



ELECTRONIC Delivery

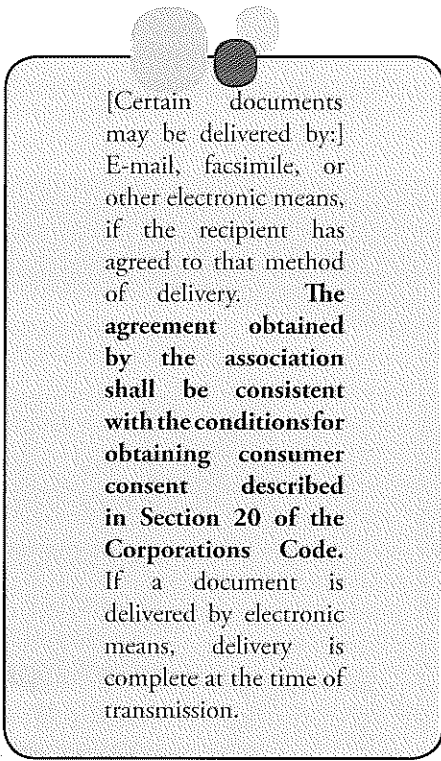
Electronic Delivery (Email) of Documents Now Permitted Under the Davis Stirling Act: Legislature Amends Civil Code Section 1350.7

FINALLY THE LAW IS CATCHING up with current technology. The Civil Code requirements that “meetings” take place, or that agreements and other documents be “in writing” are so inextricably entangled with every aspect of law that it is extremely difficult to reconcile the technical requirements with the reality that, at times, in today’s world, a phone conference (combined with a web conference using online services) is more common than a face-to-face meeting and e-mail has all but replaced FedEx, faxes and in many cases, telephone calls.

How does this issue affect community association law? The Davis-Stirling Act has been particularly slow to acknowledge technology and to encourage or even allow for its integration into association governance. This can be frustrating for association managers, board members and others (such as community association attorneys) who recognize that significant money could be saved if the association’s

required disclosures and/or notices could be transmitted via e-mail, be made available for download at the association’s website or even delivered on a disk or flash drive rather than printed on volumes of paper and then snail-mailed to the owners. As of December 31, 2009, Civil Code §1350.7(b)(3) allowed an association to deliver a document via e-mail, facsimile or other electronic means if the recipient has agreed to that method of delivery. However, this subsection was the only mention of these technologies in the entire Davis-Stirling Act, and it did not provide much detail or clarity. Unlike some other statutes pertaining to the use of technology, the Davis-Stirling Act prior to 2010 did not clearly state whether Section 1350.7(b)(3) applied only to electronic transmissions (such as e-mail) or also to electronic media (such as CDs or PDF downloads, etc.), and if electronic media was not included in this Section, whether it was otherwise permitted. This Section also did not describe the homeowner consent that is required.

Fortunately, as of January 1, 2010, this changed due to the enactment of an amendment to Civil Code §1350.7(b)(3). Pursuant to this amendment this subsection now reads as follows (new language in bold font):



[Certain documents may be delivered by:] E-mail, facsimile, or other electronic means, if the recipient has agreed to that method of delivery. **The agreement obtained by the association shall be consistent with the conditions for obtaining consumer consent described in Section 20 of the Corporations Code.** If a document is delivered by electronic means, delivery is complete at the time of transmission.

The documents that are delivered pursuant to this Section include all of the documents listed in the new disclosure index, which is to be distributed upon request in accordance with Civil Code § 1363.005 as of January 1, 2010, and documents that are distributed pursuant to any other statute that specifically references this provision. This therefore includes all of an

association's required annual disclosures, as well as notices relating to operating rule changes. However, any notices that are not included in the disclosure index and that are required by a statute that does not reference § 1350.7, must continue to be delivered by paper copy, even if the owner has consented to electronic distribution. For example, an association is still required to send hard copies of notices relating to special assessments and use of reserve funds, collections and foreclosure notices, and notices relating to disciplinary proceedings and fines.

Civil Code § 1350.7(b)(3) incorporates Corporations Code § 20, which pertains to electronic transmissions by a corporation, including facsimile transmissions, e-mails, posts on an electronic message board, and all "other means of electronic communication." While § 20 does not help clarify whether a physical delivery of documents in electronic format, such as a CD, is permitted, it does impose certain requirements on an association seeking to transmit documents electronically. First, it requires that the recipient has provided their unrevoked consent to the use of those means of transmission. Although the Davis-Stirling Act also requires homeowner consent, the language of this § 20 adds that the consent may be revoked, and that upon revocation, the association will be

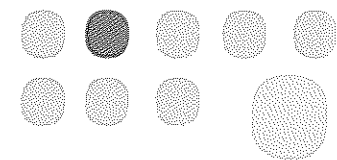
required to send hard copies of documents to homeowners. Secondly, it requires that the transmission create a record that is capable of retention, retrieval, and review, and that may thereafter be rendered into clearly legible tangible form. The final component of § 20 is that consent must be given pursuant to a designated procedure.

Consent under § 20 of the Corporations Code is a specifically defined process which requires that consent to the electronic transmission has been preceded by or includes a clear written statement from the association to the recipient as to (1) the right

federal E-Sign Act (codified at 15 U.S.C. §7001 *et seq.*). Concurrently with the amendment to Civil Code § 1350.7(b)(3) which incorporated Corporations Code § 20, Corporations Code § 20 was amended so that it no longer incorporates the E-Sign Act. Associations may breathe a sigh of relief at this, as the consent procedure required by the E-Sign Act is much more intricate and involves a number of additional steps.

Although this statutory amendment may seem to fail to answer some of the important questions (i.e., is distribution

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of the recipient to have the record provided or made available on paper or in non-electronic form, (2) whether the consent applies only to that particular transmission, to specified categories of communications, or to all future correspondence from the association, and (3) the procedures that the homeowner must follow to withdraw consent. This provision also reflects recent changes to the Corporations Code, which until January 1, 2010, required additional consent procedures in accordance with the

of documents on a CD considered an "electronic transmission" we conservatively recommend that all associations follow the required process not only prior to distributing documents via electronic transmissions, such as e-mail and facsimile, but also before physically delivering records in electronic format, such as on CDs or flash drives), it benefits associations in a number of ways. First, it is useful in that the law was previously unclear as to what kind of consent was required in order for an association to send documents electronically. We have seen many disputes that revolve around claims that the association sent notices or documents to an unauthorized e-mail address and that the homeowner never received them. The added step of requiring that the association specifically state what documents will be transmitted electronically in the future will hopefully eliminate this problem. Further, this amendment is an affirmative step toward updating the Davis-Stirling Act to reflect current technology. We can expect and anticipate that in time the list of what can be delivered to owners electronically will be broadened. Who knows, some day the Act may even allow board meetings to be conducted via an internet web conferencing service such as Go To Meeting. ⚙️

This article was written and submitted by Sandra Gottlieb of Swedelson & Gottlieb.

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