

Request for Interpretation of By-Laws

Date: 2005-09-06

The following interpretation questions were posed to the IHTA attorney. The attorney's interpretation is inserted with the notation "Interpretation:".

Given the language of the current IHTA By-Laws, it appears that there is some disagreement about what the By-Laws say regarding filling the vacancy. Below, please find several questions. In some cases, the questions are asked directly. In other cases, the questions are asked indirectly, such as "Right?", which means that you are being asked to confirm the interpretation. If you disagree the interpretation, please explain why you disagree, including relevant citations of the By-Laws, statutes, and case law. Please answer both the direct and indirect questions.

In article 3, section 6, it says:

Section 6. Vacancies. In case of a Director's death or resignation or loss of membership, that Director's position shall be vacant ipso facto, and such Director shall be replaced or not, in the Member's discretion, by a majority vote of the Members. In the case of a Director's removal for cause, the provisions of Article III, Section 8 shall govern the replacement of such Director.

Regarding the vacancy of the Secretary, since we are required to have a minimum of 5 directors, there is no issue for the Members to decide because the vacancy must be filled. In other words, at the upcoming Members meeting it is unnecessary to take a vote on whether or not to fill the vacancy of the Secretary position. ***Right?

Interpretation: I agree that the members do not need to whether to fill the vacancy: therefore, the members can proceed to elect a new director who would be the Secretary by default.

In article 3, section 8, it says:

Section 8. Removal. Any Director may be removed for cause by a vote of two-thirds of the Members present and voting at a meeting, in person or by proxy. Cause shall include, but not be limited to, absence from three (3) consecutive Board meetings without a valid excuse. Written notice of an impending removal for cause shall be mailed to the Director no less than fifteen (15) days before the date set for removal, and such Director shall have ten (10) days to reply in writing as to why he or she should not be removed, and the Members shall give due consideration to such reply in making their final decision to remove. If a Director is removed pursuant to this provision, the Members shall appoint a replacement Director who shall serve until the next annual meeting of the Members.

Given the wording in section 6 and section 8, it is clear that the By-Laws anticipate the replacement of Directors prior to the annual election and that the Members choose a replacement. ***Right?

Interpretation: Right.

The reason for replacement determines whether on not the replacement is mandatory or optional. For "death" or "resignation", the replacement is optional and determined by the

Members (unless some other provision prevails, such as the need for a minimum number of Directors), while for "removal", the replacement is mandatory. ***Right? RIGHT.

Given the recent changes that the By-Laws mandated only one director per apartment and, at the time, there were two directors from the same apartment, then one of them was required to resign. ***Right?

Interpretation: Right, within reasonable time.

Hypothetically, if the By-Laws change and eliminate the position of, say, Vice Chair, and there are no provisions in the new By-Laws to "grandfather" existing officer positions, then after the new By-Laws have been approved, no directors shall have the title of Vice Chair. ***Right?

Interpretation: Right.

In article 3, section 4 it says:

(a) Election. At each annual meeting of the Members, the members shall elect the Directors.

This statement makes the requirement that annual elections shall occur at the annual meeting, but this statement does not prohibit other elections for vacancies (as envisaged in article 3 sections 6 and 8). ***Right?

Interpretation: Right.

In article 3, section 4, it provides procedures for nomination, acceptance, and publication of candidates.

(b) Nomination of Candidates. Each candidate shall be nominated by two (2) Members, in writing. The nomination shall be delivered to the Secretary, or person(s) designated by the Board, together with the written acceptance of the nomination, no less than seven (7) days prior to the election. Candidates must be Members.

(c) Acceptance and Publication of Candidates. The period of accepting candidate nominations shall be not less than fourteen (14) days. Acceptance of nominations shall close no later than seven (7) days prior to the election. The Secretary or their designee shall accept all nominations for candidates for Directors and shall prominently post a list of candidates within the lobbies of Island House. The posting of the slate shall be made no later than five (5) days prior to the election.

Since paragraphs (b) and (c) have no exclusions or special requirements for annual elections (as compared with other elections), then paragraphs (b) and (c) would apply to both annual elections and other elections. ***Right?

Interpretation: Right.

(d) Election of Directors. All voting for the election of Directors shall be conducted in a private and confidential manner, pursuant to procedures established by the Secretary or its designee. In the event of a tie vote in the election of any Director, the Outgoing Board shall

break the tie by a majority vote. The results of the election shall be announced at the meeting at which the vote was taken

When electing Directors, the voters (Members) credentials need to be validated and the election itself needs to be conducted in "a private and confidential manner". Thus, it seems likely that a ballot box is used to collect the votes, and the tallying of the ballots may take hours. Unlike meetings where quorum needs to be maintained during the meeting for making decisions, a ballot box election has no such quorum requirements. For example, if people are waiting in line or they come and go to drop the election ballots in the ballot box. There is no quorum requirement in that at least 10% of the Members (about 40 Members) must stay continuously around the ballot box while the ballots are received or tallied. ***Right?

Interpretation: Right, per election procedures that need to be developed.

Thus, it is possible to have a Members meeting that spans several hours where members come and go and drop off their election ballots, e.g., at certain moments it might be possible that there are only election monitoring staff while they wait for additional Members to arrive and deliver their ballots. ***Right?

Interpretation: Right, per election procedures that need to be developed.

Thus, it is possible to have an election that spans, say, two days where Members arrive at "election hours" (to be specified) to vote for their candidates. ***Right?

Interpretation: Right, per election procedures that need to be developed.

Regarding article 3, section 4:

(e) Monitoring of Election. The Board shall be responsible for conducting a confidential election and to ensure fairness for all parties. Members shall be entitled to witness the counting of ballots. The Board shall establish detailed election procedures at least two (2) months prior to an annual election. The election procedures shall remain in place unless superseded by subsequent election procedures. The election procedures shall detail submission requirements, kinds of proof of identity, absentee ballot procedures, election monitoring plan, and any other items deemed necessary.

The sentence "The Board shall establish detailed election procedures at least two (2) months prior to an annual election" indicates that the 2-month period of determining election procedures applies only to annual elections. ***Right?

Interpretation: Right, while there is an argument to be made on the contrary, my interpretation (and best guess as to a court's interpretation) is that election procedures do not need to be developed 2 months prior to a special election.

The sentence "The election procedures shall remain in place unless superseded by subsequent election procedures" indicates that existing election procedures can be used for non-annual elections. ***Right?

Interpretation: Right.

For non-annual elections, there is no timing requirement for determining the election procedures. ***Right?

Interpretation: Where by-laws are silent to a certain issue, courts will often interpret the by-laws as having a "reasonableness" requirement. My view is that a court interpreting this section would require that the election procedures be developed within a "reasonable time" prior to the special election. I would say a reasonable time is no less than 10 days-2 weeks of the date of the election.

The sentence "The election procedures shall detail submission requirements, kinds of proof of identity, absentee ballot procedures, election monitoring plan, and any other items deemed necessary" identifies the main components of election procedures. ***Right?

Interpretation: Right.

The By-Laws makes no requirement for a "Candidates' Night". ***Right?

Interpretation: Right.

If a Candidates' Night were held, the By-Laws would provide no constraints on the timing and format of the event. ***Right?

Interpretation: Again, where by-laws are silent to a certain issue, courts will often interpret the by-laws as having a "reasonableness" requirement. My view is that a court would require that a "candidates night" be held within a reasonable time of the election. My view of reasonableness in this context is that the "candidates night" should not be held prior to the closing of the nomination for candidates time nor less than 5 days prior to the election.

Given that the Candidates' Night is not required or mentioned in the By-Laws, it is possible and permitted to have a Candidates' Night of *anticipated* candidates *prior* to the close of the 14-day period for nomination of candidates (article 3, section 4). ***Right?

Interpretation: Theoretically possible but see answer directly above.

In paragraph (d) "... pursuant to procedures established by the Secretary or its designee", it is possible that the Members at a Members Meeting direct the Secretary or its designee with respect to specific election procedures. ***Right?

Interpretation: I would agree that if the members vote to approve specific election procedures, those should govern the election. In the absence of such a vote, the secretary of the board or his/her designee would be responsible for promulgating election procedures that would govern.

For absentee ballots, it is possible and permitted to distribute serialized ballots two weeks prior to the election, but to notify the absentee balloters of the actual list candidates 5 days prior to the election (e.g., notification via web, E-mail, or fax). ***Right?

Interpretation: There is no applicable provision of the by-laws addressing this question and thus a court will interpret the by-laws as having a "reasonableness" requirement. My view is that a court interpreting this section would hold that the proposed schedule is

permissible and reasonable, though notification of the actual candidates should be by E-mail, postal mail or hand delivery to apartments, as provided by Article II, Section 5.

It is possible and permitted to receive absentee ballots via web, E-mail, or fax as long as the authenticity of the ballots can be maintained and in accordance with any other provisions of the By-Laws and the election procedures. ***Right?

Interpretation: My best interpretation is that a court would require all correspondence regarding the elections be done in accordance with Article II, Section 5, and thus notification should be done by E-mail, postal mail or hand delivery to apartments.

Thus, the following are possible and permitted by the By-Laws:

- (1) A Members meeting on September 8

Interpretation: Right.

- (2) At that Members meeting, to approve expanding the board to 9 members

Interpretation: Right.

- (3) At that Members meeting to define election procedures, i.e., to direct the Secretary on election procedures

Interpretation: Right.

- (4) At that Members meeting to call for elections with the following timetable:
 - (a) A 14-day period of September 8 to September 22 for receiving nominations.

Interpretation: Right.

- (b) On September 24, announcing the candidates.

Interpretation: Right.

- (c) On September 29-30, have election open between noon and 9PM.

Interpretation: Right.

- (d) On the evening of September 30, to count the tally of ballots and absentee ballots.

Interpretation: Right.

- (5) Absentee ballots may be requested up through September 22.

Interpretation: Right.

- (6) Absentee balloters will receive notification of the candidates on September 24-27.

Interpretation: Right.

(7) Absentee ballots are to be received no later than noon September 30.

Interpretation: Right.

(8) One or more Candidates' Nights can occur at any time.

Interpretation: My view is that a court would require that a "candidates night" be held within a reasonable time of the election. My view of reasonableness in this context is that the "candidates night" should not be held prior to the closing of the nomination for candidates time nor less than 7 days prior to the election.