



To: Board

From: Travis Longcore, President

Date: August 19, 2021

Re: Grievance Regarding BABCNC June 30, 2021 Election

At the regular meeting of the BABNC Board on June 30, 2021, an election was held to fill the vacant seat for the Bel-Air Glen elected residential district. This vacancy can be filled by the Board under the terms of Article V, Section 6 of the Bylaws, which state, in part:

In event of resignation, or creation of a vacant seat following a public election where no candidates run for such seats, any Board Member may nominate, and the Board shall elect, a new Board Member or Member-at-Large at the next scheduled publicly noticed meeting of the Board, or as soon as practicable.

This election was placed on the agenda as item 22.c., falling at the end of the meeting. Two candidates were nominated from the floor, Philip Enderwood and Maureen Smith. During the following vote, there was some confusion about the number of votes counted using a show of hands that will be discussed in detail below, and a roll-call vote resulting in a tie. At that point, and on the advice of the Parliamentarian, which role I was serving in at the time, the Chair proceeded with the meeting after finding that no candidate had achieved a majority and leaving the filling of the vacancy to the next meeting.

Following the meeting, on July 21, 2021, the Secretary of the Board received a grievance from Maureen Smith, filed under Article XI of the Bylaws. The substance of that grievance is as follows:

I have listened to the tape of the meeting several times, and I believe that I won that election by a 12 to 11 majority. These results were the results of the first vote

taken. According to Robert's Rules of Order (Nominations and Elections:XIV: page 428): "As soon as one of the nominees receives a majority vote, the chair declares him elected and no votes are taken on the remaining nominees for that office." We voted several times for the nominees for the Bel Air Glen seat, which was a violation of Robert's Rules. BABNC's By-Laws are silent on the issue.

The President acknowledged receipt of the grievance and sought advice on its resolution. It was not placed on the agenda for the July 28, 2021 meeting. The purpose of this memorandum is to analyze the grievance and the facts surrounding the Bel Air Glen election, identify the relevant questions of fact and the applicable rules that support a determination by the president regarding the grievance. Such determination by the President would be appealable and could be overruled by a majority of the Board.

Governing Rules

Three documents govern elections to the Board of BABNC as pertains to filling vacancies.

The Bylaws, which were last approved and updated by the City on November 16, 2020, govern the filling of vacancies. Although this version of the Bylaws have not been formally ratified by the Board, they are in force, given that they contained revisions that were imposed by ordinance by the City and over which the Board has no power to object (e.g., the change in the qualifying age of the youth seat).

The Standing Rules would in theory provide guidance about the undertaking of elections. A version of Standing Rules was adopted on January 22, 2013, but it does not contain any information regarding the election process.

The Bylaws specify that *Robert's Rules of Order, Revised Version*, will apply in conduct of all meetings of the Board (Article XII). The Bylaws also specify that all grievances will be handed following Standing Rules "to be adopted by the Board," but no such standing rules have been thus far adopted.

The grievance pertains specifically to the counting of votes within an election, and does not dispute the process for nominating. The process for nominating is defined by the Bylaws, but only *Robert's Rules of Order* provide guidance on votes and voting within the context of an election.

The Brown Act also governs election procedures for teleconference meetings. According to the EmpowerLA Virtual Governance Guidelines, all votes taken during a teleconference meeting

must be roll-call votes. “All Board action will be determined by a roll vote to allow the public to hear who voted, how they voted, and the final vote.”

Facts of the Election

I have reviewed the video recording of the election and vote count in detail. The recording of the meeting only shows the person who is talking at any given time, and not the digital reactions that Board members may make (such as the “raise hand” function) or video of Board members when they are not speaking. Based on the video and audio, I observed the following events.

The Chair called for the vote and asked all those in favor of Philip Enderwood to raise their hands. She started counting once, calling out the names and stopped at 9. She then counted the votes again, and named 9 Board members. I cross checked the names and found that these two counts named different Board members as follows (Table 1).

Table 1. Vote counts for Enderwood.

	<i>Hands 1</i>	<i>Hands 2</i>	<i>Roll Call</i>
<i>Spradlin</i>	X	Abstain	Abstain
<i>Bayliss</i>	X	X	X
<i>Levinson</i>	X	X	X
<i>Loze</i>	X	X	X
<i>Palmer</i>	X	X	X
<i>Ringler</i>	X	X	X
<i>Schlesinger</i>	X	X	X
<i>Enderwood</i>		X	X
<i>Lee</i>		X	X
<i>Morris</i>		X	X
<i>Holmes</i>		X*	X
<i>Greenberg</i>			X
Total	7	10	11

We learned after the fact that Kristie Holmes had technical difficulties and had texted Catherine Palmer asking that her vote in the show of hands be recorded for Philip Enderwood. The number of votes counted for Enderwood from the show of hands was 9, with Holmes intending to vote but stymied by technical issues.

Then the Chair asked for the votes for Maureen Smith by a show of hands. The raised hands were counted twice, as before. The count here is quite difficult, because not all hands that were raised using the digital hand function on Zoom were named on the recording, and some members voted by raising their hands on video. Ten digital hands were raised and two people raised hands on video (Stojka and Garfield, although his hand was down for the second count). After both counts, abstentions were recorded for MacGinnis and Leisten. Then Sandler came on the tape stating that she had voted for Smith. For the show of hands, the votes are tabulated below, with

some question as to Heather Roy because her name was not read on the recording but she presumably was one of the 10 digital hands raised.

Table 2. Vote Counts for Smith.

	<i>Hands 1</i>	<i>Hands 2</i>	<i>Roll Call</i>
<i>Garfield</i>	X	?	Abstain
<i>Evans</i>	X	X	X
<i>Le Kennedy</i>	X	X	X
<i>Longcore</i>	X	X	X
<i>Mann</i>	X	X	X
<i>Miner</i>	X	X	X
<i>Smith</i>	X	X	X
<i>Stojka</i>	X	X	X
<i>Wayne</i>	X	X	X
<i>Murphy</i>		X	X
<i>Roy</i>		X*	X
<i>Sandler</i>		X	X
<i>Total</i>	9	11	11

At this point, Enderwood had an apparent 10 votes (counting Holmes). In theory, Enderwood might have had 11 if Spradlin had maintained his vote through the show of hands count, which he did not (and he verbally confirmed abstention during the roll-call vote). Smith had an apparent 11 votes (counting Roy, whose vote was subsequently confirmed in the roll-call vote, but not counting Garfield, who did not keep his hand up and subsequently abstained during the roll-call vote).

As the tally of the show of hand votes continued, Cathy Palmer, who was keeping minutes, suggested that a roll-call vote be taken. The Chair of Rules, Bylaws, and Elections (Mr. Leisten) concurred, and the Chair initiated a roll-call vote. The roll-call vote differed from the count of hands as follows.

- Member Spradlin abstained. He had voted for Enderwood in the first show of hands but was not named in the second count of hands. He verbally abstained in the roll-call vote.
- Member Garfield abstained in the roll call vote after having raised his hand for Smith and being counted for her in the first count.
- Member Holmes voted for Enderwood after having communicated her vote in the show of hands electronically to Cathy Palmer, unbeknownst to the Board and Chair.
- Chair Greenberg voted, adding to Enderwood's tally, having not voted in the raised hands vote.

As a result of these changes, the roll-call vote was an 11-11 tie, with 4 members not voting.

Then, the Chair, on advice of the Parliamentarian (me) and the Chair of the Rules, Bylaws, and Elections Committee determined that neither candidate had received a majority of the votes cast

and therefore the position remained unfilled and would be taken up at a future date. No Member objected to this determination.

Analysis

These facts raise a series of questions warranting discussion.

Is it Permissible to Conduct Multiple Counts of the Same Votes Using Different Means?

My review of the recording shows that the two counts of the show of hands for each candidate were going through and counting the same raised hands, not two separate votes. For example, the order was to count the hands raised for Enderwood twice and then those raised for Smith twice. Had it been two separate votes, the counting would have alternated. It is permissible to count the same raised hands twice to be certain about a count. In fact, if a Chair is not certain of the outcome of a vote, the vote can be retaken (*Robert's Rules* 4:51). This rule applies to rising votes (where members in a meeting stand to express their preference and the outcome is estimated by the chair), but can also be extended to counted rising votes, which is comparable to the count of raised hands in the electronic format. I interpret this rule to mean that recounting votes using the same means and without starting the vote over is allowable and it is in the interest of fairness and good order that votes be counted fully and accurately.

The next question is if it was permissible to take the vote using a second method after having counted the votes using the show of hands. The relevant rule to this action is *Robert's Rules* 30:6, which states in its entirety:

Retaking a Vote. As explained in 4 (see 4:34–56) and 45 (see 45:11), the regular methods of initially taking a vote are by voice (*viva voce*), by rising (division), or by show of hands—the latter two of which may also be called for by any member as a means of verifying an inconclusive vote that has just been taken (see 29)—and the chair may order that a vote be counted or that an uncounted vote be retaken as a counted vote. After a question has been voted on in any of these ways, and within the time specified in Standard Characteristic 1 above, the assembly can still order that the vote be taken again by some method other than any of the regular ones (see Other Methods of Voting, 45:17ff.) or that an uncounted vote be retaken as a counted vote. But after a vote has been taken by one of those other methods, or after the assembly has ordered that a counted vote be taken, it is not in order to move that the vote be taken again. It is never in order to move that the vote on a question be taken a second time by the same method.

Because of the Brown Act requirement to take all votes in a manner that the votes of each member can be recorded, BABCNC cannot use uncounted methods such as voice or uncounted rising votes, or an uncounted show of hands. Rule 30:6 provides for votes to be retaken if requested immediately following the original vote by another means mentioned in 45:17. These other methods include Ballot, Electronic Machine, and Roll-Call votes. In this instance, the Board had voted by a counted show of hands, and then, under the direction of the Chair ordered (or at least acquiesced) to a Roll-Call Vote. The action to do so was timely because it came before the Chair announced an outcome of the vote and declared a winner. The rule provides for retaking a vote with a roll-call vote in the event that there has already been a show of hands that has been counted. The Chair made the determination to proceed with the roll-call vote following the request of a Member, but without a formal motion and vote. This is, however, a minor breach of protocol and resulted in an action that is permissible under Rule 30:6.

Was the Chair Obligated to Stop the Vote Count After the Show of Hands?

The grievance cites *Robert's Rules* 46:38 as an authority to state that the election should have been stopped when a majority of those voting were counted for Smith in the show of hands. That rule states, "As soon as one of the nominees receives a majority vote, the chair declares him elected and no votes are taken on the remaining nominees for that office." If there had been certainty in the Chair's mind about the outcome of the show of hands vote, she would have been obligated to declare a winner at that point. She did, however, at that point receive what amounted to a motion to retake the vote that was timely. Although that request was not made in the form of a motion, the Chair acted on it and no one on the Board objected. This was the in the form of a statement by Member Leisten that a roll-call vote be taken, after which the Chair asked for a roll-call vote. Even though these actions were not expressed properly in the form of motions or even voted on, the lack of an objection means that those actions stand.

Other rules are related that also give broad latitude to the Chair to seek certainty on a vote before declaring an outcome. Rule 4:51 addresses the actions of a Chair facing an uncertain rising vote, and provides as follows:

If the chair is in actual doubt in the case of such a vote, however, he does not announce a result, but instead immediately retakes the vote—strictly speaking, always as a rising vote. (Regarding use of a show of hands as a method of verifying an inconclusive voice vote, however, see below.) If it appears when those in the affirmative rise that the vote will be close enough to require a count, the chair should count the vote, or direct the secretary to do so, or (in a large assembly) appoint a convenient number of tellers—preferably an even number equally divided between members known to be in favor of the motion and those opposed to it. If, after a vote has been retaken as an uncounted rising vote, the

chair finds himself still unable to determine the result, he must take the vote a third time as a counted rising vote.

So long as the Chair did not state a final result and an outcome of the election, it was permissible both to recount the show of hands votes and to act on the de facto motion to retake the vote using a different method.

Finalizing a vote consists of three elements (*Robert's Rules* 4:43), which are announcing the final vote tally, a statement of the outcome of the vote (e.g., Candidate A is elected), and a statement of the effect of the vote or ordering its execution. No such statement was made by the Chair and given the de facto, timely request to retake the vote and the latitude given chairs to continue to count votes until certain about the outcome in the rules, ordering a roll-call vote appears to be a permissible action.

Is it Permissible for a Member to Change Votes While Votes Are Being Counted?

When the roll-call vote was taken, the result did not match the final tally from the show of hands vote. This difference arose from four changes. For Enderwood, votes from Member Holmes and Robing Greenberg were recorded. For Smith, Garfield switched his vote to an abstention. The votes for Enderwood were not changes, but rather recording of votes not recorded (Holmes) or not yet cast (Greenberg) in the show of hands. Greenberg had the right to vote as Chair and could have voted in the show of hands before announcing a final outcome if her vote would have been dispositive (*Robert's Rules* 44:12). These changes are therefore permissible.

Member Garfield switched his vote to an abstention. This too is permissible, so long as the final outcome of the vote has not been announced, which it was not in this case. In fact, "a member has the right to change his [or her] vote up to the time the result is announced" (*Robert's Rules* 4:42). Member Garfield therefore could change his vote to reduce the total for Smith so long as the final tally had not yet been announced, which it had not. As discussed above, an announcement of the final tally would have included a statement about the final vote, and who won (4:43), which had not occurred.

Could Any Show of Hands Vote be Valid?

The Brown Act takes precedence over BABCNC Bylaws and Rules. According to the City Attorney, no show of hands vote can be a valid vote during a teleconference meeting because it does not allow the public, who may be listening only and without access to video, to hear how each member voted. Because the names were called out during the show of hands, this concern is mitigated to some degree, but a full understanding of the vote as it was held requires both audio and video because votes were counted using the digital "hands" in the Zoom platform as

well as on video. Under the Brown Act, only a roll-call vote can be considered valid (California Government Code § 54953(b)(1); “All votes taken during a teleconferenced meeting shall be by rollcall.”). Therefore, no show of hands vote can be considered valid unless every vote were counted and named orally so that someone *listening to the audio only* would have proof of the outcome.

Conclusion

The only legal vote under the Brown Act provisions for teleconferencing, superseding all other rules, was the roll-call vote that showed a tie.

Even if one considered the naming of votes with the show of hands as being proper in lieu of a roll-call vote, the request for a revote using a roll-call vote was timely and proper and the Chair was not obligated to declare a winner under *Robert’s Rules*, given that there was doubt about the outcome and she had not yet determined if her vote would break or make a tie. It was furthermore proper to record changed votes and additional valid votes in the roll-call vote that resulted in a tie.

The seat remains open and should be filled pursuant to the Bylaws as soon as practicable.