

First Supplement Memorandum 2007-47

Statutory Clarification and Simplification of CID Law (Comments on Tentative Recommendation)

This supplement begins the discussion of the comments received in response to the Commission’s tentative recommendation on *Statutory Clarification and Simplification of CID Law* (June 2007). The comment letters are attached in the Exhibit to Memorandum 2007-47. References in this supplement to the “Exhibit” are references to the Exhibit to Memorandum 2007-47.

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

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OVERVIEW OF PUBLIC RESPONSE

The solicitation for comments was very successful. We received a large number of comments from a wide range of interests: individual homeowners, board members, property managers, attorneys, realtors, and representatives of every size of association from the very small to the extremely large.

The comments that we received can be grouped into the following categories:

- General objections to the proposed law as a whole.
- General support for the proposed law as a whole.
- Support for specific elements of the proposed law.
- Objections to specific elements of the proposed law.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

- Suggestions for substantive changes to existing law.
- Technical and stylistic issues.

Given the large volume of comments that we have received, and the limited time available if the Commission intends to recommend legislation in time for introduction in 2008, we will need to proceed as efficiently as possible.

General Objections

Need for Enforcement is Paramount

Several of the commenters expressed the general view that statutory improvement is not useful unless there is an affordable way to enforce CID law. See Exhibit pp. 2, 50, 58, 70, 89, 131-32, 163. Because there is no public enforcement of the Davis-Stirling Act, enforcement requires a private lawsuit. That remedy is unaffordable for many homeowners, especially if the dispute does not involve monetary damages (as is often the case for governance disputes).

The Commission is aware of this general problem and recommended the creation of a state agency to oversee and assist common interest developments. The intent was to create an entity that would eventually mature into a public enforcement agency (if the need for such enforcement were borne out by empirical data). See *Common Interest Development Ombudsperson*, 35 Cal. L. Revision Comm'n Reports 123 (2005). A bill to implement that recommendation was vetoed by the Governor. See AB 770 (Mullin) (2005).

Even without an affordable enforcement mechanism, the public would still benefit if the law were stated more clearly. Many problems result from misunderstanding or ignorance of the law, rather than malfeasance. Clarity in the law will help to avoid those problems.

Letter Writing Campaign

We also received a handful of opposition letters that appear to have been the result of a letter-writing campaign. See Exhibit pp. 24-32, 37-49, 58-60. The letters express distrust of the Commission's motives and competence. They assert that the proposed law will cause serious problems, without identifying any specific problems or explaining how they would be caused.

The only identifiable objection raised in the letters is a concern about the transitional cost and disruption that would result from reorganization of the statutes and section renumbering. See Exhibit pp. 25-26, 30, 36.

This is a legitimate concern. There are transitional costs whenever a body of law is reorganized. Those who have learned the existing system must learn a new one. Practice materials and forms that reference the prior system must be revised. It is more difficult to find case law applicable to a renumbered provision, as one must also search for cases involving the former provision from which the new provision is derived.

On the other hand, a successful recodification adds benefits that endure long after the inconvenience of the transitional period has passed.

The proposed law includes three things that should ease the transition from the old law to the new law:

- (1) A deferred operative date, to provide time for people to learn the new scheme and revise documents.
- (2) An official Comment for each section, stating the source of that provision.
- (3) A comprehensive disposition table, stating where each provision of existing law is continued.

Although the transitional costs are real, the staff believes that the improvements contained in the proposed law justify the transitional inconvenience.

General Support

Most of the comments focus on the specifics of the proposed law and do not offer any general opinion on the merits of the proposed law. However, we did receive several comments expressing appreciation and support for the proposed law as a whole. See, e.g., Exhibit pp. 52, 61, 73, 90, 126, 139, 153, 171, 222. To conserve resources, those expressions of general support are not reproduced in the memorandum.

Support for Specific Elements of the Proposed Law

Many of the comments express support for a specific element of the proposed law. The staff does not intend to reference those comments in this memorandum, with two exceptions:

- (1) If an element of the proposed law provoked both support and opposition, the support will be described along with the opposition.
- (2) If a supportive statement is made in response to a note requesting comment, all responses to the note will be described.

Objections to Specific Elements of the Proposed Law

Most of this memorandum consists of analysis of substantive objections to specific parts of the proposed law. The objections are organized by subject matter, below.

Proposed Substantive Improvements to Existing Law

We received a large number of comments suggesting substantive improvements to *existing law*. This underscores one of the benefits of the proposed law — simply placing the applicable provisions of existing statutory law into a single organized scheme casts light on the numerous deficiencies of existing law. The public comment has helped to pinpoint those existing problems.

The problems are real, and the staff does not doubt that many of the suggestions for change would be improvements. **Nonetheless, the staff recommends that those suggestions be set aside for later study.**

The volume of work involved in reviewing all of the proposed substantive improvements to existing law is too large to be undertaken all at once. The work should instead proceed incrementally.

If the proposed law can be finalized this year, implementing legislation can be introduced in 2008.

The staff would then prepare a memorandum that catalogs all of the suggestions that the Commission has received for substantive improvements to existing law, organized by subject matter. With that catalog in hand, the Commission could decide which subject area to study next. That subject could be studied as a coherent whole, without delaying other work.

The recommended approach is based on pragmatic concerns about the manageability of the Commission's workflow and does not reflect on the merits of any of the proposed substantive changes.

There are two minor exceptions to that approach. The staff will analyze suggestions that relate to proposed *new* provisions (rather than provisions of existing law) and suggestions that are offered in response to specific questions asked in the tentative recommendation.

Technical and Stylistic Issues

A number of the comments point out purely technical issues relating to cross-references, stylistic choices, typographical errors, and the like. Those comments are very much appreciated but are not discussed in this memorandum.

Instead, the staff will evaluate all such comments and implement any necessary changes when preparing a draft of a final recommendation (which will be presented to the Commission at a later meeting).

Discussion Items v. Consent Items

Following the practice that we have been using successfully in the general study of mechanics lien law, this memorandum will use the “☞” symbol to introduce an item that clearly requires discussion at a meeting.

Items that are not introduced with that symbol are presumed to be noncontroversial “consent” items. The staff does not intend to discuss consent items, but will do so if discussion is requested at the meeting.

GENERAL ISSUES

There are a number of general issues that were raised in the comments, that span different substantive areas of the proposed law. Rather than address each occurrence of those issues piecemeal, they are discussed in general terms below.

General Drafting Approach

The California Association of Realtors (“C.A.R.”) suggests that the proposed law should be revised to follow what they describe as “Better Statutory Construction (BSC)”:

C.A.R. believes the CLRC has generally **succeeded** in attaining its stated goal of replacing the current Davis-Stirling Common Interest Development Act ... “with a new statute that continues the substance of existing law in a more user-friendly form.” With one exception, noted below, C.A.R. believes the stated goals have been met:

The restatement of excessively long and complex code sections in simpler and shorter sections, unfortunately, continues a poor legislative drafting practice that ignores a key principle of statutory construction: Have a basic premise for each code section and elaborate on that premise with subdivisions when necessary. Instead, the unacceptable current Davis-Stirling approach of making each section a series of subdivisions, with no identifiable basic premise, is continued. C.A.R. recommends “Better Statutory Construction (BSC)”, as noted below.

...
[A] number of code sections lifted “verbatim” from the current Davis-Stirling Act ... do not follow the basic tenet of statutory construction, as described above. In many instances, the code sections have no base coverage delineated and simply list a series of subdivisions that are often minimally related.

See Exhibit p. 171 (emphasis in original). Most of the 50 page submission by C.A.R. consists of suggested revisions to conform to the approach they describe.

The proposed drafting approach seems to require that the first paragraph of a code section serve as a general statement of the premise of the section, with elaboration by subdivisions as necessary. The first paragraph would not be designated as subdivision (a) of the section. For example, C.A.R. proposes that proposed Section 4550 be revised as follows:

4550. ~~(a)~~ Within 30 days after a board meeting, including a meeting held in executive session, the board shall prepare minutes of the board meeting.

~~(b)~~ (a) The minutes for any part of a board meeting held in executive session shall include only a general description of the matter considered in executive session.

~~(c)~~ (b) A member may request a copy of the minutes under Article 3 (commencing with Section 4700). Notwithstanding Section 4705, a request for a copy of meeting minutes is not required to include a statement of the purpose for the request.

~~(d)~~ (c) The member handbook (Section 4810) shall inform the members of their right to obtain copies of board meeting minutes and shall describe the procedure for obtaining a copy of the minutes.

See Exhibit p. 177. Other proposed revisions would be slightly more involved. The introductory “premise” of the section might be revised to include material from another part of the section. Or an initial subdivision might be split, with part of the subdivision as the premise, and the remainder as a new subdivision (a).

C.A.R.’s proposed drafting approach seems sensible. It might be helpful for lay readers if each section were to begin with a general statement of the purpose of the section. In fact, many of the sections of the proposed law already begin in that way. In those cases, C.A.R. would only delete the subdivision (a) enumeration from those paragraphs.

Despite any advantages that C.A.R.’s proposed drafting approach might offer if the Commission were starting from scratch, we are not starting from scratch,

and the staff is not convinced that the benefits of the proposed approach would justify redrafting the proposed law. In many cases, the proposed revision would simply delete the first subdivision enumerator and renumber the subdivisions that follow. It is not clear that this would significantly improve the clarity of the law. It would, however, require wholesale revision of cross-references, Comments, and the disposition table.

What's more, under existing law, each subdivision has equal importance. If the proposed approach were implemented, it might appear that there was an intention to elevate the first provision of a section, as the section's "basic premise," while subordinating all of the other provisions of the section as mere elaborations of the first provision. Existing law was not drafted with that model in mind; nor was the proposed law. If that approach were taken now, it might create an interpretive frame that would result in some unintended change in the meaning of a section.

The staff greatly appreciates the care and effort that C.A.R. put into its suggested drafting approach, but recommends against implementing it in the proposed law. If the Commission disagrees, and would like the staff to implement the C.A.R.'s stylistic suggestions, that can be done in preparing the draft recommendation.

Relationship Between Board and Membership

Another general issue raised by Bob Sheppard and others concerns the division of decision making authority between the board and the membership. Should statutes that currently reserve decision making power to the board be revised to allow the membership to exercise the same power? See Exhibit pp. 234, 241.

This raises a fundamental policy question going to the nature of CID governance. Should an association be a representative body, with most decisions being made by elected representatives? Or should an association be a direct democracy, with most decisions in the hands of the membership as a whole? Under existing law, an association is a hybrid, though it leans heavily toward the corporate representative model.

Changes to the existing balance of power between the board and the membership would go beyond the scope of the current project.

Special Problems Relating to Stock Cooperatives

Bob Sheppard has pointed out a number of ways in which existing law is inadequately tailored to the realities of how stock cooperatives are structured and managed. See Exhibit pp. 1, 18, 229. Other commenters have echoed his general concerns. See Exhibit pp. 150, 169, 221, 228, 258. Those concerns are discussed below.

Lack of Recorded Declaration.

Mr. Sheppard notes that many stock cooperatives do not have a recorded declaration. See Exhibit p. 234. Instead, the information that would be provided in a declaration is spread across other governing documents (bylaws, rules, and the proprietary lease or stock certificate that establishes the member's separate interest). The staff has spoken with the staff at the Department of Real Estate and confirmed that this is true. Many (if not most) stock cooperatives do not have a recorded declaration.

That is a problem because the Davis-Stirling Act presupposes the existence of a recorded declaration, in a number of ways:

- The recorded declaration is a prerequisite to the *existence* of a CID under the Davis-Stirling Act. See proposed Section 6000. If a stock cooperative does not have a declaration, its legal status (and the application of the Davis-Stirling Act) are cast into question.
- There are many provisions of existing law that allow for local variation from a statutory rule, but only as provided in the *declaration*. See, e.g., proposed Section 5700 ("Unless the declaration provides otherwise, the responsibility for repair, replacement, and maintenance is as follows..."). A stock cooperative that lacks a declaration cannot benefit from the flexibility provided in that section.
- Some mandatory disclosures to a new purchaser are required to be included in the declaration. See proposed Sections 6030-6035.
- Some special rules apply to the "declarant." See proposed Sections 5650, 5680, 6200, 6215. If there is no declaration, there is no declarant. See proposed Section 4130.

The solution to these problems is not obvious. One possibility would be to create a special rule for stock cooperatives providing that any reference to a declaration should be treated as a reference to another of the cooperative's governing documents. However, it is not clear which document would be an appropriate substitute. The bylaws? The proprietary lease or stock certificate?

Operating rules? The best document might vary with the provision. Worse, it might vary by cooperative, if there is no uniformity as to how declaration content is spread across those other types of documents.

Proposed Section 6000 could perhaps be revised to recognize the existence of a stock cooperative based on the date on which the cooperative's articles of incorporation are filed with the Secretary of State. But some cooperatives might be unincorporated, in which case there would be no filed articles.

The staff sees no easy solution.

Remedy for Nonpayment of Assessment

Because the separate interest in a stock cooperative may be established by the ownership of a share in a corporation or by execution of a lease, remedies other than foreclosure of a lien may be used by a stock cooperative in response to a member's nonpayment of assessments. Bob Sheppard reports that some associations use an internal disciplinary procedure to terminate a debtor's membership. Others use unlawful detainer to evict a person whose separate interest is established by a proprietary lease. See Exhibit p. 231-32.

Existing law does not acknowledge those remedies for nonpayment of assessments. It provides for a lien and the possibility of foreclosure. See Sections 1367-1367.5. Those provisions do not necessarily preclude other enforcement remedies. However, the elaborate rules that have been developed apply only to the imposition of a lien. They do not provide guidance for an association that does not lien.

Bob Sheppard suggests that the law should be adjusted to better account for the alternative collection remedies used in some cooperatives. That would be a significant change in the law.

Recommendation

The staff believes that existing law is, in many ways, poorly suited to stock cooperatives. Adjustments should be made.

However, the problems are complex and the solutions are not obvious. Stock cooperatives are not only different from other types of CID, it appears that they differ greatly between themselves. For example, a stock cooperative might be a converted apartment building (see Exhibit p. 169) or it might be a converted house, where the separate interests are individual bedrooms (see Exhibit p. 150). The property might be owned by a corporation, an unincorporated association, or community property trust. It might be a market rate cooperative, or a limited

equity housing cooperative, where the price of the separate interests is regulated to provide affordable housing.

Although the issues described above are important, the staff recommends against attempting to address them in connection with the proposed law. Doing so would require significant and potentially thorny substantive changes to existing law. Such changes should not be hurried or implemented piecemeal. Stock cooperatives should be studied separately.

Accounting Standards

The Davis-Stirling Act includes some fairly detailed requirements for fiscal accounting by an association. Those provisions are continued in the proposed law as follows:

- Section 4800: Annual budget report.
- Sections 4805, 4825: Annual financial statement.
- Section 5500: Accounting.
- Sections 5510-5520: Use of reserve funds.
- Sections 5550-5560: Reserve fund analysis and planning.
- Sections 5575-5585: Assessment setting.

Don Haney, a CPA with over 30 years of professional experience working with CIDs, writes to comment on the accounting provisions of the proposed law. See Exhibit pp. 12, 255. Mr. Haney believes that the proposed law generally accomplishes the mission of recasting existing law into a “more organized and clearer presentation without attempting to resolve potentially controversial issues.” However, he sees a number of problems with existing law that the proposed law would continue:

- The law describes accounting practices inaccurately, using terminology that is different from that used by accountants.
- The law sets standards that are unclear and that may be different from the prevailing standards of the industry. “The most important accounting thing that the CLRC should handle with this rewrite is to establish one clear accounting basis.” See Exhibit p. 15.

As a general proposition, Mr. Haney believes that the Legislature should not be setting accounting standards and micromanaging the details of accounting practice. He proposes a number of changes to the proposed law that would conform to industry terminology and that incorporate the standards of the industry by reference.

The staff has two general concerns about Mr. Haney's proposals:

- (1) *Apparent imperfections in existing law may reflect deliberate choices by the Legislature.* For example, there is an inconsistency between Section 1365(a)(1), which requires that the annual budget include an estimate of revenue and expenses "on an accrual basis," and Section 1365.2(a)(1)(C), which provides that accounting records be prepared with "an accrual or modified accrual basis of accounting." Which standard applies: accrual or modified accrual? Beth Grimm reports that the language authorizing modified accrual accounting was the product of a deliberate and hard fought legislative compromise. See Exhibit p. 116. It therefore appears that any attempt to reconcile the two sections would undo a legislative compromise that involved considerable controversy.
- (2) *Incorporation of professional standards may cause problems for small associations.* Most associations have 25 or fewer units. Those small associations may not be able to afford a CPA to maintain their books. A volunteer member may do that work. If the proposed law were to incorporate standards adopted by the accounting profession, for use by regulated professionals, it might set the bar too high for those who do their own bookkeeping. Mr. Haney counters that small associations have the same fiscal obligations as large associations. See Exhibit p. 256. That is true, and if the bar is set too low, associations may make critical mistakes or provide misleading information to their members.

Having worked through the accounting provisions of the Davis-Stirling Act and reviewed the comments submitted by Mr. Haney, the staff is convinced that there is considerable room for further improvement to that part of CID law. **However, as with other proposed improvements to existing law, the staff recommends that the matter be set aside for separate study.** In this area in particular, the staff believes that any reform should proceed very deliberately, with input from experts such as Mr. Haney, as well as other interested groups.

Specific comments about problems with the proposed accounting provisions are discussed below.

PRELIMINARY PROVISIONS

The proposed law begins with a set of preliminary provisions. Those provisions define the scope of the proposed law and set some general procedural standards for notice delivery and decision making thresholds. Comments on the preliminary provisions are discussed below.

Continuation of Prior Law

Proposed Section 4010 provides:

4010. A provision of this part, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be considered as a restatement and continuation thereof and not as a new enactment, and a reference in a statute to the provision of this part shall be deemed to include a reference to the previously existing provision unless a contrary intent appears.

This is a standard provision in recodification projects. It preserves the continuity of cases interpreting the prior law.

Beth Grimm suggests that it would be helpful to add language stating that a reference to prior law *in an association's governing documents* is deemed to be a reference to the provision of the proposed law that continues the prior law. See Exhibit p. 95. That would save associations the expense of amending their governing documents merely to update section numbers. An association should make those changes eventually, but it might be possible to defer them until there is another reason to amend the governing documents.

That is a sensible improvement to a new provision. It seems entirely noncontroversial. **The staff recommends that the change be made (along with a minor stylistic change), as follows:**

4010. (a) A provision of this part, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be considered as a restatement and continuation thereof and not as a new enactment, and a reference in a statute to the provision of this part ~~shall be~~ is deemed to include a reference to the previously existing provision unless a contrary intent appears.

(b) A reference in an association's governing documents, to a former provision that is restated and continued in this part, is deemed to include a reference to the provision of this part that restates and continues the former provision.

Application of Part

Proposed Section 4015(a) provides that the proposed law applies to a "common interest development." Subdivision (b) then adds that the proposed law does *not* apply to a development that lacks a common area.

Subdivision (b) is redundant. By definition, every "common interest development" has a common area. A note following proposed Section 4015 asks whether subdivision (b) could be deleted.

We received a conflicting response. Kazuko Artus believes that subdivision (b) should be retained, in the interest of clarity. See Exhibit p. 74. The California Association of Realtors recommends that it be repealed as a possible source of confusion. See Exhibit p. 172.

Subdivision (b) is existing law. Redundancy is sometimes helpful in reinforcing a point. **The staff recommends that the subdivision be preserved.**

Application of Corporations Code

Proposed Section 4025 states expressly which parts of the Corporations Code are preempted by the proposed law. That will help to avoid the overlap between the Davis-Stirling Act and the Corporations Code that greatly complicates finding and understanding the law that governs CIDs.

That provision was drafted on the assumption that an incorporated homeowner association would be formed as a mutual benefit corporation, rather than some other form of corporation. Consequently, only provisions of the Nonprofit Mutual Benefit Corporation Law are included in proposed Section 4025.

Beth Grimm writes to suggest that some homeowner associations are formed as public benefit corporations. For that reason, proposed Section 4025 needs to be adjusted to also preempt the equivalent provisions of the Nonprofit Public Benefit Corporation Law. See Exhibit p. 96.

This is the first time that the staff has heard that a homeowner association might be formed as a public benefit corporation. That would be counter-intuitive. A public benefit corporation is formed for a public or charitable purpose. Corp. Code § 5111. It is hard to see how a CID would serve either a public or charitable purpose. It is a private housing development, with individual owners.

The staff invites further comment on this issue. If it is true that there are a significant number of homeowner associations organized as public benefit corporations, then proposed Section 4025 will need to be revised to include the sections of the Nonprofit Public Benefit Corporation Law that parallel the provisions that are currently included in the section.

Delivery of Notice to the Board

Proposed Section 4035 provides that a notice to the board shall be delivered to the person designated to receive the notice in the member handbook. If no such person is designated, then delivery is to the president.

Bob Sheppard suggests that the statute should provide an alternative for associations in which there is no president. See Exhibit p. 4.

Beth Grimm suggests that the secretary would be the more natural recipient. See Exhibit p. 96.

Curt Sproul suggests that personal delivery at a board meeting should be allowed as an alternative to mailing. See Exhibit p. 237.

This is a new provision. All of the suggestions are sensible and appear to be noncontroversial. **The staff recommends that proposed Section 4035 be revised as follows:**

4035. If a provision of this part requires that a document be “delivered to the board” the document shall be delivered by one of the following methods:

(a) By first-class mail, postage prepaid, to the person designated in the member handbook (Section 4810) to receive documents on behalf of the association. If no person has been designated to receive documents, the document shall be delivered to the president or secretary of the association.

(b) By personal delivery to a director at a meeting of the board.

General Notice

Proposed Section 4045 specifies the manner of delivery for a notice that is designated in the statute as a “general notice”:

(a) Any method provided for delivery of an individual notice (Section 4040).

(b) Inclusion in a billing statement, newsletter, or other document that is delivered by one of the methods provided in this section.

(c) Posting in a location that is accessible to all members and that has been designated in the member handbook (Section 4810) for the posting of general notices by the association.

(d) Publication in a periodical that is circulated primarily to members of the association.

(e) If the association broadcasts television programming for the purpose of distributing information on association business to its members, by inclusion in the programming.

Most of that provision is drawn from Section 1350.7, which governs the delivery of notices in the procedure for adopting operating rules. See Section 1357.130(e).

We received a number of comments objecting to the section. The concern is that some of the forms of notice listed would not be adequate if relied on exclusively; some members would not receive the notice.

Bob Sheppard objects to reliance on a notice in a billing statement or newsletter. It “could easily be overlooked.” See Exhibit p. 4. He also objects to television broadcast as a form of delivery. Some people do not watch television. *Id.*

Anthony Williams wonders whether physical posting in the CID is sufficient for those members who do not reside full time within the development. See Exhibit p. 33.

On a related point, the suggestion has been made that website posting should be added as a permissible form of general notice. See Exhibit p. 155, 238. Website posting could be a very useful form of notice, but would raise the same general issue as notice by television: not everyone has Internet access.

The staff believes that all of these concerns can be addressed by revising proposed Section 4045 as follows:

4045. (a) If a provision of this part requires “general notice,” the notice shall be provided to all members by one or more of the following methods:

(a) (1) Any method provided for delivery of an individual notice (Section 4040).

(b) (2) Inclusion in a billing statement, newsletter, or other document that is delivered by one of the methods provided in this section.

(c) (3) Posting in a location that is accessible to all members, including on an Internet website, and that if the location has been designated in the member handbook (Section 4810) for the posting of general notices by the association.

(d) (4) Publication in a periodical that is circulated primarily to members of the association.

(e) (5) If the association broadcasts television programming for the purpose of distributing information on association business to its members, by inclusion in the programming.

(f) Notwithstanding subdivision (a), if a member requests that general notice to the member be delivered as an individual notice, a general notice to the member shall be delivered as an individual notice (Section 4040). The option provided in this subdivision shall be described in the member handbook.

In addition to authorizing web posting, the proposed revision would allow a member to opt out of receiving general notices, in which case the notice would be delivered as an individual notice instead (most probably by mail). That preserves the efficiency benefits of general notice, while providing a way to solve any actual problems that arise.

Time and Proof of Delivery

Proposed Section 4050 provides rules for fixing the time of delivery of a notice and proving delivery of a notice. It is drawn, in part, from Code of Civil Procedure Section 1013 (governing service by mail).

Time for Delivery

Proposed Section 4050(b) would provide for an extension of any time periods that are contingent on delivery, to account for the time involved in delivery:

If a document is delivered by mail, delivery is complete at the time of deposit into the mail, but if this part specifies a time period after delivery for notice or for any other action or response, the time period is extended as follows:

- (1) If the place of mailing and the address of delivery are both in the State of California, by five calendar days.
- (2) If either the place of mailing or the address of delivery is outside the State of California, by 10 calendar days.
- (3) If either the place of mailing or the address of delivery is outside the United States, by 20 calendar days.

The Sun City Roseville Community Association (“Sun City”) is concerned that procedural deadlines would be extended if even a single notice is delivered out of state or out of the country. See Exhibit p. 155. Considering that Sun City has over 3,100 units, that may be a common occurrence.

That would not be much of a problem if an association is sending notice to a single member. In that case, the delay is appropriate. But if the association is sending notice to all of its members, as part of a statutory procedure, problems would arise. For example, proposed Section 4595 provides that notice of a member meeting must be delivered to all members “at least 10 days, but not more than 90 days, before the date of the meeting.” Suppose that one member lives out of the country. Would the rule then require that the notices be put into the mail 30 to 110 days before the meeting? That is just one of many procedural timing rules that could vary depending on whether a notice is mailed out of state or out of the country.

Viewed from that perspective, the time extension rules could cause confusion and unpredictability. Rather than simplify procedures, the time extension rules would make things more complicated.

The staff recommends that subdivision (b) be revised to remove the time extension rules, as follows:

If a document is delivered by mail, delivery is complete at the time of deposit into the mail, ~~but if this part specifies a time period after delivery for notice or for any other action or response, the time period is extended as follows:~~

~~(1) If the place of mailing and the address of delivery are both in the State of California, by five calendar days.~~

~~(2) If either the place of mailing or the address of delivery is outside the State of California, by 10 calendar days.~~

~~(3) If either the place of mailing or the address of delivery is outside the United States, by 20 calendar days.~~

With that change, the Commission should also extend some of the statutory time periods, which would otherwise be unrealistically short. **The staff proposes that periods of 10 or fewer days be increased by an additional five days.** That change would affect proposed Sections 4520 (notice of board meeting), 4705 (period of inspection of records), 4715(b) (delivery of materials to members who have opted out of the membership list), 4730 (notice of denial of record request), 5005 (notice of disciplinary action), 5830 (request for transfer documents).

Affidavit of Delivery

Proposed Section 4050(d) provides for proof of delivery by affidavit:

An affidavit of delivery of a notice, which is executed by the secretary, assistant secretary, or managing agent of the association, is prima facie evidence of delivery.

Bob Sheppard believes that the provision is “ripe for abuse.” See Exhibit p. 5. Kazuko Artus believes that the burden of proof of delivery should fall on the person making delivery. A claim that a notice was not delivered should be prima facie evidence that the notice was not delivered. See Exhibit p. 74.

Proposed Section 4050(d) restates part of existing Corporations Code Section 7511(b), which governs all notices given under the Nonprofit Mutual Benefit Corporation Law. The staff is not aware of problems under that provision that would justify a significant substantive change in the law. **The staff recommends that proposed Section 4050 be retained as drafted.**

Undeliverable Mail

Proposed Section 4055 provides rules for what an association should do if a notice is returned as undeliverable.

Kazuko Artus believes that the provision is “reasonable” but suggests that the section should address nondelivery that results from a simple error in

transcribing an address. **The staff recommends against adding a rule to the proposed law to address that issue.** It seems very likely that an association would check to see whether a returned notice was misaddressed, before doing anything else. It would be in an association's interest to simply correct the error rather than taking the extra (and unnecessary) step of changing the mailing list. The law does not need to manage such fine details of administration.

Curtis Sproul suggests that proposed Section 4055 should provide for redelivery of the failed notice (rather than just providing a rule for delivering future notices). **The staff recommends that the suggestion be implemented.** If proposed Section 4055 seems to sanction simply discarding failed notices, some associations will do just that, rather than bear the cost and hassle of attempting redelivery. The better result would be to send the notice again to the alternate address.

Proposed Section 4055 should be revised as follows:

4055. (a) If a notice to a member is returned by the United States Postal Service marked to indicate that the United States Postal Service is unable to deliver the notice to the member at the given address, the association shall ~~address~~ deliver that notice and any future notices to that member to the address of a separate interest owned by the member.

(b) If electronic delivery of a notice to a member fails, the notice shall be delivered by other means, and the association shall not deliver any future notice to that member electronically, unless the member provides a new address or the association determines that a technical problem with the given address has been corrected.

Member Approvals

Proposed Section 4065 provides a standard for what is meant when a provision of the proposed law requires that a decision be "approved by a majority of all members":

4065. If a provision of this part requires that an action be approved by a majority of all members, the action shall be approved or ratified by an affirmative vote of members representing more than 50 percent of the total voting power of the association, or if the governing documents of an association divide the members into two or more classes for the purposes of voting, by an affirmative vote of members representing more than 50 percent of the voting power in each class that is required to approve the action.

Kazuko Artus asks how that rule would work if some member voting rights have been suspended. See Exhibit p. 74.

The concept of the “voting power” of an association is important and arises in a number of provisions of the proposed law. See, e.g., proposed Section 4580 (quorum for member meeting is one-third of voting power).

Under existing law, the determination of an association’s voting power is left to the association. See Section 1363.03(a)(4); proposed Section 4630(d). **The proposed law should leave the matter in the hands of the association.**

DEFINITIONS

The proposed law includes a number of definitions that govern the proposed law as a whole. The Commission received various suggestions for stylistic improvements to the definitions. For the most part, those will be considered in preparing the draft recommendation and are not discussed in this memorandum. Substantive comments are discussed below.

“Board”

Proposed Section 4085 defines the term “board” as follows:

4085. “Board” means the board of directors of an association.

Bob Sheppard points out that some associations put every member on the board. He is concerned that the proposed law not cause problems for associations that follow that model. See Exhibit p. 234.

Proposed Section 4085 would not preclude that practice.

There are many sections of the proposed law that differentiate between the board and the general membership (as they do under existing law). See, e.g., proposed Section 6120 (member reversal of rule change approved by board). Such sections may be a poor fit for an association that places all members on the board, but it is not clear that they would actually cause any insurmountable problems. It seems likely that the members would simply maintain the fiction of wearing different “hats” in different parts of the process. The statutes could probably be drafted to provide greater efficiency for such associations. **That would represent a change from existing law, which should be studied separately.**

“Board Meeting”

The proposed definition of “board meeting” provoked a number of comments. They are substantive in nature and are discussed under “Board Meetings,” below.

“Common Interest Development”

Proposed Section 4100 restates the definition of “common interest development.” That provision prompted a question and a suggestion.

Kazuko Artus asks how it is possible that the owner of a separate interest could have an interest in “all or part” of the common area, as the definition provides. See Exhibit p. 73. The answer is that existing law defines a condominium project as a CID that consists of a separate interest combined with “an undivided interest in common in a *portion* of real property.” Section 1351(f) (emphasis added). The staff’s understanding is that some condominium projects are developed in phases, with the common area divided into distinct parts. A member may have an interest in one part of the common area, but not another. See also proposed Section 4115 (“condominium” defined).

Michael Hardy suggests that the definition should include a reference to proposed Section 6000 (which continues part of Section 1352). That section provides that recordation of a declaration is a prerequisite to the application of the Davis-Stirling Act.

Conceptually, the suggestion makes sense. However, adding such a reference would reinforce the problems faced by a stock cooperative that does not have a recorded declaration (as discussed above). The staff has recommended that the Commission postpone consideration of that issue. Mr. Hardy’s suggestion seems linked to the problem and should also be set aside for now.

However, the staff recommends that the Commission’s Comment to proposed Section 4100 be revised to include a reference to proposed Section 6000. That would provide useful guidance without adding weight to the legal problem facing stock cooperatives.

Condominium Terminology

Proposed Sections 4115 and 4125 define “condominium” and “condominium project” respectively. In drafting those provisions, the staff restated the existing language, in order to add clarity. Curtis Sproul has offered a number of stylistic

and technical suggestions. See Exhibit pp. 238-39. **The staff intends to examine those suggestions when preparing the draft recommendation.**

Mr. Sproul also answers a question posed by a note following proposed Section 4125. The note asks whether any purpose is served by proposed Section 4125(e), which provides:

An individual condominium within a condominium project may include, in addition, a separate interest in other portions of the real property.

Mr. Sproul doubts that the subdivision serves any real purpose and suggests that it be deleted. In his practice, he has not seen a condominium in which a member owns separate interest property apart from the unit. (There may be exclusive use common area appurtenant to a separate interest, but that is not itself separate interest property.) See Exhibit p. 239.

Even with that input, the staff is reluctant to delete language that is not fully understood, especially in the technically complex definition of a condominium. At worst, the language is harmless, authorizing something that never happens. **The staff recommends that it be retained.**

“Exclusive Use Common Area”

Proposed Section 4145(a) provides as follows:

“Exclusive use common area” means a part of the common area designated by the declaration to be used exclusively by one or more, but fewer than all, of the members. The right of exclusive use is appurtenant to the separate interests of those members.

There were a number of comments on that definition.

Designation of Exclusive Use Common Area

Kazuko Artus points out that requiring that exclusive use common area be “designated by the declaration” is inconsistent with proposed Section 5900, which provides a special procedure for a transfer of exclusive use common area. Nothing in proposed Section 5900 requires a designation in the declaration.

That problem could be solved in one of two ways: (1) revise proposed Section 5900 to require an amendment of the declaration, or (2) adjust proposed Section 4145 to recognize exclusive use common area granted pursuant to proposed Section 5900, as an alternative to “designation by the declaration.” The first approach would provide for more complete title records, but would complicate

the process in ways that might not be consistent with the Legislature’s intention in adding Section 1363.07.

The staff recommends the second approach, which could be implemented by revising proposed Section 4145(a) as follows:

“Exclusive use common area” means a part of the common area, designated by the declaration or pursuant to Section 5900, to be used exclusively by one or more, but fewer than all, of the members. The right of exclusive use is appurtenant to the separate interests of those members.

Appurtenant to What?

Bob Sheppard notes that, in some associations, a right to use exclusive use common area may be appurtenant to one’s general membership rather than to the right to occupy a particular unit. A person who moves from one unit to another would not necessarily lose the right to such exclusive use common area. See Exhibit p. 4. He wonders if existing law is adequate to capture that concept.

The staff does not believe that proposed Section 4145 would preclude that arrangement. Membership in the association is also appurtenant to the separate interest. See proposed Section 5925. So any right established as an incident of membership would ultimately derive from ownership of a separate interest. Proposed Section 4145(a) doesn’t necessarily require that exclusive use common area be appurtenant to one specific separate interest.

Wiring

Proposed Section 4145(c) provides:

Notwithstanding the provisions of the declaration, internal and external communication wiring designed to serve a single separate interest, but located outside the boundaries of the separate interest, are exclusive use common areas allocated exclusively to that separate interest.

Mr. Sheppard wonders whether the reference to “wiring” could be read to exclude nonmetallic transmission media (such as fiber optic cable). See Exhibit p. 5. The staff did some dictionary research and found that the term “wire” does connote metallic composition. The staff could find no good synonym that does not also carry that connotation. Mr. Sheppard suggests “electrical and signal bearing elements.”

A staff recommends a more direct approach. Add the following sentence to the subdivision: “For the purposes of this section, ‘wiring’ includes nonmetallic

transmission lines.” **A similar change would also be made in proposed Section 5710, which also references “communication wiring.”**

“Governing Documents”

Proposed Section 4150 defines the term “governing documents.” It continues Section 1351(j), except that it omits the catch-all phrase “any other documents ... which govern the operation of the common interest development or association.” A note following proposed Section 4150 explains:

This would eliminate any existing uncertainty as to the types of documents affected by provisions that apply to the governing documents. See, e.g., existing Sections 1355 (governing documents may specify procedure for amendment of declaration), 1360.5 (amendment of governing documents triggers pet restriction override), 1368 (seller must provide governing documents to prospective purchaser).

After reviewing the various uses of the term, the Commission found only one instance in which the open-ended meaning seemed appropriate — in the provision authorizing a member to inspect the association’s governing documents. See proposed Section 4700(a)(1). In all other cases, reference to only the declaration, articles, bylaws, and operating rules seemed appropriate.

That approach met with a mixed response.

Opposition to Narrowed Definition

Beth Grimm believes omission of the catch-all would be problematic, in that it would omit “resolutions” and “written policies” that govern the association. See Exhibit pp. 93, 99. Trudy Morrison makes the same point. See Exhibit p. 135. That suggestion actually supports the Commission’s approach. Should all board resolutions be given to a prospective purchaser under Section 1368? Can a board resolution change the procedure for amendment of the declaration under Section 1355?

Curtis Sproul also recommends keeping the catch-all:

We would recommend retaining the language quoted in the Comment (“any other documents which govern, etc”) because many of the more complicated common interest development projects will have other key documents, not mentioned in the list set forth in Section 4150, that are of critical importance to the governance of the project and to the rights and obligations of owners/members. For example, it is not uncommon in a resort or a condominium hotel project for the project to be integrated with

other elements of the overall resort or hotel complex by easements and shared facilities use agreements (recorded) that confer rights of use and enjoyment in favor of the common interest project in adjacent facilities that are outside of the project boundaries. Also, under the proposed, more restrictive, definition of “governing documents” would a declaration of annexation applicable to particular phases (which often contain substantive changes to a declaration, as applied to the phase) be a “governing document”?

Some of the problems noted in the NOTE following Section 4150 are simply examples of poor drafting in the current Davis-Stirling Act. For example, the sentence in Civil Code section 1355(a) stating that the Declaration can be amended pursuant to the governing documents or this title probably should have said, from the outset, “pursuant to its terms or this title” since the provisions for amending a declaration are always included in the declaration, itself.

See Exhibit p. 240.

Bob Sheppard has also pointed out that, in a stock cooperative, the proprietary lease serves as an important governing document. It establishes a separate interest and may include use restrictions. The existing catch-all language would include the proprietary lease; proposed Section 4150 would not.

Kazuko Artus wonders why the definition of “governing documents” excludes condominium plans, final maps, and parcel maps, if those documents are addressed in the chapter entitled “Governing Documents.” See Exhibit p. 75.

Support for the Narrowed Definition

Peter Wilke feels that the change would not cause any problems and would avoid ambiguity. See Exhibit p. 142. The California Association of Realtors feels it would be a “very positive” change, which would help to avoid inconsistent interpretations of the term. See Exhibit p. 175.

Recommendation

The staff believes that the catch-all is problematic for the reasons noted in the proposed law. However, the comments point out significant problems that could result from elimination of the catch-all. As Curtis Sproul and Bob Sheppard note, there are documents that are not listed in proposed Section 4150 that should bind the governance of an association and the rights of its members.

In order to avoid any unintended substantive change, **the staff recommends that the catch-all be restored to the definition.** With that change, the equivalent catch-all language in proposed Section 4700(a)(1) would be deleted as surplus.

☞ “Member”

Existing law uses the terms “member” and “owner” interchangeably. In the interest of uniformity, the Commission chose to use the term “member” in most cases. Proposed Section 4160 defines “member” as follows: “‘Member’ means an owner of a separate interest in a common interest development.”

Kazuko Artus supports that approach, but believes that the meaning of “owner” should also be defined. See Exhibit p. 75. Curtis Sproul makes a similar suggestion, especially in connection with the definition of “exclusive use common area.” See Exhibit pp. 239-40.

The concept of real property ownership is usually clear, but can get complicated at the margins. The definitions proposed by Kazuko Artus and Curtis Sproul illustrate how difficult it would be to try to capture all of the nuances:

“Member” should be defined (1) to include a person who is not a record owner because he or she or it has transferred the title to the separate interest to another as a security for the performance of an obligation or to a trust for which he or she or it serves as a trustee and (2) to exclude the person to whom the title has been transferred in such manners.

See Exhibit p. 75.

The record holder, whether one or more persons or entities, of fee simple title to a separate interest, expressly excluding person or entities having an interest in a separate interest merely as security for the performance of an obligation until such person or entity obtains fee title thereto and those parties who have leasehold interests in a separate interest.

See Exhibit p. 239.

The Davis-Stirling Act does not currently define “owner.” **The staff recommends against adding such a definition, at least without more analysis of all of the possible consequences of doing so.**

Curtis Sproul also suggests that the definition of “member” should include any person who is designated as a member in the declaration, articles, or bylaws. He reports that there are developments in which related entities (e.g., an adjacent resort) has membership rights and is entitled to vote on specified matters. See Exhibit p. 240. To the extent that such arrangements exist, proposed Section 4160 could defeat them, by expressly limiting membership rights to those who own separate interests in the development.

The staff recommends revising proposed Section 4160 as follows:

4160. "Member" means ~~an~~ either of the following persons:

(1) An owner of a separate interest in a common interest development.

(2) A person that is designated as a member in the declaration, articles, or bylaws. The incidents of a membership established under this paragraph may be limited by the document that establishes the membership.

The last sentence of the proposed revision would make clear that a specially created membership may not have all of the rights and duties of a regular member.

"Member Election"

Proposed Section 4163 defines the term "member election" as "a vote of the members on a matter that requires the approval of the members."

Kazuko Artus would like the definition to be expanded to expressly include a matter that is submitted to a vote of the members by the board, even though there is no legal requirement that the members approve the matter. See Exhibit p. 76. The staff believes that the proposed law would encompass that situation. The definition does not say that approval of the members must be required *by law*. If the board decides that a decision must be approved by the members, then approval of the members would be required.

The staff recommends against revising proposed Section 4163.

"Stock Cooperative"

Proposed Section 4190 defines "stock cooperative." It states that the separate interest may be evidenced by a "share of stock, a certificate of membership, or otherwise...."

Mr. Sheppard points out that the right to occupy a separate interest may be conveyed by a lease, and suggests that the term "lease" be added to proposed Section 4190(b). See Exhibit p. 5. **The staff recommends that the term be added as suggested.**

MEMBER BILL OF RIGHTS

The proposed law reserves an empty chapter for a possible future "Member Bill of Rights." It has been suggested that it would be useful to have a simple set

of principles establishing the basic rights of members within an association. Various alternative drafts have been proposed.

The Commission has not studied the question in detail, but thought it best to reserve space in the proposed law for any future “Bill of Rights.”

Curtis Sproul has significant concerns about any broad expansion of the role of members in CID governance. See Exhibit pp. 242-44. In general, his point is that existing law already strikes a good balance between board control and member involvement. Expanded member authority, combined with general member apathy, invites factionalism and dispute.

He seems to be suggesting that the reserved heading would invite the development of the sorts of policies that he opposes.

The staff is inclined against removing the chapter heading. It serves no substantive purpose (and thus causes no substantive problems). The objections seem to be political and symbolic. **The staff recommends against making a change that would be seen as a symbolic rejection of member rights.**

LIMITATION OF RIGHTS

Proposed Section 4420 provides:

4420. Except as expressly provided by statute, the rights of members provided in this chapter may not be limited by contract or by the governing documents.

Proposed Section 4420 is drawn from existing Corporations Code Section 8313, which only applies to provisions that govern reports and records. Proposed Section 4420 would expand the scope of the rule to also include the provisions that govern board and member meetings, elections, director conduct, and managing agents.

A note following proposed Section 4420 invited comment on whether that expansion would create problems. The Commission also invited comment on whether proposed Section 4420 should be *expanded further*, to encompass the entire Davis-Stirling Common Interest Development Act. The response was mixed.

Kazuko Artus supports the application stated in the proposed law (all governance provisions). See Exhibit p. 76.

The California Association of Realtors proposes that the provision be expanded to govern the entire Davis-Stirling Act. See Exhibit p. 176.

Curtis Sproul strongly opposes any expansion of the provision. “That would be nothing more than an invitation to endless frivolous litigation.” See Exhibit p. 244.

Given the mixed response, the staff recommends against making any change to the proposed law on this point.

BOARD MEETINGS

☞ Definition of “Board Meeting”

Existing Civil Code Section 1363.05(f) defines a “meeting” of the board as follows (with emphasis added):

[Any] congregation of a majority of the members of the board at the same time and place to hear, discuss, or deliberate *upon any item of business scheduled to be heard by the board*, except those matters that may be discussed in executive session.

Proposed Section 4090 continues part of that definition, but intentionally omits the italicized language. It would instead provide (with emphasis added):

“Board meeting” means a congregation of a majority of the directors at the same time and place to hear, discuss, or deliberate upon *any item that is within the authority of the board*.

The Comment to proposed Section 4090 explains:

The reference to association business “scheduled to be heard by the board” has been replaced with a reference to any business within the authority of the board. The requirements of this article apply regardless of whether the matters to be considered have been formally scheduled.

As noted, the proposed definition would prevent a board from meeting privately to discuss association business merely by declining to “schedule” the meeting.

Opposition to Proposed Change

Most of the comments that we received on the proposed change were negative. Ross R. Snow indicates that his board meets only once every three months and occasionally needs to discuss business between the formal meetings (with ratification of decisions at the next meeting). He sees no problem with that arrangement. See Exhibit p. 67. Michael Hardy makes a similar point about the need to communicate between meetings. See Exhibit p. 126.

Ralph Cahn notes that “Volunteer Directors are hard to find and have limited time.” He does not believe that the law should preclude informal discussions between board members, so long as decisions are not made outside of a formal meeting. See Exhibit p. 123.

Trudy Morrison is concerned that a strict rule may interfere with ordinary social meetings between board members, thereby further deterring board service. See Exhibit p. 135.

Curtis Sproul writes that the proposed change would be “very ill-advised”:

Under the proposed definition the board members could not get together for any purpose remotely related to the business of the association without having to be in a formal meeting open to the members (other than executive session matters). Long range planning meetings, meetings with experts making presentations on general matters of interest, etc, would all be covered. ... Volunteer directors will be declining to serve in droves.”

See Exhibit p. 238.

Alec Pauluck is also concerned that a strict definition of meeting would interfere with social meetings between board members. See Exhibit p. 259.

Support for Proposed Change

Bob Sheppard believes that the existing definition of “meeting” creates a loophole that is “ripe for abuse.”

Kazuko Artus also welcomes the stricter rule and suggests an elaboration: If a board does meet outside of a formal meeting, it should make certain disclosures to the membership about the meeting. See Exhibit pp. 74-75.

Beth Grimm believes the proposed law would “be an excellent clarifying change” and would like to see all extra-meeting communications prohibited, except in cases of emergency. See Exhibit p. 98.

Peter Wilke believes that an association should follow the same strict open meeting rules that apply to public entities. “Although some might see this as problematic for volunteer directors, don’t forget that those volunteers either know or should know what they’re getting themselves into and as fiduciaries for the association, they have a deeper burden put upon them to follow the rules.” See Exhibit p. 142.

Janet Shaban also writes in support of the stricter approach, in order to promote transparency. See Exhibit p. 222.

Recommendation

The staff believes that existing law provides a significant loophole in the open meeting requirements, but is mindful of the practical problems that would follow from closing that loophole.

At a minimum, changing the law as in proposed Section 4090 would be controversial. It may also be correct that such a change would cause more harm than good, by creating new practical obstacles for volunteer board members.

The staff therefore recommends that proposed Section 4090 be revised to restore existing law:

“Board meeting” means a congregation of a majority of the directors at the same time and place to hear, discuss, or deliberate upon any item that is within the authority of the business scheduled to be heard by the board.

The proper scope of the open meeting requirements could be examined more thoroughly as a separate study.

Technical Issues

Kazuko Artus asks whether the definition should refer to a gathering of members constituting a *quorum*, rather than a “majority of members.” See Exhibit p. 74.

That is a good point. The definition should be based on the number of directors sufficient to conduct business, which may be different from a simple majority. **The staff recommends that the proposed change be made.**

Procedures for Conducting a Meeting

A number of the meeting provisions are derived from existing Corporations Code Section 7211(a). See proposed Sections 4505 (convening or adjourning meeting), 4510 (quorum), 4515 (board action), 4520(d) & (e) (meeting notice), and 4535 (teleconference).

Bob Sheppard argues that those provisions should be subordinate to an association’s governing documents, so that an association can state a different rule from the rule that is provided in the proposed law. See, e.g., Exhibit pp. 5, 229.

The staff agrees. The provisions of Corporations Code Section 7211(a) are expressly subordinate to an association’s articles or bylaws. Removal of that limitation could create a problem for some associations that use special

procedures. **Proposed Sections 4505, 4515, 4520(d) & (e), and 4535 should be revised to subordinate the provisions to an association’s declaration, articles, or bylaws.** The addition of the “declaration” to the list of controlling documents would be in the spirit of existing CID law. Note that proposed Section 4510 does not require revision, because it already contains subordination language.

Board Action

Proposed Section 4515(a) establishes that the action of a majority of the board is the action of the board. It further provides that the governing documents may not set a lower threshold for action by the board.

Bob Sheppard would like it clarified that the governing documents may set a *higher* threshold. See Exhibit p. 5. That rule seems implicit in existing law. **The section should be revised to state expressly that a higher threshold may be set.** That would avoid any uncertainty on the issue.

Senate Bill 528 (Aanestad) and Meeting Agendas

Proposed Section 4520(a) would require that notice of a board meeting “include an agenda for the board meeting.” That requirement would be new.

We received several comments on the proposed requirement, nearly all of them positive. See Exhibit pp. 5 (Bob Sheppard), 77 (Kazuko Artus), 123 (Ralph Cahn), 142 (Peter Wilke), 155 (Sun City), 176 (California Association of Realtors), 221 (Janet Shaban).

However, Trudy Morrison believes that the change would be a major new burden on associations. She suggests that an agenda should only be provided to members who specifically request receipt of agendas. See Exhibit p. 135.

We also received some comments raising technical issues about how the requirement would work in practice. See, e.g., Exhibit pp. 52 (who would prepare the agenda?), 77 (would the requirement preclude addressing last minute business?), 259 (could agenda be modified at meeting?).

As it turns out, events have overtaken this debate. SB 528 (Aanestad) has been enacted into law. See 2007 Cal. Stat. ch. 250. The bill amends Section 1363.05 to require that a board meeting notice include an agenda (using language that is essentially similar to that in the proposed law). The bill would also add the following limitations on the conduct of a board meeting:

- (i)(1) Except as described in paragraphs (2) to (4), inclusive, the board of directors of the association may not discuss or take action on any item at a nonemergency meeting unless the item was placed

on the agenda included in the notice that was posted and distributed pursuant to subdivision (f). This subdivision does not prohibit a resident who is not a member of the board from speaking on issues not on the agenda.

(2) Notwithstanding paragraph (1), a member of the board of directors, a managing agent or other agent of the board of directors, or a member of the staff of the board of directors, may do any of the following:

(A) Briefly respond to statements made or questions posed by a person speaking at a meeting as described in subdivision (h).

(B) Ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities, whether in response to questions posed by a member of the association or based upon his or her own initiative.

(3) Notwithstanding paragraph (1), the board of directors or a member of the board of directors, subject to rules or procedures of the board of directors, may do any of the following:

(A) Provide a reference to, or provide other resources for factual information to, its managing agent or other agents or staff.

(B) Request its managing agent or other agents or staff to report back to the board of directors at a subsequent meeting concerning any matter, or take action to direct its managing agent or other agents or staff to place a matter of business on a future agenda.

(C) Direct its managing agent or other agents or staff to perform administrative tasks that are necessary to carry out this subdivision.

(4) (A) Notwithstanding paragraph (1), the board of directors may take action on any item of business not appearing on the agenda posted and distributed pursuant to subdivision (f) under any of the following conditions:

(i) Upon a determination made by a majority of the board of directors present at the meeting that an emergency situation exists. An emergency situation exists if there are circumstances that could not have been reasonably foreseen by the board, that require immediate attention and possible action by the board, and that, of necessity, make it impracticable to provide notice.

(ii) Upon a determination made by the board by a vote of two-thirds of the members present at the meeting, or, if less than two-thirds of total membership of the board is present at the meeting, by a unanimous vote of the members present, that there is a need to take immediate action and that the need for action came to the attention of the board after the agenda was posted and distributed pursuant to subdivision (f).

(iii) The item appeared on an agenda that was posted and distributed pursuant to subdivision (f) for a prior meeting of the board of directors that occurred not more than 30 calendar days before the date that action is taken on the item and, at the prior meeting, action on the item was continued to the meeting at which the action is taken.

(B) Before discussing any item pursuant to this paragraph, the board of directors shall openly identify the item to the members in attendance at the meeting.

As a general practice, the Commission does not propose substantive changes to recently enacted legislative policy. **The staff recommends that the Commission follow its usual approach in this case.** The substance of SB 528 should be continued without change. The staff will prepare language to incorporate that substance into the proposed law when preparing the draft recommendation.

☞ Meeting Location

Proposed Section 4530 provides:

4530. A board meeting shall be held within the common interest development unless the board determines that a larger meeting room is required than is available within the common interest development. A board meeting held outside of the common interest development shall be held as close as is practicable to the common interest development.

Jeffrey Barnett suggests that the rule is too restrictive, and should be changed to allow a meeting location that is “reasonably close to the development as selected by the board in its good faith discretion.” The point would be to avoid providing a basis for contesting a reasonable board decision as to a meeting location. See Exhibit p. 52.

Trudy Morrison wonders whether the term “practicable” is appropriate. She worries about an association’s ability to afford the rental on public meeting space outside of an association. See Exhibit p. 135.

“Practicable” means “capable of being done, effected, or put into practice, *with the available means*; feasible.” See www.dictionary.com (emphasis added). That should provide an association with the flexibility it needs to address cost concerns. **The staff believes that the language is sufficiently flexible as drafted.**

If the Commission shares Mr. Barnett’s concern that the section might invite disputes, the last sentence could be revised as follows:

A board meeting held outside of the common interest development shall be held as close ~~as is practicable~~ to the common interest development as the board, acting in good faith, determines to be practicable.

If the Commission makes that change, a similar change should be made to proposed Section 4575(c), which states the same location rule for a member meeting.

Alec Pauluck notes that a board may wish to hold a meeting in a distant resort, as a good will gesture to board members for volunteering. See Exhibit p. 259. The proposed law would seem to preclude that practice. The staff believes that is a proper rule. The desire for a junket should not interfere with the members' ability to attend a meeting.

Teleconference

Proposed Section 4535 would authorize the use of teleconferencing in conducting a board meeting, subject to specific procedural requirements. It is drawn from Corporations Code Section 7211, with details borrowed from the governmental open meeting statutes. Gov't Code §§ 11123, 54953.

Curtis Sproul proposes that the option of participating by teleconference be limited to closed sessions, so as not to undermine the openness of meetings. See Exhibit p. 244.

The staff believes that the requirements built into proposed Section 4535 are adequate to preserve the right of members to participate in a meeting. The requirements would be as follows:

- (1) Each director participating in the meeting can communicate with all other directors concurrently.
- (2) Each director participating in the meeting is provided the means of participating in all matters before the board, including the ability to propose or interpose an objection to a specific action taken by the board.
- (3) At least one director is physically present at the meeting location stated in the notice.
- (4) A member attending the meeting at the location stated in the notice can hear and be heard by all directors.
- (5) Any vote taken at the meeting is by roll call vote.

The staff recommends against limiting the scope of proposed Section 4535 to executive sessions.

☞ Executive Session

Proposed Section 4540 provides rules for when part of a meeting may or must be conducted in closed executive session. The provision would continue existing law except that the right of a member to insist on the use of executive session

would be expanded from disciplinary matters involving the member to also include assessment disputes involving the member.

Existing law, as it would be continued in proposed Section 4540(a) allows a board to meet in executive session to consider member discipline and assessment disputes, even if the member who is the subject of the session would prefer that the matter be discussed openly. A note following proposed Section 4540 asked for comment on whether a member should be able to choose to have such matters heard in open session.

Support for Change in the Law

Bob Sheppard suggests that the grounds for executive session should be set by the association, unless they involve member privacy, in which case the decision should be left to the member. See Exhibit p. 6.

Kazuko Artus believes that a member who is the “subject of member discipline and assessment dispute proceedings should be given the discretion to decide whether the proceedings will be conducted in open session.” See Exhibit p. 78.

A subject would prefer open session if he or she or it believes that the board is making an unreasonable proposition or is acting in bad faith, so as to expose the board.

Id.

Ralph Cahn believes that the board should not be able to “force a closed session” on a member. See Exhibit p. 123. Peter Wilke also believes that an executive session should be optional for a member who is the subject of the session. The member may want the proceedings to be open and documented. See Exhibit p. 143. Sun City makes the same general point (Exhibit p. 156) as does Janet Shaban (Exhibit p. 222).

Opposition to Change in the Law

Ross R. Snow supports existing law on this issue and offers reasons why member discipline should be conducted in closed session even if the member prefers it to be open. Either party may become angry and speak carelessly. If the intemperate comments were public, legal consequences might follow. Also, the session might involve the disclosure of facts that the member hadn’t known would be raised and would have preferred to keep private. See Exhibit pp. 67-68.

The California Association of Realtors writes in favor of preserving the existing rule on closed sessions, in order to protect “rights of privacy, confidentiality, and/or personal information....” See Exhibit p. 177.

Recommendation

Most of the comments support changing the law to give a member the choice as to whether discipline or an assessment dispute involving the member are conducted in the open. However, support is not unanimous and the concern raised by the opposition is similar to concerns raised by the Commission when the issue was first discussed: that an open session might breed litigation or compromise privacy in unexpected ways. **The staff recommends that existing law be preserved on this issue.**

☞ **Action by Unanimous Written Assent**

Proposed Section 4545 would provide as follows:

4545. (a) An action required or permitted to be taken by the board may be taken without a meeting, if all directors individually or collectively consent in writing to that action. The written consent shall be filed with the minutes of the proceedings of the board.

(b) For the purposes of this section “all directors” does not include an “interested director” as defined in Section 5233 of the Corporations Code, to the extent that section is made applicable pursuant to Section 7238 of the Corporations Code.

That provision restates existing Corporations Code Section 7211(b).

Opposition to Provision as Drafted

Bob Sheppard opposes the provision: “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.” See Exhibit p. 6. He proposes strict limitations on its use. *Id.*

Kazuko Artus also proposes that the section be limited to specified types of actions. See Exhibit p. 78.

Curtis Sproul suggests that it may be appropriate to limit the provision to matters that would qualify for consideration in a closed executive session. See Exhibit p. 244.

Support for Provision

Beth Grimm believes that the provision is necessary in some situations — where fast action is needed and a formal meeting cannot be held immediately. See Exhibit p. 99.

Michael Hardy supports the provision and believes that it needs to be preserved. “There may be rare instances where the need for board action is so urgent that there is not time to call even an emergency session of the board (or the board members may not be physically available for such a meeting.)” See Exhibit p. 126.

Recommendation

Existing Corporations Code Section 7211(b) clearly authorizes action by unanimous assent outside of a board meeting. That power could be abused. Merely deleting proposed Section 4545 would not solve that problem. The proposed law would also need to expressly provide that a homeowners association does not have the power granted to corporate boards under Section 7211.

That would be a significant substantive change in the law. At a minimum, that change would be controversial. There may well be situations where an immediate decision is needed and a formal meeting (even an emergency meeting) is impractical. In order to use the power, the board must be unanimous in its support of making a decision in that way. That serves as a check on overuse.

The staff recommends against eliminating the power, at least as to corporate boards. A possible compromise position would be to preclude application of the section to an unincorporated association board. That would preserve the precise scope of existing law. However, the staff is not sure that there is a good policy reason for distinguishing between incorporated and unincorporated associations in this regard.

Minutes

Proposed Section 4550 restates provisions of Section 1363.05(d) that govern the preparation and distribution of the minutes of a board meeting.

Proposed subdivision (a) requires the preparation of the “minutes” and does not continue language from the existing provision allowing, as an alternative, the preparation of “minutes proposed for adoption that are marked to indicate draft

status, or a summary of the minutes....” Curtis Sproul sees that as a problematic change, which diminishes the operational flexibility of volunteer boards. See Exhibit p. 245.

The staff sees Mr. Sproul’s point. The simplification of language may have gone too far and cut off useful alternatives. **The staff recommends that the omitted language be restored.**

Proposed subdivision (b) provides that the minutes for any part of a meeting held in executive session “shall include only a general description of the matter considered in executive session.” Bob Sheppard suggests that the rule should be more nuanced. The minutes should describe the decision “to the extent that it does not compromise the privacy that was the lawful basis of going into such session.” See Exhibit p. 6. That would be the most open approach, but it would not provide a bright line rule that boards could rely on. Every decision would be a subjective one, exposing the board to a possible dispute. **The staff recommends that the current rule be retained.**

Janet Shaban believes that the term “general description” is too vague and would like to have greater detail as to what sorts of things can and cannot be included in the minutes for an executive session. See Exhibit p. 222. The term “general description” is from existing law. It is imprecise, but that is probably by design. It gives a board the flexibility to decide what is material and what is private. **The staff recommends against making a change to that language.**

☞ **Civil Enforcement Action**

Proposed Section 4555 provides for a civil action to enforce the statutes governing board meetings. Subdivision (c) of that section provides for asymmetrical fee shifting:

A member who prevails in a civil action to enforce a requirement of this article is entitled to reasonable attorney’s fees and court costs. A prevailing association shall not recover any costs, unless the court finds the action to be *frivolous, unreasonable, or without foundation*.

(Emphasis added).

A note following proposed Section 4555 asked for input on the standard for awarding costs to an association:

Section 1363.09 provides for an award of costs and expenses to the association if the court finds that the requesting member’s action is “frivolous, unreasonable, or without foundation.” That

seems to be aimed at limiting an award of association fees to a case involving a frivolous claim. However, the language may be too broad for that purpose. It allows for an award of fees where the action was “without foundation.” The meaning of that phrase is unclear, but it could be read to encompass any case in which the court finds against the plaintiff. The Commission requests comment on whether it might be better to use language drawn from Code of Civil Procedure Section 1038, which governs an award of fees in a frivolous case brought under the Tort Claims Act. For example: “The court may award reasonable costs and expenses, including reasonable attorney’s fees, to the association if it finds that the action was not brought in good faith and with reasonable cause.” The same issue arises under proposed Sections 4685(e) and 4735(g).

All of the input that we received on this point favors changing the language. Commenters believe that a reference to “good faith” and “reasonable cause” would be clearer and easier for laypeople to understand. See Exhibit pp. 6 (Bob Sheppard), 123 (Ralph Cahn), 143 (Peter Wilke), 178 (California Association of Realtors), 222 (Janet Shaban), 245 (Curtis Sproul).

The staff recommends that proposed Sections 4555, 4685, and 4735 be revised along the following lines:

A prevailing association shall not recover any costs, unless the court finds ~~the action to be frivolous, unreasonable, or without foundation~~ that the action was not brought in good faith and with reasonable cause.

Joint Association

Proposed Section 4560(b) provides as follows:

If two or more associations have consolidated any of their functions under a joint neighborhood association or other joint organization, the meetings of the joint organization are governed by this article.

That language continues part of former Section 1363(i) without substantive change.

Jerome Simonoff has a number of concerns regarding the way in which the Davis-Stirling Act applies to joint organizations:

There presently are Common Interest Developments (CIDs) that include use of common areas that are physically dependent and inextricably entwined with common areas shared by other persons, corporations or other organizations. These other organizations may be apartment house landlords, individual land owners, or other

incorporated or unincorporated organizations. Such areas can be common driveways, parking structures, recreational facilities, security equipment, lobbies, meeting rooms, etc. In many cases these shared common areas are governed, regulated, maintained, and financed by an umbrella organization which may include representatives from the sharing entities. Usually one or more of the CIDs belonging to the umbrella governing structure has some representation but may or may not have effective control over management, finances, or budgeting of this umbrella organization. Unfortunately even though the members of the underlying CIDs would have rights such as “open meetings” and inspection of records of the underlying CID to which the members directly belong, it has been held by some umbrella organizations that these rights do not extend for the underlying CID members to the records and meetings of the umbrella organization. This has led to situations where in effect the umbrella organization takes a position that it can keep its actions hidden from the members while having the right to assess or levy charges on those same members, thus excluding these members from informed participation in the decisions effecting their property and funds.

Mr. Simonoff is concerned that a change in terminology in the proposed law might undermine participation in master or joint associations. See Exhibit p. 62.

Section 1363(i) references a “joint neighborhood association or *similar organization...*” (Emphasis added.) The proposed law references “joint neighborhood association or other joint organization....” **It seems unlikely that the change would result in any substantive difference in meaning, but the staff has no objection to returning to the exact language of existing law (i.e., “similar organization”). That change will be made in preparing the draft recommendation.**

The same change would be made to proposed Section 4750(c), which applies the same substantive rule in the context of record inspection rights.

Mr. Simonoff also proposes the addition of the defined term “master association” and the modification of a number of provisions to make clear that they apply to both a regular association and master association. See Exhibit pp. 62-64 (master association subject to provisions on record keeping, annual reporting and budgeting, and maintenance).

The proposed changes could have far reaching and unexpected substantive effect and should not be adopted without careful study and public comment. **The staff recommends against making those changes at this time.**

MEMBER MEETINGS

We received a number of comments on the provisions governing a member meeting.

Meeting and Voting Procedures

A number of commenters pointed out that the recently enacted election rules are not well coordinated with existing law on member meetings. For example, proposed Section 4575(a) continues language from Corporations Code Section 7510, which provides that, regardless of what the governing documents might say, an association must hold a regular meeting in any year in which a director will be elected “in order to conduct the election....” That rule is at odds with recently enacted law that expressly provides that an election can be conducted entirely by mail, except for the meeting at which the ballots are counted (which can be a *board* meeting, rather than a member meeting). See proposed Sections 4640(e), 4650(c). See Exhibit pp. 102, 156.

The staff recommends that proposed Section 4575(a) be revised to reflect the recent changes in election rules, as follows:

(a) An association shall hold a regular member meeting to transact business that requires action by the members, with the frequency stated in the governing documents. ~~Notwithstanding the governing documents, an association shall hold a regular member meeting in any year in which a director is to be elected, in order to conduct the election and to transact any other business that requires action by the members.~~

There are other comments pointing to inconsistencies between existing meeting rules and the new election rules. They are discussed in their appropriate contexts, below.

Quorum Issues

Proposed Section 4580 states the rules for a quorum at a member meeting:

4580. (a) Unless the bylaws provide otherwise, the quorum for a member meeting is one-third of the voting power of the association, represented in person or by proxy.

(b) An amendment of the bylaws to increase the quorum for a member meeting shall be adopted with the approval of a majority of a quorum of the members (Section 4070).

The section continues part of the substance of Corporations Code Section 7512(a).

Bob Sheppard suggests that an association's governing documents should be able to set a higher bar for amendment of a quorum rule. See Exhibit p. 6. That might make sense for some associations, but it could present a trap for others, which might carelessly lock in unrealistically high approval requirements. That specific concern seems to be underlying the comment from Trudy Morrison, who proposes that the statutory quorum rule should never be overridden by the governing documents. See Exhibit p. 135.

The staff recommends against changing the existing rule. The consequences of doing so have not been studied or publicly reviewed.

A note following proposed Section 4580 requested comment on one minor improvement that seemed uncontroversial. It asked whether the *declaration* and *articles* should also be able to set a quorum that is different from the statutory default. Existing law only allows the bylaws to express such a rule.

We received favorable comment on that proposal. See Exhibit pp. 79 (Kazuko Artus), 178 (California Association of Realtors), 245 (Curtis Sproul). That change would not create a new power to modify the quorum, it would simply increase flexibility as to which type of governing document could be used to do so. **The staff recommends that proposed Section 4580 be revised to allow the default quorum to be overridden by the declaration or articles, as well as the bylaws.**

Percentage of Vote Required for Board Action

Proposed Section 4585(a) provides:

Unless this part or the governing documents require a greater number of votes, an action approved by a majority of a quorum of the members (Section 4070) is the action of the members.

That provision continues part of Corporations Code Section 7512(a).

Beth Grimm suggests that this provision ignores the fact that an existing Corporations Code section sets a different rule for small associations (50 members or less) and larger associations (more than 50 members). See Exhibit p. 103.

The provision that Ms. Grimm seems to have in mind is Corporations Code Section 7222, which sets special rules for the recall of a director. The proposed law does not supersede that section. It would continue to apply, alongside the proposed law. **The issue should be noted for possible future study.**

Breaking Quorum

Proposed Section 4585(b) provides:

A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of members, if any action taken is approved by affirmative votes equaling at least a majority of the number of votes required for a quorum or, if a higher percentage of the vote is required by law or the governing documents, by that higher percentage.

The subdivision continues existing Corporations Code Section 7512(c).

Bob Sheppard objects that the state should not impose that rule on associations. The option of blocking action by walking out of a meeting and breaking quorum is built into the governing documents of some associations and relied on. It should not be taken away by the law. See Exhibit pp. 7, 228.

Essentially, Bob Sheppard is proposing a change to existing law, at least with respect to incorporated associations. He makes a good argument. However, there may also be associations that would not welcome the ability of a small group to shut a meeting down. That would create a situation in which a minority could hold the majority hostage.

One possibility would be to revise proposed Section 4585(b) so that it is subordinate to the governing documents. That would allow an association that wants to be able to break a quorum, to adopt a rule to that effect. The staff sees little harm in that approach, as it would not impose any result on an unwilling association. The only problem would be if the majority used the option to adopt a rule that disadvantages the minority somehow. That seems unlikely, as the ability to break quorum seems to be a tactic that works to the advantage of the minority.

The staff recommends that proposed Section 4585(b) be revised to begin: "Unless the governing documents provide otherwise,"

Teleconference

Proposed Section 4590 authorizes the use of teleconferencing in conducting a member meeting, subject to specific requirements designed to guarantee adequate participation by all members. The provision is drawn from Corporations Code Section 7510(f), with details borrowed from the governmental open meeting statutes. Gov't Code §§ 11123, 54953.

Beth Grimm notes that use of teleconferencing will often be impractical. See Exhibit p. 103. However, the section is permissive. An association would never

be *required* under the section to create the conditions necessary for teleconferencing. **The staff recommends that the permissive nature of the provision be emphasized in its Comment.**

Meeting Notice Content

Proposed Section 4595 governs the notice that must be given before a regular member meeting.

Compatibility with New Election Law

We received some general comments that the references in proposed Section 4595 to voting at the meeting may be incompatible with recent changes in election law, which allows an election to be conducted entirely by mail, without a vote at a member meeting. See Exhibit pp. 104, 135.

However, the new election law does not *preclude* voting at a meeting. It simply provides that voting at a meeting is not required. See proposed Section 4640(e). It is still possible for a vote to be held at a meeting, using the sealed ballot procedure. For that reason, proposed Section 4595 is proper as drafted.

Complicated Rule

Proposed Section 4596(c)(1) & (2) restate existing Corporations Code Sections 7511(f) and 7512(b), which are fairly complicated rules. In restating the provisions, the staff attempted to simplify them. A note following proposed Section 4596 asked for comment on whether the simplification would cause any substantive change.

For reference, proposed Section 4596(c) provides as follows:

The notice of a regular meeting shall state the matters that the board, at the time of the notice, intends to present for action by the members. The members may act on a matter that is not described in the notice, except in the following circumstances:

(1) If the bylaws of the association provide for a quorum of one-third or less of the voting power and less than one-third of the voting power is present, the members shall not act on any matter that was not described in the notice.

(2) The members shall not act on any matter that is not described in the notice and that requires the approval of the members under Section 7222, 7224, 7233, 7812, 8610, or 8719 of the Corporations Code, unless the matter is required to be approved by the unanimous vote of those entitled to vote on the matter, or the general nature of the matter is described in each of the documents waiving notice under Section 4610.

(The provisions referenced in subdivision (c)(2) address removal of a director (7222), filling board vacancies (7224), approving a self-interested transaction (7233), amendment of the articles (7812), dissolution of the corporation (8610), and distribution of assets after dissolution (8719).)

Bob Sheppard notes, correctly, that subdivision (c)(2) is still hard to understand. See Exhibit p. 7. He suggests, as an alternative, a rule that *all* matters must be in the notice in order to be taken up at a meeting, unless there is unanimous consent. *Id.*

That is a much simpler rule. However, it would cut off an association's existing ability to do routine business at meetings without describing the business in the notice. That would be a significant substantive change and would likely be controversial, especially in very large associations where unanimity is effectively impossible.

There was no comment suggesting that the restatement of subdivision (c) would cause any substantive change in the law. **The staff recommend that proposed Section 4596 remain as is.**

Adjournment

Proposed Section 4605 provides for adjournment of a member meeting to another time and place. Carole Hochstatter and Norma Walker ask whether a ballot cast at a meeting would still be valid if the meeting is adjourned to another time. See Exhibit p. 162.

That should not be a problem. An association can conduct the same business after adjournment that it could conduct before adjournment. See 15 Cal. Jur. 3d *Corporations* § 358 (2007).

☞ Court-Ordered Meeting

Proposed Section 4615 provides a judicial remedy when an association is required to hold a member meeting or conduct a written ballot but does not do so. The court may issue summary orders compelling the association to hold the meeting or conduct the election. The provision is drawn from Corporations Code Sections 7510(c)-(d) and 7511(c).

Under proposed Section 4616(e), if the court orders a meeting or election *there is no quorum requirement*. That continues the substance of existing Corporations Code Section 7510(d).

A note following proposed Section 4615 asked for comment on whether the quorum should be automatically waived, or instead, whether the court should simply be authorized to waive or reduce the quorum.

All of those who commented favor authorizing the court to modify the quorum, rather than eliminating it automatically. See Exhibit pp. 33 (Anthony Brown), 79 (Kazuko Artus), 144 (Peter Wilke), 180 (California Association of Realtors), 245 (Curtis Sproul).

The staff recommends that proposed Section 4615(d)-(e) be revised as follows:

(d) The court may issue any appropriate order, including an order that sets the time and place of a meeting and the record date for determination of members entitled to vote, requires that notice of the meeting be delivered, modifies or eliminates the quorum, or specifies the form or content of the notice.

~~(e) If a regular member meeting or a written ballot is held pursuant to a court order issued under this section, a quorum is not required for that meeting or written ballot, notwithstanding any contrary provision of this part or the governing documents.~~

☞ Court-Ordered Modification of Meeting Requirements

Proposed Section 4620 provides a judicial remedy that can be used to request modification of meeting requirements (such as a quorum or member approval requirement) when it is “impractical or unduly difficult” to conduct a member meeting or obtain a necessary member approval:

4620. (a) A director, officer, or member may petition the superior court for an order modifying any requirement of this part or the governing documents that governs the conduct of a member meeting or a written ballot.

(b) If the court determines that it would be impractical or unduly difficult for the association to conduct a member meeting or otherwise obtain the consent of the members, the court may order that a member meeting or written ballot be held and may, to the extent it is fair and equitable to do so, modify or dispense with any provision of this part or of the governing documents that relates to the conduct of a member meeting or written ballot, including any quorum requirement or provision requiring a specified number or percentage of votes for member approval of a matter.

(c) An order issued pursuant to this section shall provide for a method of notice that is reasonably designed to give actual notice to all parties who are entitled to notice of the member meeting or written ballot. Compliance with the method of notice ordered by the court need not result in actual notice to all persons who are entitled to notice.

(d) To the extent practical, an order issued pursuant to this section shall limit the subject matter presented for member approval to the following matters:

(1) An amendment of the governing documents that would or might enable the association to manage its affairs without further resort to this section.

(2) Dissolution, merger, sale of assets, or reorganization of the association.

(3) A reasonable amendment of the declaration.

(e) In a proceeding under this section, the court may determine who is a member or director of the association.

(f) Member approval of a matter that is obtained in compliance with the requirements of an order issued under this section is valid and shall have the same force and effect as a member approval that complies with all of the requirements of this part and the governing documents.

The provision continues the substance of Corporation Code Section 7515.

Section 1356 provides a similar procedure for court modification of meeting rules when attempting to amend the declaration. In the interest of procedural simplification, the general substance of Section 1356 is subsumed within proposed Section 4620(d)(3).

Kazuko Artus suggests that some of the specific procedural requirements of Section 1356 (subdivisions (a)-(c)) should be continued in the new provision, “to ensure that members or the association opposing the proposed action will have an opportunity to be heard by the court and the court will have an opportunity to review all relevant materials.” See Exhibit p. 80.

The content of Section 1356(a)-(c) is discussed below.

Scope Limitation

Section 1356(a) limits the judicial remedy to a reasonable amendment declaration where *more than 50 percent of the voting power is required to amend the declaration*.

That restriction could be preserved by revising proposed Section 4620(d)(3) as follows:

(d) To the extent practical, an order issued pursuant to this section shall limit the subject matter presented for member approval to the following matters:

...

(3) A reasonable amendment of the declaration, if more than 50 percent of the voting power is required to amend the declaration.

Although it would add to the complexity of the law, that would be the more conservative approach. Given that the issue was raised as a substantive concern, **the staff recommends making that change.**

Documentation

Section 1356(a) & (c) spell out detailed documentation requirements for filing a petition. The staff believes that the evidentiary burden imposed on the petitioner under the Corporations Code and proposed Section 4620 (to show that a proposed declaration amendment is reasonable, that the meeting rules are unduly impeding the amendment, and that it would be fair and equitable to modify the meeting rules) would lead to much the same substantive result as the detailed documentation requirements. Under either rule, the petitioner would produce the same sorts of documents to support the petition.

The staff prefers the simpler approach of the Corporations Code: simply state the petitioner’s burden and leave it to the petitioner to produce the necessary evidence. A detailed list would be unnecessarily cumbersome, impose requirements that would not make sense in some cases, and set a potential trap for a petitioner who does not fully comply. For example, Section 1356(a)(1) requires that the petitioner provide “the governing documents.” As discussed above, the scope of the “governing documents” is not entirely clear. Does it include a board resolution? A parcel map? It clearly includes the operating rules. The Commission has been informed that in a large association, the operating rules may run to hundreds of pages. Could a court order be challenged if the petitioner failed to include all of the governing documents?

Hearing

Section 1356(b) requires a hearing. That is a significant substantive difference from the proposed law. A hearing would allow members who disagree with the board’s action to present their arguments to the court. That would also produce documentation that weighs against granting the petition (which would further obviate the need for detailed documentation rules). If the board fails to get member assent because a proposal is unpopular with most members, the members should have an opportunity to apprise the court of that fact.

The staff recommends that the following language be added to proposed Section 4620(a):

On filing the petition, the court shall set the matter for hearing. The petitioner shall provide general notice of the hearing, including a copy of the petition.

That would provide the members with a meaningful opportunity to be heard on a potentially important matter.

MEMBER ELECTIONS

We received a number of comments on the member election provisions, including a general comment from the California Association of Retired Americans (“CARA”), cautioning the Commission against disturbing carefully negotiated legislative compromises on the subject:

CARA’s major concern is that the CLRC recommendations disturb the agreements arrived at over the course of three years worth of negotiations by all the stakeholders in association elections. The negotiating sessions were presided over by the office of Senator Jim Battin. CARA would oppose any recommendations that weaken these agreements.

See Exhibit p. 161. That is an important consideration. The Commission should be particularly cautious about making substantive changes to existing election laws.

Election Rules

Proposed Section 4630 requires that an association’s “governing documents” provide rules governing specified aspects of the election procedure. The provision restates part of Section 1363.03(a)(3)-(5) with one significant change. Existing law requires that the “operating rules” address those subjects. Thus, the proposed law would change existing law, by allowing the election rules to be expressed in any form of governing document (e.g., the declaration or bylaws). A note following proposed Section 4630 asks for comment on whether that would cause a problem.

CARA strongly objects to the change:

Of special concern is disturbing the agreement that election operating rules shall govern elections. SB61/SB1560 requires that election operating rules are to be developed under one of the most critical pieces of legislation sponsored by the CLRC itself, i.e. Fairness in Association Rulemaking, authored by Assembly member Patricia Bates [R-Laguna Niguel.]

Operating Rules, as the CLRC has made clear, are to be developed jointly by association members and the CID board. The purpose of having members and boards develop the operating rules together is to prevent -- or at least minimize -- post-election disputes. Dispute prevention itself has been another CLRC priority.

Subsequent to the signing of the new elections law by the Governor, Senator Battin's office has made clear -- in letters and in public statements -- that it is not necessary to amend an association's CC&Rs or by-laws in order to accommodate SB 61/SB1560. In fact, the reverse is true: operating rules are to be developed within the framework of an association's existing bylaws and CC&Rs.

Among its several purposes, operating rules resolve questions and issues which may not be addressed in the HOA's governing documents, e.g. who retains physical custody of the ballots? Where are the ballots to be preserved? How does a member obtain a duplicate ballot? Who has custody of the voter registration lists?

The point that CARA wants to stress to the Commission is that negotiations over the new elections law were carried out over a period of three years by the stakeholders. They were long and difficult, as Senator Battin's office will attest. CARA would strongly oppose any recommendations that disturb our agreements over proxies, selection of the Inspector of Elections, quorums, nominations from the floor, secret ballots and all the other elements of Senator Battin's election legislation.

See Exhibit pp. 161-62. See also Exhibit p. 136 (Trudy Morrison).

The Commission also received comments supporting the approach taken in the proposed law (allowing election rules to be expressed in any form of governing document, including operating rules). Sun City writes: "We support allowing election rules to be promulgated in any of the governing documents. In fact, part of the rules governed by existing law appears in our bylaws." See Exhibit p.156. See also Exhibit p. 245 (Curtis Sproul).

The staff recommends that the provision be revised to follow existing law on the issue; the election rules should be expressed only in the operating rules. Not only should we be taking a particularly conservative approach to changing the law in this area, but the staff sees merit in CARA's concern. Requiring that election rules be expressed in the operating rules will guarantee that there is a dialog on the issues, between the board and the membership. Even if there are already some rules stated in other governing documents, the Legislature's intent could well have been to require that an association *reconsider* how those rules would fit into the comprehensively reworked statutory rules.

Election Inspector

Proposed Section 4635 provides rules for the selection of an election inspector. It restates a number of provisions from Section 1363.03.

Disqualification of Certain Persons

Certain persons are disqualified from serving as an election inspector, including a current director, a candidate for office, an employee or contractor of the association, and a person who is “related” to a director or candidate. See proposed Section 4635(c).

A note following proposed Section 4635 asked whether a relative of an employee or contractor should also be disqualified, and whether the meaning of “related to” should be clarified.

We received a number of comments in support of revising the law so that a relative of *any* of the types of disqualified persons would also be disqualified. We also received support for clarifying the meaning of “related to.” Some commenters suggested that the term should include a cohabitant or business partner. See generally Exhibit pp. 80 (Kazuko Artus), 136 (Trudy Morrison), 144 (Peter Wilke), 156 (Sun City), 181 (California Association of Realtors), 246 (Curtis Sproul).

There was no opposition to making such changes.

Existing Code of Civil Procedure Section 229(a) provides that a party may challenge a juror for bias if the juror is related to a party by “consanguinity or affinity within the fourth degree....” “Consanguinity” is relation by “blood” and “affinity” is relation by virtue of marriage. See Black’s Law Dictionary (8th Ed. 2004) (“consanguinity”); Code Civ. Proc. § 17 (“affinity”).

Surprisingly, California law does not provide a clear method of calculating the degree of consanguinity or affinity. Former Civil Code Section 1393 used to provide a rule:

In the collateral line the degrees are counted by generations from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and nephew in the third degree; cousins-german in the fourth, and so on.

See *Robinson v. Southern Pac. Co.*, 105 Cal. 526, 557, 38 P. 94 (1894). In other words, degrees are counted as steps up and down through lines of ancestry and descent;

lateral steps are not allowed. It is not clear to the staff whether a spouse is counted as a step, or whether affinity means that a person stands in the shoes of his or her spouse for the purpose of counting degrees of affinity.

It is unrealistic to expect that a layperson (or even most attorneys) would know how to calculate a degree of consanguinity or affinity. **The staff recommends that proposed Section 4635(c) be revised using much simpler terms:**

(c) The following persons may not be selected as an election inspector:

- (1) A director.
- (2) A candidate for the office that is the subject of the election.
- (3) ~~A person who is related to a person identified in paragraphs (1) or (2).~~

(4) Unless the governing documents expressly provide otherwise, an employee or contractor of the association.

(4) A person who is the parent, grandparent, child, grandchild, brother, sister, spouse, domestic partner, uncle, aunt, niece, nephew, or first cousin, whether by blood, marriage, domestic partnership, or adoption, of any person who is disqualified under this subdivision.

The proposed list of relations is not the same as any rule based on the traditional counting of degrees of consanguinity, but it has the significant advantage of being understandable.

The staff recommends that the Commission consider studying, as a future topic, the general question of calculating degree of consanguinity under California law. There are a number of provisions that rely on the concept, but no clear guidance on what it means.

The staff understands the appeal of adding a business partner or cohabitant to the list of disqualified persons, but is concerned that the terms would be hard to define with precision and could lead to disputes.

Kazuko Artus suggests that an election inspector be required to certify that he or she is not disqualified. See Exhibit p. 80. Again, the suggestion makes sense, but the staff is concerned about straying too far from existing law in the election provisions. Also, the more formal the process is, the more likely that someone will attempt to overturn an election on the basis of a purely procedural error. We should not be creating new grounds for litigation.

On a related point, Beth Grimm believes that the provision disqualifying an employee or contractor (except as otherwise provided in the governing

documents) would cause serious problems. The staff believes she has misread the proposed law. Both the proposed law and Section 1363.03(c)(2) allow an employee or contractor to serve as election inspector if authorized in an operating rule. That should provide sufficient flexibility.

“Independent Third Party”

Section 1363.03(c) requires that an election inspector be an “independent third party” which it defines as follows:

For the purposes of this section, an independent third party includes, but is not limited to, a volunteer poll worker with the county registrar of voters, a licensee of the California Board of Accountancy, or a notary public.

By using the “includes, but is not limited to” construction, the sentence defines a completely open class. Its only effect is to provide illustrative examples of the sorts of people that the Legislature has in mind.

In restating that provision, the Commission attempted to distill out the principle underlying the choice of examples and state it expressly to provide more guidance. Thus, proposed Section 4635(b) provides:

An election inspector shall be an independent third party, and may include a person with experience administering elections or with special evidence of integrity, such as a volunteer poll worker with the county registrar of voters, a licensee of the California Board of Accountancy, or a notary public. Except as provided in subdivision (c), a member of the association may serve as election inspector.

Beth Grimm finds that formulation objectionable:

As to the comments about “a person of higher integrity,” I [imagine] there will be all sorts of comments. That is rather an unnecessary slap on the intelligence and professionalism of many, many people. The language should be stricken simply because of its false implication that others not in the professions or positions mentioned are of less integrity.

In drafting that language, it was not the staff’s intention to imply that the listed persons have some unique claim to the qualities described. The words “such as” were meant to indicate that the list was illustrative rather than exclusive.

Ms. Grimm's concern does expose one potential problem with the section. If the provision is read as requiring some concrete *evidence* of experience or integrity, some perfectly acceptable candidates might be disqualified.

In order to avoid creating any overly strict limitations, the staff recommends that proposed Section 4635(b) be revised to more closely track existing law:

An election inspector shall be an independent third party, ~~and may include, a person with experience administering elections or with special evidence of integrity, such as~~ including, but not limited to a volunteer poll worker with the county registrar of voters, a licensee of the California Board of Accountancy, or a notary public. Except as provided in subdivision (c), a member of the association may serve as election inspector.

Standard of Care

Both Section 1363.03 and proposed Section 4635(e) require that an election inspector act impartially and in good faith, "to the best of the election inspector's ability."

That is an oddly subjective standard, which would seem to excuse incompetence by an incompetent. Bob Sheppard suggests that the standard be changed to an objective standard of "reasonable care." See Exhibit p. 7.

The staff recommends against that suggestion. Not only is the standard the product of a recent legislative compromise, it is drawn from Corporations Code Section 7614(c). It appears that the standard has been in widespread use without causing any apparent problems.

☛ Scope of Secret Ballot

Proposed Section 4640(a) states the scope of application of the statutory double-envelope balloting procedure. The provision continues Section 1363.03(b) without substantive change.

The Commission had considered expanding the scope of application, but was convinced that doing so might have unintended consequences and would disturb the compromise struck by recent legislation adding and amending the section.

Unfortunately, a staff note drafted before that decision was inadvertently kept in the tentative recommendation when it should have been deleted. It erroneously states that the proposed law would expand the scope of application

of the double-envelope procedure. That error caused some confusion, which the staff regrets.

A number of the comments advocated expanding the application of the double-envelope procedure, in the interest of procedural simplicity and uniformity. Having two different procedures for different types of elections is potentially confusing. See generally Exhibit pp. 7 (Bob Sheppard), 127 (Michael Hardy), 136 (Trudy Morrison), 152 & 157 (Sun City), 246 (Curtis Sproul).

The staff recommends against expanding the *mandatory* application of the procedure. Doing so might impose an inappropriate procedural burden in elections that can properly be handled less formally.

However, Beth Grimm offers an interesting compromise. She suggests that an association should be able to adopt the statutory procedure for use in whatever elections it pleases (in addition to those cases where it is mandatory). See Exhibit p. 107. In all likelihood, an association already has that option. An association is required to adopt election rules and there is nothing in the statute that precludes borrowing the double-envelope procedure for specified types of elections (or all elections). It would then be up to each association to decide the extent to which expanded application would make sense. All of the efficiencies of expanded application could be realized without the risk of unintended negative consequences that might follow from an expanded mandatory rule.

The staff recommends that proposed Section 4640 be revised as follows:

4640. (a) This section governs a member election on any of the following matters:

- (1) Assessment approval.
- (2) Director election or removal.
- (3) Amendment of the governing documents.
- (4) The grant of exclusive use of common area.
- (5) Any other matter that is expressly identified in the operating rules as being governed by this section.

Relationship Between Double-Ballot Procedure and Corporations Code

Proposed Section 4025 lists the provisions of the Corporations Code that are inapplicable to a CID. That avoids confusion and overlap. The Corporations Code provisions on member meetings and elections are mostly preempted. See proposed Section 4025(b)(2)-(3).

Sun City asks whether the application of Corporations Code Section 7513 should be expressly preserved for those elections that are not conducted

pursuant to the double-envelope procedure. Section 7513 authorizes an election by mailed ballot, without a member meeting.

That is a sensible suggestion. It should be noncontroversial, as it preserves flexibility outside of the scope of the recent legislation. **The staff recommends adding a subdivision (f) to proposed Section 4640, as follows:**

(f) A member election that is not conducted pursuant to this section may be conducted as provided in Section 7513 of the Corporations Code.

Determining Quorum

Proposed Section 4620(e) provides that, for the purposes of determining the existence of a quorum, a ballot received by the election inspector “by mail” is treated in the same way as a vote cast at a meeting.

Kazuko Artus suggests that the words “by mail” be deleted. Any ballot received by the election inspector, by whatever method, should be counted for determining a quorum. See Exhibit p. 82. This is a good point. An association might allow personal delivery of ballots to an election inspector. There is no reason to exclude such ballots from the quorum count. **The staff recommends that the proposed change be made.** It would seem to be a noncontroversial improvement.

Form of Ballot

The basic principle of the double-envelope model is that the ballot does not identify the voter, and is sealed within an envelope that does not identify the voter, which is then sealed within an envelope that does identify the voter. See proposed Section 4620(b).

This allows the election inspector to validate the voter’s identity from the outside envelope, and then set the inside envelope aside for later counting. When that counting occurs, there will be no way to determine who cast which vote.

It is not clear how that system would work if a member can cast more than one vote, or if members are divided into different classes for the purposes of voting. The Commission considered that problem and decided that it was too thorny for easy statutory resolution, especially when the ink is not yet dry on the hard-fought statute that created the system.

Anthony Brown writes to suggest that a member with multiple votes should receive multiple ballots, which would then be cast in multiple double-envelope wrappers. See Exhibit p. 33. That may be what some associations are doing to

address the problem, and there is nothing that precludes that approach in the statute. **However, the staff still recommends against attempting to solve the operational problems by statute at this time.**

Beth Grimm notes another operational problem. The existing procedure requires that a member sign the outside envelope. See proposed Section 4640(c)(3). That raises identity theft concerns, as those who handle the envelope will have the name and address of the person, along with a signature sample. Some members will decline to vote rather than mail a signed envelope. Beth Grimm proposes that unsigned ballots should be counted, unless an association adopts some other form of validation (like another envelope!). See Exhibit p. 105.

The signature requirement was clearly intended as the principle means of authenticating the identity of the member casting the ballot. There is no obvious straightforward substitute. Simply removing the requirement would probably be controversial and disrupt the balance struck in the recent legislation. **The staff recommends against attempting to solve the problem at this time.**

In-Person Voting

The Commission did propose an alternative procedure to be used when ballots are cast in person. See proposed Section 4645. It would avoid many of the operational problems arising from differential voting power and the need to authenticate a member's identity. It would be a fairly significant departure from the recently enacted statutory scheme. The Commission invited comment on its merits.

The reaction was not good. Kazuko Artus suggests that parts of the procedure might be used simply as a method of delivering sealed ballots to an election inspector. See Exhibit p. 82.

Michael Hardy finds the provision confusing:

While I can see the benefit of Section 4645, especially for smaller associations, I think it adds another level of complexity to an already complex statutory scheme. Less confusion would be generated if Section 4640 were designated as the only acceptable procedure for association elections, at least for the four types of elections identified in that section.

Jeffrey Barnett supports the proposed procedure. See Exhibit p. 52.

The staff recommends that proposed Section 4645 be deleted. It is too significant a deviation from existing law to adopt without a strong consensus that it would be beneficial overall.

Counting Ballots in “Public”

Proposed Section 4650 provides rules for counting ballots in a member election. It continues existing language that requires that the ballots be counted “in public” at an open meeting of the board or the members. A note following Section 4650 asked for comments on the merits of that requirement.

Most of the comments were opposed to the requirement. An association is a private group, and many felt that the meeting should be open only to association members. The general public has no interest in observing the vote of a private organization. See Exhibit p. 33 (Anthony Brown), 68 (Ross Snow), 110 (Beth Grimm), 123 (Ralph Cahn), 128 (Michael Hardy), 136 (Trudy Morrison), 246 (Curtis Sproul).

However, we received a few comments in support of the requirement. “Free and fair elections have nothing to hide.” See Exhibit p. 144 (Peter Wilke). The rule allows non-member residents (such as a tenant of an owner) to attend, which causes no harm. See Exhibit p. 157 (Sun City). A prospective buyer may want to observe the process, or a current member may want legal counsel on hand. See Exhibit p. 223 (Janet Shaban).

Given the division of opinion on the issue, with reasonable arguments on both sides, **the staff recommends against changing existing law on this issue.**

Verification of Ballots

Proposed Section 4650(b) provides as follows:

Prior to opening and counting a ballot, the election inspector shall verify the identity, eligibility to vote, voting power, and voting class of the member who cast the ballot. A decision to accept or reject a ballot is governed by Section 7517 of the Corporations Code.

The first sentence of the provision restates part of the substance of Section 1363.03(f). The second sentence is an express recognition of the Corporations Code provision that governs the acceptance or rejection of ballots.

Kazuko Artus suggests that it would be easier on the reader to reiterate the substance of Section 7517, rather than incorporate it by reference. See Exhibit p. 82. In considering the extent to which the proposed law should reiterate the Corporations Code, the Commission decided to take a moderate approach. In areas where there is considerable overlap or inconsistency, language would be moved into the Davis-Stirling Act and the Corporations Code source would be

expressly preempted. However, parts of the Corporations Code that stand well on their own and do not overlap with provisions of the Davis-Stirling Act would be left undisturbed. Section 7517 falls into the latter category. **The staff recommends against the proposed drafting suggestion.**

Kazuko Artus is specifically concerned that language in Section 7517 that authorizes *officers* to reject ballots is inconsistent with the intent of the proposed law, that the *election inspector* make those decisions. That is a good point. **The staff recommends that proposed Section 4650(b) be revised as follows:**

Prior to opening and counting a ballot, the election inspector shall verify the identity, eligibility to vote, voting power, and voting class of the member who cast the ballot. A decision by the election inspector to accept or reject a ballot is governed by Section 7517 of the Corporations Code.

Beth Grimm is concerned that it would often be a practical impossibility for an election inspector to “verify the identity” of a voter. The staff believes that verification could be achieved by checking the signature of the voter against a signature log, without too much burden. In fact, Section 1363.03(f) requires verification of the member’s “information and signature....”

In any event, consistent with our conservative approach to the election provisions, **the staff recommends that the word “identity” be replaced with the words “information and signature” as in existing law.** Ms. Grimm could be correct that the wording change in the proposed law would impose a stricter burden than exists under the current wording.

Campaign Information

Proposed Section 4670 restates existing provisions on the obligations of an association to provide candidates and advocates with equal access to association meeting space and media. See Sections 1363.03(a)(1)-(2), 1363.04.

Immunity of Association

Proposed Section 4670(b) includes a new sentence: “An association is not liable for campaign related information provided by a candidate or advocate pursuant to this subdivision.” A note following proposed Section 4670 asks for comment on that addition:

The last sentence of proposed Section 4670(b) is new. It provides express immunity from liability for information that must be provided under this section. That immunity is consistent with Corporations Code Section 7525. Section 7525 also provides for

indemnification of the association by any person who submits campaign information. The Commission invites comment on whether such a provision should be preserved in the proposed law.

Trudy Morrison believes that the immunity language should be kept in the proposed law. See Exhibit p. 136. Curtis Sproul agrees. See Exhibit p. 246.

The California Association of Realtors supports expansion of the provision, to require indemnification of the association by the person providing the campaign material. "This is justified by the privilege extended by the [association] to the candidate in publishing campaign materials." See Exhibit p. 183.

The staff recommends that the new sentence be retained as drafted. Without a stronger consensus for adding indemnification language, such a substantively significant change should not be made to the proposed law.

"Campaign Related" Information

Proposed Section 4670 provides rules relating to "campaign related information." Subdivision (d) of the section defines that term as follows:

For the purposes of this section, "campaign related information" includes, but is not limited to, the following information:

- (1) A statement advocating the election or defeat of a candidate in a pending member election.
- (2) A statement advocating the passage or defeat of a proposal at issue in a pending member election.
- (3) Information that includes the photograph or name of a candidate within 30 days before an election.

That definition restates part of the substance of Sections 1363.03(a)(1)-(2) and 1363.04(b).

Curtis Sproul is concerned that the restatement may change the meaning. Section 1363.03 requires specified types of access "for purposes reasonably related to the election." He worries that the requirement of a reasonable relation to an election may be lost in proposed Section 4670(d), especially because the definition is framed as a nonexclusive list. See Exhibit p. 246.

In order to avoid any ambiguity or unintended change in meaning, **the staff recommends that proposed Section 4670(d) be revised as follows:**

For the purposes of this section, "campaign related information" ~~includes, but is~~ means information that is reasonably related to a pending election, including, but not limited to, the following information:

(1) A statement advocating the election or defeat of a candidate in a pending member election.

(2) A statement advocating the passage or defeat of a proposal at issue in a pending member election.

(3) Information that includes the photograph or name of a candidate within 30 days before an election.

That would help to clarify the meaning of the provision and should be noncontroversial. As noted, existing law already limits required access to purposes that are “reasonably related” to an election.

The inclusion of the word “pending” would add a sensible time constraint, which would address a gap in the statute identified by Beth Grimm. See Exhibit p. 157. Beth Grimm makes other suggestions for improvements to existing law on this issue. Those suggestions have been noted for possible future study.

Nomination at Meeting

Proposed Section 4665 provides general rules for the nomination of candidates. Proposed subdivision (b) provides: “The governing documents shall not prohibit self-nomination.” Carole Hochstatter and Norma Walker suggest that the subdivision be revised along the following lines: “The governing documents shall ~~not prohibit~~ permit self-nomination.” The difference is subtle, but could be significant. An association might decline to accept self-nomination on the grounds that the governing documents do not expressly permit it. That would be contrary to the plain intent of existing law. **The staff recommends that the change be made.**

Jerome Simonoff is concerned that proposed Section 4665(c), which permits nomination from the floor if an election is held at a member meeting, would be defeated by proposed Section 4640(d), which provides that a ballot is irrevocable once it is received by the election inspector. See Exhibit p. 72. That could be a problem if an election is a mix of mailed ballots and voting at a meeting. Those who mailed ballots before the meeting would be unable to change their minds to vote for a person nominated at the meeting. The staff sees no simple fix for that problem that would not potentially upset the compromise struck in enacting the election statute. **The problem should be noted for possible future study.**

Cumulative Voting

Proposed Section 4675(d) provides as follows:

Notwithstanding Section 7615 of the Corporations Code, if the governing documents of an association permit the use of cumulative voting, cumulative voting shall be used by the association in any election of a director or other officer.

That language is new and is intended as a more practical approach than the one provided in Corporations Code Section 7615(b), which reads:

No member shall be entitled to cumulate votes for a candidate or candidates unless the candidate's name or candidates' names have been placed in nomination prior to the voting and the member has given notice at the meeting prior to the voting of the member's intention to cumulate votes. If any one member has given this notice, all members may cumulate their votes for candidates in nomination.

The point of the proposed new rule would be to avoid the need for a triggering member request. It may be impractical to give such a request "at the meeting prior to the voting" if votes are held entirely by mail. A note following proposed Section 4675 asked for comment on the proposed approach.

Bob Sheppard opposes the change. He feels that an association should not be *required* to use cumulative voting merely because its governing documents *permit* cumulative voting. Language permitting cumulative voting may have been added to the governing documents at the insistence of the Department of Real Estate and may not reflect the membership's preferred approach. Amendment of the governing documents to remove the authority may be costly. See Exhibit pp. 7, 231. Anthony Brown is generally supportive of the proposed rule, but worries about the cost for large associations, where a large number of cumulative votes would need to be tallied. See Exhibit p. 33.

The proposed rule is supported by Jeffrey Barnett, Beth Grimm, Carole Hochstatter, Norma Walker, and the California Association of Realtors. See Exhibit pp. 52, 108, 164, 183.

Trudy Morrison suggests that cumulative voting should only be permitted during the period of developer control. Once the members control the majority of votes, there is no longer a need for minority protection devices such as cumulative voting. See Exhibit p. 136. Curtis Sproul suggests that cumulative voting should be prohibited except where it is expressly authorized by the governing documents. "Particularly with the secret ballot voting rules, cumulative voting is a mess." See Exhibit p. 247.

Most of the comments support the proposed rule. However, the objections raised by Bob Sheppard are reasonable. Also, the general concerns raised by Trudy Morrison and Curtis Sproul weigh against any expansion of the use of cumulative voting.

Given the lack of stronger agreement that the reform would be beneficial, the **staff recommends that proposed Section 4675(d) be deleted.** The use of cumulative voting would continue to be governed by Corporations Code Section 7615, on an election by election basis. That provision *could* cause problems, but we have not yet heard concrete examples of it doing so.

☞ **Judicial Enforcement**

Proposed Section 4685 provides for judicial enforcement of the election provisions. It restates part of the substance of Section 1363.09.

As indicated in the note following proposed Section 4685, the remedy provided in the Davis-Stirling Act seems to be intended to preempt the similar remedy provided in Corporations Code Section 7616. The note asks whether any part of Section 7616 should be incorporated into the Davis-Stirling Act remedy.

In response, Michael Hardy points out that Section 7616 provides an expedited procedure. Section 7616(c) provides:

Upon the filing of the complaint, and before any further proceedings are had, the court shall enter an order fixing a date for the hearing, which shall be within five days unless for good cause shown a later date is fixed, and requiring notice of the date for the hearing and a copy of the complaint to be served upon the corporation and upon the person whose purported election or appointment is questioned and upon any person (other than the plaintiff) whom the plaintiff alleges to have been elected or appointed, in the manner in which a summons is required to be served, or, if the court so directs, by registered mail; and the court may make such further requirements as to notice as appear to be proper under the circumstances.

Mr. Hardy recommends adding something similar to the proposed law. Rapid adjudication would help to minimize any disruption that a disputed election would bring.

That is a good point. The staff sees no reason why a CID should not have the same expedited procedure that is available to other nonprofit mutual benefit corporations. **The staff recommends that a provision along the lines of Corporations Code Section 7616(c) be added to proposed Section 4685.** If it

turns out that such a provision is controversial, it could be withdrawn before the recommendation is finalized.

The staff also recommends that proposed Section 4685 be revised to use more conventional language in describing a frivolous action, as discussed in connection with proposed Section 4555 (enforcement of open meeting rules), above. There is support for that change. See Exhibit pp. 144 (Peter Wilke), 184 (California Association of Realtors), 222 (Janet Shaban), 245 (Curtis Sproul).

REMAINING ISSUES

We also received comments on the following topics:

- Record Inspection
- Record Keeping
- Annual Reports
- Director Standard of Conduct
- Managing Agents
- Government Registry
- Disciplinary Action
- Internal Dispute Resolution
- ADR Prerequisite to Civil Action
- Civil Actions
- Accounting
- Use of Reserve Funds
- Reserve Funding
- Assessments
- Maintenance

Comments on those topics will be discussed in a supplement to this memorandum or in a subsequent memorandum.

Respectfully submitted,

Brian Hebert
Executive Secretary