Motions, Seconds and Voting

Motion. Motions are proposals for action by the board and can only be made by directors. Motions have a variety of objectives, and each motion has characteristics that make it unique. Directors, **including the president**, may make a motion by saying, "I move...", and then stating the motion. Motions should always **be specific**.

Second. Most motions require a second. A second does not mean the seconder agrees with the motion, but that he/she believes the motion is worthy of consideration. A director can make a second simply by saying "Second" after a motion is made, without having to obtain the floor.

Discussion. The motion is discussed by members of the board, after which the motion is put to a vote. Homeowners in the audience do not have a right to participate in the discussion. However, the board can, if it chooses, invite comment from owners.

Vote. A voice vote is the most common type of voting. The chair of the meeting (usually the president) will ask those in favor of a question to say "aye" and those opposed to say "nay." Or, the chair may ask for a show of hands. He/she then announces the result of the vote (for more, see **silent acquiescence**).

Informal Procedures. Boards can allow motions without a second and hold informal discussions while no motion is pending. (**Robert's Rules**, 11th ed., pp. 487-488.) Unless an association's governing documents require otherwise, the chair of the meeting can decide how to conduct the meeting since there is **no requirement** in the Davis-Stirling Act that any particular form of parliamentary procedure be followed in board meetings. In the event boards choose to follow Robert's Rules, see **summary of motions** prepared by parliamentarian Jim Slaughter.

Recording Motions in Minutes. There is no requirement the name of the person making the motion and the one seconding the motion be recorded in the minutes. While some associations do, many associations simply state that a motion was made and seconded. Both practices are acceptable. Even though boards of directors are not required to use parliamentary procedures for their meetings, Robert's Rules of Order serve as a useful guideline for taking minutes.

Roll Call Votes. Since boards are not required to follow any particular rules of parliamentary procedure, many simply record that a motion passed or failed. If directors want to be on record that they voted for or against a particular motion, they must speak up at the time the vote is taken and ask that their vote be recorded by name. This is called a "roll call" vote. (**Robert's Rules**, 11th ed., p. 420.) Following is an example of a motion recorded in the minutes: *Motion by John Smith seconded by Mark Jones to approve a painting contract with ABC Paint Company to paint the exterior of the clubhouse for $10,000 using specifications prepared by Dunn-Edwards Paints. Payment to be made from the Association's reserve account. Motion passed 4-1 with Jane Dough voting no.*

Robert's Rules of Order were written by General Henry Robert and first published in 1876. He prepared rules of conduct for meetings to establish an orderly manner for everyone to be heard and make decisions. Robert's Rules have been widely adopted by private organizations throughout the world and seem to be the procedure of choice for homeowner association meetings.

Board & Committee Meetings. There is no requirement that board and committee meetings be conducted under *Robert's Rules* or any other system of parliamentary procedure. Strict adherence to *Robert's Rules* in board meetings can be unwieldy. Boards are free to use more flexible procedures, unless the association's governing documents require otherwise.

As provided for in *Robert's Rules*, board meetings where there are not more than a dozen directors present, "some of the formality that is necessary in a large assembly would hinder business." Accordingly:

-Directors are not required to obtain the floor before making motions or speaking.
-Motions need not be seconded.
-There is no limit to the number of times a director can speak to a question, and motions to close or limit debate generally should not be entertained.
-Informal discussion of a subject is permitted while no motion is pending.
-Sometimes, when a proposal is perfectly clear to all present, a vote can be taken without a motion's having been introduced.
-The chair need not rise while putting questions to vote.
-The chair can speak in discussion without rising or leaving the chair; and, subject to rule or custom within the particular board he usually can make motions and usually vote on all questions.
Accordingly, most boards loosely follow *Robert's Rules* when conducting their meetings and do not use a parliamentarian.

Approval by the Board. Once a **quorum** has been established, all actions of the board must be **approved by the board** and recorded in the **minutes**. The **president** should vote on all matters, provided there are no **conflicts of interest** requiring the president to **recuse** himself. When the president votes, he/she votes as a **director not an officer**. Votes by the board need not be **roll-call votes**. To vote, directors must be present at board meetings and **executive sessions** either in person or by **electronically**, not by **proxy**.

Duty to Vote. Unless there is good reason not to vote, all directors should vote on all motions.
*Although it is the duty of every member who has an opinion on a question to express it by his vote, he can abstain, since he cannot be compelled to vote. (**Robert's Rules**, 11th ed., p 407.)*
The duty to vote is present if the member is present. (Dry Creek Valley Assn., Inc. v. Bd. of Supervisors (1997) 67 Cal.App.3d 839, 844.)
Silent Acquiescence. It is common practice that when someone is silent when a vote is taken, their vote is counted with the majority. For example, if a voice vote is called for in a

board meeting and some directors say “aye” and other are silent; the president then asks if there are any “nays” and no one responds. The president then announces the vote to be unanimous and again no one objects. Under those circumstances, the vote is properly deemed as unanimous in favor of the motion.

This interpretation of silent acquiescence is supported by California's Attorney General (**Opinion No. 10-901, December 208, 2011**).

> [Silence] “acts as an acquiescence in the action taken by the majority of voting members, whether the majority was affirmative or negative.” (p. 10, para. 1.)
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> ...the abstaining member [through silence] may accurately be said to have “acquiesced in” or “consented to” any resolution reached by the body, as long as the number of members voting was at least a majority of the quorum. (p. 13, para. 2.)
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> We likewise disapprove any suggestion that a body may validly take action without the support of concurring votes from at least a majority of that body’s quorum. (AG Opinion, p. 14, para. 1.)

Abstentions. If someone states, “I abstain,” their vote cannot be counted as a “yes” vote or a “no” vote. It is a non-vote. 'To 'abstain' means not to vote at all." (**Robert's Rules**, 11th ed., p 45.) A director might abstain because he believes there was insufficient information for him to make a decision. An abstention may, however, have the practical effect of a "no" vote since a motion may fail for lack of sufficient "yes" votes. For example:

1. If five directors are present (out of five) and there is a motion to close the pool each day at 8:00 p.m. (from the current 10:00 p.m.) and two directors vote "yes," two directors vote "no," and one abstains, the motion fails. The vote needed a majority of three "yes" votes to pass and it received only two. ["...an act or decision done or made by a majority of the directors present at a meeting duly held at which a quorum is present is the act of the board." (**Corp. Code §7211(a)(8)**.) Since a five directors were present, a majority is three was needed to pass the resolution.]

2. Similarly, if a 5-member board were to vote on a motion where two directors vote “yes” and three vote “I abstain,” the vote fails. [As noted by the Attorney General in their example: "The votes of the three abstaining members cannot be considered as votes in favor of the motion..." (p. 11, fn 37.]

Distribution/Availability of Meeting Minutes

Within 30 Days. The minutes, minutes proposed for adoption that are marked to indicate draft status, or a summary of the minutes of any meeting of the board of directors of an association, other than an executive session, must be made available to members within 30 calendar days of the meeting. (**Civ. Code §4950**.)

Corrections. Once a draft has been prepared, the Secretary /Recording Secretary can distribute the minutes to the board for review and feedback on any corrections that need to be made. This does not violate the Open Meeting Act because it's not an email discussion. Instead, it is feedback from individual directors to the secretary on corrections and revisions. The draft minutes then go into the board packet for the next meeting for board discussion and approval.

Distribute Upon Request. The minutes, proposed minutes, or summary minutes must be distributed to any member of the association upon request. Associations may charge for **copying costs**. Failure to provide minutes can result in penalties against the association. (**Civ. Code §5235**.)

Unauthorized Publication. Without board authorization, management companies do not have a "right" to publish draft minutes. As managing agents, they take their direction from the board. If the board instructs them, for whatever reason, to hold on the publication of draft minutes, the management company does not have a right to ignore the board's direction. The board must make minutes available in draft form for review by the membership within 30 days of the meeting. If there is concern about publishing draft minutes that may contain errors, boards should have the minutes sent to them for review and feedback to the minute-taker for corrections before they are posted.

DRAFT Minutes. As noted above, there is no requirement that draft minutes be posted. There is, however, a requirement that they be distributed to members who request it. If and when draft minutes are posted or distributed, they should have a large "**DRAFT**" stamp on the page or marked "**DRAFT only--not approved by the Board**" or something similar to indicate the minutes have not yet been approved by the board and may contain errors.

Publish Approved Minutes. Once draft minutes have been approved by the board, they should be distributed to the membership in some fashion--either by summarizing them for the newsletter, posting them on a common area bulletin board, posting them in a password protected place on the association's **website**, and/or mailing them to the membership. Approved minutes must be **permanently available** for inspection by the membership.

How Long to Keep Documents on File

Following is a general guideline for how long records should be kept. The guideline does not cover all records or situations. Boards should work with legal counsel and a CPA to establish their own records retention policy.

A. Permanent

1. Governing Documents
    - CC&Rs
    - Bylaws
    - Articles of Incorporation
    - Condominium Plan
    - Parcel Map
2. Minutes
    - board and membership meetings. (**Civ. Code §5210(a)**.)
    - **committees** with decision-making authority.
3. Deeds to Property Owned by the Association
4. Architectural Plans for the common areas.

B. Seven Years. To ensure that all statutes of limitations have passed, the following records should be kept for seven years before disposing of them.

1. Financial Records
    - budgets
    - general ledgers, journals and charts of account
    - year-end financial statements
    - accounts payable
    - accounts receivable ledgers, trial balances and billing records
    - canceled checks and bank statements
    - expense analysis and expense distribution schedules
    - invoices from vendors
    - deposit slips
    - reconciliations
    - petty cash vouchers
    - purchase orders
2. Expired Contracts
3. Personnel Records (payroll records and employee records after termination)
4. Insurance Records
    - accident reports
    - settled claims
    - expired policies
    - fidelity bonds
    - certificates of insurance
5. General Correspondence
6. Closed Litigation Files

7. Newsletters
8. Expired Warranties
9. Tax Returns
10. Owner architectural submittals.

C. One Year. Ballots must be stored by associations in a secure place for no less than one year after the date of the election. (**Civ. Code §5125**.)

D. Secure Destruction. Whenever an association disposes of records, it must ensure that the records are completely destroyed, preferably by shredding or incineration. Simply throwing them into the trash can result in potential liability if confidential records end up in the wrong hands.

E. Litigation Hold. Records should not be destroyed if the association has notice of or reasonably believes it will be involved in a lawsuit. Based on various California cases, the destruction of records could result in sanctions as summarized below:
Unless justified by the responsible party, the intentional or negligent destruction, concealment, alteration or failure to preserve documents, data, information, or other evidence, reasonably known, at the time when it is eliminated, to be relevant to the issues or subject matter of reasonably knowable, pending or probable litigation, shall be subject to appropriate sanctions imposed in the pending action against a party if and to the extent such elimination of potential evidence is a reasonably certain cause of the substantial impairment of or significant prejudice to the ability to prove or disprove an element of the cause of action or defense.

Intentional, grossly negligent or other culpable conduct , done for the purpose of destroying or preventing the use of evidence or without reasonable concern for preserving evidence, and proximately causing the destruction or unavailability of relevant evidence in known pending or reasonably imminent litigation, may result in exemplary or punitive sanctions in order to adequately compensate the victim of such conduct or to deter future culpable conduct.

Ownership of Meeting Documents/Minutes

Although members have the right to **inspect and copy** minutes, they don't own the minutes nor do they have the right to remove them from the association's office. Following is the experience of one association.

Theft. An owner entered the management office to inspect minutes. When the receptionist left the room to make arrangements, the owner grabbed a binder of original, signed minutes and fled the building. The manager pursued the owner into the parking lot, calling his name. She caught up with him as he opened his car door. She demanded that he return the association's property; otherwise, she would call the police. The owner threw the binder into his car and then turned on the manager and began screaming at her. He came within inches of her face, raised his hands and put his finger in her face. Fearful of being struck, the manager backed away. At that point, the owner jumped into his car and sped away.

Arrest. The Sheriff's Department was notified. After investigating the incident, a Sheriff's deputy arrested the owner and recovered the minutes. The District Attorney filed a criminal action against the owner but later dismissed the case.

Lawsuit. The owner sued the association, the manager, the deputy who arrested him, the District Attorney, and the County. He claimed that as a member of the association he could not be guilty of "stealing his own property."

Ruling. The court ruled in favor of the association and ordered the owner to pay the association's attorneys' fees and costs. The court wrote that "while Plaintiff as an association member may have access to the minutes, he does not have the unfettered right to walk into [the] Association's office and take possession of the binder containing the meeting minutes without permission."

COMMENTS. The Davis-Stirling Act defines records as the "association's" records, not the members' records. (**Civ. Code §5200**.) Members may inspect the association's records but with **limitations**. Moreover, because the records belong to the association, owners cannot use or sell the association's records for commercial purposes, or for any other purpose not reasonably related to a member's interest as a member. (**Civ Code §5230**.) The restriction on removal of records from the management office **applies to directors** as well as homeowners.

QUESTION: My association used to post meeting minutes on our website. They stopped posting them and now require us to pick up copies at the office. Is there a reason why our minutes can't be posted on our website? We have over 700 members.

ANSWER: There is nothing in the law requiring boards to post minutes. Instead, the statute requires that associations provide members with both draft and finalized open meeting minutes upon request. (**Civ. Code §4950**.) Even so, if associations have their own websites, they should post their minutes (except for executive sessions). This keeps the membership informed without any expense to the association or the members.

Recommendation. Minutes should be posted on bulletin boards and in a password protected area of an association's website. If the association does not have a website, boards should consider distributing minutes or minute summaries in the association's newsletter or including them in monthly billing statements.