



COMMUNITY ASSOCIATION *Law Bulletin*

CELEBRATING 30 YEARS
OF SERVICE TO THE
COMMUNITY
ASSOCIATION INDUSTRY

- General Counsel
- Assessment Collection
- Construction Defect
- Business Litigation
- Contract Review
- Arbitration / Mediation
- Maintenance Matrices
- CC & R Enforcement
- Board Resolutions
- Mechanic's Liens
- Opinion Letters
- Recall Elections
- Mold Litigation
- Amending Governing Documents



4 CIVIC PLAZA
SUITE 300
NEWPORT BEACH CA
92660
PHONE: 949.729.8002
FAX: 949.729.8012
1888-HOA-LAW2
1-888-462-5292
WWW.CAHOALAW.COM

RECALL ELECTIONS OR THE KIND OF STUFF LAWSUITS ARE MADE OF By Stanley Feldsott

It is not unusual to expect that sometime during the life of an association the board of directors will become involved in a recall election. As you can imagine, emotions run high at the recall meeting. Given the fact that it is the board whose recall is being sought which runs the recall election, these situations often wind up in court. After the expenditure of significant monies on attorneys fees, a judge makes a determination as to whether the recall election was valid. Thus, it is extremely important that these recall elections be handled properly.

Elections involving a recall of the entire board pose far fewer technical problems. *Corporations Code* §7222(a) provides, in pertinent part, that:

"In a corporation with fewer than fifty members, such removal is approved by a majority of all members (§5033)."

"In a corporation with fifty or more members, such removal is approved by the members (§5034) [i.e., a majority of the quorum]."

The real challenges arise when less than all of the directors are being removed in an association whose bylaws authorize members to cumulate their votes pursuant to subparagraph (a) of *Corporations Code* §7615 (almost all associations). In such situations, *Corporations Code* §7222 provides, in pertinent part, that:

"No director may be removed...when the votes cast against removal, or not consenting in writing to such removal, would be sufficient to elect such director if voted cumulatively at an election at which the same total number of votes were cast (or, if such action is taken by written ballot, all memberships entitled to vote were voted) and the entire number of directors

authorized at the time of the director's most recent election were then being elected."

The formula used to determine the number of votes needed to defeat the removal of a director pursuant to *Corporations Code* §7222 is as follows:

$$X = \frac{S \times D}{N + 1} + 1$$

X is the number of votes needed to defeat the Recall measure

If the recall election is to be had at a meeting (the usual manner for such matters), S represents the total number of votes being cast at that recall meeting, **not the total number of members in the association**. Use the total number of members for "S" is arguably correct only if the recall election is being conducted without a meeting via written ballot.

In the removal situation, D is always equal to 1, even if the meeting is being called to remove two directors. If two directors were to be removed, there would be two separate votes, one for removal of Director A and a second for removal of Director B. In each instance, D, in the formula, would be 1. See *Corporations Code* §7222 which states:

"No director may be removed...when the votes cast against removal...would be sufficient to elect such director if voted cumulatively..."

N is the total number of directors authorized and not simply the number of directors elected at the prior meeting. Section 7222 states:

"...[T]he entire number of directors authorized at the time of the director's most recent election were then being elected."

The use of the singular possessive



Feldsott, Lee, Iger & Lew

4 CIVIC PLAZA, SUITE 300
NEWPORT BEACH, CA 92660

C O N T I N U E D

(director's) suggests that **it is not the most recent election, but rather the most recent election at which the director to be recalled was elected.**

A recall election can be done without a meeting by way of a written mail-out ballot. This is generally not done since the election of new directors where cumulative voting is in effect cannot be done by mail-out ballots. Since directors continue to serve until their successors are elected, even if the recall election via mail-out ballot is successful, the then recalled directors will continue to serve until a meeting is called.

Recall elections start out by the calling of a special meeting of the members. This meeting can be compelled by the members themselves through the petition process. The petition should demand the calling of a special meeting for the purpose of recalling the board or certain named directors and electing new directors if

the recall is successful. This way the entire matter is dealt with at one meeting. The *Corporations Code* requires the board to send out a notice of the meeting within twenty days after receipt by the association of the petition. The meeting must be set not less than thirty-five nor more than ninety days after receipt of the petition. *Corporations Code* §7511(c).

In general, elections of this type are decided by the proxies. The side that wins is the side that puts forth the effort to obtain proxies. Proxies used in a recall election must afford the proxy giver an opportunity to instruct the proxyholder on whether to vote for, against or abstain on the recall issue.

If you are going to be embroiled in a recall election, you really should seek the advice of competent legal counsel. There is nothing worse than finding out that your proxies are invalid or that the board is not calling a meeting because your petition is defective. ■