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CAI - Channel Islands Seminar

"The Ever Changing World of Elections: The Role of Inspector of Elections, Recalls and Election by Acclamation"

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Whether you are a community association manager, member of the Board of Directors, or an attorney servicing the Homeowner Association industry, we are all far too familiar with the issues involving elections, recalls and election by acclamation.

The election process evolution was largely driven by the goal of promoting greater access to the election process and transparency, so as to avoid certain historic problems such as backroom counting of ballots which created uncertainty as to the legitimacy of the actual outcome. The new election process also increases members' rights to serve on the Board of Directors by limiting the basis for disqualification of members.

This article will focus on three (3) main elements, i.e. the role and purpose of the Inspectors of Election; the recall process of one or more members of the Board of Directors and the newest of issues, election by acclamation regardless of the size of the Association.

The appointment of the Inspector of Elections should occur early in the process. In order to serve as an Inspector of Elections, you must be an independent third-party as detailed in Civil Code Section 5110(b). As such, the Association's management company cannot serve as Inspector of Elections.

Generally the Board appoints the independent third party to act as the Inspector(s) of Election, which shall be either one (1) or three (3) in number. Pursuant to Civil Code Section 5110(b) an independent third-party includes, but is not limited to, a volunteer poll worker with the County Register of Voters, a licensee of the California Board of Accountancy, or notary public. In addition, an independent third-party may be a member of the Association, but may not be a director or a candidate for director, or be related to a director or to a candidate for director. As referenced above, an independent third-party may not be a person, business entity, or subdivision of the business who is currently employed or under contract to the Association for any compensable services other than serving as an Inspector of Elections.

Pursuant to Section 5110(C) Inspector of Elections functions include the following:

(1) Determining the number of memberships entitled to vote and the voting power of each.
(2) Determine the authenticity, validity and effect of proxies, if any.
(3) Receive ballots.
(4) Hear and determine all challenges and questions in any way arising out of or in connection with the right to vote.
(5) Count and tabulate all votes.
(6) Determine when polls shall close, consistent with the governing documents.
(7) Determine the tabulated results of the election.
(8) Perform any act as may be proper to conduct the election with fairness to all members in accordance with this article, the Corporations Code, and all applicable rules of the Association regarding the conduct of the election that are not in conflict with this article.

Pursuant to Civil Code Section 5125, the sealed ballots, signed voter envelopes, voter list, proxies, and candidate registration list shall at all times be in the custody of the Inspector of Elections, or in a location designated by the inspector, until after the tabulation of the vote and until the time allowed by Section 5145 (within one year of the date that the Inspector of Elections notifies the board and membership of the election results or the cause of action accrues, whichever is later) for challenging the election has expired. At that time, custody shall be transferred to the association. In the event of a recount or other challenge to the election process, the Inspector of Elections shall, upon written request, make the ballots available for inspection, and review by an association member or the member's authorized representative. Any recount shall be conducted in a manner that preserves the confidentiality of the vote.

Importantly, Inspector of Election shall perform all duties impartially, in good faith, to the best of the Inspector of Election's ability, as expeditiously as is practical and in a manner that protects the interests of all members of the Association.

The decision of the Inspector(s) of Elections, based upon the majority decision of the inspectors (if there are three inspectors) shall be prima facie evidence of the facts stated in any report made by the inspectors regarding the election.

A question often posed is what may the Inspector(s) of Elections delegate to others, and whether the management company can be involved in the process of receiving the members' ballots on behalf of the Inspector of Elections. There is nothing set forth within the *Davis-Stirling Act* that states that a manager cannot be the recipient of or the ballot collector on behalf of the Inspector of Elections. However the ballot

collector cannot tamper with, open up or do anything else with the ballot other than to collect them and deliver them to the Inspector of Elections.

Annual elections must be conducted in compliance with Civil Code Sections 5100, et seq. A longstanding issue is the cost of conducting an election and its necessity under certain circumstances, specifically when the number of members running for the Board is equal to or less than the number of seats that are available. Basically, why does an Association have to go through the entire election process, which is costly in both time and money, if it is a fait accompli that the nominees will be elected because the number of nominees are equal to or less than the actual number of open board seats. This issue was resolved in 2022, via a new law allowing election by acclamation as long as specific requirements are met.

Specifically, Civil Code Section 5103 pertains to election by acclamation. Unfortunately, the process is not as simple as stating that if there are three (3) open Board seats and three (3) people are running, it is an uncontested election and the new Board is automatically put in place by acclamation. The Code requires a significant number of steps to be taken including knowing the historical context of prior annual meetings as well as issuing numerous notice requirements. Generally, Civil Code Section 5103 requires the following:

1. Initially, in order for the process of election by acclamation to be applicable, as of the deadline for submitting nominations the number of qualified candidates cannot be more than the number of vacancies to be elected, as determined by the inspectors of election. In such case, the Association may, but is not required to, consider qualified candidates to be elected by acclamation if all of the following conditions have been met:

2. The Association has held a regular election for the directors in the past three (3) years with the time period being calculated from the date ballots were due in the last full election to the start of voting for the proposed new election. As such, if there has not been a regular election for directors in the last three (3) years, then there is no need to further consider election by acclamation since it will be inapplicable. However, if there has been a regular election for directors in the last three (3) years then the following items must also be met.

3. The Association must have provided individual notice of the election and the procedures for nominating candidates as follows:

- Initial notice to the members at least ninety (90) days before the deadline for submitting nominations provided for in Section 5115(a) of the Civil Code. This initial notice shall include all of the following:

  (a) The number of Board positions that will be filled at the election;

(b) The deadline for submitting nominations;
(c) The manner in which nominations can be submitted;
(d) A statement informing members that if, at the close of the time period for making nominations, there are the same number or fewer qualified candidates as there are Board positions to be filled, then the Board of Directors may, after voting to do so, seat the qualified candidates by acclamation without balloting.

In addition to the above, the Association must provide a reminder notice between seven (7) and thirty (30) days before the deadline for submitting nominations as provided for in Section 5115(a). This reminder notice shall include all the following:

(a) The number of board positions to be filled at the election.
(b) The deadline for submitting nominations.
(c) The manner in which nominations can be submitted.
(d) A list of the names of all the qualified candidates to fill the Board positions as of the date of the reminder notice.
(e) A statement reminding the members that if at the close of the time period for making nominations, there are the same number or fewer qualified candidates as there are Board positions to be filled, then the Board of Directors may, after voting to do so, seat the qualified candidates by acclamation without balloting. This statement is not required if, at the time that the reminder notice will be delivered, the number of qualified candidates already exceeds the number of Board positions to be filled.

Further, the Association must provide, within seven (7) business days of receiving a nomination, a written or electronic communication acknowledging the nomination to the member who submitted the nomination and a communications to the nominee indicating either of the following: (1) The nominee is a qualified candidate for the board or (2) the nominee is not a qualified candidate for the board, the basis for disqualification and the procedure pursuant to Civil Code 5900 by which the nominee may appeal the disqualification.

In addition to the requirements set forth above, the Association must also follow the requirements below:

1. The Association permits all candidates to run if nominated, except for nominees disqualified for running as allowed or required pursuant to Section 5105(b-d).
2. Notwithstanding paragraph (1), an Association may disqualify a nominee if the person has served the maximum number of terms or sequential terms allowed by the Association.

3. If an association disqualifies a nominee pursuant to the subdivision, an Association in its election rules shall also require a director to comply with the same requirements.

Finally, if all of the above has been satisfied, the Association's Board then votes to consider the qualified candidates to be elected by acclamation at a duly noticed meeting pursuant to Article 2 (commencing with Section 4900) for which the agenda item reflects the name of each qualified candidate that will be seated by acclamation if the item is approved.

It is important to note that if the Association's governing documents allow for nominations from the floor or write in candidates on the ballot (Civil Code Section 5105(f)), election by acclamation is inapplicable.

Unfortunately, election by acclamation is a long drawn out process taking approximately 105 plus days.

There is no obligation to amend your Association Bylaws or Election Rules so as to allow election by acclamation since it is statutorily permitted pursuant to Civil Code Section 5103 regardless if it is included in your Association Bylaws or Election Rules.

A historically difficult and complex issue involves recall/removal of one or more members of the Board of Directors. The Corporations Code deals with recalls with variables including the size of the association; whether there is one (1) or more Board members being recalled; whether cumulative voting is allowed in the Board election process, etc.

A recall arises when a petition signed by 5% or more of the membership seeks a special meeting to remove one or more members of the Board of Directors.

Corporations Code section 7510(e) states: "Special meetings of members for any lawful purpose may be called by the Board, the chair of the Board, the president, or such other persons, if any, as are specified in the bylaws. In addition, special meetings of the members for any lawful purpose may be called by 5 percent or more of the members."

Once a petition signed by 5 percent or more of the membership is presented to the Board, the Board is under strict timelines to schedule a recall meeting.

Upon receipt of the petition to conduct a special meeting for the purpose of recall, the Board is required within twenty (20) days after receipt of the membership petition to schedule the special meeting. Specifically, Civil Code Section 7511(c) states as follows: "Upon request in writing to the corporation addressed to the attention of the chair of the Board, president, vice president, or secretary by any person (other than the

Board) entitled to call a special meeting of members, the officer forthwith shall cause notice to be given to the members entitled to vote that a meeting will be held at a time fixed by the Board not less than 35 nor more than 90 days after the receipt of the request. If the corporation is a common interest development, as defined in Section 4100 of the Civil Code, the corporation shall cause notice to be given to the members entitled to vote that a meeting will be held at a time fixed by the Board not less than 35 nor more than 150 days after receipt of the request. If the notice is not given within 20 days after receipt of the request, the persons entitled to call the meeting may give the notice or the superior court of the proper county shall summarily order the giving of the notice, after notice to the corporation giving it an opportunity to be heard. …"

The critical modification to Corporations Code Section 7511(c) is the addition of the exception for a common interest development extending the time to conduct a meeting from no more than 90 days to no more than 150 days. This change/modification allows the Association to evaluate the petition when it is received, confirm the validity of the member signatures and provides time to then schedule the recall meeting without running afoul of what had originally been a 90 day deadline to complete the process.

Corporations Code Section 7222(a) makes clear that the membership has authority to remove one or more members of the Board of Directors with or without cause via a secret ballot. Corporations Code 7222(a) states as follows: "Subject to subdivisions (b) and (f), any or all directors may be removed without cause if: (1) In a corporation with fewer than 50 members, the removal is approved by a majority of all members (Section 5033). (2) In a corporation with 50 or more members, the removal is approved by the members (Section 5034), i.e. a majority of a quorum." It should be noted that board members who are the subject of the recall can run as candidates to be elected to the board if the recall is successful.

Corporation Code Section 5033 states as follows: "Approval, by (or approval of) a majority of all members means approval by an affirmative vote (or written ballot in conformity with Section 7513, or Section 9413) of a majority of the votes entitled to be cast. Such approval shall include the affirmative vote of a majority of the outstanding memberships of each class, unit or grouping of members, entitled, by any provision of the articles or bylaws… to vote as a class…"

Corporation Code Section 5034 states as follows: "Approval by (or approval of) the members" means approved or ratified by the affirmative vote of a majority of the votes represented and voting at a duly held meeting at which a quorum is present (which affirmative votes also constitute a majority of the required quorum) or written ballot in conformity with Section 5513, 7513, or 9413 or by the affirmative vote or written ballot of such greater proportion, including all of the votes of the memberships of any class, unit, or grouping of members as may be provided in the bylaws (subdivision (e) of

Section 5151, subdivision (e) of Section 7151, or subdivision (e) of Section 9151) or in Part 2, Part 3, Part 4 or Part 5 for all or any specified member action."

The first issue with a removal turns on whether the removal is of the entire Board of Directors or simply a single director. The second issue is whether the existing Board wishes to conduct the election of a new Board contemporaneously with the recall (if the recall is successful) or to conduct a separate election of a board and commence that process only after the successful recall election. It is our general opinion that the recall and election of new board member(s) should be done contemporaneously, especially if it is the entire board that is the subject of the recall, so as to avoid the risk that the board is recalled but remain on the board until an election is completed months later.

If the recall is for either the entire board or only a single director then everyone knows in advance what is at stake and how many board members potentially could be removed. When this occurs, an Association can use a single ballot in dealing with both a recall and an election of a new board contemporaneously if they so choose. In this instance, the Inspector of Elections will count the ballots with respect to the recall first. If the recall fails then the process ceases at that point and there is no counting of the ballots for the replacement board. Conversely, if the recall succeeds then the Inspector of Elections would proceed forward in counting the ballots for the replacement director(s) and certify the election. In this case, the new director(s) immediately take their seats upon the conclusion of the special meeting.

The benefit of the above process is that if the recall is successful then the new director(s) are contemporaneously voted in, making the process seamless. Again, avoiding having recalled board members(s) remaining in place until a future election is conducted. It should be noted that the Board members elected as part of the recall process serve out the term of the director in which they are replacing.

A more complicated scenario occurs when more than one (1), but less than the entire board, is being recalled. This creates uncertainty as to how many board members, if any, may be successfully recalled.

Where more than one (1), but less than the entire board is subject to the recall, the association could perform back to back or sequential elections by first going through the recall election process. If the recall fails, the process stops and the board remains in place. Conversely, if the recall is successful and some number of directors are in fact recalled then an election to replace the removed board members is required. In this instance, we know the number of open board seats that need to be filled through a new board election. Under this scenario the association will now be starting a new election process to elect new board members which will take 90 plus days to complete. This will leave the board members who have been recalled still on the board since replacement directors have not yet been elected. Again, the recalled board members are remaining

in place. As such they continue to make decisions regarding the association even though they were removed. In addition, if the recalled board members immediately step down the association may have a board that does not have a quorum and therefore cannot function. It should be noted that the remaining board members, i.e. those not recalled, are not allowed to appoint replacement directors since the removed directors had been recalled by the membership. (Corporations Code Section 7224(a).)

Another option where there is more than one (1) but less than the entire Board of Directors subject to recall is to perform a single ballot election. This process is similar to the process identified above when there is the recall of the entire Board or single director, i.e. the number of directors subject to the recall is known. Though using the single ballot to conduct both the recall and election of new Board members (if the recall is successful) has uncertainties because there is more than one (1) but less than the entire board subject to the recall which means that when the members are casting their ballots they do not know exactly the number of open board seats, if any, since it is dependent upon the outcome of how many board members are actually recalled. If cumulative voting is not allowed, the ballot could identify the maximum number of seats that could be available to be filled (if the recall is successful) and then allow the members to have one vote for each possible open seat. As an example, if five (5) members are running and there is ultimately only three (3) board member seats that are vacant as a result of the recall, the candidates with the three (3) highest votes would be the winners and complete the remaining term of the three (3) board members who were recalled. It should be noted that using one (1) ballot for both the recall as well as the election of a new board (if the recall is successful) does not work when cumulative voting is allowed due to the fact that Corporations Code Section 7615 makes clear that the number of votes that a member may cast must be equal to the number of directors to be elected. When the number of potential directors to be elected is unknown until the conclusion of the recall vote, cumulative voting would prevent the use of a single ballot.

The third option when the number of directors to be recalled is greater than one (1) but less than the entire board is to run a contemporaneous/overlapping election. This involves starting both the recall and the election of a replacement board contemporaneously but conducting the recall so as to be completed within approximately 65 days since the recall process can be conducted in a shorter period of time since it does not require, as part of its process, the time required to request nominations from members to serve on the board. Contemporaneously with running the recall process, the election of a replacement board can be conducted and completed (if necessary) within approximately 105 days. As part of the replacement board election, the association would send out its request for nominations which can be done while the recall process is ongoing. The recall would be completed before the ballot for replacement directors is mailed to the membership. Again, if the recall fails then the ballots to elect new board members would not be sent to the membership. If the recall succeeds then the ballots are sent out to membership stating the actual number of board seats that are open as a result of the success of the recall. This process

eliminates the cumulative voting issue since there is certainty as to the number of open board seats as a result of the recall to be voted on. This option also reduces the time gap between the successful recall and election of new board member(s).

Another complexity with recalls is when a single board member is the subject of the recall and the association uses cumulative voting. This situation creates the need for the use of a formula to determine whether the recall can actually be blocked by a minority of the membership. Initially, members must vote to either approve or reject the removal of the single board member.

As stated above, Corporations Code 7222(a) states as follows: "Subject to subdivisions (b) and (f), any or all directors may be removed without cause if: (1) In a corporation with fewer than 50 members, the removal is approved by a majority of all members (Section 5033). (2) In a corporation with 50 or more members, the removal is approved by the members (Section 5034)," i.e. a majority of a quorum.

Even if the members approve the removal of the director, pursuant to Corporations Codes 5033 or 5034, the cumulative voting requirement often included in the Bylaws allows for the blockage of the removal pursuant to Corporations Code Section 7222(b)(1) which states as follows: "In a corporation in which the articles or bylaws authorize members to cumulate their votes pursuant to subdivision (a) of Section 7615, no director may be removed (unless the entire Board is removed) when the votes cast against removal, or not consenting in writing to the removal, would be sufficient to elect the director if voted cumulatively at an election at which the same total number of votes were cast (or, if the action is taken by written ballot, all memberships entitled to vote were voted) and the entire number of directors authorized at the time of the director's most recent election were then being elected."

This allows a smaller percentage of the membership to actually block the removal of a single director.

As such, in dealing with recalls, if petitioners truly want to increase their chance of success of a recall then seeking to recall the entire Board provides for a greater opportunity to accomplish that goal.

The above processes are difficult and confusing at best. As such, great care must be taken to ensure that they are Code compliant so as to avoid the risk of challenge.

Maybe the good old days when members simply showed up at a meeting and raised their hands to vote on matters wasn't so bad!