What HOA Elections Will Be Like Under Senate Bill 323

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On September 25, 2019, Senate Bill – 323 was approved by the California State Legislature. On October 12, 2019 Governor Newsome signed the bill into law over strong objections by CAI's California Legislative Action Committee (CLAC). In its current form, substantial changes will need to be made to most associations' election rules.

As space will not allow a discussion of every proposed change that SB 323 will make to Civil Code §§5100, 5105, 5110, 5115, 5125, 5145, 5200, and 5910, this article will seek to highlight the most important amendments. According to the Legislation's Digest: "This bill enacts a series of reforms to the laws governing board of directors' elections in common interest developments, commonly referred to as homeowners associations or HOAs. In broad strokes, the reforms seek to increase the regularity, fairness, formality, and transparency associated with such elections." Although few can object to such goals, the devil is, as they say, in the details. In fact, this bill may result in an invasion into members' privacy, a lessening of participation in the election process and a substantial increase in the cost of conducting elections.

The news is not all bad however, as the new law includes a few positive changes. For example, only members of the association may qualify to run for and serve on the board of directors. In our opinion, owners have a greater incentive than others to ensure that their association's affairs are operated in the best interest of all of the members. Many other states already limit directorship to members and, we believe, California should follow this trend. SB-323 also prohibits the amendment of the election rules within ninety (90) days of an election (Civil Code §5105(h)). Such a restriction may prevent "bad boards" from adopting rules which would disqualify their competitors at the last minute. In order to encourage greater participation, this bill expressly confirms that persons holding a power of attorney for a member must be allowed to vote. Finally, SB 323 provides, in some instances, that election rules may provide for the disqualification of a candidate who is not current in their regular and/or special assessments. Disqualification would not apply however, where the candidate has failed to pay fines, collection charges, late charges or costs levied by a third party.

Unfortunately, the list of unfavorable provisions of SB-323 is larger than that of its benefits. By way of example, the law does not prohibit felons from serving on the board. Rather, an "association *may* disqualify a nominee if that person discloses, or if the association is aware or becomes aware of, a past criminal conviction that either prevents

Many in the industry have expressed their concern that SB-323 will invade the privacy rights of association members. Such concern is well founded. Civil Code §5105(a) (7) mandates the retention of both a candidate registration list and a voter list. The voter list must include the name, voting power, and either the physical address of the voter's separate interest, the parcel number, or both. Both lists are now deemed to be "*Association Election Materials*" (Civil Code §5200(a) (14) and (c)). Please note too, that the definition of membership list now includes the email addresses of those members who have not opted out pursuant to §5220. Incredibly, the new law allows any member to review other members' signatures which appear on their ballot envelope.

Although SB 323 purports to encourage "fairness," it actually creates two separate classes of members based upon the longevity of their ownership. Boards can now prohibit a candidate from running for a seat if he or she has been a member of the association for less than one (1) year. At the same time, the law prohibits disqualification of members who have committed major violations of the governing document and/or who owe fines to the association.

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the association from purchasing the fidelity bond coverage required by §5806 should the person be elected or terminate the association's existing fidelity bond coverage should the person be elected." By utilizing the word "*may*" instead of "*shall*" the law permits convicted felons to serve on the board. When a candidate's criminal background is discovered, it may not be possible to determine whether such history will prevent the purchase or the cancellation of fidelity bond coverage before the nomination forms are distributed and the ballots are to be cast. As the grounds for disqualification must be specified in the bylaws or the election rules, most associations will incur substantial expense updating their rules.

In terms of voting, the new statute provides: "… the rules adopted pursuant to this section shall do all of the following: (1) Prohibit the denial of a ballot to a member for any reason other than for not being a member at the time when the ballots were distributed." In other words, the board may no longer suspend the right to vote of any member or their power or attorney for any reason.

Finally, SB-323 increases the cost of elections. One example of such an impact can be found in the prohibition against the community management company serving as the Inspector of Election. Often the cost associated with this function is included in management fee. However, Civil Code §5110(b) prohibits management from serving in this capacity.

Without question, we all favor fair and open elections. SB-323 however, does not achieve these goals and, in fact, negatively impacts the association election process. The law also jeopardizes personal privacy. By allowing owners who are delinquent on their assessments to run for a seat on the board and violators to vote, the law also places substantial limitations on the board's ability to enforce the governing documents.

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In his many years of practice, Mr. Grode represents hundreds of community associations relative to a broad array of legal issues including, but not limited to, interpretation and enforcement of governing documents, drafting of governing documents, contract negotiations and disputes, and construction defect litigation. His practice includes the representation of commercial and residential owners, homeowners' associations and builders with regard to construction defect litigation.