

## **Suspension of Voting Rights, Qualifications For Serving On The Board and Related Issues**

*By David Swedelson, Condo Lawyer and HOA Attorney*

For many associations who are preparing to hold their annual elections, boards and managers are trying to determine who is actually eligible to be a candidate for the board and who can vote. This is a big issue these days as there are so many delinquent owners. Boards and managers are questioning why an owner who is not paying their assessments or is in violation of the CC&Rs or rules should be able to serve on the board. The fact is that for many California community associations, the bylaws and other governing documents may not set out any qualifications for serving on the board. This means that even a tenant or other non-owner can serve on the board.

And there is nothing in the Davis-Stirling Act or the Corporations Code requiring directors to be in “good standing” to serve on a board. Delinquent directors can have their voting privileges suspended for membership elections, but not their voting rights as a board member unless provided for in the governing documents.

The term “good standing” is not defined in the Davis-Stirling Act but is generally understood to mean a member who is current in the payment of their assessments and not in violation of the governing documents.

Much to the chagrin of some boards, candidates for election to the board can be delinquent in the payment of their assessments and in violation of the governing documents unless there is a provision in the bylaws stating otherwise. If the bylaws do not disqualify candidates who are not in good standing from serving on the board, the candidate's delinquency and/or noncompliance with the CC&Rs can, nonetheless, be a campaign issue in the election.

What to do? Associations can amend their bylaws to add director qualifications to provide for the ability of the board to remove a director who is not in good standing. The corporations code allows for removal of a board member by the board (and not requiring a vote of the owners)

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if they fail to meet the qualifications that were in place when they were elected to the board.

If bylaws are lacking in this area, directors not in good standing can always be removed by the membership, but this is often not that easy to accomplish, especially if the association has cumulative voting.

Many associations have dealt with the qualification issue as part of the amendment and restatement of the bylaws. Some make it a requirement that candidates for service on the board not only be an owner, but be in good standing, not in litigation with the association, not a co-owner with another director (precluding, for example, husbands and wives from serving at the same time), from missing a certain number of meetings, or not a convicted felon (and this is a bigger issue than you might think).

But what about the owner that has not paid their assessments or is not otherwise in good standing? If your association is like most, the board has the authority, following a properly noticed hearing before the board (even if the governing documents do not require a hearing, the Civil Code does), to suspend the voting rights of its members, either because they are delinquent in paying their assessments, they have violated some other provision of the governing documents, or both. It depends on what the association's governing documents say, so do not assume that your documents provide for this.

Suspending the voting rights of the owner of one unit is easy enough, but what if the suspended member owns more than one unit? This question can arise when the association's developer still owns units, or an investor has purchased a number of units at the association. This decision may mean taking away one vote versus taking away a hundred. Do you allow this member to vote for all units except one, or are all voting privileges suspended?

The applicable statute doesn't answer this question, so unless your association's governing documents specifically address this issue (most don't), your board will have to make its best determination of whether the infraction for which the member's voting privileges were suspended are unit-specific or not. If the disciplinary matter only involves one of the owner's units – such as failure to pay assessments on only one unit,

failure to properly maintain only one of the units, or performance of unauthorized modifications to only one of the units – the most logical approach, and easiest to defend, would be to only suspend the owner’s right to vote on behalf of the single unit that is the subject of the discipline. If, on the other hand, the matter applies to all units (the owner is delinquent on all accounts) or applies to the owner in a general, rather than unit-specific way (the owner was creating a nuisance in the common area, parked in visitor parking, or broke a pool rule), it would be reasonable for the board to suspend all of that member’s voting rights.

If your board is considering suspending the voting rights of a multiple-unit owner, we suggest that you consider and make clear the board’s decision in the Notice of Hearing regarding the board’s intent to suspend voting rights for all units owned or only specific units owned. Then, after the hearing, if applicable, the board should specify each unit for which the voting rights are being suspended. If you are suspending the voting rights for multiple units, and you are sending the notification of suspension by mail (rather than personal delivery), be sure to send it to the mailing address on record for each of the units, even if they are the same.

Suspending an owner’s voting rights or right to serve on the board is sometimes complicated and can often lead to acrimony. We recommend that the board consult with legal counsel to determine the association’s rights and remedies in dealing with these issues.

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