

New for 2006  
**Effective July 1, 2006: Civil Code §1363.03**  
(formerly SB 61)

## **Associations Must Adopt Rules Setting Forth Specific Voting Procedures**

After enacting this new law, the legislature promptly embarked on “urgency” legislation (SB 1560, Battin) to amend it. We have generally described some of the expected edits in endnotes. You should expect some changes in the coming weeks or months. (5/12/06)

Rules shall  
include:

**1363.03(a)** An association shall adopt rules, in accordance with the procedures prescribed by Article 4 (commencing with Section 1357.100) of Chapter 2, that do all of the following:

Equal Access  
to HOA  
Communications

**1363.03(a)(1)** Ensure that if any candidate or member advocating a point of view is provided access to association media, newsletters, or Internet Web sites during a campaign, for purposes that are reasonably related to that election, equal access shall be provided to all candidates and members advocating a point of view, including those not endorsed by the board, for purposes that are reasonably related to the election. The association shall not edit or redact any content from these communications, but may include a statement specifying that the candidate or member, and not the association, is responsible for that content.

Equal Access to  
Common Area  
Meeting space

**1363.03(a)(2)** Ensure access to the common area meeting space, if any exists, during a campaign, at no cost, to all candidates, including those who are not incumbents, and to all members advocating a point of view, including those not endorsed by the board, for purposes reasonably related to the election.

Candidate  
qualifications &  
reasonable  
nomination  
procedures

**1363.03(a)(3)** Specify the qualifications for candidates for the board of directors and any other elected position, and procedures for the nomination of candidates. A nomination or election procedure shall not be deemed reasonable if it disallows any member of the association from nominating himself or herself for election to the board of directors.

Voting  
qualifications,  
proxy  
information,  
polling times

**1363.03(a)(4)** Specify the qualifications for voting, the voting power of each membership, the authenticity, validity, and effect of proxies, and the voting period for elections, including the times at which polls will open and close.

Independent  
third party  
Inspector(s) of  
Election

**1363.03(a)(5)** Specify a method of selecting one or three independent third parties as inspector, or inspectors, of election utilizing one of the following methods:

**1363.03(a)(5)(A)** Appointment of the inspector or inspectors by the board.

**1363.03(a)(5)(B)** Election of the inspector or inspectors by the members of the association.

**1363.03(a)(5)(C)** Any other method for selecting the inspector or inspectors. <sup>1</sup>

Secret Ballot

**1363.03(b)** Notwithstanding any other law or provision of the governing documents, an election within a common interest development regarding assessments, selection of members of the association board of directors, amendments to the governing documents, or the grant of exclusive use of common area property pursuant to Section 1363.07 shall be held by secret ballot in accordance with the procedures set forth in this section. <sup>2</sup>

Who can be an  
Inspector of  
Election

**1363.03(c)(1)** The association shall select an independent third party or parties as an inspector of election. The number of inspectors of election shall be one or three.

**1363.03(c)(2)** For the purposes of this section, an independent third party includes, but is not limited to, a volunteer poll worker with the county registrar of voters, a licensee of the California Board of Accountancy, or a notary public. An independent third party may be a member of the association, but may not be a member of the board of directors or a candidate for the board of directors or related to a member of the board of directors or a candidate for the board of directors. An independent third party may not be a person who is currently employed or under contract to the association for any compensable services unless expressly authorized by rules of the association adopted pursuant to paragraph (5) of subdivision (a).

Duties of  
Inspector(s) of  
Election

**1363.03(c)(3)** The inspector or inspectors of election shall do all of the following:

**1363.03(c)(3)(A)** Determine the number of memberships entitled to vote and the voting power of each.

**1363.03(c)(3)(B)** Determine the authenticity, validity, and effect of proxies, if any.

**1363.03(c)(3)(C)** Receive ballots.

**1363.03(c)(3)(D)** Hear and determine all challenges and questions in any way arising out of or in connection with the right to vote.

**1363.03(c)(3)(E)** Count and tabulate all votes.

**1363.03(c)(3)(F)** Determine when the polls shall close.

**1363.03(c)(3)(G)** Determine the result of the election.

**1363.03(c)(3)(H)** Perform any acts as may be proper to conduct the election with fairness to all members in accordance with this section and all applicable rules of the association regarding the conduct of the election that are not in conflict with this section.

Validity of  
Inspector(s) of  
Election

**1363.03(c)(4)** An inspector of election shall perform his or her duties impartially, in good faith, to the best of his or her ability, and as expeditiously as is practical. If there are three inspectors of election, the decision or act of a majority shall be effective in all respects as the decision or act of all. Any report made by the inspector or inspectors of election is prima facie evidence of the facts stated in the report.

Instructions on  
Proxy

**1363.03(d)** Any instruction given in a proxy issued for an election that directs the manner in which the proxy holder is to cast the vote shall be set forth on a separate page of the proxy that can be detached and given to the proxy holder to retain. The proxy holder shall cast the member's vote by secret ballot.<sup>3</sup>

- Ballots:
- delivered 30 days prior to deadline
  - two envelopes with instructions

**1363.03(e)** Ballots and two preaddressed envelopes with instructions on how to return ballots shall be mailed by first-class mail or delivered by the association to every member not less than 30 days prior to the deadline for voting. In order to preserve confidentiality, a voter may not be identified by name, address, or lot, parcel, or unit number on the ballot. The association shall use as a model those procedures used by California counties for ensuring confidentiality of voter absentee ballots, including all of the following:

No signature on  
Ballot, insert into  
envelopes

**1363.03(e)(1)** The ballot itself is not signed by the voter, but is inserted into an envelope that is sealed. This envelope is inserted into a second envelope that is sealed. In the upper left hand corner of the second envelope, the voter prints and signs his or her name, address, and lot, or parcel, or unit number that entitles him or her to vote.

Deliver to  
Inspector(s) of  
Election

**1363.03(e)(2)** The second envelope is addressed to the inspector or inspectors of election, who will be tallying the votes. The envelope may be mailed or delivered by hand to a location specified by the inspector or inspectors of election. The member may request a receipt for delivery.

Votes counted at  
noticed meeting

**1363.03(f)** All votes shall be counted and tabulated by the inspector or inspectors of election in public at a properly noticed open meeting of the board of directors or members.

Candidates  
and/or members  
may witness vote  
count

Any candidate or other member of the association may witness the counting and tabulation of the votes. No person, including a member of the association or an employee of the management company, shall open or otherwise review any ballot prior to the time and place at which the ballots are counted and tabulated. <sup>4</sup>

Election results  
publicized within  
15 days

**1363.03(g)** The results of the election shall be promptly reported to the board of directors of the association and shall be recorded in the minutes of the next meeting of the board of directors and shall be available for review by members of the association. Within 15 days of the election, the board shall publicize the results of the election in a communication directed to all members.

Custody of  
sealed ballots

**1363.03(h)** The sealed ballots at all times shall be in the custody of the inspector or inspectors of election or at a location designated by the inspector or inspectors until after the tabulation of the vote, at which time custody shall be transferred to the association.

Ballots  
maintained for at  
least one year

**1363.03(i)** After tabulation, election ballots shall be stored by the association in a secure place for no less than one year after the date of the election. In the event of a recount or other challenge to the election process, the association shall, upon written request, make the ballots available for inspection and review by association members or their authorized representatives. Any recount shall be conducted in a manner that shall preserve the confidentiality of the vote.

Confidentiality to  
be preserved

All Associations  
to comply

**1363.03(j)** The provisions of this section apply to both incorporated and unincorporated associations, notwithstanding any contrary provision of the governing documents. <sup>5</sup>

*(Operative on July 1, 2006.)*

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## Also Effective July 1, 2006:

### §1363.09. Civil Action for Violation of Election Procedures.

Court Challenge

**1363.09(a)** A member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by an association of which he or she is a member, including, but not limited to, injunctive relief, restitution, or a combination thereof, within one year of the date the cause of action accrues. Upon a finding that the election procedures of this article, or the adoption of and adherence to rules provided by Article 4 (commencing with Section 1357.100) of Chapter 2, were not followed, a court may void any results of the election.

Member can  
recover fees,  
costs & penalties

**1363.09(b)** A member who prevails in a civil action to enforce his or her rights pursuant to this article shall be entitled to reasonable attorney's fees and court costs, and the court may impose a civil penalty of up to five hundred dollars (\$500) 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. A prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

Small Claims  
Court

**1363.09(c)** A cause of action under Section 1363.03 with respect to access to association resources by a candidate or member advocating a point of view, the receipt of a ballot by a member, or the counting, tabulation, or reporting of, or access to, ballots for inspection and review after tabulation may be brought in small claims court if the amount of the demand does not exceed the jurisdiction of that court.

*(Operative on July 1, 2006.)*

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dlr: 5/12/06

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1. SB1560 adds a provision allowing the Inspectors of Election to appoint "independent third parties" to assist with the tabulation of the votes.
2. SB 1560 states that double envelope secret balloting shall be used for "all items legally requiring a vote of the membership" and specifically adds "removal of directors" to the list of types of votes to which this applies. There has been a push to exclude "ministerial" items, such as the IRS Resolution and approval of the prior year's Annual Meeting minutes from this process. Time will tell.  
This section is further amended to indicate that a quorum is required only if stated in the governing documents; and that cumulative voting, if provided for in the governing documents, shall be allowed using the double envelope procedure.
3. SB1560 indicates that associations are not required to prepare and distribute proxies.
4. SB 1560 states that once a ballot is received by an inspector of election, it may not be revoked.
5. SB 1560 adds new subsections (k) through (o), which address voting without a meeting, provisions are applicable to incorporated and unincorporated associations, Civil Code provisions prevail over Corporations Code provisions if there is a conflict, and an effective date of 7/1/06.

**A BRAVE NEW WORLD  
of  
ELECTIONS and ANNUAL MEETINGS®**

May 12, 2006

Now that the legislature has “de-linked” Member voting from meetings, we are left to re-evaluate two old concepts in a new light: Annual Membership Meetings and the Timing of Voting. We have given these matters considerable thought, trying to meld the stilted aspects of the new law with Association practices and preferences that have worked for years. We have some suggestions.

**Annual Membership Meetings.**

Every year notice of the Annual Meeting would go out. Then there was always the struggle to get enough proxies and participants to reach a quorum. Why was a quorum so important? Without a quorum, the election of directors could not take place. Now that ballots are mailed to elect directors, and vote on other matters, what is there to do at the Annual Membership Meeting?

Think “outside of the box.” Does the Association need an Annual Membership Meeting at all? Yes, if the Bylaws require it. However, since there will not be any voting by Members, the lack of a quorum is a “no harm no foul” situation. Our suggestion? Amend the Bylaws to remove the requirement of an Annual Membership Meeting.<sup>1</sup> Also, we suggest a new type of Annual Meeting, which we now refer to as the Annual Board Report and Informational Meeting. Officers’ reports, committee reports, goals for the year, candidate statements and a Member discussion forum can and should still take place. The meeting will not, however, be a quorum-qualified Member meeting. Think of it as an informational and social meeting with a Board meeting sitting just beneath the surface. The gathering of Association Members remains very important from a community, social and psychological standpoint, but is now “de-linked” from any voting. We do recommend that despite casting a tall shadow, it be technically a qualified Board meeting to assure some structure.

**The Old Days of Annual Meetings:**

- Check-in/Registration
- Collecting Proxies
- Establishment of Quorum  
(last minute scurry for more people)
- Distributing Ballots
- Write-Ins
- Voting, Counting, Announcing

**The Timing of Voting.**

Once you have de-linked voting and the Annual Meeting, there are technically three options on the timing of voting: before, during or after the Annual Meeting. We have rarely seen a groundswell of

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<sup>1</sup> The California Corporations Code provides that if (1) election of directors is done by mail, and (2) the Bylaws are amended to eliminate the “annual meeting” requirement, the traditional annual meeting can be dispensed with (CEB Advising California Common Interest Communities §2.44). Meanwhile, if an Annual Meeting is required by the Bylaws, there are certain requirements that technically must be met in order to preserve the Association’s corporate shield (such as convening a quorum of members).

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The Brave, New World:

- Community gathering
- Review of previous year
- Goals for coming year
- Candidates speak
- Maybe a little wine,  
a few hors d'oeuvres ...

interest in Association business prior to annual meetings. Sending out requirements for nominations, candidate nights and appointment of Inspectors of Election prior to the Annual Meeting will be cumbersome and irritating at best. Combining the vote by mail with voting at a meeting will be procedurally complex and risky. Rather, we advocate that the voting be choreographed to take place AFTER the new style Annual Meeting.

Just like the “old days,” the Nominating Committee can hunt for volunteers prior to the Annual Meeting. Volunteers can step forward at any time before or at the Annual Meeting. Nominations can remain open up to the end of the Annual Meeting. And, yes, there can still be nominations from the floor. The Board, at the Annual Meeting, can close nominations and appoint Inspectors of Election. Candidates present can speak. Then after the meeting is over, the next week can be used to prepare the ballot material, listing all candidates on the ballot, and gathering candidate forms to go with the mailing. The material can be sent out with instructions that the ballots must be returned within thirty days. The meeting at which the ballots will be tallied will be a Board meeting for that purpose.

Once that Board meeting is convened by the sitting Board, the main business of processing ballots and tabulating results can go forward. Candidates can be there, as well as anyone else interested in the process or outcome. There won't, however, be the pressure of a room full of people hoping the Inspectors of Election will “hurry up” with the results so they can go home. (Members will have been to the Annual Meeting and likely will not bother to come to the Board meeting for the counting of ballots.). After processing the votes and identifying the winners, the results are to be publicized within fifteen days of that Board meeting. This communication to all Members is also an opportunity to send out a summary of the remarks from the Annual Board Report and Informational Meeting. Remember, such a summary should be categorized as “remarks” not Member meeting “minutes” (which used to require Member approval the following year) because there was no Member “meeting.”

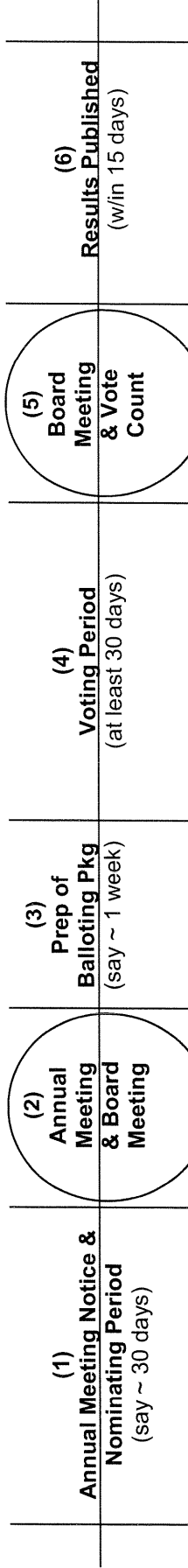
With this new scenario, what used to take place in one Member meeting, has now been split into “1-½” Board meetings. Attached is a timeline graphic which portrays our recommended approach. With the addition of a few extra envelopes and amending the Bylaws<sup>2</sup>, the agony over achieving a quorum is a thing of the past. The silver lining to the new laws is here!

This scenario may not fit every Association, but we suspect that for most, it will be the process and sequence that best fits the community expectations.

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<sup>2</sup> When updating the Bylaws, be sure to address the “IRS Resolution” and other required quorum levels.

# Timeline for New Voting Procedure



**Careful!** This is a generic scenario. New Civil Code section 1363.03 requires new voting methods, but some aspects are still controlled by your Bylaws and/or CC&Rs.

**(1) Annual Meeting Notice and Nominating Period:**

At least 30 days in advance, deliver notice to Members of upcoming Annual Meeting. Include reminder that volunteers are needed to run for Board and let Members know how to apply.

**(2) Annual Meeting & Board Meeting:**

(a) "Annual meeting" of the Members takes place. Technically, if no Member votes are to be taken, the lack of quorum may be a "no harm, no foul" situation. (Remember, you should amend the Bylaws to eliminate the requirement of a Member/Annual Meeting.) Agenda will include review of prior year activities, committee reports, goals for upcoming year, forum for Member discussion candidate forum and nominations from the floor. This is really an informational meeting.

(b) Board Meeting is also conducted simultaneously. Board appoints the Inspector(s) of Election. Board announces close of nominating period as of close of meeting.

**(3) Prep of Balloting Package:**

Copy & mail all balloting material, including two envelopes, completed candidate forms, any other campaign material, voting instructions and specify the deadline for close of voting.

**(4) Voting Period:**

Members must be given at least 30 days in which to cast their votes. (Note that a vote cannot be changed once received.)

**(5) Board Meeting:**

In this scenario, votes are counted at a Board meeting which follows. This Board meeting is to be approximately 37 days after the Annual/Board Meeting (minimum 30 days plus allow 7 days to prepare and mail). The results of the vote are reported to the Board and noted in the minutes of that meeting.

**(6) Results Published:**

Voting and election results must be publicized in a communication to all Members within 15 days of the result tally.