

Legal Changes for HOA Elections

BY SANDRA L. GOTTLIEB, ESQ., CCAL

The new election law is generating a lot of questions and a lot of commotion amongst community association industry professionals. The timing of the bill and its requirements cause for swift movement for many associations throughout the state.

For any elections held after January 1, 2020, the new law requires that all Election Rule changes must be made more than 90 days prior to an election (including director elections, special assessment votes, governing document amendments, and other votes that require secret balloting). In other words, this needs to be an agenda item at your next board meeting if you have an annual meeting after the beginning of the year.

The new law requires Election Rules to include several statutory statements/requirements; we have listed these below. Note that because the changes are required by the new law, directly adding the newly required statutory language to your Election Rules will arguably not invoke the 28-day member comment period for rule changes, meaning an association would be able to make changes without the member comment period. However, we don't believe this is advisable or practical, considering that making



changes to rules is almost always a substantive process and some of the key parts of the new law are optional in nature and will in fact require the statutorily required 28-day member comment.

While the new law restricts what board member qualifications an association can require, here are some of the qualifications that associations can, but are not obligated to impose. Remember, the following qualifications must be in the Election Rules in order to enforce them.

- An association may require a nominee for a board seat to be current in the payment of regular and special assessments (as long as board members are also subject to these requirements) and provided that
 - The nominee hasn't paid such assessments under protest.
 - The nominee isn't subject to an approved payment plan.
- An association may disqualify a nominee if that person would be serving at the same

time as another person who holds joint ownership in the same separate interest who is either already nominated or an incumbent director.

- An association may disqualify a nominee who has been a member of the association for less than one year.
- An association may disqualify a nominee that has a past criminal conviction that would prevent the association from purchasing or maintaining a fidelity bond.

Associations will need to further review its election rules to ensure that they comply with the following statutory requirements or contain the following statements:

- Voting rights can no longer be suspended, the only basis for which an association can withhold a member's ballot is for a person not being a member at the time when ballots were distributed.

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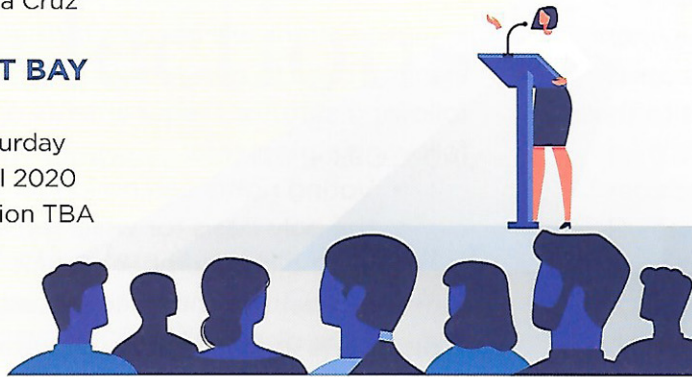
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- An association cannot deny a ballot to or from a person with a general power of attorney for a member.
- Under duties for the inspector of election, it must include a statement that the inspector of election must deliver, or cause to be individually delivered to each member, at least 30 days before an election, both the ballots and either a copy of the election rules or a statement in 12-point font that reads, "the rules governing this election may be found here {insert web address}." Read: if the association doesn't have a website, it should

consider establishing one if it will cost less to maintain it than printing costs for the rules for each vote the association holds requiring a secret ballot under the civil code.

- Election rules may no longer permit 3rd parties who are under contract with the association to act as an inspector of election. Read: managers are no longer permitted to be an inspector, so budget accordingly.

Election rules will also need to contain the following notice requirements:

- General notice of the procedure and deadline for submitting a nomination shall be issued at least 30 days before the nomination deadline (unless individual

notice has been requested by the member).

- General notice of the following shall be made at least 30 days before ballots are distributed (unless individual notice has been requested by the member).
- The date and time by which and the physical address where ballots are to be returned by mail or handed to the inspector(s) on the date of the election.
- The date, time and location of the meeting at which ballots will be counted.
- The list of candidates' names that will appear on the ballot.
- A statement that the association must retain election materials, a candidate registration list and a voter list as defined in the statute.
- A statement that members are permitted to verify the accuracy of their individual information on the candidate registration list and the voter list at least 30 days before ballots are distributed; the association or member shall report any errors or omissions to either list to the inspector or inspectors of election, who shall make corrections within 2 business days.
- A statement that pursuant to Civil Code Section 5105, the association must disqualify a nomination for candidacy if the nominee is not a member of the association, except for rights provided to developers under the DRE regulations and the association's CC&Rs.

- A statement that if the title to a separate interest parcel is held by a legal entity that is not a natural person, the governing authority of that legal entity shall have the power to appoint a natural person for voting purposes.
- A statement that the association shall not disqualify a nominee if that person has not been provided the opportunity to engage in internal dispute resolution.
- If the association has any board member qualifications that are no longer permitted under the new law, these may be stricken from the rules without member comment (please see below for additional qualifications).

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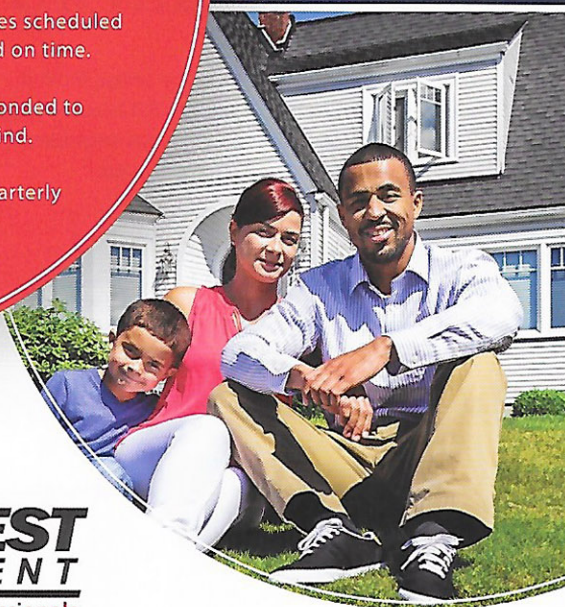
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As previously stated, associations will be required to offer internal dispute resolution to any nominee that it intends to disqualify. If an association fails to do so, that nominee will have the right to be nominated, even if they fail to meet one of the director qualifications.

And finally, under the new law, Civil Code Section 5145 has been amended to require courts to invalidate elections unless, by a preponderance of the evidence, the association can show that its non-compliance with the election laws or its Election Rules did not affect the outcome of the election. Therefore, associations should take extra care to follow the election procedures as it will be difficult to prove through a “preponderance of the evidence” that the violations did not impact the election’s outcome.

Any inconsistencies with the new election laws found in the bylaws will automatically be invalidated. Associations do not need to amend their bylaws solely for this purpose. As long as the election rules comply with the law, it will suffice. Of course, for clarity and to avoid conflicts, amendments to the bylaws should be addressed.

It should be clear that most associations will need to amend their Election Rules to ensure compliance with the new law. Time is of the essence.



Sandra L. Gottlieb, Esq., CCAL is the managing partner and head of the transactional division of SwedelsonGottlieb, a law firm that exclusively represents homeowners’ associations throughout California.