Study H-855 January 23, 2007

First Supplement to Memorandum 2007-4

Statutory Clarification and Simplification of CID Law: Member Elections

The Commission received the following communications on the topic of member elections in a common interest development:

This memorandum discusses issues raised by the commenters. Except as otherwise indicated, statutory references in this memorandum are to the Civil Code.

GENERAL COMMENT

Michael Hardy, a Walnut Creek attorney with over 25 years experience practicing CID law, is generally supportive of the Commission's work to reorganize and simplify CID law and believes that it will be especially helpful with respect to the member election provisions. See Exhibit p. 4. He offers specific comments on the proposed law, which are discussed below.

Bill Mallory has "participated as a Member, Officer and Director of at least five different Associations in the State of California…." See Exhibit p. 2. He believes that "[more] details in the Civil Code and the Corporation Code will not solve the problems faced by Homeowners in Community Associations in the State of California." The main problem that he sees is the often prohibitive difficulty and expense that a homeowner faces in trying to enforce CID law. *Id.* He believes that the state needs a CID Ombudsperson of the type recommended by the Law Revision Commission. That recommendation was approved by the Legislature, but ultimately vetoed. See AB 770 (Mullin) (2006).

Lisa Martin raises some questions about proposed Section 4635, which restates existing law governing the selection of an independent election inspector to conduct CID member elections:

Member as Election Inspector

Proposed Section 4635(b) requires that an election inspector be an "independent third party." Ms. Martin wonders whether that provision would somehow preclude an association member from serving as election inspector.

She has a point. A member is arguably neither independent nor a third party.

Existing Section 1363.03 is clear in providing that a member may be selected as election inspector, unless the member falls into one of the classes of disqualified persons (continued in proposed Section 4640(c)).

In order to avoid any uncertainty on the point, **the staff recommends that the following language be added to proposed Section 4635(b)**: "Except as provided in subdivision (c), a member of the association may serve as election inspector."

Contractor as Election Inspector

Section 1363.03(c)(2) provides that an association employee or contractor may not be selected to serve as election inspector, unless an operating rule expressly provides otherwise.

Ms. Martin wonders whether that prohibition conflicts with the association's ability to pay for election inspection services. See Exhibit p. 3.

The staff does not see a problem. The prohibition restricts who may be **selected** to serve as election inspector. It does not affect the terms under which that person serves once chosen.

Property Manager as Election Inspector

Ms. Martin questions whether a property manager should be permitted to serve as election inspector. She suggests that a property manager can have a financial interest in the results of a board election. See Exhibit p. 3.

The staff assumes that this concern is behind the existing provision that disqualifies an association employee or contractor from being selected to serve as election inspector. However, the Legislature chose to qualify that prohibition. It can be overridden by the adoption of an operating rule that allows an employee or contractor to serve as election inspector.

That legislative policy decision is clear and took effect less than a year ago. The staff sees no reason to revisit it.

SECRET BALLOT PROCEDURE

Mr. Doyle and Mr. Hardy raise some specific points with respect to the procedure for conducting a secret ballot. Those issues are discussed below.

Scope of Application

Mr. Hardy supports the approach of proposed Section 4640(a), which would provide that the secret ballot procedure applies to any member election that is required by law (rather than limiting it to enumerated types of member elections). See discussion in CLRC Memorandum 2007-4, at pp. 4-5.

He feels that the proposed change would eliminate confusion and disputes by applying a single fair and reasonable procedure in all cases. See Exhibit p. 4.

On further reflection, the staff now wonders whether Section 4640 is overbroad. Would it apply to a purely procedural vote of the members that is necessary for the conduct of a member meeting (e.g., a vote to adjourn the meeting)? It would not make sense to require a secret ballot for a routine procedural matter that could be settled by a voice vote. **If the Commission agrees, the staff will insert appropriate limiting language to make clear that the secret ballot procedure does not apply to a procedural vote at a member meeting.**

Delivery of Ballot

Mr. Doyle describes an election in which board members went door-to-door collecting ballots. See Exhibit p. 1. He believes that could be intimidating or could lead to vote tampering, and would like to see the practice prohibited.

Existing Section 1363.03(e)(2) (continued in proposed Section 4640(c)(4)) would require that a member mail or hand deliver the member's ballot to the election inspector. However, it isn't clear that this language prohibits a third person from delivering the ballot on the member's behalf.

Nor is it clear that the practice should be prohibited. Existing law allows the use of a proxy to authorize another person to cast a member's vote at a meeting. If that much power can be delegated, what is the harm in letting someone deliver a ballot on behalf of a member? Such an accommodation may be necessary if a

member suffers from a physical disability that would make it difficult for the member to deliver or mail the ballot personally.

The staff recommends against tightening the delivery provision in the way that Mr. Doyle suggests. The ballot is sealed and signed. That should be sufficient to protect the secrecy and integrity of the ballot.

On a related point, Mr. Hardy believes that proposed Section 4640(b)(3) is a bit unclear as to what is required to be printed on the outside envelope. He suggests that it be revised along the following lines:

> (b) The association shall deliver the following voting materials to every member who is entitled to vote, by first-class mail or personal delivery, not less than 30 days prior to the deadline for voting:
>
> …
>
> (3) An outside envelope that is marked with the name of the member, the address of ~~each~~ the separate interest owned by the member, and the address ~~at~~ to which the ballot is to be ~~cast~~ mailed or delivered.

See Exhibit p. 4. **The staff has no objection to that change and agrees that it might be clearer.**

Cumulative Voting

As discussed in CLRC Memorandum 2007-4, at pages 6-7, the staff was not sure how to reconcile a provision of existing Section 1363.03(b) (which provides that an association may use cumulative voting in the secret ballot procedure) with Corporations Code Section 7513(e) (which provides that cumulative voting may not be used to elect directors if ballots are mailed).

The staff tentatively concluded that the two rules are not necessarily contradictory, because Section 1363.03 does not **require** that ballots be mailed. A note following proposed Section 4640 asks for comment on whether that interpretation is correct.

In response, Mr. Hardy points to a legislative committee analysis of SB 1560 (which added the language at issue). See Exhibit p. 4. The analysis states:

> One of the most significant provisions of this bill clarifies that homeowner associations may continue to use cumulative voting where allowed or required by the governing documents. While the author's intent was never to affect cumulative voting, some attorneys have raised concerns that SB 61 may be in conflict with a provision in the Corporations Code relating to non-profit mutual benefit corporations that prohibits election by written ballot where

> directors are elected by cumulative voting. This bill explicitly overrides any potential conflict.

Senate Transportation and Housing Committee Analysis of SB 1560 (March 30, 2006), p. 3.

With that understanding of the legislative intent, **the staff recommends that proposed Section 4640(f) be revised to remove the limitation on cumulative voting**:

> Cumulative voting may be used in an election, to the extent provided in the governing documents. Cumulative voting is governed by Section 7615 of the Corporations Code.

Although Corporations Code Section 7615 has clearly not been superseded by the Davis-Stirling Act, Mr. Hardy believes that one requirement of that section may be unworkable under the new election law.

Corporations Code 7615(b) provides that cumulative voting may only be used if at least one member gives notice of an intention to use cumulative voting, **at the member meeting that preceded the election**. That requirement could be difficult to satisfy if an association decides to forego most member meetings in favor of conducting elections by mail (as existing Section 1363.03 allows).

Mr. Hardy suggests that the notice requirement be eliminated. See Exhibit p. 5. However, that would also take away a member's power to compel the use of cumulative voting in an election. Presumably, the question of whether to use cumulative voting would be decided by the governing documents or the board.

Another alternative would be to modify the rule to provide a different triggering mechanism, while preserving the power of members to compel the use of cumulative voting. For example, language could be added along the following lines:

> In an association that permits cumulative voting, cumulative voting shall be used if any member requests that it be used, in writing, before ballot materials for the election are distributed.

If the Commission decides to address the issue, the staff favors the latter approach. It would better preserve the substance of existing law.

UNOPPOSED CANDIDATES

Proposed Section 4660(e) provides that, if the number of candidates nominated in an election is equal to or less than the number of positions to be

filled, the board may declare the nominees elected without conducting a member vote. That rule is drawn from Corporations Code Section 7522(d).

Mr. Hardy expresses his strong support for the provision:

> I have received many inquiries from association clients asking why, when they have trouble finding even enough candidates to fill board vacancies they must go through a meaningless election procedure for which the outcome is already determined.

See Exhibit p. 5.

Respectfully submitted,

Brian Hebert
Executive Secretary

Exhibit

EMAIL FROM MIKE DOYLE (1/17/07)

From: "Mike" <airi@cox.net>
Date: January 17, 2007
Subject: RE: Common Interest Developments Message

Dear Mr. Hebert,

Recently I was informed that the following election procedure was used in a HOA that I was an owner in:

The current Board members brought in most all of the votes themselves to the elections meeting at the management office (where the election meeting was held). The envelopes were presumably double wrapped. These votes were not mailed nor were they cast in person by the individual owners at the management office. Only the Board Members and one other, who was running against the incumbents, showed up for the election meeting. The result of the election... the incumbents were re-elected by unanimous votes. The very votes that they "hand carried" to the election meeting.

The underlying question here; what is the 'secret vote' all about if the incumbents can "collect" the votes by going "face to face or door to door". It is intimidating for the homeowner when confronted by a neighbor that is asking for their for ballot to be handed to them.

My questions and comments to you and the commission: First of all; can this type of "vote collection" be done with the current laws? If YES, then how can we remove the doubt of WHO really cast the vote and ensure that the vote is not cast be intimidation or foul play? Secondly; should all of the votes be cast in person or via US Mail to insure that the validity of each vote?

Yours truly,

Mike Doyle

EMAIL FROM BILL MALLORY (1/17/07)

From: "Bill Mallory" <wamallory@adelphia.net>
Date: January 17, 2007
Subject: Memorandum 2007-4, Statutory Clarification and Simplification of CID Law: Member Elections

Brian: I have had a opportunity to scan the subject memorandum and I have some comments for your consideration.

More details in the Civil Code and the Corporation Code will not solve the problems faced by Homeowners in Community Associations in the State of California. I have participated as a Member, Officer and Director of at least five different Associations in the State of California and they all have the same problem and it is not the content of the By Laws or the CC&R's. The problem is simple, the Homeowners can't fight for the rights granted to a Homeowners because it is two expensive to carry your case to the courts for the noncompliance by the Association for the items that effect the individual Homeowner. When the Association ignores a reasonable request for information, to which he has right to under all agreements, and the Association doesn't respond nor provide the information you can't afford an Attorney to fight your case. In one of my experiences I was raising an issue concerning the overcharge of assessment for Reserves by the Association. It was an overcharge of $50,000 affecting an Association of 94 Members. I spent considerable time an effort attempting to convince the Board that the charge was a violation. They just ignored me, so I went to an Attorney to discuss the matter. After laying out the details of my position the Attorney looked at me and said how much money and time do you think it would take, and assume you ore 100 % correct, to have the Association recognize the overcharge? I said that I couldn't guess and she smiled at me and said that her estimate would be about $10,000 to $15,000 and probably a year or so. I responded that it would be stupid for me to spend that amount of money to maybe recover $531 and than if I won to have the legal fees incurred by the Association being charge back to the Homeowners. A no win proposition. These are the basic facts we face as Homeowers when we fight an Association that we financially support.

AB 770 would have been the possible solution to me and many other Homeowners, but you know what happened to that. It was Vetoed, no doubt, because the legal profession got to the Governor. The formation of an Ombudsman would have made a path for the Homeowner to place his complaints in front of a body that would provide a sounding board to listen to the problems without costing more than time and effort. I don't believe that any Homeowners would complain about the annual fee requirements that would be necessary to fiscally support that office. I sent my complaint to the Governor but I was ignored.

More definitions won't solve anything! Existing laws have to be enforced and will not be under the judicial system and the attorneys who are eating at the trough.

I am in another Association now and the same problems exist that were in all the others. The Attorney General of California has on his website that he will intervene for certain matters involving the rights of Homeowners. That's not true! With the new Attorney General and his history I can't believe anything is going to get any better.

Do me a favor and check to see if they have ever intervened to help a Homeowners. Also read the introduction to AB 770 which explains the need for the law. It hits the point on competency of Board Members and the Management Companies who handle operations. The Board doesn't adhere to their responsibility (nor probably even understand them) and the Management Company and the attorney do not follow the directions that are clearly stated in the Civil Code and the Corporation Code.

Bill Mallory

EMAIL FROM LISA MARTIN (1/17/07)

From: "Wygodsky" <Wygodsky@comcast.net>
Date: January 17, 2007
Subject: RE: Common Interest Developments Message

Regarding selection of election inspector, please note.
4635(a) If a property manager becomes the sole inspector, it would be very difficult to determine whether an election is "clean". Due to the fluctuating composition of a Board, the property manager frequently becomes the de facto dictator of the HOA. Boards may come and go but a property manager can oversee a property in perpetuity. Please see further comments below.
4635 (b) Does this exclude members from being inspectors?
4635 (c)

1. 4635 (a) implies a PAID election inspector which would seem to be in contradiction with 4635 (c) (4)
2. A property manager has a vested interest in who is elected to the board. The board has hire/fire authority. Allowing a property manager to be an inspector, receiver of ballot envelopes which identify voters AND custodian of the post-election ballots creates a very real climate for potential fraud.

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January 19, 2007

California Law Review Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Study H-855; Memorandum 2007-4
CID Member Election Procedures

Ladies and Gentlemen:

First of all, I would like to express my appreciation for your work in organizing and clarifying California law in general and common interest development law in particular. As an attorney who has practiced homeowner association law for more than twenty-five years, I am confident that this area of law will benefit greatly from your efforts. One area where this is especially true is the new association election law, Civil Code §1363.03, which is the subject of the above referenced memorandum. I do not recall any recent law which has generated so much confusion, debate and controversy as to its interpretation and application. I would like to offer my comments for your consideration in preparing your final recommendations on this subject.

My initial comments relate to proposed Section 4640. First, I fully agree with proposed Section 4640(a). This would help to simply the election process by providing one established procedure with no alternatives. The process has been determined by the legislature to be fair and reasonable. The proposed subsection eliminates any confusion and disputes at to what type of election procedure is suitable for a particular matter.

Section 4640(b)(3) is somewhat confusing as to the information that is to appear on the outer ballot envelope. I think the intent of Section 1363.03(e) is that the outer envelope contain: (1) the printed name of the owner; (2) the signature of the owner; and (3) the address of the separate interest for which the ballot is being cast. This information is sufficient to validate the ballot. I do not see why every separate interest owned by the voter needs to be listed. I assume the reference to "the address at which the ballot is to be cast" refers to the address to which the ballot is to be mailed or delivered. This alternative language would help to avoid any confusion.

I believe the attempt of proposed Section 4640(f) to reconcile the current provision regarding cumulative voting with Corporations Code Section 7513(e) is misplaced. In the analysis of SB1560 for the Senate Transportation and Housing Committee it is stated that it was never the author's intent to affect use of cumulative voting by associations and "This

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bill explicitly overrides any potential conflict [with Corporations Code §7513]." Keeping in mind that many association elections are conducted without the assistance of an attorney and some cases without even the assistance of an association manager, this provision should be kept as simple as possible. The statement should simply be that cumulative voting is permitted if authorized by the Bylaws.

Another problem with the proposed wording is that it seems to distinguish between ballots which are mailed back and those which are delivered by hand to the inspector of elections. I can see no rational basis for such a distinction.

There is another issue relating to cumulative voting. Corporations Code Section 7615(b) states: "No member shall be entitled to cumulate votes for a candidate or candidates unless . . . the member has given notice at the meeting prior to the voting of the member's intention to cumulate votes." This section has been incorporated verbatim into many bylaws, which were written on the assumption that all director elections would take place at the annual meeting. There is no opportunity to give such notice under the new voting procedure. I propose a statement be included in Section 4640(e) similar to the following: "Notwithstanding Corporations Code Section 7615(b) or any similar Bylaw provision, no advance notice by any member prior to voting of his or her intent to utilize cumulative voting is required, if cumulative voting is otherwise permitted by the Bylaws."

I strongly support proposed Section 4660(e) permitting election by acclimation. I have received many inquiries from association clients asking why, when they have trouble finding even enough candidates to fill board vacancies they must go through a meaningless election procedure for which the outcome is already determined.

Again, thank you for your efforts to simplify the lives of association members, managers and attorneys. I look forward to reading your final recommendations.

Very truly yours,
ANGIUS & TERRY LLP

Michael Hardy