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Cagle-Pugh, Attorneys & Counselors Review of ManageCASA as the PIPOA's eVoting System and our authority to conduct out-of-meeting elections

POA Question:

Good afternoon, Gregory.

The attachment looks complicated (our ManageCASA Voting Plan), but our question is simple:

The PIPOA wants to make it compulsory for members who want to vote in our annual election process to sign up for our new, board-approved property management system with its built-in eVoting system, ManageCASA. Signing up means providing ManageCASA an email address and a user-selected password. It's a simple process and voting takes less than 5 minutes. **Can we impose this requirement on our community?**

On background:

Switching to ManageCASA saves the PIPOA over \$100,000 per year in operating costs. It contains a very secure eVoting system that provides better security protection than we had with our previous 3rd party election services. Our basic plan is attached. Our old property management system was "sun downed" by the vendor last month. We had no choice but to upgrade. The reason for our question, as I'm sure you can imagine, is based on the fact some folks resist change practically at all costs. Some would prefer we return to our very expensive 3rd party election system; we simply can't afford that given we have the same revenue stream we had in 2007.

FYI: I'm not here on Fridays but I generally get email every day. George Reed, as CC'd above, is the president of the board. This is routine priority.

Regards,

Rick

Rick McGinley

Executive Director

Padre Isles Property Owners Association, Inc.

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Cagle-Pugh Response:

The short answer is that the Board can impose the described voting requirements (ManageCASA) on the members of the Association. The following is a brief explanation in support of such answer.

Permitted voting procedures are governed by Section 22.160 of the Texas Business Organizations Code and Section 209.00592 of the Texas Property Code.

Section 22.160(b) of the Texas Business Organizations Code provides that a member of a Texas nonprofit corporation may vote in person or, unless otherwise provided by the certificate of formation or bylaws, by proxy executed in writing by the member or the member's attorney-in-fact. Section 22.160(d) provides further that if authorized by the certificate of formation or bylaws of the nonprofit corporation, a member vote on any matter may be conducted by mail, by facsimile transmission, by electronic message, or by any combination of those methods. The way I generally explain these provisions is that Section 22.160(b) governs voting of members at a meeting of the nonprofit corporation, while Section 22.160(d) governs voting of members outside of a meeting. In other words, under Section 22.160, a nonprofit corporation may conduct a membership vote either: (1) exclusively at a meeting, at which members may vote in person or, unless otherwise provided by the certificate for formation or bylaws, by proxy; or (2) if authorized by the certificate of formation or bylaws, exclusively by mail, facsimile or electronic message, or any by any combination of such authorized methods. However, Section 22.160 does not authorize a nonprofit corporation to conduct a hybrid vote whereby some members are permitted to vote at the meeting and some are permitted to vote outside of a meeting, nor does it allow for votes cast outside of a meeting to be counted toward quorum for those members who are voting at the meeting; rather, the nonprofit corporation (if authorized to conduct a vote outside of a meeting) must choose to conduct a membership vote exclusively at a meeting or exclusively outside of a meeting. If authorized to conduct a vote outside of a meeting, one of the primary benefits of conducting a vote in such a manner is that no quorum is required and the vote is considered valid regardless of the number of votes actually cast.

In 2011, the Texas legislature enacted Section 209.00592 of the Texas Property Code to bridge the gap between conducting votes at a meeting and outside of a meeting and to allow votes cast outside of a meeting to be both combined with those cast at a meeting and to count toward a meeting's quorum. Section 209.00592 provides that the voting rights of a property owner in a property owners association to be cast or given: (1) in person or by proxy at a meeting of the property owners' association; (2) by absentee ballot in accordance with Section 209.00592; (3) by electronic ballot in accordance with Section

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209.00592; or (4) by any method of representative or delegated voting provided by a dedicatory instrument. In addition, Section 209.00592 provides further that, unless a dedicatory instrument provides otherwise, a property owners' association is not required to provide an owner with more than one voting method, but that an owner must be allowed to vote by absentee ballot or by proxy (or, as a result of an amendment that takes effect on September 1, by electronic ballot). Finally, Section 209.00592 provides an absentee or electronic ballot may be counted as an owner present and voting for purposes of establishing a quorum for items appearing on the ballot.

Unlike Section 22.160, which provides for voting either at a meeting or, if authorized by the certificate of formation or bylaws, outside of a meeting, Section 209.00592 allows for votes to be cast outside of a meeting (without authorization by the certificate of formation or bylaws) and for such votes to be combined with votes cast at a meeting. While Section 209.00592 seems to suggest that a property owners association may limit the methods of voting to absentee or electronic ballots only, such authority is subject to the property owners association's dedicatory instruments, which almost always requires voting to occur at a meeting if it does not authorize voting to be conducted outside of a meeting. In other words, if a property owners association is authorized by its bylaws to conduct a vote exclusively outside of a meeting, then it does not need to rely upon Section 209.00592 for authority to conduct a vote by absentee or electronic ballots, but if a property owners association does not have authority to conduct a vote in its bylaws and is relying upon Section 209.00592 for authority to allow owners to vote by absentee or electronic ballots, then the property owners association's bylaws more than likely require that owners vote at a meeting, in which case the property owners association most likely will not be able to conduct a membership vote exclusively outside of a meeting by absentee or electronic ballots. Said more simply, Section 209.00592 is really intended to be used for the purpose of combining votes cast outside of a meeting with those cast at a meeting and not for the purpose of conducting a vote exclusively outside of a meeting where the property owners association does not authorize the property owners association to do that. If a property owners association wants to conduct a vote exclusively outside of a meeting by mail or electronic voting, then there needs to be express authority to do so under the property owners association's bylaws.

I have reviewed the Association's Bylaws. Section 1.03(B) thereof provides that a "Voting Member may vote in person or by proxy," which is a pretty standard boilerplate provision that tracks the language of Section 22.160(b) of the Texas Business Organizations Code, and should be interpreted as making clear that members are permitted to vote in person and by proxy in any vote conducted at a meeting of the Association. Section 1.03(C) of the Bylaws provides further that "voting may be

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conducted by mail or electronic means in such a manner as the Board of Directors shall determine,” which provides the necessary authorization required by Section 22.160(d) of the Texas Business Organizations Code to conduct a vote of the Association’s members outside of a meeting by mail and/or electronic means without having to rely upon the statutory authorization of Section 209.00592 of the Texas Property Code. As a result of such Bylaw provisions, the Board of Directors is expressly authorized to conduct a vote of the membership exclusively outside of a meeting by mail, electronic means, or any combination thereof in such a manner as the Board of Directors determines. Moreover, because the Bylaws authorize a vote of the members to be conducted exclusively outside of a meeting, the Board of Directors is not required to allow members to vote in person at the meeting or by any other method of voting other than by mail, electronic voting or a combination thereof, as determined by the Board.

The only additional note that I want to add is that it may be advisable to amend the Bylaws to include additional language that outlines how an electronic vote may be conducted, including timelines for casting ballots, addresses to which paper ballots or electronic voting instructions will be sent to members, etc. I don’t think it is required, but it will prevent the Board having to adopt such protocols each time they want to conduct a vote by mail and/or electronic means as determined by the Board.

Finally, I am attaching a CLE article that I authored for the State Bar of Texas’ 2021 Advanced Property Owners Association Law Seminar on this topic. It contains pretty good information on voting procedures and how they affected the ability of property owners associations to conduct voting in conjunction with virtual membership meetings in the wake of 2020’s covid pandemic.

Please let me know if you have any additional questions or would like to discuss this matter further.

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