

Enforcement Issues Relating to the New California Election and Voting Procedures Called for by S.B. 61

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July 2006

With the adoption of Senate Bill 61 by the California State Legislature, community associations have been scrambling to bring themselves into compliance with the new election and membership voting requirements by the July 1, 2006, deadline set by the Legislature. Senate Bill 61 added Cal. Civil Code sections 1363.03, 1363.04 and 1363.09. Appropriately, much of the initial focus has been on compliance with Sections 1363.03 (election procedures) and 1363.04 (use of association funds for campaigns prohibited) as these two Sections focus on the procedural aspects that need to be in place before the July 1st deadline. Less of the focus has been on Section 1363.09, which deals with the issue of remedies for any violations of these two sections. Now, however, with the statutes coming into effect and post July 1, 2006, annual meetings fast approaching, associations need to be cognizant of the possible sanctions associated with non-compliance as well as the remedies available to aggrieved members of the association.

Subpart (a) of Section 1363.09 makes it clear that a member must bring any legal action for a violation of Sections 1363.03 or 1363.04 within one year of the date the cause of action accrues. Presumably, most causes of action will have arisen by the end of the election, so it follows that most civil actions will be barred more than one year after completion of the election. Further, section 1363.09 states that upon a finding that the election procedures set forth in sections 1363.03 and 1363.04 were not followed, or if the association-adopted rules and regulations were not followed, “a court may void any results of the election.” Note that the word “may” is used in this final sentence of subpart (a), which indicates that a reviewing court will have some discretion on this issue, but still has the clear power to invalidate an election result and presumably order a new election.

Next, subpart (b) of Section 1363.09 provides that “a member who prevails in a civil action to enforce his or her rights. . . shall be entitled to reasonable attorney’s fees and court costs.” Also, the court is given discretion to impose a civil penalty of up to \$500.00 for each violation, except that each identical violation shall be subject to only one penalty if the violation affects each member of the association equally. Subpart (b) provides an incentive for members to challenge elections in court as the ability to recoup legal fees and costs as well as possible civil penalties gives the challenger a definite up side that did not previously exist.

On the other hand, subpart (b) of Section 1363.09 hampers the ability of an association to recover fees and costs should it be the prevailing party in the context of an election challenge. The last sentence of Subpart (b) establishes a different “prevailing party” criteria for associations. Under this increased criteria, “a prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable or

without foundation.” These criteria will make it very problematic for an association to recover full compensation should it prevail in a Section 1363.09 lawsuit and clearly gives members a greater incentive to bring such an action as there is far less downside. However, it should be noted that this last sentence of Subpart (b) only refers to “costs,” where as the first sentence specifically refers to “reasonable attorney’s fees and court costs.” Perhaps the legislature only intended to make it difficult for an association to recover costs as opposed to both legal fees and costs. This is an issue that will need to be clarified by either future court opinions or possibly clean-up legislation. For now, Associations should take the position that the increased criteria only apply to an award of costs and not legal fees.

The final component of Section 1363.09, Subpart (c), opens the doors of the Small Claims Courts up to a possible flood of Section 1363.09 lawsuits. Subpart (c) lists a variety of claims that may be brought in Small Claims Court stemming from Sections 1363.03 and 1363.04 as well as the election rules and regulations adopted by associations. The ability of members to sue on these issues in Small Claims Court will likely invite many more lawsuits as opposed to if members were limited only to filing in Superior Court. Also, the ability to litigate in Small Claims will place additional strain on both the board and management as attorneys will not be able to represent the interests of the association and directors or management will have to appear on behalf of a defendant association.

The clear intent of Section 1363.09 is to provide some teeth for the enforcement of Sections 1363.03 and 1363.04. Both associations and management need to do their best to comply with the new voting and election requirements in order to avoid the sanctions contained in Section 1363.09. This is true as Section 1363.09 is stacked very much against associations, and almost encourages member challenges. The end result of this inequality may be a great number of member challenges, which will only serve to make it more difficult and costly for associations to operate. Hopefully, in the short term, the Legislature will take steps to level the Section 1363.09 playing field so that there is not a litigation incentive for one side and increased exposure for the other side. In the meantime, associations and management will need to work with legal counsel to run code compliant elections in order to avoid the pitfalls of Section 1363.09.