

Attorneys
Jay A. Goldstein
Jason M. Zittel
Daniel A. Berner
Eric J. Lanza

GOLDSTEIN
LAW OFFICE PLLC



1800 Cooper Point Road SW, No. 8, Olympia, WA, 98502
(360) 352-1970 fax (360) 357-0844 www.jaglaw.net

Accountant
Marlene Biggs, EA

Paralegal
Karen L. Dietrich

Legal Assistant
Crystal Maynor

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Re: Clearwood Quorum Requirement for Special Meetings

Dear Clearwood Board of Directors:

1. Introduction/Executive Summary

The Bylaws of Clearwood state that a quorum for a special meeting exists if attendance at the special meeting is equal to 50% of the number of members who were physically present at the last Annual Meeting. Members who voted by mail at the last Annual Meeting were not physically present, and therefore not computed into the quorum calculation.

Members who were not physically present, but appointed a proxy who was physically present at the last Annual Meeting, were, prior to 2006, treated as being physically present, thus factoring into the quorum calculation.

However, the 2006 resolution, in a failed attempt to eliminate proxy voting altogether, did successfully alter the language of the bylaws: a proxy who was physically present at the last Annual Meeting counts as one "member present," and the member who appointed the proxy is not considered to be "present." In other words, the member who appointed the proxy does not count towards the quorum calculation.

If the Board would like to increase the quorum threshold, the Board should adopt a resolution to do so, and present that resolution for a membership vote at the next Annual Meeting. The resolution should be drafted *carefully*, as it appears the 2006 resolution was poorly drafted, and did not achieve what I believe to be the drafter's desired result.

2. The Default Provisions Contained in RCW 24.03 (Washington Nonprofit Corporation Act) and RCW 64.38 (Homeowners Association statute)

RCW 24.03.090 states that the bylaws may provide the number or percentage of members entitled to vote represented in person or by proxy, which shall constitute a quorum at a meeting of members. RCW 24.03.090 provides a quorum requirement that is to be imputed **if the bylaws are silent as to what constitutes a quorum.**

Similarly, RCW 64.38.040 states that “**unless the governing documents specify a different percentage**, a quorum is present throughout any meeting of the association if [34% of the voting power is present in person or by proxy.]”

Both statutes provide wide latitude for the Association, through its governing documents, to craft quorum requirements. Associations are not bound to make bylaw provisions conform with these statutory provisions—these statutes are placeholders to be used when the Association either:

1. Has no bylaws, or
2. Has bylaws that are silent as to what constitutes a quorum for meetings.

3. The Current CCA Bylaws Unambiguously Establish the Applicable Quorum Requirement for Special Meetings. The RCW Provisions Do Not Override the Language of The Bylaws.

The Bylaws at Article IV(4) state:

“At all meetings *members present* (in good standing), which total 50% of the number of *members present* at the last annual meeting at which a quorum was present shall constitute a quorum.”

I have italicized each use of the term “members present” because the Bylaws have a specific definition of who are considered “members present.”

“Members Present” is defined as “members of the association in good standing attending in person at a meeting.”

Therefore, to have a quorum, attendance must equal 50% of the number of *members of the association in good standing attending in person* at the last annual meeting.

Although the bylaws authorize voting by mail-in ballot at the annual meeting, the mail-in votes do not count towards the quorum requirement. The quorum calculation is a calculation based on the number of “members ...attending **in person**” at the last annual meeting.

Mail-in voters do not meet the definition of “Members Present,” and therefore they are not computed in the quorum calculation. A potential ambiguity exists as to whether a person fits the definition of a “Member Present” (and thus to be factored into the quorum calculation) if the member executes a valid proxy, and someone else voted on the member’s behalf at the last annual meeting.

In other words, may a member be considered to attend a meeting “in person” if the member is not physically in attendance, but someone holding a valid proxy to vote on the member’s behalf is physically present at the meeting? Common sense says yes. For all intents and purposes, the voting power is physically present at the meeting through proxy.

The 2006 Board resolution was likely adopted with the intent to resolve some ambiguity around proxy voting.

4. Board Resolution 2006-12-02 was an Attempt to Eliminate Proxy Voting Altogether, but the Resolution was Poorly Drafted.

The 2006 Board Resolution all but eliminated any reference to “proxy” or proxy voting, including the reference to proxies contained in the definition of “Members Present.”

Prior to the 2006 resolution, the definition of “Members Present” specifically included members in good standing who have registered with the election administrators in person *or by personal proxy*. After the resolution, the specific reference to proxy registration was removed from the definition of Members Present.

Proxy voting is allowed only if the governing documents authorize proxy voting. RCW 24.03.085 states that a member “may vote in person or, **if so authorized by the...bylaws**...by proxy.” If the bylaws do not authorize proxy voting, a member may not vote by proxy—this is another default rule embedded in the RCW provisions.

Again, it appears the 2006 resolution was intended to eliminate the authorization to vote by proxy. However, the bylaws expressly allow proxy voting for two types of votes (whether these two exceptions were created on purpose, or inadvertently, I can’t say—the meeting minutes do not offer much clarity) and voting on other issues—including issues presented at Annual Meetings—are allowed to be voted on by a member’s “authorized agent.”

According to the bylaws, proxys are still *specifically* authorized by the bylaws in at least two instances:

- A vote to waive the annual audit of the Association’s financial records (Bylaws Section VII(7))
- A vote to amend the Bylaws (Bylaws Section X)

Furthermore, when voting to remove a member of the Board of Directors, and voting at the Annual Meeting, a member is allowed to vote through an “Authorized Agent.” See Bylaws Section VI(5)(a) and Bylaws Section V(7).

The 2006 resolution replaced the word “proxy” with “his or her authorized agent.” This appears to be an ill-conceived change: when a member executes a proxy, the member designates someone to act as authorized agent. Reason shows no substantive distinction between a Proxy and an Authorized Agent—a proxy is an authorized agent with the authority to act on another’s behalf regarding voting issues posed to the membership.

Proxy voting is still allowed, but it was purposely excluded from the definition of “Members Present” Therefore, although proxy voting is allowed at the annual meeting, when a

proxy is physically present at the annual meeting, the person who appointed the proxy is not considered a “member present” for the purpose of the quorum calculation at subsequent meetings.

5. Conclusion

The “default rules” regarding quorum calculations in RCW 24.03 and 64.38 do not apply because Clearwood has a defined quorum calculation in its bylaws. Clearwood bylaws say that a quorum exists when 50% of members who attended the last Annual Meeting in person are present.

“Members present,” as used in the quorum calculation, clearly *excludes* members who voted by mail. The definition clearly *includes* members who were physically present at the Annual Meeting. Ambiguity exists as to whether someone who appoints a proxy, and the appointed proxy is physically present at the meeting, is a “Member Present” for the basis of the quorum calculation.

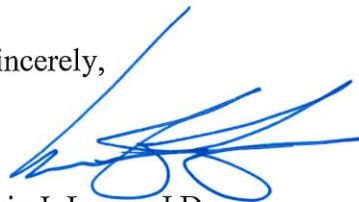
Common sense would say yes, a member represented by proxy is a “member present” and should count towards the quorum requirement.

However, the language of the 2006 Resolution seems to suggest a concerted effort to exclude proxies from the definition of “Members Present.” I believe the Resolution was intended to eliminate proxy voting all together—but the Resolution did a poor job of accomplishing that. Proxy voting is still authorized in many circumstances.

Although the Resolution failed to eliminate proxy voting, it eliminated proxies for the purposes of the quorum calculation. When a proxy is physically present at the annual meeting, the person who appointed the proxy is not considered a “member present” for the purpose of the quorum calculation at subsequent meetings. Therefore, a quorum exists when 50% of the members in good standing, who were physically present in person at the last annual meeting, are present.

If you have any questions, or would like further clarification on any of these issues, please contact me.

Sincerely,



Eric J. Lanza, J.D.
GOLDSTEIN LAW OFFICE, PLLC