



DECISION PAPER

December 30, 2020

TITLE:

Proposed Tahoe Donner Election Rules and Fair Campaign Guidelines

RECOMMENDATION:

By Motion:

1. The Board of Directors adopt the recommendation by staff and approve and send the final draft of the proposed Election Rules to the members for the 45-day member notice and comment period, so that the Election Rules may be timely adopted at the February 2020 Board meeting.
2. The Board of Directors by Resolution adopt the proposed Fair Campaign Guidelines

BACKGROUND AND ANALYSIS:

Why are changes needed to what we have now?

Tahoe Donner elections are currently guided by (i) Voting and Election Rules, (ii) Fair Campaign Guidelines, and (iii) the Elections Committee Charter and related timelines and procedures produced by the Elections Committee.

The current Voting and Election Rules need to be updated to comply with the Davis Stirling Act, which mandates that the Association adopt very specific operating rules to guide elections. These requirements were significantly amended with the passage of SB 323, a bill which became effective as of January 1, 2020. SB 323 added additional protections intended to prevent incumbent Boards of Directors from following discretionary election rules that could result in unfair elections. While the required process was followed by Tahoe Donner in the 2020 Election, the stand-alone Election Rules were not updated.

The current documents that guide elections also do not clearly distinguish between what is a required and enforceable operating rule, and what is a guideline or best practice as it relates to an election. During the 2020 election cycle, which saw a record 49.5% voter turnout, claims were made that under the existing election rules and fair campaign guidelines the Board and/or the Elections Committee had a duty to investigate and take action relating to campaign advocacy that occurred outside of Association channels, such as on social media platforms or via electronic mail sent by candidates or members. As such action would conflict with the free speech rights of interested members and candidates and erode the required neutrality of the Association in the

administration of the election, it became clear that revisions were needed to clarify what the Association's role is, and is not, in the election process.

What was process by which the final draft Election Rules and the Fair Campaign Guidelines have been developed?

The process began during the 2020 Election as a response to the claims that arose during the election. The Elections Committee, the Inspector of Elections, legal counsel, and the Board have been actively working on needed reforms since that time. The Elections Committee also conducted a survey of the membership after the election and the members expressed concerns about election process, and specifically uncertainty and some confusion about the Associations role in policing campaign advocacy outside of Association channels.

In August of 2020, the Board directed staff and the Elections Committee to work with counsel to revise and update the election related documents. Over the last several months the Elections Committee and staff and interested stake holders have weighed in, and the result is this recommendation to adopt and send for member comment the attached final draft Election Rules, and to adopt the Final Draft Fair Campaign Guidelines.

What about the other election related documents?

The recommendation is also to revise the Elections Committee Charter to clarify what the Elections Committee role is, and importantly is not, during the election process.

In addition, as certain complaints and claims arising from the 2020 election related to the conduct of sitting Board Members in campaign advocacy outside of Association channels and the role of the Association in monitoring and policing such advocacy, it is recommended that the Director's Code of Conduct be revised.

A separate Decision Paper and Draft of the recommended revised Election Committee Charter will be provided, along with a draft of the revised Director's Code of Conduct.

What is the primary difference between the recommended final draft Election Rules and Fair Campaign Guidelines?

As noted above, to avoid any misconception about what the Association can and cannot do during an election, it is important to distinguish between what is a required and enforceable operating rule, and what is a guideline or best practice as it relates to campaign advocacy that occurs outside of Association channels. Thus, a primary goal of the revisions is to separate the apples from the oranges, the apples being mandatory and enforceable election rules, and the oranges being the guidelines or best practices.

Thus, for example, the Fair Campaign Guidelines recognize that the election administered by the Association should be guided by the principle that the Association is and must remain neutral during the election process and that individual members have wide latitude grounded in fundamental free speech rights to participate in the election process using outside channels.

Making this clear should avoid the type of claims that arose in the 2020 election, when the Board and its Elections Committee was asked to investigate or “fact check” the content of election related communications that originated from individuals outside of Association channels.

While the Elections Committee’s mandate under the Bylaws is correctly “...to monitor the election process to help assure its fairness and impartiality” – that is, to monitor the process administered by TDA – the existing Fair Campaign Guidelines provide that the Elections Committee, in conjunction with the Inspector of Election, “... will monitor campaign activities of candidates, respond to and investigate inquires/complaints from members, staff and/or other candidates and inform the board of issues that may be in conflict with the Association CC&Rs.” This language was interpreted by certain parties to permit or encourage investigations as to the content of election related communications outside of Association channels, and thus must be clarified.

The current Guidelines also use broad, somewhat subjective language, such as stating that candidates should “abide by basic principles of decency, fair play and honesty, including not making statements known to be false about other candidates, their backgrounds, affiliations or positions.” It is not the Association’s role to be the arbiter of what is decent or fair in campaign advocacy, and the revised Fair Campaign Guidelines make that clear.

The final proposed draft of the Fair Campaign Guidelines includes existing guidelines such as (i) requiring TDA volunteers and Board Members to include in any campaign advocacy a disclaimer that they do not speak for the Association, (ii) best practices for use of the membership list for election related communications, and (iii) the inclusion of an “Opt Out” option for recipients of election related electronic communications, and (iv) although we cannot require candidates to sign the Fair Campaign Guidelines we have included a signature line for candidates to abide by the Fair Campaign Guidelines. While there was discussion of including these in the Election Rules, the final consensus was to keep these provisions as advisory guidelines.

Do we have additional time to evaluate the proposed final draft of the Election Rules?

No. It is mandatory that TDA adopt new Election Rules that are consistent with the Davis Stirling Act, Civil Code Section 5100, et seq., and specifically the changes enacted as part of SB 323, which took effect January 1, 2020. As noted above, while the Association followed the managed process in 2020, the adoption of a stand-alone Election Rules that comply with the Davis Stirling Act is not optional.

The Election Rules must be adopted at least 90 days before the election, and as enforceable operating rules, are subject to the 45-day member notice and review process required by the First Restated Declaration of Covenants and Restrictions (“the Declaration”), Article III, Section 7. Thus, assuming the Board approves the final proposed draft, the timeline would be as follows for adoption:

- January 8, 2021: Board approves final proposed Election Rules and directs delivery of draft to members to start the 45-Day Member Notification and Comment Period.



- January 15, 2021: Staff delivers notice and a copy of the proposed Election Rules for member comment. This would be a separate direct mailer to members due to the size of the document.
- January 22, 2021: Board of Directors meeting; consider initial member comment, discussion item only.
- February 26, 2021: Board of Directors meeting; consider additional member comments; make final decision to adopt the proposed Election rules.
- May 27, 2021: This is 90 days after adoption, which is just before the planned June 2021 Election.

Should we delay adoption of the Fair Campaign Guidelines?

The final proposed Fair Campaign Guidelines are related to but distinct from the Election Rules, as they are not enforceable operating rules but rather guidelines, or expectations of conduct. Member notification and comment therefore is not required to adopt the guidelines, and thus it is not as critical to adopt the Fair Campaign Guidelines now.

However, a benefit of adopting the guidelines now is that they can be included in the mailer with the Elections Rules, so that the members can see more clearly how the Rules relate to the guidelines, which should lead to a better understanding and acceptance of the Rules. Providing the guidelines may also help educate the members with regard to the Association's role in elections and the distinction between enforceable election operating rules on the one hand, and fair campaign guidelines and best practices, on the other hand.

FUTURE MEMBER OUTREACH:

Election Rules

Future anticipated member outreach will include a direct mailer, website posting, email blast topics, and member comment period during the February board meeting.

Fair Campaign Guidelines

Future anticipated member outreach will come through the direct mailer, and at the upcoming board meetings, and website posting.

FISCAL IMPACT:

Election Rules

Direct mailer expense is estimated between \$4,000-\$6,000, which is within publications budget parameter.

Fair Campaign Guidelines

While these may be included in the mailer with the proposed Election Rules, there is no direct fiscal impact.

ALTERNATIVES:

1. Election Rules: Provide additional direction to staff and the committee on specific changes to the draft proposed Election rules and publish the 45-day notice with said changes following review by legal counsel, mindful of the requirement to adopt Election Rules at least 90 days before the 2021 election.

2. Fair Campaign Guidelines: Provide direction to staff and the committee on specific changes to the draft proposed Fair Campaign Guidelines.

ATTACHMENTS:

1. Current Tahoe Donner Election Rules and Guidelines.	2. Annotated final proposed Election Rules reflecting input and statutory requirements, with copy of Davis Stirling Act provisions.	3. Clean copy of final proposed Election Rules.	4. Clean copy of proposed final Fair Campaign Guidelines.	5. Previous Version of Rules with select guidelines included
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Prepared by: **Robin Bennett, Executive Project Manager/Asst. to GM 12/30/2020**

Reviewed by: David Mickaelian, General Manager

Board Meeting Date: 1/8/2021

General Manager Approval to Place on the Agenda: _____

