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SB-323 Common interest developments: elections. (2019-2020)

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Senate Bill No. 323

CHAPTER 848

An act to amend Sections 5100, 5105, 5110, 5115, 5125, 5145, and 5200 of, and to add Section 5910.1 to, the Civil Code, relating to common interest developments.

[Approved by Governor October 12, 2019. Filed with Secretary of State October 12, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

SB 323, Wieckowski. Common interest developments: elections.

(1) The Davis-Stirling Common Interest Development Act governs the creation and management of common interest developments. The act requires a homeowner's association to adopt rules that, among other things, specify the qualifications for candidates for the board of directors of the association and any other elected position, 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. The act requires the sealed ballots to be at all times in the custody of the inspector or inspectors of elections or at a designated location until after the tabulation of the vote.

This bill would, among other things, require an association to provide general notice of the procedure and deadline for submitting a nomination as a candidate at least 30 days before any deadline for submitting a nomination. The bill would require an association to disqualify a person from nomination as a candidate for not being a member at the time of the nomination. The bill would authorize an association to disqualify a person from being nominated or from serving on the board for specified reasons, including the failure to pay regular and special assessments. The bill would require the rules to require retention of, as association elections materials, both a candidate registration list and a voter list, which would be required to be made available to members to verify the accuracy of their individual information, in accordance with specified timeframes. The bill would require these rules to prohibit the denial of a ballot to a member and to a person with general power of attorney for an owner. This bill would require the sealed ballots, signed voter envelopes, voter list, proxies, and candidate registration list to be in the custody of the inspector of elections or at a designated location until after vote tabulation and would, with certain exceptions, require these association election materials to be considered association records, as defined, subject to inspection.

(2) Existing law requires an independent third party to be selected by the association as the inspector of elections and prohibits a person, business entity, or subdivision of a business entity that is employed or under contract to the association for any compensable services from being an independent third party unless otherwise expressly authorized by the rules of the association.

This bill would delete the exception made by rules of the association.

(3) Existing law authorizes a member of an association to bring a civil action for declaratory or equitable relief for a violation of the above-described provisions by the association within one year from the date the cause of action accrues and authorizes a court

to void the election results, as specified. Existing law also authorizes a cause of action for certain violations of the provisions governing common interest development association elections to be brought in small claims court.

This bill would, among other things, authorize the civil action to be brought 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, within one year from the date that the inspector of elections notifies the board and membership of the election results, whichever is later. The bill would also require the court, if a member establishes by a preponderance of the evidence that election provisions or operating rules were not complied with, to void the election results unless the association establishes, by a preponderance of the evidence, that the association's noncompliance with the election provisions or operating rules did not affect the election results. The bill would also prohibit an association from filing a civil action regarding a dispute in which the member has requested dispute resolution unless the association has complied with the internal dispute resolution procedures governing common interest developments, as specified.

(4) Existing law defines association records to include membership lists, including name, property address, and mailing address, as specified.

This bill would include email addresses among the records that are defined as association records.

(5) Under existing law, elections regarding common interest development assessments that legally require a vote, election and removal of directors, amendments to the governing documents, or the grant of exclusive use of common area are required to be held by secret ballot in accordance with specified procedures.

This bill would require an election for the board of directors to be held at the end of each director's expiring term and at minimum every four years.

This bill would incorporate additional changes to Section 5100 of the Civil Code proposed by SB 754 to be operative only if this bill and SB 754 are enacted and this bill is enacted last.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 5100 of the Civil Code is amended to read:

5100. (a) (1) Notwithstanding any other law or provision of the governing documents, elections regarding assessments legally requiring a vote, election and removal of directors, amendments to the governing documents, or the grant of exclusive use of common area pursuant to Section 4600 shall be held by secret ballot in accordance with the procedures set forth in this article.

(2) An association shall hold an election for a seat on the board of directors in accordance with the procedures set forth in this article at the expiration of the corresponding director's term and at least once every four years.

(b) This article also governs an election on any topic that is expressly identified in the operating rules as being governed by this article.

(c) The provisions of this article apply to both incorporated and unincorporated associations, notwithstanding any contrary provision of the governing documents.

(d) The procedures set forth in this article shall apply to votes cast directly by the membership, but do not apply to votes cast by delegates or other elected representatives.

(e) In the event of a conflict between this article and the provisions of the Nonprofit Mutual Benefit Corporation Law (Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code) relating to elections, the provisions of this article shall prevail.

(f) Directors shall not be required to be elected pursuant to this article if the governing documents provide that one member from each separate interest is a director.

SEC. 1.1. Section 5100 of the Civil Code is amended to read:

5100. (a) (1) Notwithstanding any other law or provision of the governing documents, elections regarding assessments legally requiring a vote, election and removal of directors, amendments to the governing documents, or the grant of exclusive use of common area pursuant to Section 4600 shall be held by secret ballot in accordance with the procedures set forth in this article.

(2) An association shall hold an election for a seat on the board of directors in accordance with the procedures set forth in this article at the expiration of the corresponding director's term and at least once every four years.

(b) This article also governs an election on any topic that is expressly identified in the operating rules as being governed by this article.

(c) The provisions of this article apply to both incorporated and unincorporated associations, notwithstanding any contrary provision of the governing documents.

(d) The procedures set forth in this article shall apply to votes cast directly by the membership, but do not apply to votes cast by delegates or other elected representatives.

(e) In the event of a conflict between this article and the provisions of the Nonprofit Mutual Benefit Corporation Law (Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code) relating to elections, the provisions of this article shall prevail.

(f) Directors shall not be required to be elected pursuant to this article if the governing documents provide that one member from each separate interest is a director.

(g) Notwithstanding the secret balloting requirement in subdivision (a), when, as of the close of nominations for directors on the board, the number of director nominees is not more than the number of vacancies to be elected, as determined by the inspector or inspectors of the elections, the director nominees shall be considered elected by acclamation if all of the following are true:

(1) The association includes 6,000 or more units.

(2) The association provided individual notice of the election and the procedure for nominating candidates at least 30 days before the close of nominations.

(3) The association permits all candidates to run if nominated, except as follows:

(A) An association shall disqualify a person from nomination as a candidate if the person is not a member of the association at the time of the nomination. 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.

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

(i) 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 would either prevent the association from purchasing the fidelity bond coverage required by Section 5806 should the person be elected or terminate the association's existing fidelity bond coverage as to that person should the person be elected.

(ii) Failure to be current in the payment of regular and special assessments, which are consumer debts subject to validation. If an association requires a nominee to be current in the payment of regular and special assessments, it shall also require a director to be current in the payment of regular and special assessments. An association may not disqualify a nominee for nonpayment of fines, fines renamed as assessments, collection charges, late charges, or costs levied by a third party. An association shall not disqualify a nominee for failure to be current in payment of regular and special assessments if any of the following circumstances are true:

(I) The nominee has paid the regular assessment or special assessment under protest pursuant to Section 5658.

(II) The nominee has entered into a payment plan pursuant to Section 5665.

(III) The nominee has not been provided the opportunity to engage in internal dispute resolution pursuant to Article 2 (commencing with Section 5900) of Chapter 10.

(iii) If the person, if elected, would be serving on the board at the same time as another person who holds a joint ownership interest in the same separate interest parcel as the person and the other person is either properly nominated for the current election or an incumbent director.

(iv) If that person has been a member of the association for less than one year.

SEC. 2. Section 5105 of the Civil Code is amended to read:

5105. (a) An association shall adopt operating rules in accordance with the procedures prescribed by Article 5 (commencing with Section 4340) of Chapter 3, that do all of the following:

(1) Ensure that if any candidate or member advocating a point of view is provided access to association media, newsletters, or internet websites 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. The association shall not edit or redact any content from these communications, but may include a statement specifying that the candidate or member, and not the association, is responsible for that content.

(2) 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.

(3) Specify the qualifications for candidates for the board and any other elected position, subject to subdivision (b), and 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 themselves for election to the board.

(4) Specify 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.

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

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

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

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

(6) 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.

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

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

(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.

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

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

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

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

(4) 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 would, if the person was elected, either prevent the association from purchasing the fidelity bond coverage required by Section 5806 or terminate the association's existing fidelity bond coverage.

(d) An association may disqualify a person from nomination for nonpayment of regular and special 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. The person shall not be disqualified for failure to be current in payment of regular and special assessments if either of the following circumstances is true:

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

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

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

(f) Notwithstanding any other law, the rules adopted pursuant to this section may provide for the nomination of candidates from the floor of membership meetings or nomination by any other manner. Those rules may permit write-in candidates for ballots.

(g) Notwithstanding any other law, 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 not being a member at the time when ballots are distributed.

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

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

(4) 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:

(A) The ballot or ballots.

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

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

(ii) Individual delivery.

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

SEC. 3. Section 5110 of the Civil Code is amended to read:

5110. (a) The association shall select an independent third party or parties as an inspector of elections. The number of inspectors of elections shall be one or three.

(b) For the purposes of this section, an independent third party includes, but is not limited to, a volunteer poll worker with the county registrar of voters, a licensee of the California Board of Accountancy, or a notary public. An independent third party may be a member, but may not be a director or a candidate for director or be related to a director or to a candidate for director. 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 other than serving as an inspector of elections.

(c) The inspector or inspectors of elections shall do all of the following:

(1) Determine 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 the polls shall close, consistent with the governing documents.

(7) Determine the tabulated results of the election.

(8) Perform any acts 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.

(d) An inspector of elections 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 interest of all members of the association. If there are three inspectors of elections, the decision or act of a majority shall be effective in all respects as the decision or act of all. Any report made by the inspector or inspectors of elections is prima facie evidence of the facts stated in the report.

SEC. 4. Section 5115 of the Civil Code is amended to read:

5115. (a) An association shall provide general notice of the procedure and deadline for submitting a nomination at least 30 days before any deadline for submitting a nomination. Individual notice shall be delivered pursuant to Section 4040 if individual notice is requested by a member.

(b) An association shall provide general notice of all of the following at least 30 days before the ballots are distributed:

(1) 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.

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

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

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

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

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

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

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

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

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

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

SEC. 5. Section 5125 of the Civil Code is amended to read:

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 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 by Section 5145 for challenging the election has expired, at which time custody shall be transferred to the association. If there is a recount or other challenge to the election process, the inspector or inspectors 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.

SEC. 6. Section 5145 of the Civil Code is amended to read:

5145. (a) A member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by the association, including, but not limited to, injunctive relief, restitution, or a combination thereof, within one year of the date that the inspector or inspectors of elections notifies the board and membership of the election results or the cause of action accrues, whichever is later. If a member establishes, by a preponderance of the evidence, that the election procedures of this article, or the adoption of and adherence to rules provided by Article 5 (commencing with Section 4340) of Chapter 3, were not followed, a court shall void any results of the election unless the association establishes, by a preponderance of the evidence, that the association's noncompliance with this article or the election operating rules did not affect the results of the election. The findings of the court shall be stated in writing as part of the record.

(b) A member who prevails in a civil action to enforce the member's rights pursuant to this article shall be entitled to reasonable attorney's fees and court costs, and the court may impose a civil penalty of up to five hundred dollars (\$500) for each violation, except that each identical violation shall be subject to only one penalty if the violation affects each member of the association equally. A prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation. If a member prevails in a civil action brought in small claims court, the member shall be awarded court costs and reasonable attorney's fees incurred for consulting an attorney in connection with this civil action.

(c) A cause of action under subdivision (a) may be brought in either the superior court or, if the amount of the demand does not exceed the jurisdictional amount of the small claims court, in small claims court.

SEC. 7. Section 5200 of the Civil Code is amended to read:

5200. For the purposes of this article, the following definitions shall apply:

(a) "Association records" means all of the following:

(1) Any financial document required to be provided to a member in Article 7 (commencing with Section 5300) or in Sections 5565 and 5810.

(2) Any financial document or statement required to be provided in Article 2 (commencing with Section 4525) of Chapter 4.

(3) Interim financial statements, periodic or as compiled, containing any of the following:

(A) Balance sheet.

(B) Income and expense statement.

(C) Budget comparison.

(D) General ledger. A "general ledger" is a report that shows all transactions that occurred in an association account over a specified period of time.

The records described in this paragraph shall be prepared in accordance with an accrual or modified accrual basis of accounting.

(4) Executed contracts not otherwise privileged under law.

(5) Written board approval of vendor or contractor proposals or invoices.

(6) State and federal tax returns.

(7) Reserve account balances and records of payments made from reserve accounts.

(8) Agendas and minutes of meetings of the members, the board, and any committees appointed by the board pursuant to Section 7212 of the Corporations Code; excluding, however, minutes and other information from executive sessions of the board as described in Article 2 (commencing with Section 4900).

(9) Membership lists, including name, property address, mailing address, and email address, but not including information for members who have opted out pursuant to Section 5220.

(10) Check registers.

(11) The governing documents.

(12) An accounting prepared pursuant to subdivision (b) of Section 5520.

(13) An "enhanced association record" as defined in subdivision (b).

(14) "Association election materials" as defined in subdivision (c).

(b) "Enhanced association records" means invoices, receipts and canceled checks for payments made by the association, purchase orders approved by the association, credit card statements for credit cards issued in the name of the association, statements for services rendered, and reimbursement requests submitted to the association.

(c) "Association election materials" means 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 list. Signed voter envelopes may be inspected but may not be copied.

SEC. 8. Section 5910.1 is added to the Civil Code, to read:

5910.1. An association may not file a civil action regarding a dispute in which the member has requested dispute resolution unless the association has complied with Section 5910 by engaging in good faith in the internal dispute resolution procedures after a member invokes those procedures.

SEC. 9. Section 1.1 of this bill incorporates amendments to Section 5100 of the Civil Code proposed by both this bill and Senate Bill 754. That section shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2020, (2) each bill amends Section 5100 of the Civil Code, and (3) this bill is enacted after Senate Bill 754, in which case Section 1 of this bill shall not become operative.