

Amend Your Governing Documents and Make Other Major Association Decisions by Membership Consent Without a Formal Vote or Meeting

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As community associations mature, the need to update their governing documents or for major repairs or replacements of the common elements or common property increases. More specifically, statutes authorizing tort immunity for associations, the collection of capital contributions and membership fees, or the imposition of fines cannot be implemented by an association without authorization in the association's governing documents. Moreover, the major repairs or capital improvements by an association and/or their funding normally requires the approval of at least a simple majority of the association membership.

Over the years, it has been a common lament of community association boards that it will be extremely difficult, if not impossible to obtain the required vote for the amendment of their by-laws or the approval of other major questions. Sometimes, concern is also expressed about the inability to satisfy quorum requirements, especially where the members of mature associations have become apathetic. Because of these perceived impediments, membership referendums on important issues often never take place.

On the other hand, knowledgeable boards with political savvy are able to obtain the required membership approvals through the utilization of the "consent in lieu of meeting" provisions of the New Jersey Non-Profit Corporation Act (N.J.S.A. 15A:5-6b) or in the case of cooperative corporations, the comparable provision of the New Jersey Business Corporation Act (N.J.S.A. 14A:5-6). More particularly, N.J.S.A. 15A:5-6 provides in pertinent part: "Except as otherwise provided in the certificate of incorporation or bylaws...any action required or permitted to be taken at a meeting of the members by this act, the certificate of incorporation or by-laws, other than the annual or bi-annual election of trustees, may be

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taken without a meeting upon the written consent of members who would have been entitled to cast the minimum number of votes which would be necessary to authorize the action at a meeting which all members entitled to vote thereon were present and voting, if (i) the corporation provides to all other members advance notification setting forth the proposed action consented to, (ii) the proposed action is not consummated before the expiration of ten (10) days of the giving of the notice..., and (iii) the notice sets forth the existence of such ten (10) day period.” [Emphasis added.]

Moreover, in addition to obviating the need for a membership meeting, this statute provides the following practical advantages:

- Membership approval can be obtained by petition and/or another form of written consent. No formal ballot is necessary.
- The absence of a statutory requirement that there be a vote enables an association to obtain the required consents over an extended period rather than at a given date when a membership meeting is scheduled.
- There is no opportunity to cast a negative vote on a consent form or petition, as would be the case with conventional formal ballots.
- There can be an ongoing tabulation as to the number and identify of members who have approved the particular matter. This enables management and/or the board to continue to solicit consents from those members who have not consented until the required majority is obtained.

After the required consent threshold is met, the statute requires a notice to be sent to all non-consenting members advising them that the matter has been approved by consent and that the proposed action will not be consummated or become effective before the expiration of ten (10) days after the notice is given. No further action by the Board or the membership is necessary.

Although Association managers and Board members should consult with counsel before implementing the consent procedure described above, this approach should be considered as a more effective and practical alternative to conventional meeting and balloting procedures for the approval of major association questions or amendments of governing documents. Be aware, however, that this practice does not apply to Board elections.

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