

# LEGAL FAQs

The law of common interest developments is evolving and sometimes attorneys do not always agree how that law may be applied to a given situation. The answers provided here reflect different points of view and are not the official positions taken by CACM. Also, the answers are tailored to the specific questions raised, and may resemble, but not be identical to situations encountered by our members. Thus the answers should be taken as background information only. Where legal questions arise in work with common interest development clients, they should be referred to counsel. Many of the answers below are based on the *Davis-Stirling Common Interest Development Act* found at Civil Code §§1350 et seq. unless indicated, section references are to the Civil Code.

## RESERVES

**Q1: What constitutes borrowing from reserves? If the reserves are simply underfunded, is this considered borrowing from reserves? Are there special disclosures that must be made in this circumstance?**

**A:** There is no specific definition for the term “borrowing;” however, borrowing from reserves does require disclosures.

**Analysis:** Section 1365.5 subsection (c) (1) provides that “[t]he Board of directors shall not expend funds designated as reserve funds for any purpose other than the repair, restoration, replacement, or maintenance of, or litigation involving the repair, restoration, replacement, or maintenance of, major components that the Association is obligated to repair, restore, replace, or maintain and for which the reserve fund was established.” However, section (c) (a) provides that “the Board may authorize the temporary transfer of moneys from a reserve fund to the Association's general operating fund to meet short-term cash-flow requirements or other expenses, if the Board has provided notice of the intent to consider the transfer in a notice of meeting, which shall be provided as specified in Section 1363.05.”

- No statute requires a reserve account to be 100 percent fully funded (although full funding might be required by the governing documents for a particular Association).
- If reserves are underfunded, it does not necessarily mean funds were borrowed from reserve accounts; underfunding typically occurs because an Association has not accumulated amounts proposed to be kept in reserves according to its reserve study.
- The intent of the Civil Code appears to be that “borrowing” involves a *transfer* from the reserve account to the operating account.
- An Association’s Board of directors can transfer funds from reserve to operating accounts at a meeting, the agenda for which specifically notices the reasons for the transfer, options for repayment, and when and how replenishment is anticipated. See § 1365.5(c)(2).

**Q2: If monies “budgeted” for reserves are “diverted” to pay for ongoing operations would this be considered “borrowing?”**

**A:** The Civil Code does not address this question and it can be argued that using monies allocated in the budget for operations is “borrowing” even though there is no actual “transfer” of funds from reserves to operating.

**Analysis:** The real issue here is disclosure. If the annual budget is based on monthly reserve contributions of a certain amount but the Board decides to reduce that contribution, the effect is to reduce anticipated reserves in the same way that borrowing would do. This would be inconsistent with owner expectations and those of buyers reviewing the budget in escrow disclosure packages. A resolution clearly disclosing this action is especially warranted if the membership voted on an assessment increase with the express budgetary assumptions outlined in the budget defining the need for the increase and representing specific reserve funding allocations that are being changed mid-year. Also, while the decision to “divert” funds before they “arrive” in reserve accounts would require some disclosure in the agenda posted prior to the action being taken at a Board meeting (§1363.95(i)) that level of notice is not as comprehensive as that required for a “transfer” of funds. We do not recommend that funds be diverted without consulting counsel. A resolution clearly disclosing this

action/diversion is especially warranted if the membership voted on an assessment increase with the express budgetary assumptions outlined in the budget defining the need for the increase and representing specific reserve funding allocations that are being changed mid-year.

### **ACCESS TO A RESIDENCE TO MAINTAIN OR REPAIR**

**Q3: When is it appropriate (if ever) for a manager to enter a homeowner's unit to view a repair/concern?**

**A:** In extreme cases, and only when authorized by the Board of Directors and the client's governing documents.

**Analysis:** Some CC&Rs authorize the Association or its agents to enter in the event of emergencies; others authorize access to simply "maintain" if the owner fails to do so. The CC&Rs will also set forth the type of prior notice to the owner (and perhaps the resident, if different), and this notice will need to be reasonable. Sometimes, access will be for the purpose of making an inspection, at other times it might be to address a leak or other condition posing a risk to others in the building. Access into a unit poses high risks for the manager and the Association and, again, should not be done without conferring with counsel. Some basic tips include bringing a locksmith and witnesses, taking "before" and "after" photographs, and, in some cases, involving a law enforcement officer.

**Q4: Whose responsibility is it to pay for maintenance violations when a house is in foreclosure? Can the Association maintain and bill the bank? Is a hearing required?**

**A:** The current owner, whoever that is (the bank or otherwise), is responsible for complying with the CC&R provisions requiring maintenance. If maintenance is inadequate (for example, if grass dies from lack of water) the CC&Rs may permit the imposition of fines on the owner or even reimbursement assessments (after notice and hearing) for expenses incurred by the Association in performing maintenance that an owner does not attend to.

## REQUIREMENTS TO MAINTAIN THE COMPLEX

**Q5: Can a Board stop maintaining amenities, such as shutting down the pool, spa, and sauna or can they cancel services like parking patrol, etc. to cut costs without any legal repercussions?**

**A:** Depending on the particular community, some amenities and services can be canceled or scaled back. But which ones, and how the problem is addressed, must be handled very carefully.

**Analysis:** First and most importantly, a Board should not authorize a plan that subjects members to an increased risk of harm. An Association is obligated to use “reasonable care” in maintaining common areas, and it, and Boards of directors can be held responsible for injuries that result from failing to do so. The most famous case addressing this is *Frances T. v. Village Green Owners Assn.* (1986). In this case, common area lighting was poor and the Board refused to improve it. A resident was assaulted in her unit and claimed the assault was foreseeable and arose out of the inadequate lighting on common area. The California Supreme Court held the directors and Association could be liable, as although an Association is not a guarantor that a development is safe, it must take steps to adequately address safety risks. Eliminating amenities or services may be inconsistent with that obligation. Reduction or elimination of recreational amenities or facilities that do not result in increased safety risks may be appropriate but, even so, care should be taken to assure compliance with the CC&Rs and any outside legal standards. For example, in some cities, removal of “tot lots” or other amenities may require the consent of government agencies (Planning Department, City Council, etc.). Also, elimination of amenities that have a disproportionate impact on children or the disabled may subject an Association to discrimination claims.

In determining whether to discontinue a particular service or the maintenance of a common area facility, the Board must engage in a balancing process (and should do this at a properly noticed meeting to gain member input and support) considering the following:

- As to security, the types of services or amenities required to protect members and their property from unreasonable risks of harm or damage; and whether alternative (less expensive) forms of action

might minimize the risk (for example, improving light if reducing security).

- Evaluation of the CC&Rs for provisions that create assumptions of safety or service, or require that certain items be kept or maintained, and consideration of amendments to eliminate mandatory obligations.
- Determine member expectations and focus on services that can be reduced without increasing the risk of property damage or personal injury (for example, landscaping on common area). Such “cut backs” generally can be determined by a Board without member consent.

### INSURANCE & LIABILITY ISSUES

**Q6: Is a ‘Certificate of Insurance’ from the vendor sufficient to protect the Association in the event of claims, or must the Association get something more/different?**

**A:** More is required.

**Analysis:** A certificate of insurance affords no protection to the Association. It is a document issued by an insurance agent that states that it confers no rights on the certificate holder. It does not amend, extend, or alter the terms of the insurance policy itself. At best, it reflects the insurance that the vendor has at the time the certificate is issued, such as liability, automobile, and workers compensation. It will show the policy expiration date but the policy could be canceled in advance of that date, or lapse for non-payment. Best practices are to:

- 1) obtain the complete insurance policy including all endorsements;
- 2) review the policy to verify that there is express coverage for operations on common interest developments;

- 3) have the Association named as an additional insured on the liability policy; and
- 4) require modification of the certificate of insurance to provide that the Association will receive thirty days advance written notice of cancellation.

**Q7: If a Board member/director acts “in good faith” and is thus protected from claims by the “business judgment rule” does that also mean that the Association is protected from claims?**

**A:** No.

**Analysis:** The “business judgment rule” (based on Corporations Code § 7231) is not intended to protect “entities” (corporations or unincorporated Associations). Instead, it protects directors, provided they have met certain standards of conduct (acted in good faith, asked proper questions, relied on qualified consultants, etc.). By contrast, the liability of an Association generally depends on whether it has acted reasonably and in accord with its legal obligations, including obligations imposed on the Association by the CC&Rs or the Davis-Stirling Common Interest Development Act and other applicable laws.

A recent case illustrates the difference between the responsibility of directors and of the Association. In *Ritter & Ritter, Inc. v. The Churchill Condominium Association*, the Association was found liable for failing to properly maintain a common area concrete slab under an owner’s unit but the directors were not faulted for their mistaken belief that the obligation fell on the owner. Generally, courts will “defer” to decisions made by directors and will not find them liable for what the Association does if, under the Supreme Court’s 1999 decision in *Lamden v. La Jolla Shores Clubdominium Homeowners Association*, they:

- 1) perform their duties as director in good faith;
- 2) act in a manner the director believes to be in the best interests of the corporation/ Association; and,
- 3) act with such care as an ordinarily prudent person in a like-position

would use under similar circumstances.

**Q8: Should Associations have workers compensation insurance even if they have no employees and only hire licensed and insured contractors?**

**A:** Yes.

**Analysis:** Workers compensation coverage for Associations without employees provides the Association with protection from circumstances wherein the Association could, by law, be deemed to be an unwitting “employer.” Without workers compensation insurance, the Association may be unprotected from what could be significant and potentially catastrophic financial responsibility related to an injured worker in a number of different circumstances. Such circumstances include, but are not limited to, the following:

- The (knowing or unknowing) hiring of unlicensed persons to perform work which requires a contractor’s license.
- The hiring of a contractor whose license is expired or suspended, and injuries incur during the contractor’s work for the Association.
- The injury of a worker employed by a vendor performing services for the Association and that vendor has no workers compensation coverage at the time of the injury.
- If a vendor’s insurance, for whatever reason, is not adequate to cover potential claims of its employees and the vendor performs services for the Association.

In general, the cost of workers compensation insurance for Associations without employees is relatively inexpensive. Yet, the protection it provides, in circumstances that cannot be directly controlled by the Association, can potentially be great. For this reason, an Association’s Board should be encouraged to consult with the Association’s insurance professionals to weigh the costs and benefits of such coverage and to make a coverage decision it feels is best for its Association’s specific circumstances. In many cases this will likely be a decision to obtain and maintain such coverage.

**Q9: Is there any liability for an Association if it hires a vendor/contractor who has insurance with an exclusion for multi-dwelling?**

**A.** Yes.

**Analysis:** The net effect of the exclusion is that the vendor is uninsured. No matter how extensive the coverage otherwise referenced in the vendor's policies (or certificate of insurance, or other evidence of coverage), the vendor's insurance is likely of no benefit to the Association if other terms of the policy itself, or any endorsement thereto, excludes coverage for multi-dwelling projects and/or community Associations. If the Board authorizes a contract with a vendor who lacks proper insurance, the directors may have breached the CC&Rs or their own duty to protect the Association. Also, the cost of correcting the vendor's poor work might have to be absorbed by the Association if the vendor lacks adequate insurance.

### **MANAGEMENT & MANAGEMENT AGREEMENT**

**Q10: What type of documents should *not* be posted on a community website?**

**A.** Any document a Board has determined should not be disclosed (as consistent with California law), and any other document the Board believes should not be available to the public at large.

**Analysis:** Given the breadth of Association-related documents that could potentially be considered for posting on a community Association's website, it is impossible to provide a definitive list of documents to exclude from a community Association website. In light of the incredible power of modern Internet search engines, a community Association should not, in general, post anything that the Board does not want viewed by the entire world (literally).

Association members and their agents (but no one else) have the right to inspect and copy budgetary and other operational documents pursuant to the governing documents and §1365.2. Documents posted on a website should, at a minimum, not be broader than those subject to this inspection

right. Further, any information posted should be reviewed to protect member financial or privacy right (or where publication could lead to fraud or identify theft) and various legal privileges. Even minutes that might otherwise be available to members upon request should be studied to “redact” information that might not be appropriate for the public at large. Any such redaction should contain appropriate notices (with the advice of counsel).

Generally, posting of the governing documents and architectural guidelines would be appropriate. Likewise, posting of general instructions (how to join committees, where to send payments, where to find city and utility information, how to get a replacement pool key, how to contact the professional management, etc.) and posting Association-related forms (architectural applications, clubhouse rental forms, work requests, etc.) are often of great assistance to the members and the Association’s professional management.

**Q11: Where should managers draw the line on providing “legal” advice to Boards? Often Boards ask questions about the Civil Code, contracts, collection policies, etc. and put managers on the spot to help interpret and understand provisions in legal agreements.**

**A:** It is a misdemeanor in California to practice law without a license, and it is also prohibited by the CACM Code of Ethics.

**Analysis:** California law defines the phrase “practicing law,” very broadly, to include giving legal advice and preparation of contracts or other legal documents. Managers should never give advice on the interpretation of a statute or the application of a statute of limitations or repose. Arguably, directors are not protected from liability if they rely on managers who, by definition, are not qualified to give legal advice (whereas directors are generally protected if they rely upon the advice of counsel).

**Q12: An Association is sued and the suit also names the management company. There is a typical indemnity clause in the management agreement. What if the Association’s insurance carrier refuses to include management in their defense? What remedy does the management company have? How can they convince the insurance carrier to include them?**

**A:** If the Association has a duty to defend and indemnify the manager, that duty exists regardless of whether there is applicable insurance (unless the contract says otherwise).

**Analysis:** Most professional management agreements contain indemnity provisions in favor of the professional manager (see, for example, the CACM “Standardized Management Agreement,” §7.6). If the insurer refuses to defend the manager, the manager should formally demand that the Association do so. This can be expensive for an Association, may complicate the defense of claims (since the Association and the manager may have different counsel and for other reasons), and will negatively impact relations between the parties. The best approach will be for the Association to discuss with its insurance broker how to obtain the right type of insurance to provide the greatest possible protection for the Association and the manager.

## ASSESSMENTS

**Q13: If the Association’s current collection policy states that the Association will charge a late fee of \$10.00 or 10 percent maximum, does the language in the collection policy ‘fix’ (change) different limitation language in the CC&Rs, allowing the Association to charge up to §1366’s 10 percent maximum?**

**A:** No, an Association cannot modify the CC&Rs by adopting a rule or collection policy provision that is inconsistent with the CC&Rs. To “fix” CC&Rs, an Association will need to amend or restate those CC&Rs. CC&Rs generally contain an amendment provision that provides that the CC&Rs can only be changed by a vote of the membership. In *Ticor Title Insurance v. Rancho Santa Fe* (1986) the court confirmed that a rule cannot be more restrictive or inconsistent with a CC&R provisions.

**Q14: If a special assessment is passed by the members for a specific project (deck repairs) and the final costs are less than the special assessment, can the difference be put in reserves, rather than being returned to the members?**

**A:** Yes, provided that the voting materials for the special assessment state that

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excess funds will be put into reserves. If such a statement was not included in the voting material, the answer might still be yes, depending on the particular facts of the situation.

**Analysis:** We recommend that the Association specifically state that any excess left over after paying for the project will be paid to reserves. Refunding any excess could lead to current members raising disputes as to whether the monies should go to those who paid the special assessment (possibly former members) versus those who are the current members and who may not have contributed to the special assessment. Before considering a refund, the Association should check with its' CPA to see if there are any tax consequences to the Association or members and, if so, make proper disclosures if the refunding plan is implemented.

## COLLECTIONS & FORECLOSURES

**Q15: How much investigation should a Board do prior to recording a lien or foreclosing on a property? For example, should the Board check title first to see if the owner is upside-down or being foreclosed on by their lender, thus avoiding unrecoverable legal fees?**

**A.** At least some "investigation" should be undertaken.

**Analysis:** How much investigation should be done depends in part upon how much it will cost to investigate, and how much the action contemplated (recordation of lien or foreclosure) will cost. At least some research should be done to determine the benefits of recording liens. This could include working with a title company to find out the status of senior mortgages. Recordation of a lien is generally an excellent way of enhancing the chances that the unpaid assessments will ultimately be paid. Also, even if collection is uncertain, there may be reasons to proceed (i.e. to force a senior lien holder to foreclose and thus obtain a new paying owner etc.).

In some cases, it may be possible to negotiate with stake holders for at least some of the unpaid assessment and collection costs. Recordation of a lien may be a real benefit if an owner with assets or good employment

seeks bankruptcy protection, since the Association would then be a “secured creditor” and in a better position to collect than would be true if the lien had not been recorded.

**Q16: Is it legal for the Association (as an owner of a foreclosed property) to rent that property and keep all of the rent money without paying any mortgage payments to the bank holding the 1st? What risks do the directors and/or management face if Association keeps all the rent?**

**A:** This is a complicated situation, and will depend on a number of factors.

**Analysis:** This action should not be considered without the advice of counsel.

## RECEIVERSHIP

**Q17: We can't get anyone to step forward to serve on the Board. We understand a Receiver could be appointed by the court to act in the place of the Board. What does it take to get a Receiver appointed? What does the Receiver do? What does it cost? How long does it last?**

**A.** Yes, “Receivership” may be a remedy in some cases.

**Analysis:** A petition to appoint a Receiver may be granted by the Superior Court pursuant to CCP § 564. Receivership may be appropriate where the Association is insolvent, is in imminent danger of insolvency or has forfeited its corporate rights; or where necessary to preserve the property or rights of any party; or to enforce the rights of a secured lender. An action to appoint a Receiver by a secured lender is specifically not considered a foreclosure and is thus not subject to the restrictions on a secured lender in the foreclosure process. Once appointed, a Receiver can abolish the Board, levy assessments without membership approval (including assessments to cover the Receiver’s fees) and generally operate the Association. The Receiver may retain new professional management or other contractors or consultants as the Receiver deems reasonable and necessary. Receiverships can be expensive and while the Receiver’s activities are generally supervised by a Court (who will require periodic reporting supported by documentation of income and expenses) members

themselves have little control over the Association's funds and maintenance once a Receiver is appointed.

## **BANKRUPTCY**

**Q18: What are the benefits or damages to an Association declaring bankruptcy due to excessive delinquencies/foreclosures?**

A. Bankruptcy, if available at all to an Association, will not generally be a good remedy for an Association, as it would most likely lead to Receivership and other legal and financial dilemmas.

**Analysis:** Since most Associations have no common area with market value, have the ability to collect assessments to satisfy their debts and have ongoing maintenance duties to their members, it will be difficult or impossible to discharge an Association's debt in bankruptcy. An Association contemplating bankruptcy should confer with their corporate counsel or bankruptcy counsel to explore the issues.

## **MEMBER DISCIPLINE**

**Q19: Does an owner called to a hearing have the right to question the parties complaining?**

A: If the only basis for the complaint is the complaining party's statement, and neither the Board nor management has an independent basis for the complaint, it would be fundamentally unfair not to allow the owner to question the person complaining. The Board should not take a complaining witness' statement at face value, but should independently verify the violation reported. If the Board has independent evidence of the charge, then the Board can protect the confidentiality of the witness(es) who complained.

**Q20: Can the Board of Directors evict a tenant for violating the use restrictions in the CC&Rs or Board policy?**

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**A:** The Association should look to the CC&Rs as to whether the Association has a right to evict a tenant for CC&Rs violation. The Association's primary responsible party is the owner who allows the tenant to commit the violation. Owners who lease should be required to put in their leases that the tenant acknowledges receipt of the CC&Rs and Rules and Regulations of the Association, and a violation of the CC&Rs or Rules and Regulations is a breach of lease and grounds for eviction. The CC&Rs should reflect this provision by advising owners that the Association has authority to cause the eviction of any tenant in violation of CC&Rs. An Association must tread lightly here as it doesn't want to interfere with landlord-tenant contractual relationships or step into the shoes of the owner/landlord.

**Q21: Can the Board fine and/or suspend the rights of a member THEN make that member ask for a hearing?**

**A:** No, the Board cannot fine or discipline without first providing the owner with notice of the charge and an opportunity to be heard – Due Process. CC Section 1363 (h) requires advanced notification prior to discipline being imposed.

## RECORDS

**Q22: The Board has passed an emergency special assessment and the members want to see all records associated with any related repairs and the Association's cash disbursements for the last two years to determine if the shortage of funds is a matter of delinquency rather than a matter of unforeseen deterioration. Do we have a duty to redact anything relating to delinquency?**

**A:** Delinquency records are not specified in 1365.2 as among the records that must be made available to the members. Any information about a particular owner's delinquency should not be produced for another owner. General information about the amount of uncollected assessments, however, must be released as part of the Association's financial records provided annually to the membership, or upon proper written request by a member.

**Q23: Withdrawn**

**ANNUAL & SPECIAL MEETINGS OF THE MEMBERS**

**Q24: If the Board did not conduct an annual meeting this year, and the IRS resolution (to issue a rebate or credit of excess assessments collected) was not included on the written ballot, can the Association simply mail out a ballot for the IRS resolution (the CPAs always look for this action) and, if so, what carries this election? There are no references to quorum in the governing documents.**

**A:** Yes, the Revenue Rulings require the membership to vote on the resolution. While it has been common practice to vote on the resolution at the annual meeting, the resolution can be presented in the form of a written ballot. The ballot need not be solicited by a Civil Code §1363.03 secret written ballot, because it is not one of the matters requiring the procedures, as specified in Civil Code §1363.03(b). Members can vote on the transfer of operating funds, as required by the Revenue Rulings, pursuant to Corporations Code §7513, unless such a vote is prohibited in the articles or bylaws. The written ballot could be mailed, or if not prohibited by the governing documents, distributed electronically, as provided in Corp. Code §7513(a), which provides:

**Corporations Code §7513**

(a) Subject to subdivision (e), and unless prohibited in the articles or bylaws, any action which may be taken at any regular or special meeting of members may be taken without a meeting if the corporation distributes a written ballot to every member entitled to vote on the matter. Unless otherwise provided by the articles or bylaws and if approved by the Board of directors, that ballot and any related material may be sent by electronic transmission by the corporation (Section 20) and responses may be returned to the corporation by electronic transmission to the corporation (Section 21). That ballot shall set forth the proposed action, provide an opportunity to specify approval or disapproval of any proposal, and provide a reasonable time within which to return the ballot to the corporation.

When the bylaws are silent on the quorum requirements for member

votes, the quorum requirement is **one-third of the members**, as provided in Corporations Code § 7512(a), which provides:

- a) One-third of the voting power, represented in person or by proxy, shall constitute a quorum at a meeting of members, but, subject to subdivisions and
- b) a bylaw may set a different quorum. If a quorum is present, the affirmative vote of the majority of the voting power represented at the meeting, entitled to vote, and voting on any matter shall be the act of the members ....”

For this particular action, the bylaws could specify a lower percentage – or even just provide that the quorum is the equal to the number of ballots cast. However, if the bylaws provide for a quorum less than one-third, Corporations Code § 7512(b) restricts the action that can be taken at a meeting to the action(s) specified in the meeting notice.

On the question of “What percentage is required for approval?,” the matter carries either by a written ballot or at a duly noticed meeting once a quorum is confirmed, if a majority of votes cast, approve the action.

In the case of a very small Association, the resolution could be adopted by unanimous written consent of members per Corporations Code §7516, which provides:

Any action required or permitted to be taken by the members may be taken without a meeting, if all members shall individually or collectively consent in writing to the action. The written consent or consents shall be filed with the minutes of the proceedings of the members. The action by written consent shall have the same force and effect as the unanimous vote of the members.

**CAVEAT** – There may be another issue to consider. Do the bylaws still require an annual meeting? In the event an annual meeting is mandated under the bylaws, and if the Board fails to call an annual meeting of members in 15 months from the last meeting, Corporations Code §7510(c) provides that an owner could petition the Superior Court to order the meeting per that Section.

**Q25: Our documents and election rules allow for write-in candidates. Two people are running and there are three vacancies. Ballots are mailed out with the two candidates and room for write-ins. When the ballots are returned only one of them has a write-in candidate. Is this person then elected?**

**A:** Yes, as long as the member, who is named as a write-in candidate, meets the qualifications to be a director, as specified in the bylaws and/or the election rules. Additionally, the governing documents (usually the bylaws or election rules) must allow for nominations from the floor at the meeting of members, and that person must be nominated accordingly.

**Q26: There are three vacancies in an upcoming election for a five member Board. None of the incumbents are running for re-election and no one has returned a self-nomination form. The Board chooses not to send out a ballot, and at their annual meeting they declare that there are three vacancies and that the seats will be appointed by the remaining two directors. Permissible? Legal?**

**A:** Maybe. However, the ultimate response is very fact-dependent. The facts could indicate there is tremendous apathy and it is very difficult to get anyone to step forward to volunteer for the Board. If that is the case, it might be “legal” for the Board to appoint, depending upon other factors discussed below. The facts don’t indicate whether there was any effort to obtain candidates, or a process other than returning the self-nomination form. The Board may well be doing what it thinks reasonable under the circumstances, mindful of the pressure to make sure the Association seats a Board to meet corporate formalities. We also don’t know if the governing documents require a nominating committee, or a meeting of members to introduce the candidates and to allow for nominations from the floor. If any of these procedures are specified in the bylaws, then the action of the Board is not legal.

**Analysis:** The Board must take reasonable steps to allow for member participation in being considered to serve on the Board. Some attorneys cite the language in Civil Code §1363.03(j) as it requires an Association to go through the secret balloting process, regardless of whether there is an equal or less than required number of candidates to fill the open Board positions. Others disagree and opine it is permissible only if there are an

equal number of candidates to move the slate of candidates by acclamation. The Association should take a conservative approach and follow the secret balloting process regardless of whether there is an equal or less than required number of candidates to fill the open Board positions, as the Association probably does not want to become a test case for this statute in the event an owner brings suit to overturn the election results.

Civil Code §1363.03 does not specify the nominating procedures, nor does it mandate specific meetings, other than to count the ballots. Civil Code §1363.03 (j) provides some guidance, indicating the election rules may specify the procedures to place names in nomination, and if nominations from the floor are allowed. Section (k) doesn't prohibit a meeting of candidates, or any other meeting, but does clarify that the only meeting actually required is the one to count the ballots. Those sections provide:

(j) Notwithstanding any other provision of law, the rules adopted pursuant to this section may provide for the nomination of candidates from the floor of membership meetings or nomination by any other manner. Those rules may permit write-in candidates for ballots.

(k) Except for the meeting to count the votes required in subdivision (f), an election may be conducted entirely by mail unless otherwise specified in the governing documents.

In addition, Corporations Code § 7520 and Civil Code §1363.03(a)(3) both address the issue that the election procedures must be available to the members and the nomination and election process must be reasonable. Those sections provide, in pertinent part, Corporations Code §7520:

- a) As to directors elected by members, there shall be available to the members reasonable nomination and election procedures given the nature, size, and operations of the corporation.
- b) If a corporation complies with all of the provisions of Sections 7521, 7522, 7523, and 7524 applicable to a corporation with the same number of members, the nomination and election procedures of that corporation, shall be deemed reasonable. However, those sections do not prescribe the exclusive means of making available to the

members reasonable procedures for nomination and election of directors. A corporation may make available to the members other reasonable nomination and election procedures given the nature, size, and operations of the corporation.

Civil Code §1363.03(a)(3) requires an Association to adopt rules ... that do all of the following: (3) Specify the qualifications for candidates for the Board of directors and any other elected position, and procedures for the nomination of candidates, consistent with the governing documents. A nomination or election procedure shall not be deemed reasonable if it disallows any member of the Association from nominating himself or herself for election to the Board of directors.

Finally, assuming the governing documents don't mandate a specific procedure that is being ignored by the Board, and that the Board's process has been reasonable, then we must look to the governing documents for guidance as to whether the Board can actually appoint the new members and if they can declare a "vacancy" on the Board - at the annual meeting. There are several factors that might preclude the Board's action. For example, with 3 of the 5 members going off the Board, there will be less than a quorum of directors to vote to fill the vacancy. Assuming the governing documents don't address this issue, we turn to Corporations Code §7224 that provides:

- a) Unless otherwise provided in the articles or bylaws and except for a vacancy created by the removal of a director, vacancies on the Board may be filled by approval of the Board ([Section 5032](#)) or, if the number of directors then in office is less than a quorum, by:
  - 1) the unanimous written consent of the directors then in office,
  - 2) the affirmative vote of a majority of the directors then in office at a meeting held pursuant to notice or waivers of notice complying with [Section 7211](#), or
  - 3) a sole remaining director.

**Q27: If the election of directors by secret ballot under Civil Code §1363.03 terminates in a membership meeting, do the ballots cast count towards a quorum for issues not on the ballot? An example might be the 70-604 rollover resolution that is not on the ballot but is to be voted at the meeting where the ballots are tabulated.**

**A:** Yes, Civil Code §1363.03(b), provides: “If a quorum is required by the governing documents, each ballot received by the inspector of elections shall be treated as a member present at a meeting for purposes of establishing a quorum.” However, as noted above, if the actual number of people present, in person, by proxy (if applicable), or by secret ballot, constitute less than one-third of the voting power, any action to be voted on at the meeting where the ballots are tabulated must have been properly noticed in the notice to members.

**Q28: Section 1363.03(b) states that if a quorum is required by the governing documents of the Association, each ballot received by the inspector of elections shall be treated as a member present at the meeting for purposes of establishing a quorum. Do the secret ballots only count towards quorum for the issue(s) being voted upon under the secret ballot, such as a director election and/or an assessment increase, or can the secret ballots also be used to establish quorum for voting on other items at that meeting?**

**A:** The secret ballots (and persons present in person or by proxy, if applicable) may establish a quorum for all issues on the agenda of that members’ meeting. However, the percentage required for the given action that was not on the secret ballot may be specified in the governing documents as having different approval requirements. For example, if the secret ballot concerned a special assessment requiring a member vote, and the meeting agenda item was whether to allow the Board to enter into a loan agreement, it is quite probable that the quorum requirements for the special assessment and loan agreement would be the same, but it is possible that approval of the loan could require a higher percentage of member consent than the special assessment. Thus, quorum could be met to conduct the vote on the loan, but the loan could require a higher threshold to pass than the special assessment.

**Q29: Does the language set forth within a members' recall petition (when that petition is signed by at least five percent of the members) control how the Association/Board holds the member vote (i.e., when the polls close, etc)?**

**A:** No, the Board controls how the recall election is structured, in accordance with the bylaws and/or election rules and California law.

**Analysis:** The time the polls close and the record date which determines who is eligible to vote are sometimes established under the bylaws, but more frequently now, the election rules. In the absence of a record date provision in the governing documents, Corporations Code Section 7611 controls, and the record date is the first business day preceding the date of notice of the meeting. The ability of the members to call a meeting is specified in Corporations Code §7510(e):

(e) Special meetings of members for any lawful purpose may be called by the Board, the chairman of the Board, the president, or such other persons, if any, as are specified in the bylaws. In addition, special meetings of members for any lawful purpose may be called by five percent or more of the members.

However, Corporations Code §7511 provides that the date the petition is presented to the Board does dictate within a large window of time when that meeting must be called. That section further provides that only the items specified in the petition can be presented at the special meeting of members. Corporations Code §7511(c), requires the Board to send out notice of such meeting within twenty days of receiving the petition, and if the Board fails to set the date for the meeting within that time frame, the petitioners may set the date. The notice must set the meeting date for not less than 35 nor more than 90 days from the date of receipt of the written request for meeting. If a secret ballot vote is to be held at the meeting, Civil Code Section 1363.03 would also apply; secret ballot materials should be distributed with the notice, and the deadline for voting must be a date not less than 30 days from the date the secret ballot materials were distributed. If the entire Board could be recalled, election materials should also be prepared and distributed at the same time for voting on new Board members immediately after the recall election occurs to ensure that the Association has a Board in place. The Association should speak with legal

counsel if a total Board recall is a possibility.

### **REGULAR, SPECIAL BOARD MEETINGS**

**Q30: What if my Association has no location in its common area for posting Board meeting notices/agendas? Is notice by mail to all members sufficient under Davis-Stirling Act requirements?**

**A:** Yes, posting is the primary method of providing notice, but mailing is one of the options, and is required if a member makes such a request. Civil Code §1363.05(f) specifies the method of providing notice of Board meetings to members, assuming the meeting is not regularly set. It provides:

f) Unless the time and place of meeting is fixed by the bylaws, or unless the bylaws provide for a longer period of notice, members shall be given notice of the time and place of a meeting as defined in subdivision, (j), except for an emergency meeting, at least four days prior to the meeting. Notice shall be given by posting the notice in a prominent place or places within the common area and by mail to any owner who had requested notification of Board meetings by mail, at the address requested by the owner. Notice may also be given, by mail or delivery of the notice to each unit in the development or by newsletter or similar means of communication. The notice shall contain the agenda for the meeting.

**Q31: Can my Association only give four days notice for a member meeting or is a longer notice period required?**

**A:** No. The four days applies to providing notice to members of Board meetings, not meetings of members. Corporations Code Section 7511 provides that notice of member meetings must be given not less than 10 nor more than 90 days before the date of the meeting. However, if a secret ballot vote is to be held at the meeting, the voting materials must be distributed at least 30 days prior to the deadline for voting, and it is usually convenient to provide notice of the meeting in that same mailing.

**Q32: Can Boards that normally meet less frequently than monthly, hold general session meetings (during the months they would not normally meet) by conference in which all Board members are calling in, to approve lien resolutions for delinquent homeowners? I assume that notice requirements are the same, but does the Board need to identify a central location where interested homeowners can listen to the Board's conversation?**

A: The fact that the majority of Board members are deliberating and voting on Association business, should call into question why the teleconferencing is called a "general session" as if to distinguish it from a Board meeting. Civil Code §1363.05 (j) defines a "meeting" to "include(s) 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."

**Analysis:** The Corporations Code §7211(a) (6) provides: Members of the Board may participate in a meeting through use of conference telephone, electronic video screen communication, or electronic transmission by and to the corporation (Sections 20 and 21). Participation in a meeting through use of conference telephone or electronic video screen communication pursuant to this subdivision constitutes presence in person at that meeting as long as all members participating in the meeting are able to hear one another. Participation in a meeting through use of electronic transmission by and to the corporation, other than conference telephone and electronic video screen communication, pursuant to this subdivision constitutes presence in person at that meeting if both of the following apply:

- a) Each member participating in the meeting can communicate with all of the other members concurrently.
- b) Each member is provided the means of participating in all matters before the Board, including, without limitation, the capacity to propose, or to interpose an objection to, a specific action to be taken by the corporation.

Therefore, while the Open Meeting Act may provide that the majority of

the Board must be in the same “place,” the above Corporations Code section states that the Board members’ participation in the electronic meeting forum constitutes “presence in person at that meeting,” so long as the stated conditions are met.

If these “general sessions” are being conducted as indicated, they would be “meetings” of the Board and would have to allow for an owners’ forum, for notice to owners and an opportunity for owners to hear all Board members deliberating on all issues.

One of the nuances that must be addressed is the fact that the Board meets in these “general sessions” to authorize the recording of a lien. Such an action must be taken at a Board meeting, not a workshop; not an executive session; or a “general session.” If a Board is voting under Civil Code §1367.1, on whether to lien a member’s interest, the statute states the Board “shall approve the decision by a majority vote of the Board members in an open meeting. The Board shall record the vote in the minutes of that meeting.”

While the procedure of teleconferencing might be viewed as being in compliance with the Open Meeting Act, for the reasons stated above, it is not good practice to make all meetings “virtual” meetings. However, if a director is unable to attend a meeting but wishes to attend by phone, it would be reasonable and appropriate to allow for that Board member to participate via teleconference.

**Q33: If such meetings are allowed, can they be conducted without a homeowner open forum?**

A: No. The Open Meeting Act says that a “meeting” is any time a majority of the Board members come together to deliberate Association business and it does not distinguish between a regular or a special Board meeting. With respect to the requirement to allow an “owners’ open forum,” Civil Code §1363.05 (h) uses “shall,” which is mandatory language, requiring such a forum at “any meeting of the Association or the Board of directors, except for meetings of the Board held in executive session.” Therefore, owners must be allowed to speak at all Board meetings.

## EXECUTIVE SESSIONS

**Q34: Can a Board meet in executive session without having a regular/open forum Board meeting immediately before the executive session meeting?**

A: Most likely. The Open Meeting Act, Civil Code §1363.05 states that owners can attend meetings, “except when the Board adjourns into executive session,” which could lead one to conclude that there is no such meeting as “executive,” only Board meetings and that Boards may adjourn immediately after general session meetings into executive session if no other business is to be conducted. However, as a practical matter, it is quite common that Board members meet alone or with advisors such as legal counsel to discuss certain matters (i.e., litigation), and the Board may not go through the formality of the notice and the opening of an open session, only to adjourn into closed session, each time that it meets. Although a literal reading of the statute could indicate that a general session meeting is always required before an executive session meeting, this is not practical and may not relay the true intent of the legislature.

**Q35: What disclosure(s) need to be made by the Board to members at the regular Board meeting before the Board can properly adjourn to executive session?**

A: The fact that the Board will adjourn to executive session to discuss topics that are the subject of executive session (formation of 3<sup>rd</sup> party contracts; member discipline; consider litigation; employee issues) must be on the agenda, unless the topic would qualify as an “emergency” agenda item. While the statute does not require it, it is good practice for the Board to state it is adjourning into executive session in order to discuss the specific items allowed under Civil Code §1363.05(b). This is similar to the Brown Act, wherein public “closed session” items must be listed on the agenda and the number of items to be covered under the allowable topic, e.g. litigation, must be listed.

**Q36: What is within the scope of the ‘executive session’ exception? For example, can the Board discuss all legal issues or only litigation?**

A: The Board may discuss all legal issues with counsel in executive session. The statute does not limit the topic to “pending litigation,” but rather states “consider litigation.” Further, under the attorney-client privilege, all

discussions with counsel are privileged and confidential, unless the Board chooses to disclose the information to the membership or other parties.

**Q37: Can a Board discuss contract termination or only formation of contract(s) with third parties?**

**A:** The Board may also discuss contract termination in executive session. Civil Code §1363.05(b) allows the following specific topics to be discussed in “executive session” without members present: “ ... to consider litigation, matters relating to the formation of contracts with third parties, member discipline, personnel matters, or to meet with a member, upon the member's request, regarding the member's payment of assessments, as specified in Section 1367 or 1367.1. The Board of directors of the Association shall meet in executive session, if requested by a member who may be subject to a fine, penalty, or other form of discipline and the member shall be entitled to attend the executive session.”

The termination of a contract would fall within the general topic to discuss “formation of contracts” or “personnel matters” (if the contract is a personnel issue).

**Q38: Should/can the Board make decisions in the executive session, or should the Board only discuss items then hold the related vote (make the actual decision) during a general session/open forum portion of a Board meeting?**

**A:** It depends upon the topic and the type of vote being taken. If there is continuing litigation, and the decisions in executive session are providing direction, or providing counsel with a ‘pulse’ of how the Board might vote at another meeting, but still confidential, then that would not be reported out. If the matter involves member discipline, then the decision should be made in executive session. However, if after reaching a decision following negotiations in executive session during the formation of a contract, the vote to approve the contract should be made in open session.

**Q39: What must/should get announced to the members (or put in minutes) about what happened in the executive session after the Board meets in executive session?**

**A:** The matter(s) discussed in executive session are not required to be disclosed in detail, and are only generally noted in the minutes. Civil Code §1363.05(c) provides: “(c) Any matter discussed in executive session shall be generally noted in the minutes of the immediately following meeting that is open to the entire membership.”