

First Supplement to Memorandum 2009-19

**Small Common Interest Developments  
(Public Comment)**

In this study, the Commission is considering whether the law governing common interest developments (“CIDs”), should differentiate between different sizes of CIDs, in order to provide more appropriate governance rules for small CIDs.

As a first step in the study, the Commission is examining the procedures used to conduct a member election.

Memorandum 2009-19 sets out a staff draft tentative recommendation which would provide an optional in-person voting procedure for use in an association with 50 or fewer separate interests.

The Commission has received three letters commenting on the staff draft. They are attached in the Exhibit as follows:

|  |                   |
|--|-------------------|
|  | <i>Exhibit p.</i> |
| • Elaine Roberts Musser, Davis (3/31/09) .....               | 1                 |
| • Beth Grimm (4/9/09) .....                                  | 4                 |
| • Sean Rashkis, Disability Rights California (4/14/09) ..... | 7                 |

The comments made in those letters are discussed below.

GENERAL RESPONSE

Beth Grimm is an attorney specializing in CID law. She supports some differentiation in the law based on the size of the association, noting that very small associations are seldom professionally managed, have a hard time finding enough board member volunteers, have a hard time raising money for services and projects, and have a hard time following the statutory election procedure. See Exhibit p. 4.

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Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

Elaine Roberts Musser is an attorney who is affiliated with a number of organizations (listed below her signature on Exhibit p. 3). However, it is not clear whether she is writing on behalf of those organizations or as an individual.

She expresses general skepticism of the need for simplification of the member election procedures for small associations, which she describes as “a solution in search of a problem.” See Exhibit p. 1.

#### SPECIFIC DISAGREEMENTS WITH RATIONALE FOR REFORM

Ms. Roberts Musser disagrees with a number of points raised in the staff draft. Those points of disagreement are discussed briefly below.

#### **General Problems with Existing Election Procedure**

The staff draft notes that there are a number of general problems with the existing election procedure that would be cured in an association that uses the proposed in-person voting procedure.

Ms. Roberts Musser disputes the significance of those general problems:

##### *Identity Theft*

Under existing law, a CID voter is required to sign the outside of the ballot envelope, which is then mailed or delivered to the election inspector. The Commission has received a number of complaints about that requirement, from individuals who believe that providing a signature sample on an envelope that goes through the mail creates an increased risk of identity theft. See Memorandum 2009-19 at Exhibit p. 5.

Ms. Roberts Musser disagrees. She does not believe that the signature alone creates a significant risk of identity theft. See Exhibit p. 1.

##### *Multiple Ballots*

The staff draft explains the operational difficulties involved when a single member is entitled to cast more than one vote in an election. Under the existing double-envelope voting procedure, it would appear that each separate ballot would need to be cast in its own separate set of two sealed envelopes. See Memorandum 2009-19 at Exhibit pp. 5-6.

Ms. Roberts Musser maintains that the likelihood of an owner being able to cast more than one vote is reduced in a small association, and the burden of casting those votes separately should also be reduced. See Exhibit p. 1. That may

be correct. Nonetheless, the proposed law would simplify the process of casting any multiple votes that do arise.

Ms. Roberts Musser also notes that the proposed law would not solve the problem of casting multiple votes in a large association. See Exhibit p. 2. That is correct. However, the proposed law is not intended to address election problems in large associations.

### *Proxy Voting*

As noted in the staff draft, the use of a double-envelope system presents significant problems when an association permits the voting of proxies. There does not appear to be any practical way to authenticate that a ballot in a sealed “inside” envelope is being cast pursuant to a proxy. That problem would be avoided under the proposed law, because proxies could be authenticated in person, before a ballot is cast. See Memorandum 2009-19 at Exhibit pp. 6, 8.

Ms. Roberts Musser raises three objections to that argument:

- (1) *The proposed law would not address the proxy problem in large associations.* See Exhibit p. 2. Again, the proposed law is not intended to solve problems in large associations.
- (2) *The proposed law would not protect the privacy of a voter who casts a “directed proxy” (i.e., where the proxy directs how the proxy holder should vote).* See Exhibit p. 2. That is true. However, the staff does not see that as a problem created by the proposed law. There is no practical way to preserve the secrecy of a ballot cast pursuant to a directed proxy. The ballot must be reviewed to ensure that it complies with the directions given in the proxy.
- (3) *Authentication problems might be avoided by authenticating a proxy before ballots are distributed.* See Exhibit p. 2. It is not clear to the staff how this would work. The concept might be explained further at the Commission meeting, when this memorandum is discussed.

### **Problems Specific to Small Associations**

The staff draft asserts that the existing election procedure is unduly burdensome and costly for a small association. See Memorandum 2009-19 at Exhibit pp. 6-7. As a specific example, it notes that the existing election procedure requires the involvement of one or three independent election inspectors. The staff draft notes that the cost of hiring an election inspector would be hard to spread in a small association. That cost could be avoided by using an in-person voting procedure (without an election inspector).

Ms. Roberts Musser points out that the law does not *require* that an election inspector be paid a fee. If a volunteer (or person willing to serve for a modest fee) can be found, then the cost would be more readily absorbed in a small association.

As a practical matter, it may be difficult to find a person willing to serve as election inspector without compensation. The law requires that an election inspector be “independent,” which “includes, but is not limited to, a volunteer poll worker with the county registrar of voters, a licensee of the California Board of Accountancy, or a notary public.” Civ. Code § 1363.03(c)(2). The election inspector cannot be a member of the board, a candidate for the board, or related to a board member or candidate. *Id.* There are restrictions on the use of a property manager as election inspector. *Id.* There is the possibility of civil liability if an election inspector makes errors. All of those factors would probably decrease the likelihood of finding an eligible person who is willing to serve without compensation.

In any event, the proposed law would avoid the need for an election inspector, which would avoid whatever fee an election inspector might charge. Considering that two-thirds of California CIDs have 50 separate interests or fewer, the overall savings should be significant.

#### PERSONS WITH DISABILITIES

Disability Rights California (“DRC”) correctly notes that the proposed law is premised on the notion that in-person voting would be feasible in a small association. DRC disputes that premise in part, pointing out that a person with a disability (or caring for a person with a disability) may not be able to attend a meeting in order to cast a vote. See Exhibit p. 7.

Under existing law, a person who cannot attend a meeting for reason of a disability could still cast a vote by mail.

Under the proposed law, such a person could only vote by use of a proxy. DRC points out the deficiencies of that alternative. Either the person would need to use a general proxy (thereby surrendering control of how the vote is cast), or a directed proxy (thereby compromising the secrecy of the person’s vote). See Exhibit p. 8.

Ms. Roberts Musser raises a similar objection. See Exhibit p. 2.

**This is a compelling point.** The goal of the current study is to provide procedural simplification that is appropriate to operations on a smaller scale, **without significantly undermining substantive rights provided by existing law.** A simplification that impairs the voting right of a person with a disability is inconsistent with that goal.

DRC offers a possible solution. A provision could be added to the proposed law to require that a person with a disability (or caring for a person with a disability) be allowed to drop off a ballot in advance or mail it. **That strikes the staff as a reasonable compromise.** It would preserve the overall benefit of the simplified procedure while preserving the rights of those affected by disability.

DRC raises a related objection to the proposed provision allowing for an immediate run-off to resolve tie votes (proposed Section 1363.08(a)(6)). A person who cannot attend a meeting to vote, also cannot participate in a run-off vote that is conducted later at the same meeting. See Exhibit p. 8.

**Again, that objection seems compelling.** The proposed run-off language was added to enhance procedural efficiency. That is not a sufficient justification to disenfranchise voters who cannot attend an election meeting due to disability.

**The staff recommends that the proposed law be revised to address those problems, as follows:**

1363.08. (a) A small common interest development may choose to conduct a member election under this section, rather than under Section 1363.03. A member election conducted under this section is governed by Sections 1363.04 and 1363.09.

(b) A member election conducted under this section shall substantially comply with all of the following requirements:

(1) Notice of the election shall be provided to each member at least 30 days before the meeting at which the election is held. The notice shall state the time and place at which the meeting will be held. The notice shall describe the matters that will be decided in the election.

(2) The election shall be held at a meeting of the members at which a quorum is present. If the governing documents permit the use of a proxy, a proxy may be counted in determining the quorum.

(3) A candidate for elected office may be nominated prior to the election or at the meeting at which the election is held.

(4) Votes shall be cast by secret written ballot, except as may be necessary to cast a ballot pursuant to a proxy. A vote may be cast for a write-in candidate.

(5) After all of the members present have had an opportunity to vote, the ballots shall be counted openly, at the meeting at which

they were cast. The vote totals and results of the election shall be announced at the meeting.

~~(6) If a vote to elect directors or other officers results in a tie, and a quorum is still present when the tie is announced, the members present at the meeting may act immediately to attempt to break the tie. Unless the governing documents provide another method, a run-off election between the tied candidates shall be used to attempt to break the tie. Notwithstanding the foregoing, the association shall make reasonable accommodations to facilitate voting by a person who cannot attend an election meeting due to disability or the need to care for a person with a disability. A reasonable accommodation might include the option of voting by mail or by a ballot delivered to the board before the election meeting. A reasonable accommodation shall preserve the secrecy of any ballot cast by an alternative method.~~

(c) As used in this section “small common interest development” means a common interest development with 50 or fewer separate interests.

The staff believes that the revised language would address the concerns discussed immediately above.

Respectfully submitted,

Brian Hebert  
Executive Secretary

*Elaine Roberts Musser*  
*Attorney at Law*

March 31, 2009

Brian Hebert  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303-4739

Dear Mr. Hebert,

*In regard to the March 27, 2009 Memorandum 2009-19 Small Common Interest Developments: Member Elections, I would like to comment. The concept of “differentiating between different sizes of CIDs” to “provide simpler...in-person voting procedure[s]” seems to be a solution in search of a problem. Please be advised as follows:*

- *Concern that placing a signed ballot envelope in the mail somehow creates a risk of identity theft is unwarranted. A signature with address in and of itself is not enough to steal a person's identity. What is required to facilitate identity theft is an accompanying Social Security or bank account number along with the signature.*
  - *Signatures on hand written return addresses are used every day on the outside of envelopes, without fear of identity theft.*
  - *Signature with street address on the outside of mailed absentee ballots in federal, state and local elections are a matter of routine, and not deemed to create any risk of identity theft.*
- *If a homeowner/developer is entitled to cast multiple ballots in an election, then either:*
  - *The CID is not very likely a “small association” of 50 units or less as defined;*
  - *Or the number of multiple ballots involved would not be particularly cumbersome.*

*For example, a developer entitled to cast 100 votes, as was proposed in a previous memorandum, would not belong to a “small association” by definition. A homeowner that owned three units within a 50 unit complex would only have to cast 3 ballots, which would not be particularly burdensome. Additionally, any “streamlining of the election process” for “small associations” would not solve the problem of large multiple votes cast in CIDs of more than 50 units that are using a double-envelope system.*

- *In regard to the “proxy issue”:*
  - *The suggested simplification in election procedure for small associations would not resolve the “proxy issue” for larger associations. Nor does simplification in election procedure protect the privacy of the voter if it is a directed proxy. Thus the “proxy issue” has nothing to do with “streamlining the election process” for “small associations”.*
  - *Furthermore, if before the ballot is distributed to the proxy-holder and placed in the envelope, an election inspector*
    1. *Authenticated the identity and voting power of the person who is to give the proxy,*
    2. *Determined whether the proxy is general or directed,*
    3. *And then confirmed the ballot to be cast by the proxy-holder actually conformed to the authority granted by the proxy,**then the double envelope procedure should be just as effective as it ever was for all sized CIDs.*
- *A “simpler” in-person voting system may disenfranchise those senior citizens and adults physically unable to make it to an association meeting. However, the disabled can fill out a ballot and mail it from their home. **Thus the double-envelope balloting system provides necessary voting rights protection for handicapped homeowners.***
- *There is nothing in CID election law that requires an outside inspector to be a paid professional. All that is required is that the inspector be “independent”. It could be a neighbor, a local realtor, a college student or other person not living in the CID who is paid a nominal fee for services rendered. CIDs have been carrying on elections for a good while, without necessarily paying huge sums for a paid professional elections inspector.*
- *“Streamlining the election process” for “small homeowner associations” will do nothing more than erode the consumer protection guarantees already provided in the Davis-Stirling Act - guarantees in place for good and cogent reason. If multiple voting or proxies are a major issue in CID*

*election law, address these problems separately and directly, not by convoluted means that do not address the controversy at hand.*

*Respectfully,*



*Elaine Roberts Musser*

**Member Board of Directors, CA Center for Homeowners Association Law (CCHAL)**  
**Executive Director, Building Bridges (elder abuse prevention)**  
**Chair Triad Task Force, Yolo County Commission on Aging & Adult Services**  
**Chair, Davis Senior Citizens Commission**  
**Volunteer Attorney, Senior Legal Hotline & Yolo County Legal Clinic**  
**Member, Yolo County Multi-Disciplinary Team**

*cc file*

**EMAIL FROM BETH GRIMM**  
**(4/9/09)**

Small HOAs and CONDOS - What Are The Options Legislatively and Otherwise?

"Small" HOAs and Condo Associations - Maybe we should be talking about the differences between **ultra** small (10 and under) and small (25 and under, as NL says, or 50 and under as the CLRC says) associations - because there are some considerable differences. Both of these groups suffer many similar maladies:

- \*\*\*Are seldom professionally managed
- \*\*\*Are subject to the same laws that large associations have to follow
- \*\*\*Have the hardest time finding enough board members to serve
- \*\*\*Have the hardest time raising money for services or projects AND
- \*\*\***Have the hardest time with the new election rules**

The California Law Revision Commission (CLRC) is studying these things. And below are excerpts from a letter provided to the CLRC (and also sent to me) by a California homeowner who is concerned:

[Dear Brian Hebert - Who is Chair of the CLRC]

"I believe that the number of units in an association is the best measurement in what constitutes a small homeowner's association. If the purpose is to simplify the requirements for small associations, then the number of units is the only factor that matters since all the operations of the association have to be performed by a limited number of persons.

...

I would like to address election procedures in smaller homeowner associations. We are a 7 unit association. Due to our small size, we elect 4 directors who are also the officers. Since we have a limited number of residents, most of the homeowners have been willing to serve on the board for a few years and then find another homeowner to take their position when they grow weary of the work. Up until our 2008 elections, we never had more than 4 candidates in any given year who wanted to serve on the board. Any homeowner who was willing to take on the job of a board member could have the position and the homeowners would unanimously approve them. We did not use secret written ballots until 2007 and it wasn't really secret in 2007 since only 4 candidates were willing to take the 4 board positions. If you want to do the work, the homeowners will vote for you.

...

In 2008, the position of secretary became available due to our former secretary of 3 years tiring of the position. Our election was conducted in accordance with the law using secret written ballots. All 7 homeowners returned their ballots. The outgoing board has only 3 of the 7 homeowner

votes. The incoming board still has only 3 of the 7 homeowner votes. We also have space for a write in candidate for each position although no homeowner wrote in a candidate.

...

We also used secret written ballots to pass amendments to our bylaws this year. Homeowner's 2 thru 6 voted in favor of passing the amendments. Homeowner's 1 and 7 did not return their ballots. What's the point in using a secret written ballot when the results will never be a secret? If they aren't secret in a 7 unit association, they could never be secret in an association less than 7 units.

In-person voting in our small association would save us some time, although the results will still not be secret. There is a significant difference in a 7 unit vs. a 25 unit association. At a certain size association, secrecy could be attained. I hope you hear from other size associations on this issue.

I know the commission has received comments from others that imply smaller associations have contempt for the law. Our association does not have contempt for the law. We simply are asking that the law be reasonable and equitable. It presently is neither.

NL"

Let's take a look at just the elections for a moment. In a 7 unit association with an upcoming election for the 3 director positions, who is currently serving? who will run for the board? who will serve as inspector of elections? ...

None of the inspectors may be related to any of the board members in any way, they must be independent. And given that some members have shown they are totally apathetic and not willing to vote, let alone serve, that exacerbates the situation. Must the Board go outside the HOA or Condo Association to find and/or hire an inspector of elections?

What if the owners want to gather in a room and choose directors among them based on who are willing to do the work on a volunteer basis, maybe using a calendar to "divvy up" the next few years of service? Can they do that? Not under the current law on elections.

I do not believe that small HOAs necessarily have contempt for the CLRC or the law itself, per se - but I find that once a small association is introduced to the vast array of laws that apply to them, I do believe they develop contempt for the **complicated nature of the laws that apply** especially when they do not have the resources to keep up with them.

Am I saying small associations should not be subject to the Davis Stirling Act? Not even close. What about the meetings laws - should they apply? Yes, they should. What about budget and reserves planning and assessment collection, should they do it? An emphatic "yes" for condo associations with buildings to maintain, or HOAs with shared amenities!

But the complicated election laws? In a 7 unit association, as NL says, there is no secrecy to the voting. Everyone can figure out how everyone voted, even if the

Association uses a double envelope ballot system for elections. So come on ... yes, I agree, think "ultra small" vs "small".

And check out the recently issued Memorandum MM09-19 at the CLRC website!

Beth A. Grimm, HOA Attorney

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*California's protection and advocacy system*

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April 14, 2009

Brian Hebert  
California Law Revision Commission  
By Email: [bhebert@clrc.ca.gov](mailto:bhebert@clrc.ca.gov)

**Re: Small Common Interest Developments – Member Elections**

Dear Mr. Hebert:

Disability Rights California, formerly Protection & Advocacy, Inc., is a federally-mandated and federally-funded non-profit organization that advocates for the rights of people with disabilities throughout California. We appreciate the opportunity to comment on the Law Revision Commission's Draft Tentative Recommendation dated April 23, 2009 which proposes changes to election procedures for small Common Interest Developments (CIDs).

The Commission's proposal to allow small CIDs to hold elections on a strictly in-person basis, without the possibility of a mail-in ballot, ignores the needs and the rights of homeowners with disabilities, and homeowners caring for people with disabilities, who may not be able to attend meetings in person. The federal Fair Housing Act (FHA) prohibits housing providers, including homeowners' associations, from discrimination in the terms, conditions or privileges of occupancy of a dwelling because of the disability of a homeowner or tenant, or of a person associated with a homeowner or tenant. 42 U.S.C. § 3604(f)(2). Regulations promulgated under the FHA specify that disability-based discrimination includes "limiting the use of privileges, services or facilities associated with a dwelling because of [the disability] of an owner, tenant or a person associated with him or her." 24 CFR § 100.65(b)(4). The California Fair Employment and Housing Act, contains similar protections. Gov't Code § 12955.

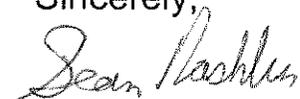
The Commission's assumption that in-person voting is feasible for a small CID "because all of the owners could easily meet to directly participate in the election process" does not hold true for many people with disabilities, or for individuals who care for people with disabilities. These individuals may face mobility and/or scheduling restrictions because of their own disability or the disability of a child, parent, or other individual for whom they are responsible. Because of these disabilities, they may not be able to attend an in-person election. If they can attend, they might not be able to stay until the end of the meeting to participate in a run-off vote.

The opportunity to vote by proxy does not provide for an adequate alternative to in-person voting. A general proxy is clearly not adequate because it essentially gives the person's vote to a third party. As the Commission acknowledges, a directed proxy, does not allow a homeowner to cast a secret vote. This may be particularly problematic for small CIDs, where homeowners tend to know each other and internal politics may be pervasive. A directed proxy would also not allow a homeowner to vote in a run-off election that took place immediately following a scheduled in-person election. Finally, a proxy may be difficult to find, particularly for individuals with disabilities that affect their ability to communicate.

The Commission's proposal to allow small CIDs to require homeowners to vote in person, and to be present for run-off elections, does not give due consideration to the needs of people with disabilities and those who care for them. By sanctioning a discriminatory election structure, it would open the door for small CIDs to unintentionally engage in disability-based discrimination in violation of state and federal law. If the Commission finds it necessary to allow small CIDs to hold in-person elections, they should be required to provide an option for people with disabilities and people caring for people with disabilities, to mail-in or drop-off a ballot in advance. In addition, instead of taking place at the end of in-person voting sessions, run-off elections should be scheduled at a later time, with the same option for mail-in or drop-off voting.

Thank you for your attention. We appreciate your consideration of our comments, and look forward to hearing from you.

Sincerely,



Sean Rashkis  
Attorney

EX 8