

RESOLUTION 02-01-2020

DIGEST

Homeowners' Associations: Election Length and Write-in Candidates

Amends Civil Code sections 5105 and 5115 to reduce the time for homeowners' associations' elections from 90 days to 60 days, and to require that all write-in candidates be qualified.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Civil Code sections 5105 and 5115 to reduce the time for homeowners' associations' elections from 90 days to 60 days, and to require that all write-in candidates be qualified. This resolution should be disapproved because the elimination of the 30-day time period to review a candidate list may deny potential candidates an opportunity to dispute the candidate list with the inspector(s) before ballots are sent to members.

Current law allows for write-in candidates for homeowners' associations' elections, which permits candidates to be elected even if they missed the deadline for submitting a nomination. (Civ. Code, § 5105, subd. (f).) Current law requires that at least 30 days prior to ballots being distributed in any homeowners' associations' election, a general notice must be provided to members, unless individual notice has been requested, which includes the date and time for ballots to be returned, the date and time of the meeting at which the ballots will be counted, the procedure and deadline for submitting a nomination, the list of names that will appear on the ballot, and the list of voters. (Civ. Code, § 5115, subd. (b).) As of January 1, 2020, current law also requires ballots and a copy of the election rules to be delivered to each member of an association at least 30 days before an election. (Civ. Code, § 5115, subd. (c).)

This resolution would require that notice of when and how voting will take place, and the list of candidates' names, be provided along with the ballot itself, rather than separately providing a general notice at least 30 days before the ballot is provided to members. These changes would essentially provide each member of an association with the notice and ballot together and thereby shorten the time-period of election by 30 days. In addition to limiting members' opportunity to vote, shortening this time-frame could prevent potential candidates an opportunity to dispute the candidate list with the inspector(s) before ballots are sent to members. This resolution also seeks to confirm that write-in candidates for an election must still be qualified at the time of the election, according to applicable law and the governing documents of the association.

This resolution is similar to Senate Bill 323 (Wieckowski) (2019-2020 Reg. Sess.), which passed the Legislature and was signed by the Governor on October 12, 2019. (Civ. Code, § 5115.) That bill amended Civil Code section 5115 to require associations, effective January 1, 2020, to provide general notice of the procedure and deadline for submitting a nomination as a candidate at least 30 days before the deadline for submitting the nomination. (Civ. Code, § 5115, subd. (a).)

The bill’s author incorporated the time period to ensure voting rights for members are preserved and that association boards could not prevent candidates from running who otherwise would be qualified. (Sen. Com. on Housing, Analysis of Sen. Bill No. 323 (2019-2020 Reg. Sess.) as amended Apr. 9, 2019.)

The proponents of SB 323 asserted that “incumbent boards have seized upon this discretion to undermine the democratic function of the elections by, among other things, disqualifying members from running for the board, limiting members’ ability to vote, and rigging the balloting procedures.” (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 323 (2019-2020 Reg. Sess.) April 2, 2019, p. 1.) The proponents of SB 323 further reported “numerous incidents in which HOA members were left unaware that any election was taking place. As a result, these members could not run for the board or voice much of an opinion in the governance of the association.” (*Id.* at p. 12.)

This resolution seeks to undo the changes to the time period effected by the passage of SB 323. These changes became law this year and there no evidence that the newly enacted law has caused harm necessitating further amendment. While it is understandable that there may be some benefit to reducing the overall time required to hold an election, members of an association who may be interested in running for the board would be limited in seeking nomination if they were not aware of the election until a ballot was received. The requirement of an additional 30 days enacted by SB 323 acts as a stopgap to help ensure those who are qualified can be added to the candidate list. That additional time also assists in addressing concerns about candidates being qualified for election.

Therefore, this resolution should be disapproved.

This resolution is related to Resolution 02-02-2020.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code sections 5105 and 5115 to read as follows:

- 1 § 5105
- 2 (a) An association shall adopt operating rules in accordance with the procedures
- 3 prescribed by Article 5 (commencing with Section 4340) of Chapter 3, that do all of the
- 4 following:
- 5 (1) Ensure that if any candidate or member advocating a point of view is provided access
- 6 to association media, newsletters, or internet websites during a campaign, for purposes that are
- 7 reasonably related to that election, equal access shall be provided to all candidates and members
- 8 advocating a point of view, including those not endorsed by the board, for purposes that are
- 9 reasonably related to the election. The association shall not edit or redact any content from these
- 10 communications, but may include a statement specifying that the candidate or member, and not
- 11 the association, is responsible for that content.
- 12 (2) Ensure access to the common area meeting space, if any exists, during a campaign, at
- 13 no cost, to all candidates, including those who are not incumbents, and to all members

14 advocating a point of view, including those not endorsed by the board, for purposes reasonably
15 related to the election.

16 (3) Specify the qualifications for candidates for the board and any other elected position,
17 subject to subdivision (b), and procedures for the nomination of candidates, consistent with the
18 governing documents. A nomination or election procedure shall not be deemed reasonable if it
19 disallows any member from nominating themselves for election to the board.

20 (4) Specify the voting power of each membership, the authenticity, validity, and effect of
21 proxies, and the voting period for elections, including the times at which polls will open and
22 close, consistent with the governing documents.

23 (5) Specify a method of selecting one or three independent third parties as inspector or
24 inspectors of elections utilizing one of the following methods:

25 (A) Appointment of the inspector or inspectors by the board.

26 (B) Election of the inspector or inspectors by the members of the association.

27 (C) Any other method for selecting the inspector or inspectors.

28 (6) Allow the inspector or inspectors to appoint and oversee additional persons to verify
29 signatures and to count and tabulate votes as the inspector or inspectors deem appropriate,
30 provided that the persons are independent third parties.

31 (7) Require retention of, as association election materials, both a candidate registration
32 list and a voter list. The voter list shall include name, voting power, and either the physical
33 address of the voter's separate interest, the parcel number, or both. The mailing address for the
34 ballot shall be listed on the voter list if it differs from the physical address of the voter's separate
35 interest or if only the parcel number is used. The association shall permit members to verify the
36 accuracy of their individual information on both lists at least 30 days before the ballots are
37 distributed. The association or member shall report any errors or omissions to either list to the
38 inspector or inspectors who shall make the corrections within two business days.

39 (b) An association shall disqualify a person from a nomination as a candidate for not
40 being a member of the association at the time of the nomination.

41 (1) This subdivision does not restrict a developer from making a nomination of a
42 nonmember candidate consistent with the voting power of the developer as set forth in the
43 regulations of the Department of Real Estate and the association's governing documents.

44 (2) If title to a separate interest parcel is held by a legal entity that is not a natural person,
45 the governing authority of that legal entity shall have the power to appoint a natural person to be
46 a member for purposes of this article.

47 (c) Through its bylaws or election operating rules adopted pursuant to subdivision (a) of
48 Section 5105 only, an association may disqualify a person from nomination as a candidate
49 pursuant to any of the following:

50 (1) Subject to paragraph (2) of subdivision (d), an association may require a nominee for
51 a board seat, and a director during their board tenure, to be current in the payment of regular and
52 special assessments, which are consumer debts subject to validation. If an association requires a
53 nominee to be current in the payment of regular and special assessments, it shall also require a
54 director to be current in the payment of regular and special assessments.

55 (2) An association may disqualify a person from nomination as a candidate if the person,
56 if elected, would be serving on the board at the same time as another person who holds a joint
57 ownership interest in the same separate interest parcel as the person and the other person is either
58 properly nominated for the current election or an incumbent director.

59 (3) An association may disqualify a nominee if that person has been a member of the
60 association for less than one year.

61 (4) An association may disqualify a nominee if that person discloses, or if the association
62 is aware or becomes aware of, a past criminal conviction that would, if the person was elected,
63 either prevent the association from purchasing the fidelity bond coverage required by Section
64 5806 or terminate the association's existing fidelity bond coverage.

65 (d) An association may disqualify a person from nomination for nonpayment of regular
66 and special assessments, but may not disqualify a nominee for nonpayment of fines, fines
67 renamed as assessments, collection charges, late charges, or costs levied by a third party. The
68 person shall not be disqualified for failure to be current in payment of regular and special
69 assessments if either of the following circumstances is true:

70 (1) The person has paid the regular or special assessment under protest pursuant to
71 Section 5658.

72 (2) The person has entered into a payment plan pursuant to Section 5665.

73 (e) An association shall not disqualify a person from nomination if the person has not
74 been provided the opportunity to engage in internal dispute resolution pursuant to Article 2
75 (commencing with Section 5900) of Chapter 10.

76 (f) Notwithstanding any other law, through its bylaws or election operating rules adopted
77 pursuant to subdivision (a) of Section 5105 only, an association may provide for the nomination
78 of candidates from the floor of membership meetings or nomination by any other
79 manner. ~~Those~~ Such bylaws or election operating rules may permit write-in candidates for
80 ballots, subject to the requirement that each candidate is qualified at the time of the election,
81 according to applicable law and the governing documents.

82 (g) Notwithstanding any other law, the rules adopted pursuant to this section shall do all
83 of the following:

84 (1) Prohibit the denial of a ballot to a member for any reason other than not being a
85 member at the time when ballots are distributed.

86 (2) Prohibit the denial of a ballot to a person with general power of attorney for a
87 member.

88 (3) Require the ballot of a person with general power of attorney for a member to be
89 counted if returned in a timely manner.

90 (4) Require the inspector or inspectors of elections to deliver, or cause to be delivered, at
91 least 30 days before an election, to each member ~~both~~ all of the following documents:

92 (A) The ballot or ballots.

93 (B) The election notice, as required by section 5115.

94 (C) A copy of the election operating rules. Delivery of the election operating rules may
95 be accomplished by either of the following methods:

96 (i) Posting the election operating rules to an internet website and including the
97 corresponding internet website address on the ballot together with the phrase, in at least 12-point
98 font: "The rules governing this election may be found here:"

99 (ii) Individual delivery.

100 (h) Election operating rules adopted pursuant to this section shall not be amended less
101 than 90 days prior to an election.

102 § 5115
103

104 (a) An association shall provide general notice of the procedure and deadline for
105 submitting a nomination at least 30 days before any deadline for submitting a nomination.
106 Individual notice shall be delivered pursuant to Section 4040 if individual notice is requested by
107 a member.

108 ~~(b) An association shall provide general notice of all of the following at least 30 days~~
109 ~~before the ballots are distributed.~~A notice with the following information shall be distributed
110 with each ballot:

111 (1) The date and time by which, and the physical address where, ballots are to be returned
112 by mail or handed to the inspector or inspectors of elections.

113 (2) The date, time, and location of the meeting at which ballots will be counted.

114 (3) The list of all candidates' names that will appear on the ballot.

115 ~~(4) Individual notice of the above paragraphs shall be delivered pursuant to Section 4040~~
116 ~~if individual notice is requested by a member.~~

117 (c) Ballots and two preaddressed envelopes with instructions on how to return ballots
118 shall be mailed by first-class mail or delivered by the association to every member not less than
119 30 days prior to the deadline for voting. In order to preserve confidentiality, a voter may not be
120 identified by name, address, or lot, parcel, or unit number on the ballot. The association shall use
121 as a model those procedures used by California counties for ensuring confidentiality of vote by
122 mail ballots, including all of the following:

123 (1) The ballot itself is not signed by the voter, but is inserted into an envelope that is
124 sealed. This envelope is inserted into a second envelope that is sealed. In the upper left-hand
125 corner of the second envelope, the voter shall sign the voter's name, indicate the voter's name,
126 and indicate the address or separate interest identifier that entitles the voter to vote.

127 (2) The second envelope is addressed to the inspector or inspectors of elections, who will
128 be tallying the votes. The envelope may be mailed or delivered by hand to a location specified by
129 the inspector or inspectors of elections. The member may request a receipt for delivery.

130 (d) A quorum shall be required only if so stated in the governing documents or other
131 provisions of law. If a quorum is required by the governing documents, each ballot received by
132 the inspector of elections shall be treated as a member present at a meeting for purposes of
133 establishing a quorum.

134 (e) An association shall allow for cumulative voting using the secret ballot procedures
135 provided in this section, if cumulative voting is provided for in the governing documents.

136 (f) Except for the meeting to count the votes required in subdivision (a) of Section 5120,
137 an election may be conducted entirely by mail unless otherwise specified in the governing
138 documents.

139 (g) In an election to approve an amendment of the governing documents, the text of the
140 proposed amendment shall be delivered to the members with the ballot.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: This resolution addresses two main issues faced by Common Interest Development Associations, commonly known as "homeowners associations" (HOAs). One issue is the length of time to carry out an election. For example, there are currently three 30-day time

blocks. First, there is a “call for candidates” period that lasts at least 30 days. Second, there is an “election notice” period, that must occur at least 30 days before the ballots are distributed. Third, the ballot period must last at least 30 days. The sum of these sequential periods lasts 90 days. A second issue this resolution addresses is about disqualifying candidates for the position of Director. California created a mandatory requirement that all HOAs must disqualify candidates who are not members at the time of their nominations. See Civil Code sections 5100(g)(3)(A)(for associations with 6,000 or more units) and 5105(b). In addition, California created four permissive disqualifications that each HOA may choose to adopt. See Civil Code sections 5100(g)(B)(i-iv)(for associations with 6,000 or more units) and 5105(c)(1-4). However, Civil Code section 5105(f) allows each HOA to allow write-in candidates on the ballots, which could obviate the Association’s ability to verify that each candidate is “qualified” for the position of Director.

The Solution: For the first issue addressed, about shortening the election period, HOAs should be able to carry out elections over relatively short periods of time so that their routine operations will continue to flow. The overall HOA election process can be shortened to just over 60 days if the State of California would consolidate the second and third time periods described above. Somewhere between the initial “call for candidates” period, which must last at least 30 days, and the final 30-day ballot period, the Association can verify whether each candidate is qualified. Because the Association would be reviewing its own records about each candidate, the verification process can be completed quickly. This resolution would allow the entire election process to be carried out in just over 60 days, as opposed to the current 90-day period. This resolution would also allow each HOA to comply with the 90-day requirement in Corporations Code section 7511, for recall elections. For the second issue addressed, about write-in candidates, this resolution would require write-in candidates to be “qualified” candidates.

CURRENT OR PRIOR RELATED LEGISLATION

Civil Code sections 5105 & 5115 Amended by Stats. 2019, Ch. 848, Sec. 4 (SB 323) Effective Jan. 1, 2020.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

AUTHOR AND/OR PERMANENT CONTACT: Catherine Rucker; 448 Ignacio Blvd., #124, Novato, CA 94949; 415-246-6647; catherinerucker@me.com

RESPONSIBLE FLOOR DELEGATE: Catherine Rucker

RESOLUTION 02-02-2020

DIGEST

Homeowners' Associations: Membership Requirement for Appointed Directors

Amends Corporations Code section 7224 to require that any person appointed to the board of a common interest development association have the same qualifications as an elected director.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Corporations Code section 7224 to require that any person appointed to the board of a common interest development association have the same qualifications as an elected director. This resolution should be approved in principle because it harmonizes the Corporations Code provision with recent changes to the common interest development law, particularly Civil Code section 5105.

The common interest development law generally provides that such developments are to be governed by owners' associations (Civ. Code, § 4800) which, whether incorporated or not, may exercise the powers granted to a nonprofit mutual benefit corporation under the Corporations Code. (Civ. Code, § 4805, subd. (a).) Membership in the association is based on ownership of one or more separate interests in the development. (Civ. Code, § 4160.)

Corporations Code section 7224 pertains to the appointment of directors of nonprofit mutual benefit corporations in the event of vacancies. It does not include qualification requirements for directors appointed by the board, which are the same as the qualification requirements for directors who are elected by members.

Effective January 1, 2020 the Legislature amended the common interest development law to, among other things, clarify the qualification requirements for directors of owners' associations. (Stats. 2019, Ch. 848, Sec. 2. (SB 323).) More specifically, subdivision (b) was added to Civil Code section 5105 to provide that a candidate for election as a Director must be a member. Civil Code Section 5105, subdivisions (b)(1) and (2) provide:

(1) This subdivision does not restrict a developer from making a nomination of a nonmember candidate consistent with the voting power of the developer as set forth in the regulations of the Department of Real Estate and the association's governing documents.

(2) If 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 to be a member for purposes of this article.

This resolution adds new subdivision (b) to Corporations Code section 7224 to change the qualification requirements for appointed directors of common interest development associations, so that their qualifications match the qualifications required for directors elected through membership vote.

This resolution should be approved in principle because it will provide consistency in the law and procedures for common interest developments and further the legislative intent for directors in common interest developments to be eligible members of the owners' association, regardless of whether a director is elected or appointed.

Therefore, this resolution should be approved in principle.

This resolution is related to Resolution 02-01-2020.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Corporations Code section 7224 to read as follows:

- 1 § 7224
2 (a) Unless otherwise provided in the articles or bylaws and except for a vacancy created
3 by the removal of a director, vacancies on the board may be filled by approval of the board
4 (Section 5032) or, if the number of directors then in office is less than a quorum, by (1) the
5 unanimous written consent of the directors then in office, (2) the affirmative vote of a majority of
6 the directors then in office at a meeting held pursuant to notice or waivers of notice complying
7 with Section 7211, or (3) a sole remaining director. Unless the articles or a bylaw approved by
8 the members (Section 5034) provide that the board may fill vacancies occurring in the board by
9 reason of the removal of directors, or unless the corporation has no members pursuant to Section
10 7310, such vacancies may be filled only by approval of the members (Section 5034).
11 (b) Notwithstanding subdivision (a), for a common interest development subject to this
12 part, the board shall not approve nor appoint any person as a director to fill a vacancy on a
13 board unless the person to be approved or appointed is a member and otherwise meets all
14 qualifications prescribed by law and by the governing documents.
15 ~~(b)~~ (c) The members may elect a director at any time to fill any vacancy not filled by the
16 directors.
17 ~~(e)~~ (d) Any director may resign effective upon giving written notice to the chairman of
18 the board, the president, the secretary or the board of directors of the corporation, unless the
19 notice specifies a later time for the effectiveness of such resignation. If the resignation is
20 effective at a future time, a successor may be elected to take office when the resignation becomes
21 effective.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: On January 1, 2020, the State of California amended Civil Code sections 5100 & 5105 to require Common Interest Development Associations, commonly known as “homeowners associations (HOAs),” to disqualify a person from being a candidate for a position of Director if the person was not a member at the time of the nomination. See Civil Code section 5100(g)(1) and section 5105(b). However, there is a loop-hole to this new requirement because HOA Boards of Directors are still able to appoint non-members as Directors. Non-Members do not pay HOA assessments (dues) and they do not have property interests in HOA developments. As a result, non-members should not serve as Directors, by election or by appointment. Although the Davis-Stirling Act has an article about member elections for HOAs in Civil Code sections 5100-5145, HOA Board appointments to fill vacant Director positions are controlled by Corporations Code section 7224.

The Solution: Corporations Code section 7224 should be amended to require HOA Boards to only appoint members to vacancies for Director positions.

CURRENT OR PRIOR RELATED LEGISLATION

Senate Bill No. 323 (2019-2020 Reg. Sess.)(which requires HOAs to eliminate all candidates who are not members at the time of nomination); Senate Bill No. 754 (2019-202 Reg. Sess.)(which added Corporations Code section 7522(e) to allow HOA elections by acclamation).

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

AUTHOR AND/OR PERMANENT CONTACT: Catherine Rucker; 448 Ignacio Blvd., #124, Novato, CA 94949; phone: 415-246-6647; catherinerucker@me.com

RESPONSIBLE FLOOR DELEGATE: Catherine Rucker