

First Supplement to Memorandum 2006-25

Statutory Clarification and Simplification of CID Law: Association Governance and Dispute Resolution (Public Comment)

Timothy Ford has commented on Memorandum 2006-25 (available at www.clrc.ca.gov). Mr. Ford is a CID homeowner and attorney who has been active in developing his association's disciplinary procedures.

Mr. Ford suggests two changes to the provisions governing dispute resolution. Those suggestions are discussed below.

Delegation of Member Discipline Duties

Existing law provides that the board must give a member notice and an opportunity to be heard at a board meeting before imposing discipline for a violation of the governing documents. The board must provide written notice of a decision to impose discipline. See Civ. Code § 1363(h). Those requirements would be continued in proposed Section 5005.

Mr. Ford suggests that the law be revised to make clear that a board may delegate disciplinary duties to a committee of individuals selected by the board for that purpose. A member who is disciplined by a committee would be given the right to board review of the decision.

This approach would be most useful in a large association, where it might not be practical for the board to review the facts of every alleged violation. Routine matters could be disposed of at the committee level.

Existing law probably already allows the approach that Mr. Ford advocates, at least in an incorporated homeowner association. Corporations Code Section 7151(c)(4) provides that a nonprofit mutual benefit corporation board may, if authorized by its bylaws, appoint a committee to exercise powers delegated to it by the board. See also Corp. Code §§ 7210 (delegation of "management" of corporation's activities), 7212 (committees generally).

What's more, Corporations Code Section 7341(c), which sets out a default procedure for the most extreme forms of discipline (expulsion or suspension of a member), provides only for a hearing before "a person or body authorized to

decide” the matter. There is no express requirement of a hearing before the board.

On the other hand, Section 1363(h) expressly requires that discipline be imposed at a meeting of the board. The Legislature might have meant that literally, with the intention that the delegation provisions of the Corporations Code be overridden.

The staff could find no published opinion directly addressing the issue. There is one unreported case in which a homeowner association committee made a disciplinary decision, but the question of whether the law permits such action by a committee was not discussed. See *San Vicente Villas Homeowners Ass’n, Inc. v. Cohen*, 2003 WL 22962813. See also C. Sproul and K. Rosenberry, *Advising California Common Interest Communities* § 7.20, at 461 (Cal. Cont. Ed. Bar, 2006) (advising that “enforcement committee” conduct disciplinary hearing).

The staff agrees with Mr. Ford that delegation of the disciplinary procedure to an appointed committee would be significantly more efficient for a large association.

The staff is less sure that a disciplinary hearing before an appointed committee would achieve the same level of justice (or the perception of justice) that is achieved by a hearing before the full board. A right of reconsideration by the board might improve the outcome, or the board might simply rubber-stamp decisions made by its appointees.

The staff is also concerned that an express authorization of delegation of this specific power could create an implication that delegation of other powers is not allowed unless it is expressly authorized.

For example, Civil Code Section 1357.130 provides that an operating rule change must be made “at a meeting of the board of directors.” Existing law arguably allows an incorporated association to delegate that function to a rulemaking committee. Would an express authorization of the delegation of disciplinary functions imply that rulemaking functions may not be delegated (because Section 1357.130 does not expressly authorize delegation)?

This raises a more substantive and controversial point: to what extent should a homeowner association board be allowed to delegate its powers? Is a homeowner association sufficiently different from other types of nonprofit corporations to justify a different rule? Those questions are undoubtedly too

controversial to be resolved in the proposed law. **The staff recommends that the Commission examine the issue as a separate study item.**

That would leave Mr. Ford's immediate concern unresolved. However, the staff does not believe that the proposed restatement of Section 1363(h) would have any substantive effect on whether a board can or cannot delegate its disciplinary powers. It should not disturb the status quo on that point.

Internal Dispute Resolution and Member Discipline

Existing Sections 1363.810-1363.850 require that an association provide an internal dispute resolution procedure for use by a homeowner who has a dispute with the association. At a minimum, a member has the right to meet and confer with a person appointed by the board to attempt to resolve the dispute through a negotiated agreement. Civ. Code § 1363.840.

Mr. Ford is concerned that a member who is disciplined by the association could attempt to use the internal dispute resolution process to undo a properly imposed disciplinary decision. The staff agrees that this could be a problem.

The point of the internal dispute resolution process is to make sure that a homeowner has an opportunity to meet with a representative of the board and explain his or her side of a dispute, in the hopes that the problem can be resolved by mutual agreement.

The procedure for imposition of discipline provides a similar opportunity to be heard.

The staff sees no reason to submit the same issue to two substantively similar processes, and recommends that proposed Section 5050 be revised as follows:

§ 5050. Application of article

5050. (a) This article applies to a dispute between an association and a member involving their rights, duties, or liabilities under this part, under the Nonprofit Mutual Benefit Corporation Law (Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code), or under the governing documents.

(b) This article supplements, and does not replace, Article 3 (commencing with Section 5075), relating to alternative dispute resolution as a prerequisite to an enforcement action.

(c) This article does not apply to a decision to discipline a member that is made pursuant to Section 5005.

Comment. Subdivisions (a) and (b) of Section 5050 continue former Section 1363.810 without substantive change.

Subdivision (c) is new. It makes clear that this article does not apply to member discipline that is imposed pursuant to Section 5005. It would not preclude the application of this article to a dispute that involves a failure of the association to comply with Section 5005.

Respectfully submitted,

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