy voting was never meant to increase the power and impact of HOA Boards to influence a vote but can be under current law. Ballots should not allow for defaulting a home owner's rights to an HOA Board official and this is an issue worthy of changes in State HOA law. If home owners want to end this practice they can vote to repeal and thus modify their by-laws. Any proxy default voting process authorized by HOA by-laws should not be implemented by not informing the home owners through exclusion of explanation on a ballot. Hoarding proxy ballots should be limited. HOAs should limit proxies to specific events, issues and elections (one time only) to avoid problems with expired proxies. Home owners should work with their HOA to reform the use of proxy voting and ensure the balance of power in the HOA is not tilted toward the Board via use of proxy voting.

Is it time for the issue of proxy default voting and hoarding to be discussed in your HOA?