





Memorandum

VIA E-MAIL AND FIRST CLASS MAIL

To: BIMC Board of Governors
From: Lawrence A. Costich 
Milt Reimers 
Date: July 22, 2011 - FINAL
Subject: BIMC Amendments to the *Articles of Incorporation*
File No.: 121338/172776

QUESTIONS PRESENTED

- (1) What is the voting requirement for approving proposed amendments to the BIMC's *Articles of Incorporation*?
- (2) Were the proposed amendments to the *Articles of Incorporation* considered by the BIMC membership at the July 2, 2011 Annual Meeting adopted under the applicable standard?

ANSWER

The Nonprofit Corporation Act, chapter 24.03 RCW, provides that any proposed amendment to *Articles of Incorporation* "shall be adopted upon receiving at least two-thirds of the votes which members present at such meeting or represented by proxy are entitled to cast." The proposed amendments to the BIMC's *Articles of Incorporation* that were presented to the membership at the July 2, 2011 Annual Meeting exceeded the threshold set forth in the statute and were therefore properly adopted by the BIMC membership.

ANALYSIS

On July 2, 2011, the BIMC held its annual membership meeting (the "Annual Meeting") on Blakely Island. During the Annual Meeting, amendments to the BIMC's *By-Laws* and *Articles of Incorporation* were presented to the membership for consideration.

1. **A Quorum Was Present.**

The *By-Laws* (Article VII, Section 7) provide that a majority of... the members shall constitute a quorum for the transaction of all business." The BIMC reached a quorum with 105 out of 139 total voting members participating in the Annual Meeting.

2. Proposed Amendments to the By-Laws.

Seven proposed amendments to the *By-Laws* were presented to the membership for consideration at the Annual Meeting. The *By-Laws* (Article VII, Section 7) provide: "A majority vote of those present or represented by proxy and eligible to vote shall be required to pass any issue submitted to the members[.]" With 105 votes present, either in-person or by proxy, 78 members voted in favor of approving six of the amendments (Amendments Nos. 2, 3, 4, 5, 6, and 7), and 23 voted against.¹ This equates to 74% approving of passage of the amendments, and 26% disapproving of passage of the amendments.

These six amendments to the *By-Laws* were approved by more than a majority of the voting members present, as required under the *By-Laws*, and therefore adopted.

3. Proposed Amendments to the Articles of Incorporation.

Seven proposed amendments to the *Articles of Incorporation* were also presented to the membership for consideration at the Annual Meeting. At the time the proposed amendments to the *Articles of Incorporation* were being considered, the members discussed whether the threshold for passing a proposed amendment was two-thirds of the BIMC's total voting membership or two-thirds of the voting members present at the annual meeting (both personally present and present by proxy).² Amid the confusion and under the threat of a new lawsuit by Pam Roats, the BIMC's Board of Governors declined to decide what the voting threshold was for amending the *Articles of Incorporation*, instead deferring any final interpretation until after having a chance to examine the issue further and consult with the BIMC's attorneys.

The Nonprofit Corporation Act, RCW 24.03.165, establishes the process and requirements for amending a nonprofit corporation's Articles of Incorporation and provides: "The proposed amendment shall be adopted upon receiving at least two-thirds of the votes which

¹ The first proposed amendment relating to the issuance of stock was not adopted by the membership.

² We recognize that the *Blakely Island Covenants*, ¶ 2.C, states in relevant part, "The restrictions and conditions herein imposed may be amended, renewed or extended in whole or in part, at any time or at once, by written instrument duly executed and acknowledged by the owners of not less than two-thirds (2/3) of all of the lots or tracts included within the recorded plan of the San Juan Aviation Estates at the time of the vote on the amendment." This provision applies only to amendments to the covenants and does not apply to amendments to the articles of incorporation. In this instance, the statutory authority for amending the articles would control.

The *Blakely Island Covenants* are equitable servitudes on the property which "run with the land" and are therefore binding on all property owners and their successors in-interest. See *Blakely Island Covenants*, ¶ 2.B ("The covenants, conditions, restrictions, and reservations of this BIC shall run with and bind the land subject to the BIC..."). Given that, a higher threshold of approval is required to impose restrictions or conditions, which are property interests that may be enforced by other property owners or the BIMC. Conversely, the *Articles of Incorporation* is the instrument that creates the BIMC as a legal entity in the State of Washington. As a further distinction, the *Articles of Incorporation* are not required to be acknowledged (i.e., notarized) by the owners or recorded with the San Juan County Auditor, which are necessary steps to impose covenant amendments on property.



members present at such meeting or represented by proxy are entitled to cast." (underline added)
There is no separate reference to a voting threshold for the *Articles of Incorporation* set forth in any of the BIMC's governing documents. In the absence of a threshold requirement set by the BIMC, the statute dictates the requirements for passing any amendments to the BIMC's *Articles*.

The Board's resolution at the March 10, 2011 meeting further anticipated that the amendments to the *Articles of Incorporation* would be approved based on the consent of two-thirds of those present at the annual meeting in accordance with the corresponding statutory authority. The Board's resolution specifically stated:

Amendment to the Articles of Incorporation

RESOLVED, that, in accordance with RCW 24.03.165, the Board of Governors directs that the amendments to the Articles of Incorporation of the Association set forth on the attached Exhibit A be submitted to a vote of the members having voting rights for approval.

RESOLVED, that following approval of the amendments to the Articles of Incorporation by two-thirds of the voting members, the President of the Board of Governors shall file the amended Articles of Incorporation with the Washington Secretary of State.

Accordingly, the Board resolved to follow the statutory requirements prescribed by RCW 24.03.165, as quoted above. Noteworthy is the fact that the Board specified that approval would require two-thirds of the voting members ~ not of the full *membership*.

As applied to the BIMC's July 2, 2011 Annual Meeting, any proposed amendments to the *Articles of Incorporation* required at least two-thirds (or 66%) of the 105 votes present to approve of an amendment in order for it to be adopted. After consideration of the proposed amendments to the *Articles of Incorporation*, 77 out of 105 members³ present voted to approve the proposed amendments. This equates to 73% of the members present approving passage of the amendments. Only 23 members voted to disapprove the amendment.

The proposed amendments to the *Articles of Incorporation* exceeded the threshold set forth in the Nonprofit Corporation Act, were adopted by the membership, and should be incorporated into the *Articles of Incorporation* for filing with the Washington Secretary of State.

4. Action Steps by the Board of Governors

To confirm that the membership voted to adopt the proposed amendments to the *Articles of Incorporation*, the Board should take the following steps:

1. Review the Nonprofit Corporation Act, RCW 24.03.165, along with the analysis set forth above;

³ 100 member votes/proxies were cast on this measure. It is presumed that the five members who did not cast votes either left the annual meeting or abstained from the vote.



2. Review the minutes from the 2011 BIMC Annual Meeting to confirm the vote count for the proposed amendments to the *Articles of Incorporation*;
3. Consider a motion to confirm the voting threshold required for approving amendments to the *Articles of Incorporation* under RCW 24.03.165 and the result of the membership's vote based on that threshold;
4. Distribute the Annual Meeting minutes, the Board's motion, and this legal memorandum to the BIMC membership explaining the Board's action; and
5. File the amended *Articles of Incorporation* with the Washington Secretary of State.

