

Safe Governance

GAME-CHANGING LAWS, RULES, AND CASES



SHUTTERSTOCK/RAWPIXEL.COM

BCL SEC. 602/603

Shareholder Meeting Requirements

BY KENNETH JACOBS

➤ **SO YOU'VE CALLED** your annual meeting, sent out proxies, put up reminders, and promised refreshments. The big day comes – and you don't have a quorum. What do you?

This is a recurring problem. Paradoxically, the lack of a quorum could mean that the owners are satisfied with the current regime, and they don't want to make any changes. But you still have to deal with getting a quorum and having an election. Some boards simply throw up their hands and say, "Well, we tried. Is that good enough?" Legally, no.

Section 602-d of the Business Corporation Law provides that your

bylaws may state procedures for adjourning annual meetings. A typical bylaw provision states that if no quorum is achieved, a majority of those owners in attendance at the annual meeting can adjourn the meeting to a future date. The idea is that you can use that time to collect additional votes to achieve a quorum. Usually when this happens, the board has already collected enough proxies so that it can make this decision as the holder of a majority of the votes present at the meeting. But if the board hasn't collected proxies, then you have to take a vote of shareholders to do this.

If you do adjourn the annual meeting, intending to reconvene it on that future date, then I recommend a few safeguards. First, proxies that have been collected should be held in escrow unopened. They will be counted at the adjourned

meeting. Proxies with a later date can override proxies that have already been cast since the actual vote is taking place at the adjourned meeting.

Second, owners at the initial unsuccessful meeting can be offered the opportunity to cast early votes if they don't want to come back to the reconvened meeting. If they do cast their votes, those votes should also

be held unopened. If you're uncomfortable with the idea of casting early votes, you can have these owners cast directed proxies designating a board member or the board secretary as their proxy-holder and directing how the vote should be cast. Again, if that unit-owner or shareholder shows up at the adjourned meeting, he or she can put in a new proxy or vote in person. That would override the previous proxy.

Third, you should tell everybody that you've adjourned



KENNETH JACOBS

It's possible for shareholders to elect a co-op board even if the annual meeting fails to attract a quorum.

Safe Governance

the meeting and that you're going to reconvene it, but you don't need to send out a new formal notice of meeting.

What if your bylaws don't provide that you can adjourn the meeting and then reconvene it at a future time? What happens if you reconvene the meeting, and you still don't get a quorum? You can continue to reconvene the meeting, if you want. But many boards say they don't want to go to the expense of having a second, third, or fourth unsuccessful annual meeting. Under those circumstances, another part of the Business Corporation Law, Section 603, may come into play.

Section 603 states that thirteen months after the last annual meeting, or one month after the date fixed for the annual meeting in the bylaws, if the board has not succeeded in electing directors, then the board must call a special meeting with the sole purpose of electing directors. If the special meeting is called but the board has still not succeeded in electing directors for two months after that first thirteen-month deadline, or if the board doesn't

call a meeting within two weeks after the first deadline expires, the holders of 10 percent of the shares of the corporation can sign a petition demanding a special meeting.

This meeting must take place 60 to 90 days after the date of their demand. If the secretary doesn't call that meeting, then any shareholder who signed the demand for that special meeting can call the meeting on his or her own. At that special meeting, believe it or not, quorum requirements are suspended.

In other words, if the board does not call for an annual meeting even after they've tried in good faith, and if 10 percent of the shareholders present a petition saying they want a special meeting to elect directors and the board doesn't comply, a shareholder who made that demand can send out a notice of that special meeting, and it does not matter how many shareholders show up. Directors will be elected at that special meeting.

So even if the board gives up or if the board simply doesn't try, co-op

shareholders have a remedy. The burden is on the shareholders to act.

Now does this apply to condos? You can certainly apply the same adjournment and reconvening procedures to a condo annual meeting. You can adjourn the condo's meeting and reconvene it at a future date, and collect additional proxies, just as you can do in a co-op. But the statutory remedy in Section 603 is not available to condo unit-owners. Now, even if a condo board refuses to call an annual meeting, many courts will import the Business Corporation Law to determine what procedures a condo should follow in calling an annual meeting or in trying to reach a quorum.

So what's the moral of this story? One way or another, you can be forced to have an election. Boards should make every reasonable effort to have one in order to avoid extra expense and potential confrontations. ■

Kenneth Jacobs is a partner at Spolzino Smith Buss & Jacobs.