



## Keough & Moody Webinar

### **CAPITAL PROJECTS IN ASSOCIATIONS:**

#### **A Step-by-Step guide**

**June 7, 2022 at 12:00 p.m. - 1:30 p.m.**

*\*Pending approval for continuing education*

Join Karen Beverly and Jonathan Wassell on Tuesday, June 7, 2022, from 12:00 p.m. to 1:30 p.m., to discuss planning for, paying for, and administering capital projects within an association.

Karen and Jon will take you through a step-by-step process of handling a capital project, from identifying the need to undertake the project, identifying funding sources, selecting a contractor, administering the project, and handling owner concerns. Issues to be discussed include practical considerations for your projects and legal requirements and limitations per the Illinois Condominium Property Act and Common Interest Community Association Act. We will also address problems that may arise while planning for and executing capital projects, and we will provide recommendations on how to avoid and respond to these situations. We will provide real examples to best educate all on this very important topic.

Join us for what we believe will be very beneficial to all board members and managers. As always, come learn and have your questions answered.

Register in advance for this webinar below.

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## Common Annual Meeting Questions

Over the last two (2) months, Gabby and Dawn have conducted a two-part webinar entitled “Electing the Board of Directors.” Part I focused on the steps to be taken before the election. Part II focused on the actual annual meeting and thereafter. The webinars identified

mistakes to avoid and best practices to ensure that your community's annual meeting goes off without a hitch. As stated during the webinars, planning for next year's election begins IMMEDIATELY after this year's!



The following are some common questions related to annual meetings that can help your community as you plan for the next election.

***Should we allow owners to vote by proxy or by association-issued ballots only?***

For a condominium association, the answer really depends on how far out the next annual meeting is scheduled. The Illinois Condominium Property Act (“Act”) requires the condominium association to adopt a rule requiring the use of association-issued ballots only at least 120 days before the Board election. Such a rule must also prohibit the use of a proxy. The submission of an association-issued ballot allows the Owner to be counted towards the required quorum. The Act also allows the Board to adopt a rule that requires the voting through an association-issued ballot to be secret, but the rule must also include a means to verify the status of the unit owner casting the ballot. Associations that are bound by the Illinois Common Interest Community Association Act (“CICAA”) can also adopt these rules, but they do not have to be adopted 120 days in advance of the next meeting. Using association-issued ballots only in an election makes it easier to conduct a virtual annual meeting. In addition, it allows owners to vote without having to find someone to be present to act as his/her proxy.

***How do we conduct a call for candidates?***

The rules for the association should address how a call for candidates will be conducted. The Act has specific deadlines that must be followed when voting is only allowed through the use of an association-issued ballot or through electronic means. While neither the Act nor CICAA specifically requires the association to allow nominations from the floor on the date of the annual meeting, it is a good practice to accept such nominations, especially as both statutes require that owners are provided the opportunity to cast their vote for owners whose names do not appear on the ballot. The rules should also specify what information must be submitted for one to be considered a candidate and any limitation on candidate statements. In addition, the rules should specify if a candidates' forum will occur and, if so, the process to be followed.

***Can the association limit campaigning by the candidates?***

The rules for the association should specify what campaigning is allowed and what is prohibited. It should be clear whether candidates can slide campaign material under the doors of their neighbors. Candidates should know if there is a common bulletin board where they can post flyers. In addition, if only the Board or its designated agent can post candidates' information on specific bulletin boards, candidates should know exactly how and to whom they must submit this information, so their material can be posted. The rules should state whether owners can post political signs within the community and if there are any time

limitations. Finally, rules and the Board should encourage respectful campaigning only.

**Is a candidate entitled to receive a list of all owners within the association prior to the annual meeting, so he can send his campaign material?**

Section 19 of the Act states that an owner is entitled to inspect, examine, and copy a current listing of the names, addresses, email addresses, telephone numbers, and weighted vote of all members entitled to vote. If the condominium association is located within the City of Chicago the City ordinance should be followed, which states that an owner is entitled to the above listing but is not entitled to the unit owner's email address and telephone number. (Please note that unless the condominium association chooses to opt-out of being bound by Section 13-72-080(c) of the City of Chicago Ordinance by a two-thirds (2/3) vote of all unit owners, the condominium association is bound by the language of the City of Chicago's ordinance as it relates to this particular document request.) CICAA does not contain any such language. Therefore, whether the information has to be provided depends on the terms of the association's community instruments. It is recommended that the association's rules and regulations address how such a request would be handled to ensure consistency.

**Should the association hire a third party to tabulate the votes at the annual meeting?**

The answer to this question really depends on the community and what has happened in the past at the annual meeting. For smaller associations and those communities with little participation by the Owners, hiring someone to tabulate the votes may not be worth the expense. However, for the larger association and of those with contentious elections, using a third party can add credibility to the election and avoid issues thereafter. A third party can send a message to the community that the tabulator is truly neutral. It is common for larger associations to hire an accounting firm to tabulate the votes. The use of an accounting firm can prevent errors. However, they must have the accurate information to properly tabulate the votes, i.e., an accurate ownership list; an accurate list of the voting members; the correct percentage of ownership assigned to each unit; and they must understand the voting process per the association's rules.

**Do we have to have the association's attorney at the annual meeting?**

Like hiring a third party to tabulate the votes at the annual meeting, whether an association has legal counsel present at the annual meeting depends on the community and what has happened in the past at the annual meeting. It also depends on the text of the association's rules. Some rules and regulations *require* legal counsel to be a part of the election process. The attorney can help tally the votes. In addition, the attorney should be the one deciding which votes will be invalidated. If the attorney is not present at the annual meeting, the association should determine in advance of the meeting how questions related to the validity of the votes will be handled, i.e., legal counsel is only present for an hour after the votes have closed to review questionable ballots or proxies.

**Can we review the proxies or ballots before the annual meeting to make sure that the forms were completed properly?**

For those of you who attended the webinars, you heard that Dawn and Gabby have different opinions or approaches to this issue. Dawn believed that while you may look at the votes in advance if the rules allowed for this, taking affirmative steps to have the Owners correct their errors before the voting closed could create more problems for the association. Dawn believes that inevitably you will not get everyone to correct the vote, so did you open the door for someone to allege the association should have tried harder to allow me to fix my error? As Dawn stated, “no good deed goes unpunished.” On the other hand, Gabby’s opinion is that as long as the same opportunity is given to all people to correct their errors, it is worth the effort as we always want to encourage people to vote and to take all steps to count a vote. Yet, they both agreed that whatever is decided by the Board of Directors, it must be consistently applied to all who may have a defective vote.

**Can the voting to elect the Board of Directors close before the annual meeting’s start time?**

Yes, the voting to elect the Board of Directors can close before the annual meeting’s start time. However, this must be clearly conveyed to the Owners. That is, the exact time that voting closes must be specifically stated to the Owners. The association’s rules should also specify that the Board of Directors has the authority to determine when voting will close.

**What happens if an owner has a legitimate reason why they could not submit their vote before the voting closed, but the owner can tender it to the person tallying before the tallying is completed?**

Whether an owner has a legitimate reason or no excuse at all is irrelevant. No vote should be counted after voting has closed. No exceptions. End of Story. Period.

**Is it proper for a condominium association to allow owners to submit votes by email when there is no rule allowing for this, and the Board election is less than 120 days away?**

The Act only requires a rule to be adopted 120 days before the Board election if the voting will be through the use of electronic means. If the association is simply allowing owners to send their proxy or association-issued ballot to management via email, a rule does not have to be adopted 120 days in advance. After all, Section 18.8 of the Act states that any vote may be accomplished by using acceptable technological means, provided that a record is created as evidence and maintained as long as required by the non-electronic format. For this reason, best practice requires the document sent via email to be kept within the books and records and the email which sent the vote should also be maintained for at least one (1) year. It is also best for the association’s rules to specifically state that a vote can be sent via email or through other allowable technological means.

**In preparing for this year’s election, the Board of Directors for a condominium**

**association reviewed the association's rules and has determined some changes are needed to ensure that this year's meeting runs smoothly. The association allows for voting by secret ballot. Does the association need to adopt these amended rules 120 days in advance of the annual meeting for the amended rules to be effective?**

No. It is only the initial rule that adopts voting by secret ballot or association-issued ballot that must be adopted 120 days before the annual meeting. After the rule is adopted, the rules can be amended less than 120 days before the annual meeting. The Board of Directors just must be sure it follows Section 18.4(h) of the Act.

**Does the association have to allow people to observe the tallying?**

Both the Act and the Illinois Not for Profit Corporation Act allow for observers to watch the tallying of the votes. The Act specifically states that any candidate or representative of a candidate can request to observe the tallying. Even if no one asks, it is a good idea for the association to make a call for observers. This sends a message to the community that the tabulators have nothing to hide. It also helps to add credibility to the process. Further, an extra set of hands or eyes can prevent errors, especially when a third party is not utilized to tally the votes. It is important for observers to know that they are not to interfere with the process.

**What should every association do before sending notice of the annual meeting and the election documents to the owners?**

The Board of Directors must confirm the number of seats for election and the terms. Remember, a board member appointment only lasts until the next annual election. Therefore, the current member of the Board who was appointed to fill a vacancy one (1) month ago is sitting in a seat that is currently up for election. The Board of Directors should also take steps to confirm those people wanting to be a candidate are eligible to serve on the Board. Steps should be taken to confirm each candidate is an owner or a designated voting member for a specific unit. If the association's community instruments require a member of the Board to be a resident or in good standing, these requirements too must be confirmed. (If the association's declaration or bylaws do not state that a member of the Board must be a resident or in good standing to be eligible to serve on the Board, these are then not requirements that must be met by each candidate.) Finally, several eyes should review the notice and election documents. Make sure the documents are consistent with the terms of the association's governing documents, including the rules. Do not just assume the previous year's documents were correct—the governing documents should actually be reviewed to confirm consistency.

**How can an association avoid confusion with voting?**

The simplest way to avoid confusion is to provide the owners with clear and specific instructions. The voting form should specifically tell an owner what sections must be completed. The form should be easy to read. There is no need to cram a lot of information onto one (1) page. If two (2) pages are needed to ensure clear instructions are provided, use two (2) pages. The following are some basic tips on drafting the voting form:

1. List the names of the candidates in alphabetical order (and do not identify which are

- current members of the Board of Directors).
2. Identify the number of seats for election.
  3. Identify the number of votes the Owner can cast.
  4. Indicate if cumulative or non-cumulative voting is allowed.
  5. Remind the Owner of a few mistakes to avoid ensuring the vote counts (i.e., sign the form; date the form; do not cast more votes than allowed; do not cast more than one (1) vote per candidate).

**If an owner contests the election, does the Board have to conduct a recount?**

Unless the association's community instruments specifically provide that a request by an owner requires a recount to occur, the decision vests solely with the Board of Directors. Before deciding, the Board of Directors should consider the issue raised and the likelihood that an error did occur. Like with a violation, the Board of Directors should not consider who made the request or why the request was made. Instead, the focus should be solely on the issue raised if it is a legitimate issue. Before making a final decision, the Board of Directors may decide to conduct an "unofficial" recount. That is, perhaps management, legal or a member of the Board reviews the voting documents and tallies them again to see if they identify any errors and if the error would change the results of the election. When faced with a request for a recount, it is a good idea for the Board of Directors to consult with legal counsel to ensure that the Board meets its fiduciary duty. Rarely should the answer to a request for a recount simply be "no" without further investigation or guidance.

**Does the association have to allow an owner to inspect the votes cast by the members after the annual meeting?**

Section 19 of the Act requires the condominium association to keep the votes for 12 months. Similarly, Section 1-30 of CICAA requires common interest community associations to keep the votes for one (1) year. Therefore, the documents must be made available for inspection. However, when a request is made under CICAA, the Owner must state a proper purpose for requesting to see the votes. Please keep in mind that it is likely a proper purpose for an owner to state that he is questioning the tabulation of the votes. We often hear boards say that they do not want to give the documents as owners do not want others to know how they voted. While this may be a legitimate concern, unless the association's documents provide that voting is by secret ballot, the association must allow the inspection of the documents which identify the voter's identity. It is only when the voting is truly by secret ballot that an owner requesting to inspect the ballots is not entitled to have the voter's identity disclosed.

**If you have questions about how to conduct your current annual election or would like your association's rules and regulations related to electing the Board of Directors reviewed, please contact:**

**Dawn Moody ([dln@kmlegal.com](mailto:dln@kmlegal.com)) or Gabby Comstock ([grc@kmlegal.com](mailto:grc@kmlegal.com)).**

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**Keough & Moody, P.C.,**  
**114 East Van Buren, Naperville, IL 60540**

