Study H-855 August 10, 2010

First Supplement to Memorandum 2010-29

Statutory Clarification and Simplification of CID Law:
Comments on Preliminary Provisions

This supplement concludes the analysis of public comments on the "preliminary provisions" of the Commission's tentative recommendation on *Statutory Clarification and Simplification of CID Law* (Feb. 2010). The Comments discussed in this memorandum are set out in the Exhibit to Memorandum 2010-36.

NOTICES

Five of the provisions discussed in this supplement would provide standardized rules and procedures for notice delivery within a common interest development ("CID"). See proposed Sections 4035 (delivery to association), 4040 (individual delivery), 4045 (general delivery), 4050 (time and proof of delivery), 4055 (minimum font size). Comments on those provisions are discussed below.

Proposed § 4035. Delivery to Association

Proposed Section 4035 is new. It would provide a standard for delivery of a notice to the association's board of directors. By its own terms, the section would only apply to notices that are required by the Davis-Stirling Act:

> 4035. If a provision of this part requires that a document be delivered to an association, the document shall be delivered by first-class mail, postage prepaid, or by certified mail, to the person designated in the annual policy statement, prepared pursuant to Section 5310, to receive documents on behalf of the association. If no person has been designated to receive documents, the document shall be delivered to the president or secretary of the association.

We received a number of comments on this provision.

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). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

Electronic Delivery

Duncan McPherson, writing on behalf of a group of three attorneys (himself, Jeffrey Wagner, and Peter Saputo) (hereafter, the "McPherson Group"), suggests that the provision should permit electronic delivery. See Memorandum 2010-36, Exhibit p. 10. The same point is made by Kazuko K. Artus. See Memorandum 2010-36, Exhibit p. 50.

The staff believes this is a good suggestion, so long as the association agrees to electronic delivery of notices. Language to effect this change is set out below, under "Proposed Revisions."

Personal Delivery

The McPherson Group, Kazuko Artus, and the California State Bar Real Property Law Section Working Group ("RPLS Working Group") all propose that personal delivery of notices be permitted. See Memorandum 2010-36, Exhibit pp. 10, 50, 104.

Both Ms. Artus and the RPLS Working Group further propose that any language authorizing personal delivery also require that the association's representative provide a written receipt confirming delivery.

The Commission received strongly negative comment on a prior provision authorizing personal delivery of notices to *members*, because personal delivery could lead to sloppy or dishonest practices, and complicate proof of delivery. In response to those comments, the Commission removed the language authorizing personal delivery of notices to members.

However, personal delivery to an association representative, with a receipt for delivery, might not present the same problems.

A receipt procedure would be easily administered in a large and sophisticated CID, with a business office and staff. However, a receipt process would be harder to administer in a small association, where personal delivery might involve handing notice to a board member at his or her home. Recall that most associations are very small, with more than half of all California CIDs having 25 units or fewer.

Perhaps the best approach would be to authorize personal delivery with a receipt, *at the option of the association*. This would provide flexibility for associations that are equipped to handle the receipt formalities, without imposing troublesome procedural burdens on small associations. Language to effect this change is set out below, under "Proposed Revisions."

Objection to Designation of Person to Receive Notices

Proposed Section 4035 provides that notices to the association shall be delivered to the person designated to receive such notices, in the association's annual policy statement. If no person is designated, notice is to be delivered to the association's president or secretary.

The California Association of Community Managers ("CACM") objects to the provision on designating a person for receipt of notices (which is not required under existing law). It believes this would be a significant new cost for large associations and ignored by small associations. See Memorandum 2010-36, Exhibit p. 205.

The staff sees it differently, for two reasons:

(1) Designation of a person to receive notices is not strictly mandatory. The last sentence of proposed Section 4035 provides a default rule for associations that do not make such a designation (i.e., delivery to the association president or secretary).

(2) CACM's objection to the cost of making the designation in the annual policy statement appears to be grounded in a general objection to delivering an annual policy statement at all (pursuant to proposed Section 5310). **Therefore, CACM's objection is probably best addressed when Section 5310 is discussed, in a future memorandum.**

Proposed Revisions

The staff recommends that proposed Section 4035 be revised along the lines discussed above, thus:

> 4035. (a) If a provision of this part requires that a document be delivered to an association, the document shall be delivered ~~by first-class mail, postage prepaid, or by certified mail,~~ to the person designated in the annual policy statement, prepared pursuant to Section 5310, to receive documents on behalf of the association. If no person has been designated to receive documents, the document shall be delivered to the president or secretary of the association.
>
> (b) A notice delivered pursuant to this section may be delivered by any of the following methods:
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> (1) First-class mail, postage prepaid
>
> (2) Certified mail.
>
> (3) By e-mail, facsimile, or other electronic means, if the association has assented to that method of delivery.
>
> (4) By personal delivery, if the association has assented to that method of delivery. If the association accepts a notice by personal delivery it shall provide a written receipt acknowledging delivery of the notice.

Individual and General Delivery

The proposed law would standardize the delivery of statutory notices to members, by providing two different methods of delivery: individual delivery and general delivery. Individual delivery would be used in those instances where individualized delivery to every member should be required by law. General delivery would be used where constructive notice is adequate, with the notices being posted, published, or broadcast.

Importantly, the proposed law provides that any member may request individual delivery of general notices. This would avoid problems where a member would have difficulty accessing posted notices (e.g., an absentee owner).

Proposed § 4040. Individual Delivery

We received a number of comments on the proposed rules for individual delivery of notices. They are discussed below.

Electronic Delivery Option

Proposed Section 4040(a)(2) permits electronic delivery of individual notices, but only if the recipient has consented to electronic delivery:

> 4040. (a) If a provision of this part requires "individual delivery" or "individual notice," the notice shall be delivered to the member to be notified by one of the following methods:
>
> …
>
> (2) E-mail, facsimile, or other electronic means, if the recipient has agreed to that method of delivery. The agreement obtained by the association shall be consistent with the conditions for obtaining consumer consent described in Section 20 of the Corporations Code.

The McPherson Group objects that the method specified in Corporations Code Section 20 is too complex, because that provision requires compliance with a federal statute on the issue. See Memorandum 2010-36, Exhibit p. 11. Fortunately, that issue has been largely resolved by a recent amendment of Section 20, which significantly simplified the rule for obtaining consent to electronic delivery. It no longer incorporates the federal requirements. See 2009 Cal. Stat. ch. 296 (AB 285 (Tran)). Section 20 now reads:

> 20. "Electronic transmission by the corporation" means a communication (a) delivered by (1) facsimile telecommunication or electronic mail when directed to the facsimile number or electronic mail address, respectively, for that recipient on record with the corporation, (2) posting on an electronic message board or network

> which the corporation has designated for those communications, together with a separate notice to the recipient of the posting, which transmission shall be validly delivered upon the later of the posting or delivery of the separate notice thereof, or (3) other means of electronic communication, (b) to a recipient who has provided an unrevoked consent to the use of those means of transmission for communications under or pursuant to this code, and (c) that creates a record that is capable of retention, retrieval, and review, and that may thereafter be rendered into clearly legible tangible form. However, an electronic transmission under this code by a corporation to an individual shareholder or member of the corporation who is a natural person, and if an officer or director of the corporation, only if communicated to the recipient in that person's capacity as a shareholder or member, is not authorized unless, in addition to satisfying the requirements of this section, the consent to the transmission has been preceded by or includes a clear written statement to the recipient as to (a) any right of the recipient to have the record provided or made available on paper or in nonelectronic form, (b) whether the consent applies only to that transmission, to specified categories of communications, or to all communications from the corporation, and (c) the procedures the recipient must use to withdraw consent.

On a related point, the RPLS Working Group urges the Commission to adopt the term "electronic transmission" as defined in Section 20, in lieu of the phrase "E-mail, facsimile, or other electronic means." See Memorandum 2010-36, Exhibit p. 109. This is part of a broader theme in the RPLS Working Group letter, where they generally urge the Commission to use "time-tested" Corporations Code provisions rather than providing simplified analogs in the Davis-Stirling Act.

In the staff's view, those suggestions run counter to another broad theme of the RPLS Working Group letter, that the proposed law should not be made too complex for easy use by nonlawyers. One of the greatest complicating factors for those who must use the Davis-Stirling Act, is that it must be read together with the Corporations Code in order to fully understand the law governing CIDs. That problem is exacerbated when the Davis-Stirling Act incorporates Corporations Code provisions by reference. Not only does that require the reader to consult another code (which may not be as available as the Davis-Stirling Act), but it also requires the reader to determine how to adapt provisions drafted for use in one code for use in another.

Section 20 provides a good example of this problem. If a non-lawyer needs to read the Davis-Stirling Act to determine whether electronic notice delivery is permitted, the answer should be as simple and direct as legally feasible. E.g., the

notice may be sent by "E-mail, facsimile, or other electronic means, if the recipient has agreed to that method of delivery." That would seem to be much easier to understand than a rule authorizing "electronic transmission pursuant to Corporations Code Section 20."

In the staff's view, the greater simplicity of the language drafted by the Commission more than justifies the lack of uniformity with the Corporations Code.

The Legislature has already decided that homeowner consent to receive notices electronically should satisfy the standard set in Section 20. The staff is not inclined to second-guess that judgment. However, the rule could be expressed more simply, without relying on a cross-reference to Corporations Code Section 20. **The staff recommends the following revision:**

> 4040. (a) If a provision of this part requires "individual delivery" or "individual notice," the notice shall be delivered to the member to be notified by one of the following methods:
>
> …
>
> (2) E-mail, facsimile, or other electronic means, if the recipient has ~~agreed~~ consented to that method of delivery. The ~~agreement obtained by the association shall be consistent with the conditions for obtaining consumer consent described in Section 20 of the Corporations Code~~ consent given under this section shall be in writing. The consent may be revoked by the recipient.

That language would preserve the relevant substance of Section 20, without requiring that the reader find and understand all of the complexities of Section 20.

Deference to Governing Documents

The RPLS Working Group also suggests that language be added providing that the statutory procedure for individual delivery of notices yields to a procedure stated in the association's governing documents. See Memorandum 2010-36, Exhibit p. 104.

The staff recommends against this suggestion. Proposed Section 4040 is very permissive, and would allow most reasonable methods of notice delivery. To the extent that it does impose limits on notice delivery, those limits are intended to protect members (e.g., the requirement that recipient consent be received before sending notice electronically). To the extent that those limitations reflect good policy, they should not be overridden by a board-adopted rule.

Personal Delivery to Member

The RPLS Working Group and CACM suggest that personal delivery of individual notices should be permitted. See Memorandum 2010-36, Exhibit pp. 105, 205.

The Commission discussed this issue at length at a prior meeting and decided against authorizing personal delivery. It was felt that personal delivery was too unreliable a method for statutory notices of the type required to be delivered to members individually. In addition, personal delivery would create problems of proof, if delivery of the notice is disputed. **The staff recommends against allowing personal delivery.**

Certified Mail, Express Mail, Courier Service

Proposed Section 4040 permits delivery of an individual notice by first class mail. The RPLS working group suggests that the section be revised to permit use of certified and express mail, as well as delivery by a commercial carrier. See Memorandum 2010-36, Exhibit p. 105.

In response to a prior suggestion, the Commission has already revised proposed Section 4035 to permit certified mail for delivery of a notice to the association. It would make sense for the delivery methods authorized in the two sections to be parallel. **Should the two provisions be revised to permit certified mail, express mail, and delivery by a commercial carrier?** If so, the staff will include appropriate language in the next iteration of the draft proposed law.

Delivery of Notice to "Member"

The RPLS Working Group points out that proposed Section 4040 refers to delivery of notice to a "member," despite the fact that proposed Section 4785 requires individual delivery of a notice to an "occupant." See Memorandum 2010-36, Exhibit p. 105.

In order to avoid this problem, and any similar problems that might arise through future development of the Davis-Stirling Act, **the staff recommends that proposed Section 4040 be revised to refer to delivery of a notice "by the association," without specifying the recipient.** Thus:

> 4040. (a) If a provision of this part requires <u>that an association deliver a notice by</u> "individual delivery" or "individual notice," the notice shall be delivered ~~to the member to be notified~~ by one of the following methods:
>
> …

Notice v. Document

The RPLS Working Group wonders whether it would be better to refer to delivery of a "document," rather than a "notice." See Memorandum 2010-36, Exhibit p. 105.

It is possible that a non-lawyer might interpret "notice" as being narrower than "document" (on the theory that a notice is different from a report, plan, agenda, etc.). That wasn't the Commission's intent.

To avoid any misunderstanding, the staff recommends that proposed Section 4040 be revised to use the term "document."

Address Provided by Member

Continuing existing Section 1350.7, proposed Section 4040 provides for delivery of a notice to the last address "shown on the books of the association *or otherwise provided by the member*." (Emphasis added.)

The RPLS Working Group indicates that disputes have resulted from the italicized portion of that provision. Allowing an oral change of address introduces too great a scope for error, disagreement, and problems of proof. See Memorandum 2010-36, Exhibit p. 106. The group proposes modifying the last clause to require delivery of a *written* change of address.

The staff sees the problem and agrees that it should be addressed. However, the issue seems to involve record keeping more than notice delivery. **Consequently, the staff recommends that the italicized language be deleted and that the Commission consider adding a procedure for submitting a change of address when it considers comments on the record keeping provisions.**

Delivery to Two Addresses

Under existing law, there are two provisions that expressly require an association to deliver specified notices to two different addresses, on the request of the recipient. See Civil Code §§ 1365.1(c) (annual budget, assessment policy statement, summary of reserve funding plan), 1367.1(k) (assessment collection notice).

The proposed law would generalize the "two address" option to apply to any notice that is delivered individually.

CACM opposes generalization of the two address rule. They object to the added cost and complexity of the new requirement. See Memorandum 2010-36, Exhibit p. 205.

The staff sees it differently. Under existing law, an association must already maintain two addresses for the mailing of some notices to some members. Thus, the record keeping complexity imposed by this requirement already exists. No additional record keeping cost would be incurred by making the option apply to all individual notices. In fact, such a rule would be easier to administer (since it would apply to all notices).

It is true that the proposed generalization would increase mailing costs, as some members would receive more double-mailed documents. However, the Legislature has already determined that double mailings are appropriate for a number of legally significant notices. The logic of that decision would seem to apply with equal force to all legally significant notices.

Why should double mailing ever be required? The staff sees at least three important justifications.

(1) Some units may be owned jointly, with one owner being a resident and the other a non-resident. Double mailing helps to keep both owners informed of legally significant information about their property.
(2) There may be instances where a lender, conservator, or other third party has an interest in keeping abreast of legally significant information about an owner's property.
(3) An owner of a vacation home may be resident at some times of the year but not at others. Rather than repeatedly requesting changes to the mailing list, double mailing ensures that the owner will receive all notices.

Considering all of the foregoing, the staff recommends that the generalization of the two address requirement be preserved.

That said, the RPLS Working Group has raised some technical issues about the drafting of the provision. The suggestions mostly relate to the formalities of *requesting* double mailing. See Memorandum 2010-36, Exhibit pp. 106, 108. After reviewing those suggestions, the staff recommends that proposed Section 4040(b) be revised as follows:

> (b) ~~A member may request in writing that a notice to that member be sent to up to two different address~~ If a member has requested, pursuant to Section [ ], that individual notices relating to that member's separate interest be mailed to two different addresses, a document delivered under this section shall be delivered to both specified addresses.

This would limit Section 4040 to the procedure for *delivery* of the notice. The procedure for *requesting* double mailing could be spelled out in a later provision of the proposed law (with the other record keeping provisions). **Should that change be made?**

Definition of "Notice"

The RPLS Working Group suggests that the scope of application of proposed Section 4040 should be made clearer:

> If it is the intention of the Commission that "notices" are only those notices that are expressly required by a statute in the CLRC Proposed Act to be provided by "individual notice," then that limitation should be clearly noted in Section 4040. As it is currently written, the notices referred to are not so limited.

See Memorandum 2010-36, Exhibit p. 106.

The staff believes that proposed Section 4040(a) already does exactly what the group is proposing. It begins as follows:

> (a) If a provision of this part requires "individual delivery" or "individual notice," the notice shall be delivered to the member to be notified by one of the following methods:

In the staff's view, that introductory clause unambiguously limits the section to notices that are required to be given by individual delivery by a provision of the Davis-Stirling Act. This would not include notices to be given by general delivery. Nor would it include notices that are not required by statute (e.g., notice of pool operation hours).

Proposed § 4045. General Delivery

Proposed Section 4045(a) authorizes a number of alternative methods for the distribution of "general notices." Subdivision (b) of that section would permit a member to elect to receive general notices by individual delivery methods. Comments on those provisions are discussed below.

Deference to Governing Documents

The RPLS Working Group again suggests that language be added providing that the statutory procedure for delivery of notices yields to a procedure stated in the association's governing documents. See Memorandum 2010-36, Exhibit p. 107.

The staff recommends against this suggestion. Proposed Section 4045 provides some important protections that should not yield to a board-adopted operating rule. For example, Section 4045(a)(3) limits the location for posting notices. An association should not be able to circumvent those limitations, simply by adopting a contrary rule.

Posting

Proposed Section 4045(a)(3) permits a general notice to be posted "in a location that is accessible to all members, if the location has been designated for the posting of general notices by the association in the annual policy statement, prepared pursuant to Section 5310."

Kazuko Artus believes that the provision should also require that the location be "prominent," "well-lit," and "shielded from human and other traffic to enable interested persons to stop to read and take notes." See Memorandum 2010-36, Exhibit p. 51. That suggestion has obvious merit in the abstract, **but the staff believes it would go too far in micromanaging associations.**

Ms. Artus is also concerned that requiring a location that is accessible to "all members" might be problematic, because some members are not residents. *Id*. **The staff does not see the problem.** So long as the posting location is *accessible* to all members (i.e., none are barred), the standard would be satisfied. A non-resident member could always choose to receive general notices by mail.

Publication in Periodical

Proposed Section 4045(a)(4) would permit a general notice to be "published in a periodical that is circulated primarily to members of the association." The RPLS Working Group has two concerns about that provision.

First, the group suggests that the provision be limited to a periodical that is distributed to *all* members. This would avoid publication in a periodical that is distributed only to some subset of the membership. See Memorandum 2010-36, Exhibit p. 51. The staff sees the problem.

Second, the group is not sure that the term "circulated" is sufficiently clear. *Id*.

When the periodical language was first developed, the Commission had in mind a private newspaper that was targeted at a particular CID community. The Commission had heard that such specialty papers existed in very large CIDs. Subdivision (a)(3) was drafted to permit publication of general notices in such periodicals.

However, such periodicals are probably quite rare. If so, then the benefit of providing for publication of general notices in those periodicals may not be worth the resulting confusion for the great majority of associations that are not served by such periodicals. **The Commission should consider deleting the provision.**

Internet Posting

The RPLS Working Group echoes comments we received earlier in the study, urging the Commission to permit Internet posting of general notices. See Memorandum 2010-36, Exhibit p. 107. After fairly lengthy discussion, the Commission had decided against doing so. The Commission was persuaded that there are still too many members who cannot easily access Internet content. Instead, the Comment to proposed Section 4045 was revised to make clear that an association is free to publish general notices on its website if it wishes to do so, but doing so would not satisfy the requirements of proposed Section 4045. **The staff sees no reason to reverse that considered decision.** (The RPLS Working Group points out a technical error in implementing the Comment revision described above, which the staff will correct. See Memorandum 2010-36, Exhibit pp. 107-08.)

It is also noteworthy that the RPLS Working Group is unsure whether the approval of "posting" in subdivision (a)(3) could be read to include posting a notice on the Internet. See Memorandum 2010-36, Exhibit p. 108. The provision was intended to authorize only physical posting of printed documents. To make that meaning clearer, it might be worth revising proposed Section 4045(a)(3) to authorize posting "a *printed* notice." **Should that change be made?**

Individual Delivery Option

As noted, proposed Section 4040(b) would allow a member who does not want to rely on posting or publication of general notices to instead elect to receive general notices by individual delivery methods. This could be important for nonresident members or members who might face obstacles to reviewing a posted or published notice.

Kazuko Artus suggests that subdivision (b) should *precede* subdivision (a) in the proposed section, in order to make the individual delivery option more prominent. See Memorandum 2010-36, Exhibit p. 51. There is a reasonable argument for that organization of the section. **However, the staff believes that**

the current organization is more straightforward. It states the general rule first, followed by the exception.

The McPherson Group suggests that the section be revised to require a *written* request in order to exercise the individual delivery option. See Memorandum 2010-36, Exhibit p. 12. That is a reasonable suggestion. It would help provide certainty and avoid disputes that might otherwise arise if oral requests were permitted. **The staff recommends that the proposed change be made (i.e., if a member requests, in writing, …").**

CACM opposes the provision requiring individual delivery of general notices on request. See Memorandum 2010-36, Exhibit p. 206.

Part of that opposition is based on a concern that the provision would be read to apply to *all* posted notices (including non-statutory notices). That is not the intention. Perhaps the provision would be clearer if it were revised as follows:

> (b) Notwithstanding subdivision (a), if a member requests to receive general notices by individual delivery, all general notices to that member, given pursuant to this section, shall be delivered pursuant to Section 4040. The option provided in this subdivision shall be described in the annual policy statement, prepared pursuant to Section 5310.

Should that change be made?

CACM is also concerned that failure to comply with an individual delivery request could create legal complications for an association. It is always the case that noncompliance with a statutory mandate could create legal problems for an association.

Finally, CACM notes that other owners must pay the cost of this option (through their shared assessments).

CACM's concerns are reasonable. **However, the staff believes that the general delivery provision will result in a net benefit to associations, even with the individual delivery option.** Without the individual delivery option, the general delivery provisions might prove too controversial for inclusion in the proposed law, resulting in a requirement that *all* notices be individually delivered (at a much higher cost to the association).

Terminology

To the extent possible, the terminology used in Section 4045 should parallel that used in Section 4040. To the extent that the Commission approves changes to

the terminology in Section 4040, the staff will also make parallel changes in Section 4045.

Proposed § 4060. Minimum Font Size

Proposed Section 4060 would provide that all writings prepared by the association for delivery to a member, pursuant to a requirement of the Davis-Stirling Act, be printed in at least a 12 point font. This would generalize two existing provisions that mandate a minimum font size for specific documents. See Civ. Code §§ 1365(d) (summary of annual budget), 1365.1(a) (notice of assessment collection policy).

The Legislature is already mandating a minimum font size for some documents (presumably to facilitate readability for those with visual impairment). The Commission did not see any policy reason to limit that policy to the specified documents. Many of the notices mandated by the Davis-Stirling Act provide important information to members about their property. Meeting notices, meeting minutes, election materials, notice of foreclosure, reserving funding plans — arguably all of those are as important or more important than the documents currently singled out for minimum font size requirements. For those reasons, the proposed law would require that *all* statutorily mandated documents be printed in 12 point type or larger.

We received a number of comments on that proposal.

CACM opposes the proposed change, on cost grounds. They maintain that certain detailed financial and tax information need to be set out in small print in order to conserve resources. They suggest that the option to use small type be preserved, perhaps with a requirement that the association make a larger print version of the document available to the members at no cost. See Memorandum 2010-36, Exhibit p. 206.

The RPLS Working Group also expresses general concern about the practicality and cost of mandating a minimum font size for all documents. See Memorandum 2010-36, Exhibit p. 109-10.

The McPherson Group wonders about the scope of the provision. By its terms it applies to a document that an association is required "to prepare and deliver," pursuant to a provision of the Davis-Stirling Act. Would that include documents that are prepared *for* the association by an accountant, reserve analyst, or other third party specialist? See Memorandum 2010-36, Exhibit p. 12.

In light of the fairly broad objections to the provision, the Commission should consider deleting Section 4060 and restoring the status quo (i.e., restoring the font size rules to the provisions that continue existing Sections 1365(d) and 1365.1(a)).

On a related point, Kazuko Artus suggests requiring that associations make individual notices available in Braille, on request. See Memorandum 2010-36, Exhibit p. 51. **The staff is reluctant to address this issue in the Davis-Stirling Act , as it is presumably already governed by general disability law.**

MEMBER APPROVAL

Proposed Sections 4065 and 4070 would provide uniform standards for member approval, to simplify the drafting of provisions that require the approval of (1) a majority of all members, or (2) a majority of a quorum. (Similar provisions are provided, to similar effect, in Corporations Code Sections 5033 and 5034.)

Comments on the member approval provisions are discussed below.

Corporations Code Provisions Preferred

The RPLS Working Group suggests that the already familiar and tested language used in the Corporations Code should also be used in the Davis-Stirling Act, rather than devising new language to the same substantive effect. The group is divided on whether this should be accomplished by importing language from the Corporations Code into the Davis-Stirling Act or through incorporation of the Corporations Code provisions by reference. That said, the group sees no justification for using new language as is done in the proposed law. See Memorandum 2010-36, Exhibit pp. 110-11.

As discussed earlier, in connection with the definition of "electronic transmissions," the staff is inclined against the incorporation of Corporations Code provisions by reference. This would require that property owners, many of them in small self-governed associations, find, read, understand, and harmonize both the Davis-Stirling Act and the Corporations Code. This would be true even in associations that are unincorporated. That would add to the complexity of the law and is at odds with the RPLS Working Group's general suggestion that the proposed law should not be a "lawyer's document."

For example, Corporations Code Section 5033 provides as follows:

> 5033. "Approval by (or approval of) a majority of all members" means approval by an affirmative vote (or written ballot in conformity with Section 5513, Section 7513, or Section 9413) of a majority of the votes entitled to be cast. Such approval shall include the affirmative vote of a majority of the outstanding memberships of each class, unit, or grouping of members entitled, by any provision of the articles or bylaws or of Part 2, Part 3, Part 4 or Part 5 to vote as a class, unit, or grouping of members on the subject matter being voted upon and shall also include the affirmative vote of such greater proportion, including all, of the votes of the memberships of any class, unit, or grouping of members if such greater proportion is required by the bylaws (subdivision (e) of Section 5151, subdivision (e) of Section 7151, or subdivision (e) of Section 9151) or Part 2, Part 3, Part 4 or Part 5.

Some of the references in that provision are to portions of the Corporations Code that will never apply to a CID (because they refer to other types of nonprofit corporations). Other references are to election rules that have been largely superseded by the Davis-Stirling Act (e.g., Section 7513). Others are so general as to require sophisticated knowledge of Corporations law to understand them (e.g., class voting rights under "Part 3").

If the RPLS Working Group is correct that a mere reference to an "article" or "chapter" would be too esoteric for many CID homeowners to construe (see Memorandum 2010-29, p. 8), then Section 5033 would be virtually impenetrable.

Still, it would be possible to simplify the relevant language from Sections 5033 and 5034 and import it into proposed Sections 4065 and 4070 as follows:

> 4065. If a provision of this part requires that an action be approved by a majority of all members, the action shall be approved or ratified by an affirmative vote of ~~members representing more than 50 percent of the total voting power of the association~~ a majority of the votes entitled to be cast.

> 4070. If a provision of this part requires that an action be approved by a majority of a quorum of the members, the action shall be approved or ratified by an affirmative vote of ~~members representing more than 50 percent of the votes cast in an election at which a quorum is achieved~~ a majority of the votes represented and voting at a duly held meeting at which a quorum is present (which affirmative votes also constitute a majority of the required quorum).

The staff sees no problem with making those revisions, and the increased uniformity with the Corporations Code would probably be beneficial. However, it is unclear whether this degree of uniformity would be sufficient to

address the concern raised by the RPLS Working Group. In particular, the group may wish to include language addressing class and supermajority voting, issues that the Commission had previously decided to omit from the proposed law in the interest of simplicity.

Those issues could perhaps be addressed in broad brush fashion, by adding language at the end of the two provisions, along these lines:

> Nothing in this section supersedes a class voting or supermajority requirement in the governing documents or other law.

Should such language be added?

"Majority" v. "Fifty Percent"

The McPherson Group suggests that proposed Sections 4065 and 4070 be revised to replace the phrase "more than 50 percent" with "a majority." The staff sees no difference in meaning that would justify the change. However, "majority" is the term used in the Corporations Code. The proposed revisions set out above would use the term.

Include Only Members in Good Standing

CACM recommends adding language to proposed Sections 4065 and 4070 to make clear that the required approval threshold should be calculated by including only those members who are in good standing and are therefore entitled to vote. See Memorandum 2010-36, Exhibit pp. 206-07.

That is a valid point that could be addressed through careful definition of the terms "quorum" and "voting power." **Those definitions would need to be addressed in a future memorandum.** (Note that the RPLS Working Group is independently urging the Commission to develop a definition of "voting power," consistent with Corporations Code Section 5078. See Memorandum 2010-36, Exhibit p. 112. That issue will be addressed in a future memorandum.)

Note that the revisions proposed above, to more closely track language from the Corporations Code, goes some distance toward addressing the issue. As revised, proposed Section 4065 would refer to "votes entitled to be cast." That revision should be sufficient to address part of CACM's concern.

Meaning of Quorum

The RPLS Working Group is concerned that proposed Section 4070 would confuse matters by addressing both "approval by the members" and what

constitutes a "quorum of the members." See Memorandum 2010-36, Exhibit p. 112. **The staff does not understand this point and invites clarification.** Nothing in Section 4070 attempts to define quorum requirements.

Default Approval Rule

The McPherson Group suggests that another provision be added to the proposed law, to define a default rule for "approval by the members" when neither Section 4065 nor 4070 are invoked. See Memorandum 2010-36, Exhibit pp. 11-12.

The staff does not understand this point and invites clarification.

Respectfully submitted,

Brian Hebert
Executive Secretary