



FAQ's REGARDING THE 2024 DIRECTOR ELECTION

April 23, 2024

The information below provides answers to questions regarding the effect of new Legislation on the Director term limit contained in the Association's Bylaws, and its impact on the Association's 2024 Annual Election of Directors ("2024 Director Election"). The information below was prepared by the Association's legal counsel, Steve Tinnelly of Tinnelly Law Group, APC.

What is Assembly Bill 1764 (AB 1764)?

AB 1764's enactment by the California Legislature resulted in several statutory changes which became effective as of January 1st of 2024. Among those changes were revisions to Civil Code section 5105 governing the content of an HOA's election rules and the qualifications for candidacy of persons running for the Board ("Candidate Qualifications"). One of Section 5105's central purposes is to restrict the types of Candidate Qualifications an HOA may enforce to only those qualifications which are specifically listed within the text of the statute.

What Impact did AB 1764 have on the 2023 Director Election?

At issue in the Association's 2023 Annual Election of Directors ("2023 Director Election") was the discovery of a provision in the Association's Bylaws that prohibits Directors from serving more than two (2) consecutive terms ("Term Limit"). The discovery of the Term Limit raised concerns regarding the pending 2023 Director Election at that time—namely, the fact that there were incumbent candidates running for the Board in the 2023 Director Election who, if elected, would be serving more than two (2) consecutive terms ("Termed-Out Directors"). The Association's legal counsel advised the Board that the Association could not disqualify those incumbent candidates irrespective of the Term Limit contained in the Bylaws. This was because, as referenced above, AB 1764 was not yet signed into law. Accordingly, Civil Code section 5105 did not—at the time of the 2023 Director Election—include term limits within its list of permissible Candidate Qualifications that HOAs could adopt or enforce. The incumbent Termed-Out Directors were therefore legally permitted to run in the 2023 Director Election.

What impact does AB 1764 have on the 2024 Director Election?

AB 1764 and its recent amendments to Section 5105 have now explicitly addressed the issue of term limits contained in an HOA's governing documents and their permissible enforcement as a Candidate Qualification. The Legislature's action in amending Section 5105 to now address the term limit issue validates the guidance provided by the Association's legal counsel to the Board last year during the 2023 Director Election; guidance that was consistent with the language of Civil Code section 5105 as it existed *at that time*.

Civil Code section 5105 (as amended by AB 1764) now affirmatively requires the Association to "disqualify ***a nominee*** if that person has served ***the maximum number of*** terms or ***sequential terms*** allowed by the association." (Civ. Code § 5105(b) (Emphasis added).) Because the Association

has a sequential Term Limit in its Bylaws, it must disqualify any candidate who fails to satisfy that qualification. Accordingly, if any incumbent Termed-Out Director sought to run as a candidate in the 2024 Director Election, the Association would be legally required to disqualify them as a candidate and not permit them to run.

Why have the Termed-Out Directors currently serving on the Board not been removed?

The Term Limit contained in the Bylaws is a Director qualification per the terms of California Corporations Code section 7151. In a situation where a sitting Director ceases to meet a Director qualification contained in the Bylaws, that Director is not automatically removed from the Board. Rather, Corporations Code section 7221 authorizes the remaining members of the Board to, at their option, vote to remove that disqualified Director from the Board by declaring that disqualified Director's seat vacant. The Board is not, however, required to exercise this discretionary authority, nor is a disqualified Director under any legal mandate to resign from the Board.

The sitting Directors who are not Termed-Out therefore have the *option*, but not the *obligation*, to declare the Termed-Out Directors seats vacant by a majority vote. That option has not been exercised by the Board.

What is the prescribed minimum duration during which Termed-Out Directors cannot seek re-election?

The law does not provide any guidance on what length of time a Termed-Out Director must be off the Board for the sequential term limit to no longer disqualify their candidacy in future elections. There is no statutory definition of what period constitutes a sufficient "break" in consecutive service when applying a sequential term limit. The Board intends to address this issue through an amendment to the Association's election rules that will define the requisite "break" in consecutive service when applying the Term Limit qualification in future elections. However, because Civil Code section 5105(h)(4)(B)(iii) prohibits election rules from being amended less than ninety (90) days prior to an election, any amendment to the Association's election rules will not take place until after the 2024 Director Election has concluded. Once the Board commences the process of amending the election rules to address this issue, notification will be provided to the membership in satisfaction of Civil Code requirements.

Who comprises the Association's "Nominating Committee" and what is their function?

The Association's Bylaws contain provisions mandating the formation of a "Nominating Committee" for the purposes of making "as many nominations for election to the Board as it shall in its discretion determine, but not fewer than the number of vacancies that are to be filled. Such nominations may be made from among the members or nonmembers." These types of provisions are based on an antiquated concept whereby a group of volunteers (a Nominating Committee) would select those persons whom they felt were suitable candidates for their HOA's Board.

However, because the California Legislature has enacted several laws dictating how HOA Director elections must be conducted, Nominating Committees have been rendered essentially meaningless. For example, as referenced above, the contemplated purpose of Nominating Committees was to propose persons whom the Committee members felt, in their discretion, were qualified to run for the Board. Civil Code section 5105 strips such discretion away from an Association and any Nominating

Committee it may have by specifying precisely what Candidate Qualifications are legally allowable. Moreover, Civil Code section 5105 also prohibits any election procedure that “disallows any member from nominating themselves for election to the board.” Accordingly, a member has the ability to nominate themselves for election to the Board and, so long as the member satisfies the Candidate Qualifications that Section 5105 prescribes, neither the Association nor its Nominating Committee have any discretion to disqualify the member’s candidacy.

The modern “Nominating Committee” for a California HOA serves only limited administrative functions; they receive submitted candidate nominations and verify their ability to run by confirming their compliance with all Candidate Qualifications the Association is obligated to enforce per the Civil Code. Like the vast majority of California HOA’s, the Association’s management company performs this function and consequently distributes the required nomination forms, candidate notifications, etc. per the terms of the “Nomination Procedures” contained in Article V of the Association’s election rules.