Study H-857 April 17, 2009

Second Supplement to Memorandum 2009-19

Small Common Interest Developments (Public Comment)

The Commission has received two more letters commenting on issues discussed in Memorandum 2009-19. They are attached in the Exhibit as follows:

The comments made in those letters are discussed below.

GENERAL RESPONSE

Bob Sheppard is writing on behalf of Walnut House Cooperative ("WHC"). They are generally pleased with the direction taken in the proposed law, but have some specific concerns. See Exhibit p. 1. Those concerns are discussed below.

Trudy Morrison is a CID property manager whose work includes representing associations from 11 to 427 units in size. She is somewhat supportive of the proposed law as a general reform of the election procedure, and urges that it be made available to all CIDs regardless of size. See Exhibit p. 4.

However, she is skeptical that small associations bear any greater proportional burden under the existing election procedure than do large associations. *Id.*

SPECIFIC COMMENTS ON PROPOSED LAW

WHC expresses a number of concerns and suggestions about the proposed legislation that is set out in Memorandum 2009-19. Those comments are discussed below.

Use of Proxies in Determining Quorum

Proposed Civil Code Section 1368.08(b)(2) would provide:

> 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.

WHC has two concerns about that provision.

First, WHC requires a quorum of "natural persons" regardless of the number of proxies represented at the meeting. The proposed language does not directly conflict with that approach, but could perhaps be read to allow broader counting of proxies than WHC permits.

Second, WHC requires that a proxy be held by a person other than a member, so as to prevent any concentration of voting power in the hands of a single member. Again, the proposed language does not directly conflict with that approach, but could perhaps be read to allow broader counting of proxies than WHC permits.

In informal conversations with Bob Sheppard, the staff has emphasized that the proposed language merely *authorizes* the counting of proxies in determining a quorum, and says nothing about the *manner* in which they are counted. That would seem to leave ample space for an association like WHC to adopt its own rules on how proxies may be counted. So long as those rules don't conflict with the proposed statutory language, there should not be any problem.

Mr. Sheppard does not believe that would be an adequate solution. He sees ambiguity in the proposed language that might lead to misunderstandings and disputes.

WHC proposes that the second sentence of the proposed language be revised to read:

> If the governing documents permit the use of a proxy, an association may allow the counting of a proxy toward a quorum.

See Exhibit p. 1. The theory seems to be that the proposed revision would more clearly place authority as to the manner of counting proxies in the hands of the association (which would then clearly be governed by its established rules).

The staff has no objection to that revision, which has the benefit of identifying the person responsible for exercising the discretion granted by the provision. Should that change be made?

Proxy-Holder

WHC's rules permit a member to grant a proxy to a person other than another member. Bob Sheppard is concerned that the proposed law might preclude that practice. See Exhibit p. 2. The staff sees nothing in the proposed law that would do so.

As a solution to its concern, WHC proposes that language be added to make clear that a proxy may be given to another member or to any other person who has a right of occupancy in a separate interest. *Id.*

That language would go beyond simply clarifying that a proxy may be given to a non-member. It would restrict the giving of proxies. Only non-members *with a right of occupancy* could be given a proxy.

The staff see no obvious reason for imposing that restriction. Why not allow a person to give a proxy to a nonresident friend, care-giver, sibling, attorney, etc.?

The staff recommends against making the proposed statutory change. However, it might be helpful to add language to the Comment to make clear that the proposed law is not intended to regulate the manner in which proxies are granted or used. Thus:

> Section 1363.08 permits the use of a proxy in a member election, if the use of proxies is also authorized by an association's governing documents. Nothing in Section 1363.08 mandates the use of proxies or governs the manner in which a proxy may be granted or acted upon. Those matters may be addressed in the association's governing documents.

Write-In Ballots

Proposed Section 1368.08(b)(5) authorizes the casting of write-in votes:

> 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.*

(Emphasis added.)

WHC recommends that the language be revised to limit write-ins to those who are "subsequently nominated." In the alternative, WHC suggests that the language be deleted as surplus, since subdivision (b)(3) authorizes nominations from the floor. See Exhibit p. 2.

The staff sees no significant practical harm that would result from allowing write-in candidates, regardless of whether they have been formally nominated.

However, in informal conversations, Mr. Sheppard has expressed concern that members may write in the names of persons who are unwilling to serve, unnecessarily complicating the election results. In the staff's view, that problem could be avoided in a small association with only a small measure of reasonableness and communication. The problem does not seem to warrant complicating the statutory language.

The staff is inclined against changing the proposed write-in language as suggested by WHC. However, it may again be appropriate to add some comment language, making clear that the proposed law is intended only to *authorize* the use of write-ins, and is not intended to preclude reasonable regulation of the write-in process by an association's governing documents (e.g., providing that a write-in vote for a fictional person is a non-vote). Thus:

> Subdivision (b)(5) authorizes the use of write-in voting. Nothing in this section precludes an association from adopting reasonable rules for the handling of write-in votes (e.g., providing that a write-in vote for a fictional person is a non-vote).

Tie-Breaking

WHC requests that the proposed tie-breaking provision (subdivision (b)(6)) be eliminated or expressly subordinated to the association's governing documents. They are concerned that the proposed language might impair an association's ability to break ties in the manner that it chooses.

Note that the staff has already recommended that subdivision (b)(6) be deleted, because of its effect on the voting rights of persons with disabilities who cannot easily attend an election meeting. See First Supplement to Memorandum 2009-19. WHC's request adds weight to that recommendation.

Meeting Notice

WHC believes that the period for giving notice prior to an election should be reduced from 30 days to 10 (both in the proposed law and in the general election procedure when that procedure is used by a small association). See Exhibit pp. 2-3. They believe that 10 days is adequate and that associations should be given flexibility to set their own timetables.

However, existing law requires 30 days of notice. See Section 1363.03(e). Any shortening of the existing notice period might be seen as diminution of the substantive rights of homeowners in small associations.

The staff recommends against making the proposed changes.

Omission of Existing Requirements

The proposed procedure is drafted as a complete alternative to the existing election requirements of Section 1363.03. A small association that complies with the proposed law, would not be required to comply with any part of Section 1363.03.

WHC suggests that there are some parts of Section 1363.03 that should be incorporated into the proposed law. Specifically:

(1) The requirement of an election inspector.
(2) Rules on counting and tabulation of ballots.
(3) Control and retention of ballots.
(4) Limits on the scope of the election procedure.

See Exhibit p. 3. The staff will address each of those suggestions in turn.

Election Inspector

WHC asks "Who will run the election?" *Id.*

The staff has two responses to this. First, there is nothing that precludes an association from hiring a neutral to run an election if it sees a benefit in doing so. No statutory authorization (or mandate) is required.

Second, an election conducted under the proposed law would take place at a member meeting. It could be conducted by whoever is in charge of running the meeting. Or an officer could be designated to run the election (e.g., the board secretary). All of this could be addressed by operating rule, and need not be mandated by statute.

One goal of this study is to provide a procedure that is intuitive and general enough to validate good faith practices. If the statute becomes too loaded up with mandatory requirements, it would become a series of traps for small associations, inviting litigation over minor procedural failures that do not affect the fairness or accuracy of the election. **In the staff's view, associations should be left alone to determine for themselves who will run the election under the proposed law.**

Counting and Tabulation of Ballots

Regarding the counting and tabulation of votes, WHC asks "Will it be open or secret?" *Id.*

Proposed subdivision (b)(5) seems to answer this question adequately:

> 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.

(Emphasis added.)

Control and Retention of Ballots

WHC suggests that it might be helpful to add rules on the control and retention of ballots.

The staff sees some merit in that suggestion, but is again leery of creating a mandatory requirement that could lead to litigation over procedural issues, even in the absence of any substantive problem with the fairness of the election.

The procedure provided in the proposed law is simple and transparent. If there is any concern about voting or the counting of votes, it should be immediately obvious to those who participate in the election. It is therefore not clear that there needs to be an express statutory rule for retention of ballots.

If, however, the Commission sees merit in adding a ballot retention requirement to the proposed law, it could be done by adding an additional paragraph to proposed subdivision (b), along these lines:

> (7) Ballots and proxies shall be retained by the association for at least one year.

The one-year period would match the statutory period for filing an election challenge under Section 1363.09.

Limits on Scope of Election Procedure

WHC notes that existing Section 1363.03(b) limits the double-envelope election procedure to specified types of elections. It seems to be suggesting that a similar limitation should apply to the proposed in-person voting procedure.

The staff disagrees. The proposed procedure would be expressly optional. Its use would never be required.

The primary purpose of the proposed law is to provide an alternative to the double-envelope system in small associations. But the staff sees no reason to limit

the proposed procedure to the sorts of elections that are governed by the double-envelope system. If an association *elects* to use the optional procedure in other types of elections (but is not *required* to do so), what would be the harm?

Respectfully submitted,

Brian Hebert
Executive Secretary

Walnut House Cooperative
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April 16, 2009

California Law Revision Commission
Attn: Brian Hebert (via email)

Re: Comments on Memorandum 2009-19

Dear Brian and Commissioners:

We are pleased with the general approach the staff has taken toward simplifying election procedures for small associations. Please refer to our previous comments; this memo will not repeat them. Here are our comments on the staff's draft tentative recommendations that we have not previously submitted. **We intend for all of our comments below to apply only to small associations.**

Definition of a quorum (1368.08(b)(2))

We believe there are two issues. First: how does one determine the quorum that is necessary to hold a meeting. Second, how much voting power is necessary for an election in such a meeting to be valid, whether in person or by proxy. For example, there may be many proxies at a meeting such that there are sufficient votes for a valid election, but there may be insufficient members in attendance in order to form a quorum to hold the meeting. In our association, a meeting is held for the purpose of in-person deliberation; we value a broad discussion and therefore require a quorum of natural persons representing memberships in attendance, regardless of the number of proxies. Also, as we've previously written, we disfavor and prohibit the concentration of voting power by requiring that only a non-voting household member (e.g. a spouse or tenant) may hold a single proxy.

We think the language of the draft could be much clearer in specifying the party having the right to count a proxy toward a quorum. It's our understanding that the intent is permissive toward the association, rather than toward the member. A layperson could easily misinterpret this. We'd favor something like:

"If the governing documents permit the use of a proxy, an association may allow the counting of a proxy toward a quorum."

Proxies for non-members (1368.08(b)(2))

The statute requires that only members may hold proxies. We have cases where a member's spouse lives in the member's unit with the member as a household, but is not on title for legal or personal reasons. Thus, the spouse is not a "member". We believe that the statute prohibiting such an occupant from holding a proxy is unfair, particularly if the governing documents allow it (which ours do). Also, we have members that sublet their units for temporary relocation, vacation, etc. and wish to give their tenant a proxy, which is also prohibited. Thus, we would like to suggest that the definition of a proxy-holder be extended. For example:

"An association may permit a member to give a proxy to any other member or any person having an exclusive or non-exclusive right to occupy a separate interest."

Write-in ballots (1368.08(b)(4))

The language in the draft could be clearer in expressing the intent and interpretation of the issue of pre-printed ballots and in-meeting nominations. We'd suggest:

"If printed ballots are used, there shall be spaces on them for subsequently nominated write-in candidates."

This would clarify the intent of the provision and that the association could choose not to count non-candidates. Or, the subsection could be eliminated, as it is implied in the previous (b)(3) subsection.

Breaking of ties (1368.08(b)(6))

There are so many ways that an association could choose to break a tie (e.g. wait for a specified time and vote again, take another vote, draw lots, etc.), that we think it would be better to omit this section and leave the procedure up to the association. In the alternative, each sentence in the section should be "subject to an association's governing documents".

Meeting notice (1368.08(b)(1))

For an informal rule in a small association, we believe that a 30-day notice requirement is too long and inflexible. Our governing documents require a 10-day notice (as does the Corp. Code) and we had used this notice requirement for many years, without problems. Members of associations have varying local scheduling preferences, so assumptions about scheduling patterns made by a statute could be wildly inaccurate. For example, members of our association are more likely to commit to a meeting date that is sooner, rather than later. If members of an association need more notice, they are free to require it in their governing documents. We prefer the 10-day minimum notice in the Corp. Code.

Omission of existing requirements (Existing 1363.03(a))

Many existing election requirement are not included in the simplified procedures. The protections afforded by some of them may be necessary to protect the rights of members. For example:

Election inspector: Who will run the election? (1363.03(a)(5))
Counting and tabulation: Will it be open or in secret? (1363.03(f))
Ballots: Control and retention. (1363.03(h) and (i))
Scope: Which elections are covered (e.g. directors, governing documents, etc.)? (1363.03(b))

We believe that provisions similar to those in the existing statute should be included in the simplified procedures, to protect the rights of members.

Changes to existing procedures

For a small association, we believe that the notice requirement for an election per the statute should be the same as for an in-meeting election, for the reasons stated above. Thus, we favor 10 days in 1368.03(e). For example:

"1368.03(e) Ballots and two preaddressed envelopes with instructions on how to return ballots shall be mailed by first-class mail or delivered by the association to every member not less than 30 days prior to the deadline for voting, *except in the case of a "small association", where it shall be not less than 10 days*."

Except as provided above, we support the staff's draft recommendation. Please feel free to contact me if you have questions or require further information. Thank you for your consideration.

Very truly yours,

Bob Sheppard, Legislative Coordinator
Walnut House Cooperative

Contact: 510.644.2463

EMAIL FROM TRUDY MORRISON
(4/17/09)

I deal with CIDs both large and small (11 to 427 units/lots). In my experience, size isn't the issue. It's how contentious an election is. There are some elections in small associations that should absolutely remain under the current system, while some larger associations could benefit equally from the changes proposed for smaller HOAs.

My recommendation would be that the proposed 1363.08 (a) allow all CIDs to choose which system to use - determined on an election-by-election basis.

The cost of preparing and mailing ballots is the same no matter the size of the association. For the associations mentioned above, it would be approximately $11 or $427. In other words, the percentage of the association's budget is going to be the same, no matter what the total. It's no more onerous on a small association than a large.

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