

A Dozen Myths on the New Election Procedures

By: Kelly G. Richardson

A completely new set of election procedures and requirements is now mandatory for all common interest developments. Since the law, found in Civil Code Section 1363.03 and 1363.04, was enacted July 1, 2006, a number of urban legends have already arisen about it. Here are some of the widely distributed misconceptions, matched up with the reality.

1. **Proxies are now illegal.** No, proxies given by one member to vote for another can still be used.
2. **All votes must now be by mail.** No, elections may be held purely by mailed or delivered ballots, as before, or with a meeting of the membership. The double envelope procedure only applies to votes mailed or delivered to the Inspectors of Election. Members can still vote in person at membership meetings, and ballots cast in advance of the meeting must comply with the double envelope requirement.
3. **Directed proxies cannot be used.** No, but in effect yes, because it will become very difficult to use them. In the past, directed proxies were often used as "absentee ballots", in which the member filled out a proxy and directed the proxy holder (often the secretary of the association) to cast the member's vote in a certain manner. However, under the new law, the directed proxy is essentially replaced by the mailed or delivered ballot. If a member has the proper ballot and envelope packet from the association, there is no need to cast a directed proxy.

A directed proxy is technically still possible, but sufficiently complicated compared to the new "absentee ballot" procedure that it is unlikely associations will use them in the future.

4. **Our association can comply with the law as long as we follow the procedures.** The law requires all associations to adopt written election rules which comply with the new law, so simply following the process is insufficient. Written election rules must be adopted.
5. **Our association only consists of 6 homes, and all our votes are typically by voice vote. The law does not apply to us, right?** There is no exemption for small common interest developments. All CIDs must comply with this procedure.
6. **The association must hire an independent company to supervise our elections.** While there is an impression that the law requires all associations to hire a professional elections supervisor, this impression is not true. The law allows the association's election rules to provide for anyone to serve as inspector of election, except for directors or candidates or their families.
7. **If we do our best, and the election is basically fair, it cannot be overturned even if there are technical violations of the election law.** Not necessarily. There is no "good faith" or "substantial compliance" provision in the law. A failure to follow any of the required procedures could be grounds to set aside an election.
8. **If the association is taken to court by a member challenging an election and the member loses, the association may recover attorney fees.** Probably not. Members successful in overturning an election "shall" recover their legal fees, while if they are unsuccessful they "may" be liable for the association's fees only if the challenge is found to be frivolous.

9. **This law is really the association's problem, and does not concern the manager.** The association looks to the manager for assistance regularly for assistance in operating the election process. Furthermore, flawed elections burden everyone, including the manager. Will associations hold a manager responsible for an election that is fatally flawed?
10. **Attorneys or managers cannot serve as inspectors of election.** If the association's election rules so provide, the manager or attorney can serve. However, it may be advisable not to indicate either as an inspector. Both have key roles to play in helping the inspectors do their jobs, as impartial agents loyal to the corporation (and not the board or any particular officers). On the other hand, the rules might provide that the manager serves as the inspector only for the purpose of receiving ballots during the thirty days prior to the balloting, and that other inspectors will take over all other functions.
11. **Inspectors of election are not needed until the time of the election, so we will continue to have them elected by the members at the meetings.** Once an election has been scheduled, the ballot package needs to indicate where to mail or deliver ballots. Inspectors must receive the ballots and safeguard them, unopened, until the time of the balloting or opening of ballots. Therefore, the association's election rules must include some method to designate inspectors prior to the election.
12. **This law is a disaster for homeowner associations.** The law brings about major change in the area of homeowner association elections, an area upon which the Davis-Stirling Act did not previously provide much guidance. Fair and well-run elections are in everyone's best interests, and this law provides a framework to try to improve the level of elections in CID's. It should help push associations to develop a more standard and professional election process. Associations that ignore this will find themselves exposed to great difficulty.

© All Rights Reserved