

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2021-2022 Regular Session**

SB 391 (Min)  
Version: March 22, 2021  
Hearing Date: April 6, 2021  
Fiscal: No  
Urgency: Yes  
TSG

**SUBJECT**

Common interest developments: emergency powers and procedures

**DIGEST**

This bill establishes an alternative set of minimum procedural standards for conducting homeowners' association meetings by video or telephone conference during an officially declared disaster or emergency.

**EXECUTIVE SUMMARY**

Residential common interest developments come in many physical formats, from small apartment buildings to vast subdivisions with single-family residences. What unites them is their combination of separately-owned housing units with shared common spaces and amenities, all governed by a homeowners' association (HOA) and its elected board of directors. The HOA board's primary duties are to levy annual assessments on the membership, authorize expenditures, set rules, and enforce them. To perform these duties, the board must conduct regular meetings carried out in accordance with the provisions of state law. As relevant to this bill, those laws currently require that, for any board meeting conducted by telephone or video conference, there must also be at least one physical location at which members can attend and where at least one director is present. In the case of a disaster or emergency -- such as the current COVID-19 pandemic, for example -- such an in-person gathering could be impractical, unsafe, or even illegal. In light of that fact, this bill would allow HOA boards to dispense with the in-person meeting location requirement during an officially declared state of emergency or disaster, provided that the board complies with specified safeguards designed to ensure that all members and directors can still participate fully in the meetings.

The bill is author-sponsored. Its content, as introduced, was recommended by the California Law Revision Commission. Support comes from groups representing homeowners' associations. Opposition is raised by advocates for homeowner members, who assert that the alternative rules undermine important homeowner rights and are unenforceable. This bill contains an urgency clause. It passed out of the Senate Housing Committee by a vote of 6-0.

**PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Establishes, within the Davis-Stirling Common Interest Development Act, rules and regulations governing the operation of a residential common interest development (CID) and the respective rights and duties of an HOA and its members. (Civ. Code § 4000 et seq.)
- 2) Prohibits an HOA board of directors from taking action on an item of business outside of a board meeting. (Civ. Code § 4910(a).)
- 3) Defines a “board meeting” as either of the following:
  - a) a congregation, at the same time and place, of a sufficient number of directors to establish a quorum of the board, to hear, discuss, or deliberate upon any item of business that is within the authority of the board;
  - b) a teleconference, where a sufficient number of directors to establish a quorum of the board, in different locations, are connected by electronic means, through audio or video, or both. (Civ. Code § 4090.)
- 4) Requires all of the following in relation to a board meeting conducted by teleconference:
  - a) the meeting must be conducted in a manner that protects the rights of members of the association and complies with all other Davis-Stirling Act requirements;
  - b) participation by board members constitutes presence at the meeting as long as all directors participating can hear one another, as well as members of the association speaking on matters before the board;
  - c) the notice of the teleconference meeting must 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 is present at that location. (Civ. Code § 4090(b).)
- 5) Provides that any HOA member may attend a board meeting, except while it is in executive session, and that any HOA member is entitled to attend a teleconference meeting, which shall be audible to the members in a location specified in the meeting notice. (Civ. Code § 4925.)
- 6) Requires an HOA to provide general notice of the time and place of a board meeting at least four days before a meeting, except as follows:
  - a) only two days’ notice is required for a non-emergency board meeting that is held solely in executive session;
  - b) no notice is required for an emergency meeting, as defined. (Civ. Code § 4920.)

- 7) Provides that if an HOA must provide “individual notice” of a meeting, it shall deliver the notice by mail or overnight delivery unless the recipient has consented to delivery by email, facsimile, or other electronic means. (Civ. Code § 4040(a).)
- 8) Provides that if an HOA must provide “general notice” of a meeting, it may deliver the notice by any of the following means:
  - a) any method constituting individual notice;
  - b) including the notice in a billing statement, newsletter, or other document;
  - c) posting the notice in a prominent location that is accessible to all members, as specified; or
  - d) television broadcast, if the association broadcasts television programming. (Civ. Code § 4045(a).)
- 9) Requires an HOA to provide all general notices by individual notice if a member requests it. (Civ. Code § 4045(b).)
- 10) Provides that all votes in a board election shall be counted and tabulated by the inspector or inspectors of elections in public at a properly noticed open meeting of the board or members. Any candidate or other member of the association may witness the counting and tabulation of the votes. No person, including a member of the association or an employee of the management company, shall open or otherwise review any ballot prior to the time and place at which the ballots are counted and tabulated. (Civ. Code § 5120(a).)
- 11) Authorizes an HOA president, or any two directors, to call an emergency board meeting without notice if there are circumstances that could not reasonably have been foreseen which require immediate attention and possible action by the board and which of necessity make it impracticable to provide notice. (Civ. Code § 4923.)
- 12) Authorizes an HOA board to hold an emergency board meeting through a series of electronic transmissions only if all directors consent in writing (including by email) to that action, and if the written consent is filed with the minutes of the board meeting. (Civ. Code § 4910(b)(2).)
- 13) Authorizes any member of an association to bring a civil action against the HOA seeking declaratory or equitable relief for a violation of the laws governing HOA meetings, within one year of the date the cause of action accrues. (Civ. Code § 4955(a).)
- 14) A member who prevails in a civil action to enforce the member’s rights pursuant to this article shall be entitled to reasonable attorney’s fees and court costs, and the court may impose a civil penalty of up to five hundred dollars (\$500) for each violation, except that each identical violation shall be subject to only one penalty if the violation affects each member equally. A prevailing association shall not

recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation. (Civ. Code § 4955(b).)

This bill:

- 1) Authorizes HOA boards, in an area affected by an officially-proclaimed federal, state, or local disaster or emergency, to meet by teleconference without any physical location being held open where HOA members may attend, provided that all of the following conditions are met:
  - a) the notice for the first such meeting during a particular disaster or emergency is provided to members by individual notice, as defined;
  - b) if the association has reason to believe that the disaster or emergency will prevent any member from receiving a notice at the member's address in the association's records, the association shall take all reasonable steps to provide notice to those members through alternative means.
  - c) all notices for such meetings provide clear technical instructions on how to participate; the telephone number and email address of a person who can provide technical assistance with the teleconference process, both before and during the meeting; and a reminder that any member can request individual delivery of meeting notices, with instructions on how to do so.
  - d) every director and member has the same ability to participate in the meeting that would exist if the meeting were held in person;
  - e) any vote of the directors is to be conducted by a roll call vote; and
  - f) any person entitled to participate in the meeting is given the option of participating by telephone.

### COMMENTS

#### 1. About common interest developments

Common interest developments (CIDs) are self-governing groups of dwellings that share common spaces and amenities. They come in a wide variety of physical layouts: condominium complexes, apartment buildings, and neighborhoods of detached, single-family residences, for example. Some consist of thousands of units. Others are made up of just a handful. Dwellings within common housing developments currently account for approximately a quarter of the state's overall housing stock, meaning that the laws governing such developments have a large impact on the population. In California, CIDs are primarily governed by the Davis-Stirling Act. (Civ. Code §§ 4000-6150.)

The Davis-Stirling Act sets forth a system for each CID to govern itself through a homeowners' association (HOA). The owners of the separate properties within the CID are the members of the HOA. Association members vote for the board of directors of the HOA.

The board manages the HOA, frequently by hiring an individual or entity – the property manager – to do so on its behalf. The board determines the annual assessments – much like taxes – that members must pay in order to cover communal expenses. The board enforces the community rules and can propose and make changes to those rules. If members do not pay their assessments in full or on time, or if members violate the community rules, the board has the power to fine the members, place liens on the offending member’s property, and, if ultimately necessary, the power to foreclose. This array of responsibilities and powers has led multiple courts to observe that HOAs function in many ways almost “as a second municipal government, regulating many aspects of [the homeowners’] daily lives.” (*Villa Milano Homeowners Ass’n v. Il Davorge* (2000) 84 Cal.App.4th 819, 836 [citations omitted].)

## 2. About HOA board meeting requirements

HOA boards must carry out the functions described in Comment 1, above, through formal board meetings. (Civ. Code § 4910.) The Common Interest Development Open Meetings Act sets forth certain basic ground rules for how these meetings must be noticed, conducted, and memorialized. (Civ. Code § 4900 *et seq.*) Ordinarily, the board must provide at least four days’ general notice to the HOA members of the time and place at which the board meeting will take place, as well the agenda for the meeting. (Civ. Code § 4920.) The meeting can be conducted by telephone or video conference, but if it is, the board must identify a physical location at which HOA members can attend the meeting in-person and where at least one director or their designate will be present. (Civ. Code § 4090(b).) That location must be included in the notice of the meeting. (*Ibid.*)

## 3. How this bill would alter the usual law governing HOA board meetings conducted by video or teleconference

Conducting HOA board meetings by video or telephone conference will often be cheaper and more convenient for both the board and HOA members. As the current COVID-19 pandemic illustrates, however, the requirement to operate a concurrent physical location so that HOA members may attend in-person may not always be safe, practical, or even legal. Accordingly, this bill proposes making an exception to that requirement for times when the HOA community is affected by an officially declared federal, state, or local disaster or emergency. Instead, under this bill, an HOA board could proceed with a video or telephone-based meeting without designating a physical location for in-person attendance, provided that the board meets certain other conditions. Specifically, to conduct a board meeting entirely by video or telephone conference under this bill, the board must ensure the following.

First, the HOA must provide individual notice of the initial meeting to be held by telephone or video conference without an associated physical location for in-person attendance. This means that the HOA must mail the notice to each member, unless the

recipient has consented to delivery by email, facsimile, or other electronic means. (Civ. Code § 4040(a).)

Recognizing that the particular nature of the disaster or emergency may disrupt mail or even electronic delivery, the bill also says that HOAs must take all reasonable steps to provide notice to the membership by alternative means in such a situation. The flexibility inherent in such broad language has policy value but it can also be criticized for leaving too much room for interpretation and, thus, opening the door to legal disputes. To tighten this language, the author proposes to offer an amendment in Committee that would require HOAs to provide notice by email to any member who has formally provided their email to the HOA, if the nature of the emergency or disaster means that notice by mail will not reach the member.

The bill's second precondition for dispensing with the in-person, physical location requirement for telephone or video-based board meetings is that the HOA must include all of the following information in every notice about the meetings: clear technical instructions on how to participate; the telephone number and email address of a person who can provide technical assistance with the teleconference process, both before and during the meeting; and a reminder that any member can request individual delivery of meeting notices, with instructions on how to do so. These conditions are intended to ensure that directors and members still have a full opportunity to participate in the meetings.

#### 4. Concerns specific to meetings at which ballots will be inspected and counted

For the purposes of most HOA board meetings, the conditions placed on the use of video and telephone conferencing would seem sufficient to allow directors and members to observe and participate as fully as if they were present in person. There is one variety of board meeting for which this may not be true, however. Board meetings at which HOA elections ballots will be counted are subject to unique requirements. Specifically, the elections inspector must open and count the ballots in public at a properly noticed board meeting where all candidates and HOA members can bear witness. (Civ. Code § 5120(a).)

While it is theoretically possible for the inspector to open and count ballots in front of a video camera, that might not provide the same degree of transparency that public, in-person tabulation offers. It might be hard to see what is going on in the video. People could not change their visual perspective as they could in person. And, to the skeptical at least, there may be questions about what is happening just beyond the camera frame. As a result, the procedure would be far less likely to engender trust and confidence in the fairness of the election. With that in mind, the author proposes to offer an amendment in Committee that would make it clear that a board cannot dispense with the requirement to conduct the opening and counting of ballots at a physical location where candidates and HOA members can observe, unless the nature of the declared

disaster or state of emergency renders in-person gatherings unsafe or impossible. In that case, the use of a video feed would be sufficient, so long as members can still witness the counting and tabulation of ballots.

5. Should video and telephone-based board meetings be recorded?

The opponents of this bill assert that board meetings should be recorded if they are going to be held by video or telephone conferences with no designated physical location for attendance. The stated justification for this suggestion is that not all members may be able to attend at the designated time, so a recording would be useful to enable them to “attend” the meeting by watching or listening later.

Arguably, recording board meetings is a best practice that HOA boards would be wise to adopt. As the critics of this bill point out, recording meetings would make it easier for HOA members to follow board activity even if they cannot attend meetings in real time. Moreover, recordings of meetings could reduce misunderstandings and disputes about what was said or decided at any given meeting (though this should ordinarily be the role of the meeting minutes). And modern technology makes recording, storing, and sharing recordings relatively simple and inexpensive.

These considerations apply equally to *all* board meetings, however, and this bill only relates to a very narrow set of board meetings: those conducted by telephone or video conference during an officially proclaimed state of emergency or disaster without a physical location designated for in-person attendance. From a policy perspective, therefore, it would seem anomalous to impose a recording requirement on board meetings, but only in the context covered in this bill. It could be argued that HOA members will be especially harried during an emergency or disaster and that they are less like to be able to attend HOA meetings at any given time as a result. But in this regard, it is crucial to note that the bill does not make any changes to *when* a board meeting takes place; it only deals with *where* the meeting takes place (specifically, whether there must be an option to attend in-person at a physical location). In fact, the change proposed by this bill will likely make it *easier* for harried members to attend board meetings in an emergency or a disaster, because those meetings will be more likely to take place online or over the phone once the HOA does not have to worry about providing a physical space for people to attend and sending someone there to staff it. It is not clear then why these meetings should be subject to a recording requirement when no other board meeting is.

In sum, the Legislature may at some time wish to debate the merits of imposing a recording requirement on HOA board meetings generally, but there is no obvious policy rationale for imposing such a requirement only within the context of the very particular type of board meeting addressed by this bill.

## 6. Enforcement and remedies for violations

If an HOA board violates the requirements contained in the Common Interest Development Open Meetings Act, homeowners have a clear set of remedies. They can file a civil action against the HOA seeking declaratory or equitable relief, including an injunction ordering the HOA to comply. (Civ. Code § 4955(a).) Moreover, so long as the homeowner has a decent legal case, the homeowner should not have great difficulty in obtaining legal counsel, because the Act entitles a prevailing homeowner to reasonable attorney's fees and court costs. In addition, the court may impose civil penalties on the HOA for having violated the meeting requirements. (Civ. Code § 4955(b).)

In its current form, this bill is not part of the Common Interest Development Open Meetings Act. Therefore, the bill does not offer the same remedies, or even any mechanism for enforcement at all, as its critics have pointed out. In consequence, it is not clear what homeowners could do if they were faced with a recalcitrant board unwilling to abide by the bill's rules. In response to this concern, the author has indicated that he will offer amendments in Committee which would apply the same remedies to a violation of this bill that already apply to violations of the Common Interest Development Open Meetings Act.

## 7. Proposed amendments

In order to address the issues set forth in the Comments, above, the author proposes to incorporate amendments into the bill that would:

- modify the requirements for notice associated with a first video or telephone-based HOA board meeting during a disaster or emergency to include email notification when mail service will not achieve actual notice;
- require a physical location for members to observe and inspect the counting of HOA election ballots, even during a declared state of emergency or disaster, with an exception for circumstances in which physical human proximity is dangerous; and
- add a mechanism for CID members to enforce their rights under the bill

A mock-up of the amendments in context is attached to this analysis.

## 8. Arguments in support of the bill

According to the author:

As we navigate natural disasters such as catastrophic wildfires and mud slides as well as other emergencies, we must expand emergency powers so that Common Interest Developments (CIDs) can safely and effectively work during emergencies. By expanding the Davis-Stirling Act to include these emergency powers, SB 391 will ensure that, even in the midst of extraordinary circumstances, CIDs can safely and effectively conduct business in a way that is



transparent and accessible. [...] As we have seen throughout the, COVID-19 pandemic, we need to remove obstacles preventing organizations from safely meeting during emergencies.

In support, the California Association of Community Managers (CACM) writes:

The recent COVID-19 pandemic highlighted the inadequacy of existing law when it comes to operating a CID and enabling owner access to meetings when in-person attendance is not possible. The fundamental governance structure of a CID relies on participation of its owners. [...] In the midst of COVID-19, associations throughout the state allowed teleconference participation pursuant to the Governor's emergency orders. In most instances, public participation actually increased when homeowners were allowed the convenience and safety of doing it by teleconference.

9. Arguments in opposition to the bill

In opposition to the bill, the Center for California Homeowner Association Law and the California Alliance for Retired Americans write:

While we recognize that government-declared emergencies may call for an increased use of technology to facilitate communication, we are concerned that the legislation both infringes on and deletes specific rights of homeowners to participate in association governance. An emergency should be an opportunity to increase participation in governance and not an opportunity to suspend homeowner rights.

In further opposition to the bill, Habitat for Humanity writes:

We are extremely appreciative of the author's openness to the recommended amendments to protect homeowners' rights. However, we remain concerned that SB 391 does not require that electronic meetings be recorded. Our strong recommendation is for SB 391 to include the best practice of requiring homeowner associations to record and preserve electronic meetings as an association record.

**SUPPORT**

California Association of Community Managers  
California Association of Realtors  
Community Associations Institute's California Legislative Action Committee

Desert Resort Management  
Morgan Hill Homeowners Association  
Parkmont Villas Townhouse Association  
Professional Community Management, an Associa Company  
Riverside Sun City Homeowners Association

### OPPOSITION

California Alliance for Retired Americans  
Center for California Homeowner Association Law  
Habitat for Humanity California

### RELATED LEGISLATION

#### Pending Legislation:

SB 392 (Archuleta, 2021) alters the legal requirements for providing individual notice to members of HOAs and timeshares, so that the primary mode of delivery will be email unless the member opts-out, beginning in July 2023. SB 392 is currently pending consideration before the Senate Housing Committee.

SB 432 (Wieckowski, 2021) clarifies that if the independent, third party inspector of an HOA board election appoints additional people to assist with verifying signatures and counting and tabulating votes, those additional people must meet the same specified criteria for third party independence as the inspector. The bill also clarifies that an HOA may disqualify a member from running for the board of directors once that member has served the maximum allowable number of terms or sequential terms. SB 432 is currently pending consideration before the Senate Housing Committee.

#### Prior Legislation:

SB 969 (Wieckowski, 2020) was substantially similar to SB 432. SB 969 was referred to the Senate Housing Committee but was not heard during the 2020 COVID-19 pandemic.

SB 323 (Wieckowski, Ch. 848, Stats. 2019) enacted a series of reforms to the laws governing homeowners' association board of directors elections in common interest developments. In broad strokes, the reforms increased the regularity, fairness, formality, and transparency associated with such elections. As relevant to this bill, the bill established certain rights for HOA members to observe the counting and tabulation of HOA board election ballots.

SB 61 (Battin, Ch. 450, Stats. 2005) enacted the basic requirements for conduct of an HOA, including access to association publications for candidates, appointment of an elections inspector, and the methods for conducting balloting.

**PRIOR VOTES:**

Senate Housing Committee (Ayes 6, Noes 0)

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**Amended Mock-up for 2021-2022 SB-391 (Min (S))**

**Mock-up based on Version Number 98 - Amended Senate 3/22/21  
Submitted by: Griffiths, SJUD**

**THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:**

**SECTION 1.** Section 4090 of the Civil Code is amended to read:

**4090.** “Board meeting” means either of the following:

(a) A congregation, at the same time and place, of a sufficient number of directors to establish a quorum of the board, to hear, discuss, or deliberate upon any item of business that is within the authority of the board.

(b) A teleconference, where a sufficient number of directors to establish a quorum of the board, in different locations, are connected by electronic means, through audio or video, or both. A teleconference meeting shall be conducted in a manner that protects the rights of members of the association and otherwise complies with the requirements of this act. Except for a meeting that will be held solely in executive session or conducted under Section 5450, the notice of the teleconference meeting shall 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. Participation by directors in a teleconference meeting constitutes presence at that meeting as long as all directors participating are able to hear one another, as well as members of the association speaking on matters before the board.

**SEC. 2.** Article 11 (commencing with Section 5450) is added to Chapter 6 of Part 5 of Division 4 of the Civil Code, to read:

**Article 11.** Emergency Powers and Procedures

**5450.** (a) This section only applies to a common interest development that is in an area affected by one or more of the following conditions:

(1) A state of disaster or emergency declared by the federal government.

(2) A state of emergency proclaimed by the Governor under Section 8625 of the Government Code.

(3) A local emergency proclaimed by a local governing body or official under Section 8630 of the Government Code.

(b) Notwithstanding any other law or the association's governing documents, a board meeting or meeting of the members may be conducted entirely by teleconference, without any physical location being held open for the attendance of any director or member, if all of the following conditions are satisfied:

(1) Notice of the first meeting that is conducted under this section for a particular disaster or emergency affecting the association is delivered to members by individual delivery.

(2) The notice for each meeting conducted under this section includes, in addition to other required content for meeting notices, all of the following:

(A) Clear technical instructions on how to participate by teleconference.

(B) The telephone number and electronic mail address of a person who can provide technical assistance with the teleconference process, both before and during the meeting.

(C) A reminder that a member may request individual delivery of meeting notices, with instructions on how to do so.

(3) Every director and member has the same ability to participate in the meeting that would exist if the meeting were held in person.

(4) Any vote of the directors shall be conducted by a roll call vote.

(5) Any person who is entitled to participate in the meeting shall be given the option of participating by telephone.

~~(c) If the association has reason to believe the disaster or emergency will prevent any member from receiving a notice at the address in the association's records, the association shall take all reasonable steps to provide each of those members with notice of the meeting through alternative means.~~

(c) If, as a result of the disaster or emergency, mail delivery or retrieval is not possible at any association onsite address and the address on file with the association for that member is the same association onsite address, then the association shall send the notice of the first meeting referenced in paragraph (1) of subdivision (b) to any email address provided to the association by that member, in writing, pursuant to paragraph 2 of subdivision (a) of Section 4040 or subdivision (b) of Section 4041.

(d) Subdivision (b) does not apply to a meeting at which ballots are counted and tabulated pursuant to Section 5120, unless all of the following conditions are met:

(1) The declared or proclaimed disaster or emergency makes it unsafe or impossible for people to gather in-person in order to count and tabulate ballots.

(2) The meeting at which ballots are to be counted and tabulated is conducted by video conference.

(3) The camera is placed in a location such that members can witness the inspector of elections counting and tabulating the votes.

(e) The remedies available pursuant to Section 4955 shall also be available to address violations of this section.

**SEC. 3.** This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to authorize common interest developments in an area affected by a disaster or emergency to safely hold board meetings as quickly as possible, it is necessary that this act go into effect immediately.