Study H-855 April 18, 2007

Fourth Supplement to Memorandum 2007-4

Statutory Clarification and Simplification of CID Law: Member Elections

The Commission has received more letters and emails commenting on CLRC Memorandum 2007-4 and its supplements. Those communications are attached in an Exhibit as follows:

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

GENERAL COMMENTS REGARDING THIS STUDY

Donie Vanitzian, of Marina del Rey, expresses general opposition to the Commission's effort to restate and simplify statutory common interest development ("CID") law. She sees no merit in the study. See Exhibit p. 5. More specifically, she opposes the study because the proposed law would change existing section numbers and because she feels that it "heavily favors" language used in the Uniform Common Interest Ownership Act. *Id.*

GENERAL OBJECTIONS TO EXISTING ELECTION LAW

For the most part, Ms. Vanitzian's letters express thorough dissatisfaction with existing law:

> Section 1363.03 is a financially irresponsible law, it is fundamentally flawed, and it simply *does not work*. There are so many problems and inconsistencies with regard to that Section they cannot possibly all be addressed.

See Exhibit p. 6 (emphasis in original). The remainder of her submission details problems that she sees with existing law. See generally Exhibit pp. 6-24.

The Commission is not intending to make significant substantive changes to election law in this study. That law was recently overhauled, after protracted negotiation and compromise by affected interest groups. In general, the Commission is deferring to the decisions made by the Legislature as part of that compromise. The staff will continue to note apparent problems with the law, for possible future study by the Commission.

MATTERS CONSIDERED EARLIER IN STUDY

Bob Sheppard offers extensive commentary on the proposed law. See Exhibit p. 27. He is particularly concerned about the suitability of the proposed law as applied to stock cooperatives.

Mr. Sheppard makes several comments on the proposed election provisions. Those comments are discussed in this supplement.

He also comments on other provisions of the proposed law, which the Commission considered earlier in the study. Those comments are not discussed here, but will be discussed in a later memorandum.

APPLICATION OF PROPOSED LAW TO NONRESIDENTIAL CIDS

Existing Section 1373 exempts nonresidential CIDs from many of the requirements of the Davis-Stirling Common Interest Development Act ("Davis-Stirling Act"). Section 1373(b) explains that the provisions from which commercial developments are exempted "may not be necessary to protect purchasers in commercial or industrial developments" and could simply add unnecessary costs and burdens.

Throughout the study of CID law, the Commission has been mindful of the distinction between residential and non-residential CIDs. The Commission's recommended changes to rulemaking and architectural decisionmaking law were *not* applied to non-residential CIDs. See Section 1373(a)(2) & (9).

Karen Conlon of the California Association of Community Managers writes to suggest that non-residential CIDs should also be exempt from the detailed secret ballot procedures now required under the Davis-Stirling Act.

> We believe this proposed revision will be non-controversial. The only objection we can candidly imagine is a blanket argument

> that this is a whittling away of the recently passed legislation imposing secret ballots on all community associations. However, the protections of that legislation were never intended for this market. The following two demographic facts differentiate the purchaser of a commercial building or unit from the purchaser of a residence: (1) Approximately 90% of the owners who purchase buildings or commercial units in the associations own them as a corporation, LLC, trust or partnership. Almost all of these, whether they are owned as noted above or as individuals/joint tenants, own and operate an incorporated business within the building or unit. These parties are sophisticated. They have hired legal counsel to form their legal entities and have the legal and financial resources to hire legal counsel when they believe it appropriate to protect their interests. (2) The typical purchase price, represented as the middle 70% of the building or units sold today, varies between $1,000,000 - $4,000,000. The purchase and sale of these buildings and units are typically facilitated by one or more attorneys, who are obligated to protect the interests of their clients through the diligence process. In summary, these are parties who have the sophistication to manage businesses, take advantage of legal and tax opportunities presented to such businesses and to purchase multi-million dollar buildings for the tax and estate benefits provided thereby.

See Exhibit pp. 25-26.

The staff agrees that the proposed exemption should be noncontroversial. It would have no effect on homeowners. The only group affected would be business owners, and they are the ones asking for the change. **The staff recommends that the proposed change be made.**

On a related point, the staff has suggested to CACM that it convene a working group of commercial owners to prepare an analysis of which parts of the Davis-Stirling Act should be applied to an exclusively non-residential development. CACM could then sponsor its own legislation disposing of the issue comprehensively, or submit its analysis to the Commission for possible future study.

SECRET BALLOT PROCEDURAL ISSUES

Door to Door Ballot Collection

Michael Doyle has expressed concern about association officials collecting ballots door to door. He feels it poses a risk of intimidation or tampering. See First Supplement to Memorandum 2007-4, p. 3.

Mr. Sheppard agrees. See Exhibit p. 36.

Ms. Grimm does not. See Exhibit p. 2. She feels that a candidate should be allowed to gather ballots or proxies as part of a campaign, and a board should be able to collect ballots to make sure that enough people vote to achieve a quorum.

The staff continues to believe that the law should not prohibit the collection of ballots.

Invalidation of Ballots

Existing Section 1363.03(c)(3) provides that the election inspector shall determine which members are entitled to vote and the voting power of each, determine the validity and effect of proxies, and decide any challenge or question relating to the right to vote. That authority is continued in proposed Sections 4635(d) and 4645(b). The latter provision expressly incorporates Corporations Code Section 7517, which governs the acceptance or rejection of a ballot or proxy.

Ms. Grimm notes that many homeowners are unwilling to sign the "outside envelope" as Section 1363.03(e)(1) requires, out of concern for the risk of identity theft. Consequently, many otherwise valid ballots are rejected by the election inspector. Ms. Vanitzian notes the same problem. See Exhibit p. 23. She also suggests that an election inspector may invalidate a ballot even if the outside envelope is signed, if the signature does not appear to be authentic.

Those are significant problems. However, existing law is clear. It requires a signature in order to authenticate the ballot and authorizes rejection of a ballot on the ground that it is unsigned or inauthentic. See Corp. Code § 7517(c). The inside envelope may not identify the person casting the ballot that the envelope contains. There is no way to address the problems described above without making a significant change to the existing procedure.

The staff invites comment from those who were involved in the drafting of existing Section 1363.03, on whether there is any room to explore alternatives without disturbing a consciously crafted legislative compromise.

On a related point, Ms. Grimm suggests that an unsigned ballot should at least be counted for the purposes of establishing a quorum, even if the ballot is rejected for purposes of vote counting. **The staff invites comment on that possibility as well.**

Secret Ballots and Differential Voting Power

The main memorandum discusses the difficulties inherent in use of the double-secret envelope voting procedure when a member is entitled to cast more than one ballot. See CLRC Memorandum 2007-4, pp. 5-6. Once an anonymous "inside envelope" is removed from the member-identified "outside envelope" the election inspector has no way to know the voting class or power of the person casting the ballot contained within the sealed inside envelope.

Ms. Vanitzian reports that there have been problems with members who are entitled to cast more than one ballot placing multiple ballots within a single inside envelope. See Exhibit p. 19. When that envelope is opened, the election inspector rejects all but one of the ballots.

The staff again invites comment from those who were involved in the drafting of existing Section 1363.03, on whether the legislative compromise left any room to explore alternatives that might address this problem.

Cumulative Voting

The Commission approved the following language regarding the use of cumulative voting:

> Cumulative voting may be used in an election, to the extent provided in the governing documents. Notwithstanding Section 7615 of the Corporations Code, in an association that permits cumulative voting, cumulative voting shall be used if any member requests that it be used, in writing, before ballot materials for the election are distributed.

See Exhibit p. 1; Minutes (January 2007), pp. 5-6.

Ms. Grimm is concerned that this would be unworkable because some members would not know in advance that cumulative voting is being used. See Exhibit p. 4. A similar objection is raised by Mr. Sheppard. See Exhibit p. 33.

Proposed Section 4640(b)(4) partially addresses that concern. It would require that the ballot explain how to cast cumulative votes if cumulative voting is to be used. That would provide notice of cumulative voting when the ballot arrives.

However, there may be instances in which earlier notice would be important. The member who requested cumulative voting might be unfairly advantaged by knowing that cumulative voting will be used before other members discover that fact. See Exhibit p. 33.

Ms. Vanitzian suggests that cumulative voting should be mandatory. See Exhibit pp. 17-18. That would certainly provide a level playing field, but it would deny associations ultimate control over whether cumulative voting will be used.

A compromise solution, suggested by Ms. Grimm, would be to provide that cumulative voting must be used in every election if the association's governing documents allow any use of cumulative voting. In other words:

> If the governing documents of an association provide for the use of cumulative voting, cumulative voting shall be used in any election of a director conducted by the association.

Is the Commission interested in adopting that approach?

Revocation of Proxy

Mr. Sheppard suggests that a proxy should be revocable up until the collection of ballots at the meeting at which ballots are to be cast. See Exhibit p. 33.

Proposed Section 4655(f) provides that a proxy is revocable "until it is received by the election inspector." That continues the rule provided in Civ. Code § 1363.03(d)(3).

The existing language should work well whether the proxy is given to the election inspector at a meeting or is submitted by mail. In each situation, revocability ends when the proxy is received by the election inspector. **The staff sees no reason to change proposed Section 4655(f).**

ALTERNATIVE TO SECRET BALLOT PROCEDURE

Ms. Grimm is supportive of the spirit of the proposed in-person alternative voting procedure. See CLRC Memorandum 2007-4, pp. 7-8. But she feels that even that procedure may be too burdensome and restrictive for small associations. See Exhibit p. 4. She suggests an alternative:

> Why not just exclude the associations that are 25 units or less from the elections balloting provisions? You could add language that says if the governing documents require secret balloting, the board shall adopt procedures that assure a secret ballot.

The staff considered that possibility, but was concerned that it would not be politically feasible. Election privacy advocates might object that the right of a secret ballot should not depend on the size of the association. **The staff invites public comment on the issue.**

Acceptance of Nomination

Ms. Vanitzian states that some associations require express acceptance of a nomination before the nominee's name will be placed on a ballot. See Exhibit pp. 17. She objects that this requirement is unlawful and can be used tactically to exclude some candidates.

The staff understands that the timing of nomination and acceptance could be exploited to manipulate the nomination process, but sees nothing inherently unreasonable or unlawful in a requirement that a nominee accept a nomination. Without that requirement, a ballot might include the name of a person who has no intention of serving if elected. Votes cast for that person would be wasted.

Election Without Vote

Proposed Section 4660(e) would provide that nominees for the board may be deemed elected without a member vote, if after a reasonable period for the submission of nominations, the number of nominees is equal to or less than the number of vacancies to be filled. That provision is drawn from Corporations Code 7522(d), which permits (but does not mandate) that rule in a corporation of at least 5,000 members.

The staff recommended that the rule be applied to all homeowner associations as a cost-saving measure.

Mr. Sheppard objects to the provision. See Exhibit p. 33. He points out that some associations require that a minimum number of votes be cast for a person in order for that person to be elected. Viewed from that perspective, the election is not just about choosing *between* candidates, but about whether any particular nominees should be allowed to serve. Mr. Sheppard has informed the staff that some associations would prefer that a position be left vacant than that it be filled by a person who cannot muster the required level of support from the membership.

That is a good point. However, Mr. Sheppard is not describing all associations, and the staff is still concerned about the cost of conducting an election, in a situation where the outcome is, in fact, a foregone conclusion.

An alternative would be to qualify the provision as follows:

> (e) The governing documents may provide a reasonable period for the submission of nominations. ~~If~~ The governing documents may also authorize the board to declare that all of the qualified

> nominees are elected without further action, if after the close of nominations, the number of qualified ~~people nominated~~ nominees is equal to or less than the number of directors to be elected~~, the board may declare the nominees elected without further action~~.

That would preserve the option, but only for an association that affirmatively opts in as part of its election rules.

MATTERS CONSIDERED AT JANUARY MEETING

Some of the comments presented in this supplement relate to matters that were considered at the January meeting. The staff does not intend to revisit these matters at the April meeting, unless the Commission wishes to do so.

Election Inspector Standard of Care

Mr. Sheppard supports changing the statutory standard of care for an election inspector to an objective standard (rather than "to the best of his or her ability" as in existing law). See Exhibit p. 33.

The staff had the same concern, but ultimately recommended that the existing language be preserved. It is drawn verbatim from the Corporations Code and is not known to be causing problems.

Application of Secret Ballot Requirements

Ms. Grimm recommends that the use of secret ballot procedures should be expanded. In addition to those matters in which secret balloting is *required*, an association should have *discretion* to use the secret ballot procedure in any other election. See Exhibit p. 1. The staff believes that existing law already provides that flexibility.

Mr. Sheppard suggests that the secret ballot procedure should be used in any election in which a member might face retaliation if the member's vote were made public. See Exhibit p. 33. The staff sees no obvious way to draw that distinction. Any substantive election could conceivably result in pressure or retaliation.

The Commission decided to preserve the existing application of the secret ballot requirement, in order to preserve the recent legislative compromise. See Minutes (January 2007), p. 5. As under existing law, a secret ballot would be required in "elections regarding assessments legally requiring a vote, election and removal of members of the association board of directors, amendments to

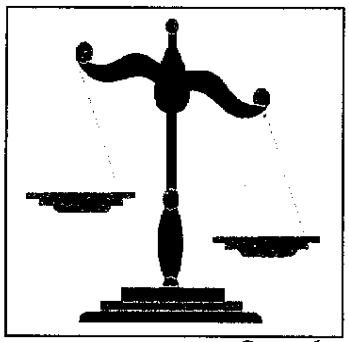
the governing documents, or the grant of exclusive use of common area property."

Association Member as Election Inspector

Ms. Grimm agrees with the Commission's decision to make clear that a member may serve as election inspector. See Exhibit p. 2; Minutes (January 2007), p. 5.

Respectfully submitted,

Brian Hebert
Executive Secretary



BETH A. GRIMM. P.L.C.
3478 Buskirk Ave., Ste. 1000
Pleasant Hill, CA 94523
Ph. 925 746-7177
Fax 925 215-8454
Web: http://www.californiacondoguru.com

Serving HOAs and HOs throughout the State of California

February 28, 2007

Mr. Brian Hebert
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

VIA FAX: 650-494-1827
E-mail: bhebert@clrc.ca.gov
Total: 5 pages

Re: Study H-855; Memorandum 2007 and Three Supplements – CID Law Reorganization
And Current Subject: Elections

Dear Mr. Hebert and Members of the Commission:

I have corresponded with the Committee before. My background or the last 20+ years includes advocacy, mediations, teaching, authoring helpful books and speaking publicly about CID living and the law, involvement in legislative efforts and commentary on proposed laws, and representation of many owners, many self managed boards, and many professionally managed boards, and last but not least, service work in this industry. There is truly a supermajority of people in California who know very little about operations and day to day issues encountered in common interest developments and who get their "education" from the news media (unfortunately). I am not just talking about owners and board members, but judges, legislators, realtors, and other reporters. One cannot just send these people to the Codes to read the Davis Stirling Act for guidance, as most of it is incomprehensible to the average lay person (and even some attorneys). What you are doing in rewriting the codes is commendable and a reasonable and much needed step toward educating Californians on what the law is.

I would like so much to attend the hearings, but my schedule makes it very difficult. I feel badly that I have not weighed in for awhile, but again, the work I am doing in this industry, which reaches far beyond advocacy as an attorney, requires an inordinate amount of time. Still, I believe that comments are important, at whatever point they are provided, so here are my comments related to current topics. I apologize for the late delivery. I thought I would be able to make the March 1 hearing.

I have read the recommendations/reports noted above and this is my feedback. It is based on many things, including my extensive experiences in CID advocacy and education.

MEMORANDUM 2007-4

Election Inspectors: I strongly agree with the recommendation that the law be made clear that members can serve as the elections inspectors. While I believe it to be clear in its present state, I have many people inquire as to whether it is allowed. I also believe with the recommendation that associations continue to be allowed to use their vendors or managers, if the rules allow for it. I know that owners tend to distrust the association managers in some cases, but in many, the manager can do these functions with their eyes closed, without any personal "flavor". In my work writing association rules and making suggestions to boards, I caution whether use of the manager is wise if there is any "perception", right or wrong, of bias. I also recommend using members for the elections that are uncontested, and it there are "sides", that a member be chosen from each "side" along with one neutral member. Strangely enough, these people can usually be identified readily. I always recommend using a paid vendor who does inspector work and has experience sufficient to feel comfortable for elections that are contentious. I always suggest that the Board consider what it knows about an upcoming election and decide which works best in any given situation. My point is: the Boards need choices, for many reasons. They need to be able to tap the most practical, cost efficient, and time efficient resources depending on the situation. Solution: The recommendations made for the Committee are appropriate. The Boards should be allowed to use anyone who is "independent" as defined, of board or candidate affiliations, and identifying that members may be used is important if there have been misconceptions about what "independent" means.

Type of Elections covered. The Committee has been asked to include all elections in the process using the double envelope procedures. Wisely, acknowledgement has been given to the fact that motions raised at meetings such as adjourning a meeting, or even acclamation under Robert's Rules (if and when applicable) should not require stopping to commence the voting again and having to allow a 30 day grace period. Solution: It makes sense, and reflects the way I have been writing election rules, is to simply, in addition to requiring the double envelope system for the elections identified, allow the Boards to use the double envelope system for any other elections it chooses. Of course, the subjects set forth in the law require it but making the other elections discretionary makes more sense than trying to identify all of the possible types of member elections that might arise and putting some in the basket and leaving others out.

Door to Door Collection of Ballots: Comments were provided to the Committee suggesting that door to door collection of ballots should be prohibited. In essence, collection of ballots is no different than collection of proxies, and if an owner wants to waive secrecy and allow the person who is given the ballot the opportunity to see it (such as turning over an unsealed envelope), that should be up to the owner. If the practice of going door to door to seek votes (which could include collecting ballots) is banned, what does that mean about going door to door to campaign? In many associations, there is

simply no other way to get the owners to participate in an important election than to go door to door. I do not think there should be any ban on allowing members to bring in the ballots for their neighbors, if their neighbors want to send them in that way. In fact, say there are to be nominations from the floor and the ballot was sent out 30 days before the meeting – if owners mail their ballots in before the meeting, they cannot get it back to change their vote if their favorite neighbor decides to nominate himself or herself at the meeting. An owner may want to trust their neighbor to fill out the ballot – how is that any different than giving a proxy? I know that the public elections have prohibitions about collecting ballots, but the public elections do not have quorum requirements to meet to be valid. Solution: Be careful about banning a practice that might be very important to achieving quorum. You have recognized that there are situations where an owner should be able to send their ballot in with a neighbor (in the case of a disability).

Information To Be Provided On The Outside Of The Envelope To The Inspector: There have been comments offered that the outer envelope should have the"separate interest" information on it. Some say only one lot or unit needs to be designated if a member owns more than one. Others say all separate interest of an owner owns should be listed. If one separate interest is noted and there are more than two attributed to one owner, then how would the inspectors know that the ballot should be "checked in" for two properties? And, I have not yet seen this problem noted, but it occurs: If the return **mailing** address for the owner is not listed on the envelope, and the ballot is not delivered as addressed to the Inspector (lack of a stamp or post office error or inadequate address), it may not make its way back to the owner. If there is a tenant in the unit and the envelope is addressed to the Inspector, and it comes back to the tenant, the owner will not every know it was not received, unless the tenant tells them. If the separate interest is vacant, the owner would not know the ballot was returned. The outer envelope presents another problem. I have received inquiries and information that some owners refuse to send something through the mail or provide an envelope to strangers that has their signature on it. So they do not sign. I spoke with one inspector that was at an election for a 1300 unit association and 150 of the returned envelopes were not signed. I realize that the legislator writing the elections law for associations was trying to utilize as a model the public elections law, but there are some things that present real problems – again, because of the quorum issue. Solution: Allow associations to use control numbers on the outer envelopes, and labels with mailing addresses. The control numbers would tell the inspectors what property or properties were covered by the return ballot.

Quorum Issue: There is one way that these problems could be prevented from stifling an election for directors. Solution: State in the law that the quorum requirement equals the number of ballot packages that are returned, or the number of valid ballot packages that are returned for board elections only. Yes, I realize this could turn out to be a low number, but why should an association be penalized by technicalities that are hard to ignore? Why should an election be stifled for owner error in reading and following instructions? The control number system has worked for years for many associations (using it on the ballot itself). The current law does provide that ballots returned count toward the quorum but the invalidated packets do not count, and there is too much room for error in the many technical requirements? This is something that needs attention. In

public elections, there are no quorum requirements for a valid election. If that model is used, there needs to be a way for Associations to get to the valid election. In addition, in this day and age, not wanting to have your signature floating around is a valid concern.

Cumulative Voting: It is true that Civil Code 1363.03 does not integrate well with Corporations Code 7513. However, the recommendations proposed I believe allow boards to choose whether cumulative voting will be used, or not, in any given election, and I do not believe that is helpful. A board could conceivably utilize this power to control an election. If you write in that it will be used only when an owner announces they want it before the ballot is sent out, that creates a rather ludicrous practical situation. No owner is likely to have a clue about this, unless the Board makes it clear in the pre-balloting materials. Solution: The better option, it seems to me, is to simply say that if cumulative voting is allowed in the bylaws, it must be explained in the ballot procedures and allowed for everyone. The problem in trying to acknowledge the requirements of Corporations Code 7513 and work through them is that, with this new ballot procedure per Civil Code Section 1363.03, if some owners vote without it and others, because of the announcement at the annual meeting get to use it, is creates an inequity in the vote. It needs to be announced ahead of the time when owners are getting information about the voting process.

In Person Voting At Meetings/Smaller Association Issues: I commend the recommendation to provide for in person voting at meetings, and the recognition that more than half of the associations in the state are too small for the double envelope voting requirements to be practical or cost efficient. However, I see some issues that need to be addressed. If an association opts to use the procedure for voting at a meeting, using a ballot box, what does this mean? That everyone needs to come to the meeting or send a proxy and vote there, without the mail in option? This brings these associations back to needing to provide proxies. The use of the words "proxy voting" should be eliminated and reference should be made to "use of proxies" instead, as there is no longer any option for "proxy voting". The law as written specifically provides for a tear off page for the voting measures so a to protect privacy and this tear off page should be given to the proxy holder; however if the inspectors are put to the task of assuring that the proxy holder voted as the proxy giver wished, the inspector will have to ask for this "tear off" page and then, voila! That would be bringing back ***proxy voting***. Solution: Why not just exclude the associations that are 25 units or less from the elections balloting provisions? You could add language that says if the governing documents require secret balloting, the Board shall adopt procedures that assure a secret ballot. Explaining a specific process puts the 2-25 unit associations back into the category of complicating elections when the members of many smaller associations simply either participate or they don't. Because of apathy, one suggestion I have made is to send around a 5 year calendar with blanks in it and tell the owners they must step up and fill in a term they will serve. The smaller associations do not tend to have the problems of contested elections; the more prevalent problem is finding volunteers willing to do the work. Carving these associations out of the complicated rules allows a small association to do voice votes, use member inspectors if they wish, have a locked ballot box, or use proxy voting. They can avoid the expense of and complication of the other provisions.

Donie Vanitzian
Marina del Rey, CA 90295

March 1, 2007

Mr. Brian Hebert
California Law Revision Commission
3200 Fifth Avenue
Sacramento, California, 95817

THE TEMPLE OF BLAME AND LEGALIZED FRAUD DRESSED UP AS AN "ELECTION"

Dear Mr. Hebert,

This is in response to the California Law Revision Commission's Second Supplement to Memorandum 2007-4.

I will be writing shortly regarding the "Davis-Stirling Act Overhaul Project" initiated by the CLRC and my **objections** to it—the least of which entirely changes the name AND numbering system of the existing Civil Code section where the **public has come to rely upon**.

That project merely serves to minimize an already ugly situation. In concert, the California legislature and California Law Revision Commission create the monster then try to cage the beast.

It was brought to my attention by readers to my co-authored Los Angeles Times column, *Associations,* that the CLRC's new "outline" looks surprising familiar to some readers as sort of resembling another book that was recently published. Be that as it may, the "Overhaul Project" in my opinion is **ridiculous,** a total **waste of resources**, and I question what appear to be **wholesale additions**, **deletions**, and "**tweaking**" of laws. It also appears to heavily favor language [what a shock] similar to that used in the Uniform Common Interest Ownership Act--California has NOT adopted the UCIOA for good reasons--too many to list here. The CLRC's attempt to "backdoor" the useless UCIOA is beyond words. Why can't the CLRC put its efforts toward fixing the Evidence Code or the Probate fiasco and the Code of Civil Procedure, or try making up a code to remove all the bad judges that are in the Small Claims Court or Superior Court system throughout California, but take its finger out of the common interest development dike.

Why not turn the Davis-Stirling Act along with these responsible legislators who bastardized it, over to ***titleholders who have been prejudiced by its one-sided effects?***

"OWNERS" ARE "TITLEHOLDERS"

For the purpose of this communication I refuse to lend credence to the CLRC's unilateral attempt to lower the status of a residential deed-restricted **"titleholder"** by its elimination of the word **"homeowner"** and assigning the paltry, inconsequential, moniker of **"member"** to hard-working people who have **paid earnest money** in the thousands, if not millions of dollars to purchase HOMES in California common interest developments.

We hold "title to property" -- if we have a "membership" -- that membership is ancillary to the recorded deeds that we hold in hand.

THESE LAWS DO NOT HELP OWNERS!

Owners are tired of shelling out money for legislative mistakes such as Civil Code §1363.03.

Section 1363.03 is a financially irresponsible law, it is fundamentally flawed, and it simply **does not work.** There are so many problems and inconsistencies with regard to that Section they cannot possibly all be addressed.

Make no mistake, homeowner association elections determine the extent in which a titleholder:

(a) Will or will not be able to control their personal assets,
(b) How much it will cost each titleholder to continue to live and own in that particular common interest development.

After numerous telephone calls to Senator Battin's office, and with no qualitative, let alone quantitative results to the problems plaguing Civil Code §1363.03, in July 2006 I published my correspondence titled *Yes! We Want Fair Elections But at What Cost and Prejudice?* My correspondence to Senator Battin demanded two things:

1) Demand for emergency "Stay of Compliance" regarding Civil Code §1363.03 and/or in the alternative;
2) Publish official legislative explanation regarding Senate Bill 1098, Senate Bill 1560 and their relationship to Civil Code §1363.03 in conjunction with Civil Code §1357.100.

My letter was ignored.

IT DOES NOT WORK!
DON'T TRY TO FIX THIS BAD CODE SECTION: JUST REPEAL IT!

For Section 1363.03 to work, it must work for ***every*** association, not just ***some.*** It must be apply fairness in the same manner for ***every*** association, not just ***some.***

Civil Code §1363.03 was flawed from the start. It managed to gain momentum as each lobby group sought to inject themselves into the titleholders' assets by exerting influence regarding the bill's content.

No "clean-up" bill could fix this unmitigated disaster. I am hereby requesting the California Law Revision Commission **demand** the California legislature [NOT the CLRC] *publish an official explanation deciphering "each" and "every" sentence written in Senate Bills 1098 and 1560 that* ***explains*** *what each means in laymen's terms along with point-by-point* ***instructions to boards in how to implement the bill,*** *or in the alternative,* ***instruct the legislature to pass an emergency "stay" of compliance*** *to the codified Civil Code section 1363.03.*

HOMEOWNER PERSONAL BANK ACCOUNTS FUND THE LEGISLATIVE FARCE TITLED "SECTION 1363.03"

Irrespective of what the CLRC or Senator Battin's office may WANT to believe the bill is a disaster for owners and a lottery win for management companies[1] and attorneys who can get themselves on the perpetual payroll band wagon at any association.

The telephonic answers from Senator Battin's office regarding my queries are always the same: ***"The Senator has worked with numerous groups in creating this bill."*** As if THAT explanation SOMEHOW answers the question as to WHY this BAD piece of legislation was written, let alone "passed." **It does not.**

Even after I spent considerable time on the phone with Senator Battin's office attempting to obtain some clarification, the person assisting me ***could not answer my questions.*** The reason my questions could not be answered is because the bill is flawed, and even those who drafted it can't explain it and they can't defend it.

Several times I was palmed off to what an employee in Senator Battin's office termed an "expert" on this bill. That person is in a conflicted position and is neither an expert nor a lawyer—s/he is a "lobbyist" and s/he does not represent MY interests or the interests of tens of thousands of other titleholders.

VOTING IS NOW MORE COMPLICATED THAN EVER

Whether the common interest development consists of two units or two thousand units, voting under Civil Code §1363.03 is now more difficult than it has ever been, especially for those of us who are infirm, without transportation, or who are unable

[1] To date, I am aware of only one management company that refused to partake in the shenanigans perpetrated against owners by the industry. This company refuses to belong to any industry trade group.

to get our mail on a timely basis because it is difficult to do so, or for those who are dependent on others for a variety of reasons, or for those of us who have other impairments. Section 1363.03 **does not help us vote impartially and it does not promote fairness in our voting procedures.**

Merely "complying" with Section 1363.03 is a problem -- that is, if someone can come up with a definition of the word "compliance" under the fiasco created by the Davis-Stirling Common Interest Development Act.

When asked, many of the elderly who have already received the "double envelopes" were so confused they gave up trying to figure out how it worked. Several told me they merely threw the package out and didn't bother to vote. Others who did not speak English could not get bi-lingual voting materials and they did not vote.

Owners with questions regarding the voting procedures could not get answers from their board or vendor management companies **no matter how hard they tried.** When replies were obtained from those entities, they were ambiguous, meant to confuse, and just plain wrong.

Owners with questions regarding the validity of ballots and/or proxies provided by their associations, and whom their boards and/or management companies ostracized or ignored, contacted their Senators or Assemblypersons only to be told "call your board or management company."

FAIR ELECTIONS? HA!

Leisure World Laguna Woods: Make no mistake, this "community" is "strained" and bursting at the seams. Presently it is apparently anything but a "community." The Leisure World (oxymoron) common interest development consists of all seniors, the majority of which actually had the audacity to believe they would have a better quality of life if they purchased a home there. If the constant stream of communications I receive at my co-authored Los Angeles Times, *Associations* column is any indication of the turmoil; seniors are in big trouble.

Residents complain of infiltration by industry interlopers in nearly every aspect of their lives and association operations in general. Those who believed they would be retiring on their hard-earned pensions have reported rapid depletion of their personal assets at an alarming rate. Those who believed the development's amenities would enhance that "quality of life," are learning the hard way that a sales pitch is just that, a "sales pitch." Those who believed they would be able to utilize the development's amenities as long as they owned a home there learned those amenities could be sold out from under them in an instant. Those who believed they would be able to "afford" to live their lives out "peacefully" without going bankrupt in the process, have learned an invaluable lesson: ***Don't believe everything you are told when you buy property in a common interest development.***

Many residents have attempted to get the attention of California's Attorney General, the Dept. of Insurance Commissioner, the Dept. of Real Estate Commissioner, the Federal Bureau of Investigation, the Dept. of Justice, Governor Schwarzenegger, untold Senators, Assemblypersons, and Council members, ALL to no avail.

All of this began and was made possible through "elections" and laws that do not

protect titleholders.

The blurring of the line between management and owners has compromised that community. Controlling the "written word" through newsletters sanctioned and distributed by the boards of directors helped spread the propaganda. Because of the age of those who are able and capable of participating, and their late life frailties (terminal illness and death are major factors) many do not have the stamina to campaign effectively to overthrow a board of directors that has been infiltrated by third parties, outside influences, or industry.

Elections and election results are manipulated even while those purportedly "in control" pretend to go through the motions of comporting with election laws set forth in the Davis-Stirling Act.

Few, if any homeowners have the means, let alone the funds coupled with good health that **is necessary to take on City Hall.** A management company and attorneys that are embedded in nearly every facet of association operations as it relates to the owners' lives, the fear of being sued by their conglomerate association(s), a management company representative sitting on the board(!) are too great a threat for many of the residents.

Any person or entity in a conflicted position should **not** have custody, control, access to, or handle, **any** ballots, proxies, envelopes, or other voting materials. This includes even the **receipt of such materials,** storage of such materials, or one of the biggest scams playing today that is used by many management companies consists of convincing boards that management is merely "making sure the signatures are accurate." Many excuses are conjured up in order to get their hands on those voting documents.

Any third party vendors such as, and including, management companies should not have custody OR control over any ballots or proxies, and neither should the association's attorney(s).

Seniors have reported to me that the ballots and/or proxies that the association provided to them were **intentionally confusing, misleading,** and/or **complicated.** Those owners with disabilities were ***forced to rely on management company personal for assistance with no way to verify if the senior's instructions were followed.*** Obviously, the end-game was to invalidate votes.

It is my understanding that hundreds of ballots and/or proxies have been invalidated.

Fifty acres of *prime real estate* have become ripe pickings for those able to manipulate the system. What is ethical about having a management company that is intricately intertwined in/with, to name a few, •real estate sales, •ownership of the local escrow company, •real estate investor clients, •leader of a builders association that includes title companies, builders, and real estate companies?

Meanwhile, owners in Laguna Woods find their **mandatory** homeowner assessments improving land and/or property that is being sold out from under them. Their **mandatory** homeowner assessments are paying to maintain, repair, and replace amenities that are being sold out from under them and that they may never be able to use again.

What does Civil Code §1363.03 do for **these** seniors? NOTHING!

REPEAL CIVIL CODE §1363.03 March 1, 2007

ASSOCIATIONS SHOULD BE "AUTOMATICALLY" PENALIZED FOR NON-COMPLIANCE OF ANY PART OF THE DAVIS-STIRLING ACT

What is the incentive for an association that operates with indemnification and the business judgment rule, to comply with Civil Code §1363.03? **There is none.** There is no meaningful mandated penalty for an association's non-compliance of Section 1363.03 in the statute and there is no meaningful, cost-effective way for an owner to enforce a penalty against the association that acts unlawfully. Like much of the Davis-Stirling Act, it's just a bunch of "talk" leaving owners to fend for themselves -- and at their own expense. **The results, I might add, are disastrous.**

COURTESY OF YOUR LEGISLATORS HOMEOWNERS BEWARE!

It appears that, early on, the industry hijacked Civil Code §1363.03. Rather than the statute dictating the **law,** industry vendors intercepted and interpreted it to their advantage. Their self-proclaimed rendition of the Code was then used to eviscerate the initial intent of Section 1363.03.

For example, just after the passage of Civil Code §1363.03 some management companies circulated correspondence targeting "ALL [management company name] ASSOCIATION PRESIDENTS AND TREASURERS."

In part, the letter states,

> ***"Without such rules in place, any election can be voided by any member objection. This new law is very complicated and contradictory. We are sending you a sequence of newsletters from [attorney name], a condo attorney, addressing the various issues involved."***

The Executive Vice President of the management company then writes,

> ***"I can only assume that this will be an industry wide charge for doing this. . . . Remember, this is the law and you MUST comply."***

An enclosed form titled "Drafting New Election Rules" was enclosed in the package. The enclosed form states:

"We would like [management company name] to take care of sending our CC&Rs to one of the mentioned condominium attorneys so that our new election rules can be drafted. We understand that there will be a bill from the attorney, which should not exceed [$_____], stated prices range from $____ to $____ depending on CC&R requirements. We would like to use:

Attorney 1 ____
Attorney 2 ____
Attorney 3 ____

Attorney 4 ____
Attorney 5 ____
Please take care of this for us.
Signature _____; Date _____; For [association name]."

The same management company continues:

> ***"In addition to drafting the rules, Associations are facing the expense of distributing the rules to owners, and for the costs of the mailings mandated by the law. The law has yet to address the potential issue of no one responding to the call to run for the Board. There can be no election meeting as before and therefore it will not be possible to draft candidates from the floor."***

Because the attorneys were listed throughout the correspondence in several places along with telephone numbers and brag rights, it is clear that a correspondence of this magnitude could not have been generated without the involvement of the attorneys themselves, whose names and law firms were embedded in the propaganda piece.

This fraud is being perpetrated right under the Legislature's nose and still there are no mandated penalties against management companies and the attorneys who partake in these calculated schemes to "hook" boards of directors into relying on their words.

Whether it is an ambulance chaser doing the "capping" or a "management company" doing the capping, in California "capping" is illegal. So too, is practicing law without a license. In the instant case, the information distributed by that management company to all of their clients was wholly inaccurate and misleading. The average homeowner and boards of directors do not know this information is false, misleading, and inaccurate, and the California Legislature has done NOTHING to correct their errors in a timely manner.

Many impressionable boards are signing, let alone accepting, boilerplate "Resolutions" for no other reason than it "came from an attorney." One board member explained to me that after the board shoved several "Rules" and "Regulations" and "Resolutions" down the throats of its owners at the eleventh hour (forcing signatures on ballots), the attorney "recorded the document." Little did the owners know, let alone understand, that the so-called "Rules" "Regulations" or "Resolutions" sold to the owners under the guise of "complying with the new election statute" were stacked with CC&R changes that would never have been passed if the owners **understood what they were signing**. In other words, nothing prevented the board from wording the "election compliance rules" in such a way that it allowed amendments to CC&Rs that were **unrelated to Section 1363.03**, or from slipping in additional items **unrelated to Section 1363.03** that did not pertain directly to voting. Deceitful? Yes.

Even though some association attorneys were/are WRONG in the advice proffered to boards of directors, boards were/are loath to go against their association attorney opinions and some are loath to go against their management company's opinion--even though management companies are third-party vendors in positions of

inherent conflict and have a vested interest in one thing: their contract to be paid by the association.

Numerous boards of directors have contacted me to report pressure from association attorneys and management company personnel to adopt what the interlopers claim would put the association in "compliance with Civil Code §1363.03." Information garnered from various association advisors, consultants, and third-party vendors forwarded to me from boards of directors confirm threats of "compliance" and other scares used to intimidate and coerce boards to "hire" and then implement a particular set of rules, regulations, or amendments to governing documents—**even if those "rules" were detrimental to the owners.**

Much of the self-professed "informative" propaganda consists of scare mongering and misrepresentations dressed up as "fact" or "law." **Still, it is effective. Still, it is costly.** Nothing in Section 1363.03 prevents that from happening. If the legislature wanted to make this Section clear, they should have done it before forcing it into law!!

Documents shared with me indicate the propaganda started early on, shortly before and after Civil Code §1363.03 was signed into law. In concert with their industry cohorts, the first advisors generated mass mailings with infomercial-type cover letters from vendors including management companies, to their "association clients."

Honing in on association boards of directors and then shamelessly pounding them with measured dosages of fear until they "purchase the compliance package" whether or not it suited the needs of their association, should be punishable at law. These actions happened with lightening speed and were clearly designed to exact the desired effect.

For every association board that "bites the bait" the prize would be worth tens of thousands of dollars in the pockets of advisors and all those interlopers who helped them pick up an association client. It was easier than they thought it would be. Because too many boards of directors overly rely on, or by default rely on, management companies and association attorneys to TELL THEM what to do, their reliance may prove to be untenable, but they continue to fall back on what they perceive to be a "safety net," not realizing that same net is an entrapment.

Because Civil Code §1363.03 was so poorly written, boards have taken it upon themselves:

> (a) To hire counsel or other expensive consultants at **astronomical rates** to draft so-called "compliance" materials--even though it is unnecessary;
>
> (b) To incur additional and unnecessary costs in hiring advisors to perform, among other things, rewriting the association's covenants, conditions, and restrictions, drafting new and more vigorous rules and regulations, attending board meetings, and other incredibly creative items supposedly relating to compliance with Civil Code §1363.03 and all in the name of "compliance";
>
> (c) To [mis]interpret Civil Code §1363.03 by reading it as a threat to their positions on the board. Because there is **nothing** that is clear-cut in that code section (except of course to those who

drafted it) boards are panicking, the threats are flying, and **the elections are still corrupt.**

TITLEHOLDERS COMPLAIN OF MASSIVE ELECTION-RELATED FRAUD, CONFUSION, CORRUPTION, AND RISING COSTS

Each individual, hard-working, deed-restricted titleholder **is funding this mess, all in the name of "Compliance."**

The reaction to Civil Code §1363.03 has led to confusion, corruption, and fraud. Immediately after passage of Civil Code §1363.03, I was ***barraged*** with letters and boxes of documents alluding to relentless pressure on boards by third party vendors, some include management companies, attorneys, board propaganda, minutes, board notices to owners that association attorneys **insisting the association's documents must be rewritten to comply with Civil Code §1363.03, and so on.** Many management company solicitations and other interpretations of Section 1363.03, claim to be "following the law" as set forth in Senate Bill 1098, now codified under Civil Code §1363.03. It would be fair to say that ALL claim to be following the law "as they see it or want it to be."

Presently, I am aware of dozens of owners who have sold their property located inside a common interest development (after living there for over twenty years) because of the additional costs they are now incurring due to this bill—in their board's words "to comply with the law created in Civil Code §1363.03." I have invoices from "election inspectors" some at $1,578 and others surpassing $6,000.00. The invoice prices are **rising.**

Like so many otherwise "well-intentioned" laws and proposed legislation, the side effects have created yet another full employment opportunity for association attorneys, advisors, and consultants, to perpetually remain on association payrolls for nothing more than their "opinions" right or wrong.

Useless as that may be, **the owners' money is spent.** The money cannot be taken back. The money is gone. The owners that spent that money in hopes or fear (whichever the case may be) of complying with the law are still out the expenditures.

To date, invoices and billings collected throughout California *and related only to elections, implementing the mandate under Civil Code §1363.03, and processing election-related paraphernalia*, collectively **amounts to over a million dollars.**

Regardless of the association's size, the cost per association that use attorneys and/or third-party vendors or advisors to implement the election process under Section 1363.03 and/or challenges thereafter, has conservatively, surpassed approximately $5,000 per association. Though the initial pricing proposed to many associations may claim to begin at $300 to $500 on paper, yet the **actual fees charged are typically and easily ratcheted up into the "thousands of dollars" range.** In many respects that is not a one-time charge, it is recurring and the potential for that cost recurring each year, per each association, is staggering.

Still no equal access to owner names and addresses. Historically, boards of directors have had custody and control over owner names and address lists. Even today, associations can, and do, systematically prevent owners from access to the

SAME list—this is not difficult to do with the word "redaction" written into applicable statutes.

There are **no statutory assurances** built into the Davis-Stirling Act or elsewhere that unequivocally state the ***association's name and address list*** that is presented to the owner making the demand will in fact:

1) be the **same list** the board uses for its mailing;
2) be **legible** and in a certain readable font type and size;
3) be **current**, let alone "accurate";
4) be **timely** produced;
5) provide for an alternate method for contacting those owners who choose to "opt out" pursuant to Civil Code §1365.2(a)(1)(I)(iii).

Boards of directors or entities aiding the board are in a position to ***easily take advantage of non-resident owners*** through the use and misuse of such lists, and I dare say, their ballots and proxies. This corruption is widespread.

Therefore, **even if the board may at first appear** to be the "minority" in power, by virtue of the Davis-Stirling Act, they are in actuality, the new **"majority".** Through this "Hypocrisy of Majority Rule"[2] a board of directors with their aider and abettor third-party vendors, including attorneys, control owner access to information and retain the power to continue to prevent owners from equal access, thereby remaining in their board seats, with or without Section 1363.03.

REMOVE "PRIMA FACIE" FROM CIVIL CODE SECTION 1363.03

It is preposterous that all such reported corruption is conducted in a so-called **valid** election that is now made ***prima facie*** through Civil Code §1363.03.

The existence of Evidence Code §641 should be enough to invalidate Civil Code §1363.06. Evidence Code §641 should have been addressed by California's legislature long ago, prior to patching the Davis-Stirling Act. The problems surrounding "notice" and "delivery" abound. (See Vanitzian, *Common Interest Developments, Homeowners Guide,* Thomson/West, 2006-2007) According to the Evidence Code, the author states,

> *"a letter correctly addressed and properly mailed is **presumed** to have been received in the ordinary course of mail. This rebuttable presumption creates problems for residential deed-restricted titleholders."* Like the majority of laws in the Davis-Stirling Act, *"Though rebuttable, the burden of producing such proof may be next to impossible for homeowners who already have difficulty accessing association books, records and other related documents,* [and] *[h]ow does one 'prove' that an uncertified piece of correspondence was 'mailed,' let alone 'received'?"*

[2] See Vanitzian & Glassman, *Villa Appalling! Destroying the Myth of Affordable Community Living,* (2002).

The ***prima facie*** label, which appears to have been slapped on as an afterthought, is unsubstantiated by the statute's wording, lack of safeguards, and the fact that the code was not adequately tested (qualitatively, demographically, statistically, logistically, and quantitatively) prior to crossing over into laws of evidence. In my view this was, and is, ***irresponsible*** because it ***ipso facto*** disenfranchises innocent homeowners.

PROXIES, BALLOTS, PROXY-BALLOTS AND DISENFRANCHISING OWNERS

The built-in confusion between proxies and ballots should be enough to void Civil Code §1363.03. If the legislature wanted to help owners, this certainly would have been the place to do it. The legislature **easily** could have devised a **statutory ballot** and a **statutory proxy**, included both in this code section and be done with it. But they didn't. Though I made that recommendation prior to signing Section 1363.03 into law, it was ignored.[3]

The Code appears to use the terms "proxy" and "ballot" interchangeably causing further confusion. It also appears that Section 1363.03, through its inconsistent language tends to redefine the word "ballot" and "proxy" by virtue of what can be interpreted as stipulations that are stated or implied in the bill's language. Again, the result is disenfranchisement of the very owners this statute was supposedly meant to protect.

The Ballot-Proxy: Some associations are adding to the confusion by labeling the ballot or proxy a "Ballot-Proxy." What does THAT mean?

Titleholders are not told (in clear-cut language and in wording they can understand) that **ballots are unequivocally irrevocable and they cannot change their vote once the ballot is sent in.** This means, even if the pre-printed candidate names change in the interim of a ballot mailing and the time of the annual election meeting, **that owner who sent in their ballot is out of luck.**

As referenced in the *Common Interest Developments, Homeowners Guide,* "Civil Code §1356(a) does not require production of the actual ballots and/or proxies used for petitioning the court for an amendment of the association's declaration. Nor does it require the actual ballots and/or proxies used in petitioning the court to be held in safekeeping for any specified time." If the statutory election process has designated a status of "prima facie" to said election and election results, then ***"These ballots and/or proxies should be deemed evidentiary and treated accordingly; destruction of them should be punishable by law."***

I was told by Senator Battin's staff that a visible *"signature on the ballot or outside envelope does not invalidate the ballot."* Typical of the legislature, **there is *nothing* in the statute language to that effect.**

---

[3] Problems associated with the language of Section §1363.03 and discussion of the word "ballot" are addressed at greater length in *Common Interest Developments, Homeowners Guide,* (Thomson/West 2006) and need not be rehashed here.

REPEAL CIVIL CODE §1363.03 March 1, 2007

Proxies: Associations that have traditionally provided proxies for their titleholders have stopped doing so. Without explanation and without reason, they've just unilaterally stopped providing them. At first glance that may not seem like such a big deal, but it is. When the owner does not want to vote by ballot, or wants to assign a representative to vote by proxy, and no proxies have been provide, what does that owner do? If the owner is 90 years old and has been voting by proxy for 40 years, what does that owner do? It is my contention that associations that suddenly stop providing proxies do so as a "trick." The intent is to confuse owners who unclear about Section 1363.03, or who are unclear about the new type of voting procedures, to perhaps discourage them from voting at all -- and, that is exactly what is being reported back to me.

Civil Code §1363.03 creates a risk for owners where none existed before. In part section 1363.03(d)(2) states, **". . .the association shall not be required to prepare or distribute proxies pursuant to Civil Code §1363.03."** Here's my question: Why the hell not? If the association has provided proxies in the past, they need to continue providing proxies just as always. Section 1363.03(d)(2) **creates a great risk for owners** who use and/or rely on using proxies.

If the association does not provide the proxy form, an owner

(a) may not know that they can create and use their own proxy;
(b) may be unaware they can use a proxy if they want to;
(c) may create their own proxy but run the risk of the association unilaterally invalidating it ***for whatever reason they want;***
(d) may be unaware of the fact that Section 1363.03 does not impose a duty on the association to provide a "proxy" -- that alone, instantly ***creates a de facto presumption that proxies cannot be used and cannot be voted.***

What part of "disenfranchisement does the legislature not understand? What on earth was the legislature thinking!

DO NOT REMOVE CUMULATIVE VOTING: MAKE IT MANDATORY AND PREVENT PREEMPTION BY CC&RS OR BYLAWS THAT ELIMINATE IT

Even though the CLRC states in its Second Supplement to Memorandum 2007-4, that, "The use of cumulative voting should be guaranteed. Section 1363.03 trumps the limitation provided in Corporations Code §7513(e). [. . . and] [t]he staff agrees and has recommended a change to the proposed law," there are already ways around this. Because the Davis-Stirling Act does not provide penalties against such board actions, circumvention of the laws will continue unabated.

I hate to be the one to break it to the CLRC, but NOTHING right now trumps the covenants, conditions, and restrictions (CC&Rs), at least that is what is being sold to boards and homeowners across this state. If the legislature intended Section 1363.03 to trump CC&Rs and/or other governing documents—then it should have **stated** that

mandate in the Code itself. **It failed to do so.**

The initial Senate Bills and now Section 1363.03, confuse(d) issues that may involve APN #'s, write-in candidates, proxy forms, ballot forms, cumulative voting issues, and other items that will substantially affect each titleholder's rights to FAIRNESS. Cumulative voting was created to protect minority interests. ***Senator Battin's office intimated to me that the next move was to remove cumulative voting.*** That would be a foolish thing to do because it will further disenfranchise owners who have no representation on the board or in their association. Merely because the legislature has given boards the vehicle to disenfranchise owners is no reason to eliminate the only tool owners have for representation on their boards, that is, cumulative voting. Cumulative voting MUST remain so that minority ownership interests are represented.

Without cumulative voting this Civil Code Section creates an autocracy.

THE NOMINATION PROCESS

"Self-nomination should be expressly permitted." Yet, ever-ingenious vendor interlopers and association advisors have already created a **"contingency"** in the nomination process where none exists in the statute.

It is now being reported to me that once a titleholder is nominated s/he may receive a telephone call, or voice mail message from a management company employee, board member, or other entity asking if the person who has been nominated "ACCEPTS" the nomination.

The law as it is written, **DOES NOT REQUIRE a particular method of "ACCEPTANCE," nor does it require "acceptance" per se,** nor should it.

It should be written into Section 1363.03 that ALL such communications **should be made in writing subject to specific "notice" requirements written into the law.**

Already some management personnel are claiming they "made the call and left a message for the nominee" but did not receive an answer back. The nominee states s/he "never received such a message."

The date and time of such contact becomes critical--as does the response and the amount of time that a recipient of the alleged "message" has to respond. This is an added burden to the titleholder.

Neither Section 1363.03 nor any of the documents I have reviewed relating to that Section make "acceptance" of a nomination a "contingency" on being nominated, nor should it be. The nominees name should be place on the ballot (or proxy) with the other candidates and mailed at the same time so as not to prejudice that nominee.

Too many management companies and advisors are apparently under the impression that they can unilaterally inject their fabricated rules or standards into the process "on the fly" and without board approval, and certainly without the knowledge of the owners. Better care should have been taken in drafting Civil Code §1363.03.

Soon, the legislature must consider instituting enforceable penalties against vendor management companies whose employees and/or principals interfere with

the business of the association and a titleholder's rights.

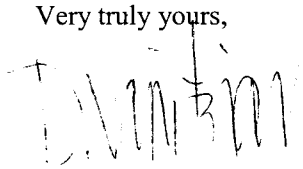
Unintended consequences have resulted in elimination of annual meetings. Because of Section 1363.03 many associations are now doing away with their annual election meetings altogether. This further puts titleholder assets at risk and eliminates one of the only avenues many owners still have left where they can address their boards of directors face-to-face. **Annual meetings should be mandatory.**

Loopholes and crossover laws. The bill fails to adequately close the loopholes and crossovers regarding nominations from the floor and ***many*** other items motioned at an annual election meeting, too numerous to list here.

While owners look to fairness and comprehensible legislation they are instead met with complications, higher costs, and insurmountable rules and regulations that no mortal could possibly comply with. This only serves to prejudice owners further than they are already prejudiced through the Davis-Stirling Act and other biased laws.

No matter how you slice Civil Code §1363.03, in its present form it is incomprehensible and nearly, if not wholly, impossible to comply with *in toto.*

Very truly yours,



D. Vanitzian

Donie Vanitzian
Marina del Rey, CA 90295
March 15, 2007

Mr. Brian Hebert
California Law Revision Commission
3200 Fifth Avenue
Sacramento, California, 95817

THE TEMPLE OF BLAME AND LEGALIZED FRAUD DRESSED UP AS AN "ELECTION" PART II

Dear Mr. Hebert,

The Temple of Blame and Legalized Fraud Dressed Up As An "Election, Part I" **erroneously referenced Senate Bill 1029. It should have referenced Senate Bill 61.** I apologize for that error.

Unfortunately, there are many more problems with this code section, but they will have to wait for another time. Until then, please add the following items to my letter dated March 1, 2007 requesting repeal of Civil Code §1363.03.

DISQUALIFICATION AND/OR SELECTIVE INVALIDATION OF OWNER BALLOTS

It has been reported to me that so-called "Inspectors of Elections" ***for whatever reason(s)*** are "disqualifying" ballots based on THEIR interpretation of the law.

With nothing more than the name "inspector," such "inspectors" are ***unilaterally*** deciding whether owner ballots are "qualified" or "disqualified."

Number of units owned by a single titleholder: The statute does not address the issue of a single titleholder owning more than one unit. The legislature could have easily eliminated problems related to this issue, but were derelict. Presently, if the association has not adopted any rule that restricts the number of ballots to be mailed in each separate envelope, those ballots that are legitimately voted and mailed in a single envelope should ***not*** be invalidated, yet that is precisely what is occurring.

Owners of multiple units have reported to me, that their associations and/or the

"inspectors" chosen to oversee such voting procedures are selectively disqualifying titleholder ballots. In one case, the so-called "Inspector of Elections" (whatever THAT'S supposed to mean) disqualified two votes of three votes cast by a titleholder who owns three units in one common interest development. That titleholder was entitled to cast—and have counted—**one ballot for each unit owned irrespective of the envelope they were mailed in.** Instead, the "Inspector" disqualified and discarded (destroyed) two ballots "because the inner envelope contained three ballots." In actuality, and only for sake of argument, for the invalidation to be legal, all three votes should have been disqualified.

> (a) NO ballots should have been destroyed and,
>
> (b) Nothing in Civil Code §1363.03 prevents, nor *ipso facto* disqualifies, or gives any inspector of said elections the authority to disqualify, a titleholder holding title to more than one property within the same common interest development, from voting all his/her ballots at one time and placing said ballots in one envelope.

In another case, a titleholder owning more than one unit, clearly wrote his name and address and signed it (as indicated in the association's instructions) on the outer envelope, and clearly wrote that it contained three ballots. Even though the "Inspector" checked the outer envelope against the association's homeowner list indicating the titleholder is entitled to cast three ballots, the "Inspector" invalidated two votes of the three.

In a case where a titleholder owning two units -- voted his two ballots – mailed them in the same envelope provided, the "inspector" invalidated both votes because only one envelope was used.

Some "inspectors" are "discarding" the ballots and others are merely "invalidating" the ballots. Civil Code §1363.03 does not define these terms nor does it discuss this situation. The code fails to address the aforementioned problems. This should have been a no-brainer to the legislature and the legislator who was responsible for sponsoring this fiasco.

LONG AND INCOMPREHENSIBLE INSTRUCTIONS

I am witnessing longer and longer, and yes, even ***longer,*** instruction sheets or multiple instruction sheets, accompanying voting procedures distributed to titleholders. One of the many problems with such "instructions" and the rules adopted by associations pursuant to Civil Code §1357.100 is that they are drafted by boards AND consultants or advisors who think they know what they are doing. In the interim thousands of titleholders are being ***disenfranchised*** because an advisor thought it would be a "good idea to include" [insert that good idea] in the instructions.

Apparently, those responsible for circulating ballots and/or voting materials will take it upon themselves to insert their own wording, or a sentence, or a paragraph, or what they may call a "clarifying note" into instructions that were NOT part of the language adopted by the owners and/or the board of directors let alone Civil Code §1363.03.

There are many who now believe that the taint on homeowner association elections and fairness in general, is irreparable. The industry's influence has so corrupted the process that many of us believe it is beyond salvage. When a board of directors announces "it has passed" -- all hope is deflated by those owner who know it "didn't pass."

GOOD STANDING, BAD STANDING, NO STANDING JUST SIT DOWN AND SHUT UP!

Irrespective of the titleholders' being in good standing at their associations or not, "inspectors" are unilaterally making the "call" whether owner ballots are "qualified" or "disqualified."

It apparently no longer matters that the titleholder has a property right, one that vested on purchase of their property. As associations will do anything to divest owners of their property rights, this bogus nonsense written into many association documents consisting of "you are not in good standing so you cannot vote" overrides all statutes.

OPEN TO ANYONE'S NTERPRETATION

Perhaps one of the biggest flaws with Civil Code §1363.03 is that it is open to interpretation.

Ballots created and distributed by management companies and/or other third-party vendors and forwarded to me by boards of directors and owners are evidencing a frightening trend. Management companies and other so-called "professionals" are apparently taking it upon themselves to insert ***their*** verbiage (i.e, via poetic license) into ballots.

It is also disturbing to find that there is a basic breakdown in communicating meaningful "instructions" to owners. Simple questions, like this one addressed to me from a reader, *"HOW do those of us who did not vote by ballot, cast a vote at the annual election by attendance?"* One owner forwarded seventeen letters asking that same question to her board over two months time. At the time of this writing, the question was still unanswered.

Creating unilateral contingencies in the balloting process: Too many ballots are wrongfully inserting, then publishing, contingencies into the voting process where no such "contingency" exists in the law and no such contingency exists in the association's governing documents, or the "rules" adopted by the board. One such ballot that was irresponsibly created by a management company states *"you must first check with the person to make sure they want to run for the board."*[1] Such an admonition of "acceptance" is not a statutory requirement, thus that statement functions as an "admonition" which in turn results in the "addition" of a "contingency" into the voting procedure and invalidates the election, let alone the ballot.[2] Another management company took it upon themselves to write on the face of the ballot:

> *"Write-in candidates, ie, candidates written on the ballots after they are distributed by the Association and nominations from the floor, are discouraged as they do not afford such candidates the same opportunity as those candidates whose names are pre-printed on the ballot, and it complicates the election process at the time of the meeting."*

[1] Vanitzian, *California Common Interest Developments-Homeowners Guide* (Thomson/West 2007).

[2] Vanitzian, *California Common Interest Developments-Homeowners Guide* (Thomson/West 2007).

Aside from the vendor's arrogance in believing they can simply write what they want, that hyperbole confuses voters and could arguably subject the association to liability. It invalidates the election because it functions as an "admonition" which in turn results in the "addition" of a "contingency" in the balloting process. [3] Incompetent "opinions" injected into the balloting process by third-party vendors contracted by the association NOT to practice law but to provide a "service" in exchange for remuneration invalidates the election process. This interference is costly to the association and subjects the owners to insufferable preaching by paid employees[4] who have nothing to do with protecting the owners' assets.

Mailed ballot invalidated and superseded by yet another mailing; and another mailing after that

Another problem occurs when ballots that were already circulated, voted, returned to the inspector, and waiting to be counted -- yet just prior to counting those ballots -- all ballots are invalidated.

The statute does not address this problem. In several instances that I have recently been made aware of, the management company or board of directors refused to return the invalidated ballots and it is unclear if those ballots were discarded, and if they were discarded, how so? There are variations on this theme, too lengthy for discussion in this forum, but in need of clear and unequivocal direction by the legislature. If the advisor, management company, or other third-party vendor contracting with the association is the recipient of the returned ballots, those ballots (as it was relayed to me) those entities are keeping, or holding onto those "invalidated" ballots.

Adding candidates

This is another problem that is growing in intensity. In the event the first mailing of ballots was invalid, and a second ballot mailing is necessary to correct an error, I have received communications from dozens of owners showing that advisors, management companies, or other third-party vendors contracting with the association, have taken it upon themselves to add candidate names to a new or corrected-ballot without giving prior notice to all titleholders that there was an extension of time allotted (ie, "created" due to the initial balloting error) to nominate and/or include one's name on the ballot. Situations like this ***disenfranchise all owners and*** those who would have added their name as a candidate had they ***known*** that the time had been extended to place a candidate's name on the ballot. [5]

Envelopes[6]

Without elaborating further, I have received hundreds of complaints and examples regarding the "double envelope" process, the quality or ***lack*** there of, regarding said envelopes. The complaints range from mailing-related problems to ballot invalidations as they relate to the envelopes provided by the association or other third-party vendor entity.

[3] Vanitzian, *California Common Interest Developments-Homeowners Guide* (Thomson/West 2007).
[4] Vanitzian, *California Common Interest Developments-Homeowners Guide* (Thomson/West 2007).
[5] Vanitzian, *California Common Interest Developments-Homeowners Guide* (Thomson/West 2007).
[6] Vanitzian, *California Common Interest Developments-Homeowners Guide* (Thomson/West 2007).

In one ballot enclosure executed by a vendor management company employee purporting to some sort of Vice President, the instructions state, *"Any unsigned outer envelope will not be counted as it cannot be validated."*

That fabricated statement is deceitful, it is not the law, and without a published "validation" policy, it unilaterally disenfranchises the titleholder.[7] The statute does not state that, nor does it allude to that type of unilateral disqualification, or invalidation. In my discussions with Senator Battin's office I was told that is not a true statement, ***the ballot will NOT be invalidated.***

Signatures, privacy, identity theft:

Too many ballots are being invalidated or disqualified based on the owner's "signature." There are no guidelines in the statute that detail how "signature invalidation" is to occur, and under what circumstances it should occur, if it should occur at all. Owners report that their ballots are being invalidated for no other reason than "someone" said their signature was "suspect." Yet, the person or entity invalidating ballots using the excuse of "suspect signatures" had nothing to compare the owners' signatures to.

For obvious reasons, NO TITLEHOLDER wants their signature to be housed at a management company office -- let alone there are no assurances of privacy from such companies. Stockpiling signatures at a third-party vendor's office where there is, among other things, no control over employees, access to documents, safeguarding of property, are unacceptable.

Predictably, this will mean that each titleholder must notarize their ballot prior to mailing it in. Without notarized ballots, its anyone's guess whose signature it is.

Incompetence and interference: Third-party vendors are likely costing associations more than they bargained for. For example, in one ballot enclosure executed by a management company executive it states:

"Return the double sealed ballot to the Inspector of Elections by xx/xx/07."

That statement is false and cannot be complied with for these reasons:

> (1) there is NO double sealed BALLOT. The ballot itself cannot be sealed; and
>
> (2) on its face, the aforementioned statement gives ALL titleholders until MIDNIGHT on xx/xx/07 to return their ballots and/or to vote, thus contradicting the governing documents AND what was written in the other enclosures mailed with the ballot that stated the ballots are counted in the open at the annual meeting, and results are announced at that time.

Misrepresentations: Some third-party vendors, including management companies, advisors, consultants, and the like, have injected there own sayings onto the face of the ballots, and/or in accompanying materials that invalidate the election process. One such saying is as follows:

"A quorum of members must return ballots in order for the election to be valid."[8]

[7] Vanitzian, *California Common Interest Developments-Homeowners Guide* (Thomson/West 2007).

[8] Vanitzian, *California Common Interest Developments-Homeowners Guide* (Thomson/West 2007).

That statement alone invalidates the entire election because:

(a) for a variety of reasons too length for this discussion, it creates a "contingency" for the owner's "vote";

(b) assuming arguendo that the statement is accurate, it fails to state the quorum "number" required for the election to be "valid";

(c) it places an (additional) "instruction" on the document which should not be there without a vote and direction of the board;

(d) that statement (in this instance) "contradicted" other enclosures published by the management company vendor and/or board of directors that accompanied the ballot itself;

(e) it "assumes/presupposes" that the owner cannot or will not utilize a proxy or send a representative in to vote;

(f) the statement predicates a "valid election" on a quorum of ***returned ballots.*** This may not be the case in ***every*** association. This also does not account for attendance at the meeting for quorum purposes, it does not account for votes and nominations from the floor and in-person voting at the time of said election and/or annual meeting; (this assumes that the annual meeting is also THE meeting where the election of officers will occur), it misstates the facts;

(g) if the ballot does not state on its face, that "this ballot will be used to establish a quorum," then ***that*** statement cannot be made.[9]

Let's keep recounting until we get the result we want:

Some owners have reported influence from outside entities encouraging if not demanding that the boards recount ballots. Some have reported recounting ballots over three times. Each time the result narrows and by invalidating certain ballots, the slate, or existing board members can keep their seats. In each instance, the competition was eliminated. Coincidence? You decide.

Again, no matter how its sliced, Civil Code §1363.03, in its present form it is incomprehensible and nearly, if not wholly, impossible to comply with *in toto*.

Very truly yours,

D. Vanitzian

D. Vanitzian

[9] Vanitzian, *California Common Interest Developments-Homeowners Guide* (Thomson/West 2007).

California Association of
Community Managers, Inc.SM

23461 South Pointe Dr. • Suite 200
Laguna Hills, CA 92653
949.916.2226 • 949.916.5557 Fax
800.363.9771
info@cacm.org •

March 22, 2007

Mr. Brian Hebert
California Law Revision Commission
3200 5th Avenue
Sacramento, CA 95817-2799

Re: CLRC Study H-855, Statutory Clarification and Simplification of CID Law: Suggestions for Amendment to Proposed Section 4020

Dear Mr. Hebert:

Thank you for meeting with us on March 16th to discuss the uniqueness of commercial associations and why we believe they should be treated differently in certain areas of Common Interest Development law. We are hopeful that you will include our recommendation in your CLRC Study H-855. The information and recommendations set forth in this letter were compiled by Mark Guithues of Jackson, DeMarco, Tidus and Peckenpaugh, whom you met during our meeting.

We believe that Section 4020 of the Proposed Legislation regarding Civil Code §§ 4000-_____ Common Interest Developments should be revised to include "Article 4 of Chapter 3 commencing with Section 4625." This revision would be the functional equivalent of revising Civil Code Section 1373 to include Sections 1363.03 to 1363.09, exempting commercial associations from the secret ballot provisions recently added to the Civil Code for all community associations.

Although the secret ballot provision are appropriate to protect purchasers in most residential common interest developments, they are not necessary nor appropriate to protect the sophisticated purchasers in commercial or industrial developments. The application of those provisions result in unnecessary administrative and management burdens and costs for these types of developments which the owners resent and have stated they do not want.

We believe this proposed revision will be non-controversial. The only objection we can candidly imagine is a blanket argument that this is a whittling away of the recently passed legislation imposing secret ballots on all community associations. However, the protections of

that legislation were never intended for this market. The following two demographic facts differentiate the purchaser of a commercial building or unit from the purchaser of a residence: (1) Approximately 90% of the owners who purchase buildings or commercial units in the associations own them as a corporation, LLC, trust or partnership. Almost all of these, whether they are owned as noted above or as individuals/joint tenants, own and operate an incorporated business within the building or unit. These parties are sophisticated. They have hired legal counsel to form their legal entities and have the legal and financial resources to hire legal counsel when they believe it appropriate to protect their interests. (2) The typical purchase price, represented as the middle 70% of the building or units sold today, varies between $1,000,000 - $4,000,000. The purchase and sale of these buildings and units are typically facilitated by one or more attorneys, who are obligated to protect the interests of their clients through the diligence process. In summary, these are parties who have the sophistication to manage businesses, take advantage of legal and tax opportunities presented to such businesses and to purchase multi-million dollar buildings for the tax and estate benefits provided thereby.

The distinction between the unsophisticated residential buyer and the sophisticated commercial buyer has been acknowledged and accepted by the legislature in the past. Civil Code Section 1373 presently provides commercial associations with several exemptions to the Davis-Stirling Act, which include annual disclosures, informal dispute resolution provisions, reserve studies, various disclosure requirements of the Board and elimination on limitations on raising assessments.

The majority of commercial associations are comprised of less than a dozen owners. The typical annual meeting takes half an hour and may be moved multiple times before quorum is achieved. Assuming the third party inspector of elections has a flexible enough schedule to attend, their costs divided over such a small group is prohibitive.

Thank you for your attention to this matter. Should you have any questions, please contact our Legislative Advocate, Jennifer Wada, at (916) 448-4000 or at Jennifer@wadawilliams.com.

Very truly yours,

Karen Conlon, CCAM
President
California Association of Community Managers

Cc: Mr. Mark Guithues, Attorney, Jackson, DeMarco, Tidus and Peckenpaugh
Mr. Craig Stevens, Principal, Mar West Real Estate
Ms. Jennifer Wada, Legislative Advocate, Wada Williams Law Group, LLP

EMAIL FROM BOB SHEPPARD
(MARCH 30, 2007)

Brian,

I appreciate the Commission's valuable work on the Davis-Stirling Act. I have some comments and concerns about the latest draft (1/16/07) which I would like to share with your staff and the Commission. These include the applicability of provisions of the draft to stock cooperatives, as well as other general comments.

My involvement with housing cooperatives extends back to the late 1970s. I was instrumental in organizing a conversion from rental housing to a limited-equity cooperative in the midwest. This included developing governing documents, creating a business plan, arranging for financing, developing and delivering training for the prospective members, etc. I advocated for the creation of the National Consumer Cooperative Bank (now the NCB) and negotiated one of the first cooperative housing loans with them. I served on the board of directors of a housing cooperative in California and have served on numerous committees in both cooperatives. I have owned and lived in housing cooperative units for over twenty-five years.

My comments follow. Should you have questions or need additional information, please feel free to contact me at your convenience. In particular, if my rational for any of my comments is unclear, you are welcome to bring them to my attention and I will attempt to clarify them.

Bob

==========

General Concerns About the Treatment of Cooperatives
==========

In general there are many parts of the draft which apply to condominiums but not cooperatives. I would like to see each provision of the draft examined from this viewpoint. If a provision could not be applied to cooperatives as they are presently organized, it should be changed to apply to all types of CID, including cooperatives.

Declarations
==========

The co-ops of which I'm aware have the following governing documents:
- Articles of Incorporation
- Bylaws
- Proprietary Lease
- possibly a Membership Agreement
- policies/"house rules"

I have not seen co-ops record a formal declaration, although some might. Even in post-Davis-Stirling co-ops, many public records do not show such a recordation. Some of the information required to be in the declaration might be strewn across several documents, which might or might not be recorded. I've seen co-op use restrictions appearing generally in the proprietary lease and policies/house rules.

The current staff draft relies heavily on the declaration and I believe that the draft should be revised to also serve those stock cooperatives not having the elements of a declaration.

Enforceability, Education
==========

I agree with previous commentators that there is a great lack of education amoung both CID homeowners and CID boards of directors. I believe this causes many of the problems which these parties are facing. The other cause I believe contributes to this is a realistic lack of enforceability. The provisions of the CID Open Meeting Act may help to alleviate this. Other provisions in the staff draft include a similar enforcement mechanism which may help with those particular provisions.

In most other cases, however, there will not be a realistically affordable enforcement mechanism. Those unit owners with means will be able to protect themselves from corrupt or ignorant boards, but others will not be able to afford legal counsel.

I believe that until these issues (which have been proposed in previous bills) are addressed, all of the good work that the Commission, it's staff and all of us commentators are doing may come to naught. All of us can proposed wonderful legislative solutions but unless there is education and enforcement, I believe it may all go to waste.

As a start, the judicial enforcement provisions should, as a minimum, apply to any breach of the governing documents or Davis-Stirling.

Liens and Foreclosures as Applied to Cooperatives
==========

In general, an owner of a coop unit would have a lease that has provisions relating to termination of membership, termination of the lease and eviction. I do not know of any coops that provide for liens or foreclosure as a remedy. Since the lease remedies are not in the staff draft, does this mean that coops will be required to foreclose rather than evict?

The draft should bring these issues into confluence.

All Members as Directors
==========

I know of several cases where each member is automatically a director. And I believe this may be the case in many co-housing communities, which are usually organized as condominiums. The draft should be carefully scrutinized to discover and resolve such issues.

Members Making Director Decisions
==========

The draft regulates many decisions traditionally made by directors, requiring that they be made by directors. However, many small coops (and possibly co-housing developments) require that such decisions be made by the entire membership. The draft should have language that allows this.

Appurtenant Areas
==========

The draft distinguishes between common areas, exclusive use common areas and separate interests. From the language, it appears that only those three designations are permitted to be assigned to any part of a CID. However, some cooperatives, and possibly other CIDs, have areas that do not fall into any of these categories. They are areas that might be appurtenant to a separate interest or a membership. This appurtenance might last for the term of the member's

membership in the CID, regardless of the specific separate interest that is owned by the member.

For example, the member might have the exclusive right to occupy a specific garage or storage space, regardless of which unit they own. This appurtenant space might not be evidenced by a separate ownership or occupancy instrument and the member would be assessed an additional charge for its occupancy. Upon the unit owner selling their unit or voluntarily giving up the appurtenant space, the HOA might either offer it to another unit owner or use it for their own storage purposes.

The draft should incorporate this type of occupancy into its framework.

Membership Voting Systems

Associations may conduct elections entirely within the scope of a single meeting. They may allow for nomination of directors at such a meeting. They may also use supermajority thresholds for the election of directors or other matters. And they may use runoff rounds if the thresholds mentioned above are not met. They may provide for the casting of ballots only during the meeting. All of these methods should be accommodated within the draft.

Comments About Specific Sections

- 4035. The case of no president should be provided for. There may be periods when no one has volunteered for the job.

- 4040. The law should allow the HOA's bylaws to require a more restrictive form of individual notice.

- 4045(b). These types of notices could be easily overlooked. Many credit card companies send out separate notices. I would prefer these types of notices only be allowed if permitted in the bylaws.

- 4045(e). This should be deleted. Not everyone owns or watches a television. Also, the HOA could give the notice once in the middle of the night and claim they had fulfilled the requirements of this section.

- 4050(d). This is ripe for abuse.

- 4090. This is a significant loophole that is ripe for abuse and should be closed. Also, the unanimous written consent vehicle should be either completely closed or restricted to emergencies only.

- 4145(c). I would call these elements something like "electrical and signal-bearing elements" to refer to any type of electrical conductor, fiber-optic cable, etc. Any type of bearing element that could carry power or a signal should be covered, as should any conduit that encloses these elements. Also, there are cases where an individual conduit might carry these elements to more than one single separate interest.

- 4165. Sometimes the bylaws require that an operating rule be approved by the membership. Please allow for that case. Also, any regulation that affects or regulates the rights and responsiblities of a member should be considered an operating rule.

- 4190(b). There is at least one case where the share is appurtenant to the lease and the lease carries many of the rights of membership. So I would suggest adding the term "lease" to the list of instruments.

- 4505. I don't think the legislature should impose this onto an HOA. The HOA's articles or bylaws should control this, usually by specifying rules of order.

- 4515(a). It should be clarified that the bylaws can set a higher threshold.

- 4515(b). I don't see a reason for the legislature to dictate to an HOA that they may not break quorum. Only the bylaws or rules of order should be able to restrict the power to break quorum.

- 4520(a). "The" agenda (rather than "an" agenda) should be given as part the notice, even if the date is set in the governing documents. Non- board members wishing to attend board meetings on subjects of interest need to know if such a subject will be discussed, so they can plan their schedules accordingly.

- 4520(c). Notice of an emergency meeting should be given at the time such a meeting is called, even if it's given at the time the meeting is convened. This will allow any member seeing the notice to attend the meeting.

- 4520(d). If a meeting is adjourned to such a time that would follow the scheduled end of a meeting, general notice should be given to all members and individual notice given to members and directors requesting it. This will allow members having scheduling conflict with the original meeting to possibly attend the continuation of the adjourned meeting.

- 4540(a). The bylaws should determine when the board may adjourn to an executive session, unless a member privacy issue is involved and the member wants an executive session, not the legislature. For example, the membership may have enacted a bylaw provision requiring an open meeting for discussion of contracts with third parties. The legislature should not force the HOA to abondon this.

- 4540(b). The target member may want an open meeting to avoid secret discrimination, retaliation, threats, etc. that might occur during an executive session. The member should have the right to decide whether such a meeting should be open or closed.

- 4540(c). For a member requesting a payment plan, see comments for 4540(b) above.

- 4545. This is a huge loophole to allow directors to conduct all of their business in secret, without the opportunity for accountability. I have seen it used this way. It should not be generally available to the board. I can think of two examples when it might be justified: (a) in an emergency when there are no board members available at the normal meeting place to set up a telephonic conference call and (b) in the case of a CID such as a time- share where it is unlikely for the board to ever meet contemporaneously. If an action without a meeting were to be permitted under these two exceptions, all deliberations (drafting, email, etc.) should be immediately communicated to all members both through general notice (e.g. posting on a bulletin board) and, if by email, by copying all members providing an email address. Members should be permitted to provide feedback to the board by email and possibly other means. The burden of proof of an emergency should be placed on the board. This is a controversial section that should not be included until and unless a careful analysis of the consequences is performed.

- 4550(b). The minutes of an executive session should state the decision made in such session to the extent that it does not compromise the privacy that was the lawful basis of going into such session.

- 4555. I agree that the phrase "without foundation" should be eliminated.

- 4580(b). There are HOAs that require a 2/3s vote of all members to amend their bylaws. I do not think the legislature should impose the lowering of such a standard.

- 4585(b). I don't think the right to break a quorum by withdrawing from a meeting should be prohibited by the legislature. The association's bylaws and/or

its rules of order (which should be incorporated into its bylaws) should control this issue.

- 4595(c)(2). I think this subsection would be a little hard for a layperson to read. The association should be able to require that any matter to be considered in a meeting must be in the notice of the meeting in order for the matter to be decided. An exception would be a matter that requires the unanimous consent of all entitled to vote on it.

- 4635(e). The "to the best of one's ability" standard is relative and ambiguous and should be replaced with the "reasonable care" standard.

- Member Elections - Please see my comments near the beginning of these comments.

- 4640(a). Any member election that might result in retaliation against a member if the vote were known should be by secret ballot. This would include rule change votes, where approval of the membership is required and bylaw amendments.

- 4640(f). Cumulative voting is a strategic voting method. For a chance of success, it involves coordination and planning within the factions vying for the election of their minority candidates. Therefore, the requirement that a voter pre-announce their intention to use cumulative voting is crucial to give everyone a level playing field. Anyone intending to cumulate their votes should be required to give notice of their intention to all members, on or before the date that nominations are to be opened.

- 4655(g). If a member gives a proxy and shows up at a meeting before their vote has been cast, the member should have the right to revoke the proxy on the spot and vote in person.

- 4660(generally). Please see my comments above for 4640(f).

- 4660(e). Some associations require a supermajority of all members to elect a director. They do this because they want directors with wide support and want to exclude candidates without it. This section allows the legislature to take this power away from the members by allowing the board to bypass the supermajority requirement. Please remove the second sentence. If an association wants to allow this bypass, they may place language in their bylaws permitting it.

- 4680. Please remove the phrase "without foundation".

- 4700(generally). Should there be three catagories: (a) things members have a right to inspect, regardless of the governing docs, (b) things members should never have a right to inspect, regardless of what's in the governing docs, (c) things members can inspect if permitted or not prohibited by the governing docs and perhaps (d) things the HOA has discretion to decide whether to make available for inspection (e.g. if it might violate someone's right to privacy that the assiciation has promised to protect)?

- 4700(a)(2). E-mail addresses should only be released if the member opts-in.

- 4700(b)(1). If an HOA has a record, I see no reason why the member should be prevented from inspecting it.

- 4710(a). If a member wants their own record, they should be able to get it without redaction. Perhaps they suspect the HOA has incorrect personal information and may want to correct it or take other action. A member should be able to prevent the redaction of their own information.

- 4715(a). Please include email addresses.

- 4735(g). Please remove "without foundation"

- 4810. A member handbook is a valuable document. It should contain all of the governing documents, including any policies, procedures, house rules, etc. The handbook should be kept up to date by requiring the association to distribute changes to the handbook. They should be codified and hole-punched to maintain maximum usefulness.

- 4830. Should this section also include a minimal enforcement provision as is in many other articles (ie $500 plus fees & costs)?

- 5000. Not only should this power derive only from the governing documents, this section should include non-fine disciplinary actions (e.g. taking away a right). Distribution should be made per my comments for 4810 above. If this isn't done, the member will have dozens of unorganized sheets of paper with different rule changes on them, rather than an organized and codified handbook.

- 5015. The legislature should not impose this on an association if the governing documents conflict with the section.

- 5500. Many co-ops have a "reserve for replacements", "operating reserve", "tax and insurance escrow reserve" and an operating account. A co-op's reserve for replacements is equivalent to an association's "reserve account". This should

be clarified to avoid confusion with designations that a co-op board member would understands.

- 5510. Some co-ops might use funds from the reserve for replacements for capital improvements. Should this be permitted if allowed in the governing documents?

- 5555 et seq. The association might want to use a different format for presenting information (e.g. more columns, etc.). The statute should allow for different formats if the required information is included in them and easy to access.

- 5575(b). The associations member might want to levy a higher assessment to either avoid a special assessment or to save for a capital improvement. Should the legislature prevent them from doing this?

- 5580(a). Since the members would be the ones taking the consequences for failure to fulfill financial obligations, they should be the ones to potentially have the power (through the bylaws) of determining whether or not to allow an increase above 20%. Also, the membership may disagree with the board about an allegation of an obligation.

- 5580(b). A stricter voting requirement in the bylaws should prevail (higher threshold, etc.); it should be the association's decision.

- 5600 et seq. Please see my earlier comments on the applicability of liens to co-ops.

- 5605(a). Coops generally don't have declarations, the late fee is generally in the proprietary lease and/or a late payment policy. Please conform to co-op document names.

- 5610. Do 5610(a) and (c) contradict each other? If they don't, please re-draft so that it's clear to a layperson.

- 6000. There seem to be two issues here: what is required to legally create a CID, and what entities are subject to regulation by the statute. They should be separated, because a lay person reading 6000(a) or (c) might conclude that a co-op that was created without a declaration or parcel map is not subject to the statute.

- 6005. Please include co-op proprietary leases and co-ops not having declarations.

- 6100 et seq. This section doesn't cover the case where the membership, rather than the board, approves an operating rule.

- 6110(a). The governing documents of some smaller co-ops and co-housing developments require members to provide their labor to the association as a condition of their membership and occupancy in the association. This labor allows the association to operate on a self-managed basis. The list of operating rules in this subsection should include rules pertaining to this issue.

My Comments on Others' Comments
==========

1/23/07 staff memo:

- I agree with Mr. Doyle's comments in the staff's 1/23/07 memo.
- Because cumulative voting is a strategic system, all members should receive notice that it will be used before the opening of nominations for the election of directors.