



Confidential Memorandum

DATE: February 6, 2020
TO: Kathleen Trainor - Downtown Barrie BIA
FROM: Jacklyn Tuckey & Jim McIntosh (Barriston LLP)
RE: ADVICE RE: BOARD ELECTION PROCESS COMPLAINT
OUR FILE: 94632

BACKGROUND

The Downtown Barrie BIA recently conducted an election as required pursuant to its Constitution and as authorized in accordance with the Municipal Act, 2001 to elect a new Board of Directors. A complaint has been received from a Downtown BIA member questioning the results of the election based on concerns raised regarding the casting of approximately 180 proxy votes by individuals who had been seeking election to the Board. The proxy votes cast were, with few exceptions, accepted as valid proxies at the time of the election. The proxies cast by the individuals in question were cast on behalf of corporate members as well as individual members entitled to vote in their personal capacity. The voting package that had been sent out to all members included a proxy voting form to be completed but did not contain any specific procedural guidance regarding the use and verification of the proxy or limitations on the use of the proxy.

QUESTION

1. Does legislation permit proxy voting in the election of a Business Improvement Area (BIA) board?
2. What would be the appropriate process and regulations associated with proxy voting?
3. What remedies are available to contest the election?

ANSWER

It is our opinion that nominee voting on behalf of a corporation is permissible without the enactment of a by-law allowing for same, and that such nominees are entitled to represent multiple corporations. It is our opinion that proxy voting on behalf of individuals requires the enactment of a by-law permitting same by the Board

and approved by the members. It may be argued that Ministry of Municipal Affairs election guidelines provide for proxy voting without the enactment of a by-law, however, this is likely a weak argument when held up against statutory provisions.

Even if proxy voting on behalf of individual Downtown Barrie BIA members was found to be permissible, it is clear that, in the case of individual members entitled to vote, a proxy may represent only one individual and may not represent multiple individuals. An exception to this restriction is set out in the *Voters' Guide for Ontario Municipal and School Board By-elections 2016-18* which provides that a proxy may be appointed for more than one person if the proxy is representing their own family members. The Guide also requires that the proxy must have properly completed the proxy form and that it be declared before and certified by a municipal clerk. In the case of the Downtown Barrie BIA election, it would be the Chief Election Official who would receive the form, accept the declaration of the proxy and certify its validity.

Unfortunately, it appears from the background information provided that the limitations placed on individual proxy votes were not clearly set out in the voting packages distributed among the members and that numerous proxy votes were cast on behalf of individual members all represented by the same proxy. This could form the basis for a challenge to the election results for the recent election of the Downtown Barrie BIA Board as a controverted election. Moreover, it is to be noted that the Downtown Barrie BIA Constitution does not contemplate the appointment of proxies by individual voting members. In view of this, the complainant would likely succeed if a challenge to the election results is pursued.

It is recommended that the BIA board and Council act proactively by disposing of the results of the previously-held election and calling a new election, with proper procedure formally outlined in a by-law if proxy voting on behalf of individuals is to be permitted, and to clarify proxy voting procedure for proxies voting on behalf of corporate members.

ANALYSIS

The rules concerning voting procedures for a BIA board are usually determined at general meetings and board meetings, and set out in a subsequent by-law. A traditional requirement allows for a corporate member of a BIA to nominate in writing one individual to vote on behalf of the corporation.¹ This is similar to the Downtown

¹ Ontario. "Managing and operating a BIA." <https://www.ontario.ca/document/business-improvement-area-handbook/managing-and-operating-bia>.

Barrie BIA Constitution provision for corporate nominees to attend Annual or General Meetings. The practice in Toronto is to not allow voting by proxy at BIA meetings.²

Municipal Act

Designated improvement areas are governed by the *Municipal Act*, S.O. 2001, c. 25, particularly s.204, which states under subsection (2.1) that “[a] board of management is a local board of the municipality for all purposes.”³ Subsections (7) and (8) provide for the corporate appointment of nominees as follows:

(7) A corporate member of an improvement area may nominate in writing one individual to vote on behalf of the corporation.

(8) Subject to subsection (6), one individual may be nominated for voting purposes by two or more corporations that are members of an improvement area.

If the voting that occurred by “proxy” for the Downtown Barrie BIA board was in fact corporate voting by a nominee, it would be considered a permissible method of voting pursuant to the statutory authority. If it was, however, true proxy voting conducted on behalf of an individual, this is not provided for in the *Municipal Act*.

Voters’ Guide for Ontario Municipal and School Board By-elections

We may turn, for consultation purposes, to the *Voters’ Guide for Ontario Municipal and School Board By-elections 2016-18*,⁴ prepared by the Ministry of Municipal Affairs and Housing. Because the *Municipal Act* identifies a BIA as a local board of the municipality, it is logical to conclude that the rules governing voting for other municipal boards would be applicable to an election for members of a BIA board. The Guide states that the information contained therein applies to any council or school board by-election held after Bill 68 received Royal Assent.

Page 6 of the Guide provides for the appointment of a voting proxy, stating that

If, for any reason, you will be unable to get to a voting place to cast your ballot, you may wish to appoint someone to go to the voting place and cast a ballot on your behalf. This person is called your voting proxy.

² Ontario, *supra* note 1.

³ *Municipal Act*, S.O. 2001, c. 25, s.204(2.1).

⁴ Ministry of Municipal Affairs and Housing (June 2017) “Voters’ Guide for Ontario Municipal and School Board By-elections 2016-2018.” <http://www.mah.gov.on.ca/AssetFactory.aspx?did=15844>.

To appoint a voting proxy, you and the person you want to appoint must fill out the Appointment for Voting Proxy Form.⁵

The process for a proxy to cast a vote is set out on page 7, as follows:

If someone has appointed you as their voting proxy you must take the completed form to the municipal clerk to get it certified. Once the form has been certified, you may cast a vote on behalf of the person who appointed you.⁶

In the Guide's provision for voting proxy, a proxy may only be appointed for more than one person if all persons for whom the proxy is acting are family members of the proxy; otherwise, the proxy may only represent one person.⁷

Municipal Elections Act

Important for consideration is the *Municipal Elections Act*, 1996, S.O. 1996, c. 32, which applies to an election to an office on a local board, if the holder of the office is required to be elected in the same manner as members of the council of a local municipality that has not passed a by-law authorizing the use of a ranked ballot election.⁸ The *Municipal Elections Act* provides that the council of a local municipality may pass by-laws authorizing electors to use an alternative voting method that does not require electors to attend at a voting place in order to vote.⁹ Subsection 42(3)(a)(ii) states that the clerk shall establish procedures and forms for the use of any alternative voting method authorized by by-law.¹⁰

Pursuant to subsection 42(5) of the *Municipal Elections Act*:

When a by-law authorizing the use of an alternative voting method is in effect, sections 43 (advance votes) and 44 (voting proxies) apply only if the by-law so specifies; if the by-law specifies that section 44 applies, it may also establish additional criteria that a person must meet to be entitled to vote by proxy.¹¹

Section 44 of the *Municipal Elections Act* provides as follows:

⁵ Ministry of Municipal Affairs and Housing, *supra* note 4, at p.6.

⁶ *Ibid*, p.7.

⁷ *Ibid*.

⁸ *Municipal Elections Act*, 1996, S.O. 1996, c. 32, s.3(1)(iii).

⁹ *Ibid*, s. 42(1)(b).

¹⁰ *Ibid*, s. 42(3)(a)(ii).

¹¹ *Ibid*, s.42(5).

44 (1) A person who is entitled to be an elector in a local municipality may appoint another person who is also so entitled as his or her voting proxy, using the prescribed form.

Restrictions

(2) A person shall not,

- (a) appoint more than one voting proxy;
- (b) act as a voting proxy for more than one other person.

Spouses, etc.

(3) The restriction in clause (2) (b) does not apply if the proxy and the other person are spouses or siblings of each other, parent and child, or grandparent and grandchild. 1996, c. 32, Sched., s. 44 (3);

Timing

(4) A person shall not appoint a voting proxy for an election until the later of,

- (a) the time for the withdrawal of nominations under section 36 has expired for all offices for which the election is being conducted; and
- (b) the time when the clerk has certified all persons qualified to be nominated under subsection 35 (2).

Same

(4.1) An appointment under subsection (4) does not remain in effect after voting day of the election.

Application for clerk's certificate

(5) A person who has been appointed a voting proxy shall,

- (a) complete an application in the prescribed form, including a statutory declaration that he or she is the person appointed as a voting proxy; and
- (b) present the application and the appointing document to the clerk at the clerk's office, or any place designated by the clerk, in person. 1996, c. 32, Sched., s. 44 (5);

Time and place

(6) The application may be presented at any time when the clerk's office or other place designated by the clerk is open; on the day of an advance vote held under section 43, the clerk's office and any other place designated by the clerk shall be open for this purpose from noon to 5 p.m.

Certificate

(7) If satisfied, after considering the application, that the person who appointed the voting proxy is entitled to do so and that the person appointed is entitled to act as the other's voting proxy, the clerk shall apply a certificate in the prescribed form to the appointing document.

Production of certified appointing document

(8) A person may vote as a voting proxy only if he or she,

(a) produces to the deputy returning officer the appointing document with the clerk's certificate; and

(b) takes the prescribed oath.

Voting in own right

(9) A person who votes as a voting proxy is also entitled to vote in his or her own right.¹²

Section 44 provides the rules and regulations for proxy voting in municipal elections, and pursuant to s.42(5) comes into effect only if a by-law specifically elects to allow proxy votes pursuant to this section. The requirements set out in s.44 are the minimum requirements, with a provision under s.42(5) for boards to impose additional requirements for proxy voting.

Downtown Barrie BIA Constitution

In s.23(12) of the Downtown Barrie BIA Constitution, the BIA has allowed for the mailing in of ballots, provided that certain conditions are met. This subsection indicates that the BIA turned its collective mind to the idea that voting members may not be present to cast votes in person, likely resulting in the perception that the exclusion of a provision for proxy voting was deliberate except in the specific case of corporate members where a nominee is properly appointed to cast a vote on behalf of the corporate member. It is the Chief Election Official who has the responsibility to verify and accept or reject the nominee appointment or proxy.

Remedies Available to Complainant

We have identified two potential resolutions to this matter. The proactive option, and our recommended course of action, would be to advise Council not to proceed with the appointment of the BIA members as elected, as the election process has been tainted. If this option is chosen, the BIA will need to hold a re-election, and if it wishes to allow voting by proxy will have to adopt a by-law outlining the specific proxy voting process and verification requirements. The BIA may impose its own verification process, but this process must be transparent and subject to scrutiny.

Alternatively, if Council appoints the BIA members as currently elected, the taxpayer complainant may file for injunctive relief under s.440 of the *Municipal Act* on the grounds that the local board has contravened its enacting by-law and/or failed to adhere to its constitution – particularly Section 21 – Appendix 1 – Municipal

¹² Municipal Elections Act, *supra* note 8, at s.44.

Act, and Section 23 – Appendix 3 – Nomination & Election Process. The test for the issuance of a statutory injunction pursuant to s.440 simply requires that the applicant be a taxpayer in Ontario, and that there has been a clear breach of the by-law. The court has residual discretion to issue or decline to issue the injunction, but in order to protect the public interest will only decline to do so if the respondent can demonstrate exceptional circumstances to justify the breach.

Conclusions

Given the above analysis, it is our opinion that nominee voting on behalf of a corporation is permissible without the enactment of a by-law allowing for same, and that such nominees are entitled to represent multiple corporations. It is our opinion that proxy voting on behalf of individuals requires the enactment of a by-law permitting same. It may be argued that Ministry of Municipal Affairs election guidelines provide for proxy voting without the enactment of a by-law, however this is likely a weak argument when held up against statutory provisions. If proxy voting were found to be permissible in the situation at hand, it is clear that each proxy for an individual may represent only one individual unless that proxy represents only family members, and that the proxy must have the completed proxy form certified by the Chief Election Official to ensure accountability, fairness and transparency.

Recommended Course of Action

It is recommended that the current BIA board (which is continued until the new Board has been properly elected and appointed) and City Council act proactively by disposing of the results of the previously-held election and calling a new election to take place following the procedure currently permitted under its Constitution, which does not allow proxy votes except in the limited case of corporate members, where a duly authorized nominee or proxy is permitted to cast a vote on behalf of the corporation.