Study H-855 April 10, 2006

First Supplement to Memorandum 2006-4

Statutory Clarification and Simplification of CID Law: Public Comment

Memorandum 2006-4 (available at www.clrc.ca.gov) continues the Commission's work on the reorganization and simplification of common interest development law. This supplement presents issues raised in public comments on the project. A letter from CID homeowner Janet Shaban is attached as an exhibit.

Meeting Recording

In Memorandum 2006-4, at page 12, the staff raises the issue of whether CID law should expressly guarantee a member's right to record a board meeting (other than any part of the meeting that is held in closed executive session). A staff note following proposed Civil Code Section 4625 asks for comment on the issue.

The staff has heard informally from several homeowners who support such a change in the law.

We have also heard that some boards prohibit recording on the grounds that nonconsensual recording is prohibited by Penal Code Section 632, which provides in relevant part (with emphasis added):

> 632. (a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. …
>
> (b) The term "person" includes an individual, business association, partnership, corporation, limited liability company, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, **but excludes an individual known by all parties to a confidential communication to be overhearing or recording the communication**.

> (c) The term "confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but **excludes a communication made in a public gathering** or in any legislative, judicial, executive or administrative proceeding open to the public, **or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded**.
>
> …

In general, Section 632 protects as confidential "any conversation under circumstances showing that a party desires it not to be overheard or recorded…." See *Flanagan v. Flanagan*, 27 Cal. 4th 766, 774 (2002). However, Section 532 provides specific exceptions for circumstances in which the parties to the communication reasonably expect or know that the communication is being recorded. That suggests that a member could not be punished under Section 632 for recording a meeting so long as the recording is known to the participants.

Secret and unexpected recording might be punishable, so long as a board meeting is not deemed to be a "public gathering." Some proponents of recording cite the decision in *Damon v. Ocean Hills Journalism Club,* 85 Cal. App. 4th 468 (2000), which held that an association board meeting was a public forum. However, the court in *Damon* was construing the scope of application of a specific statute (anti-SLAPP). It isn't clear that its holding on that issue can be extrapolated to Penal Code Section 632.

Even if Penal Code Section 632 does not criminalize the recording of an association meeting, there is another potential source of prohibition — the association's governing documents. Statutory law does not guarantee the right of a member to record a meeting (in notable contrast to governmental open meeting laws). Presumably an association's governing documents could include a rule that prohibits the recording of a board meeting.

In light of reports that disputes over the recording of meetings are actually occurring and are sometimes leading to litigation, it would probably be helpful to provide statutory guidance on the issue.

Depending on the Commission's policy preference, one of the following two alternative provisions could be added to proposed Civil Code Section 4625:

Alternative #1: Recording guaranteed

> (c) A member may record a board meeting, other than any part of the meeting held in executive session. The board may set reasonable limitations on the manner in which recording is conducted.

Alternative #2: Recording allowed as default

> (c) Unless the governing documents provide otherwise, a member may record a board meeting, other than any part of the meeting held in executive session. If recording is allowed, the board may set reasonable limitations on the manner in which recording is conducted.

Executive Session

CID homeowner Melvyn Klein has raised a concern about the rules on when a board must meet in closed executive session. See Civ. Code § 1363.05(b) (continued in proposed Civil Code Section 4640).

That section provides that an association board **may** meet in executive session to consider member discipline (and **must** do so if requested by the member who is to be disciplined).

Mr. Klein feels that the decision of whether to conduct member discipline in closed executive session should be left entirely to the member. Otherwise, a board that wishes to punish a member unfairly could close the proceedings in order to shield its actions from the scrutiny of other members. Allowing the member to choose whether to meet in closed session would let the person whose privacy is at issue choose whether privacy or publicity is more important in the particular circumstances.

Mr. Klein's concern could be addressed by revising proposed Civil Code Section 4640 as follows:

> 4640. (a) The board may adjourn to executive session to consider litigation, matters relating to the formation of contracts with third parties, ~~member discipline, an assessment dispute,~~ or personnel matters.
>
> (b) The board shall adjourn to executive session to consider member discipline, an assessment dispute, or a request for a payment plan for overdue assessment debt, if requested to do so by the member who is the subject of the matter to be considered.
>
> (c) Notwithstanding Section 4625, if the board meets in executive session to consider member discipline, an assessment dispute, or a request for a payment plan for overdue assessment

debt, the member who is the subject of that matter may attend and speak during consideration of the matter.

Should that change be made in the proposed law?

Member Motion at Board Meeting

Ms. Shaban suggests that a member should be authorized to make or second a motion at an association board meeting. See Exhibit pp. 1-2.

The staff is not aware of any statute or regulation that governs the manner in which motions are made or considered by a homeowner association board (or by the board of a mutual benefit corporation generally).

Without judging the substantive merit of the proposed change, the staff would note that the proposal is probably too controversial for inclusion in a cleanup project of the sort we're currently working on. If the Commission agrees, Ms. Shaban's suggestion will be added to the list of substantive suggestions for future Commission study.

Access to Membership List

Ms. Shaban reports that a request for her association's membership list was denied. Instead, the association offered to deliver her letter to the members, without providing her with their address information.

Corporations Code Section 8330 allows an association to offer a reasonable alternative to inspection of the membership list, provided that the alternative would accomplish the purpose of the request in a timely manner. The alternative offered by Ms. Shaban's association is specifically contemplated by the law and seems to be fairly typical.

Newly enacted Civil Code Section 1365.2(a)(1)(I), which becomes operative on July 1, 2006, arguably limits the use of such alternatives. It requires disclosure of the membership list, with one exception. A homeowner may opt out of being included in the membership list. A member who asks to inspect the list can also request that the board deliver materials to any members who have opted out of the list.

Proposed Civil Code Sections 4710(b) and 4715 would continue the new approach, which should substantially address Ms. Shaban's concern.

Inspection of Association Correspondence

Ms. Shaban suggests that homeowners should be able to inspect attorney letters that contain information related to the requesting member's interest as a

member. See Exhibit pp. 2-3. She cites as an example a letter that her association received from a county attorney warning of flood risks.

In analyzing this suggestion, it is necessary to distinguish between correspondence between an association and its **own** counsel and communication between an association and a **third party** attorney (or any other third party, for that matter).

Confidential correspondence between the association and its own counsel is privileged. Evid. Code § 954. See also Code Civ. Proc. § 2018.030 (attorney work product). The member's record inspection right specifically excludes matters that are privileged. See proposed Civil Code Section 4700(b)(2).

Correspondence between an association and a third party (whether an attorney or not) would not be privileged. However, the existing record inspection provision does not provide for member inspection of such correspondence. That seems to be the real source of the problem in Ms. Shaban's example.

So long as privacy concerns are accommodated, the staff believes that there are good reasons to allow member inspection of association correspondence. This could be implemented by adding the following paragraph to the list of records that are subject to member inspection under proposed Civil Code Section 4700(a):

> (13) Official written correspondence of the association, other than correspondence that relates to litigation, the formation of a contract with a third party, personnel matters, member discipline, an assessment dispute, or a request for a payment plan for overdue assessments.

The exceptions in this provision are drawn from the criteria for determining which matters are to be considered by an association board in executive session. Those are matters that the Legislature has already determined should be kept private.

This would be a significant substantive change. The staff is not sure how controversial such a proposal might be. It could be added to the proposed law with a note specifically drawing attention to the change and asking for comment on whether it is appropriate. Should the staff make that change?

Noncommercial Display

Existing law limits an association's ability to restrict certain types of noncommercial displays on a member's separate interest property. See Civ. Code

§ 1353.6 (continued in proposed Civil Code Section 4305). Ms. Shaban suggests that the scope of that provision should be extended to protect an owner's choice of door knocker hardware. See Exhibit p. 1.

While it is understandable that a homeowner might object to such a degree of aesthetic control by an association, the proposed change seems inappropriate.

Section 1353.6 protects actual and symbolic speech: signs, posters, flags, and banners. By contrast, a choice of door knocker hardware raises purely aesthetic considerations.

The authority of an association to control aesthetic choices, to the extent provided in the association's governing documents, is well-established. The proposed change would constitute a very specific override of that authority. The staff sees no reason to single out door knockers for such protection. Another homeowner might feel just as strongly about window treatments, landscaping, exterior paint, or some other aesthetic feature of the home.

The staff is aware that there could be problems drawing a clear line between a protected "sign" and an unprotected decorative element (e.g., a "welcome" mat), but does not believe that the problem warrants a legislative solution.

Period for Member Reversal of Operating Rule

Under existing Civil Code Section 1357.140 (continued in proposed Civil Code Section 6120), the members of an association have 30 days after adoption of an operating rule to submit a request for a special meeting to reverse the rule change. Ms. Shaban suggests increasing that time period. See Exhibit p. 2.

The 30 day period was the subject of specific legislative attention during the process of enacting the rulemaking provisions. Those reforms were enacted in 2003. See 2003 Cal. Stat. ch. 557. Barring evidence of a significant problem, the staff would recommend against tinkering with such recently established law.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Date: February 23, 2006

To: California Law Commission

From: Janet Shaban, Ph. D., Woodside (Sacramento, California, CID) Homeowner

Subject: Memorandum 2006-4

4090. "Board meeting."

This requirement would mean that "business that is conducted by a series of separate conversations, electronic mail messages, and the like" would be prohibited. The key is "business that should be conducted in the open is not discussed privately." If the matter is one that should be discussed openly, in the presence of association members, then the matter should not be permitted to be private, whether contact occurs in face-to-face contact, via telephone or e-mail, etc.

One concern I have is with some board members' excluding others while meeting as a minority. If they meet as a minority, their meeting isn't regarded as a "meeting." Hence members A, B, and C could meet, then A, B, and D, perhaps D and E. F and G aren't included. Yet there has been, technically speaking, no board meeting.

4305. Noncommercial display

I ask for the addition of two words, which I have italicized: "(a) . . . the governing documents of an association may not prohibit the display of the flag of the United States or any other noncommercial sign, poster, flag, banner, or *door knocker* within a member's separate interest or exclusive use common area." (Alternatively, the architectural section might include reference to the allowance of door knockers.)

4620. Notice of board meeting

Yes, the notice of a meeting should include the meeting's agenda, whether the meeting is one regularly scheduled or not.

4625. Board meetings open

At the January, 2006, Woodside board association meeting a homeowner asked if only the Woodside board could make a motion. "Yes," the board president replied. I asked if the *CC&Rs* so specified. A board member said she would ask the Woodside attorney's opinion. (Another board member explained that only board members could make motions since the meeting was a board, not an association, meeting. I asked when there was an association meeting. Only once a year, at the annual election, when the election is the only business at hand.)

At the February 21, 2006, board association meeting the board member reported the attorney

concurred with the president–no motions from members–and referred to 1363.05–"The board of directors of the association shall permit any member of the association to speak at any meeting of the association or the board of directors, except for meetings . . . held in executive session. A reasonable time limit . . . to speak . . . " I asked if the attorney had provided a rationale for the decision that only board members could make motions. The answer was that he could be consulted further for "hundreds of dollars." The association manager then announced California law specifically prohibited association members, those not on the board–mere rabble?–from making motions. I asked if an association member could request a board member to make a motion. The answer was yes, though the request might not be answered in the affirmative. The board member providing this answer smiled as she said this. I would like to see language that permits association members the right not only to speak but also to make and second motions at board association meetings.

The board member who told me the monthly meetings were board rather than association meetings informed me that homeowners did not have to be permitted at the monthly association board meetings! To her credit, she did express interest in seeing a copy of California laws pertaining to CIDs.

Yes, meetings should be recorded and permanent records kept.

4655. Application of article

"A meeting of a committee that exercises a power of the board"–same provisions apply as apply to board.

Oh, yes, please. Presently the only committee at Woodside that has its meeting time announced (sometimes) is the architectural committee's–though its agenda is not announced. It should be.

6120. Reversal of rule change by members

Are association members able to make a written request only within thirty days after the general notice of the rule change or enforcement of the existing rule? I'm thinking of a situation where the rule might not be seen as problematic until more than thirty days have passed. Then what? Perhaps sixty days would be more reasonable.

4700. Scope of inspection rights

I asked to see the Woodside membership list and was told my request had to be approved by the Woodside attorney. The reason for my request was that I wanted to contact people like me, people who had been told they had to remove their door knockers (even though there was no rule prohibiting door knockers). My request was denied. I was told Woodside would contact these people for me. Recently a homeowner wanted a membership list so that she could contact people like her, people who had been flooded at Woodside, so that she could inform them of a flood

support group. Her request was denied. I would say both of these requests were "related to the requesting member's interest as a member."

Homeowners should have access to attorneys' letters that contain information relevant to their, the homeowners', concerns. Had residents of Woodside known of county attorney Gregory O'Dea's letters warning Woodside of its continued vulnerability to flooding and of Woodside attorney Daniel P. Whaley's request for a letter that omitted mention of "flood risks to Woodside," they might have taken cautionary measures prior to being flooded--another flood in a series--in December, 2005. I'm proposing that homeowners be notified of the existence of such correspondence and provided, if they so request, the right to inspect and copy it.