

## 29--Proxies: When Are They Valid?

Washington law allows Association members to vote by Proxy.<sup>1</sup> Proxies cannot be used for Board Meetings. Aside from the specific requirements below, each community's Governing Documents must be examined for additional requirements.

### Condo Associations

For Condo Associations, a Proxy must satisfy all of the following requirements:

- A) It must be on paper or in some other kind of tangible form (or can be by electronic transmission, such as email);<sup>2</sup>
- B) It must be in writing;
- C) It must be dated;<sup>3</sup>
- D) It must be executed (or if by email, sufficiently identify the sender);<sup>4 5 6</sup>
- E) It cannot specify that it is revocable without notice.<sup>7</sup>

### HOAs

The HOA Act does not contain specific requirements for Proxies. However, if an HOA is a nonprofit corporation, requirements for Proxies may be authorized in the Articles of Incorporation or the Bylaws,<sup>8</sup> and must satisfy the following requirements:

- A) It must be on paper or in some other kind of tangible form (or can be by electronic transmission, such as email);<sup>9</sup>
- B) It must be in writing;<sup>10</sup> and
- C) It must be executed (or if by email, sufficient to identify the sender).<sup>11</sup>

### WUCIOA Communities<sup>12</sup>

WUCIOA provides that, unless the Governing Documents provide otherwise, a Unit Owner may vote by Proxy in the manner outlined in RCW 24.06.110.<sup>13</sup>

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Therefore, WUCIOA requires that a Proxy must be given:

- A) In a writing
- B) Signed (in person or electronically) by the Owner or an authorized director of the Owner (if a corporation); and
- C) Must be dated.<sup>14</sup>

### **Tangible Versus Electronic Proxies**

Under Washington law, both facsimiles and scanned documents qualify as "tangible medium[s]." Thus, a copy of a written, signed Proxy that has been faxed or scanned and sent to an Association would be treated the same as the original, signed document. In other words, if the original, signed document was valid, a faxed or scanned copy of the document would be valid as well.

A Proxy sent via email would likely be treated the same as a Proxy executed via a tangible medium. A simple email (i.e. one that did not contain a digital signature as defined under Washington law) is still a validly executed Proxy under RCW 24.03.005(14), as long as it contains enough information to "determine the sender's identity." Because it could be harder to determine the sender's identity in a simple email, courts might be more likely to invalidate a Proxy executed via email. If the invalidated Proxy had cast the deciding vote, or if the Proxy's presence were necessary for the Association to have a Quorum, it would invalidate the election result. Under WUCIOA and RCW 26.06 a digital signature is required in an email.

### **Duration and Use of Proxies**

A Proxy is valid for eleven months, unless otherwise stated in the Proxy. Proxy votes by Association members do count towards Quorum requirements.

Proxies cannot be used for Board Meetings. While Washington's statutes neither specifically authorize nor prohibit voting by Proxy for Board Members, it is generally accepted that allowing Proxy voting by Board Members is inconsistent with the duties and responsibilities entrusted personally to them.<sup>15</sup> WUCIOA specifically states that Board Members may not vote by Proxy or absentee ballot.<sup>16</sup>

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<sup>1</sup> RCW 64.34.340(1), (2) provides, in relevant part:  
t...Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner....

This provision applies to both New and Old Act condos. RCW 64.34.010.

RCW 64.38.025(3), (5), provides, in relevant part:  
...Unless at that meeting the owners of a majority of the votes in the association are allocated or any larger percentage specified in the Governing Documents reject the budget, **in person or by proxy**, the budget is ratified, whether or not a quorum is present...The owners of a majority of the voting power in the association present, **in person or by proxy**, and entitled to vote at any meeting of the owners at which a quorum is present, may remove any member of the board of directors with or without cause.

RCW 64.90.455(5)(a) ("Votes allocated to a unit may be cast pursuant to a directed or undirected proxy duly executed by a unit owner in the same manner as provided in RCW 24.06.110.")

<sup>2</sup> RCW 24.03.005(11):  
"Execute," "executes," or "executed" means **(a) signed**, with respect to a written record or **(b) electronically transmitted along with sufficient information to determine the sender's identity**, with respect to an electronic transmission, or (c) filed in compliance with the standards for filing with the office of the secretary of state as prescribed by the secretary of state, with respect to a record to be filed with the secretary of state.

RCW 24.03.005(9):  
"Electronic transmission" means an electronic communication (a) not directly involving the physical transfer of a record in a tangible medium and (b) that may be retained, retrieved, and reviewed by the sender and the recipient thereof, and that may be directly reproduced in a tangible medium by a sender and recipient.

RCW 24.03.005(20):  
"Tangible medium" means a writing, copy of a writing, facsimile, or a physical reproduction, each on paper or on other tangible material.

<sup>3</sup> RCW 64.34.340. (See Footnote #1)

<sup>4</sup> RCW 24.03.005(9), and (20); RCW 64.34.340.

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<sup>5</sup> Under Washington law, a digital signature is sufficient when it is:

- 1) Verified by reference to the public key listed in a valid certificate issued by a licensed certification authority;
- 2) Affixed by the signer with the intention of signing the message; and
- 3) The recipient has no knowledge or notice that the signer either:
  - a. Breached a duty as a subscriber; or
  - b. Does not rightly hold the private key used to affix the digital signature.

Generally, an email will fail to satisfy the first requirement because it will not reference a public key in a certificate issued by a licensing authority. Even when an email did satisfy these requirements, however, an association is not obligated to accept it as a digital signature unless it is contained in a certified court document as defined in RCW 19.34.321. Additionally, associations are free to establish their own rules "establishing the conditions under which the recipient will accept a digital signature." RCW 19.34.300(2)(c).

<sup>6</sup> "Executed" and "signed" do not have the same meaning under Washington law. "Executed" is a broader term that encompasses a "signed" document, but also includes electronic transmissions such as email. "Signed," in contrast, refers to a document on a "tangible medium" or to an electronic transmission containing a digital signature, and thus would not include most emails. *See also Footnotes 2 & 6.* RCW 24.03 and 24.06 have different definitions of what "executed" means. RCW 24.06 requires a signature of some kind.

<sup>7</sup> RCW 24.03.005(14); RCW 24.06.005(17).

<sup>8</sup> RCW 24.03.085(2).

<sup>9</sup> RCW 24.03.085 (Voting); RCW 24.06.110 (Voting).

<sup>10</sup> RCW 24.03.005(11); RCW 24.03.085; RCW 24.06.110; RCW 24.06.005(17).

<sup>11</sup> *Id.* But again, "executed" has a different meaning under the two non-profit corporations acts.

<sup>12</sup> RCW 64.90.455(5)

Except as provided otherwise in the declaration or organizational documents, the following requirements apply with respect to proxy voting:

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(a) Votes allocated to a unit may be cast pursuant to a directed or undirected proxy duly executed by a unit owner in the same manner as provided in RCW 24.06.110.

<sup>13</sup> RCW 24.06.110

...If a member or shareholder may vote by proxy, the proxy may be given by:

(1) Executing a writing authorizing another person or persons to act for the member or shareholder as proxy. Execution may be accomplished by the member or shareholder or the member's or shareholder's authorized officer, director, employee, or agent **signing the writing or causing his or her signature to be affixed** to the writing by any reasonable means including, but not limited to, facsimile signature;

<sup>14</sup> RCW 64.90.455(5)(d).

A proxy is void if it is not dated or purports to be revocable without notice.

<sup>15</sup> Board members vote after receiving and reviewing information provided to them by an association manager, subcommittee, or other person or entity, and after discussion of an issue at the board meeting. If they are not present, they cannot be fully informed and a "proxy" vote could not be a vote made after adequate inquiry.

<sup>16</sup> RCW 64.90.445(2)(m).

"A board member may not vote by proxy or absentee ballot."