

G. ELECTION AND TERMS OF HOMEOWNERS' ASSOCIATION DIRECTORS

1. Director Requirements and Qualifications

Incorporated associations are legally required to have directors. Unincorporated associations need not have directors. The governing documents can require that directors have certain qualifications so long as the qualifications are reasonable. In most associations, directors must be owners. Some governing documents require directors be residents as well as owners.

2. Director Nomination and Election

The governing documents usually specify nomination procedures for director candidates. For associations with fewer than 500 owners, the only requirement imposed by law is that the procedures be reasonable. (See Corporations Code §§ 7521-7524 for requirements applicable to associations with 500 or more members, in Chapter 4.) In fact, it is not necessary to have any formal nomination procedures if the association allows any owner to nominate a director. However, if any nominations have been made prior to the date the meeting notice is sent to the owners, the nominees should be identified in the notice.

Civil Code § 1363.03 requires an association to adopt rules that (1) ensure candidates equal access to association media, newsletters, and internet web-sites for campaign purposes, whether the candidate is supported by the board or not; (2) ensure equal access to common area meeting space for campaign purposes; (3) specify the qualifications for candidates and procedures for the nomination of candidates; (4) specify the qualifications for voting, the voting power of the association members, requirements for proxies, and voting schedules; and (5) specify the method of selecting one or three independent third parties as inspectors. The duties of inspectors of elections are enumerated in the statute.

Regardless of what the governing documents provide, elections involving the selection or removal of directors, amendments to the governing documents, assessments requiring owner approval, and the grant of exclusive use common area to a member must be by secret ballot. All other elections will be governed by the provisions of the

governing documents.

Secret ballot elections must be held as follows: ballots and two pre-addressed envelopes with instructions on how to return ballots must be mailed by first-class mail or delivered to every member not less than 30 days before the voting deadline. Voters may not be identified by name, address, or lot, parcel, or unit number on the ballot. The ballot itself is not signed by the voter, but is inserted into an envelope that is sealed. This envelope is inserted into a second envelope that is sealed. In the upper left hand corner of the second envelope, the voter prints and signs his/her name, address, and lot, or parcel, or unit number that entitles him /her to vote. The second envelope is addressed to the inspector(s) of elections who tallies the votes. The envelope may be mailed or delivered by hand to a location specified by the inspector(s). The member may request a receipt upon delivery.

A quorum for a secret ballot election is required if stated in the governing documents. If a quorum is required, each ballot received by the inspector(s) is treated as a voter present at a meeting for the purposes of establishing a quorum.

All votes must be counted by the inspector(s) in an open meeting of the board or owners. Any owner may witness the counting of ballots. No one may open a secret ballot before all of the ballots are counted. The results must be promptly reported to the board, recorded in the minutes of the next board meeting and available for review by the members. Within 15 days of the election, the board must notify all owners of the election results. The ballots must remain in the custody of the inspector(s) until they are counted and then delivered to the association for safe storage for no less than one year.

In the event of a challenge, the association must make the ballots available for inspection by the owners or their authorized representatives. For additional information, see Civil Code § 1363.03, in Chapter 2.

The law prohibits the use of association funds for campaign purposes in the election of directors. For additional information, see Civil Code § 1363.04, in Chapter 2.

A violation of secret voting requirements invokes several penalties. Any owner may bring a civil action to challenge the election within one year after the date of the election, and if a court finds that the secret election rules were not adopted or the required procedures were not followed, the court may void the results of the election, award the challenging owner reasonable attorney's fees and court costs, and impose a civil penalty of up to \$500 for each violation, except that a single violation affecting all owners equally is subject to only one civil penalty. Notably the statute does not allow an association its cost of defending an election challenge unless the court specifically finds that the challenger's civil action is frivolous, unreasonable, or without foundation. For additional information, see Civil Code § 1363.09, in Chapter 2.

A claim for many violations of secret voting requirements may be brought in Small Claims Court if the amount of the claim does not exceed the jurisdictional limit of Small Claims Court (now \$7,500 for an action brought by a natural person and \$5,000 for an action brought by a corporation or other business entity). For further information, see Civil Code § 1363.09, in Chapter 2 and Code of Civil Procedure § § 116.220, 116.221.

3. Cumulative Voting

In an election of directors using cumulative voting, each owner is allowed to cast a total number of votes equal to the number of directors to be elected, and may combine or "cumulate" those votes in any way he/she wishes. Thus if there are five seats on the board to be filled at the election, each owner will be entitled to five votes, but will not be required to vote for five candidates. As an alternative to casting one of his/her votes for each of five candidates, an owner can cast five votes for one candidate, or three votes for one candidate and two votes for another, and so on. The purpose of cumulative voting is to give each owner a stronger likelihood of electing at least one or two directors who share his/her views.

The law allows cumulative voting only if it is specifically authorized in the governing documents. If it is authorized, the association must allow cumulative voting using secret ballot procedures including mail-in ballots. The former requirement that cumulative voting will

be triggered only if prior to the voting, at least one owner states his/her intention to cumulative his/her vote, has been eliminated. For additional information, see Civil Code § 1363.03, in Chapter 2.

4. Proxies

“Proxy” means a written authorization signed by an owner that gives another owner the power to vote on his/her behalf. A photocopy, facsimile or electronic transmission bearing an owner’s signature is valid. Proxies may not be used in lieu of a ballot or combined with a ballot. They must be a separate, distinct document. In addition, if there are any voting instructions accompanying a proxy, the instructions must be on a separate sheet of paper that can be detached from the proxy when it is delivered to the inspector(s) of elections and retained by the proxy holder. For additional information, see Civil Code § 1363.03(d), in Chapter 2.

A proxy is valid only for 11 months from the date it is signed, unless the proxy specifically states that it is valid for a longer period. No proxy is valid for more than 3 years from the date it is signed under any circumstances. A proxy may be revoked at any time before a ballot is received by the inspector(s) of elections. For additional information, see Corp. Code § 7613, in Chapter 5 and Civil Code § 1363.03(d), in Chapter 2.

The use of proxies for election of directors is of diminished importance with the advent of mail-in ballots commencing July 2006.

5. Length of Director Terms/Staggered or Concurrent Terms

The length of the directors’ terms is usually specified in the governing documents. By law, however, directors’ terms may not exceed four years. If the governing documents do not specify term length, the law provides that it will be one year. It is not necessary for all directors to have terms of the same length, or for all directors’ terms to expire in the same year. Frequently, the governing documents provide for staggered terms, so that fewer than all of the board seats are open to election at one time providing continuity in transition. For further information, see Corporations Code § 7220, in Chapter 3.

6. Removal of Directors Prior to Expiration of Term

A director may be removed by owner vote at any time using secret ballot procedures. The owners do not need a reason for the removal. The number of owner votes needed to remove a director is determined as follows:

(1) If the governing documents allow cumulative voting, a director can be removed only if the total number of votes of the owners opposing removal, if cumulated and all cast in favor of the director, would be insufficient to elect him/her (see Corporations Code § 7222(b)(1), in Chapter 3, for additional details);

(2) If the governing documents provide for voting in classes or subgroups, a director elected by a particular class or subgroup can be removed only by a majority vote of that class or subgroup (see Corporations Code § 7222(b)(2) and (3), in Chapter 3, for additional details);

(3) If neither of the first two paragraphs apply, and the association has fewer than 50 owners, director removal requires a majority of the total voting power of the association (rather than just a majority of the votes cast in the removal election); and

(4) If neither of the first two paragraphs apply, and the association has 50 or more owners, director removal requires a majority of the voting power cast in the removal election.

A director may also be removed by the other directors, but only if there is cause for removal. Appropriate cause for removal by the other directors includes mental incapacity and felony conviction. In addition, the governing documents may allow the board to remove directors for missing a specified number of meetings. For additional information, see Corporations Code § 7221(a), in Chapter 3.

7. Director Vacancies

The method of selecting a director to fill a vacancy following a resignation or removal is usually prescribed in the governing documents. If the governing documents are silent on the issue, a vacancy created by resignation is filled by board vote, and a vacancy created by removal is filled by owner vote (regardless of whether the removal was executed by the owners or by the board). For additional information, see Corporations Code § 7224, in Chapter 3.