



May 13, 2020

Members of Santa Ynez Recreational Center

**Re: Santa Ynez Recreational Center, Inc. ("SYRC") // Election Rules // Letter to the Entire Membership**

Dear SYRC Members:

On behalf of the Board, we would like to thank you for expressing your comments concerning our proposed election rules. The Board asked that we summarize our response to some of the comments for your information. See the questions and answers below.

**QUESTION: Should the Board Have Had the Current Rules Red-Lined Rather than Draft New Proposed Rules?**

**Answer: No.**

In our experience, it is more practical and cost effective for the Association to have new rules prepared pursuant to our attorneys' flat fee service rates, which SYRC in fact did. The alternative, red-lining the current rules, would actually be less cost effective because the project would require an attorney to review the existing rules, one by one (and even line by line), and determine where changes are required. This would be a lengthy process and billed at the firm's hourly rates.

**QUESTION: Do the Proposed Rules Preclude the Use of Proxies During an Election?**

**ANSWER: No.**

The major difference between the proposed rules and the current rules concerning proxies is that the Association will no longer be required to distribute proxy forms with the election materials pursuant to the election rules. This rule change does not preclude the use of proxies, it merely shifts the burden of preparing the proxy to the member that wishes to utilize one. In effect, this proposed rule change is actually more cost efficient for the Association because it will save on printing and distribution costs.

Moreover, pursuant to California Civil Code §5130(b), "Proxies shall not be construed or used in lieu of a ballot. An association may use proxies if permitted or required by the bylaws of the association and if those proxies meet the requirements of this article,

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other laws, and the governing documents, but the association shall not be required to prepare or distribute proxies pursuant to this article." Thus, according to the law, the SYRC is not required to prepare or distribute the proxy materials.

Furthermore, any concern that this change requires approval of the membership is unfounded because this proposed rule will not alter the governing documents. Again, this rule does not prohibit the use of proxies, which the governing documents allow. It merely requires the voter – instead of the Association – to prepare the proxy materials if s/he wishes to utilize such a voting method.

And finally, to our knowledge, none of our many community association clients distribute proxies and it is rare for an owner to submit a proxy in an owners meeting.

**QUESTION: Will the Proposed Rules Effectively Suppress the Vote Because the Association is No Longer Required to Prepare and Distribute the Proxy Materials?**

**ANSWER: No.**

Any concern that not sending out proxies suppresses the vote is misplaced. We are unaware of any association that sends out proxies. They were popular prior to 2006 before the law was changed to require secret ballot elections. Prior to 2006, ballots were not sent to the owners. If they could not attend the meeting where the ballots would be provided, they could give someone their proxy. At the meeting, the proxy would be exchanged for a ballot. Now, ballots are sent out to all owners, which they can mail back to the association themselves. There is really no need for proxies. They are rarely if ever used. But, again, the proposed rules do not prohibit the use of proxies.

**QUESTION: Do the Proposed Rules Relax the Obligation of the Inspector(s) of Election to Comply with the California Corporations Code?**

**ANSWER: No.**

The proposed rule concerning the inspector of election is actually more transparent and broader than the original rule. The original rule expressly required the inspector of election to comply with the Corporations Code and made no reference to other areas of the law. The proposed rule, however, provides that the inspector of election shall "[p]erform any acts as *may be proper to conduct the election with provisions of the law* and all applicable rules of the Association regarding conduct of the Association that are not in conflict with the law." Thus, while it does not expressly reference the

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Corporations Code, the proposed rule encompasses and requires the Inspector to comply with the Corporations Code *and any other applicable laws*.

### **QUESTION: Do the Proposed Rules Concerning the Inspector of Election's Ability to Consult with an Attorney Violate SB323?**

#### **ANSWER: No.**

The law does NOT eliminate the HOA lawyer from participation in Association elections. At most, the new election law prohibits anyone under contract with the Association from acting as the inspector of elections. That would include the manager and the lawyer; it does not mean that the independent inspector of elections cannot discuss legal issues with the Association's legal counsel. And legal issues do come up and most inspectors of election are not equipped to respond to those legal issues. The proposed rule change is standard language/procedure.

Any concern that allowing the inspector of election to consult with the Association's attorney would contradict SB323's requirement for the inspector of election to act independently is misplaced. The proposed rules clearly state that the inspector of election may consult with the Association's attorney *"for the limited purpose of informing and advising the Inspector regarding issues related to the Inspector performing his or her duties for the Association, and the Association waives the attorney-client privilege for that limited purpose."* Issues may constantly arise during an election and this allows the inspector of elections to consult with an attorney to clarify whether she is performing her duties for the Association properly. This is merely a tool to allow legal counsel to clarify any issues or confusion that may arise when the inspector is performing her duties.

### **QUESTION: Must the Membership Approve the Proposed Rules Because They Prohibit Write-In Candidate and Nominations from the Floor?**

#### **ANSWER: No.**

It is true that the proposed election rules are a departure from the current rule regarding floor nominations and write-ins. However, the proposed revised rule is permissible under the new law and does not require membership approval because it is not a change to the existing governing documents.

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The Election Rules rely upon the Bylaws. Even though there generally exists a hierarchy to interpreting the Association's Governing Documents in which the Bylaws typically prevail over Association Rules and Regulations, parts of SB323 and the Civil Code regarding Election Rules provide an exception in which the law on Election Rules can supersede certain provisions of the Bylaws. The Board has the authority to adopt Election Rules like any other rule or regulation. Per Civil Code § 5105(f) (Election Rules) write-ins and floor nominations are permitted, but not required in Election Rules.

The Association's Bylaws are silent about write-ins and per Civil Code § 5105(f) the Association's Election Rules can allow or prohibit write-ins.

There are also practical reasons for not allowing write-ins and floor nominations. As a practical matter, it is virtually impossible for a write-in candidate to win the election when most owners will have already voted and mailed in their completed ballots. It is administratively easier to handle voting when candidates have been nominated in advance rather than having to handle write-ins and floor nominations on the day of an election. Arguably, removing write-ins and floor nominations also filter out less serious candidates who were nominated by other members when the nominated candidate did not want to run for election or candidates who did not bother to make an effort to self-nominate themselves in advance.

**QUESTION: Why Do the Proposed Rules Not Address a Member's Right to Bring a Civil Action for Violation of the Election Requirements and Why Do the Proposed Rules Not Define Association Records?**

**ANSWER: The Proposed Rules Are Not Intended to Restate the Entirety of the Law Concerning Elections; They Are Intended to Address the Rules Governing Elections Only.**

SB323, which amends various sections of the Civil Code, should not be misinterpreted as mandating all changes to be reflected in an association's Election Rules. The proposed Election Rules are not required to address all the changes to the Civil Code made by SB323.

Specifically, SB323 amended Civil Code § 5145 (Remedies Violation of Ballot Election Statutes). However, Civil Code § 5105 (Election Rules) does not explicitly require the text of Civil Code § 5145 to be part of the Election Rules. Similarly, email addresses are now part of membership lists, but this statement is not required to be inserted into

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the Election Rules. Not only are these items unnecessary to include in the proposed Election Rules, the Election Rules are already long enough and to include every change made by SB323 (including those that don't address actual election procedures/protocols) would make the rules burdensome to review.

### **QUESTION: Why Do the Proposed Rules Not Include a Timeline?**

#### **ANSWER: Inclusion of a Timeline is Impractical and Not Legally Required**

It is impractical to include a timeline of the entire election process because the law provides for minimum time requirements, but that does not prohibit a Board from extending these time periods. Further, it should be noted that, within the proposed election rules document, there are several references to explicit time periods, thus providing important *milestones* that the membership can follow.

### **QUESTION: Should the SYRC and SYHOA Have Updated Their Election Rules Jointly? Would Doing So Have Saved on Legal Fees?**

#### **ANSWER: No.**

The SYRC and SYHOA are separate entities and independent of each other. There is no legal requirement to jointly adopt or develop items in tandem. Also, the two entities being separate and independent, the individual Boards may have different interests for what is best for each.

Had the two associations retained the same legal counsel to update both associations' rules, the two associations would still have incurred the fees for two projects because the attorneys would have been required to do the same work to produce two (2) separate documents/Election Rules for the separate associations based on their respective bylaws and needs a desires.

### **QUESTION: Why Did the Board Wait So Long After SB323 Passed to Update the Election Rules?**

#### **ANSWER: It Would Have Been Impractical to Retain Counsel to Update the Rules Immediately After SB323 Passed.**

It should be noted that even if the Board attempted to update the election rules immediately after SB323 passed, it would not have been likely for the Board to receive a rough draft of the proposed rules that quickly. Practically speaking, law firms had to

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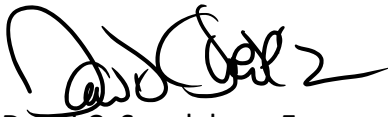
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take their time to understand the new law and the effect it had moving forward. Furthermore, Boards are usually too busy with many things on their plate at one time (especially at the end of the year) to drop everything and address changes in the law immediately.

Sincerely,

**SwedelsonGottlieb**

A handwritten signature in black ink, appearing to read "David C. Swedelson". The signature is stylized and cursive, with a long horizontal flourish extending to the right.

David C. Swedelson, Esq.