

## **Recall Elections To Remove Directors**

Few actions within a community association create more angst, anxiety and anger than the receipt of a petition to recall one or more members of the Board of Directors. Recalls can be highly emotional, confrontational and divisive, and their ramifications can last for years. While recalls are sometimes necessary, they can also be based on little more than a disagreement with a single decision of the Board. Regardless, the Board's response to the receipt of a petition must be diligent and timely.

Recall elections are governed by Corporations Code section 7222 and an association's governing documents. Recall elections may involve the removal of one, some, or all of the directors. The recall process generally commences when the board receives a petition signed by at least 5% of the members of the association calling for a special meeting for the recall of one or more directors. However, the recall of individual directors may also be initiated by the board, or as otherwise provided in an association's governing documents.

Within 20 days of the board's receipt of a petition from the members requesting a special meeting, the board must set a date for, and notify the members of, the special meeting that must be held between 35 and 90 days after receipt of the petition ("recall meeting"). This notice can be the official notice of the meeting or a preliminary "save the date" notice, with the official notice being given when the ballots are mailed to the members. If the initial "save the date" notice is used, it should state: (i) the board received a petition requesting a recall vote; (ii) the date, time and location of the recall meeting; (iii) the quorum required for the recall meeting; and (iv) a solicitation of candidates to run for election if the recall is successful. If the board does not set its own date and send out notice of the recall meeting within 20 days of receiving the petition, the members calling the meeting may independently set a date and send out the notice. When the "save the date" notice is used, the official notice of the meeting is sent to the members once the candidates are known and the ballot is finalized.

Upon receiving a petition, the board should also promptly appoint a neutral inspector or inspectors of election to make important decisions regarding the recall process, including, but not limited to, determining the number of memberships entitled to vote, determining the validity of any proxies and ballots, receiving the ballots, making decisions on voting and challenges, performing registration and validation of envelope information, tabulating the votes, and certifying the results of the voting. The inspectors of election become the primary decision-making entity on all issues governing the recall process rather than the Board of Directors.

Both the recall and election for replacement directors must be done by secret ballot. Therefore, an association must send secret ballots, voting instructions and two return envelopes to the members at least 30 days before the date of the recall meeting. If the election for replacement directors is held at the same time as the recall vote, the members will be voting on two issues: (i) the recall of directors, and (ii) the replacement of directors. Although the election of replacement directors could be conducted at a later

meeting (depending on the language of the petition), when the election for replacement directors is held at the recall meeting, the inspectors of election can tabulate the votes on the replacement of directors immediately following the recall, assuming the recall is successful.

Just as with regular meetings, an association must obtain quorum at a recall meeting before it may conduct any business. If there is no quorum, the meeting may be adjourned in accordance with the association's governing documents. Sometimes, an association's governing documents will provide for a reduced quorum at reconvened meetings. Does this reduced quorum requirement apply to reconvened recall meetings? Likely yes, but a board may be able to avoid the reduced quorum requirement at an adjourned recall meeting by simply adjourning the meeting and not calling for a reconvened recall meeting provided, of course, that no member has made a motion to reconvene the meeting prior to the motion to adjourn.

Assuming quorum is obtained, the only business that may be transacted at the recall meeting is the business specified in the notice of the meeting. For example, if the notice of the special meeting calls for a recall of directors only, the association cannot also conduct an election of replacement directors at the same meeting. It is therefore important to ensure the notice of the special meeting includes all of the items intended for action at the meeting, including an election if the recall is successful.

Where an association's governing documents provide for cumulative voting, there is a complicated formula which must be used to determine whether an individual director is removed. (See Corporations Code section 7222). This formula makes it very difficult to successfully recall fewer than all of the directors. However, if the recall is successful, and one or more directors are removed, then the remainder of the recall meeting is dedicated to the election of new directors, if the notice so provides. Note, the ballot for electing replacement directors can be quite complicated when the recall could result in removing one, two, three or even four directors.

When the recall is for the entire Board, whether or not the association's governing documents provide for cumulative voting, Corporations Code section 7222(a) provides that the required vote for removal of directors is the affirmative vote of a majority of all members if the association has fewer than 50 members, and the affirmative vote of a majority of a quorum of the members if the association has 50 or more members.

Recalls are complicated and stressful on an association's directors and members. A recall election should only be used when all other avenues to address disputes between boards and members have failed, but of course, if members are determined to hold a recall election such elections cannot be avoided. If the board receives a valid petition, it must call for the special meeting or allow the petitioners to do so. Mistakes in recall elections can result in court challenges and are expensive to defend. Upon receiving a petition for recall from the members, the association manager should immediately inform the board of the legal significance of the petition, deadlines related to receipt of the petition, and seriousness of the recall process. For these reasons, and more, an

association should contact its legal counsel upon receipt of the petition for advice on conducting the recall election.

The above general information is for educational purposes only. If the Board needs further guidance or has specific questions on this issue, please contact your legal counsel.