

## Memorandum 2020-50

**Emergency-Related Reforms:  
Common Interest Developments  
(Additional Proposed Studies)**

---

In July, the Commission<sup>1</sup> received a letter from the California Association of Community Managers (CACM).<sup>2</sup> In addition to commenting on the Commission's proposal to authorize common interest development (CID) meetings to be conducted entirely by teleconference during an emergency, CACM proposed two other emergency-related reforms of CID law.

At that time, the staff recommended that "discussion of these new proposals be postponed until the September meeting, to provide more time for staff analysis and public comment."<sup>3</sup>

This memorandum presents CACM's proposals for the Commission's consideration.

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

## ELECTION PROCEDURES

**Background**

Existing law specifies detailed procedures that must be followed in conducting certain votes of the membership.<sup>4</sup> Major features of the election procedure<sup>5</sup> include:

---

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](http://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. See First Supplement to Memorandum 2020-35, Exhibit p. 1.

3. *Id.* at 1.

4. Sections 5100-5145. Elections governed by those provisions include "elections regarding assessments legally requiring a vote, election and removal of directors, amendments to the governing documents, or the grant of exclusive use of common area pursuant to Section 4600." Section 5100(a)(1).

- An independent election inspector is selected.<sup>6</sup>
- Notice of the election is mailed to the members, along with the ballot and two envelopes. The ballot is to be placed in an inner envelope, which does not identify the voter. The sealed inner envelope is to be placed in the outer envelope, which does identify the voter. The outside envelope is signed by the member and the whole ballot packet is then mailed or delivered by hand to the election inspector.<sup>7</sup>
- The ballots are counted by the election inspector at an open board or membership meeting. Any member has the right to observe the counting of the ballots.<sup>8</sup>
- The election inspector maintains custody of all election materials until the time for filing a contest has run.<sup>9</sup>

## Proposal

CACM suggests that the Commission study whether a CID should be permitted to conduct member elections electronically during an emergency:

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

---

5. The bullet list above only summarizes the *procedure* used in conducting the election. There are also related provisions that govern the adoption of election rules, eligibility of candidates, use of association resources for campaign purposes, election inspector qualifications, and judicial review of an election.

6. Section 5110.

7. Section 5115.

8. Section 5120.

9. Section 5125.

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.<sup>10</sup>

To summarize, CACM is specifically proposing that the Commission study the following possible reforms, to be applicable during an emergency:

- Allow members the ability to cast votes electronically, while continuing the existing physical ballot process for those who prefer to use it.
- Modify the process for counting ballots, to allow it to occur without a physical meeting. Presumably, teleconferencing would be used to allow the opening and counting of ballots to be observed without an in-person meeting.

### **Potential Controversy**

When the staff first proposed that the Commission work on emergency-related reforms, we suggested that the Commission work on topics that would be uncontroversial.<sup>11</sup> The expectation was that the Legislature's resources would be limited during the pandemic and that the Legislature would focus those resources on the highest priority matters.

To be as constructive as possible, the Commission could focus on matters where the need for reform is obvious to all and any implementing legislation could proceed on a consensus basis. This would allow clearly necessary changes to be made with little expenditure of legislative resources. This would also conserve the Commission's resources and the resources of interested persons and groups, who are probably also focused on their highest priorities.

The staff points this out because it seems almost certain that CACM's electronic election proposal would provoke strongly polarized support and opposition. In general, proposals to change the existing voting rules for CID have been controversial. Typically, the groups that represent boards and community managers tend to support simplification of the election process to lower costs. On the other side are groups that are more concerned about guaranteeing the

---

10. See First Supplement to Memorandum 2020-35, Exhibit p. 1.

11. See Memorandum 2020-19.

integrity of the vote than they are about any savings that might result from procedural simplification.

For example, Marjorie Murray, writing on behalf of the Center for California Homeowner Association Law, commented on CACM's electronic voting proposal:

CACM has used the draft legislation to raise again the prospect of INTERNET VOTING in HOA elections, a topic thoroughly vetted by the Legislature in 2014 via AB1360/Torres. The proposal to institute internet voting in HOA elections was soundly rejected in a two-page letter of opposition by the California Secretary of State, because of its inherent dangers. Not even the Department of Homeland Security and the military have been able to safeguard against the security risks of internet voting for members of the military voting from overseas posts.<sup>12</sup>

The bill that Ms. Murray references, AB 1360 (Torres) (2014) was a fairly recent attempt at introducing electronic voting into CIDs. It was supported by the Community Associations Institute – California Legislative Action Committee (CAI-CLAC), California Association of Community Managers (CACM), California Association of Realtors, Educational Community for Home Owners (ECHO), Congress of California Seniors, South Orange County Economic Coalition, and the South Orange County Regional Chamber of Commerce. The bill was opposed by the California Alliance for Retired Americans, California Common Cause, Center for California Homeowner Association Law, Secretary of State, and Verified Voting.<sup>13</sup>

In 2009, the Commission briefly considered the possibility of reforming the CID election process, in a narrowly-targeted way. Specifically, the Commission studied whether it might make sense to use a much simpler in-person voting process for elections held in small associations.<sup>14</sup> The study prompted significant opposition and it was dropped.

### **Substantive Merits**

As noted, CACM is suggesting two separate reforms of the election process during an emergency. The first would allow members to vote by electronic methods. The second would allow for the opening and counting of mailed ballots in a teleconference meeting. Those proposals are discussed separately, below.

---

12. See Memorandum 2020-49, Exhibit p. 2.

13. See Senate Committee on Judiciary Analysis of AB 1360 (April 13, 2004).

14. See Memorandum 2009-14; Memorandum 2009-19.

### *Electronic Voting*

Allowing members to vote electronically, rather than by mail, would have obvious benefits during an emergency. Certain aspects of the existing mail voting system could be difficult or dangerous to implement during a pandemic or in a situation where a significant number of homes are destroyed and the owners have temporarily relocated. For example:

- The distribution of physical ballots could be a disease vector.
- If members have been forced to evacuate their homes, it may be difficult to deliver ballots to them by mail.
- It may be difficult to find a third-party election inspector.

However, there are significant practical problems that must be solved in order to administer electronic voting in a way that is invulnerable to fraud or error. As Ms. Murray noted, there was a legislative effort to solve those problems in 2014, in AB 1360 (Torres). The Legislature took two years to consider that bill. In its final form, it would have authorized electronic voting, but only if the voting system could meet a lengthy list of practical requirements:

5116. ...

(b) The association may conduct elections by electronic voting only if all of the following requirements are met:

(1) In accordance with subdivision (a), the association receives confirmation from at least one member that he or she will be voting electronically.

(2) The association, or an electronic balloting service provider acting on behalf of the association, provides each member that will be voting electronically with all of the following:

(A) A method to securely authenticate the member's identity to the electronic voting system.

(B) A method to secure a member's electronic voting platform from, among other things, malicious software and the ability of others to remotely monitor or control the electronic voting platform.

(C) A method to securely communicate with the electronic voting system.

(D) A method to securely review an electronic ballot prior to its transmission to the electronic voting system.

(E) A method to securely transmit an electronic ballot to the electronic voting system that ensures the secrecy and integrity of each ballot.

(F) A method to allow members to verify the authenticity of receipts sent from the electronic voting system.

(G) A method to confirm, at least 14 days before the voting deadline, that a member's electronic voting platform can successfully communicate with the electronic voting system.

(H) In the event of a disruption of the electronic voting system, the ability to vote by mail pursuant to Section 5115 or to deliver a ballot in-person, notwithstanding the 30-day requirement in subdivision (a) of Section 5115.

(3) The association, or an electronic balloting service provider acting on behalf of the association, ensures that the electronic voting system meets all of the following requirements:

(A) The electronic voting system is accessible to members with disabilities.

(B) The electronic voting system is secure from, among other things, malicious software and the ability of others to remotely monitor or control the system.

(C) The electronic voting system is able to securely authenticate a member's identity.

(D) The electronic voting system is able to securely communicate with each member's electronic voting platform.

(E) The electronic voting system is able to securely authenticate the validity of each electronic ballot to ensure that the ballot has not been altered in transit.

(F) The electronic voting system is able to securely transmit a receipt from the electronic voting system to each member who casts an electronic ballot.

(G) The electronic voting system is able to securely and permanently separate any authentication or identifying information from the electronic ballot, rendering it impossible to tie any ballot to any specific member.

(H) The electronic voting system is able to securely allow members to confirm that their ballot has been received and counted.

(I) The electronic voting system is able to store electronic ballots in a secure manner, keeping them accessible to election officials for recount, inspection, and review purposes as required by Section 5125.

(4) The Secretary of State has approved the electronic voting system in accordance with the procedures for certification of voting systems in Article 1 (commencing with Section 19220) of Chapter 3 of Division 19 of the Elections Code. For purposes of this subdivision, the prohibitions contained in Section 19205 of the Elections Code shall not apply.<sup>15</sup>

That strikes the staff as a fairly conservative proposal. The law would only allow electronic voting if the Secretary of State were to review the voting system

---

15. AB 1360 (Torres) (as amended June 15, 2014) (proposed Section 5116).

(presumably to determine whether it would satisfy the lengthy list of practical requirements set out in the bill) and approve the system for use in CIDs.

Despite that cautious and carefully-framed approach, the bill was opposed by the Secretary of State, who wrote in part:

There is widely shared agreement among private and public computer security experts, including cyber security officials at the U.S. Department of Homeland Security, that casting ballots over the Internet is not secure and cannot be made secure. ... Internet voting threatens the integrity of the electoral process, which is why California law prevents any public election from being conducted over the Internet. There is no policy rationale or electoral justification to allow HOAs [homeowners associations] to ignore that law and jeopardize the elections they conduct.<sup>16</sup>

The terms of that opposition are somewhat remarkable. The Secretary of State is asserting that it is *impossible* to make Internet voting secure. He also flatly asserts that there is “no policy rationale or justification” to support using electronic voting in CIDs. As the statewide elected official in charge of elections, the Secretary of State’s view on the matter carries considerable weight.

**The staff recommends that the Commission defer to the fairly recent judgment of the Legislature and the Secretary of State and not conduct a study of this issue.**

### **Opening and Counting Paper Ballots**

Existing Section 5120(a) provides in part:

All votes shall be counted and tabulated by the inspector or inspectors of elections, or the designee of the inspector of elections, in public at a properly noticed open meeting of the board or members. Any candidate or other member of the association may witness the counting and tabulation of the votes.

CACM points out that this requirement can be difficult to satisfy in the current emergency:

[T]he 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

---

16. See First Supplement to Memorandum 2020-35, Exhibit p. 1. See also Elec. Code § 19205 (prohibiting Internet voting systems).

take place in owners' homes which is not ideal under emergency circumstances.<sup>17</sup>

This is a specific example of the general problem that the Commission is addressing in its current study of teleconference meetings in CIDs during emergencies. Existing law expressly requires that certain acts be conducted at a board or member meeting "in public," with all association members entitled to "witness" the process. How can that requirement be met during an emergency? The use of teleconferencing is probably sufficient for that purpose, so long as it includes a video component, with a clear view of the opening of each ballot and the vote that was cast.

**The staff recommends that this issue be addressed in that other study (see First Supplement to Memorandum 2020-48), rather than launching a separate study of this narrow point.**

#### TOLLING OF TIME PERIODS

CACM notes a problem that could arise if an association's architectural review process provides for deemed approval of a proposed property modification, if the proposal was not expressly disapproved within a specified period of time (i.e., silence equals approval).

Under ordinary circumstances, such a rule provides a sensible triage procedure, which allows the association to dedicate scarce resources to the review of problematic proposals, while allowing unobjectionable proposals to proceed without requiring any action.

However, as CACM points out, such a rule could produce bad results in an emergency. A failure to expressly disapprove a proposal might be the result of emergency conditions, rather than any considered judgment on the merits of the proposal. This could result in the unintentional approval of proposals that would not otherwise have been approved.

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,

---

17. See First Supplement to Memorandum 2020-35, Exhibit p. 1.

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.<sup>18</sup>

CACM seems to be describing a procedural timing rule in an association's governing documents, rather than in a statute. The staff searched for and did not find a statutory rule matching the example given by CACM. However, there is an existing provision that provides a 60-day deemed approval period for a specific type of architectural improvement — the installation or use of an electric vehicle charging station:

If approval is required for the installation or use of an electric vehicle charging station, the application for approval shall be processed and approved by the association in the same manner as an application for approval of an architectural modification to the property, and shall not be willfully avoided or delayed. The approval or denial of an application shall be in writing. If an application is not denied in writing within 60 days from the date of receipt of the application, the application shall be deemed approved, unless that delay is the result of a reasonable request for additional information.<sup>19</sup>

The staff agrees that it would be a problem if a proposed architectural change were automatically deemed approved, simply because an association lacks the resources to conduct its ordinary review process during an emergency. **The Commission should decide whether it wishes to study that specific problem.**

However, it seems likely that this is the tip of an iceberg. There may be a number of time periods specified in CID law that would be problematic if they were to continue to run during an emergency, when an association and its members are unable to attend to them.

The expiration of such periods might trigger unintended results, solely as a consequence of the distraction of dealing with an emergency.

---

18. See First Supplement to Memorandum 2020-35, Exhibit p. 2.

19. Section 4745(e).

**If the Commission is interested, the staff could review the existing CID statutes to identify any such timing rules. Once that information is in hand, the Commission could consider whether it would make sense to adjust those rules during a period of emergency.**

Respectfully submitted,

Brian Hebert  
Executive Director