

### Third Supplement to Memorandum 2009-19

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

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

	<i>Exhibit p.</i>
• Dick Pruess, Pasadena (4/19/09).....	1
• Sean Rashkis, Disability Rights California (4/20/09) .....	3
• Nancy Lynch, Mountain View (4/20/09) .....	4
• Kazuko K. Artus, San Francisco (4/21/09) .....	5

The comments made in those letters are discussed below.

#### GENERAL RESPONSE

Dick Preuss believes that the proposed law would help, but has a specific suggestion for improvement, which is discussed below. See Exhibit p. 1.

Nancy Lynch writes in general support of the proposed law:

Our small 7 unit homeowner's association would certainly welcome the proposed changes to the current election rules. It would certainly be less time consuming since our secretary would no longer need to address 14 envelopes and stuff a ballot and 2 envelopes into another envelope. We could simply email the ballots and have our homeowners print them and bring them to the meeting. To maintain the illusive secrecy for our elections, they can fold them and place them in a makeshift ballot box. In an association our size, we also do not need an elections inspector. There is simply no opportunity for election fraud to occur.

See Exhibit p. 4.

Kazuko Artus believes that effort should be put into fixing problems in the general election procedure before attempting any simplification of the election procedure for small associations. To the extent that problems in small

associations result from ignorance of the law, education efforts should be bolstered. See Exhibit p. 5.

#### ACCOMMODATION OF DISABILITY

Sean Rashkis of Disability Rights California (“DRC”) writes to follow-up on the discussion of voting by persons with disabilities that was raised by DRC’s first letter on this study. See First Supplement to Memorandum 2009-19.

In that supplement, the staff proposed adding language expressly requiring that a small association accommodate a person with a disability (or caring for someone with a disability), by adding language to the proposed law along the following lines:

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.

DRC indicates that this proposal would address its concern, provided that the language is revised as follows:

Notwithstanding the foregoing, the association shall make reasonable accommodations to facilitate voting by a person who cannot ~~attend~~ participate in 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.

See Exhibit p. 3.

This would cover individuals for whom the barrier to voting is something other than attendance at the meeting itself, for example individuals who must have the ballot information translated into Braille or another accessible format.

*Id.* That seems sensible. **If the Commission decides to add the language set out above, the staff recommends that it be adjusted as proposed by DRC.**

## MAIL-IN VOTING GENERALLY

Dick Preuss suggests that the proposed law should permit mail-in voting for any member (and not just as a means of accommodating a disability). See Exhibit p. 1. However, that option would entail the sort of secrecy and transparency concerns that led to the double-envelope complexity of the existing election procedure. Addressing those concerns would import much of the complexity of existing law into the proposed law, obviating the benefit of providing a “simplified” alternative procedure.

If a small association wants to follow a procedure that provides a general mail-in option combined with voting at a specified location, it can opt to follow the general procedure provided in existing Civil Code Section 1363.03.

Respectfully submitted,

Brian Hebert  
Executive Secretary

**CASTLEGATE HOMEOWNERS ASSOCIATION**  
**330 West California Boulevard**  
**Pasadena, California 91105**

April 19, 2009

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

Dear Mr. Hebert,

Under the proposed definition of a small association being fifty or fewer units, we would be considered as small, as we have forty-eight units. At last night's board meeting, there were five board members, the management company's President, two committee chairs, who had reports to present, and the husband and wife from one unit, who were present. One of the board members is an absentee owner.

The First Supplement to Memorandum 2009-19, certainly addresses some valid points, and the language changes do help. But they do not address the issue of owner apathy, which is further aggravated by the number of absentee owners in a CID. In our case, at the time of the last Election, November 15, 2008, there were fifteen absentee owners, or 31% of the unit owners not living within the complex. Our current board Secretary, now in her third term of office, is the only absentee owner who has been willing to run for the board in the thirty-seven years of the CID's existence, which indicates absentee ownership and apathy are linked together. Foreclosures are pushing that percentage above fifty percent in a number of cases, especially in places like Riverside County.

Prior to 2007, when candidates were nominated at the meeting preceding the Annual Meeting, and a ballot containing those who were nominated (or call it what it really is, which are those owners who are willing to run), and the number of open positions to fill, and a line to write-in candidates, was mailed first class to all owners, with a return date prior to the Annual Meeting date. A lot of people brought their ballots to the Annual meeting, and listened to the candidates, then marked the ballot and handed it to the Election Official, who was an owner who was not a candidate or board member, and was willing to count the ballots. In each of the years 2003, 2004 and 2005 between owners present, and mailed in ballots, there were thirty-seven of the forty-eight units present.

With the two envelope method, and the Annual Meeting no longer the center stage of the Election Process, there have been 31, 33 and 27 members present or ballot counted. So I would consider ours an association with little apathy compared to many.

Why not allow an election process where ballots can be: (1) Filled out and mailed in, whether it is by a person with disabilities or caring for disabilities, should not be a qualification to vote by mail. Anyone should be allowed to vote by mail. (2) Brought to the meeting and cast by Proxy. (3) Brought to the meeting by an owner and given to the Election Clerk, whom I do not feel needs to be an outsider, whether hired or not. We always have some owners present at the Annual Meeting, whom the other owners trust implicitly, and are volunteered for the job of Election Clerk to count the votes and announce the winners.

If ballot secrecy is an issue, have all mailed in ballots in a second plain envelope, have the Election Clerk take all of those ballots and place them in a BALLOT BOX, where those present at the meeting deposit their ballots, then the Clerk does not know how anyone's ballot was marked, and it is a democratic election, with secret ballots, all counted in the open by the Clerk, as other business of the Annual Meeting is conducted.

When the ballot count is completed, the meeting is interrupted, and the results are announced. This usually results in the meeting being adjourned, and the newly elected board starts a Regular Open Board Meeting, whose purpose is for the new board to determine amongst themselves who will be President, Vice-President, Secretary and Treasurer for the coming year. They then conduct whatever urgent business the association has before adjourning.

That system worked for some thirty-four years without complaints, and it allows everyone who owns property in the CID to cast their vote, whether or not they are able to attend the Annual Meeting.

If an association is so small there is difficulty in getting enough candidates for the open board seats, why not let those members present at the meeting at which the election is conducted, choose or coerce enough members to run to fill the number of vacant seats, and then declare the candidates are elected by proclamation, and there then can be a functioning board.

Is there anything in Corporations Code that says how a corporation can function if an insufficient number of board positions are filled to have a quorum? With foreclosures continuing here in California at the rate they are, that is a reality that will be faced in a number of situations, and I would like to know how to respond.

Sincerely,

Dick Pruess  
Castlegate HOA Past President



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April 20, 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,

We are writing in response to the Commission's First Supplement to Memorandum 2009-19, with regard to member elections in small Common Interest Developments (CIDs). We appreciate your consideration of our comments concerning the accessibility of the voting procedures to people who have disabilities or care for people with disabilities. Your proposed statutory language addresses our concerns. However, we suggest that the first sentence of the proposed language be changed to read:

"Notwithstanding the foregoing, the association shall make reasonable accommodations to facilitate voting by a person who cannot *participate in* an election due to a disability or the need to care for a person with a disability." This would cover individuals for whom the barrier to voting is something other than attendance at the election meeting itself, for example individuals who must have the ballot information translated into Braille or another accessible format.

Thank you again for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Sean Rashkis".

Sean Rashkis  
Attorney

April 20, 2009

Mr. Brian Hebert  
California Law Revision Commission

RE: Memorandum 2009-19

Our small 7 unit homeowner's association would certainly welcome the proposed changes to the current election rules. It would certainly be less time consuming since our secretary would no longer need to address 14 envelopes and stuff a ballot and 2 envelopes into another envelope. We could simply email the ballots and have our homeowners print them and bring them to the meeting. To maintain the illusive secrecy for our elections, they can fold them and place them in a makeshift ballot box. In an association our size, we also do not need an elections inspector. There is simply no opportunity for election fraud to occur.

Our association exclusively uses email to send all homeowner documents such as financial information and all the other numerous disclosures that we must send annually. Obviously, all our homeowners use email. I'm sure most of the homeowners do not print the documents that we send, but rather save them on their computer, a CD, DVD or a flash drive. I am all about saving paper and my printer ink. In the unlikely event a future homeowner did not have email capability, we would hand deliver any documents.

We will be holding our elections in June. Our current board members are the only nominees for next year's board. We will follow the current elections law although it really is a silly law for us since we already know who will be on the board for next year. I'm sure hoping the law can be changed in time for our 2010 elections.

I appreciate the Commission's time in trying to inject some reasonableness into the law for smaller associations.

Nancy Lynch  
Mountain View, CA

Kazuko K. Artus, Ph.D., J.D.  
San Francisco  
[Kazukokartus@aol.com](mailto:Kazukokartus@aol.com)

21 April 2009

Mr. Brian Hebert  
Executive Secretary  
California Law Revision Commission

Mr. Hebert:

Re: Small Associations (Memorandum 2009-19)

As I said it earlier while commenting on Memorandum 2009-14, I support in principle your efforts to make life easier for small CID associations. After reading Memorandum 2009-19 and public comments on it, however, I have come to believe that it is premature to provide an alternative to Civil Code § 1363.03 for any CID association, particularly if one of the reasons is that members of certain associations “may be unaware of governing statutory law,” Memorandum 2009-19, p. 7. The solution for that problem is the education of association members. If the Department of Consumer Affairs and the Department of Real Estate cannot secure an adequate amount of funds appropriated for an education course envisaged in Civil Code § 1363.001, the Legislature should look to private donations.

There are general problems in Civil Code § 1363.03 as you noted in Memoranda 2009-14 and 2009-19. I recommend that the Commission focus on those problems and introduce possible special provisions for small associations in the process. I take this opportunity to call your attention to two problems you have not mentioned.

In 2007, it was found that my association had adopted a set of election procedures, after 1 January 2004, without satisfying the requirements of Civil Code § 1357.130. In the process of curing this defect, I collated members’ comments into a revised draft. While the Davis-Stirling Act and the Corporations Code provided answers to most of questions, I found no answer to the question of whether the association could extend the voting period in an election by secret ballot without invalidating the election results. This issue was very important because the association was seeking to restate, *inter alia*, its declaration, which required the approval of a very large special majority. The association received a professional advice that it was unclear since there was no statute authorizing or prohibiting an extension and the court had not spoken to the issue. In the end the association decided to introduce a voting period extension provision and to count on no member challenging an



extension before the expiration of the limitation period in Civil Code § 1363.09(a). I imagine that many associations, small or large, would encounter the same problem.

I also had trouble with the determination of the presence of a quorum. While Civil Code § 1363.03(b) provides, “If a quorum is required by the governing documents, each ballot received by the inspector of elections shall be treated as a member present at a meeting for the purpose of establishing a quorum,” underline added, the provision is useful only after all ballots have been removed from the envelopes and counted since under the statute it is the number of ballots, not the number of outer or inner envelopes, which matters in the quorum count. An association would have to provide for the possibility that many envelopes may be found to contain no ballot. For now the election procedures of my association provide for a two-step quorum determination: a first, provisional determination, based on the number of outer envelopes received by the inspectors; and only if a quorum is provisionally determined to exist, then a second, final determination, based on the number of ballots. This is not an ideal solution. The election statute should introduce an arrangement for a simpler way to determine the presence of a quorum.

You did mention the risk of identity theft associated with the requirement that the outer envelope bear both the address and the signature of the voting member. This can be remedied easily. Commercial Code § 3401(b) provides, “A signature may be made (1) . . ., and (2) by the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing.” The election statute has only to include a similar provision. A password registered with the association would serve the purpose.

Sincerely,

Kazuko K. Artus