



Who (S)elects Directors to Replace Recalled Directors?

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When one or more directors are recalled (but less than the entire board), there is often confusion as to whether the remaining directors may appoint their replacements or whether the membership must elect their replacements. Most recall elections these days are done pursuant to statute, A.R.S. §33-1813 or A.R.S. §33-1243(H), but both of those are silent as to what happens after a director is recalled...thereby forcing associations to look to their documents for guidance. (The Legislature missed its chance to clearly spell out the procedure.)

However, sometimes even the applicable provisions in the governing documents create confusion. For example, consider the following language found in one bylaw provision: "At any regular or special meeting of the Members, any one or more of the directors may be removed without or without cause by the affirmative vote of Members eligible to vote casting not less than two-thirds (2/3) of the total votes represented, and a successor may then and there be elected by the Members to fill the vacancy." In the same bylaws, another provision provides that "All vacancies on the Board shall be filled by a vote of the majority of the remaining directors, even though less than a quorum." As you can imagine, some directors will reconcile these provisions as meaning that the membership must replace recalled directors whereas others will interpret the language to mean that the remaining directors must fill any vacancies on the Board. The general rule in contract interpretation; however, is that the more specific provision "trumps" the more general. Therefore, in a recall pursuant to the bylaws in this case, the members would elect to fill the vacancy.

Arguably, if the recall is not done pursuant to the removal process in the bylaws in the foregoing example, the remaining directors could fill the vacancy(ies) pursuant to the general vacancy language. A.R.S. §33-1243 (B) (condominiums) also provides: "The board of directors may fill vacancies in its membership for the unexpired portion of any term." The planned communities act does not have similar language, but the non-profit corporation act does. In the example provided above, an argument exists that the remaining directors are authorized to fill vacancies created by a statutory recall election. However, having the remaining directors appoint replacement(s) and therefore not allowing the membership to vote for replacement(s) could create political unease or worse yet, it could cause a legal challenge.

The approach that is least likely to be challenged is for the association to first hold the recall election. Then, if the director(s) is/are removed at that meeting,

the association should notice and hold an election at a later date for the replacement(s), after soliciting candidates. Hopefully, there would be time to do so and still meet notice requirements and send absentee ballots. However, an association's governing documents may require that it hold an election right after a recall election (at the same meeting), as in the example above. Obviously, there would be no way to elicit candidates and send absentee ballots. (Although nothing prohibits it, we do not recommend sending out calls for "potential" director candidates with recall meeting notices. It is awkward and makes it appear the association is jumping to conclusions.) If one or more directors is recalled and a new director is elected by those members at the meeting (quorum is present), those not in attendance at the meeting would have little argument that they were disenfranchised by the process.