



MEMORANDUM

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TO: Board of Directors of The Jewish Community of Ojai, A California Nonprofit Religious Corporation
FROM: Roy Schneider, Esq. and Eric A. Hirschberg, Esq.
DATE: February 5, 2018
RE: Legality of Proposed Revisions to Bylaws

A. Background

The Jewish Community of Ojai, A California Nonprofit Religious Corporation (“JCO” or the “Corporation”), is currently a Corporation with no members (i.e. no voting members), and as such, all decisions regarding the JCO are currently decided by the Board of Directors (“Board”) pursuant to California Corporations Code Section 9310. However, the current Bylaws provides for non-voting members.

The Board, at the request of the non-voting members of the JCO, has decided to transition the Corporation so that it has voting members. The Board, through a committee, has reviewed the current Bylaws of the Corporation and has drafted proposed revisions to the same.

We have reviewed the proposed changes, the current Bylaws, and the applicable sections of the California Corporations Code pertaining to religious corporations regarding the Board’s ability to revise the current Bylaws to incorporate its proposed changes as well as the legal validity of the suggested changes. The scope of this memorandum is limited to addressing the provisions of the proposed revisions to the Bylaws that are barred by the Corporations Code and does not address any of the proposed revisions that are legally permissible; it does not address or provide advice regarding the practicality of the implementation of the various proposed revisions to the Bylaws. Suggested provisions of the proposed Bylaws which are not discussed in this memorandum can be presumed to lawful and valid.

B. Issues

Which provisions, if any, set forth in the proposed revisions to the Bylaws are not permissible under the California Corporations Code?

C. Authorities and Analysis

1. Amending the Bylaws and Reserving the Board's Voting Rights

As the JCO is currently a non-member corporation, the Board may revise the Bylaws pursuant to the current Bylaws and *Corporations Code §9310*.

Once the Board amends the Bylaws providing members voting power, the Board's powers to later amend the Bylaws will be reduced in the future in accordance with the voting power provided to the members in the Bylaws and by the limitation of the Corporations Code. Thus, it is pertinent that in amending the Bylaws the Board reserves to itself various powers regarding amending the Bylaws, and otherwise, so that such issues would not require the members' votes in the future. Specifically, *Corporations Code §9150* addresses the amendment of the Bylaws by the Board and its ability to reserve certain voting powers to itself. Subsections (b) and (c) of *Section 9150* state in pertinent part that:

“(b) Bylaws may be adopted, amended or repealed as provided in the articles or bylaws and absent any provision, bylaws may be adopted, amended or repealed by approval of the members (Section 5034) or the board, except as provided in subdivision (c). The articles or bylaws may restrict or eliminate the power of the board to adopt, amend or repeal any or all bylaws subject to subdivision (e) of Section 9151.

(c) Subject to any provision in the articles or bylaws, the power of the board to adopt, amend or repeal bylaws is subject to the powers of members set forth in Section 9151.”

Corporations Code §9151 and *Corporation Code §9132(c)* provide what provisions the Bylaws may contain, and the rights that may be reserved by the Board. All of the changes to the Bylaws proposed by the Board are permissible under *Corporations Code §9151* and *Corporation Code §9132(c)*, except for those that are specifically addressed below.

Considering *Sections 9151* and *9132*, the Bylaws should contain a detailed list of what the Board has the ability to control without the vote of the members. The Board should also consider what items may be decided by the members and the consequence of the members not achieving a quorum, such as the matter reverts back to the Board for the decision.

Corporations Code §9151(c) provides that the Bylaws can designate who can vote on issues and the voting requirement on particular issues. However, *Section 9151(e)* provides specific member voting requirements concerning dissolution of the Corporation (*§9680(b)*) or removal of a board member without cause (*§9222*), which cannot be modified through the Bylaws. Further, the voting requirements for members, as set forth in the Corporations Code, cannot be modified concerning mergers (*§9640*) or sales of substantially all of the Corporation's assets (*§9631*).

2. Issues Requiring Members' Votes and Specific Voting Requirements

Below are the issues that, pursuant to the Corporations Code, will require members' votes and have specific voting requirements, which are in conflict with the proposed revisions to the Bylaws.

The Corporations Code defines members' voting requirements under *Sections 5033 and 5034*. *Corporations Section 5033* defines "approval by (or approval of) a majority of all members" as a vote by the majority of all of the Corporation's members. *Corporations Section 5034* defines "approval by (or approval of) the members" as the approval or ratification by the majority vote of the members at a meeting where a quorum is reached.

Dissolution of Corporation. As set forth above, the decision to voluntarily dissolve the Corporation requires a vote of the members, specifically, *Corporations Code §9680(b)(1)* provides that "Any corporation may elect voluntarily to wind up and dissolve (A) by approval of a majority of all the members (Section 5033) or (B) by approval of the board and approval of the members (Section 5034)." Accordingly, the Board's proposal that a dissolution of the Corporation would require a 2/3rds supermajority member vote is impermissible. However, the Board will have the ability to dissolve the JCO if one of the exceptions under *Corporations Code §9680(b)(2)* applies, such as: relief from bankruptcy, the corporation has no assets and has not conducted business for five years, or the corporation has no members.

Removal of Board Member. Additionally, pursuant to *Corporations Code §9151(e)* and §9222, the members must be provided with the right to remove a director without cause based on the majority vote when quorum is reached. Thus, the Board cannot retain voting rights as to the removal of a director without cause.

Replacement of Removed Board Member. The Board has proposed that if a director is removed then he or she is to be replaced by the Board. This would be permissible, unless the Board member was removed by a vote of the members. (*Corp. Code §9224*). Thus, a Board member can be replaced by the Board if such a provision is set forth in the Bylaws; however, if the Board member is removed by the members without cause, the members will have to vote for the new member of the Board, per *Section 9224(b)*.

Structural Matters. Furthermore, the members' ability to vote on the "Structural Matters" set forth in the Board's proposed revisions to the Bylaws, are limited under the Corporations Code. Both a merger, under *Corporations Code §9640*, by the JCO or the sale of substantially all of the Corporation's assets, under *Corporations Code §9631*, both require a majority vote of a quorum of the members, as well as, approval by the Board. Therefore, the Bylaws cannot require a supermajority vote as to these items as proposed by the Board.

3. Special Meeting Requirements

The Board proposed that special meetings of members for any lawful purpose may be called by the Board, the President, or 25 percent or more of the members. Such a requirement appears to be permissible under the Corporations Code, as *Corporations Code §9410*, gives the Board the ability to provide such condition, if they are set forth in the Bylaws. Should the Board not provide for the above provisions for calling a special meeting in the Bylaws, *Corporations Code §9411(b)* provides that a special meeting can be called by 5% of the members.

4. Members Quorum, Reversion of Vote to the Board, and Notice

The Board has proposed that the quorum requirement for members' voting be set at 50% of the voting power, represented in person or by written ballot. This quorum requirement would be permissible, pursuant to *Corporations Code §9410*, if the terms are provided for in the Bylaws. Otherwise, a quorum for members is dictated by *Corporations Code §9412*, which requires "One-third of the voting power, represented in person, by written ballot, or by proxy" for there to be a quorum of members.

The Board further proposed that in the absence of a quorum, the matters on the agenda will revert to the Board for action as it sees fit, as permissible by law. Based on *Corporations Code §9150 and Corporations Code §9150*, it would be permissible to have the vote revert back to the Board as to most issues, if such a provision is set forth in the Bylaws, except for Dissolutions (§9680), Sale of Assets (§9631), Mergers (§9640), Removal of Directors Without Cause (§9222), and the replacement of a director removed by the members without cause (§9224). Therefore, for the above items, if a quorum cannot be obtained, then such a situation could result in an inability to act by the Corporation.

Corporations Code §9410 provides that the Bylaws may provide any reasonable method of calling, noticing, and holding a special meeting or obtaining such approval of the members regarding the same. Notice for meetings is specifically governed by *Corporations Code §9211(a)*, which provides that the notice requirements may be changed by the Bylaws. However, notice for special meetings cannot be changed pursuant to the articles or bylaw, as set forth in *Corporations Code §9211(a)(2)*. Specifically, *Corporations Code §9211(a)(2)* requires that "[s]pecial meetings of the board shall be held upon four days' notice by first-class mail or 48 hours' notice delivered personally or by telephone, including a voice messaging system or by electronic transmission by a corporation."

D. Conclusions

With the exception of the items listed above, there are no legal impediments to the Board's proposed changes to the Bylaws.