

Date of Hearing: June 20, 2018

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

David Chiu, Chair

SB 1265 (Wieckowski) – As Amended May 25, 2018

SENATE VOTE: 25-12

SUBJECT: Common interest developments: elections

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

- 1) Requires election rules be adopted at least 90 days before any election and that the rules require any errors or omissions to the list of candidates' names or list of voters to be immediately reported to the inspector or inspectors of elections and require necessary corrections to be made within two business days.
- 2) Requires that the association ensure that the meeting at which ballots are counted is held on association property and accessible to all members or their representatives who want to witness the tabulation.
- 3) Requires notice be provided of all of the following:
 - a) The date and time by which, and the physical address where, ballots are to be returned by mail or handed to the inspector or inspectors of elections;
 - b) The date and location of the meeting at which ballots will be counted;
 - c) The procedure and deadline for submitting a nomination, which shall be provided at least 30 days before that deadline;
 - d) The list of all candidates' names that will appear on the ballot, which shall be provided at least 30 days before the ballots are distributed; and
 - e) The list of all voters by either name or parcel number, and voting power.
- 4) Requires the elections rules 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 when 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 or inspectors of elections to deliver, or cause to be delivered, at least 30 days before an election, to each member both of the following documents:

- i) The ballot or ballots;
 - ii) A copy of the election operating rules. Delivery of the election operating rules may be accomplished by either the following methods:
 - (1) Posting election operating rules to an Internet Web site and including the corresponding Web address on the ballot together with the phrase, in at least 12-point font: "The rules governing this election may be found here:"
 - (2) Individual delivery.
- 5) Removes references in the rules that permit the identification of qualifications for candidacy or voting.
 - 6) Provides that an association may only disqualify a member from running for office pursuant to the following:
 - a) The owner is not a member at the time of the nomination;
 - b) Within the past 20 years, the member has been convicted of a felony involving bribery, embezzlement of money, the extortion or theft of money, perjury, or conspiracy to commit any of these crimes; or
 - c) Require a nominee to be current on regular assessments however, before disqualifying a nominee the association must engage in internal dispute resolution (IDR) to validate the debt before the association's deadline for submitting a nomination. Provides that if the association fails to meet with the owner to validate the date in a timely session then the member may be named as a candidate for election.
 - 7) Adds that signed voter envelopes and a candidate registration list shall 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.
 - 8) Prohibits an association's rules from permitting any person, business, or subdivision of a business entity currently employed or under contract with the association for any compensable services from serving as an inspector of elections.
 - 9) Requires ballots, signed voter envelopes, voter lists, and candidate registration lists to be association records subject to inspection and copying by a member.
 - 10) Provides that a cause of action for a violation of member elections may be brought within one year of the date that the inspector or inspectors notify the association board and membership of the election results or the cause of action accrues, whichever is later.
 - 11) Requires a court to void the results of an election upon a finding that the election procedures were not followed, unless the association establishes by a preponderance of the evidence that the failure of the association to follow this article or the election operating rules were unintentional and did not affect the results of the election.

- 12) 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.
- 13) Permits 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 either in superior court or, if the amount of the demand does not exceed the jurisdictional amount of the small claims court, in small claims court.
- 14) Prohibits an association from filing a civil action regarding a dispute in which a member has requested IDR unless the association has participated in good faith in the IDR procedures after a member invokes those procedures.
- 15) Prohibits an association from filing an enforcement action solely for declaratory, injunctive, or write relief in superior court without first pursuing ADR for an assessment dispute.

EXISTING LAW:

- 1) Provides that an association 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.
 - 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 association .
- 3) Requires the association 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 association for any compensable services unless expressly authorized by the association.
- 4) Permits a member of an association to bring a civil action against an association 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 association to provide a fair, reasonable, and expeditious procedure for resolving a dispute between an association 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 association's internal dispute resolution (IDR) procedure, invoked by either party to the dispute, shall, at a minimum, satisfy specified requirements.
- 8) Prohibits an association 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).

FISCAL EFFECT: Unknown.

COMMENTS:

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. AB 569 (Chau), Chapter 661, Statutes of 2014, exempted associations from these procedures in cases where their bylaws require all of the members to serve on the board of directors.

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.

Changes to the election procedures: Existing law requires association to adopt rules to specify the qualifications for board members. This bill would only allow an association to disqualify a member from being nominated for the board if he or she is not a member at the time of the nomination or has committed a felony in the last 20 years. Although an association could require a nominee to be current on assessments, the association would be required to offer the owner internal dispute resolution (IDR) to validate the debt in time to resolve the issue of outstanding assessments before the association's deadline for submitting a nomination. If the association fails to meet with the owner or does not validate the debt then the member can be included as a nominee in the election. It is unclear what is meant by validating the debt. The author has indicated the intent is to require the association to meet with an owner who wants to run for office and is barred from running because of a debt to the association but not necessarily to resolve the dispute. This should be clarified in the bill. In addition, the committee may wish to consider allowing an owner to pay-under-protest in order to be included as a nominee if IDR does not result in resolution by the deadline for nominees.

Changes to vote counting procedure: Existing law requires that an inspector of elections count and tabulate votes for an election. This bill would make several changes to that process. Ballots would be counted at a meeting on association property. The inspector of election could not be employed by the association. Existing law allows an inspector of election to be employed by the association if the rules of the association expressing authorize it. In some case there may not be a common area on site that can be used to count the ballots. To clarify, the committee may wish to specify that the ballots must be counted either on association property or a location within a reasonable distance from the CID that is accessible to members.

Non-profit corporation vs. quasi-governmental entity: CIDs are typically formed as non-profit corporations. They are governed by state law, the Davis Stirling Act, as well as the by-laws of the association. CIDs are governed by volunteer boards of directors elected by the membership. Some associations, typically larger ones, contract with community managers to run the day-to-day work of the association. Most CIDs, in fact close to 70% of CIDs in the state, are made up of fewer than 50 units. In a few cases, court decisions have compared common interest developments to quasi-governmental entities because of the role they play and influence they have over owner's interest in the association. CIDs do not have the same immunities as local

governments and their authority does not have the police powers of local governments. This bill would state the intent of the Legislature that the CIDs are quasi-governmental entities with parallel powers, duties, and responsibilities and as a result it is the Legislature's intent that democratic principles and practices are in place with respect to the governance of CID. It's not entirely clear what the intent of this language is, what it would actually achieve, or its impact would be. The committee may wish to delete the language and rather work to ensure that the election process is fair and transparent for owners and associations.

Arguments in support: The supporters of this bill argue that homeowners associations have undermined association voting rights by setting arbitrary qualifications to be met by candidates for board seats, allowing third parties with a vested interest in the outcome of an election to manage the election process, and requiring candidates to warrant unreasonable rules restricting campaigning and refusing candidates access to association media.

Arguments in opposition: Opponents of this bill argue that CIDs are formed as private, non-profit organizations under the Corporations Code and are not quasi-governments. A CID has the legal authority given to it by contracting the governing documents and its authority and responsibilities can be dramatically changed by a vote of the members.

Committee amendments:

- 1) Delete the intent language in the bill.
- 2) Require ballots be counted either on the association property or at a location within a reasonable distance of the association that is accessible to all members.
- 3) Clarify that IDR is intended to give the owner an opportunity to discuss the debt but if it doesn't result in a resolution that the nominations go forward.

Double-referred: This bill was also referred to the 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
 California Alliance For Retired Americans
 David Jones, Insurance Commissioner, California Department Of Insurance
 Citizens For Constitutional Local Government Support
 El Dorado Institute, Inc.
 Greater Sacramento Urban League
 Non-profit Housing Association Of Northern California
 Individuals (40)

Opposition

California Association of Community Managers
Community Associations Institute
Lake Wildwood Association
Sun City Roseville Community Association
Individuals (317)

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