Study X-100, H-850 September 8, 2020

First Supplement to Memorandum 2020-49

Emergency-Related Reforms:
Common Interest Development Meetings
(Public Comment)

The Commission[1] has received further communications relating to its emergency-related work on common interest development law. They are attached to this memorandum as an Exhibit:

Exhibit p.

- A.L. Stanaway (8/24/20) 1
- Elaine Roberts Musser (8/27/20) 2
- John Kirkham (9/1/20) 4
- Nathan McGuire, Community Associations Institute, California Legislative Action Committee (9/4/20) 7

Respectfully submitted,

Brian Hebert
Executive Director

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

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

EMAIL FROM A.L. STANAWAY
(8/24/20)

The proposed new section of Law, California Civil Code Section 5450, in leaving existing delivery systems in place, ignores one critical element--timely notice. According to existing Law, notice and agenda of Board meetings shall be delivered at least 4 days before regular Board meetings. Delivery by general posting or via email ensures same day delivery; however, depositing into the United States mail in no way ensures timely delivery (California Civil Code Section 4050). Human error and systemic failures make the USPS an unreliable vehicle for delivery of this time-sensitive material. California Civil Code Section 4040 just does not address the problem of timely delivery. Current Law now allows Associations to choose the method of individual delivery (USPS or email).

Often management will choose the slowest, most unreliable method of delivery in order to effectively deny select members their right to attend open Board meetings. In short, it is simply unrealistic to deem meeting notice delivery complete upon deposit of the notice/agenda with USPS and it creates a loophole in Law. That loophole actually codifies a method by which Associations may deny access to Association services. Consider adding consumer choice of emergency communications medium/mechanism to the mandated compliance with California Civil Code Section 4041. This would provide a record of consumer choice in the matter. Presumably local consumers would be aware of the most reliable emergency communications locally available. Associations should be mandated to solicit and abide by member choice in this matter. Members should be notified of these methods of communication every year in the Annual Disclosure Statement (California Civil Code Section 5300, et seq).

There is another option open for consideration: using California's community emergency communication systems -- some described in the links below:
http://calalerts.org/documents/calpaws/01California-State-Warning-Plan.pdf

https://www.ocsd.org/divisions/admin/communications/sections/emergency

https://www.modocsheriff.us/sites/g/files/vyhlif921/f/uploads/communication_plan.pdf

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Honni soit qui mal y pense

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August 27, 2020

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Via email: bhebert@clrc.ca.gov

Re: Memorandum 2020-48 Emergency-Related Reforms: CID Meetings (Draft Rec.)
First Supplement to Memorandum 2020-48
Memorandum 2020-49 Emergency-Related Reforms: CID Meetings (Public Comment)
Memorandum 2020-50 Emergency-Related Reforms: CID (Additional Proposed Studies)

Dear Sirs,

In reference to CID teleconferenced meetings during a declared emergency:

1. **Notice:** Requiring individual notice of a meeting via computer is just too burdensome and costly for many HOAs. General delivery of such a meeting should be sufficient, since general delivery includes the requirement of individual notice for all those HOA members who request it. However, it is crucial for homeowners to receive access information electronically, rather than just by posted notice (general delivery), inclusion in a billing statement (general delivery), in a broadcast (general delivery), or first class mail (individual delivery). Thus notice of the access information should be posted to the HOA website if the HOA has one, and emailed to all members who have consented to that method of delivery. To emphasize this point, I would add an additional sentence to 5450(b)(1): "*(1) The meeting notice provides clear technical instructions on how to participate by teleconference. These instructions shall be posted to the HOA's website if it exists, and sent out by email to all members who have consented to that method of delivery*".

2. **Voting:** I agree that if "*Every director and member has the same ability to participate in the meeting that would exist if the meeting were held in person*", the guaranteed right to participate would encompass the right to witness the opening and counting of ballots. Including the additional suggested comment to clarify this point would be helpful, to wit: "*Paragraphs (b)(1) and (2) govern the required content of notice of a meeting conducted under this section. The method of delivery of a board meeting notice is governed by Section 4045 (general delivery). Under*

Section 4045(b) any member has the right to receive meeting notice by individual delivery under Section 4040, which can include delivery by electronic mail. That option must be noted in the common interest development's annual policy statement. See Section 5310(a)(4)".

Sincerely,

Elaine Roberts Musser

EMAIL FROM JOHN KIRKHAM
(9/1/20)

Brian:

Some thoughts on Memorandum 2020-50 and the potential pandemic-related reforms related to association electronic voting. Please feel free to publish this email as you deem fit.

I agree with the insight that this issue is in many respects a proxy battle for the long-standing fight over the complexity of association election law. That being said, I do wonder whether an issue can be deemed "controversial" in a state of 40 million people if the opposition apparently consists of a single motivated individual.

I'm not sure I agree with the conclusion that association electronic voting is impossible per se. In the Judiciary Committee's analysis of AB 1360, I note that the Secretary's Task Force is quoted as stating "[w]e believe that additional technical innovations are necessary before remote Internet voting can be widely implemented as a useful tool to improve participation in the elections process in California." The Task Force released its findings in **January of 2000**. It would seem likely that at least some "additional technical innovations" have occurred in the intervening 20 years.

I'm also not sure I agree with the conclusion that "[t]here is no policy rationale or electoral justification" to permit association electronic voting. The Secretary is quoted as stating "[i]nternet voting threatens the integrity of the electoral process, which is why California law prevents any **public** election from being conducted over the Internet." Emphasis added. But HOA elections are not public elections. Public elections involve our rights and liberties, and are the cornerstone of our democratic process. HOA elections are private elections involving which landscaper to hire, or what shade to paint the building exterior.

The Secretary - or at least its Task Force, the actual experts - seemingly recognized this "policy rationale" of proportionality, being quoted in the Judiciary Committee's analysis as stating "[t]he democratic process warrants an extremely high level of security, but the security measures cannot be so cumbersome to voters that the new process would prevent participation. An appropriate balance between security, accessibility and ease of use must be achieved before Internet voting systems should be deployed."

I would argue that current association election law - especially as amended by SB 323 - fails the Task Force's test. Assuming the last 20 years have seen sufficient "additional technical innovations", I would even argue that the tes**t recommends** electronic voting.

Voter apathy and disengagement are well-known and well-documented problems for most CIDs. Even achieving quorum is difficult for most communities, to say nothing of the percentages required to, say, amend the bylaws to reflect SB 323. These problems - and the current proxy battle - suggest that the "security measures" of association election law are currently so "cumbersome" to voters that they "prevent participation." Or, perhaps, that the stakes are so low (landscapers, paint shades, etc.) as to merit more liberal "security measures."

The ostensible purpose of SB 323 was to increase the "regularity, fairness, formality, and transparency" of association elections. The case studies offered in support of the bill allege bad-faith election procedure violations, e.g., failure to give notice, illegal disqualification, not violations of election security, e.g. ballot tampering. As such, I am unclear as to the basis for the current opposition to association electronic voting, as the practice does not affect the bill's fundamental purposes of increased notice or restricted candidate qualifications. If anything, electronic voting would enhance the former.

SB 323's complexity raises an open question as to whether amateur boards can conduct valid elections. In addition to the law's complex pre-2020 voting requirements, SB 323 now requires boards conducting director elections to set timelines involving at least ten tight, sequential deadlines or action dates over a 105 to 120 day period, to issue at least three prescribed pre-election notices, to schedule and administer IDR sessions and record inspections, and to locate and retain the services of a for-profit inspector or appoint an amateur homeowner, all conducted under a shall-void paradigm that requires flawless performance. In addition, SB 323's elimination of the exception for managers serving as inspectors - and the greatly increased potential for election liability - will mean that many managers will opt out of learning the law's details, and will thus deprive their boards of practical election assistance.

In addition to providing more safe and convenient voting, an electronic voting system with automated calendaring and document and notice generation functions would **greatly** reduce the administrative burden involved in conducting elections, and, accordingly, the risk of election law violations. See Hanlon's Razor. In so doing, such a system would seemingly **increase** the "regularity, fairness, formality, and transparency" of association elections. One can imagine a system which has been reviewed and standardized by the Secretary of State, with differing security permissions for boards, members, inspectors, and their assistants and opt-outs for paper-based processes. If other California corporate entities are currently conducting electronic voting, such processes could conceivably be studied and, if successful, used as templates for change.

The above notwithstanding, one core premise of SB 323 was that associations and their elections are essentially coextensive with municipalities and public elections. While I believe this premise overstates California precedent to that effect, it did underpin the bill. To my knowledge, pandemic-related reforms regarding electronic voting for **public**elections are not currently being

considered. As such, I am unclear as to how the Legislature could permit the practice for association elections. SB 323's premise would have to be abandoned in favor of the Task Force's proportionality test, which could erode public confidence in legislative rationality.

I understand this discussion **greatly** exceeds the scope of the pandemic-related reforms. But again, the proxy-battle nature of this issue highlights the fact that current association election law is fundamentally flawed. I will also note that most association members are still unaware of SB 323. Once associations begin conducting SB 323 compliant elections - and bearing the bill's attendant costs, conflict, and liability - I anticipate **significantly** more demand for change in favor of simplicity and functionality. This seems especially likely for small CIDs and for those communities with less than 6,000 separate interests which elect to not use acclamation.

On an unrelated note in regards to the Memorandum's discussion of tolling and CACM's referenced 45 day period, see Civil Code section 714(e)(2)(B).

Thank you,

John

John Kirkham
Attorney at Law
Industry Partner, CACM

CALIFORNIA LEGISLATIVE ACTION COMMITTEE
community
ASSOCIATIONS INSTITUTE

September 4, 2020
Via First Class Mail &
Email: feedback@clrc.ca.gov

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c/o UC Davis School of Law
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Re: Emergency-Related Reforms: Common Interest Development Meetings (Memorandum 2020-35)

Dear Commissioners,

The Community Associations Institute's California Legislative Action Committee (CAI-CLAC), which serves the interests of over 13 million homeowners residing in more than 55,000 common interest developments throughout California, commonly known as homeowner's associations, writes to express its position on Emergency-Related Reforms for Common Interest Development Meetings (Memorandum 2020-35).

1. Dispensing with the Physical Presence Requirement for CID Meetings

Meetings by Boards of Directors for Common Interest Developments ("CIDs") are governed by the Open Meeting Act (Civil Code Section 4900, *et seq.*) in the Davis-Stirling Common Interest Development Act. Civil Code §4090(b) provides for Board meeting via "teleconference" which it defines broadly to include connections "by electronic means, through audio or video or both." However, §4090(b) requires notice of a teleconference meeting to "identify at least one physical location so that members of the association may attend, and at least one director or a person designated by the board shall be present at that location." Additionally, Civil Code §4925(a) requires that a "meeting shall be audible to the members **in a location specified in the notice of meeting.**" (*Id.; emphasis added.)* During the COVID-19 pandemic, homeowner associations have been legally prohibited from complying with this physical meeting location requirement. However, Boards have not been exculpated from their fiduciary duties to operate the CIDs and discharge their obligations imposed by their governing documents.

The State, the Counties, and most cities in California have issued health orders prohibiting gatherings during the COVID-19 emergency. Over the last several months, CIDs in California have faced the need to continue operations and meet the needs of homeowners despite the fact that gatherings are prohibited. While Governor Newsom issued an Executive Order dispensing with physical presence requirements set forth in the Brown Act (Executive Order N-29-20, March 17), no such accommodation was made for CIDs. As a result, CIDs have had to either gather in

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violation of public health orders in order to meet and conduct necessary business in compliance with the requirements of the Davis- Stirling Act, or meet via teleconference or videoconference without meeting the physical location requirement set forth in the Davis-Stirling Act.

Dispensing with the physical presence requirents in times of emergency is unquestionably necessary to allow CIDs to continue to operate without having to make the Hobson's Choice of violating either public health restrictions on gatherings or to ignore the physical presence requirement set forth in the Davis-Stirling Act. Local and state government already has made that choice, and has been operating without providing a physical location for citizens to attend meetings. CIDs unquestionably need the same ability in times of emergency to dispense with the physical presence requirement that was provided by Governor Newsom to state and local agencies.

Furthermore, we urge the Commission to consider eliminating the need for the physical location requirement for CID meetings irrespective of the existence of an emergency. One of the silver linings of the pandemic, it has forced CIDs to examine how they can operate more efficiently. As the CIDs across the state adapted to teleconference and videoconference meetings, we have seen increased homeowner attendance and participation at meetings. Homeowners have been able to participate and attend meetings from the comfort of their home. Such participation should be encouraged and facilitated under all circumstances. The Act should be amended to clarify that CIDs may meet telephonically and/or via videoconference without a physical location requirement irrespective of the existence of a pandemic. We have seen no real or anecdotal evidence that should prohibit CIDs from continuing this efficient and inclusive method of meeting employed during the pandemic.

2. Method of Delivery of Meeting Notice

The current requirements for method of delivery of meeting notice call for either general notice via a posting in a generally accessible location within the community, or if the member desires, via individual notice, and no change is required. The current law provides both efficiency and flexibility for both CIDs and homeowners. Any homeowner who desires individual notice can simply request that it be provided. Requiring individual notice to all homeowners, many of whom do not want or are interested in individual notice, will result in increased costs for all homeowners, increased waste as mailed notices will often go unopened and discarded, and delayed notice as notices distributed via mail often are delivered after the time that notice is posted within the community. Therefore, no change is needed with respect to the method of delivery of meeting notice.

We thank you for your time and consideration. Please do not hesitate to contact CAI-CLAC's Advocate, Louie Brown, at 916-448-3826 or advocate@caiclac.com if you have any questions or need additional information.

Sincerely,

Nathan McGuire, Esq.
CAI-California Legislative Action Committee 2018/20 Chair