

# Community Association Management *Insider*<sup>®</sup>

JANUARY 2015

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### HUD Orders Association to Pay in Discrimination Case

The U.S. Department of Housing and Urban Development (HUD) recently ordered a condominium association in Puerto Rico to pay \$20,000 in damages plus a \$16,000 civil penalty for refusing to allow a resident with disabilities to keep his emotional support animal.

Federal fair housing law makes it unlawful to refuse to make reasonable accommodations in policies or practices when such an accommodation may be necessary to afford a person with a disability equal opportunity to use and enjoy her home. This includes refusing to grant waivers to “no-pet” policies for individuals with disabilities who use assistance or support animals, according to HUD.

The resident filed the HUD complaint, claiming that the community discriminated against him by denying his request for an emotional support animal, despite documentation from his healthcare provider identifying his disability and his need for the animal.

The resident said that pets were allowed when he bought his unit in 1995, but the community adopted a “no-pets” policy before he got the emotional support animal. According to the resident, the denial of his support animal caused him emotional distress and forced him to sell the home where he lived in for almost 20 years.

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## FEATURE

### Keep Key Principles in Mind When Using Proxies

By Andrea Brescia

Most state laws require community associations to allow their members to vote by proxy when they can't or don't want to attend a meeting in person. For many, this is helpful because using proxies can allow absentee owners—including those who might reside out of state part of the year—to cast a vote that might otherwise have been lost. It can also help an association meeting reach a quorum so that business can proceed. But the proxy process comes with a few hurdles, including how to educate your members on what exactly they are signing, how to avoid member misconduct, and what to do when your members sign more than one proxy, revoke their proxy, or show up in person after submitting a proxy.

While there's no one simple solution to all these problems, there are several things you can look out for to make the proxy process go

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## DEALING WITH MEMBERS

### Add Amenities that Reflect Members' Interests, Lifestyle Trends

As times and social tastes change, your board might explore adding amenities to keep your community association current and in line with newer associations. The amenities that were in place when your association was founded might not be completely satisfying to your membership today—or attracting new buyers.

For example, if many younger families recently moved into your community, you may want to consider adding more play areas for small children. Also, look around your neighboring communities. Newer associations might boast splashier amenities, like water parks, bike trails, and concert stages, leaving your association looking dated. Potentially, this could impact your members' lifestyles and raise concerns over property values. What was popular yesterday might need a rethinking today. You should aim to maximize the benefits that your amenities add to daily life at your association and respond to members' needs.

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## Using Proxies (continued from p. 1)

smoothly and allow your members to weigh in on issues that involve the quality of life in your community. We'll give you some advice to avoid pitfalls, as well as Model Language: Give Members Instructions for Using Proxies, so members fully understand their rights before they sign on the dotted line.

### What Is a Proxy?

A proxy is a written authorization that one person gives to another to act on his behalf. In its simplest sense, it's a power of attorney.

There are five types of proxies that are commonly used:

**General proxy.** When an owner signs a general proxy, she's authorizing another person to vote however he chooses at a meeting, on her behalf. A key benefit of this type of proxy is that it allows the proxy holder to listen to debates before committing to an issue, position, or candidate. Some states bar the use of general proxies, so check your state laws before authorizing their use in your association.

**Limited proxy.** The proxy holder can vote only on certain issues at the meeting, but the holder can listen to debates and discussion before casting a vote for the issue(s) for which the owner has given authorization.

**Directed proxy.** Similar to a general proxy, a directed proxy authorizes one person to cast a vote on behalf of another. But a directed proxy instructs the proxy holder exactly which candidate to vote for or specifically how to vote on an issue. This type of proxy is used when an owner knows how he would like to vote but either can't attend or doesn't want to attend the meeting. It also doesn't take into account important changes that might occur at the meeting regarding the issues or candidates. For example, if a candidate drops out of the election or an issue changes during the meeting, the directed proxy doesn't adapt to the circumstances. However, it does reduce the possibility of abuse.

**Limited directed proxy.** The proxy holder can vote only on certain issues as directed by the owner, and the holder must vote in the way that the owner stipulates.

## HUD Orders Association to Pay (continued from p. 1)

HUD's order modifies a previous ruling to increase the amount of damages and penalties in light of what HUD found to be the seriousness of the violation and the resident's injuries.

"Assistance animals are not pets. Persons with disabilities often depend on them in order carry out life's daily functions," Gustavo Velasquez, HUD Assistant Secretary for Fair Housing and Equal Opportunity, said in a statement. "This Order reaffirms HUD's commitment to taking appropriate action when federal fair housing law has been violated." ♦

**Quorum proxy.** This is also known as an attendance proxy. It doesn't entail a vote at all. Its purpose is to create a quorum at the meeting so that business can proceed.

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**PRACTICAL POINTER:** Keep in mind that a proxy is not a ballot or an absentee ballot. "In its purest sense, a proxy is just giving authority for someone else to show up at a meeting on your behalf," says North Carolina attorney Jim Slaughter. "If the authorized person doesn't go to the meeting, it's no longer in effect."

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### Check State Laws

While most states have provisions in place regarding the use of proxies, you'll want to make sure that your governing documents and proxy forms are in line with current laws in your state. In most states, proxies don't have to be on a sanctioned association form to be valid, but do have to contain a few key elements including a signature and the date.

In fact, according to Slaughter, in most cases, a proxy that's written on a napkin is a valid proxy if it contains the date and signature of the person executing it. Although most associations use a uniform proxy form, you must consider any written proxy form you receive as long as it has all of the key elements required by your state.

Consider sending a cover letter with the proxy. Most associations send a cover letter that gives information about the date of the meeting, the issues being discussed and voted on, and any candidate running for election. The letter will also advise the member that if he or she can't make the meeting, a proxy can be sent naming some-

one else to act on his or her behalf. According to Slaughter, you can even include language such as this in the letter that will make it easier for the member to complete the proxy:

I authorize Association Secretary Mary Smith or \_\_\_\_\_  
[insert name] to act on my behalf.

[Insert signature and date lines].

The letter should also make it clear that owners don't have to send in the proxy if they show up to the meeting.

Your state laws will also dictate the maximum amount of time that a proxy is valid. Commonly, a proxy is valid for 11 months, although you can shorten that time by stating on the proxy that it's good only for the annual meeting on a particular date, or for any event or time for which you want to dictate the term. A member can also write a proxy giving authority for just a particular date or meeting.

### General Members vs. Board Members

In most states, proxies can be used by members for membership meetings, but not by board members for board meetings. This stems from the fact that a board member has fiduciary responsibilities to the membership.

"You can't give that away to someone else," says Slaughter. "A board member is a fiduciary. It's a big deal," he says, stressing, "You can't hand off your fiduciary responsibilities to someone else." Even if the proxy is directed, the person holding the proxy isn't the person that the membership elected and has placed its trust in.

However, for absentee board members, you should check your

state laws: A certain number of states allow telephone participation by the board member who cannot be physically present at the meeting.

### Can Proxies Be Solicited?

Frequently, people running for the board or with strong opinions about an issue will try to solicit proxies from the membership. Can you keep board candidates or other members from visiting members' home to solicit votes?

"The difficult part is that people do have a right to solicit proxies," says Hawaii attorney Richard Ekimoto. "In Hawaii, there is nothing to stop owners from soliciting or using proxies—that's their legal right."

To help remedy the potential for abuse, the National Conference of Commissioners on Uniform State Laws updated its Bill of Rights to provide that "a person may not cast undirected proxies representing more than 15 percent of the votes in an association." According to Slaughter, "the thinking is that it's not fair for someone to round up all these proxies and control the vote of the association."

### Counting the Vote

How do you assure members that their directed proxy was followed to the letter? In some states like Hawaii, people are entitled to look at the proxies after the meeting, says Ekimoto. He adds that in some associations, if there is a directed proxy, the proxy holder will fill out the ballot according to the person's directions, and then that ballot is later shown to the owner.

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## MODEL LANGUAGE

### Give Members Instructions for Using Proxies

We drafted the following proxy instructions as general guidelines, but show this language to your attorney before using it to make certain that any language complies with your state statutes and governing documents. You can use this language to help your members understand the dif-

ferent types of proxies before they attach their signature to anything. The instructions clearly explain the purpose of each type of proxy and how and when the member can use it.

#### ATTENDANCE PROXY

If you are unable to attend the upcoming meeting, scheduled to be held on *[insert date and time]*, in person, please fill out this Attendance Proxy and return it to the management office. According to the bylaws of Shady Acres Community Association, the association is not allowed to conduct business without *[insert % required by your association]* of the members participating. This will count as your participation. It will NOT be used for voting purposes, only to enable the meeting to proceed.

#### GENERAL PROXY

If you are unable to attend the upcoming meeting, scheduled to be held on *[insert date and time]*, in person, but wish to give someone else the right to cast a vote on your behalf, please fill out this General Proxy. You can either return it to the management office, or the person to whom you give the right to cast your vote can bring it with him/her to the meeting. This General Proxy does NOT require the person you give it to to vote however you want him/her to, **even if that person promises to do so**. It gives him/her the right to use his/her judgment on all matters that come up for a vote of the members at the meeting. This proxy WILL be used for voting purposes.

#### LIMITED PROXY

If you are unable to attend the upcoming meeting, scheduled to be held on *[insert date and time]*, in person, but wish to give someone else the right to cast a vote on your behalf on only the issues stated here: *[fill in issues]*, please fill out this Limited Proxy. You can either return it to the management office, or the person to whom you give the right to cast your vote can bring it with him/her to the meeting. This Limited Proxy does NOT require the person you give it to to vote however you want him/her to, **even if that person promises to do so**. It gives him/her the right to use his/her judgment on the issues you have stated above that come up for a vote of the members at the meeting. This proxy WILL be used for voting purposes.

#### DIRECTED PROXY

If you are unable to attend the upcoming meeting, scheduled to be held on *[insert date and time]*, in person, but wish to give someone else the right to cast a vote on your behalf, please fill out this Directed Proxy. You can either return it to the management office, or the person to whom you give the right to cast your vote can bring it with him/her to the meeting. Make sure not only to sign this Directed Proxy but also to fill out the space indicating how you want him/her to cast your vote. This proxy WILL be used for voting purposes.

#### LIMITED DIRECTED PROXY

If you are unable to attend the upcoming meeting, scheduled to be held on *[insert date and time]*, in person, but wish to give someone else the right to cast a vote on your behalf on only the issues stated here: *[fill in issues]*, please fill out this Limited Directed Proxy. You can either return it to the management office, or the person to whom you give the right to cast your vote can bring it with him/her to the meeting. Make sure not only to sign this Limited Directed Proxy but also to fill out the space indicating how you want him/her to cast your vote on each of the issues stated above. This proxy WILL be used for voting purposes.

## Using Proxies

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At Kiawah Island Community Association in South Carolina, the ballots are returned directly to the local college's political science department, where the data is entered into the voting system, says Kiawah Executive Director Tammy McAdory. "It's 100 percent independent," she says. "That same team attends the annual meeting and then processes any votes from the floor, as well as proxy votes assigned to others in board elections and/or other proposals."

This association also requires members to sign their ballots with an original signature, and ownership is verified against the association's database before the ballots are entered.

### Last One Counts—Or Does It?

When a member signs more than one proxy, the common rule is that the proxy with the latest date is the valid one. The assumption is

that a person wouldn't have signed a later proxy unless she intended to invalidate the earlier one. Be aware though that in some states, unless the earlier proxy is actually revoked, the first signed proxy is considered the valid one. "You can sometimes avoid this by adding opening language to your proxy form that says, 'I revoke any earlier proxy,'" says Slaughter.

### Last-Minute Appearances and Surprise Guests

Frequently, owners will submit a proxy thinking that they are not able to attend the meeting and then at the last minute, show up in person. In this case, the proxy is withdrawn and the in-person representation trumps the written proxy.

Similarly, if Member A signs a general proxy over to Member B, and at the last minute Member B is unable to attend the meeting, the outcome of that proxy is uncertain. In most states, a proxy holder cannot give away a proxy to someone else. The exception is if the

original proxy contains language that says that the person is giving away her right "with the power of substitution," which means that should the original proxy holder be unable to attend, she can assign the proxy to another person.

According to Slaughter, some people will be comfortable signing a proxy if it's going to the person they choose, but they won't agree to allow their proxy to be signed over to someone else. "Like everything," he says, "this might carry political and personal concerns that have consequences." ♦

**Andrea Brescia** is a New Jersey-based editor who writes for housing-related publications and organizations.

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## Dealing with Members (continued from p. 1)

The right amenities can add luster to your association, turn your owners into neighbors, and help retain visibility and property values. So, when is the right time to add amenities to your association? How should you go about it? How do you finance a new addition? We'll give you tips to protect your association from liability, keep your association's amenities in line with current trends, and satisfy homeowners' growing and sometimes changing interests.

### Who Are Your Members and What Do They Want?

Do a little research. Board members should be thinking about what kinds of amenities they would like themselves and talking to others in the community to poll their interests. Start keeping a list of ideas and rank them by what you think your community can do easily or cost-effectively. Also, look around at other associations—newer communities—in your area and see what they're offering that your members might want.

Review your open spaces to see if there might be a better use for them. "It became clear that we had many open spaces that were not designated for specific amenities," says Wendy Taylor at South Riding Proprietary, a large association in Virginia. "So the resident task force put together a group of folks to look at every open space."

The committee went on to survey the members to uncover their interests, ultimately bringing back a list of possibilities for each par-

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## Dealing with Members

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cel. From there, the list was prioritized, and the committee ranked what they would do first. This was nine years ago. Some of their earlier projects included a skate park, additional tennis courts, and a concert stage for weekly performances.

### What's New and What's Hot?

Gathering places are one of the new trends in associations, such as fire pits and splash pads, those luring water sprays that don't hold standing water and can be enjoyed without a lot of supervision. For athletic members, BMX trails are riding high. In fact, at South Riding, members are now exploring creating a trail that would wind through the woods at the end of the community.

"The biggest project that we finished was a splash kiddie pool as an extension to a pool that had been identified as dated," says Taylor, adding that this project doubled the size of the pool. The project was completed in stages. They added a teen slide, and then the next year, put in a kiddie park with pirate ships to serve the growing number of young families in the community.

But this project wasn't without its challenges. There was initial pushback from the association swim team, who worried that the project would infringe on some of the lanes that the team had previously used to practice. "We had open meetings to discuss it and found that the only pushback was the resistance to change itself," Taylor says. Once the committee understood this,

it was able to accommodate the swim team in the association's other pools, and everyone was happy. The project was a success: It doubled the usage at the new pool, and there were even enthusiastic lines to get in.

The takeaway: Listen to your members' concerns and work together to find solutions, even if it's just as simple as understanding that change sometimes takes a little time for some to digest.

### Financing and Membership Approvals

Check your governing documents. In many cases, the board will have the authority to make capital improvements—within a certain limit. Cases where you need to collect a special assessment to add amenities may be harder to sell. A change to the main clubhouse or common area is easier for the general membership to accept than, say, a bike trail that might interest only a small percentage of your membership—people have a hard time agreeing to pay for things they feel they won't use.

Check your governing documents to see if they stipulate that you can add—or even subtract—amenities. In some cases, you might need a consensus of the community. But in any case, you'll have to market the idea and anticipate feedback. The important thing is to keep the lines of communication open, and listen to any concerns that members might raise in an open forum.

If you have an agreed-upon need for an amenity, but no agreement regarding financing it, you may need to take a creative approach. For example, at South Riding, many kids were skate-

boarding all over the common areas. The association looked into insurance for adding a skateboard park and found it needed to take a different path. So the association approached the county, built a skateboard park on county land, and then handed them the keys. Members were happy, and the kids got a much-needed place to play.

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**PRACTICAL POINTER:** Check your insurance policy. Depending on the amenity that you're adding, you might need to get additional or supplemental insurance. Some large associations with multiple amenities may even operate under the same types of insurance that protect resorts.

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### Zoning Matters

Look at the zoning laws in your local jurisdiction to check whether they permit the type of amenity your association is considering adding. "We had to get the zoning statute changed in Langdon County to allow homeowners associations to put in dog parks," says Taylor. "Dog parks are another trend that's becoming very popular in associations. Ours is going to have a wooded area as well as an obstacle course."

Another consideration in getting this park installed was marketing the idea to the larger community. Some members weren't as enthusiastic about having a dog park in their backyard, she says. But the association solved the issue by figuring out a location that was remote and would not negatively impact any homes.

### Make Room for the New

In addition to adding new amenities, it might be time to retire those that aren't working anymore. No

one knows your community better than you or knows what it takes to run the amenities. Take a hard look at how each amenity is being used. Is it used by the general membership or just a small percentage? How often? Does the usage exceed the cost to maintain?

Hawaii attorney Richard Ekimoto says he noticed that in recent years, a small trend has been to remove amenities—in particular,

underused pools. In cases such as these, it might be in the association's best interest to remove the amenity rather than to incur the costs of the next round of maintenance. This is a case where knowing the needs of your membership, and tracking usage, informs your decision-making process and allows for better management.

“Our mission is to make our community the most desirable

place to live and raise children,” says Taylor. “We think we do that by adding amenities, keeping it all here in our community.” ♦

**Insider Sources**

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**ANNUAL INDEX**

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