



HOA Brief Newsletter

So, what does the “Inspector of Elections” do, anyway?

By Robert M. DeNichilo, Esq., CCAL

The role of the inspector of elections can be a confusing mystery to members asked to serve in that role and to managers who may not really know what the job involves. Too often the inspector of elections is not appointed before the election process starts, and owners are frequently asked to serve in the role to open and count ballots at the time of the meeting set for that purpose. However, the inspector of elections has a far broader role than just opening and counting ballots, and with the enactment of Senate Bill 323, management or anyone under contract to the association can no longer act as the inspector of elections. Therefore, it is more likely that members will be asked to serve in this role and more important than ever that managers, board members, and homeowners understand what the role and duties of the inspector of elections are in community association elections.

The California Civil Code sets out some very specific duties and requirements for the inspector of elections in California community association elections. Effective January 1, 2020, one of the changes imposed by SB 323 is that the inspector of elections can not be otherwise under contract to the association. This means that management companies, lawyers, CPA's or others who are under contract to perform services, and employees of those firms, cannot act as the inspector of elections. Members who are not a director, or a candidate for director or related to a director or to a candidate for director, can continue to act as inspectors of

elections. While members are still legally allowed to act as the inspector of elections, boards should make sure that the member understands the duties of the inspector of elections and is able to fulfill the responsibilities before appointing a member to serve in that role. To assist boards, managers, and members who may be asked to serve as the inspector of elections, this article will address many of the questions as to what the responsibilities of the inspector of elections are, and what role management can still play in assisting the inspector in the association's elections.

What are the specific duties of the inspector of elections?

As stated above, the role of the inspector of elections is far broader than just showing up the night of the meeting to open and tally the ballots. The inspector of elections is responsible for the following:

- Updating the voter list and candidate registration lists within two (2) days of notice of any changes by a member, candidate, or the association. Because members have a right to review their personal information on these lists up to sixty (60) days before the election, the inspector of elections must be appointed well before the election. While the civil code does not identify when the inspector must be appointed, given this responsibility, the inspector should be appointed at the same time the election is scheduled, if not earlier. Boards should consider including language in their

appointment of the inspector that the inspector shall serve as the inspector of elections for the upcoming election, and any future elections until a new inspector of elections is appointed by the board. That will at least provide the association with someone to rely on should there be issues related to a future election and a new inspector of elections has not yet been appointed for that election.

- Delivering, or causing to be delivered, at least 30 days before an election the ballots and election rules. Ballots must be mailed, but the election rules can be posted on a website if the ballots contain, in at least 12 point font, the phrase “The rules governing this election may be found here: [insert website address where election rules are posted].”
- Determining the number of memberships entitled to vote and the voting power of each.
- Determining the authenticity, validity, and effect of proxies, if any.
- Receiving sealed ballots and proxies.
- Hearing and determining all challenges and questions in any way arising out of or in connection with the right to vote.
- Counting and tabulating all votes.
- Determining when the polls shall close, consistent with the governing documents.
- Determining the tabulated results of the election.
- Performing any acts as may be proper to conduct the election with fairness to all members in accordance with the Civil Code, the Corporations Code, and all applicable rules of the association

regarding the conduct of the election that are not in conflict with this article.

- Maintaining or directing the location for maintaining all election related records until the time for challenging the election has passed.

As stated in the Civil Code, an inspector of elections shall perform all duties impartially, in good faith, to the best of the inspector of election's ability, and as expeditiously as is practical. 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.

Among the most challenging responsibilities of the inspector of elections, and the one which may dissuade members from acting as an inspector of elections, is the fact that the inspector of elections is responsible for hearing and determining all challenges and questions in any way arising out of or in connection with the right to vote, and perform any actions as may be proper to conduct a fair election. This means that a member who acts as the inspector may be faced with determining issues such as if their friends and neighbors have a right to vote or their voting power (i.e. the number of votes they are entitled to cast). Some members who are not prepared to impartially evaluate and make determinations on election related issues, especially when it may involve the rights of their friends and neighbors, may not feel comfortable or confident in dealing with such issues. This is especially important in light of the fact that election challenges can be brought by an owner by filing a simple form and submitting the matter in small claims court. And while an owner has a right to recover attorneys fees on election challenges, associations no longer have such

a right in a post SB 323 world. That is an important consideration that boards need to keep in mind in deciding whether to appoint a volunteer member to serve as the inspector of elections or hire a professional inspector of election firm to run the election for the association.

What role can management still play in an election after SB 323?

While management can no longer serve as the inspector of elections, that does not mean it cannot serve a role in the election process. While the ultimate responsibility for these items will always lie with the inspector of elections, the inspector can designate management to physically handle some of the tasks the inspector is responsible to perform. These include:

- **Maintenance and update of voter and candidate registration list.** Under SB 323, an association must maintain two new lists, a voter list, and a candidate registration list. Management can create and maintain these lists. It can also assist the inspector of elections in updating the list when a member or candidate requests their information on the list to be updated or be corrected.

- **Mailing out ballots and election rules.** The Civil Code states that the inspector is responsible for mailing “or causing to be mailed” the ballots and election rules at least thirty (30) days prior to the election. That means that the inspector can direct management to prepare and mail out the ballots. While professional inspector of elections may perform these tasks as part of their services, others may direct management to perform this task, and any volunteer member who is appointed to serve in that role will need management to mail out the ballots and election rule (if the election rules are not posted on a

website). Such direction should be provided in writing (an email will suffice), and that written direction should be saved so that if there is a challenge to the election questioning why management mailed out the materials it can be established that management performed that task at the direction of the inspector of elections.

- **Receiving ballots and storing the association election materials and records after the election.** The inspector of elections is not only responsible for mailing out ballots, but the inspector is also responsible for receiving ballots or designating where they are to be returned. In fact, the civil code states that the “sealed ballots, signed voter envelopes, voter list, proxies, and candidate registration list shall at all times be in the “custody of the inspector 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 the custody of such records shall be transferred to the association. Therefore, the inspector can designate that the ballots are to be returned to management’s offices so that management can continue to receive ballots on the inspector’s behalf. Again, this should be done in writing, and the writing saved in case there is a challenge to the election questioning the election process and why ballots where to be returned to management.

- **Assisting in counting ballots.** While tallying the ballots is the responsibility of the inspector of elections, the inspector can designate others to assist in the process. While legally permissible, given the prohibition on anyone under contract to the association acting as the

inspector, management should carefully consider whether it will undertake this task, even at the direction of the inspector of elections. It is relatively easy to find other volunteers to assist the inspector in tallying the ballots and avoid any potential challenges that may arise out of management's role in assisting in the tallying of the ballots.

Conclusion

While the great majority of association elections occur without incident or challenge, it is often difficult to predict when an election challenge will arise. With the new law, a court can invalidate an election if the person challenging the election establishes by a mere preponderance of the evidence (this is the lowest evidentiary standard in the law and simply means it is more likely than not) that the association did not follow its election process. While the association can rebut that presumption by showing, again by a mere preponderance of the evidence, that even if there was an irregularity in the election process it did not affect the outcome of the election, establishing that something did not have an impact on the election will not always be easy to prove. Given how easy it may be to successfully challenge an election under the law as amended by SB 323, boards may want to consider budgeting for professional inspectors of elections instead of appointing volunteer members to serve in that role. This is especially true if there is any risk of a challenge known at the outset of the election process. While it may be an additional expense, it may prove to be valuable insurance in protecting the election process from potentially costly legal challenges.

Nordberg | DeNichilo, LLP
ATTORNEYS AT LAW



Ph: (949) 654-1510

Robert M. DeNichilo, Esq., CCAL

Email: robert@NDHOALaw.com

Website: NDHOALaw.com

Blog: HOABrief.com

We provide this newsletter for advertising and general informational purposes only. It is not intended to create an attorney client relationship. Readers should not act on any issues raised in this newsletter without consulting with legal counsel.

ndnl 37 inspector of elections 08292022