

Study H-855

October 26, 2007

Fourth Supplement to Memorandum 2007-47

**Statutory Clarification and Simplification of CID Law
(Material Received at Meeting)**

The following material was received by the Commission at the meeting on October 26, 2007, in connection with Study H-855 on Statutory Clarification and Simplification of CID Law, and is attached as an Exhibit:

- Bob Sheppard, Walnut House Cooperative, Berkeley (10/26/07) *Exhibit p.*1

Respectfully submitted,

Brian Hebert
Executive Secretary

MEMO

From: Bob Sheppard, Walnut House Cooperative, Berkeley
To: California Law Review Commission
Re: Comments on First Supplement Memorandum 2007-47
Date: October 26, 2007

This is our response to the Commission's First Supplement Memorandum 2007-47. We continue to appreciate the work of the Commission and its staff.

Generally speaking, the draft has many changes from existing law, some quite substantive. Therefore, we are not persuaded by arguments claiming a proposed change is outside the scope of the study because it is a change from existing law.

Plain page numbers refer to the staff memorandum and EX page numbers refer to the "Comments on Tentative Recommendation".

General issues - statutory construction (pg EX 234)

The First Supplement did not respond to our comments (pg EX 234) regarding the clarification of the meaning of the term "may": whether it grants a right that overrides an association's governing documents, or is merely granting an option that is subject to the association's governing documents. This has caused internal debates within our association as we attempt to interpret various instances of this. Since we are not attorneys and serve a low-moderate income membership, we do not have the resources to consult with an attorney every time we perceive an ambiguity. We suspect that there are many other associations in a similar situation. Since one of the purposes of the Commission's study is to simplify and clarify existing law, we would like the Commission to clarify the instances of this term to remove as much ambiguity as possible.

Relationship between Board and Membership (pg 7)

We believe the representation of existing law in the staff's memo is inaccurate. Mutual benefit corporations already have the flexibility to divide power between the board and membership as they see fit, as long as there is no conflict with the statute. Corp. Code 7151(c) and 7210. Thus, there is a conflict between the draft law and the corporation code. An association may have bylaw provisions giving powers to the membership in conflict with the draft. One implication would be the exemption of such powers from regulation by the draft.

The language of the draft defines some terms in ways that exempts some actions from its regulation. For example, Sec. 4180 defines a “rule change” based on an action by the board. Sec. 4165 restricts an operating rule to those rules passed by the board. Thus, both rule changes and operating rules adopted by the membership—rather than the board—would be unregulated by the draft.

There are other, similarly confusing provisions. For example, Sec 6110(b) appears to apply only to actions by the board. Thus, decisions regarding maintenance of the common areas, et seq made by the membership would be regulated due to their “exemption from the exemption” of that subsection.

There is a contradiction regarding the passage of operating rules. Operating rules are defined as governing documents (Sec 4150). The board shall pass rule changes (Sec 6115 & 4060). Yet, operating rules may be amended by the membership because they are governing documents (Sec 4640(a)(3)).

We ask that the draft be amended by allowing association bylaws to designate whether the board and/or membership should exercise such powers, unless there is a clear policy issue. In many instances, this could be done by replacing the word “board” with “association”. Many of the issues described above would be resolved by this type of change.

One area that should remain in the board’s power is executive sessions. However, in associations where all members are on the board (primarily small cooperatives and co-housing condominiums), this would create a problem. Attendance at such sessions would need to be restricted to a subset of the membership/board so that privacy would be protected and a fiduciary duty would exist. The draft should be changed so that such a “board” would be required to appoint a subset of itself in order to go into executive session.

Stock cooperatives and declarations

Since stock cooperatives are—by definition—corporations, the date of the filing of articles of incorporation could be used as the creation date of the CID. Other unincorporated entities that could be operated on a “cooperative basis” are not currently subject to Davis-Stirling (e.g. partnerships, tenancy-in-common, etc.) and could be ignored.

A better solution might simply recognize that: “A stock cooperative, as defined herein, is created when a corporation first falls within the scope of Sec. 4190.” Or,

“6000(a) A declaration, provided however, that if a common interest development is a stock cooperative, the use of a declaration is optional.”

We believe the subject should be studied. In the interim, each instance of the term “declaration” should be replaced with an appropriate replacement, such a “governing documents”. Fortunately, there are not many instances that would fall within the purview of a cooperative. Instances within the lien sections could be temporarily ignored and studied later.

Or, there could be a section redefining the term for those stock cooperative not having recorded declarations. For example:

“In the following sections, the term “declaration” means “governing documents” for those stock cooperatives without recorded declarations: 4145, 4185, 5605, 5700, 5705, 5805 [requires further study], 6120.”

Sec 6030, 6035: the notice shall be given to each new member.

Sec 6100: replace “declaration” with “proprietary lease”.

Document authority

The effects of Sec 6005 could produce unknown consequences for stock cooperatives and should be studied further. In the interim, stock cooperatives should be exempted from this section. The existing laws (e.g. landlord-tenant, corporation, etc.) would continue to apply, as they have in the past.

Separate interests of a stock cooperatives

The term “lease” by itself should not be used because it is not used in practice. Either the term "proprietary lease" or “occupancy agreement” should be used, because they are widely used and understood in California and the rest of the country. Sec. 4190(b) and page 26. Also, the definition of “governing documents” should include the proprietary lease, as it may have many restrictions on the use of a separate interest.

Definition of a board meeting

This is a difficult issue that should be studied further. Members of associations with corrupt boards will likely want maximum transparency and minimal extra-meeting communications, while members of associations with honest and open boards will likely want minimal extra work for their boards.

Until the issue is studied, we would fall into the first camp. Perhaps the draft could require that all extra-meeting email communications be sent to those members requesting them, and that such email be attached to the minutes of the subsequent meeting. Or, that the association be prohibited from using extra-meeting communications if a certain

percentage of the members petitioned to restrict it (e.g. 10%, 33%, etc.). Or, that the association be permitted to use it if a certain percentage of the members voted to allow it.

Executive session

We are modifying our position on executive session. We still believe that the association should decide for itself as to how much secrecy they want for non-disciplinary issues. Our bylaws—for example—require approval by the membership before the board is authorized to go into executive session to discuss litigation.

However, the situation for member discipline is different. In this case, the association or the member might suffer consequences as separate parties. We understand the concerns expressed in some comments that open meetings will breed litigation, compromise privacy, etc. However, anyone at any meeting (or in the common areas) can make negligent comments that might be considered inflammatory or an invasion of privacy. I have personally seen much of this during open meetings. Therefore, we do not see the relevance of the litigation argument summarized in the staff's comments.

A closed meeting is more likely to breed corruption by a board, because there would likely be fewer witnesses. Anyone could sue the association whether the meeting is open or closed. Unless the Commission favors minimizing litigation at the expense of a possible increase in corruption, we believe they should let the member decide who and when non-board members should be permitted to attend the member's disciplinary session. For example, the member might decide in the middle of the session that non-board members be either allowed in or prohibited from attendance, depending on the nature of the discussion.

Unanimous written consent

We would like to clarify our position on unanimous written consent. If certain criteria were set to minimize corruption, we would favor such consent. I've personally seen it abused, even by well-meaning but ignorant board members. Even the unanimous requirement was not a check on overuse. In associations with live-in board members, it will almost never be necessary. Where this is not the case, such consent may facilitate urgent situations. The criteria we favor are: (i) the situation is urgent, and (ii) it is impossible to convene an emergency meeting, whether telephonic or physical

Associations with remote boards and/or general members may need to make many decisions by written consent; however, the law should not allow them to benefit at the expense of others. Perhaps such associations should be permitted to allow their members to amend their bylaws so that all board decisions could be made in writing.

At least one HOA attorney has written about current law. She wrote that because of the provisions of the Open Meeting Act (at least those in effect at the time of the writing) and

the corporations code, an HOA would have to comply with both. Thus, an action without a meeting would be limited to an emergency situation. Retaining the current provisions would be better than the unlimited language in the draft.

We favor any of the approaches above, rather than the language in the draft.

Meeting notice content

We would like to clarify our position. An association should have the freedom to require that the membership could only make a decision if the issue were on the notice of the meeting. Thus, we would like Sec 4595(c) modified so that it would not overreach the bylaws of an association.

Form of ballot

In some cooperatives, each unit might represent a different numbers of shares (e.g. 545 shares, 546 shares, etc.). The draft does not appear to address the issue of voter secrecy in such cases. Since such cooperatives exist, we would like to see the issue addressed.

In-person voting

We do not understand the nature of the objections to this proposal. In-person voting was used by many associations prior to the statutory change that eliminated it. Thus, it cannot be “confusing”, as many associations have used it.

Associations whose bylaws require a super-majority of all member to elect a board member, and which require additional rounds of voting to fill as many board seats as possible, have serious problems with the deletion of the in-person proposal. They previously conducted their board election during a single board meeting. The current law requires a one-month balloting period for each round of voting. Previously, I’ve seen up to five or six round within a meeting. The current law (and the proposal in the draft) would thus require up to five or six months to elect a board! We hope you will restore the in-person proposal in the draft. The key for us is the elimination of the one-month balloting period and allowing elections to occur at a single meeting. We support the secret ballot requirement.