Originally published in

New York Law Journal

Are Apartment Owner Voting Records Confidential, and Should They Be?

Cooperatives and Condominiums columnist Eva Talel addresses the law governing disclosure of owner voting records, and discusses actions which boards and managers can take regarding whether to protect voting records from disclosure.

By Eva Talel | January 03, 2018

At each year's annual meeting, co-op and condominium apartment owners cast their votes, in person or by proxy, to elect the members of the entity's board. Owners may also vote, at such annual meeting or a special meeting, on other significant matters—such as amending the co-op's proprietary lease or the condominium's bylaws, adoption of a flip tax, imposition of special assessments, obtaining mortgage financing, or changing apartment repair responsibilities (where owner approval is required).

The outcome of such voting is generally reported to boards and all owners, numerically—how many votes were cast, who was elected to the board, and whether sufficient votes were cast in favor of amending the entity's governing documents. However, the identity of owners who voted in favor of (or against) board candidates and proposed amendments is not disclosed. However, such disclosure may be available to board members and even other owners. This may be problematic when there are contested board elections or controversial proposals being

voted on, because owners may be concerned that retaliatory measures could be taken (or badgering and intimidation) by those elected against those who did not vote for them or for the proposals they endorsed.

This column addresses the law governing disclosure of owner voting records, and discusses actions which boards and managers can take regarding whether to protect voting records from disclosure.

Confidentiality of Owner Voting Records in New York

Americans are accustomed to expecting the absolute confidentiality of their votes when cast in government elections or on municipal propositions.

Therefore, New York apartment owners may reasonably expect that the same level of confidentiality will be accorded their votes for board members and on matters impacting the co-op or condominium as to which the affirmative vote, approval or consent of owners is required.

It may therefore come as a surprise to such owners, their boards, and managers that such confidentiality is generally not provided for by either statute or a co-op or condominium's governing documents.

Co-ops in New York are generally incorporated under and governed by the New York Business Corporation Law (McKinney) (BCL). Article 6 of the BCL governs shareholder/co-op voting; nothing therein states that ballots, proxies or other records of shareholder voting must be accorded confidentiality. N.Y. Bus. Corp. Law. Article 6 (McKinney).

Further, while BCL §624 [see note 1] entitles a shareholder to examine the minutes of shareholder meetings (which do not disclose how individual shareholders voted regarding director elections or other matters before the meeting for consideration) and records of shareholder ownership and contact information, voting record disclosure is neither prohibited or mandated.

With regard to preserving voting record confidentiality from scrutiny by board members, the BCL is silent. BCL §717 generally details the duties of directors and officers, requiring that the same be performed "in good faith." Arguably, allowing board members to access or disclose shareholder voting records could violate the BCL's "good faith" requirement, however our research has disclosed no New York cases which so hold.

To the contrary, in *Schapira v. Grunberg*, 30 A.D.3d 345 (1st Dept. 2006), co-op shareholders aggrieved by the outcome of a board election petitioned the court for various relief. Certain elected defendant directors counter-claimed, seeking an order allowing them to inspect the election records identifying which shareholders voted for whom. The Appellate Division, First Department (having first denied the petition) granted the counterclaim which sought to inspect election records, holding that such records "constitute corporate records, and as such are subject, under the bylaws, to inspection by the directors of the Board." 30 A.D.3d at 346; see also *Matter of Lau v. DSI Enters*., 102 A.D.2d 794 (1st Dept. 1984). The court so ordered notwithstanding the undisputed fact that the co-op's counsel "announced at the election that the voting would proceed by secret ballot [because a secret ballot] is not provided for in the bylaws." Id. at 346.

Accordingly, in the absence of a successful petition to challenge the outcome of an election under BCL §619 and court-ordered discovery of shareholder voting records in connection therewith, the BCL does not protect the confidentiality of election records. N.Y. Bus. Corp. Law §619 (McKinney).

Similarly, the New York Condominium Act (the Act) (N.Y. Real Prop. Law §339-d et seq. (McKinney)) does not contain any express provision protecting the confidentiality of voting records. However, the Act does provide that the operation of the entity shall be governed by its bylaws, which must be annexed to the recorded declaration which establishes the condominium as a legal entity. The Act at §339-u.

The Act states what the bylaws must include, but does not include a requirement for the maintenance or confidentiality of such voting records by board members. However, the Act also allows the bylaws to include other provisions not inconsistent with the Act's mandatory bylaw provisions. The Act at §339-v. Thus, while the Act itself does not require board members to act in "good faith," condominium bylaws generally provide that board members must act in "good faith."

Nonetheless, regarding board confidentiality of voter records, there is no reason to believe that the outcome of any dispute regarding the same would be different from the First Department's holding in *Schapira* (30 A.D.3d at 346)—unless the entity's bylaws provide otherwise, such records are considered to be "corporate records" and therefore subject to board member inspection.

Further, while the Act affords unit owners with rights to obtain a great deal of information from the condominium entity, these do not include the right to examine owner voting records. The Act at §339-w; but see also *Pomerance v. McGrath*, 143 A.D.3d 443 (1st Dept. 2016).

While neither the BCL nor the Act provide for voting record confidentiality, neither do they prohibit it. Therefore, co-ops and condominiums may adopt bylaws providing for such confidentiality. While standard co-op and condominium bylaws do not provide for such protection, co-op boards are increasingly adopting confidentiality (as well as conflict of interest) provisions in their bylaws. Such bylaw amendments are more difficult to adopt in condominiums, where a super-majority of unit owners is generally required to amend bylaws. Adoption of a voter record confidentiality bylaw provision may be coupled with adding a provision expanding the obligations imposed on the inspectors of election, whose obligations are currently limited to the minimal ones imposed on them by BCL §610—i.e., that such inspector discharge his/her duties "with impartiality and according to the best of his ability." N.Y. Bus. Corp. Law §610 (McKinney).

However, complicating the enforcement of such a confidentiality provision as to boards member access to voting records, is that owner votes are frequently cast by proxy, and the proxy holders are generally directors or the building's managing agent. Thus, in order to carry out the voting directions given to them by owners via proxy, such proxy holders must of necessity know how individual owners vote. Further, standard bylaws frequently provide that voting shall be viva voce (which clearly affords no confidentiality) except if a ballot vote is demanded by owners. However, such ballot must state the owners name, so ballot voting is similarly not confidential.

Confidentiality of Voting Records in Other States

In Florida, election records—"ballots, sign-in sheets, voting proxies and all other papers relating to voting by unit owners"—are part of the "official records" of a co-op and must be maintained for one year and made available to unit owners for inspection and copying. Fla. Stat. Ann. §719, 104 (West). In California, elections in homeowners associations (which are similar to condominiums) are confidential, subject to state constitutional privacy rights based on the reasonable expectations of the association's members. Cal. Civ. Code §5116 (West); see also *Channtiles v. Lake Forest II,* 37 Cal. App. 4th 914 (1995).

Accordingly, the governing law in two of the largest states in the United States, other than New York, offers no consistent treatment of co-op/condominium owner voter confidentiality.

Governance Concerns and Board Actions

The benefits of unqualified confidentiality of voter records are not clear. While owner fears of retaliation are not necessarily unreasonable, certain building concerns may warrant disclosure. For example, where a board has determined that adoption of a transfer tax or other proprietary lease or bylaw amendments are in the best interest of the entity and an owner vote falls short of such adoption, it may be valuable for the board to know who voted against or abstained from voting on the proposal. The board may then wish to contact such persons, and thus gain an understanding as to why they did so, and thus possibly clarify any misunderstanding as to the impact of the provision, and whether the proposal can be revised or presented differently so as to enhance the likelihood of adoption. On the other hand, owners should not be exposed to concerns regarding the integrity of the entity's voting processes and the potential for retaliatory actions regarding their votes in board elections.

Boards and managers should weigh all of these legitimate concerns and if they determine to adopt a bylaw amendment adopting some form of voting record confidentiality, this can generally be accomplished by board action (except in most condominiums and some co-ops, where owner action is required to amend bylaws), enlarging the duties of directors to require that confidentiality be maintained by them. And the oath taken by inspectors of election can be enlarged to include a confidentiality requirement.

Endnotes:

[1] N.Y. Bus. Corp. Law §624 (McKinney). Section 624 requires that a shareholder request to inspect statutorily permitted records must be made in good faith and for a valid corporate purpose and may be denied unless the shareholder furnishes an affidavit attesting that the inspection is "not desired for a purpose which is in the interest of a business or object other than the business of the [co-op]."

Eva Talel is a partner at Stroock & Stroock & Lavan LLP and an adjunct professor at New York Law School. Margaret Jones, legal research analyst at Stroock, assisted in the preparation of this column. The firm is counsel to the Real Estate Board of New York.

Reprinted with permission from the January 3, 2018 edition of the NEW YORK LAW JOURNAL © 2018 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its

clients, or ALM Media Properties, LLC, or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.