Study H-855 May 30, 2013

Memorandum 2013-23

Common Interest Development: Statutory Clarification and Simplification of CID Law: Further Issues

In 2011, the Commission[1] finalized a recommendation to recodify the Davis-Stirling Common Interest Development Act ("Davis-Stirling Act").[2] Implementing legislation was introduced in 2011[3] and enacted in 2012.[4] The operation of the legislation was deferred until January 1, 2014.[5] This one-year delay in operation was intended to provide time for those who use the code to familiarize themselves with the new organization and numbering. It was also intended to provide a window for the introduction of any clean-up legislation that might be required.

At its December 2012 meeting, the Commission approved a recommendation to make minor clean-up amendments.[6] The recommended amendments have been included in a pending bill, Senate Bill 745 (Committee on Transportation and Housing).

At its April 2013 meeting, the staff presented a draft of a new recommendation, to make a handful of additional clean-up revisions.[7] The

1. 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. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. *Statutory Clarification and Simplification of CID Law,* 40 Cal. L. Revision Comm'n Reports 235 (2010).

3. AB 805 (Torres), AB 806 (Torres).

4. 2012 Cal. Stat. ch 180, 2012 Cal. Stat. ch. 181.

5. 2012 Cal. Stat. ch. 180, § 3.

6. Minutes (Dec. 2012), p. 3; *Statutory Clarification and Simplification of CID Law (Clean-Up Legislation),* 42 Cal. L. Revision Comm'n Reports 307 (2012).

7. Memorandum 2013-19.

Commission approved that draft as a final recommendation, with one significant change — it did not include a proposed amendment to Civil Code Section 4070.[8]

The staff has requested that the amendments in the second recommendation be added to SB 745. That request is currently under consideration by the Senate Transportation and Housing Committee.

The Commission decided to omit the proposed amendment of Section 4070 from its recommendation because it had unresolved concerns about the proposed amendment's language. The Commission instructed the staff to prepare a revised draft of the proposed amendment, for presentation at a future meeting. This memorandum presents the requested draft, below.

The memorandum also addresses a few other clean-up issues that have come up since the February 2013 meeting.

Unless otherwise indicated, all statutory references in this memorandum are to the Civil Code.

APPROVAL BY A MAJORITY OF A QUORUM (SECTION 4070)

On the Commission's recommendation, Section 4070 was added to the Davis-Stirling Act. It provides standardized language for use in sections that require that an action be approved by a majority of a quorum of the members. As enacted, Section 4070 provides:

> 4070. If a provision of this act 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 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.

Section 4070 was modeled after Corporations Code Section 5034, which serves a similar purpose for nonprofit corporations generally.

As discussed in prior memoranda,[9] attorney Peter Saputo expressed concern that Section 4070 could be read as applying only to member votes that are conducted at a "duly held meeting." Under that literal interpretation, the section would be inapplicable to a member vote that is conducted by mail.

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8. Minutes (April 2013), p. 3; *Statutory Clarification and Simplification of CID Law (Further Clean-Up Legislation)*, __ Cal. L. Revision Comm'n Reports __ (2013).

9. See, e.g., Memorandum 2013-19, p. 3.

That was not the Commission's intention. Nor is it the only possible interpretation. Section 5115(b), which governs member votes conducted by mail, provides in part:

> 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 purposes of establishing a quorum.

(Emphasis added.) In other words, ballots cast by mail are treated as if they had been cast at a meeting. While that rule applies to *establishing* a quorum, it could also be read to apply to determining a majority of a quorum under Section 4070.

In any event, Section 4070 should probably be amended to make clear that it is not limited to votes conducted at meetings. The staff sees two alternative ways that the amendment could be drafted. The first would be to modify the rule in Section 5115(b), set out above, to make clear that it applies to Section 4070:

> 5115. …
> (b) A quorum shall be required only if so stated in the governing documents or other provisions of law. 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 purposes of establishing a quorum or for the purposes of determining a majority of a quorum under Section 4070.
> …
>
> **Comment**. Section 5115 is amended to make clear that ballots received by an inspector of elections under this article are treated as members present at a meeting for the purposes of Section 4070.

A more direct approach would be to amend Section 4070 to remove any implied limitation on its application:

> 4070. If a provision of this act 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 a majority of the votes represented and voting ~~at a duly held meeting at~~ in a duly held election in which a quorum is ~~present~~ represented, which affirmative votes also constitute a majority of the required quorum.
>
> **Comment**. Section 4070 is amended to make clear that it applies to any lawfully conducted member election, whether conducted at a meeting, by mailed ballot pursuant to Sections 5100-5145, or by any other lawful means.

The staff recommends the latter approach. It would avoid any need to read two separately-located provisions together.

GOVERNING DOCUMENT AUTHORITY (SECTION 4350)

On the Commission's recommendation, Section 4205 was added to the Davis-Stirling Act. It provides guidance on the relative authority of the law and the most common types of CID governing documents. As discussed in prior memoranda,[10] the Commission received public comment expressing concern that the terminology used in Section 4205 might be read more strictly than was intended.

To address that problem, the Commission's clean-up recommendation proposes to amend Section 4205 to use more standard terminology, drawn from other similar provisions in the codes:

> 4205. (a) To the extent of any ~~inconsistency~~ conflict between the governing documents and the law, the law ~~controls~~ shall prevail.
>
> (b) To the extent of any ~~inconsistency~~ conflict between the articles of incorporation and the declaration, the declaration ~~controls~~ shall prevail.
>
> (c) To the extent of any ~~inconsistency~~ conflict between the bylaws and the articles of incorporation or declaration, the articles of incorporation or declaration ~~control~~ shall prevail.
>
> (d) To the extent of any ~~inconsistency~~ conflict between the operating rules and the bylaws, articles of incorporation, or declaration, the bylaws, articles of incorporation, or declaration ~~control~~ shall prevail.

After the Commission approved that proposed amendment, it occurred to the staff that the same terminological issue exists in Section 4350(c), a related provision governing the authority of operating rules. Section 4350(c) provides:

> An operating rule is valid and enforceable only if all of the following requirements are satisfied:
>
> …
>
> (c) The rule *is not inconsistent* with governing law and the declaration, articles of incorporation or association, and bylaws of the association.

(Emphasis added.)

For the sake of terminological consistency in provisions that address the same general matter (the relative authority of the law and CID governing document types), **the staff recommends that Section 4350(c) be amended as follows:**

> 4350. An operating rule is valid and enforceable only if all of the following requirements are satisfied:

10. See, e.g., Memorandum 2013-6.

…

(c) The rule is not ~~inconsistent~~ in conflict with governing law and the declaration, articles of incorporation or association, and bylaws of the association.

It would make the most sense to include such an amendment in SB 745, so that it could be made at the same time as the related amendment to Section 4205. However, because SB 745 is a committee omnibus bill, the opportunities for amendment of the bill are limited. Had the staff waited for the Commission's June meeting before broaching the matter, it might have been too late to incorporate the change in SB 745.

For that reason, the staff used the Commission's existing process for making a technical amendment to a Commission-recommended bill in the period between Commission meetings. Staff contacted the Chair to seek provisional approval of the amendment, subject to ratification by the full Commission at the first convenient opportunity.[11] The Chair approved the amendment on those terms and it was submitted to the Senate Committee on Transportation and Housing for inclusion in SB 745.

If the Commission approves the amendment set out above, the staff recommends that the Commission also approve the following Comment:

Comment. Section 4350 is amended to conform the terminology used in subdivision (c) to that used Section 4205.

MEETING NOTICE (SECTION 4920)

Section 1363.05(f) governs the period of notice that an association must give to its members before holding a board meeting. That provision, which is somewhat complex, reads as follows:

(f) Unless the bylaws provide for a longer period of notice, members shall be given notice of the time and place of a meeting as defined in subdivision (k), except for an emergency meeting or a meeting that will be held solely in executive session, at least four days prior to the meeting. Except for an emergency meeting, members shall be given notice of the time and place of a meeting that will be held solely in executive session at least two days prior to the meeting. Notice shall be given by posting the notice in a prominent place or places within the common area and by mail to any owner who had requested notification of board meetings by mail, at the address requested by the owner. Notice may also be

11. *CLRC Handbook of Practices and Procedures*, § 3.3.

> given by mail, by delivery of the notice to each unit in the development, by newsletter or similar means of communication, or, with the consent of the member, by electronic means. The notice shall contain the agenda for the meeting.

Section 4920, enacted on Commission recommendation, restates that provision in simpler terms (with some minor substantive changes):

> 4920. (a) Except as provided in subdivision (b), the association shall give notice of the time and place of a board meeting at least four days before the meeting.
>
> (b) (1) If a board meeting is an emergency meeting held pursuant to Section 4923, the association is not required to give notice of the time and place of the meeting.
>
> (2) If a nonemergency board meeting is held solely in executive session, the association shall give notice of the time and place of the meeting at least two days prior to the meeting.
>
> (3) If the association's governing documents require a longer period of notice than is required by this section, the association shall comply with the period stated in its governing documents.
>
> (c) Notice of a board meeting shall be given by general delivery pursuant to Section 4045.
>
> (d) Notice of a board meeting shall contain the agenda for the meeting.

The staff recently received informal input from attorney Sandra Bonato, commenting for herself and her firm, Berding & Weil. Ms. Bonato is a long-time participant in the Commission's study of CID law. She expressed concern that Section 4920 could have an unintended and problematic effect.

She points out that the language in the first sentence of Section 1363.05(f), which says that an association's by-laws may provide for a longer notice period than the statute requires, is expressly inapplicable to "an emergency meeting or a meeting that will be held solely in executive session." By contrast, the corresponding language in Section 4920(b)(3) is not subject to the same limitation.

The removal of that limitation could be a problem because some associations' bylaws have broadly-worded notice rules that apply to *all* board meetings (without any distinction drawn between standard meetings, emergency meetings, and meetings held entirely in executive session). There was no need to draw such a distinction under former law, because the first sentence of Section 1363.05(f) did not apply to emergency meetings or entirely closed meetings.

But under Section 4920, such broadly-worded governing document provisions could apply to emergency and closed meetings, inadvertently lengthening the notice periods for those types of meetings.

Ms. Bonato proposed to address that problem by amending Section 4920 to make paragraph (b)(3) completely inapplicable to emergency meetings and meetings conducted entirely in executive session. This could be done with an amendment along these lines:

> 4920. (a) Except as provided in subdivision (b), the association shall give notice of the time and place of a board meeting at least four days before the meeting.
>
> (b) …
>
> (3) If the association's governing documents require a longer period of notice than is required by this section, the association shall comply with the period stated in its governing documents. This paragraph does not apply to an emergency meeting or a meeting that is held solely in executive session.
>
> …
>
> **Comment**. Section 4920(b)(3) is amended to limit its application, consistent with former Section 1363.05(f).

That would cure the problem Ms. Bonato identified. But it would also deny associations any discretion to intentionally adopt longer notice periods, if doing so would be appropriate to their circumstances. The staff sees no good policy reason to deny associations that added flexibility.

Instead, it might be better to amend Section 4920 along the following lines:

> 4920. (a) Except as provided in subdivision (b), the association shall give notice of the time and place of a board meeting at least four days before the meeting.
>
> (b) …
>
> (3) If the association's governing documents require a longer period of notice than is required by this section, the association shall comply with the period stated in its governing documents. For the purposes of this paragraph, a governing document provision does not apply to notice of an emergency meeting or a meeting held solely in executive session unless it specifically states that it applies to those types of meetings.
>
> …
>
> **Comment**. Section 4920(b)(3) is amended to provide that a governing document addressing the period of notice for a board meeting does not affect an emergency meeting or a meeting conducted solely in executive session, unless it expressly states such application. That preserves part of the effect of the first sentence of former Section 1363.05(f).

That alternative approach would avoid inadvertent application of broadly-worded governing document provisions, while preserving the *option* of adopting special notice rules for emergency and entirely closed meetings.

Should Section 4920 be amended? If so, which approach does the Commission prefer?

CROSS-REFERENCE ADJUSTMENT (SECTION 5610)

The recommendation that the Commission approved in April included the following proposed amendment to Section 5610:

> 5610. Section 5605 does not limit assessment increases necessary for emergency situations. For purposes of this section, an emergency situation is any one of the following:
>
> (a) An extraordinary expense required by an order of a court.
>
> (b) An extraordinary expense necessary to repair or maintain the common interest development or any part of it for which the association is responsible where a threat to personal safety on the property is discovered.
>
> (c) An extraordinary expense necessary to repair or maintain the common interest development or any part of it for which the association is responsible that could not have been reasonably foreseen by the board in preparing and distributing the annual budget report under Section 5300. However, prior to the imposition or collection of an assessment under this ~~subdivision~~ section, the board shall pass a resolution containing written findings as to the necessity of the extraordinary expense involved and why the expense was not or could not have been reasonably foreseen in the budgeting process, and the resolution shall be distributed to the members with the notice of assessment.
>
> **Comment**. Subdivision (c) of Section 5610 is amended to correct an erroneous cross-reference.

Ms. Bonato believes that the existing cross-reference is correct and should not be amended. Having considered the matter further, the staff agrees.

Under its existing language, Section 5610(c) requires a board resolution whenever the board acts under that subdivision. If the reference were amended as indicated, a board resolution would also be required if the board were to act under subdivision (a) or (b).

The nature of the resolution suggests that it should be limited to action under subdivision (c). Specifically, the resolution requires an explanation of "why the expense was not or could not have been reasonably foreseen in the budgeting process." That requirement makes sense when applied to subdivision (c). By its

terms, that subdivision can only be used to address expenses that "could not have been reasonably foreseen by the board in preparing and distributing the annual budget report."

By contrast, subdivisions (a) and (b) do not require that an expense be unforeseen. Thus, there is no reason to require a resolution addressing that issue. If such a requirement were added, it might be seen as a new substantive limitation on action under subdivisions (a) and (b). The proposed amendment was incorrectly assumed to be a technical correction. There was no intention to substantively modify the rules governing emergency assessments.

The staff is persuaded that the existing cross-reference is correct and should not be amended. **We recommend that the proposed amendment be deleted from the Commission's recommendation (which has not yet been printed).**

NEXT STEPS

If the Commission approves any of the recommendations discussed above, the staff will work with the relevant committees to see whether it is possible to implement the recommendations in SB 745. If not, we will wait until 2014 and seek implementing legislation at that time.

Respectfully submitted,

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