Study H-855 June 22, 2006

Second Supplement to Memorandum 2006-25

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

We have received additional public comments on Memorandum 2006-25 and its First Supplement (available at www.clrc.ca.gov). The comments are reproduced in the Exhibit as follows:

The comments are summarized below.

Inadequacy of Internal Dispute Resolution

Mr. Ross describes his experience with the "meet and confer" process used in his association. He found the process unhelpful and suggests that it needs "teeth." See Exhibit pp. 1-2.

The staff will note his suggestions for separate study. They are too substantive for inclusion in the current study. It is worth noting, however, that the internal dispute resolution process was never intended to provide anything more than an opportunity for the parties to talk about their dispute. The expectation was that informal discussion would be helpful in resolving some disputes that are based on misunderstanding. It was never expected that internal dispute resolution would solve more deeply entrenched disagreements.

Internal Dispute Resolution and Member Discipline

In the First Supplement to Memorandum 2006-25, at pages 3-4, the staff recommends that language be added making clear that the internal dispute resolution process is not applicable to a matter resolved through the member discipline process.

Tim Ford suggests an additional clarification. In some cases an association may wish to attempt to resolve a disciplinary matter through internal dispute

resolution, before or in lieu of formal discipline. The law should not prevent that option.

The staff believes that the draft language already provides the flexibility sought by Mr. Ford, but agrees that additional language in the Comment (shown in underscore below) would help to make this clearer:

> 5050**.** … (c) This article does not apply to a decision to discipline a member that is made pursuant to Section 5005.
>
> **Comment**. …
>
> 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. Nor would it preclude the use of this article before a final discipline decision is made under Section 5005. Prior to issuing a final decision, an association may defer or suspend action under Section 5005 and proceed under this article.

The staff exchanged email with Mr. Ford on this point. See Exhibit pp. 3-4. Mr. Ford agreed that the proposed comment language would address his concern. The staff recommends that it be added.

Member Discipline

Ms. Shaban makes a number of comments on issues relating to member discipline (see Exhibit pp. 8-11):

- The existing requirement that an association adopt a schedule of penalties for member discipline should require differentiation between the various substantive types of violations (e.g., parking violation, pet rule violation, etc.). General classes of violations (e.g., nonrecurring, recurring, and exceptional) are too general to provide advance notice of the consequences of a violation and should not be allowed.

  The language used in proposed Section 5000 would require a schedule of penalties for "each type of violation" but does not elaborate on what is meant by "type." Should the law require that the schedule of penalties state the penalty for each specific type of violation, rather than for general classes?
- The notice provided to an alleged violator should be specific as to the rule that is alleged to have been broken and the penalty that can be imposed. This is consistent with proposed Section 5005, which would require greater specificity than is required under existing Section 1363(h) (which only requires notice of "the nature of the alleged violation").

- The Commission should consider imposing a statutory cap on the amount of a fine.
- An association's underlying authority to fine should only be conferred by its declaration, articles, or bylaws (and not by board-adopted operating rules).
- A board hearing should be required before a member is charged for the cost of repairs to the common area that are alleged to have resulted from damage caused by the member.

Ms. Shaban supports proposed Section 5130, which would make clear that a civil action may be brought to enforce any provision of the Davis-Stirling Common Interest Development Act.

Board Meetings

Ms. Shaban also comments on board meeting procedures (see Exhibit pp. 5-6):

- The law should not allow a board to consider or act on board business outside of a board meeting.
- The authority of a board to meet in executive session to discuss facts that could lead to litigation should be limited.

Those comments will be retained for consideration when the Commission reviews public comment on the tentative recommendation that we are currently preparing.

Newsletter Access

Ms. Shaban suggests that a group of owners organized to address issues relating to a homeowner association should be allowed to announce its formation in the association's newsletter (if any). See Exhibit pp. 6-7. The staff will note the suggestion for separate study, as it would be too substantive for inclusion in the current study.

Record Inspection

Ms. Shaban also comments on record inspection issues (see Exhibit pp. 7-8):

- A member should have the right to inspect records relating to an association's insurance coverage or claims (not just the policy).
- The record inspection provisions should apply to an association that is within the control of the developer.

Those comments will be retained for consideration when the Commission reviews public comment on the tentative recommendation that we are currently preparing.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Exhibit

EMAIL FROM SAMUEL ROSS (JUNE 16, 2006)

Subject: Comments in response to 1st Supp. to Mem. 2006-25

Brian, I just read the "First Supplement to Memorandum 2006-25, Statutory Clarification and Simplification of CID Law: Association Governance and Dispute Resolution (Public Comment) at:
<http://www.clrc.ca.gov/pub/2006/MM06-25s1.pdf>.

Let me first apologize that I have not followed the Commission's proceedings very closely of late for I have been locked in doing chivalrous battle with my HOA's annual elections where they literally "stuffed the ballot box" by manipulating an eleventh-hour appointment to the Board and our very fluid proxy system. I could make your hair curl if I have been allowed to video tape such a meeting as I am allowed to do with my local city council meetings! But let me not digress

In trying to use the "rules" to overcome my Board's malfeasance I have twice tried to use "Meet & Confer" meetings... but both attempts failed and I think the Commission needs to hear at least my point of view for you will NEVER hear one of our Directors dare defend what they have done.

At the first meeting, I was not allowed to bring anyone to witness the meeting. For the Association, there was the designated Director, a 2nd Director to witness, and two Management Company staff [Owner and another keeping notes "for the Board"]. Despite the odds against me, I still agreed to the meeting and predictably it did not go well for me. The Director representing the Association refused to respond to my written statement of my position... he refused to give even his [known to be non-enforceable] own position statement orally. Needless to say, none of the 13 disputes that we attempted to resolve in the 1-hour limit that they placed on the meeting. I was not allowed to have a copy of the notes/minutes that were taken.

So my point in this communication is that until the law [Section 1363.810 of Civ. Code?] has some teeth in it such that possible the following were the law:
(a) a set of rules for how the Meet & Confer is to be held,
(b) penalties for anyone [say $500 (for either party)] who impedes the meeting... and finally

(c) a way to make this enforceable before a small claims court Judge or Commissioner without it being just another "he said / he said" farce needlessly overburdening the Court with an unworkable situation...

So I suggest that if the first "Meet & Confer" meeting fails, that the law read that a 2nd try be tape recorded with both sides receiving a copy of the tape/CD. Then both parties [particularly the Association's Director] would know that his/her actions in the mediation meeting could be subject to review by a Small Claims Court.

These thoughts are not flippant... they are a serious effort on my part to tell you honestly what I think might actually work in my case... and I suspect in many other HOA(s). I know that (c) above is politically correct in today's environment but I'm sure you have legal professionals there who can/should make an effort and seriously try to see a way to make it work.

There will be no "justice" in HOA's like mine until we either get a rich patriot who thinks like me and spends a ton of money just finding the right attorney and then a ton more defending his rights... OR you make Associations accountable to Small Claims Courts in such a way that it is not easy for the Court to skirt its duty to enforce the law. Yes, next month when the latest legislation kick in regarding what I can take into the Small Claims Court system... yes, I intend to turn up the heat on our Board! Wish me luck "in the Court"!

I know this is a real challenge I'm throwing out to the Commission, but I felt you needed to hear from "the trenches" what is happening to foil the intent of the Meet & Confer statute [Civil Code Section 1363.810].

I have been forced into the role of an activist by our current and several past Boards who are nothing short of malfeasant!

Yours sincerely... a true patriot of Democracy... and determined to resolve at least some of my HOA's deviance!,

Don Quixote... aka Sam Ross // Novato, CA // MrSafety@Verizon.net // 415-892-1952

EMAIL EXCHANGE BETWEEN TIM FORD AND BRIAN HEBERT (JUNE 19, 2006)

Subject: RE: Comments: RE: CLRC Memo 2006-25

Your language looks great, and I like it better than mine. Thanks for taking the time to consider this.

-----Original Message-----
From: Brian Hebert [mailto:bhebert@clrc.ca.gov]
Sent: Monday, June 19, 2006 9:43 AM
To: Ford, Tim (DHS-OLS)
Subject: Re: Comments: RE: CLRC Memo 2006-25

Tim,

I tried to draft the language so that it would only preclude the application of IDR if a final discipline decision has been made under Section 5005. Before the association makes a decision, IDR would not be precluded.

That would allow an association to try IDR before commencing formal discipline proceedings, or to suspend or abort the process and switch to IDR (so long as a final decision hasn't yet been made).

Would your concern be addressed if the following language is added to the last paragraph of the proposed Comment?

"Nothing in subdivision (c) precludes the use of this article before a final discipline decision is made under Section 5005. Prior to issuing a final decision, an association may defer or suspend action under Section 5005 and proceed under this article."

Brian Hebert
California Law Revision Commission
916-739-7071
www.clrc.ca.gov

On Jun 15, 2006, at 9:41 PM, Ford, Tim ((DHS-OLS)) wrote:

Thank you for your thorough consideration of my proposals.

I understand your decision on the first proposal, since many protracted court interpretive cases can follow from a concept of that which is given special treatment means that more general statutes are overridden or at least considered as subordinate.

I appreciate very much your decision to recommend following the concept of my Proposal 2. The only part I will quibble with is that I think it can be important for it to be clearly stated that Associations are free at any time to take a matter initiated as member discipline, and voluntarily offer to convert the matter to ADR. I am concerned that not mentioning this point in proposed new subdivision (c) will cause a perception that once you start down a discipline path, you must stick with it. So I recommend adding something that covers the point made in my draft statutory language, the part:

"An association may at any time suspend, terminate, or cancel a matter involving member discipline, and instead proceed under this article."

Thank you again for your consideration and analyses on these proposals.

EMAIL FROM JANET SHABAN (JUNE 20, 2006)

To: California Law Commission

From: Janet Shaban, Ph. D., CID homeowner (Woodside Homeowners' Association, Sacramento, California)

Subject: Memorandum 2006-25

4090. "Board meeting" and 4545. Action without a meeting

The staff note is that "The requirement that a meeting be a gathering of directors 'at the same time and place' excludes business that is conducted by a series of separate conversations, electronic mail messages, and the like. This is a significant loophole that has been closed in the state and local open meeting laws. For example, Government Code Section 11122.5(b) provides, with certain . . . exceptions, that: '[Any] use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the state body to develop a collective concurrence as to action to be taken on an item by the members of the state body is prohibited.'

"That provision ensures that business that should be conducted in the open is not discussed privately, through informal contacts. However, such a restriction does impose a procedural burden, which may be too onerous for volunteer directors conducting business in their spare time. The Commission invites comment . . ."

"The Commission also invites comment on whether the policies served by open meeting requirements would be better served if the existing procedure for the conduct of board business without a meeting (on the unanimous written consent of the directors) were modified or eliminated. . . ." (pp. 7-8).

The "same time and place" restriction may impose a burden. The restriction may be inconvenient. However, given the fact that some board directors may meet or confer separately and in private when the business should be considered by all board members and in the "open," I regard the "same time and place" restriction as necessary. (I note that Woodside bylaws permit an officer "to be removed from office, with or without cause, by the Board. . . ."). Similarly, the "written assent" procedure (4545, "Action without a meeting," p. 23) would be a threat to CID members because they would not have an opportunity to observe the board in action and perhaps get in a word. Boards must not have an opportunity to meet without exposure to scrutiny unless the matters at hand are in fact clearly noncontroversial or those of "litigation, matters relating to the formation of contracts with third parties, member discipline, an assessment dispute, or personnel matters" (4540, p. 23).

Following the December 31, 2005, Woodside flood, some homeowners formed a coalition, its goal that of exploring protective measures against further flooding. The group identified itself and its purposes to the board in February and requested its flood-protective recommendations be considered for future dialogue. Instead, the board passed resolutions in private, decisions disclosed at the March 22, 2006, meeting. The board had formulated its own emergency preparedness committee. The board also appointed this committee's chair. The self-initiated coalition, though it has met steadily and raised its orphan head at board meetings, has never been recognized. The second covert resolution prohibited committees from "randomly setting a time by which the Board may act . . ." In fact a recognized committee had requested board action, did not receive it, and had not "randomly" set a deadline. Neither of these resolutions were routine. They cannot be regarded as noncontroversial. They could have been offered for consideration at a meeting open to the membership. The board obviously preferred to present them as faits accomplis, legitimizing them by announcing the vote, taken in private, had been unanimous. In other words, the board took advantage of "written assent," that is, "An action required or permitted to be taken by the board may be taken without a meeting, if all directors individually or collectively consent in writing to that action. . . ." (4545, p. 23). (One might consider what is meant by an action "required or permitted." Anything goes?)

Private interactions mean that board members can act without the entire board's knowledge. They mean it can act without the membership's knowledge. If a board wishes people to be kept in the dark, a private meeting is the place. The law must not permit this.

4540. Executive session

The Woodside board met in closed session to consider the "safety" committee's questionnaire about members' security perceptions. The board president maintained that because the matter was a "legal" one–the association attorney advised the board not to allow distribution of such a questionnaire–the board had a right to meet in executive session. I suspect the reasoning was this: The dissemination of a questionnaire might lead to the uncovering of people's fears, such fears could indicate the board should take actions to insure safety, the board could be answerable if it did not, therefore fears should remain silent. Given that 1363.05/now 4540 specifies "litigation," not "legal," as a criterion for closed (executive) session, I believe the board's secret session inappropriate. I think the law must be clarified so that a board may not retreat to closed session because it wishes to avoid possible litigation.

4525. Board meeting open and 1363.03 Election procedures, the latter reserved for later revision

The flooded homeowner coalition (introduced under 4090 discussion) attempted to get its description and meeting information in the monthly newsletter. You may remember

the board had refused to endorse the coalition; it also refused to grant a newsletter announcement. Nothing in the law specifies that a board may refuse to allow members to announce themselves. (The law does say that members must state a purpose for requesting a membership list.) Nothing in the law explicitly specifies members may have the right to announce themselves, although if one requests a membership list, a reasonable inference is that the requester's purpose might well be that of self-announcement.

4525 and 1363.03 might have some bearing upon the question:

4525: "Any member may speak at a board meeting, except for any part of the meeting held in executive session."

1363.03 (a): "An association shall adopt rules . . . that . . . (1) Ensure that if any candidate or member advocating a point of view is provided access to association media, newsletters, or Internet Web sites during a campaign . . . equal access shall be provided to all candidates and members advocating a point of view, including those not endorsed by the board, for purposes that are reasonably related to the election. The association shall not edit or redact any content from these communications, but may include a statement specifying that the candidate or member, and not the association, is responsible for that content. (2) Ensure access to the common area meeting space . . . during a campaign, at no cost, to all candidates . . . all members advocating a point of view, including those not endorsed by the board, for purposes . . . related to the election. (3) . . . A nomination or election procedure shall not be deemed reasonable if it disallows any member of the association from nominating himself or herself for election . . ."

I would like to see the law address the issue of a group's (or people's) being able to announce itself (themselves) in a newsletter.

<u>4700. Scope of inspection right and 4775. Duty to maintain records</u>

I have been told that Woodside homeowners who were flooded were told they could not see a copy of Woodsisde's insurance policy and could not inspect the insurance adjustor's reports. (These reports covered all sixty-some buildings flooded.) Should insurance adjustors' reports be added to the list of items a membership can inspect? (I see that 4775 includes item 13, "An insurance policy or record relating to insurance coverage or claims.")

<u>4705. Inspection procedure</u>

"A member may deliver to the board . . . a written request to inspect an association record. The request shall identify the record to be inspected and shall state a purpose for

the inspection that is reasonably related to the member's interest as a member. . . ." (pp. 32-33). Must a member state a purpose?

4750. Application of article

The staff note is ". . . A member's interest in the proper management of a CID is not reduced simply because the association is within the control of the developer. The Commission requests comment on whether this exemption serves a useful purpose and should be continued" (p. 38).

No, the exception should not be continued.

5000. Authority to impose disciplinary fine and 5005. Disciplinary hearing

As a new member of Woodside Association's Rules Hearing Committee, I gave it the letter, dated June 18, 2006, that follows.

Subjects: Authority to impose disciplinary fine and disciplinary hearing; a particular instance on June 5, 2006

Civil code background (disciplinary fine). Civil Code 1363 (g) states the following: "If an association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for a violation of the governing documents or rules of the association, including any monetary penalty relating to the activities of a guest or invitee of a member, the board of directors shall adopt and distribute to each member, by personal delivery or first-class mail, a schedule of the monetary penalties that may be assessed for those violations, which shall be in accordance with authorization for member discipline contained in the governing documents. . . ."

Critical language. " . . . *shall adopt and distribute to each member a schedule of the monetary penalties that may be assessed for violations* . . ."

A "schedule," according to Webster, is "a written or printed statement of details." My understanding of "a schedule of the monetary penalties that may be assessed for violations" is that of a printed list of penalties and violations. The California Law Revision Committee has revised 1363 as follows: "An association shall not fine a member for a violation of the governing documents unless, at the time of the violation, the governing documents expressly authorize the use of a fine and include *a schedule of the amounts that can be assessed for each type of violation*" [italics mine] (Memo 2006-25, May 25, 2006, Chapter four, p. 46). The Commission comments as follows: "It [the restatement] provides that the authority to fine and schedule of fine amounts must exist at the time of the violation. This prevents ex post facto punishment." I believe the Commission did not intend "each type of violation" to be construed as the Woodside

Association's "single occurrence" ("fine not to exceed $200 per documented occurrence"), "ongoing" (not to exceed $100 a month), or "exceptional" (not to exceed $500) (*Rules and Regulations, XXIII, B, C*), but rather it intended "type" to refer to a behavioral class, e.g., failure to pick up after a pet, failure to leave a pool area at closing time, etc. (The Commission's language in its disciplinary hearing portion of the law supports this belief. I offer 5005 in the next "Critical language" section.) On June 5, 2006, the board liaison to the Woodside Association's Rules Hearing Committee indicated she believed Woodside's demarcation fell within the law.

Woodside's *Rules and Regulations* differ from its *Bylaws*, which state that "in the case of a continuing violation . . . one hundred dollars ($100) per day that the violation continues" can be levied, " in addition to any previously imposed fines relating to the violation" (pp. 13-14). The conflict–$100 a day versus $100 a month–is obvious.

At the June 5, 2006, Rules Hearing Committee meeting, I said that all Woodside violation possibilities should each be assigned some specified penalty. (I believe I argued in accordance with the intent of the California Law Commission's revision.) If violations are not assigned a specified penalty, a single occurrence of any sort of violation, regardless of its nature, could be fined as much as two hundred dollars, the decision as to the amount left in the hands of the Rules Hearing Committee. An "ongoing" violation, regardless of its nature, could result in a monthly $100 fine–or a $3,100 fine, if one adheres to the bylaws. Something "exceptional"–and the Rules Hearing Committee gets to determine what's "exceptional"–$500. Ex post facto punishments subject to arbitrariness, exactly what the law seeks to prohibit.

Civil code background (disciplinary hearing). Civil Code 1363 (h) states this: "When the board of directors is to meet to consider or impose discipline upon a member, the board shall notify the member in writing . . . at least 10 days prior to the meeting. The notification shall contain, at a minimum, the date, time, and place of the meeting, the nature of the alleged violation for which a member may be disciplined, and a statement that the member has a right to attend and may address the board at the meeting. . . . A disciplinary action shall not be effective against a member unless the board fulfills the requirements of this subdivision."

Critical language. On June 5, 2006, Woodside's Rules Hearing Committee chairman said that the accused under consideration did not have to be informed of how many violations the committee had "against him." Civil Code 1363 specifies notification must include "the nature of the alleged violation." I believe the intent of the law is that the accused have access to all information upon which he or she will be judged.

Note that "*A disciplinary action shall not be effective*" unless requirements of the law are met.

The Commission has revised the disciplinary hearing portion of the law to read as follows:

"5005. (a) The board shall only impose discipline at a meeting of the board at which the accused member shall have an opportunity to be heard. (b) At least 10 days before a meeting to hear a disciplinary matter, the board shall deliver an individual notice to the accused member . . . that includes all of the following information: (1) The *provision of the governing documents that the member is alleged to have violated and a brief summary of the facts constituting the alleged violation*" [italics mine]. "(2) The *penalty that may be imposed for the violation*" [italics mine]. (3) The time, date, and location of the meeting at which the matter will be heard. (4) A statement that the accused member has a right to attend the meeting, address the board, and request that the matter be considered in closed executive session. (c) Within 15 days after hearing a disciplinary matter, the board shall deliver a written decision to the accused member, by individual notice (Section 4040). If the board imposes a penalty, the written decision *shall state the provision of the governing documents violated and the penalty for the violation*" [italics mine] (Chapter 4, p. 47).

To whom should notice have been sent? The mother of the accused was sent the hearing notice. (The parents' names, along with their son's, are on the property title.) Since the son was the one accused, surely he should have received the notice. [The letter ends here.]

The Rules Hearing Committee met June 19 with no interest in considering disciplinary fine and hearing law but said I should take my case to the board. The committee chair warned I should not do, however, unless I first consulted with an attorney, for the Woodside Association attorney had approved Woodside's *Rules and Regulations*. I will take my arguments to the board, of course, and hope they will reach the agenda. I am confident the board will consult with its attorney. I am not confident of his response.

When, on June 19, I asked the chair for the precise "yell and scream" rule–such a violation notice was before us–he first told me to find it for myself, then advised "section twenty-three." This *Rules and Regulations* section does not state such a rule; perhaps it is elsewhere.

In the meantime, might the Commission consider possible caps and restrictions on fines?

I very much appreciate the Commission's 5000 and 5005 revision.

The 5000 staff note asks this: "Should a board that is not authorized to impose fines by the declaration, articles, or bylaws be able to grant itself that power by adopting an

operating rule (which can be adopted by the board unilaterally)? Or should the authority to impose fines derive only from the declaration, articles, or bylaws?"

The latter, please.

The 5005 staff note asks this: "Should there be some sort of hearing required before such a charge can be assessed against a member [a charge to recover a cost to repair common area damage caused by a member or guest]?"

I should say so.

5130. Enforcement of this part

Staff note: "Section 5130 would provide for judicial enforcement of any provision of the Davis-Stirling Common Interest Development Act. This would eliminate the implication that a civil action may only be brought to enforce a provision of this part if there is specific statutory authorization for that action. . . . The Commission invites comment on whether this provision would be problematic" (p. 53).

The provision seems desirable to me. Problematic for boards, perhaps.

I thank the Commission for its important and careful work.