

First Supplement to Memorandum 2020-35

Emergency-Related Reforms: Common Interest Development Meetings

The Commission¹ has received letters commenting on Memorandum 2020-35 from the California Association of Community Managers (CACM) and attorney Elaine Roberts Musser. Those letters are attached as an Exhibit and discussed below.

All statutory references in this memorandum are to the Civil Code.

NEW EMERGENCY-RELATED REFORM PROPOSALS

In addition to commenting on specific points that were discussed in Memorandum 2020-35, CACM proposes two additional reforms to common interest development (“CID”) law, that would only apply during an emergency:

- Simplify the procedures for conducting an election.
- Suspend the “deemed approved” rule for proposed architectural improvements that are not expressly disapproved within a specified time period.

The staff recommends that discussion of these new proposals be postponed until the September meeting, to provide more time for staff analysis and public comment.

COMMENTS ON PROPOSED TELECONFERENCE PROVISION

Both CACM and Ms. Musser have offered comments on specific elements of the proposal discussed in Memorandum 2020-35.

They took contrary positions on two points:

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.

- Ms. Musser supports a requirement that an association provide members with a technical support contact when conducting an emergency teleconference meeting. CACM opposes that proposed requirement.
- Ms. Musser supports a proposed rule precluding the use of physical posting for notice of an emergency teleconference meeting. CACM opposes that proposed prohibition.

In addition, Ms. Musser commented on a number of other specific issues. Those comments are not summarized in this memorandum. They are clearly outlined in her letter. They will be discussed orally at the August meeting.

Respectfully submitted,

Brian Hebert
Executive Director



July 27, 2020

The California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Re: Emergency-Related Reforms: Common Interest Development Meetings

Dear Commissioners,

We appreciate the Commission's study of emergency issues related to Common Interest Developments ("CID") and your consideration of our previous letter. Especially during uncertain times, the ability for over 51,000 CIDs in California to function efficiently is critical. The owners deserve a sense of security in their communities.

We understand that the recommendation before you is to limit the study to emergency measures. With that in mind, the California Association of Community Managers ("CACM") respectfully requests the Commission consider two additional topics for inclusion in this study with the understanding that it would apply in emergency situations only:

Electronic Voting

The current pandemic highlights the need to be able to efficiently communicate in a way that eases burdens on owners during difficult times. While the current secret ballot system may have served a purpose when established, times have evolved and, at minimum, during emergencies, owners should be able to cast their ballots electronically while still allowing a mail-in system if requested. The current process is cumbersome and actually results in lower participation. Additionally, when restrictions are put into place similar to Covid-19, Shelter-In-Place, owners aren't able to attend to vote in annual meeting election. Many associations are operating on slim budgets in normal economic conditions that are worsened by reduced assessment collections related to Covid-19 economic layoffs. At a time when emergency funding is being spent to safeguard the community, we believe it is our obligation to seek ways to save money. The cost of printing, copying, envelopes and postage adds up and given voter apathy now mixed with gathering restrictions, these costs are often incurred two to three times for one election only to result in the same level of dwindling participation. Particularly during times of emergencies, we should be making it easier to participate. This could be accomplished by allowing the "mailing of ballots" to be met by confidential electronic voting through independent third parties during emergencies.

Additionally, the current meeting requirements involving inspectors of elections and counting ballots in public has proven difficult during stay-at-home/social distancing guidelines. Aside from lockdown orders, many communities don't have clubhouses or other large spaces that allow proper social distancing. Oftentimes, this must take place in owners' homes which is not ideal under emergency circumstances.

Automatic Approval of Architectural Review

Under current guidelines, architectural applications filed to the Association by interested members typically have a specified timeframe to be reviewed, inspected and approved by the Board or their delegated Committee. Applications that are not acted on by the Board after a specified number of days (e.g. 45 days) are automatically deemed approved. The logic behind this is to ensure timely consideration by the board under normal circumstances. However, when Boards cannot meet due to emergency conditions, the automatic approval can be problematic in that applications that would normally be declined will now cause architectural challenges in the community for an indefinite period of time. We request that the Commission consider halting automatic approval until the emergency period is over.

We would also like to offer the following views on some of the issues raised in the Commission's latest memo 2020-35, that have been shared with us by our members.

Delivery of the Meeting Notice

We oppose eliminating the ability of an association to satisfy the general notice requirement by posting in the common area. We believe that this means is the most economical and efficient way to deliver a meeting notice in this situation. Posting notices within a community is typically located on a bulletin board near community mailboxes or, in larger community's, in numerous different locations around the community. These notices are placed in outdoor locations for ease of access and, in our current Codiv-19 conditions, maintaining social distancing. This method is consistent with civil code 4045.3. There is no reasonable reason to change this clause in emergency conditions.

Contents of Meeting Notice

We oppose a requirement that the association dedicate a person to handle IT issues for teleconferencing. While we appreciate the importance of ensuring access, we are mindful of increasing costs for owners and believe that every proposal should be weighed against this. Given that teleconferencing can include either phone or video participation, or both, we believe that there are options for all owners to be able to participate in a manner that they are comfortable with. Additionally, the association can and should take measures prior to meetings to ensure owners have the appropriate technical resources and understand the process. Local government and school board meetings are being held by Zoom now and there is no IT person on hand to assist the public in those instances. The Supreme Court has held hearings via teleconferencing without assistance on hand to assist the public. For these reasons, we don't believe the need outweighs the cost of this proposal.

Thank you for your consideration of these important matters.



Sincerely,

A handwritten signature in blue ink that reads "Tom Freeley".

Thomas Freeley, CEO
CACM

Cc: Mr. Brian Hebert, Executive Director, California Law Revision Commission

ELAINE ROBERTS MUSSER
ATTORNEY AT LAW

P.O. Box 2366
DAVIS, CA 95617
OFFICE: 530-758-8045
CELL: 530-574-6556
EROBERTSMUSSER@GMAIL.COM

Aug. 4, 2020

California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616
Via email: bhebert@clrc.ca.gov

Re: Emergency-Related Reforms: CID Meetings (Memorandum 2020-35)

Dear Commission Members,

As a private practice attorney and strong consumer advocate, particularly in HOA law, I would like to make the following comments in regard to Memorandum 2020-35:

- I. Narrow reform - Proposed CA Civil Code §5440, teleconferencing during emergencies.
 - A. I agree that a separate section devoted to teleconferencing during emergencies is the better solution rather than amending already existing CA Civil Code §4090(b). The introduction of a new, clearly delineated provision will cause much less confusion to the public and allow for further reforms in the future.
 - B. Proposed CA Civil Code §5440(a)
 1. To proposed CA Civil Code §5440(a)(1) I would add the phrase “*by the Governor*” for clarity, so that it reads: “*A state of emergency proclaimed **by the Governor** under Section 8625 of the Government Code*”. With this additional language the reader would be less likely to feel the need to refer to the referenced government code section, which is a very annoying exercise for the average citizen.
 2. To proposed CA Civil Code §5440(a)(2) I would add the phrase “*by a local governing body*” for clarity, so that it reads: “*A local emergency proclaimed **by a local governing body** under Section 8630 of the Government Code*”. I recommend this addition for the same reasons as stated above.
 3. I would then change the order of proposed CA Civil Code §5440(a)(1),(2), (3) in ascendancy of the governing body - federal first, then state, then local, as a more logical ordering/progression of these three conditions.

C. Proposed CA Civil Code §5440(b)

1. I strongly support proposed CA Civil Code §5440(b)(1), the requirement that clear technical instructions be provided on how homeowners can access the teleconferenced HOA meeting.
2. I strongly support proposed CA Civil Code §5440(b)(2), the essential requirement of a person being made available who can provide technical support before and during a teleconferenced meeting.
3. I strongly support proposed CA Civil Code §5440(b)(3), prohibiting merely posting a notice. However, I am troubled by this language: “(3) *The meeting notice is delivered by a method other than posting a printed copy of the notice*”. The way it is worded, it could imply notice by any other method whatsoever is permissible. I think the language needs to be tightened to something like this: “(3) *Other than posting a printed copy of the notice, the meeting notice is to be delivered by the normal methods of in-person meetings as specified in Davis-Stirling and the governing documents*”.
4. I completely agree with the need for the proposed provision CA Civil Code §5440(b)(4), that existing rights to observe the progress of the meeting and to participate should not be curtailed.
5. I am very troubled by the second sentence of proposed provision CA Civil Code §5440(b)(5): “(5) *Any vote shall be conducted in a way that makes clear how each person entitled to vote has voted. Unanimous consent and acclamation are sufficient for this purpose.*” Because it will be too easily abused, I would either omit the second sentence or add some clarifying words, such as: “*If it clearly and unambiguously appears almost every homeowner is in agreement*”. Thus the second sentence could read: “*If it clearly and unambiguously appears almost every homeowner is in agreement, unanimous consent and acclamation are sufficient for this purpose.*” My preference would be to omit the second sentence altogether.
6. **Requiring telephone access as in proposed provision CA Civil Code §5440(b)(6) is a must, and needs to be also included in the current CA Civil Code §4090(b).**

II. Broader reforms - Going beyond emergencies.

- A. I personally don't think any broader reform is necessary at this time, since Davis-Stirling already allows teleconferencing - other than to amend CA Civil Code Sec 4090(b) to require that telephone access be included in any teleconferenced meeting. There are still folks who do not have access to a computer/internet, or at times the teleconferencing software has glitches during a meeting that require telephone access.
 1. If there is no current emergency, it makes good sense to ensure there is a place for homeowners to attend the meeting in person. I am adamantly opposed to waiving this requirement of CA Civil Code §4090(b).
 2. I am in favor of requiring the distribution, to homeowners, of whatever board meeting documents the board will be referring to, or at the very least requiring access to them via an HOA website or posting them somewhere on the premises. To require actual delivery to every homeowner could be too costly and burdensome for some HOAs.
 3. In regard to a requirement that teleconferenced meetings be recorded, homeowners can already do this using a smartphone/camera if the governing documents permit it or are silent as to its prohibition. However, it could be costly and burdensome to the HOA to have to post meeting videos. In addition many people are un-

willing to speak their minds if they know they are being recorded, so it could have a chilling effect on speech/robust discussion. There are definite pros and cons on this issue, and I am currently undecided.

I very much appreciate the California Law Revision Commission's willingness to address the issue of teleconferenced HOA meetings, and the very thoughtful approach it has taken. I hope the Commission finds my comments helpful and instructive.

Sincerely,

A handwritten signature in black ink that reads "Elaine Roberts Musser". The signature is written in a cursive, flowing style.

Elaine Roberts Musser