

COMMUNITY ASSOCIATION ELECTIONS: ARE WE BETTER OFF TODAY?

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In July we marked the two-year anniversary of Civil Code §§1363.03 and 1363.04, affectionately referred to as the “Elections Law.” And despite the anticipated benefits, the more costly, more time consuming balloting process may not have lived up to its promise. In many instances, the obstacles to effective elections that existed before the Elections Law still exist today. The following highlights a few elections issued experienced over the past two years along with a few tips on working through your next association vote.

Scope of the Elections Law; Elections Rules

The Elections Law expressly supersedes any other law or provision of the governing documents with respect to (1) elections regarding assessments legally requiring a vote, (2) election and removal of the board of directors, (3) governing documents amendments, or (4) the grant of exclusive use of common area property pursuant to §13363.07. Thus, where an association’s bylaws provision conflicts with Civil Code §§1353.03 and 1353.04, the Code will control. On the other hand, where your bylaws are not in conflict with the Elections Law, such as with quorum requirements, use of proxies or director qualifications, the bylaws must be followed.

All associations must have election rules in place, without exception. Consider the rules your association has adopted as work in progress allowing you to determine if those rules should be modified to better fit the needs of the association and if the rules are consistent with your association’s governing documents and the Elections Law.

You Don’t Need a Membership Meeting to Conduct a Vote

The secret ballot process requires a written mail-in ballot for a vote in connection with a membership meeting or a vote exclusively by mail. Unless your governing documents requires that the vote be conducted at a membership meeting, the vote may proceed entirely by mail, without a membership meeting, provided the requirements of Corporations Code 7513 are met. Whereas quorum for a vote in connection with membership meeting is determined by mail-in ballots received, plus members present at the meeting in person or by proxy, quorum for a written ballot election is determined by the total written ballots received.

Election of Directors; Failure to Achieve Quorum at an Annual Meeting

Despite the convenience of the mail-in secret ballot, and the fact that each mail-in ballot received counts as a member present at meeting for purposes of establishing a quorum, for many associations, achieving quorum still presents a challenge. If your association is fortunate to have a reduced quorum for adjourned meetings, there is hope. But if your association fails to achieve quorum at an adjourned meeting (with or without a reduced quorum), the directors continue to serve (1) until their term is expired and (2) their successor is elected. Therefore, consider effective ways your association may achieve quorum including 1) making it a social event; 2) sending out vote reminders, amending your bylaws to reduce quorum for adjourned meetings (or as some associations are doing, eliminate quorum requirements completely); or (3) petitioning the court pursuant to the Corporations Code

for an order reducing or eliminating the minimum quorum requirement.

Proxies are Alive and Well But Not Required

Unless your association's governing documents require that proxies be included with ballot materials, the association is not obligated to distribute them. If proxies are used, however, the Election Laws require the proxy holder to be a member of the association. Further, any proxy that instructs the holder how to vote must be set forth in a separate detachable page of the proxy and retained by the proxy holder.

Balloting for Removal; Conditional Ballot

Board member removal has survived the secret ballot process. As a result, an association faced with a removal (also known as recall) vote must be prepared to elect a new board of directors if the membership successfully removes the entire sitting board of directors. Otherwise the association is without leadership necessary to govern the association. Therefore a conditional or two-ballot election is required.

The first ballot requests the member to vote for or against the recall. A second or conditional ballot requests the member to vote for a list of candidates in the event the recall is successful. Of course this process requires the recall vote be set for enough in advance to allow the association time to compile a list of "conditional" candidates to run for elections in the event of a successful recall. If there are no declared candidates for the post-recall ballot, the association can still notice an election to take place following the special recall meeting. Nominations may be taken from the floor and the election of directors can proceed by secret ballot at the special meeting. As absurd as this may seem, the blank secret ballots must be distributed to the members at least thirty days before the meeting.

Nominations From the Floor; Ballots Are Irrevocable Once Received

Speaking of nominations from the floor, while it may be unlikely that a candidate nominated from the floor is elected, nominations from the floor of a membership meeting are required if provided for in the association bylaws. They are not otherwise

required by law. Remember that ballots are irrevocable once they have been received once they have been received by the inspector of elections. Anyone who mailed in their ballot will not be able to vote for a candidate nominated from the floor.

Community Association Managers Can Serve as Inspectors of Election

The Elections Law allows for an association manager to serve as an elections inspector, if the association's election rules so provide. There are, however, a few circumstances where they should not serve as inspectors, such as in hotly contested elections or recalls. Indeed, managers, as impartial agents of the association, often play important roles in facilitating the election and in helping the inspectors do their jobs. Practically speaking, however, at a minimum, the community association manager may serve as an interim inspector for purposes of receiving and logging in the ballots, and determining the number of ballots received for quorum purposes.

Tabulation and Announcement of the Vote

The Elections Law requires that the tabulated votes be (1) promptly reported to the board of directors; (2) record in the minutes of the next board meeting; (3) made available for review by the membership; and (4) published to all members within 15 days of the election (Civil Code §1363.03(g)). What is less certain is whether the association must merely publish the outcome or the actual tabulated vote count received by each candidate or ballot measure. However, since the spirit and intent of the Elections Law is greater transparency in association elections, the better practice is to publish the number of members voting for and against each issue to candidate and the number abstaining from voting.

Possession of Ballots

In reality, who maintains possession of the ballots is an issue only when an election is challenged. Nevertheless, it is important to understand the importance of safeguarding the ballots for the statutorily required time period. This is a two step process. Civil Code §1363(h) requires that the sealed ballots remain with the inspector or at a location designated by the inspector or at a

location designed by the inspector until tabulated and until the time period for challenging the election (nine months has passed, pursuant to the Corporations Code §7527. Thereafter, the ballots shall be transferred to the association.)

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