

Is It Fair?

You may not think you need an inspector of elections but if things get contentious, guess again.

BY GEOFFREY MAZEL

FIVE VOTES SEEMED to separate the winning candidate from the losing one. The loser demanded a recount – which you dutifully did, as president of the board – but the losing candidate was still not satisfied. He sued the co-op, saying the election had been improperly conducted. Although you thought you had followed required procedures, you made two mistakes that ultimately hurt you in court: as president, with a vested interest in the outcome, you personally counted the votes. And secondly, you didn't hire/appoint an inspector of elections.

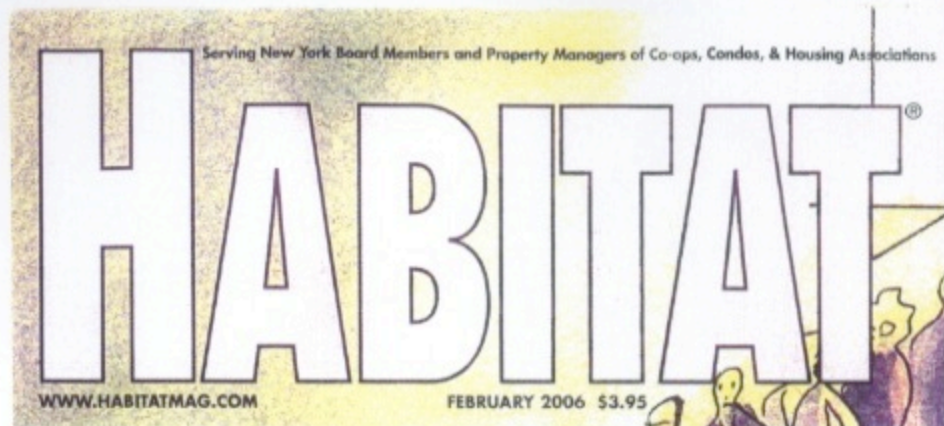
As a board member, you are a fiduciary, often responsible for million-dollar budgets. Every decision you make is subject to shareholder scrutiny and second-guessing. There is, however, one decision that should be beyond reproach – the appointment of inspector of elections for your annual meeting. The inspector of corporate elections in New York State is designed to give your cooperative an impartial person presiding over the counting of the proxies and ballot at the annual meeting. A question often asked is whether the co-op or condo should go to the expense of hiring an inspector. The answer lies in the property's bylaws and the Business Corporation Law.

The annual meeting is a gathering of shareholders or unit-owners prescribed in the bylaws and required by law. (In fact, if a board fails to call an annual meeting in the time required in the bylaws, the shareholders may call one within 30 days of the prescribed date.)

This meeting holds great importance in the governance of a corporation since it is here that the board is elected; therefore, it should be handled professionally and in strict compliance with the organizational documents of the corporation and all applicable laws, rules, and regulations.

The appointment of inspector of elections is a major component in this process. If you check your bylaws, sometimes the appointment of inspectors is only required if requested. Despite these provisions, however, Section 610 of the Business Corporation Law states that the board shall appoint one or more inspectors for meetings of shareholders. This provision goes on to state that if the board does not appoint one, the person presiding at the meeting (usually the president) shall do so.

The job of inspector is so important to the process that each inspector is required by law to sign an oath to faithfully execute his/her duties with strict



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impartiality and according to the best of his/her ability. The inspector should never be someone running for the board or anyone with a vested interest in the outcome of the voting. It should be someone who is impartial and able to competently carry out the duties.

If an election is hotly contested, it is prudent for the board to appoint more than one inspector in order to placate all factions. In addition, if a shareholder has special qualifications – *i.e.*, an attorney, accountant, priest, or rabbi – it certainly is prudent to appoint such a person as an inspector. By appointing wisely, you have a greater likelihood of defeating any possible legal challenges at a later date.

What are the required duties? They are limited by the Business Corporation Law, Section 611, and include: (1) determining the number of shares; (2) determining the existence of a quorum; (3) receiving the votes; and (4) counting and tabulating the votes. If the person presiding at the meeting requests it, the inspector shall make a report in writing of any challenges. This report can be used as evidence in court if needed.

What are the limits on the inspector? The job description is to ascertain who are the shareholders and to count their votes, but they may not go behind the list of shareholders produced at the meeting and adjudicate disputes among shareholders that are not directly connected with the election. For example, if someone submits a ballot and the inspector is aware that this unit is being illegally subtlet, the inspector must still count the vote. In addition, if an inspector suspects that certain proxies were obtained by fraud or pressure, or are forgeries, they still must count them. The discretionary powers of election inspectors cover dealing with irregularities that appear on the face of the proxy (*i.e.*, the names are wrong). Beyond that, they have no powers.

Clearly, the inspector provides a valuable role in the election of the board. The failure of a corporation to appoint an inspector runs great risks if an election is challenged by disgruntled shareholders. Courts recognize the role of the inspectors and give them great deference if they have acted properly. Pick the inspectors with great consideration. It pays. **H**