

Second Supplement to Memorandum 2007-4

**Statutory Clarification and Simplification of CID Law:
Member Elections**

The Commission received a letter from Norma Walker and Carole Hochstatter, two CID homeowners in Bakersfield. See Exhibit p. 1.

They report that their own association has not complied with recent changes in election laws and raise some specific points about the proposed member election provisions, which are discussed below.

We also received another email from CID homeowner Lisa Martin. See Exhibit p. 3. The staff will discuss her comments at the meeting.

Election Rules

Use of the term “governing documents” in proposed Section 4630 obscures the fact that election rules must be adopted as “operating rules.” See Exhibit p. 2. In fact, the staff’s intention is to make a minor substantive change in the law that would allow election rules to be expressed in other types of governing documents as well (i.e., the declaration or bylaws). It may be that Ms. Walker and Ms. Hochstatter would object to the substantive effect of that change.

The proposed change would still permit the use of operating rules to adopt an election. For that reason, proposed Section 6110 is revised to make clear that election rules are governed by the regular notice and comment rulemaking procedure. That is consistent with existing Section 1363.03(a).

It would probably help to add comment language to proposed Section 4630, along the following lines:

Comment. Section 4630 restates part of the substance of former Section 1363.03(a)(3)-(5), except that the required provisions may be included in any governing documents and not just in the operating rules. If an election rule is adopted as an operating rule, it is subject to the rulemaking procedure provided in Article 5 (commencing with Section 6100) of Chapter 7. See Section 6110(a)(7).

The provision of former Section 1363.03(a)(3) that relates to procedures for nomination of candidates is continued in Section 4660.

Cumulative Voting

The use of cumulative voting should be guaranteed. Section 1363.03 trumps the limitation provided in Corporations Code Section 7513(e). See Exhibit p. 2. **The staff agrees and has recommended a change to the proposed law.** See First Supplement to CLRC Memorandum 2007-4, pp. 4-5.

Self-Nomination

Proposed Section 4660(b) provides that an association's election rules shall "not prohibit" self-nomination. The commenters suggest that self-nomination should be expressly permitted. That might be more consistent with existing Section 1363.03(a)(3), which requires "reasonable" nomination rules and expressly provides that a rule is not reasonable if it "disallows any member of the association from nominating himself or herself for election to the board of directors." See Exhibit p. 2. **The staff has no objection to stating an affirmative right to self-nominate:** "The governing documents shall permit self-nomination."

Respectfully submitted,

Brian Hebert
Executive Secretary

Exhibit

**LETTER FROM NORMA WALKER & CAROLE HOCHSTATTER
(JANUARY 23, 2007)**

January 23, 2007

Sent via e-mail

To: California Law Review Commission

C/O Brian Hebert

Norma and I appreciate the hard work this commission has done on the subject of CIDs for these several years. However, as users of CID legislation it is just beginning to be possible for homeowners in associations to have any voice in the governance of an association without suing. This cumbersome process benefits only the vendors.

As it appears we, Norma and I, will not be able to attend the January 25, CLRC meeting, we are sending our concerns and comments.

Having recently completed our election of The Vineyards Community Association in Bakersfield, we are aware of the pitfalls and problems that can and have occurred.

Our association experienced these infractions: **not** securing the approval of election rules, **not** accepting nominations of all members in good standing who submitted their name at the correct time, sending out names of incumbents running for the Board without including those who self nominated, **not** establishing in the Election Rules procedures to name the Inspector of Elections, **not** informing the Inspector of Elections to answer all challenges to the election, **not** insuring that the Election Rules allow Cumulative Voting to be possible, refusal to follow either "Association Governing Documents" or Election Rules with regard to the Quorum, and we were **not** given 30 days to comment on the election rule changes. After trying to resolve these issues through IDR, our management representative with the board members silence stated Norma and I could sue.

As to the "Clarification and Simplification of . . . Member Elections," most of the language seems "controversial." When Senator Battin first introduced Election reform legislation, he called CID elections "wrought with fraud and abuse." The language in much of this section rather than simplify instead is vague and less specific. As we so often hear, boards of directors are volunteers; boards and homeowners who are users of this civil code truly need "Clarification and Simplification".

The use of *the term governing documents line 31 and 32 of in 4630 (f)* does not make it simpler to understand that the Election Rules are an Operating Rule. In Article 5, line 28 and 29 specific language is used. One is left to wonder why this difference. The term *governing documents* is too general for volunteer boards. In the 16 plus years Norma and I have lived in a California homeowner association, we have attended our board meetings, researched the internet often for this subject, purchased and read many books, and articles on the this subject, visited senators, assemblymen offices, and this Commission at our own expense to educate ourselves to protect the value of our homes.

1363.03 speak unequivocally to the allowance of cumulative voting. The clean up section (n) *the event of a conflict between this section and the provisions of the Nonprofit Mutual Benefit Corporation Law (Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code) relating to elections, the provisions of this section shall prevail. An association shall allow for cumulative voting using the secret ballot procedures provided in this section, if cumulative voting is provided for in the governing documents. Does not this section prevail over the conflicting Corp Code? Does the mail in ballot conflict with Corp Code?*

4660 negates 1363.03 (a) (3) because Senator Battin defined reasonable as “not reasonable if it disallows any member of the association from nominating him or herself for election to the board of directors.” The Corp code does not speak to nominations in associations less than 500. In California that speaks to a huge number of associations. In 1363.03 (n) 4660 (b) the words (*not prohibited*) should be removed.

Thank you for your attention and valuable work.

Sincerely,

Norma Walker
Carole Hochstatter
Bakersfield, California

EMAIL FROM LISA MARTIN
(JANUARY 24, 2007)

Thank you for your continued efforts to simplify and support HOAs.

1. I believe that Mike Doyle's comments on the election reinforce the need to separate the property manager from the election process. The property manager's income can be directly impacted by the board composition. Since he can be both the sole receiver and inspector of ballots, election fraud could be difficult to prove yet easy to do. Why not just truncate the following paragraph as indicated?

1363.03 (c) 2. An independent third party may not be a person, business entity, or subdivision of a business entity who is currently employed or under contract to the association for any compensable services.

2. With regard to dropping the election requirement for uncontested elections, I ALMOST support that suggestion. In our most recent election, however, the board and property manager colluded to provide ballots on which the candidates nominated equaled the number of available board openings. This was nominally to justify not having enacted appropriate election rules.

Trying to assure truly open elections is much like trying to legislate morality. I'm not sure how it is done. It seems absurd to expend time and money on a truly uncontested election. On the other hand, it is an incentive to create an uncontested election.

3. I absolutely agree with Bill Mallory's comments on the need for legal recourse. In my association, I have repeatedly seen problems with the board, property manager and association lawyers. Their actions have cost the owners thousands of dollars and put us all in jeopardy. We have, however, no reasonable method to correct these issues. On the election rules alone, what does one do if an election is not held correctly?

In summation, the intent of legislation is good. The legislation, however, is worthless if there is no way to enforce it.

Lisa Martin
Former Board Director
2006 Election Inspector
Activist Member