

Date of Hearing: June 19, 2019

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

David Chiu, Chair

SB 323 (Wieckowski) – As Amended May 24, 2019

SENATE VOTE: 28-8

SUBJECT: Common interest developments: elections

SUMMARY: Makes various changes to the election procedures in common interest developments (CIDs). Specifically, **this bill:**

- 1) Require elections in CIDs to be conducted at a minimum of every four years.
- 2) Require a CID to retain election materials including both a candidate registration list and a voter list.
- 3) Requires the voter list to include the name, voting power, and either the physical address of the voter's separate interest, the parcel number or both. Requires the mailing address for the ballot to be listed on the voter list if it differs from the physical address of the voter's separate interest or if only the parcel number is used.
- 4) Requires a homeowners association (HOA) to make both the registration list and voter list available to a member wishing to verify the accuracy of the member's information on either list at least 30 days before the ballots are distributed.
- 5) Requires a HOA or a member to report any errors or omissions to either the registration list or the voter list to the inspector(s) of elections who shall make corrections within two business days.
- 6) Requires an HOA to disqualify a person from a nomination as a candidate for the board of directors as follows:
 - a) For not being a member of the HOA at the time of the nomination, with the following exceptions:
 - i. A developer may nominate a nonmember candidate consistent with the voting power of the developer; and
 - ii. A separate interest 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 voting in an election.
 - b) A person who has been convicted within the last 20 years of a felony involving accepting, giving or offering to give a bribe, the embezzlement of money, the extortion or theft of money, perjury, or conspiracy to commit those crimes.
- 7) Allows a HOA through its bylaws or election operating rules to disqualify a person from nomination as a candidate if any of the following are true:

- a) If a nominee is not current in the payment of regular assessments. Allows an HOA to require a sitting director to be current on payment of regular assessments;
 - b) If a person who if elected would be serving on the board with another person who holds a joint ownership in the same separate interest as the person or person nominated or an incumbent director;
 - c) If the person has been a member of the HOA for less than a year; and,
 - d) A person for not paying regular assessments, but may not disqualify a nominee for nonpayment of fines, fines renamed as assessments, collection charges, late charges, or costs levied by a third party. Provides that a person may be not disqualified for failure to be current in payment of regular assessments if either of the following circumstances are true:
 - i. The person has paid the regular assessment under protest;
 - ii. The person entered into a payment plan; and,
 - iii. Prohibits an HOA from disqualifying a person who has not been offered an opportunity to engage in internal dispute resolution.
- 8) Requires the election rules of an HOA to do all of the following:
- a) Prohibit the denial of a ballot to a member for any reason other than not being a member at the time with the ballots are distributed;
 - b) Prohibit the denial of a ballot to a person with general power of attorney for a member;
 - c) Require the ballot of a person with general power of attorney for a member to be counted if returned in a timely manner;
 - d) Require the inspector(s) of elections to deliver or cause to be delivered to each member, at least 30 days before an election the following documents:
 - i. The ballot or ballots; and
 - ii. A copy of the election operating rules by either posting the rules on to an internet website or by individual delivery.
- 9) Prohibits the HOA from amending the election operating rules less than 90 days prior to an election.
- 10) Deletes the authority for the HOA to allow the inspector(s) of elections to be employed or under contract by the HOA if expressly authorized by the rules of the HOA.
- 11) Requires an HOA to provide general notice of the procedure and deadline for submitting a nomination at least 30 days before any deadline for submitting a nomination
- 12) Requires an HOA to provide general notice of all of the following at least 30 days before the ballots for an election are distributed:

- a) The date and time by which ballots are to be returned by mail or hand delivered to the inspector of elections and the physical address where they need to be delivered;
 - b) The date, time, and location of the meeting at which ballots will be counted; and,
 - c) The list of all the candidates' names that will be listed on the ballot.
- 13) Requires the inspector(s) to retain signed voter envelopes, voter list, proxies and candidate registration list in addition to the sealed ballots until the tabulation of votes for one year.
- 14) Requires an HOA to retain the following, returned ballots, signed voter envelopes, the voter list of names, parcel numbers and voters to whom ballots were to be sent proxies and the candidate registration and allow a member to inspect and copy these documents.
- 15) Provides that a cause of action for a violation of member elections may be brought in either the Superior Court or, if the demand does not exceed the jurisdictional amount of small claims court, in small claims court.
- 16) Requires a court to void the results of an election upon a finding that the election procedures were not followed, unless the HOA establishes by a preponderance of the evidence that the failure of the HOA to follow this article or the election operating rules were unintentional and did not affect the results of the election.
- 17) Requires a member to be awarded court costs and reasonable attorney's fees incurred for consulting an attorney in connection with this civil action if the member prevails in a civil action in small claims court.
- 18) Prohibits an HOA from filing a civil action regarding a dispute in which a member has requested internal dispute resolution unless the HOA has participated in the specified internal dispute resolution procedure.

EXISTING LAW:

- 1) Provides that an HOA in a CID shall adopt rules relating to board elections that do all of the following:
 - a) Ensure that if any candidate or member advocating a point of view is provided access to association media, newsletters, or Internet Web sites during a campaign, for purposes that are reasonably related to that election, equal access shall be provided to all candidates and members advocating a point of view, including those not endorsed by the board, for purposes that are reasonably related to the election;
 - b) Ensure access to the common area meeting space, if any exists, during a campaign, at no cost, to all candidates, including those who are not incumbents, and to all members advocating a point of view, including those not endorsed by the board, for purposes reasonably related to the election;

- c) Specify the procedures for the nomination of candidates, consistent with the governing documents. A nomination or election procedure shall not be deemed reasonable if it disallows any member from nominating himself or herself for election to the board;
 - d) Specify the qualifications for voting, the voting power of each membership, the authenticity, validity, and effect of proxies, and the voting period for elections, including the times at which polls will open and close, consistent with the governing documents;
 - e) Specify a method of selecting one or three independent third parties as inspector or inspectors of elections, as specified; and,
 - f) Allow the inspector or inspectors to appoint and oversee additional persons to verify signatures and to count and tabulate votes as the inspector or inspectors deem appropriate, provided that the persons are independent third parties.
- 2) Requires, at all times, the sealed ballots to be in the custody of the inspector or inspectors of elections or at a location designated by the inspector or inspectors until after the tabulation of the vote, and until the time allowed for challenging the election has expired, at which time custody shall be transferred to the HOA.
 - 3) Requires the HOA to select an independent third party or parties as an inspector of elections. An independent third party may not be a person, business entity, or subdivision of a business entity who is currently employed or under contract to the HOA for any compensable services unless expressly authorized by the HOA.
 - 4) Permits a member of an HOA to bring a civil action against an HOA for declaratory or equitable relief for a violation of the member elections provisions under the Davis-Sterling Act including but not limited to injunctive relief, restitution, or a combination, within one year of the date the cause of action accrues. Upon a finding that the election procedures were not followed, a court may void the results of the election.
 - 5) Permits a prevailing party in a civil action described in 4) above, to be entitled to reasonable attorney's fees and court costs, and the court may impose a penalty of up to \$500 for each violation.
 - 6) Provides that a cause of action with respect to access to association resources by a candidate or member advocating a point of view, the receipt of a ballot by a member, or the counting, tabulation or reporting of, or access to, ballots for inspection and review after tabulation may be brought in small claims court.
 - 7) Requires an HOA to provide a fair, reasonable, and expeditious procedure for resolving a dispute between an HOA and a member and shall make maximum, reasonable use of available local dispute resolution programs involving a neutral third party, including low-cost mediation programs. The HOA's internal dispute resolution (IDR) procedure, invoked by either party to the dispute, shall, at a minimum, satisfy specified requirements.
 - 8) Prohibits an HOA or a member from filing an enforcement action in the superior court unless the parties have endeavored to submit their dispute to alternative dispute resolution (ADR). This prohibition only applies to an enforcement action that is solely for declaratory,

injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages not in excess of the jurisdictional limits and does not apply to small claims actions or assessment disputes.

FISCAL EFFECT: None.

COMMENTS:

Purpose of this bill: According to the author, “SB 323 is needed to ensure voting rights of members living in HOAs are preserved and not treated as a mere privilege and available for use as an enforcement tool. If HOA boards can strip away voting rights of perceived “problem residents,” who may be seeking to unseat them from their position of power, board members can act with frivolity and impunity in silencing dissent. Just as we defend voting rights in local, state, and national elections, we must also do the same in these HOA elections, whose outcomes ultimately control the day-to-day personal lives of the nearly 1:4 people living in a common interest development in California.”

Background: There are over 52,000 CIDs in the state that comprise over six million housing units, or approximately one quarter of the state's housing stock. CIDs include condominiums, community apartment projects, housing cooperatives, and planned unit developments. They are characterized by a separate ownership of dwelling space coupled with an undivided interest in a common property, restricted by covenants and conditions that limit the use of common area and the separate ownership interests, and the management of common property and enforcement of restrictions by an association. CIDs are governed by the Davis-Stirling Act (the Act) as well as the governing documents of the association, including bylaws, declaration, and operating rules. The Act requires elections to conform to an extensive process, including double stuffed ballots and the selection of one or three independent third parties as an inspector or inspectors of elections. CIDs range in size from four to 30,000; however the vast majority are small -- seventy-five percent are made up of 50 units or less.

CID elections procedures: Under existing law, CID elections must be held by secret ballot and, among other things, an association must adopt rules around campaigning, specifying the qualifications for candidates for the board, qualifications for voting, and the method for selecting independent third-party inspectors. Ballots and two preaddressed envelopes with instructions for returning the ballot are mailed to every member not less than 30 days prior to the deadline for voting. The ballot is inserted into an envelope, which is placed in a second envelope and mailed to the inspectors. The votes are tabulated by the inspectors in public at a properly noticed open meeting of the board or members. The tabulated results must be promptly reported to the board and be recorded in the minutes of the next meeting. Additionally, within 15 days of the election, the board must give general notice to all members of the results of the election. Filling board of directors spots on a CID board can be challenging as many members do not want to dedicate the time to serving on the board. Board membership also requires enforcing the laws governing CIDs on neighbors, this can include engaging in dispute solution and collecting delinquent assessments.

Qualifications for board members: HOAs are required to adopt operating rules that govern the elections including qualifications for candidates for the board of directors. This bill would require an HOA to disqualify a candidate for the board if he or she is not a member of the HOA or if the person has been convicted of a felony in the last 20 years. HOAs would not be allowed

to disqualify a candidate who has owned in the CID for less than one year. An HOA could also disqualify a person who is delinquent on regular assessments, except that the person has to have been offered a payment plan, the person may pay the assessment under protest, or if the person was not given an opportunity to participate in dispute resolution. Board members could also not serve on the board if delinquent on regular assessments. Regular assessments are payments made by the membership of the HOA to pay for the basic operations of the CID. CIDs also can approve special assessments necessary to pay for larger expenses like significant construction or renovations of the CID. This bill would only allow an HOA to prevent a member from serving on the board if he or she is delinquent on regular assessments. The committee may wish to consider including special assessments in this prohibition. Board members will be required to take actions against members who are delinquent on both regular and special assessments, a board member should be current on their own assessments, both regular and special, if they are enforcing on another member.

Record retention and inspection: An HOA is required to retain the ballots after an election in case of a potential challenge to the election. This bill would require the HOA to also retain the signed voter envelopes, the voter list of names, parcel numbers, and voters to whom ballots were to be sent, proxies, and the candidate registration list. Members can review and make copies of these materials. The bill explicitly prohibits copying the signed returned ballot.

Inspector of elections: HOAs are required to retain an inspector or inspector of election to receive and count the ballots. The inspector of election must be an independent third party, including a member who is not a candidate, board member, or related to either. The inspector cannot be an HOA employee or entity the HOA contracts with unless the operating rules of the HOA expressly authorize by the HOA. This bill would eliminate the authority of the HOA to adopt a rule allowing an employee or contracted entity to serve as inspector of elections. The committee may wish to consider if this would undermine the self-governance of the HOA.

Arguments in support: Supporters argue that despite the extensive existing requirements for conducting elections in CIDs improvements are needed. These improvements include requiring access to inspect election materials, preventing HOAs from establishing qualifications for members to run for the board of directors, and adding additional notice requirements.

Arguments in opposition: Opponents argue this bill prohibits an HOA from establishing qualifications for candidates for the Board of Directors. They also raise concerns with the increase in the time necessary to conduct an election by adding a requirement that members receive a list of candidates 30 days prior to ballots being distributed.

Previous legislation:

SB 1265 (Wieckowski, 2018) This bill was substantially similar to SB 323 and would have made several changes to the elections process held in CIDs, as well as changes to the process for handling disputes between a member and an HOA. *This bill was vetoed, below is the veto message:*

“I am returning Senate Bill 1265 without my signature.

This bill makes several changes to the elections process for homeowner associations within common interest developments.

California has over 50,000 common interest developments varying in purpose and size. Each one has governing documents that are tailored specifically for that individual community. This bill takes a once-size-fits-all approach, but not all homeowner associations are alike.

If changes to an election process are needed, they should be resolved by the members of that specific community.”

Committee amendments:

- 1) Require a candidate and a member of the board of directors to be current on special assessments, in addition to regular assessments, in order to serve on the board of directors.
- 2) Reinstate existing law to allow an employee or a person that contracts with an HOA to serve as the inspector of elections, if the HOA rules expressly allow for it.

Double-referred: This bill was also referred to the Assembly Committee on Judiciary where it will be heard should it pass out of this committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Center for California Homeowner Association Law (Sponsor)
American Civil Liberties Union of California
Non-Profit Housing Association of Northern California
Schiffer & Buus
Greater Sacramento Urban League
Individuals - 2

Opposition

Community Associations Institute
Individuals - 1

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