

Yes, Every Association Really Needs Election Rules – But Why?

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Even though the elections law (Civil Code sections 1363.03, 1363.04 and 1363.09) went into effect well over five years ago (July 2006), we still frequently come across associations without election rules in place. We often hear from managers that some of their boards of directors resist investing in election rules because they do not want to spend the money. This is tragic, because election rules can be drafted quickly and inexpensively, by our firm or any other attorneys that specialize in common interest development law. The cost is particularly minimal in comparison to the serious risks involved in conducting votes and elections in the absence of voting rules.

Civil Code section 1363.03 requires that four types of member votes be conducted pursuant to election rules which describe a dual-envelope secret ballot system: (1) votes regarding assessment increases requiring member approval; (2) election or removal of directors; (3) amendment of the governing documents; and (4) the grant of exclusive use of common area to less than all members.

"There Is Stuff about Elections in Our Bylaws"

Often, when we ask for an association's election rules, we are instead given a copy of the association's Bylaws. Yes, the Bylaws (and sometimes CC&Rs and/or Articles of Incorporation) do typically address elections, but those documents are not election rules. Civil Code section 1363.03(a) unambiguously states that "An association shall adopt rules, in accordance with the procedures described by Article 4 (commencing with Section 1357.100) of Chapter 2 [the rule change/adoption procedure], that do all of the following. . . ." The statute then goes on to list the things that must be included in election rules. The specific requirements for election rules in section 1363.03 rarely are found in Bylaws (or CC&Rs or Articles). Civil Code section 1363.03 requires, on its face, that separate rules must be adopted pursuant to the procedure for adopting any "operating rules" (including at least 30 days' notice to the owners, member comments and adoption at an open board meeting).

"We Have Been Conducting Our Elections in Compliance with the Law"

It is not legally sufficient to conduct elections pursuant to the dual-envelope, secret ballot system proscribed by Civil Code section 1363.03 without separate election rules. Civil Code section 1363.09 provides that a member of an association may bring a civil action for any violation of the elections law, and provides that "Upon a finding that the election procedures of

this article or the adoption of an adherence to rules provided by Article 4 (commencing with Section 1357.100) of Chapter 2, were not followed, a court may void any results of the election." In other words, simply conducting a vote utilizing the dual-envelope, secret ballot procedure, without adopted and published election rules, violates the elections law, exposes the association to potential liability, and risks the nullification of any such vote or election.

Unlike other laws (such as the "internal dispute resolution" law), Civil Code section 1363.03 does not have a "default" set of election rules to follow if an association fails to adopt rules. Failure to adopt election rules is itself a violation of the law, period.

What Does It Mean for a Vote or Election to Be "Voided?"

The elections law was written to encourage disgruntled members to sue for violations of the elections law and to recover damages, civil penalties and attorneys' fees in the process. Moreover, the legislature has also given the courts the option to "void" results of an election. This carries huge risks for associations that many boards do not fully appreciate.

- A Board Elected Without Election Rules in Place

Civil Code section 1363.09 provides that a member of an association may bring a civil action for a violation of the elections law (including the fact that an election was conducted without election rules in place) within "one year of the date the cause of action accrues." If the cause of action "accrues" when a board is elected in violation of the law, and the election is subsequently voided, any action taken by the board in the interim may be invalidated. Considering the number of actions a board of directors takes in an average year (including collection and enforcement efforts, vendor contracts, etc.), the business of an association could be irreparably harmed if every action taken by a board was subsequently invalidated.

- Special Assessment Voted/Approved Without Election Rules in Place

Similarly, a huge potential risk exists in voting on a special assessment without election rules in place. If, for example, a large special assessment was approved by a member vote (in the absence of election rules), an owner did not pay, and an association attempted to collect the assessment via lien and foreclosure or obtaining a court judgment, the owner could claim that the assessment was invalid because the vote (to approve the special assessment) was conducted without election rules. A judge could void the special assessment vote altogether. As a result, the board's ability to collect a special assessment from owners (and subsequently pay vendors for the work that was the subject of the special assessment) would be severely compromised.

- Governing Documents Approved Without Election Rules in Place

If governing documents are approved by member vote without election rules in place, that vote could be voided and the documents invalidated. The practical effect of such an action

is unclear, especially if the prior vote was to approve CC&Rs and the approved CC&Rs were already recorded.

We are aware of one small claims case in Santa Clara County in which a homeowner challenged a vote to approve governing documents. Although the association had adopted election rules in that case, the homeowner argued that the vote was conducted in violation of the rules. The small claims judge ruled in favor of the homeowner and ruled that the documents were "of no effect." The practical effect of this small claims action is unclear because the CC&Rs had already been recorded, but the moral of the story is that it is very easy for homeowners to make these challenges in court.

Small Claims or Superior Court?

Civil Code section 1363.09 authorizes a member of an association to bring a "civil action" for declaratory or equitable relief for violations of the election law, to recover attorneys' fees and court costs, and to recover a civil penalty of up to \$500 for each violation of the law. The term "civil action" is not defined. Moreover, Civil Code section 1363.09(c) also specifically provides that a cause of action under section 1363.03 with respect to access to association resources, the receipt of a ballot by a member, or the counting, tabulation or reporting of or access to ballots may be brought in small claims if the amount of the demand does not exceed the jurisdiction of the court.

"OK, You've Convinced Us, But We Can Draft the Rules Ourselves"

Our firm has defended associations in election challenges where the board opted to draft (or have an individual director draft) election rules without legal counsel to save money. That decision resulted in each association spending far more in attorneys' fees to defend the association and the rules themselves than it would have cost to simply hire an attorney to draft the rules on the association's behalf.

Drafting election rules is not as simple as incorporating some language from the statute. Election rules must be drafted so that they comply with the law and must be tailored to work with the association's other governing documents. Because all governing documents are different, election rules are also not "one size fits all."

Conclusion

If you are a manager, make sure that every association you manage has election rules. If you are a board member, make sure your association has election rules. If election rules have not been adopted, the immediate preparation, distribution and adoption of election rules should be the association's top priority before any subsequent vote is conducted.