

First Supplement to Memorandum 2011-32

2011 Legislative Program (Status Report)

This supplement discusses two issues that relate to the Commission's legislative program.

Assembly Bill 805 (Torres) — Bill Coordination Amendment

We have received a letter from Kazuko K. Artus, commenting on the draft amendments attached to Memorandum 2011-32. Her letter is attached to this supplement as an Exhibit.

Ms. Artus feels strongly that the provisions of the draft amendments that are set out as proposed Civil Code Section 4930(f)-(h) should instead be made a separate section. She notes that the substantive content of Section 4930(a)-(e) is sufficiently different from the content of subdivisions (f) through (h) that there is no good reason to group all of those provisions in a single section. More significantly, she believes that subdivisions (f) through (h) could easily be overlooked by persons reading the Davis-Stirling Common Interest Development Act. See Exhibit.

The staff is persuaded by Ms. Artus' arguments and recommends that the provisions be recast as a separate provision of the proposed law, as follows:

Civ. Code § 4910 (added) (implementing addition of Civ. Code § 1363(j) by SB 563). Board action outside of meeting

4910. (a) The board shall not take action on any item of business outside of a meeting.

(b)(1) Notwithstanding Section 7211 of the Corporations Code, the board shall not conduct a meeting via a series of electronic transmissions, including, but not limited to, electronic mail, except as specified in paragraph (2).

(2) Electronic transmissions may be used as a method of conducting an emergency meeting if all directors, individually or collectively, consent in writing to that action, and if the written consent or consents are filed with the minutes of the board meeting.

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.

Written consent to conduct an emergency meeting may be transmitted electronically.

Comment. Section 4910 continues former Section 1363.05(j) without change, except as indicated below.

The following nonsubstantive changes are made:

- The words “board of directors” are replaced with “board.” See Section 4085 (“board”).
- The words “board member” are replaced with “director.” See Section 4140 (“director”).

See also Sections 4080 (“association”), 4155 (“managing agent”).

If this change is made, the definition of “item of business” provided in Section 1363.05(k)(1) should be set out as a stand-alone provision in the definitions article of the proposed law, in order to preserve its application to other provisions that are governed by the definition. Thus:

Civ. Code § 4154 (added) (implementing addition of Civ. Code § 1363 (k)(1) by SB 563). “Item of business” defined

4154. “Item of business” means any action within the authority of the board, except those actions that the board has validly delegated to any other person or persons, managing agent, officer of the association, or committee of the board comprising less than a quorum of the board.

Comment. Section 4154 continues former Section 1363.05(k)(1) without change, except as indicated below.

The following substantive change is made:

- The number of directors required to establish a board meeting is changed from a majority of the members to a number constituting a quorum.

See also Sections 4080 (“association”), 4155 (“managing agent”).

If that general definition were added, the duplicative provision could be deleted from proposed Section 4090. That would also be an organizational improvement.

Resolution of Authority

By statute, a resolution must be introduced each legislative session, to set out the topics that the Commission is authorized to study. See Gov’t Code § 8293. For the most recently enacted resolution of authority, see 2009 Cal. Stat. res. ch. 98 (ACR 49 (Evans)).

In recent years, the resolution of authority has also included a substantive provision, requiring the Commission to notify the Committees on Judiciary of each house on commencing a new study or making a major change to an existing study:

before commencing work on any project within the calendar of topics the Legislature has authorized or directed the commission to study, the commission shall submit a detailed description of the scope of work to the chairs and vice chairs of the Committees on Judiciary of the Senate and Assembly, and if during the course of the project there is a major change to the scope of work, submit a description of the change...

Id.

The staff is contemplating adding further substantive language to next year's resolution, to expressly affirm two long-standing Commission practices. Thus:

Be it ...

Resolved, That the staff of the commission is invited to appear and testify at any committee hearing of a bill to implement a Commission recommendation, for the purpose of explaining the recommendation and answering questions posed by committee members, provided that the staff may not advocate for the passage or defeat of the legislation; and be it further

Resolved, That the commission is requested to provide a copy of a commission recommendation to each member of a policy committee that is hearing a bill that would implement the recommendation...

Does the Commission have any objection to such language being included in the resolution of authority?

Respectfully submitted,

Brian Hebert
Executive Director

Kazuko K. Artus, Ph.D., J.D.
San Francisco
Kazukokartus@aol.com

13 November 2011

Mr. Brian Hebert
Executive Director
California Law Revision Commission

Mr. Hebert:

Re: Assembly Bill 805 (Torres) Bill Coordination Amendments

I welcome and appreciate your effort to incorporate 2011 legislation into AB 805. I take issue, however, with your proposal regarding the successor to new Civil Code § 1363.05(j), which SB 563 has introduced.

New Civil Code § 1363.05(j) is a very important element of SB 563, but it is obscured in the Staff Draft Amendments to AB 805 & AB 806 (Torres). That section provides:

- (1) The board of directors shall not take action on any item of business outside of a meeting.
- (2) (A) Notwithstanding Section 7211 of the Corporations Code, the board of directors shall not conduct a meeting via a series of electronic transmissions, including, but not limited to, electronic mail, except as specified in subparagraph (B).
(B) Electronic transmissions may be used as a method of conducting an emergency meeting if all members of the board, individually or collectively, consent in writing to that action, and if the written consent or consents are filed with the minutes of the meeting of the board. Written consent to conduct an emergency meeting may be transmitted electronically.

New subdivision (j)(1) is important for CID association members and directors. It would protect directors congregating accidentally or for social purposes outside a board meeting defined by new Civil Code § 1363.05(k)(2); since this subdivision (j)(1) prevents directors from taking action as the board in such a setting (i.e., in a gathering that is **not** called “to hear, discuss, or deliberate upon any item of business . . .”), directors present at such a gathering would not be accused of

holding an illegal board meeting even if they are sufficient in number to constitute a quorum of the board, and even if their conversation touches upon matters they might consider in a board meeting. It would protect members in general and a director who is absent from an accidental or social congregation of directors by preventing the directors present from taking action as the board.

Subdivision (j)(2) is very important for members because it would prevent the board from acting as the board without the prior knowledge and participation of members in any nonemergency situation. Before the going into effect of SB 563, Corp. Code § 7211(b) allowed (and regrettably it still does for the rest of 2011) a CID association board to act as the board without a meeting, that is, without the prior knowledge and participation of members in general, contrary at least to the spirit of Civ. Code § 1363.05(b) and (h). It has been one of the factors with a significant corrupting influence on my association.

I looked for a proposed successor to new § 1363.05(j) in the Staff Draft Amendments to AB 805 & AB 806 (Torres) with much interest. I did not find it on my first reading of the Staff Draft. I have been dismayed to find on my second reading the successor merged into proposed § 4930 as its subdivisions (f) and (g). Proposed § 4930 in the present AB 805 deals exclusively with Board consideration of “item” not on the agenda (also an important subject).

The successor to new § 1363.05(j) should be placed prominently in the recodified Davis-Stirling Act, so that readers of the recodified Davis-Stirling Act can find it with little efforts. The subject of new § 1363.05(j) is entirely different from the subject of proposed § 4930(a) to (e). The probability is high that a homeowner or director who reads the recodified Davis-Stirling Act to learn what the board must do to take a valid action but not what the Board may or may not do with an “item” not on the agenda will not read through § 4930 and will overlook the successor to new § 1363.05(j) placed at the end of § 4930.

AB 563 has added new § 1363.05(j) to § 1363.05 as an independent subdivision. The Legislature did not add it to the existing § 1363.05(i) (which it could have done if it had chosen to do so), to which proposed § 4930 in the present AB 805 would be the successor. A proposal to merge the successor to new § 1363.05(j) into the successor to § 1363.05(i) is not congruent with the approach the Legislature has chosen.

Proposed § 4930(f), (g) and (h) should collectively be made an independent section in the recodified Davis-Stirling Act and put in a prominent place. (Proposed § 4930(h) appears to repeat the second sentence of amended proposed § 4090 (Staff Draft, at 1:11-14), but it would serve as a convenient reference for

association members and directors who read the successor to new § 1363.05(j) without doing any harm as long as it does not contradict § 4090).

I urge that the section comprising proposed § 4930(f), (g) and (h) be placed at the beginning of proposed Article 2, immediately after proposed § 4900. The wide “space” between proposed § 4900 and proposed § 4920 would accommodate a new section not envisaged in the original AB 805.

Sincerely,

Kazuko K. Artus