

Windemere Property Owners Association, Inc.
Voting and Elections
Adopted by the Windemere Board of Directors
February 20, 2023

Summary Guide for Voting and Elections at Windemere

This is a user-friendly summary document to guide voting and elections. It represents the conclusions of a detailed analysis that has been presented to the Board and the Chairman of the Audit Committee to reconcile unclear language and conflicting statements in the Declaration, the Bylaws, and the Amendments thereto. The detailed analysis is attached to this summary guide, and the guide and the analysis that supports it have been adopted and will be kept on record to serve future Boards.

There are two basic distinctions – what is the required quorum, and what is the required passage.

1. Quorum – 2/3 of all Owners for everything except Meetings of the Members, which requires ½ of all Owners.
 - a. Participation while abstaining one's vote counts toward the quorum, but not in the percent approval of votes cast.
2. Approval – 51% of the votes cast in any election where a quorum has been met, except:
 - a. Amendments that solely affect non-waterfront owners specifically requires approval 2/3rd of all non-waterfront Owners.
 - b. Special Assessments and assessment increases of over 10% that are not attained through the "reach back" provision, require 2/3 approval of all Owners at the Annual or Special Meeting.
 - i. To raise the budget greater than 10% using reach back requires 51% approval of those voting at the Meeting for which the 50% quorum is met.
 - ii. To raise the budget greater than 10% without using reach back requires 2/3 approval of those voting at the Meeting for which the 50% quorum is met.
 - c. Amendments that change the nature of and ownership of the Association and its property require 2/3 approval of all Owners to:
 - i. Terminate the legal status of the Association.
 - ii. Contract the land in the Development .
 - iii. Convey any portion of the Common Area (other than roads or roadways) to any other party.
 - iv. Withdraw any portion of the property from the requirements of this Declaration.

3. Examples:

- a. Budget – 66 quorum for Meeting, passage requires >50% of votes cast:
 - i. 71 Owners and proxies present: it could pass or fail 36-35.
 - ii. 66 Owners and proxies present: it could fail 33-33.
 - iii. 68 Owners and proxies present: one abstains, it could pass or fail 34-33
- b. Typical Amendment – 88 quorum, passage requires >50% of votes cast:
 - i. 92 Owners participate in ballot: it could fail 46-46
 - ii. 88 Owners participate in ballot: it could pass or fail 45-43
 - iii. 88 Owners participate in ballot, one abstains: it could pass or fail 44-43
- c. Solely Non-Waterfront Amendment – 55 quorum, passage requires 66% of all eligible waterfront voters (a quorum in itself):
 - i. 71 Owners participate in ballot, one abstains: it could fail 54-16
- d. Special Assessment – 66 quorum for Meeting, passage requires >66% of votes cast
 - i. 66 Owners and proxies present: it could pass 44-22
 - ii. 90 Owners and proxies present: it could fail 59-31
 - iii. 90 Owners and proxies present, two abstain: it could pass 59-29

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Detailed Analysis of the Governing Documents as they relate to
Voting and Elections at Windemere

I. Meetings of the Members

BYLAWS ARTICLE III – MEETING OF MEMBERS

Section 8. Quorum. The presence at the Meeting of Members entitled to cast, or of proxies entitled to cast, a majority of the votes appurtenant to the Lots (or to the Non-Waterfront Lots, if a meeting if the Members owning Non-Waterfront Lots) shall constitute a quorum for any action except as otherwise provided in the Articles of Incorporation, the Declaration, or these Bylaws.

Section 10. Action by Members. Except as provided otherwise in the Articles of Incorporation, the Declaration, or these Bylaws, any act of decision approved by a vote of no less than two-thirds 2/3 of all votes present at a duly held meeting of the Members at which a quorum is present shall be regarded as an act of the members.

****ANALYSIS.** This sets the minimum standard for an Action by Members. Literally, it says that once a quorum is met, that action requires a vote of 2/3 of the votes cast (so, at a minimum, 2/3 of 2/3). However, Article 10 is subsequently overridden (my underline above) by the Fifth Amendment which is further clarified by the Sixth Amendment, whereby 51% of the vote of the Owners is needed for passage once a quorum has first been met – except for amendments affecting this entity itself, or its property; or, amendments affecting solely non-waterfront owners.

II. Voting on Material Amendments to the Declaration

DECLARATION ARTICLE XII. AMENDMENTS

SECTION 1. These Bylaws may be amended, at a regular or special meeting of the members, by a vote of at least two-thirds (2/3) of all votes present at a duly held meeting of the Members at which a quorum is present in person or by proxy.

SECTION 2. In case of any conflict between the Articles of Incorporation and these Bylaws, the Articles shall control; and in the case of any conflict between the Declaration and these Bylaws, the Declaration shall control.

SECTION 3.

THE FIFTH AMENDMENT TO THE DECLARATION

REPLACES ORIGINAL SECTION 3:

1. The covenants and restrictions of this Declaration may be amended at any time and from time to time by an agreement signed by a majority of the Owners whose Lots are then subject thereto.
2. Further, provided that **any amendment solely affecting the Non-Waterfront Lots, Community Boat Docks or Boatslips must be approved by a vote of no less than two-thirds (2/3) of all votes entitled to be cast by Members owning Non-Waterfront Lots.** Any such amendment shall not become effective until the instrument evidencing such change has been filed of record.
3. Notwithstanding the foregoing, the consent of the Owners holding two-thirds (2/3) of the votes in the Association and the approval of Mortgagees holding Mortgages on Lots to which at least two-thirds (2/3) of the votes of the Association are appurtenant, plus the written consent of the Declarant shall be required to terminate the legal status of the Association, to contract the land in the Development, to convey any portion of the Common Area (other than roads or roadways) to any other party, to withdraw any portion of the property from the requirements of this Declaration, or to restrict or revoke Declarant's right of enforcement hereunder provided for in Section 3 of this Article XII.
4. The consent of the Owners having at least two-thirds (2/3) of the votes in the Association and the approval of Mortgagees holding Mortgages on Lots to which at least a majority of the votes are appurtenant shall be required to add or amend any material provision of the Declaration which establish, provide for, govern or regulate any of the following:

****ANALYSIS TO MAKE PARAGRAPH 4 READABLE**

The consent of the Owners having at least two-thirds (2/3) of the votes in the Association... to which at least a majority of the votes...shall be required to add or amend any material provision of the Declaration which establish, provide for, govern or regulate any of the following:

(a) voting;

- (b) assessments, assessment liens or subordinations of such liens;
- (c) reserves for maintenance, repair and replacement of Common Areas;
- (d) insurance or fidelity bonds;
- (e) rights to use Common Areas;
- (f) responsibility for maintenance and repair of the Common Areas;
- (g) boundaries of any Lot;
- (h) the interest in the Common Areas;
- (i) convertibility of Lots into Common Areas or of Common Areas into Lots;
- (j) leasing of Lots;
- (k) imposition of any right of first refusal or similar restriction on the right of any Lot Owner to sell, transfer, or otherwise convey his or her Lot;
- (l) any provisions which are for the express benefit of Mortgagees or insurers or guarantors of Mortgages.

**** ANALYSIS.** The Amendment essentially added paragraph 1. When **Paragraphs 1 and 4** are put together in context, it is saying that if 2/3 of the Owners consent to vote (meets the quorum of 2/3rds), then an Amendment will pass with greater than 50% of the votes cast.

Paragraph 2. Non-waterfront amendments are expressly required to have 2/3rds of all non-waterfront owners for passage of Amendments that solely affect the non-waterfront lots. (Maybe that was to keep someone who owned a lot of lots at that time from controlling the others.)

Paragraph 3. Requires a 2/3rds vote of all owners to change the fundamental nature of the development.

III. Voting on the Budget

SIXTH AMENDMENT TO THE DECLARATION OF COVENANTS

ARTICLE V, COVENANT FOR ANNUAL AND SPECIAL ASSESSMENTS, Section 4, Maximum Annual Assessment. (a) is hereby deleted in its entirety and the following is inserted in lieu thereof:

- a) "For calendar years 1995 and thereafter, the Board of Directors, by a vote in accordance with the ByLaws, without a vote of the Members, may increase the Annual Assessments each year by a maximum amount equal to the previous year's Annual Assessments times ten percent (10%). The Annual Assessments shall automatically by five percent (5%) each year unless the Board of Directors determines otherwise. *If the Annual Assessments are not increased by the maximum amount permitted under the terms of this provision, the difference between any actual increase which is made and the maximum increase permitted for that year shall be computed and the Annual Assessments may be increased by that amount in a future year, in addition to the maximum increase permitted under the terms of the preceding sentence for such future year, by a vote of the Board of Directors, with a vote of the members.*"
- b) From and after January 1, 1996, the Annual Assessments may be increased without limitation if such increase is approved by a vote of no less than two-thirds (2/3) of all voted entitled to be cast by Members, taken at a duly held meeting of the Members in accordance with the Bylaws

****ANALYSIS.** Underline and Italics are mine. The italicized portion first:

A. "Reach back" percentages in the Budget

The italicized portion is stating that there is a 10% upper limit on the budget, above which approval by the Members is required. It further states, however, that if the budget in prior years was increased less than that, the Board can "reach back" and add unused percents to the percent increase. So, if three years ago, the budget was increased by 5%, the Board could reach back and increase it next year by %15 percent – with a vote of the members.

This can be an important way to increase reserves without issuing a Special Assessment (which is a negative on the property history). The budget containing a Reach Back would need to be ratified by the Members (50% vote of a 2/3 quorum – see below), whereas raising the Assessments through paragraph b) specifically requires 2/3 approval of all Owners.

**** Now, the underlined portion of the Fifth Amendment to the Declaration:**

B. Authority to Raise Assessments

The underlined portion gives the Board the authority to raise the Assessments 10% without a vote of the members. However, it specifies that if the Board were to "reach back" for "unused percentages," it would require a vote of the members, which underscores that an increase of 10% or less, does not.

****But see**

SECOND AMENDMENT TO THE BYLAWS

2. Article VI, Powers and Duties of the Board of Directors, Section 2. Duties (c)(2). is hereby amended to read as follows:

"Send written notice of each assessment to every Owner subject thereto before its due date, together with a copy of the proposed budget for the following year, said proposed budget to be ratified at the next annual meeting of the association."

****The Second Amendment to the Bylaws states that the budget must be ratified at the next Annual Meeting. (This is when the horse got placed behind the cart. The Declaration did not contemplate a regular approval process the next spring.) Legally, this should have been an Amendment to the Declaration, because in the event of a conflict between the Declaration and the Bylaws, the Declaration controls. However, if you are looking for intent, it should be noted the 5th Amendment to the Declaration was passed in 2006, and the 2nd Amendment to the Bylaws was passed in 2009. And I think that everyone (who is active) wants to continue the tradition of ratifying the budget.**

C. WHAT IS RATIFICATION?

****"Ratification" is never defined in our governing documents. In NCGS Ch. 47F, The Planned Community Act (enacted prior to this Amendment) does define budget ratification, and essentially our process:**

§ 47F-3-103

(c) Within 30 days after adoption of any proposed budget for the planned community, the executive board shall provide to all the lot owners a summary of the budget and a notice of the meeting to consider ratification of the budget, including a statement that the budget may be ratified without a quorum. The executive board shall set a date for a meeting of the lot owners to consider ratification of the budget, such meeting to be held not less than 10 nor more than 60 days after mailing of the summary and notice. There shall be no requirement that a quorum be present at the meeting. **The budget is ratified unless at that meeting a majority of all the lot owners in the association or any larger vote specified in the declaration rejects the budget.** In the event the proposed budget is rejected, the periodic budget last ratified by the lot owners shall be continued until such time as the lot owners ratify a subsequent budget proposed by the executive board.

****So, under that legal definition of ratification, 66 Owners would have to vote "no" to deny the budget (my underline). But, we probably don't want that either. Previous Boards have looked at both 2/3rds and 50% of those voting as "ratification." Based on the categories above in the 5th Amendment, I believe that the threshold should be 50% of the voters, once a quorum is reached.**

IV. Capital Reserve Expenditure Voting

8th AMENDMENT TO THE DECLARATION ARTICLE IV, SECTION 7, RESERVE FUND

1. ARTICLE IV, The Association, Section 7. Reserve Fund is hereby deleted in its entirety and the following is inserted in lieu thereof:

"The Association shall establish an adequate reserve fund for the periodic maintenance, repair, and replacement of all Common Areas which the Association is obligated to maintain in order to fund unanticipated expenses of the Association or to acquire furniture, equipment, or services deemed necessary or desirable by the Board of Directors. Such reserve fund shall be collected and maintained out of the Annual and Boatslip Assessments, as hereinafter defined, as set forth in Article V, Section 2(j) and Article VI, Section 2(i) of this Declaration. Capital reserve fund expenditures, except for emergency repairs, must have been allocated by or within a duly approved budget."

****ANALYSIS.** There is no requirement for a separate vote by the Members on capital expenditures, so long as they are already within a duly approved budget. Traditionally, the WPOA provides for voting on capital expenditures, especially large ones, and putting a large capital project into the budget without Member approval would risk failure at ratification.