

ENACTMENT OF CALIFORNIA SENATE BILL 323

On October 12, 2019, Governor Gavin Newsom signed into law, Senate Bill No. 323, which was sponsored by State Senator Robert Wieckowski. This Bill made many changes to the Davis-Stirling Common Interest Development Act (Davis-Stirling Act). The following is a summary of the changes. This summary is not meant to be relied on as legal advice but is meant to give an overview of the changes and their impact on the operation of Homeowner's Associations throughout California. If you are a Board Member or Association Manager, please contact Hudack Law, APC at (951) 708-3577, or by email at Info@HudackLaw.com for more information or an initial consultation.

Changes to Civil Code Section 5100 (Section 1 changes)

Civil Code Section 5100 was changed in two different manners. The first was the addition of subsection (a)(2) which requires an election to be held following the procedures set forth in the Civil Code at the expiration of a director's term. However, Associations must hold an election at least every four (4) years.

Changes to Civil Code Section 5100 (Section 1.1 changes)

Section 1.1 of SB-323 incorporates amendments to Section 5100 of the Civil Code proposed by both this SB-323 and SB-754. Section 1.1 shall only become operative if (1) both SB-323 and SB-754 are enacted and become effective on or before January 1, 2020; (2) each bill amends Section 5100 of the Civil Code; and (3) SB-323 is enacted after SB-754, in which case Section 1 of this SB-323 shall not become operative. In plain English, this means that Section 1.1 changes are made if SB-754 was also signed (which it was) and if SB-323 is enacted after SB-754.

Changes resulting from Section 1.1 of SB-323 – Subsection (g) was added:

Section 1.1 of SB-323 adds the same provision as Section 1, also adds to Section 5100 subsection (g) which provides the following:

1. If the number of Nominations for Director at the close of nominations is not more than the number of vacancies, then, if so, determined by the Inspector of Elections, the Nominees shall be considered elected **if ALL of the following are true:**
 - a. The Association includes 6,000 or more units; and
 - b. There was a notice of election and procedure for nominating candidates given at least 30 days before the close of nominations; and
 - c. The Association allows all nominations to run except:
 - i. If Disqualified if not a member of the Association;
 - ii. Nominee is disqualified for any of the following reasons through the Association Bylaws and Election Rules adopted pursuant to Section 5105:
 1. If the Nominee has a past criminal conviction for which the Nominee discloses or the Association becomes aware of which would prevent the

- purchasing of a Fidelity Bond or would cause the termination of a Fidelity Bond if the Nominee were to be elected.
2. Failure to be current in payment of Regular and Special Assessments, but not fines or fines relabeled as assessments, late charges, or costs, except:
 - a. IF paid under protest;
 - b. The nominee is in a payment plan
 - c. The nominee has been prevented from IDR
 3. A Joint owner would be serving at the same time.
 4. The nominee has been a member for less than 1 year.

What does this mean to the Board, Manager, and Association Members: First, an election is required to be held at the end of a director's term. Additionally Associations must hold an election at least every four (4) years. However, for most of the Homeowner's Associations in California the remaining changes do not have much of an impact. Unless you have an Association of more than 6,000 units, this new change does not impact your Association. For those with 6,000 or more units, then it means your Association may not have to go through the expense of a full election if the number of nominations is the same or less than the number of open seats. Compliance with this section will determine if you must still send out ballots and hold the vote.

Changes to Civil Code Section 5105:

There are subtle changes to Civ. Code Section 5105. The change includes the insertion of the word "*operating*" in the first line of (a) to clarify what rules the Association is adopting under 4340 et. seq. In addition, it conditions the qualifications for candidates of the board or other elected position on subdivision (b) of 5105.

Section (b) establishes what disqualifications the Association can use for nominates for Director positions. Section (b) states the disqualification is "*for not being a member of the association at the time of nomination.*" However, it also provides that this disqualification does not apply to (1) a developer, or (2) where the separate interest is held by an entity other than a natural person, then the entity can nominate a person to act for the entity as the member.

However, starting with Section (a)(7) of Civ. Code 5105 there are additional and new requirements for Associations. Included are the following:

1. Associations must retain, as Association Records, election materials, which includes the candidate registration list and voter list. [Civ. Code Section 5105(a)(7)]
 - a. Voter List to include
 - i. Name
 - ii. Voting Power
 - iii. Physical address of the Separate Interest or APN or both.
 - iv. Mailing address for the ballot if different from the physical address.
 - b. Members are allowed to verify their information at least 30 days before ballots are distributed.
 - c. Inspector of Elections is required to make corrections they are notified of by a member of the Association within 2 business days.

2. As stated above (b) was added. (b) states the disqualification is "*for not being a member of the association at the time of nomination.*"
 - a. However, this does not apply to Developers and their nominations.
 - b. Nor is it applicable to a person designated by an entity to act as the member for the entity.
3. Section (c) is a new addition and provides that Associations may use Bylaws and election rules adopted per 5105(a) only. Through this process Associations may disqualify a Nomination for any of the following:
 - a. Nominee and current directors to be current on payment of regular and special assessments. If requiring a Nominee to be current, then all current directors must be current.
 - b. A Joint owner of the separate Interest would be serving at the same time.
 - c. A member of the association for less than 1 year.
 - d. If the Nominee has a past criminal conviction for which the Nominee discloses or the Association becomes aware of which would prevent the purchasing of a Fidelity Bond or would cause the termination of a Fidelity Bond if the Nominee were to be elected.
4. However, Section (d) limits the disqualification under (c) above such that the disqualification can not be for nonpayment of:
 - a. Fines,
 - b. Fines renamed as assessments,
 - c. Collection charges,
 - d. Late charges,
 - e. Or costs levied by a third party
 - f. Of if either of the following is true
 - i. Regular or Special assessments are paid under protest, or
 - ii. Member has entered into a payment plan.
 - g. Nor if the person has not been provided the opportunity to engage in IDR.
5. Section (g) is added to require the Operating Rules (election rules) to do ALL of the following:
 - a. Prohibiting denial of a ballot for any reason other than not being a member of the Association when ballots are distributed.
 - b. Prohibiting denial of a ballot to a person with Power of Attorney for Member.
 - c. Must require the counting of a ballot of a member completed by a Power of Attorney for the Member.
 - d. Must require the inspector of elections to deliver or cause to be delivered, at least 30 days before the election, both of the following to a member:
 - i. Ballot or Ballots
 - ii. Copy of election Operating Rules. Delivery can be through one of the following methods:
 1. Posting on Internet Website and including in correspondence the website address with the following: "The rules governing this election may be found here:" in a 12-point font.
6. Finally, Section (h) was added to prohibit the changing of election rules less than 90 days before an election.

What does this mean to the Board, Manager, and Association Members: First, your Association needs to have election rules, and they cannot be adopted or changed less than 90 days before an election. Second, Association Records now includes the election materials including the candidate registration list and voter list. The Voter list now includes the physical address, mailing address if different from the physical address, and name of the owner.

Most importantly, the only way to disqualify a nomination for the Board is if they are not a member of the Association as the time of the nomination or have not paid their regular or special assessment. No longer will Associations who have enacted "Director Qualifications" that have particular requirements (member in good standing, code of conduct, requirements to attend meetings, non-felons, not in active litigation with the Association, or others). The Association must recognize and allow the nomination by an LLC or other corporate or trust entity that holds title to the property to be anyone the entity authorizes, not just the trustee of the trust or an officer or shareholder of the LLC or corporation. As for being current on payment of regular or special assessments, the nominee cannot be disqualified if they are on a payment plan. In addition, if the Association uses this to disqualify a nominee, then all current Directors must also be current in payment of their regular and special assessments. Enforcement on one is enforcement on all.

Finally, the suspension of voting rights is no longer valid. The only way to prohibit a member from voting is if they are not a member or are not current on assessments and not in a payment plan. Violations that once allowed Associations to suspend the voting rights of members are no longer valid. A fine for the violation and suspension of the rights to use common areas are the only punishments that can be used.

As for the voting by a Member, they now have the ability, even where proxies are not allowed by the Election Rules, to give their vote to a Power of Attorney Agent who can exercise their vote.

Changes to Civil Code Section 5110:

The change to 5110(a) is to change the determination of who is an "independent third party or parties" who can serve as an inspector of elections. The change is to who is not considered to be an "independent third party" by eliminating anyone who is being paid by the Association for any services, other than as an inspector of election. The change is directly applicable to Property Managers as they are paid for other services, not just being an inspector. Therefore, a property manager can no longer be and Inspector of Elections for associations they manage.

Additionally, the change clarifies subsection (d) that an Inspector of Elections is required to perform all duties "in a manner that protects the interest of ALL members of the Association." (capitalization added)

What does this mean to the Board, Manager, and Association Members: For those Associations who have allowed their Managers to serve the role of Inspector of Elections, that option is no longer available. An independent third party must be used as Managers are no longer considered to be independent.

Changes to Civil Code Section 5115:

The change to 5115 renumbers subsections (a) through (e) to new sections (c) through (g). Added as subsections (a) and (b) are the following:

- (a) General Notice to Members of the procedure and the deadline for submitting nominations at least 30 days before the deadline for submitting a nomination. Notices to be delivered according to Section 4040.
- (b) General Notice at least 30 days before ballots are distributed of:
 - a. Date, time and physical address where ballots are to be returned by mail or hand-delivered
 - b. Date, time, and location of the meeting to count the ballots.
 - c. List of all Candidates
 - d. Individual notice to members who have requested such notice.

What does this mean to the Board, Manager, and Association Members: If your practice has always been to send a notice to the Members regarding nominations and that notice went out 30 days before the close of nominations, then make sure the notice contains all the required information.

Changes to Civil Code Section 5125:

The change to 5125 added the following to the required documents the Inspector of Elections must maintain until the challenge period has ended:

1. Signed voter envelopes,
2. Voter list,
3. Proxies, and
4. Candidate registration list.

What does this mean to the Board, Manager, and Association Members: If your instructions to the Inspector does not include all the items above, then revise your instructions to include all the above items. If you are an inspector of elections, then these are the items that must be kept.

Changes to Civil Code Section 5145

Under the new law, Civil Code 5145 (a) was changed to allow the time in which to file an action for injunctive relief, restitution, or a combination as the later of either:

1. The date the Inspector of Elections notifies the Board and Membership of the election results, or
2. When the action accrues.

Also changed was a shifting of the burden of proof in a challenge to the election. The new law requires that a **member** bringing the action must prove by a "**preponderance of the evidence**" that the election procedures in Chapter 6, Article 4, or the adoption of rule was not followed. In such a case, the new law requires the court to void the results unless the Association proves by a preponderance of the evidence that "noncompliance with the article or the adopted rules did not affect the results. The court must state the finding on the record.

An additional change is to allow a member who brings an action in Small Claims Court to recover reasonable attorney's fees incurred for consulting an attorney in connection with the action.

Finally, the new law provides that a cause of action brought for 5145(a) may be brought in small claims court if the amount is within that jurisdictional limit, or in superior court.

What does this mean to the Board, Manager, and Association Members: If you are a member and you want to challenge the election, you have the later of the two times to file the suit. However, this new requirement makes it necessary for the challenging member to be the one proving the case by a preponderance of the evidence. If not, the Association is not required to defend, you have failed to prove the case. However, if you can meet this requirement, then the Association must then show the failures did not harm the election results, or the Court will invalidate the vote and award to the member their attorney fees.

Importantly, the legislature has added the award of legal fees for members who use the services of an attorney in their suit, even in Small Claims Court. Although the attorney cannot represent the member in Small Claims Court, the member can recover fees for getting help.

Changes to Civil Code Section 5200

Section 5200 was changed to include the email address in the membership list but limits the information if a member opts out as provided in Section 5220. Added to the definitions is the definition of "Association election materials."

New subsection (c) defines "Association election materials" as:

1. Returned ballots,
2. Signed voter envelopes **(may be inspected but not copied)**,
3. Voter list of names,
4. Parcel numbers,
5. Voters to whom a ballot was sent,
6. Proxies,
7. Candidate registration lists.

What does this mean to the Board, Manager, and Association Members: The Legislature has expanded the records of an Association to include the above documents. While there is fear of identity theft from the signatures on the voter envelopes, Association should keep an eye on the inspections to ensure that members are not "snapping a selfie" of the envelope to get the signatures of other members.

Added Section to the Civil Code 5910.1

1. Association may not file a civil action regarding a dispute in which the member has requested dispute resolution unless the Association has complied with ADR under Civ. Code Section 5910 by engaging in good faith in internal dispute resolution after the member has invoked the procedures.

What does this mean to the Board, Manager, and Association Members: Associations who have in the past denied or not dealt fairly with members in the internal dispute resolution process to file suit to recover attorney's fees, must think again. It is possible that the entire suit could be tossed if the member can show the Board was not acting in good faith through the internal dispute resolution process.