Study H-855 July 20, 2010

Memorandum 2010-36

Common Interest Development: Statutory Clarification and Simplification of CID Law (Comments on Tentative Recommendation)

For several years, the Commission has been studying various aspects of the law governing common interest developments ("CIDs").

A CID is a real property development in which ownership of a "separate interest" (e.g., a separate lot or unit) is coupled with an interest in "common area" property (e.g., the lobby, common walls, and roof in a condominium building).

A CID must have a homeowners association, which exists to maintain the common area property and enforce any use restrictions that are set out in the CID's declaration (often referred to as the development's "conditions, covenants, and restrictions," or "CC&Rs"). The association has the power to collect assessments from the separate interest owners, as needed to fulfill its obligations.

CIDs are governed by the Davis-Stirling Common Interest Development Act ("Davis-Stirling Act"). See Civ. Code §§ 1350-1378. A homeowners association is also governed by applicable provisions of the Corporations Code (typically the Nonprofit Mutual Benefit Corporation Law).

The Commission is currently nearing completion of a proposal to recodify the Davis-Stirling Act, in order to improve the Act's organization, make it easier to understand and use, and implement noncontroversial substantive improvements.

The Commission had issued a recommendation on this topic in 2007, which was introduced as legislation in 2008 (AB 1921 (Saldaña)). That bill was opposed by an ad hoc group of attorneys specializing in CID law, which argued in part that the proposal should be scrutinized by the State Bar Real Property Law Section ("RPLS") before moving forward. In response to that opposition, the bill was withdrawn. The Commission then revised the proposed law to address

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

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

some concerns expressed by the attorney group and to provide time for a formal review by the RPLS.

The revised proposal was completed and circulated as a tentative recommendation in March 2010.

The Commission has received extensive comment on its tentative recommendation, including a lengthy submission from a working group of the RPLS. The Comments are included in the Exhibit as follows:

Given the volume of comment received, it will take more than a single meeting to address all of the points that have been raised. For that reason, the staff is using this memorandum as the vehicle for publication of the comments that have been received. Analysis and discussion of those comments will be provided in separate memoranda. **Commissioners and interested persons should retain this memorandum for reference purposes until discussion of the comments has been completed.**

Respectfully submitted,

Brian Hebert
Executive Secretary

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March 31, 2010

Mr. Brian Hebert
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4000 Middlefield Road, Room D-1
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Re: Stakeholder Attorney Group Comments and Proposed Revisions to Chapters 1 and 2 of CLRC Staff Draft of Davis-Stirling Common Interest Development Act, dated December 2, 2009

Dear Mr. Hebert:

As you are aware I am a part of a group of lawyers who specialize in common interest development work and in the formation and operation of common interest developments who have been reviewing the Davis-Stirling Common Interest Development Act ("**Act**") revisions as contained in the CLRC Staff Draft dated December 2, 2009. Pursuant to your suggestion this group has concentrated its work on the definitions and certain other technical provisions contained in Chapters 1 and 2 of the Draft relating to the formation of CIDs. The group feels that a number of the definitions have ambiguities and other problems that have become apparent due to their usage over the last twenty-five years and that in some cases the definitions have not kept up with the trends and actual usages of common area.

Jeff Wagner has chaired the group and coordinated the meeting and Peter Saputo has acted as the group's recorder. Mr. Saputo has prepared a black-lined version of the first 35 pages of the December 2, 2009 draft Act that shows the proposed additions and deletions proposed by the groups and in some cases containing notes reflecting the group's comments. This version is attached to this letter for the Commission's consideration. For the most part the proposed changes are self explanatory but set out in the text as note comments on some of the proposed changes to supplement the black-line text.

We are hopeful that these suggested changes are helpful to the Commission in cleaning up and updating the Act.

Very truly yours,

DUNCAN R. McPHERSON

DRM/clm
cc: Mr. Steve Cohen [scohen@clrc.ca.gov]

EX 1

PROPOSED RECODIFICATION OF DAVIS-STIRLING COMMON INTEREST DEVELOPMENT ACT [REVISED]

☞ **Staff Note.** Each of the provisions below has a parenthetical description following the section number in its heading. The descriptions have the following meanings:

(UNCHANGED). A section with this description would continue existing law almost verbatim. Minor technical changes might be made to (1) correct a cross-reference to reflect the new number of the referenced provision, (2) add or modify subdivision or paragraph designators (e.g., unnumbered paragraphs might be designated as subdivisions), or (3) conform to technical stylistic conventions (e.g., to avoid use of the word "such" or the phrase "he or she"). If any of these changes are made, they will be clearly identified in the Comment following the section.

(REVISED). A section with this description will continue existing law verbatim, except as specifically indicated in the Comment and "Staff Note" that follow the section. Changes made to a "(REVISED)" section may include the rewording of ambiguous or confusing language or minor substantive improvements to existing law. Any such changes will be expressly identified.

(NEW). A section with this description will be largely new. A boxed "Staff Note" following the Comment will explain the purpose of the new section.

DETAILED CONTENTS

EX 2

EX 3

EX 4

EX 5

EX 6

PART 5. COMMON INTEREST DEVELOPMENTS

CHAPTER 1. GENERAL PROVISIONS

Article 1. Preliminary Provisions

§ 4000 (UNCHANGED). Short title

4000. This part shall be known and may be cited as the Davis-Stirling Common Interest Development Act.

Comment. Section 4000 continues former Section 1350 without change.

§ 4005 (REVISED). Effect of headings

4005. Division, part, title, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of this part.

Comment. Section 4005 continues former Section 1350.5 without change, except that "article" has been added to the list of headings and the last word of the sentence is replaced with "part."

Section 4005 is a standard provision found in many codes. See, e.g., Evid. Code § 5; Fam. Code § 5; Prob. Code § 4.

☞ **Staff Note.** Proposed Section 4005 would add "article" to the list of headings in existing Section 1350.5. The omission of articles from that list appears to have been inadvertent.

§ 4010 (NEW). Continuation of prior law

4010. (a) A provision of this part, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be construed as a restatement and continuation thereof and not as a new enactment, and a reference in a statute to the provision of this part shall be deemed to include a reference to the previously existing provision unless a contrary intent appears.

(b) A reference in ~~the governing documents~~ any governing document to a former provision that is restated and continued in this part, is deemed to include a reference to the provision of this part that restates and continues the former provision.

Comment. Section 4010 is new. Subdivision (a) is a standard provision found in many codes. See, e.g., Bus. & Prof. Code § 2; Corp. Code § 2; Fam. Code § 2; Prob. Code § 2(a); Veh. Code § 2. See also Gov't Code §§ 9604 (construction of restatements and continuations), 9605 (construction of amended statutory provision). The last clause of subdivision (a) makes clear that a statutory reference to a provision within this part includes a reference to the former law from which it is drawn. *Cf.* Gov't Code § 9604 (reference to previously existing provision deemed reference to restatement or continuation).

Subdivision (b) adapts the general principle of subdivision (a) to a statutory reference in an association's governing documents.

☞ **Staff Note.** This is a standard transitional provision. It clarifies that a new provision that restates the substance of a former provision is to be treated as a continuation of that former provision, and not as a new enactment. Thus, a reference to the former provision in a court opinion is to be treated as a reference to the provision that continues the former provision.

Subdivision (b) would expressly extend that principle to references in an association's governing documents.

§ 4015 (UNCHANGED). Application of part

4015. Nothing in this part may be construed to apply to a real property development ~~wherein there does not exist a~~ that does not contain common area as defined in Section 4095. This section is declaratory of existing law. [Please consider deleting the last sentence. Is it needed at this time?]

Comment. Section 4015 continues former Section 1374 without change, except that the term "title" is replaced with "part" and a cross-reference is updated to reflect the new location of the referenced provision.

§ 4020 (UNCHANGED). Construction of zoning ordinance

4020. Unless a contrary intent is clearly expressed, a local zoning ordinance is construed to treat like structures, lots, parcels, areas, or spaces in like manner regardless of whether the common interest development is a community apartment project, condominium project, planned development, or stock cooperative.

Comment. Section 4020 continues former Section 1372 without change.

§ 4025 (REVISED). Nonresidential development

4025. (a) The following provisions do not apply to a common interest development that is limited to industrial or commercial uses by zoning or by a declaration of covenants, conditions, and restrictions that has been recorded in the official records of each county in which the common interest development is located:

(1) Section 4275.

(2) Article 5 (commencing with Section 4350) of Chapter 2.

(3) Article 2 (commencing with Section 4525), and Article 3 (commencing with Section 4575), of Chapter 3.

(4) Section 4600.

(5) Section 4765.

(6) Sections 5300, 5305, 5565, and 5810, and paragraph (7) of subdivision (a) of Section 5310.

(7) Sections 5500 through 5560, inclusive.

(8) Subdivision (b) of Section 5600.

(9) Subdivision (b) of Section 5605.

(b) The Legislature finds that the provisions listed in subdivision (a) are appropriate to protect purchasers in residential common interest developments, however, the provisions may not be necessary to protect purchasers in commercial or industrial developments since the application of those provisions could result in unnecessary burdens and costs for these types of developments.

Comment. Section 4025 continues former Section 1373 without change, with the following exceptions: (1) Former Section 1373(a)(3) is superfluous and is not continued. (2) Cross-references are updated to reflect the new location of the referenced provisions. (3) Subdivision (a)(4) is added to continue the substance of former Section 1363.07(a)(3)(F). (4) Subdivision

[The group was concerned whether there is ambiguity as to whether fee title was needed to trigger this provision and is suggesting that the provision make it clear that conveyance of a security interest itself will not trigger creation of a CID.]

(a)(9) refers only to Section 5605(b). It does not refer to the emergency exception provisions of Section 5610, which were also part of former Section 1366(b).

☞ **Staff Note.** (1) Existing Section 1373(a)(3) exempts a nonresidential CID from the requirements of Section 1363(b). The proposed law would not continue Section 1363(b), which requires that an association comply with Sections 1365 and 1368. Section 1363(b) is unnecessary, because Sections 1365 and 1368 apply to an association by their own terms. For that reason, Section 1363(b) would not be continued in the proposed law. Therefore, it would not be necessary to continue Section 1373(a)(3).

(2) Proposed Section 4025(a)(4) continues the substance of existing Section 1363.07(a)(3)(F), which exempts nonresidential CIDs from special rules for approving a grant of exclusive use common area.

(3) Proposed Section 4025(a)(9) continues only part of the substance of existing Section 1373(a)(6). It would exempt a nonresidential CID from the member approval requirement of Section 1366(b), but would not exempt a nonresidential CID from the emergency exception provided in Section 1366(b).

That emergency exception also applies to the member approval requirement of Section 1366(a). For that reason, it should continue to apply to a nonresidential CID. That is the approach taken in Section 4025(a)(9). The Commission invites comment on whether that substantive change would cause any problems.

§ 4030 (REVISED). Creation of common interest development

4030. (a) This title applies and a common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed, provided all of the following are recorded:

(excluding the conveyance of a security interest)

(1) A declaration.

(2) A condominium plan, if any exists.

(3) A final map or parcel map, if Division 2 (commencing with Section 66410) of Title 7 of the Government Code requires the recording of either a final map or parcel map for the common interest development.

(b) Notwithstanding subdivision (a), this part governs a stock cooperative that ~~has not recorded~~ a declaration.

is not governed by

Comment. Subdivision (a) of Section 4030 continues former Section 1352 without change.

Subdivision (b) is new. It reflects the fact that some stock cooperatives are created without a recorded declaration.

☞ **Staff Note.** Proposed Section 4030(b) is new. It preserves the application of the Davis-Stirling Act to a stock cooperative in the fairly common circumstance where a cooperative lacks a recorded declaration.

§ 4035 (NEW). "Delivered to the association"

4035. If a provision of this part requires that a document be "delivered to the association," the document shall be delivered by first-class mail, postage prepaid, or by certified mail, to the person designated in the annual policy statement, prepared pursuant to Section 5310, to receive documents on behalf of the association. If no person has been designated to receive documents, the document shall be delivered to the president or secretary of the association.

[If we are going to write a new provision on delivery, why not permit (a) personal delivery and (b) electronic delivery?]

[Section 20 is unduly complex as it provides that no notice is valid unless it also satisfies the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Sec. 7001(c)(1)). No HOA will be able to use electronic delivery without hiring a lawyer to decipher Section 7001. This is a step backwards.]

Comment. Section 4035 is new. It provides a standard rule for delivery of a document to the association.

☞ **Staff Note.** Proposed Section 4035 is new. It would provide a clear rule for official communication with the association.

§ 4040 (NEW). Individual notice

4040. (a) If a provision of this part requires "individual delivery" or "individual notice," the notice shall be delivered to the member to be notified by one of the following methods:

(1) First-class mail, postage prepaid, addressed to the member at the address last shown on the books of the association or otherwise provided by the member.

(2) 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.~~

(b) A member may request in writing that a notice to that member be sent to up to two different addresses.

(c) For the purposes of this section, an unrecorded provision of the governing documents providing for a particular method of delivery does not constitute agreement by a member to that method of delivery.

Comment. Section 4040 is new. It specifies acceptable methods for delivery of a notice to an individual member, as distinguished from a notice that is to be delivered to every member. See Section 4045 (general notice). The methods listed in subdivision (a) are drawn from former Section 1350.7(b)(2)-(3).

Subdivision (b) generalizes the substance of former Sections 1365.1(c) and 1367.1(k) without substantive change.

Subdivision (c) continues former Section 1350.7(d). It precludes use of electronic delivery methods when the recipient has not consented to use of those methods or has withdrawn such consent.

☞ **Staff Note.** Proposed Section 4040 is new. It is drawn from and generalizes much of the substance of existing Section 1350.7.

§ 4045 (NEW). General notice

4045. (a) If a provision of this part requires "general delivery" or "general notice," the notice shall be provided by one or more of the following methods:

(1) Any method provided for delivery of an individual notice (Section 4040).

(2) Inclusion in a billing statement, newsletter, or other document that is delivered by one of the methods provided in this section.

(3) Posting in a location that is accessible to all members, if the location has been designated for the posting of general notices by the association in the annual policy statement, prepared pursuant to Section 5310.

(4) Publication in a periodical that is circulated primarily to members of the association.

EX 11

[This provision is ambiguous in that it seems to suggest that if a method of delivery is set out in the declaration or other recorded governing document that it may constitute a binding method of delivery to the members. However this seems inconsistent with the requirements of (a)(2) which contain restrictions on electronic notice.]

(5) If the association broadcasts television programming for the purpose of distributing information on association business to its members, by inclusion in the programming.

(b) Notwithstanding subdivision (a), if a member ~~requests~~ makes a written request to receive general notices by individual delivery, all general notices to that member shall be delivered pursuant to Section 4040. The option provided in this subdivision shall be described in the annual policy statement, prepared pursuant to Section 5310.

Comment. Section 4045 is new. It specifies acceptable methods for delivery of a notice to the membership generally, as distinguished from a notice that is to be delivered to a specific member. See Section 4040 (individual notice). Nothing in this section prevents an association from using supplemental notice methods, such as posting on an Internet website, so long as one or more methods authorized by this section are also used.

Subdivision (b) reserves the right of any member, on request, to receive general notices by the delivery methods provided for delivery of an individual notice. Thus, in an association that posts general notices to its website, individual members would still have the right, on request, to receive those notices by mail.

☞ **Staff Note.** Proposed Section 4045 is new. It would enhance efficiency by allowing an association to "broadcast" notices of general interest, while reserving the right of individual members to receive those notices as individual notices on request.

§ 4050 (NEW). Time and proof of delivery

4050. (a) This section governs the delivery of a document pursuant to this part.

(b) If a document is delivered by mail, delivery is deemed to be complete on deposit into the United States mail.

(c) If a document is delivered by electronic means, delivery is complete at the time of transmission.

Comment. Section 4050 is new. Subdivision (b) generalizes the second sentence of former Section 1350.7(b)(2).

Subdivision (c) generalizes the second sentence of former Section 1350.7(b)(3).

☞ **Staff Note.** Proposed Section 4050 is new. It would generalize the timing rules provided in existing Section 1350.7, so that they would apply to any notice delivered by the specified methods. This will provide greater certainty in resolving timing disputes.

§ 4060 (NEW). Minimum font size 10

4060. In any notice, ballot, report, or other writing that the association is required to prepare and deliver to a member pursuant to this part, the text shall be printed in a ~~12~~ point font or larger.

Comment. Section 4060 is new. This section does not apply to an association record that was not prepared for delivery to a member, merely because the record may be subject to inspection under Section 5205.

☞ **Staff Note.** Proposed Section 4060 is new. It would generalize and standardize the minimum font size rules provided in existing Sections 1365(d) and 1365.1(a), so that they would apply to any notice or report delivered to a member pursuant to this part.

EX 12

[This font requirement could cause problems with the use of footnotes and with the use of accounting or other third party provided documents since it is not entirely clear what "prepare" means in this context. Should be limited to documents prepared by the association only or any document which the association is required to have prepared for delivery. Further, the Act already contains a number of provisions requiring that certain notices be in 12 point type. The group would like to make sure that by requiring all notices to be in 12 point type that the intent of highlighting the notices in 1365(d) and 1365.1(a) is not lost. These statutes are intended to call specific attention to their provisions.]

§ 4065 (NEW). Approved by majority of all members

4065. If a provision of this part requires that an action be approved by a majority of all members, the action shall be approved or ratified by an affirmative vote of members representing ~~more than 50 percent~~ a majority of the total voting power of the association.

Comment. Section 4065 is new. It is added for drafting convenience.

☞ **Staff Note.** Proposed Section 4065 is new. It would add guidance on the procedure for approval of a proposed action that must be approved "by a majority of all members."

§ 4070 (NEW). Approved by majority of quorum of members

4070. If a provision of this part requires that an action be approved by a majority of a quorum of the members, the action shall be approved or ratified by an affirmative vote of members representing ~~more than 50 percent~~ a majority of the votes cast in an election at which a quorum is achieved.

Comment. Section 4070 is new. It is added for drafting convenience.

☞ **Staff Note.** Proposed Section 4070 is new. It would add guidance on the procedure for approval of a proposed action that must be approved "by a majority of a quorum of the members."

4071 (NEW). SEE NEXT PAGE

Article 2. Definitions

§ 4075 (REVISED). Application of definitions

4075. The definitions in this article govern the construction of this part.

Comment. Section 4075 restates the substance of the introductory clause of former Section 1351.

☞ **Staff Note.** Proposed Section 4075 recasts the introductory clause of Section 1351 to better fit within the new organization, without any substantive change in its meaning.

§ 4080 (UNCHANGED). "Association"

4080. "Association" means a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development.

Comment. Section 4080 continues former Section 1351(a) without change.

§ 4085 (NEW). "Board"

4085. "Board" means the board of directors of the association.

Comment. Section 4085 is new.

§ 4090 (REVISED). "Board meeting"

4090. "Board meeting" includes any 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 scheduled to be heard by the board, ~~except those matters that may be discussed in executive session.~~

[Can delete this last phrase as covered in Section 4925(a).]

[Section 4065 is consistent with Corporations Code Section 5033 and appears to supercede that Section with respect to votes which are to be "approved by a majority of all members." Section 4070 addresses a second special situation (one which is not governed by the Corporations Code) which is "approval by majority of quorum of members." The existence of these two sections raises the question of what vote is required to simply constitute "approval by the members." Absent some special provision in this Act, it would seem that Corporations Code Section 5034 would apply. However, that section does not address action by the secret ballot procedure of Section 5100. The result is that except for the two special situations governed by 4065 and 4070, the Act leaves us with trying to figure out how Corporations Code Section 5034 is to be applied to the secret ballot procedure which is unique to Davis-Stirling. The Act really needs to address the vote required for approval in the situations that are not governed by 4065 or 4070.]

4071 (NEW) Approval by the members.

4071. Except for actions which this part requires to be approved by a majority of all members (Section 4065) or a majority of a quorum of the members (4070), "approval by the members" means approved or ratified by an affirmative vote of members representing a majority of the votes (a) cast at a meeting of the members in which a quorum is achieved, (b) cast by secret ballot in accordance with an election governed by Article 4 (commencing with Section 5100) of Chapter 5, or (c) cast by written ballot in conformity with Section 7513 of the Corporations Code.

Comment. Section 4090 continues former Section 1363.05(j) without change, with the following exceptions: (1) The term "board meeting" is used in place of the more general "meeting," to distinguish between a board meeting and member meeting. (2) The defined term "director" is used in place of "board member." See Section 4140 ("director" defined). (3) The number of directors required to establish a board meeting has been changed from a majority of the members to a number constituting a quorum.

☞ **Staff Note:** Proposed Section 4090 would change the meaning of "meeting" to include any congregation of a *quorum* of the directors, rather than a *majority* of the directors. The purpose of the definition is to encompass a gathering of board members *at which board business might be conducted*. For that purpose, the presence of a quorum is the more appropriate measure, because in some associations the quorum may be different from a simple majority.

§ 4095 (REVISED). "Common area"

[this word causes problems with phased projects]

4095. (a) "Common area" means the ~~entire~~ common interest development except the separate interests therein. The estate in the common area may be a fee, a life estate, an estate for years, or any combination of the foregoing.

(b) Notwithstanding subdivision (a), in a planned development described in subdivision (b) of Section 4175, ~~the common area may consist of~~ mutual or reciprocal easement rights appurtenant to the separate interests. are considered common area.

Comment. Subdivision (a) of Section 4095 continues the first sentence of former Section 1351(b) without change.

Subdivision (b) continues the substance of the second sentence of former Section 1351(b), but restates it for clarity.

☞ **Staff Note.** Proposed Section 4095(b) would restate the second sentence of existing Section 1351(b), to improve its clarity without changing its meaning.

§ 4100 (UNCHANGED). "Common interest development"

4100. "Common interest development" means any of the following or a combination thereof:

(a) A community apartment project.

(b) A condominium project.

(c) A planned development.

(d) A stock cooperative.

[The addition of "or a combination thereof" is being suggested for it is common now that CID's be a combination of a planned development and condominium projects.]

Comment. Section 4100 continues former Section 1351(c) without change.

§ 4105 (UNCHANGED). "Community apartment project"

4105. "Community apartment project" means a development in which an undivided interest in land is coupled with the right of exclusive occupancy of any apartment located thereon.

Comment. Section 4105 continues former Section 1351(d) without change.

§ 4110 (UNCHANGED). "Community service organization or similar entity"

4110. (a) "Community service organization or similar entity" means a nonprofit entity, other than an association, that is organized to provide services to occupants of the common interest development or to the public in addition to the occupants, to the extent community common area or facilities are available to the public. **EX 15**

[Even with these changes Subsection (b) retains the awkward reference back to the definition of a Planned Development (Section 4175(b)) which can be easily misunderstood by someone not familiar with the Act. Perhaps one of these sections should contain the entire concept of when easements can be common area.]

[This change is being suggested since condominium plans often depict multiple condominium projects. Note however for amendment purposes the group suggest that it be clear that the plan for each condominium plan can be amended separately by the owners within each separate condominium project.]

(b) "Community service organization or similar entity" does not include an entity that has been organized solely to raise moneys and contribute to other nonprofit organizations that are qualified as tax exempt under Section 501(c)(3) of the Internal Revenue Code and that provide housing or housing assistance.

Comment. Section 4110 continues former Section 1368(c)(3) without change, except that it has been divided into subdivisions, the defined term "occupant" is used to replace "resident," and the reference to "common areas" is singularized. See Section 4163 ("occupant" defined).

§ 4120 (REVISED). "Condominium plan"

4120. "Condominium plan" means a plan consisting of:

(a) A description or survey map of ~~a condominium project,~~ which shall refer to or show monumentation on the ground.

(b) A three-dimensional description of ~~a condominium project,~~ one or more dimensions of which may extend for an indefinite distance upwards or downwards, in sufficient detail to identify the common area and each separate interest.

(c) A certificate consenting to the recordation of the condominium plan pursuant to this part that is signed and acknowledged as provided in Section 4290.

Comment. Section 4120 continues the introduction of former Section 1351(e) without change, with the following exceptions: (1) The enumerated items are set out as subdivisions. (2) A reference to "this title" has been changed to "this part." (3) The list of persons who must sign and acknowledge the certificate consenting to recordation of the condominium plan has been replaced with a reference to the section governing the creation and recordation of a condominium plan.

☞ **Staff Note.** Proposed Section 4120 would include only the definition of the term "condominium plan." Procedural provisions in Section 1351, relating to the creation or amendment of a condominium plan, would be located elsewhere. See proposed Sections 4290 and 4295.

§ 4125 (UNCHANGED). "Condominium project"

4125. (a) A "condominium project" means ~~a development~~ consisting of condominiums.

(b) A condominium consists of an undivided interest in common in a portion of real property coupled with a separate interest ~~in space~~ called a unit, the boundaries of which are described on a recorded final map, parcel map, or condominium plan in sufficient detail to locate all boundaries thereof. The area within these boundaries may be filled with air, earth, ~~or~~ water, or any combination thereof, and need not be physically attached to land except by easements for access and, if necessary, support. The description of the unit may refer to (1) boundaries described in the recorded final map, parcel map, or condominium plan, (2) physical boundaries, either in existence, or to be constructed, such as walls, floors, and ceilings of a structure or any portion thereof, (3) an entire structure containing one or more units, or (4) any combination thereof.

(c) The portion or portions of the real property held in undivided interest may be all of the real property, except for the separate interests, or may include a

particular three-dimensional portion thereof, the boundaries of which are described on a recorded final map, parcel map, or condominium plan. The area within these boundaries may be filled with air, earth, or water, or any combination thereof, and need not be physically attached to land except by easements for access and, if necessary, support.

(d) An individual condominium within a condominium project may include, in addition, a separate interest in other portions of the real property.

Comment. Section 4125 restates former Section 1351(f), without change, except that the section has been organized into subdivisions for ease of reference.

§ 4130 (UNCHANGED). "Declarant"

4130. "Declarant" means the person or group of persons designated in the declaration as declarant, or if no declarant is designated, the person or group of persons who sign the original declaration or who succeed to special rights, preferences, or privileges designated in the declaration as belonging to the signator of the original declaration.

Comment. Section 4130 continues former Section 1351(g) without change.

§ 4135 (UNCHANGED). "Declaration"

4135. "Declaration" means ~~the document, however denominated, that contains the information required by Sections 4250 and 4255~~. a recorded document which establishes equitable servitudes that governs the operation of a common interest development [As drafted 4135 and 4250 are circular]

Comment. Section 4135 continues former Section 1351(h) without change, except that the word "which" has been replaced with "that" and the cross-reference has been updated to reflect the new location of the referenced provision.

§ 4140 (NEW). "Director"

4140. "Director" means a natural person ~~elected, designated, or selected to serve~~ who serves on the board. [A person could be elected to the board before the actual term starts]

Comment. Section 4140 is new. It is added for drafting convenience.

§ 4145 (REVISED). "Exclusive use common area"

4145. (a) "Exclusive use common area" means a portion of the common area designated by the declaration for the exclusive use of one or more, but fewer than all, of the owners of the separate interests and which is or will be appurtenant to the separate interest or interests.

(b) Unless the declaration otherwise provides, any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, exterior doors, doorframes, and hardware incident thereto, screens and windows or other fixtures designed to serve a single separate interest, but located outside the boundaries of the separate interest, are exclusive use common area allocated exclusively to that separate interest.

(c) Notwithstanding the provisions of the declaration, internal and external communication wiring designed to serve a single separate interest, but located

EX 17

[The changes suggested are intended to eliminate tying the very nature of a declaration to the information referenced in Sections 4250 and 4255. There are older pre-Act declarations which may not contain all of the required information or others which do not contain the required information by mistake. The group does not feel that it makes sense to have a definition which might be construed to place a development outside the Act due to the omission of a required item in the declaration.]

outside the boundaries of the separate interest, are exclusive use common area allocated exclusively to that separate interest. For the purposes of this section, "wiring" includes nonmetallic transmission lines.

Comment. Section 4145 restates former Section 1351(i) without change, except that the term "telephone" has been replaced with "communication, the last sentence of subdivision (c) is new, and several references to "common areas" are singularized.

☞ **Staff Note.** (1) Proposed Section 4145(c) has been revised to refer to "communication" wiring rather than "telephone" wiring. This modernization reflects the changing nature of communication technology.

(2) The last sentence of proposed Section 4145(c) is added to include transmission media other than metallic wire (e.g., fiber optic cable).

§ 4150 (UNCHANGED). "Governing documents"

4150. "Governing documents" means, except as otherwise provided in the declaration, the declaration and any other documents, such as bylaws, operating rules of the association, articles of incorporation, or articles of association, which govern the operation of the common interest development or association.

Comment. Section 4150 continues former Section 1351(j) without change.

[MAJOR COMPONENT: Please consider adding a definition of "major Component" - see 4177 and 4178]

§ 4155 (REVISED). "Managing agent"

4155. (a) A "managing agent" is a person or entity who, for compensation or in expectation of compensation, ~~exercises control over the assets of~~ manages a common interest development.

[Tying the definition to "control over the assets" is incorrect under normal usage.]

(b) A "managing agent" does not include any of the following:

(1) A full-time employee of the association.

(2) A regulated financial institution operating within the normal course of its regulated business practice.

(3) An attorney at law acting within the scope of the attorney's license.

Comment. Subdivisions (a) and (b)(1)-(2) of Section 4155 continue former Section 1363.1(b) without change, except that its application is generalized so that it applies to the entire part.

Subdivision (b)(3) is added to generalize the last clause of former Section 1363.2(f). The phrase "his or her" is replaced with "the attorney's."

☞ **Staff Note.** Proposed Section 4155 would generalize the definition of "managing agent" so that it would apply to the entire act, rather than just former Section 1363.1. For provisions that use the term without any governing definition, see Sections 1363.05, 1363.5, 1366.2, and 1368.4.

In addition, proposed Section 4155 would harmonize the definition of "managing agent" provided in Section 1363.1(b) with the definition used in Section 1363.2(f), by adding an attorney as a class of person who is not included in the definition. The staff sees no good policy reason why Section 1363.1 should apply to an attorney, if Section 1363.2 does not.

§ 4160 (NEW). "Member"

4160. "Member" means either of the following persons:

(a) An owner of a separate interest.

(b) A person that is designated as a member in the declaration, articles of incorporation, or bylaws. The incidents of a membership established under this paragraph may be limited by the document that establishes the membership.

Comment. Section 4160 is new. It is added for drafting convenience.

Subdivision (b) recognizes that the governing documents may designate a non-owner as a member for a limited purpose. For example, an association may have a cooperative or reciprocal relationship with another entity (e.g., an affiliated resort) and the governing documents may provide that a member of that entity has limited membership rights within the association.

§ 4163 (REVISED). "Occupant"

legally occupying

subtenant

4163. "Occupant" means an owner, ~~resident, guest,~~ invitee, tenant, ~~lessee, sublessee,~~ or other person ~~in possession of~~ a separate interest.

Comment. Section 4163 generalizes former Section 1364(e), without substantive change.

☞ **Staff Note.** Proposed Section 4163 would generalize an existing definition of "occupant" to provide guidance with respect to other provisions that use the same term

§ 4165 (REVISED). "Operating rule"

4165. "Operating rule" means a regulation adopted by the board that applies generally to the management and operation of the common interest development or the conduct of the business and affairs of the association.

Comment. Section 4165 continues former Section 1357.100(a) without change, except that it is generalized to apply to the entire part, the superfluous phrase "of the association" is not continued, and "board of directors" is replaced with the defined term "board." See Section 4085 ("board" defined).

☞ **Staff Note.** Proposed Section 4165 would generalize the definition of "operating rule," so that it would apply to the entire act. This would facilitate the drafting of provisions that make reference to operating rules.

§ 4170 (NEW). "Person"

a natural person [consistent with 4140]

4170. "Person" means ~~an individual~~, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, association, or other entity.

Comment. Section 4170 is new. It is added for drafting convenience.

☞ **Staff Note.** Proposed Section 4170 is new. It reflects the standard statutory definition of "person" as including both natural persons and legal entities. See, e.g., Prob. Code § 56.

§ 4175 (REVISED). "Planned development"

real property

4175. "Planned development" means ~~a development~~ (other than a community apartment project, a condominium project, or a stock cooperative) having either or both of the following features:

Common area that

(a) ~~The common area~~ is owned either by an association or in common by the owners of the separate interests who possess appurtenant rights to the beneficial use and enjoyment of the common area.

some or all of

[The suggested change to this subsection is for the purpose of providing a more straight forward definition to what is now an extremely wordy and not easy to understand provision]

Common area and an association that maintains the common area with the power to levy assessments

(b) ~~A power exists in the association to enforce an obligation of an owner of a separate interest with respect to the beneficial use and enjoyment of the common area by means of an assessment~~ that may become a lien upon the separate interests in accordance with Article 5 (commencing with Section 5650) of Chapter 6.

Comment. Section 4175 continues former Section 1351(k) without change with the following exceptions: (1) The cross-reference has been updated to reflect the new location of the lien provisions of former Section 1367.1. (2) "Which" has been changed to "that" for grammatical purposes.

☞ **Staff Note.** Proposed Section 4175(b) replaces the existing reference to "Section 1367 or 1367.1" with a reference to "Article 5 (commencing with Section 5650) of Chapter 6." That reference encompasses all of the provisions of former Sections 1367 and 1367.1 under which an "assessment ... may become a lien."

§ 4177 (REVISED). "Reserve accounts"

4177. "Reserve accounts" means both of the following:

(a) Moneys that the board has identified for use to defray the future repair or replacement of, or additions to, those major components that the association is obligated to maintain.

(b) The funds received, and not yet expended or disposed of, from either a compensatory damage award or settlement to an association from any person or entity for injuries to property, real or personal, arising from any construction or design defects. These funds shall be separately itemized from funds described in subdivision (a).

Comment. Section 4177 continues former Section 1365.5(f) without change, except that the: (1) The definition is generalized so that it applies to the entire part. (2) A cross-reference has been updated to reflect the new location of the referenced provisions. (3) The term "association's board of directors" has been replaced with the defined term "board." See Section 4085 ("board" defined).

☞ **Staff Note.** Proposed Section 4177 would generalize a definition that currently only applies to Section 1365.5.

§ 4178 (REVISED). "Reserve account requirements"

4178. "Reserve account requirements" means the estimated funds that the board has determined are required to be available at a specified point in time to repair, replace, or restore those major components that the association is obligated to maintain.

Comment. Section 4178 continues former Section 1365.5(g) without change, except the definition is generalized so that it applies to the entire part, and the term "association's board of directors" has been replaced with the defined term "board." See Section 4085 ("board" defined).

☞ **Staff Note.** Proposed Section 4178 would generalize a definition that currently only applies to Section 1365.5.

§ 4180 (REVISED). "Rule change"

4180. "Rule change" means the adoption, amendment, or repeal of an operating rule by the board.

Comment. Section 4180 continues former Section 1357.100(b), except that the definition is generalized so that it applies to the entire part and the term "board of directors of the association" has been replaced with the defined term "board." See Section 4085 ("board" defined).

☞ **Staff Note.** Proposed Section 4180 would generalize the definition of "rule change," so that it would apply to the entire act. This would facilitate the drafting of provisions that make reference to rule changes.

§ 4185 (UNCHANGED). "Separate interest"

4185. (a) "Separate interest" has the following meanings:

(1) In a community apartment project, "separate interest" means the exclusive right to occupy an apartment, as specified in Section 4105.

(2) In a condominium project, "separate interest" means a separately owned ~~an individual~~ unit, as specified in Section 4125.

(3) In a planned development, "separate interest" means a separately owned lot, parcel, area, or space.

(4) In a stock cooperative, "separate interest" means the exclusive right to occupy a portion of the real property, as specified in Section 4190.

(b) Unless the declaration or condominium plan, if any exists, otherwise provides, if walls, floors, or ceilings are designated as boundaries of a separate interest, the interior surfaces of the perimeter walls, floors, ceilings, windows, doors, and outlets located within the separate interest are part of the separate interest and any other portions of the walls, floors, or ceilings are part of the common area.

(c) ~~The~~ An estate in a separate interest may be a fee, a life estate, an estate for years, or any combination of the foregoing.

Comment. Section 4185 continues former Section 1351(*l*) without change, except that the last two unnumbered paragraphs of former Section 1351(*l*) are designated as subdivisions (b) and (c), cross-references are updated to reflect the new location of referenced provisions, and a reference to "common areas" is singularized.

§ 4190 (UNCHANGED). "Stock cooperative"

4190. (a) "Stock cooperative" means a development in which a corporation is formed or availed of, primarily for the purpose of holding title to, either in fee simple or for a term of years, improved real property, and all or substantially all of the shareholders of the corporation receive a right of exclusive occupancy in a portion of the real property, title to which is held by the corporation. The owners' interest in the corporation, whether evidenced by a share of stock, a certificate of membership, or otherwise, shall be deemed to be an interest in a common interest development and a real estate development for purposes of subdivision (f) of Section 25100 of the Corporations Code.

(b) A "stock cooperative" includes a limited equity housing cooperative which is a stock cooperative that meets the criteria of Section 817.

Comment. Section 4190 continues former Section 1351(m) without change, except that the unnumbered paragraphs have been designated as subdivisions.

CHAPTER 2. GOVERNING DOCUMENTS

[This seems to permit an association to modify its articles by simply adopting an amendment to the CC&Rs. For example, the CC&Rs could change the name of the Association, change the classes of members and otherwise ignore the Articles. Is this a wise decision?]

Article 1. General Provisions

§ 4200 (NEW). Document authority

4200. (a) The articles of incorporation may not include a provision that is inconsistent with the declaration. To the extent of any inconsistency between the articles of incorporation and the declaration, the declaration controls.

(b) The bylaws may not include a provision that is inconsistent with the declaration or the articles of incorporation. To the extent of any inconsistency between the bylaws and the articles of incorporation or declaration, the articles of incorporation or declaration control.

(c) The operating rules may not include a provision that is inconsistent with the declaration, articles of incorporation, or bylaws. To the extent of any inconsistency between the operating rules and the bylaws, articles of incorporation, or declaration, the bylaws, articles of incorporation, or declaration control.

(d) This section does not apply to a stock cooperative.

Comment. Subdivision (a) of Section 4200 is new.

Subdivision (b) is consistent with Corporations Code Section 7151(c) providing that the bylaws shall be consistent with the articles of incorporation.

Subdivision (c) is consistent with Section 4350(c) providing that an operating rule may not be inconsistent with the declaration, articles of incorporation, or bylaws of the association.

Subdivision (d) reflects the fact that some stock cooperatives are created without a recorded declaration.

☞ **Staff Note.** Proposed Section 4200 is new. It would provide guidance in resolving conflicts between different governing documents.

§ 4205 (REVISED). Record notice of agent to receive payments

4205. In order to facilitate the collection of regular assessments, special assessments, transfer fees, and similar charges, the board is authorized to record a statement or amended statement identifying relevant information for the association. This statement may include any or all of the following information:

(a) The name of the association as shown in the ~~conditions, covenants, and restrictions~~ declaration or the current name of the association, if different.

(b) The name and address of a managing agent or treasurer of the association or other individual or entity authorized to receive assessments and fees imposed by the association.

[The issues with how this provision is written were discussed at the CLRC meeting of February 25, 2010 in relation to non-residential CIDs. We understand that staff is going to come up with a proposal to make it clear for instance that in cases where amended articles of incorporation are required to contain information which may be inconsistent with information contained in older CC&Rs that it is permissible for the correct information to be used.]

(c) A daytime telephone number of the authorized party identified in subdivision (b) if a telephone number is available.

(d) A list of separate interests subject to assessment by the association, showing the assessor's parcel number or legal description, or both, of the separate interests.

(e) The recording information identifying the declaration ~~or declarations of covenants, conditions, and restrictions~~ governing the association.

(f) If an amended statement is being recorded, the recording information identifying the prior statement or statements which the amendment is superseding.

Comment. Section 4205 continues former Section 1366.2(a) without change, except that the superfluous phrase "of any association" is not continued and the term "board of directors" has been replaced with the defined term "board." See Section 4085 ("board" defined).

☞ **Staff Note.** Proposed Section 4205 would not continue Section 1366(b). That provision is unnecessary, as it simply reiterates the authority of a recorder to charge for recording, using the per page fee set by the recorder. In addition, it might be confusing to include that provision in this section, but not in other sections that provide for document recording. See, e.g., proposed Section 4225.

§ 4215 (UNCHANGED). Liberal construction of instruments

4215. Any deed, declaration, or condominium plan for a common interest development shall be liberally construed to facilitate the operation of the common interest development, and its provisions shall be presumed to be independent and severable. Nothing in Article 3 (commencing with Section 715) of Chapter 2 of Title 2 of Part 1 of Division 2 shall operate to invalidate any provisions of the governing documents.

Comment. Section 4215 continues former Section 1370 without change, except that "this division" has been replaced with "Division 2" and the phrase "of a common interest development" has not been continued.

§ 4220 (UNCHANGED). Boundaries of units

4220. In interpreting deeds and condominium plans, the existing physical boundaries of a unit in a condominium project, when the boundaries of the unit are contained within a building, or of a unit reconstructed in substantial accordance with the original plans thereof, shall be conclusively presumed to be its boundaries rather than the metes and bounds expressed in the deed or condominium plan, if any exists, regardless of settling or lateral movement of the building and regardless of minor variance between boundaries shown on the plan or in the deed and those of the building.

Comment. Section 4220 continues former Section 1371 without change.

§ 4225 (REVISED). Deletion of unlawful restrictive covenants

4225. (a) No declaration or other governing document shall include a restrictive covenant in violation of Section 12955 of the Government Code.

(b) Notwithstanding any other provision of law or provision of the governing documents, the board, without approval of the members, shall amend any

declaration or other governing document that includes a restrictive covenant prohibited by this section to delete the restrictive covenant, and shall restate the declaration or other governing document without the restrictive covenant but with no other change to the declaration or governing document.

(c) If the declaration is amended under this section, the board shall record the restated declaration in each county in which the common interest development is located. If the articles of incorporation are amended under this section, the board shall file a certificate of amendment pursuant to Section 7814 of the Corporations Code.

(d) If after providing written notice to an association (Section 4035) requesting that the association delete a restrictive covenant that violates subdivision (a), and the association fails to delete the restrictive covenant within 30 days of receiving the notice, the Department of Fair Employment and Housing, a city or county in which a common interest development is located, or any person may bring an action against the association for injunctive relief to enforce subdivision (a). The court may award attorney's fees to the prevailing party.

Comment. Section 4225 continues former Section 1352.5 without change, with the following exceptions: (1) Subdivision (b) is revised to replace the term "board of directors of an association" with the defined term "board." See Section 4085 ("board" defined). (2) Subdivision (b) is revised to replace "owners" with "members." See Section 1460 ("member" defined). (3) subdivision (c) is added. (4) Subdivision (d) is revised to include a reference to the provision governing notice to an association (Section 4035).

☞ **Staff Note.** Proposed Section 4225(c) is added to require that a governing document that is in the public record be publicly updated to reflect an amendment made pursuant to this section.

§ 4230 (REVISED). Deletion of declarant provisions in governing documents

4230. (a) Notwithstanding any provision of the governing documents to the contrary, the board may, after the declarant has completed construction of the development, has terminated construction activities, and has terminated marketing activities for the sale, lease, or other disposition of separate interests within the development, adopt an amendment deleting from any of the governing documents any provision which is unequivocally designed and intended, or which by its nature can only have been designed or intended, to facilitate the declarant in completing the construction or marketing of the development. However, provisions of the governing documents relative to a particular construction or marketing phase of the development may not be deleted under the authorization of this subdivision until that construction or marketing phase has been completed.

(b) The provisions which may be deleted by action of the board shall be limited to those which provide for access by the declarant over or across the common area for the purposes of (1) completion of construction of the development, and (2) the erection, construction, or maintenance of structures or other facilities designed to facilitate the completion of construction or marketing of separate interests.

(c) At least 30 days prior to taking action pursuant to subdivision (a), the board shall deliver to all members, by individual delivery (Section 4040), (1) a copy of

all amendments to the governing documents proposed to be adopted under subdivision (a), and (2) a notice of the time, date, and place the board will consider adoption of the amendments. The board may consider adoption of amendments to the governing documents pursuant to subdivision (a) only at a meeting that is open to all members, who shall be given opportunity to make comments thereon. All deliberations of the board on any action proposed under subdivision (a) shall only be conducted in an open meeting.

(d) The board may not amend the governing documents pursuant to this section without the approval of a majority of a quorum of the members (Section 4070). For the purposes of this section, "quorum" means members representing more than 50 percent of the voting power of the association, excluding members who own more than two separate interests in the development.

Comment. Section 4230 continues former Section 1355.5 without change, with the following exceptions: (1) The phrase "his or her" is not continued in subdivision (a). (2) The phrase "of a common interest development" has not been continued in subdivision (a). (3) The terms "board of directors" and "board of directors of the association" are replaced throughout with the defined term "board." See Section 4085 ("board" defined). (4) The defined term "declarant" is used throughout, in place of "developer." See Section 4130 ("declarant" defined). (5) Subdivision (b) has been revised to use numerals to number the listed items, rather than letters. (6) Subdivisions (c) and (d) are revised to use the defined term "member." See Section 4160 ("member" defined). (7) Subdivision (c) is revised to provide for individual delivery of the specified notice. See Section 4040. (8) Subdivision (c) is revised to delete the unnecessary word "such." (9) Subdivision (c) is revised to replace "which" with "that." (10) Subdivision (d) is revised to use the standard term "approval of a majority of a quorum of the members." See Section 4070. (11) The quorum rule provided in subdivision (d) is revised to make clear that a quorum is based on a majority of the voting power (excluding those who own more than two units), and not on a majority of the members. This avoids uncertainty about the calculation of a quorum when a single separate interest is owned by more than one person.

☞ **Staff Note.** The quorum rule provided in proposed Section 4230(d) is revised to make clear that a quorum is based on a majority of the *voting power* (excluding those who own more than two units), and not on a majority of the *owners*. This avoids uncertainty about the calculation of a quorum when a single separate interest is owned by more than one person.

§ 4235 (NEW). Correction of statutory cross-reference

4235. Notwithstanding any other provision of law or provision of the governing documents, if the governing documents include a reference to a provision of the Davis Stirling Common Interest Development Act that was repealed and continued in a new provision by the act that added this section, the board may amend the governing documents, solely to correct the cross-reference, by adopting a board resolution that shows the correction.

Comment. Section 4235 is new. It is intended to provide a simplified method to correct statutory cross-references in an association's governing documents that are required as a result of section renumbering effected by the act that added this section. No other amendment can be made under this section.

☞ **Staff Note.** Proposed Section 4235 is new. It would provide a simplified method to update statutory cross-references to reflect changes made by the proposed law. This would reduce the transitional complications resulting from the proposed recodification of the Davis-Stirling Act.

Article 2. Declaration

§ 4250 (REVISED). Content of declaration

4250. (a) A declaration, recorded on or after January 1, 1986, shall contain a legal description of the common interest development, and a statement that the common interest development is a community apartment project, condominium project, planned development, stock cooperative, or combination thereof. The declaration shall additionally set forth the name of the association and the restrictions on the use or enjoyment of any portion of the common interest development that are intended to be enforceable equitable servitudes.

(b) The declaration may contain any other matters the declarant or the members consider appropriate.

Comment. Subdivision (a) of Section 4250 continues the first two sentences of former Section 1353(a)(1) without change.

Subdivision (b) continues former Section 1353(b) without change, with the following exceptions: (1) The defined term "member" is used in place of "owner." See Section 4160 ("member" defined). (2) The defined term "declarant" is used in place of "original signator of the declaration." See Section 4160 ("member" defined).

☞ **Staff Note.** Proposed Section 4250(b) would use the defined term "declarant" in place of "original signator of the declaration." That would seem to be a slight substantive change, as the existing language could be read to apply only to the *original* declarant (as opposed to any successor declarant). However, the staff does not see any good policy reason to preclude a successor declarant, who may own a large percentage of the separate interests within a CID, from having a say as to what is appropriate for inclusion in the declaration. The Commission invites comment on whether the proposed change would cause any problems.

§ 4255 (REVISED). Special disclosures

4255. (a) If a common interest development is located within an airport influence area, a declaration, recorded after January 1, 2004, shall contain the following statement:

NOTICE OF AIRPORT IN VICINITY

This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you.

(c) For purposes of this section, an "airport influence area," also known as an "airport referral area," is the area in which current or future airport-related noise, overflight, safety, or airspace protection factors may significantly affect land uses

or necessitate restrictions on those uses as determined by an airport land use commission.

(d) If a common interest development is within the San Francisco Bay Conservation and Development Commission jurisdiction, as described in Section 66610 of the Government Code, a declaration recorded on or after January 1, 2006, shall contain the following notice:

NOTICE OF SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION JURISDICTION

This property is located within the jurisdiction of the San Francisco Bay Conservation and Development Commission. Use and development of property within the commission's jurisdiction may be subject to special regulations, restrictions, and permit requirements. You may wish to investigate and determine whether they are acceptable to you and your intended use of the property before you complete your transaction.

(b) The statement in a declaration acknowledging that a property is located in an airport influence area or within the jurisdiction of the San Francisco Bay Conservation and Development Commission does not constitute a title defect, lien, or encumbrance.

Comment. Section 4255 continues all but the first two sentences of former Section 1353(a)(1)-(4) without change, except that some references to "the property" have been replaced with "a common interest development" to improve clarity. See also Bus. & Prof. Code § 11010 (disclosure of property within airport influence area); Pub. Util. Code § 21675 (designation of "airport influence area" by county airport land use commission).

☞ **Staff Note.** The language of proposed Section 4255 differs slightly from its source, in order to make the provision a stand-alone section. The changes are nonsubstantive.

§ 4260 (REVISED). Amendment authorized

4260. Except to the extent that a declaration provides by its express terms that it is not amendable, in whole or in part, a declaration that fails to include provisions permitting its amendment at all times during its existence may be amended at any time in accordance with Section 4270.

Comment. Section 4260 continues the first sentence of former Section 1355(b) without change, except "which" is replaced with "that."

☞ **Staff Note.** Proposed Section 4260 continues the authority to amend a declaration that is silent as to whether it may be amended, but does not continue the procedure specified for doing so. Instead, the amendment would be made using the general procedure for amending a declaration, which is provided in proposed Section 4270.

§ 4265 (REVISED). Amendment to extend term of declaration authorized

4265. (a) The Legislature finds that there are common interest developments that have been created with deed restrictions which do not provide a means for the

[The limitation on the extension of the term to a period that shall not exceed the initial term is out of date and the owners should be allowed to adopt a perpetual term for the declaration in accordance with current practice]

members to extend the term of the declaration. The Legislature further finds that covenants and restrictions, contained in the declaration, are an appropriate method for protecting the common plan of developments and to provide for a mechanism for financial support for the upkeep of common area including, but not limited to, roofs, roads, heating systems, and recreational facilities. If declarations terminate prematurely, common interest developments may deteriorate and the housing supply of affordable units could be impacted adversely. The Legislature further finds and declares that it is in the public interest to provide a vehicle for extending the term of the declaration if members having more than 50 percent of the votes in the association choose to do so.

for a limited or perpetual term

(b) A declaration that specifies a termination date, but that contains no provision for extension of the termination date, may be extended by the approval of members pursuant to Section 4270.

; provided that the term of the extension is set forth in an amendment which is recorded before the termination date.

~~(c) No single extension of the terms of the declaration made pursuant to this section shall exceed the initial term of the declaration or 20 years, whichever is less. However, more than one extension may occur pursuant to this section.~~

Comment. Subdivision (a) of Section 4265 continues former Section 1357(a) without change, except that the defined term "member" is used and a reference to "common areas" is singularized. See Section 4160 ("member" defined).

Subdivision (b) restates part of the substance of Section 1357(b), authorizing extension of the termination date of a declaration that does not provide for extension of the termination date.

The procedure for extension of the termination date provided in former Section 1357(b)-(c) is not continued. An extension would instead be made pursuant to the general procedure for amendment of a declaration. See Section 4270.

Subdivision (c) continues former Section 1357(d) without change.

☞ **Staff Note.** Proposed Section 4265 continues the authority to amend a declaration to extend its term, but does not continue the procedure specified for doing so. Instead, the extension would be made using the general procedure for amending a declaration, which is provided in proposed Section 4270.

§ 4270 (REVISED). Amendment procedure

4270. (a) A declaration may be amended pursuant to the governing documents or this part. Except as provided in Section 4275, an amendment is effective after (1) the approval of the percentage of members required by the governing documents has been given, (2) that fact has been certified in a writing executed and acknowledged by the officer designated in the declaration or by the association for that purpose, or if no one is designated, by the president of the association, and (3) that writing has been recorded in each county in which a portion of the common interest development is located.

vote or consent required to

(b) If the governing documents do not specify the ~~percentage of members who must~~ approve an amendment of the declaration, an amendment may be approved by a majority of all members (Section 4065).

Comment. Subdivision (a) of Section 4270 continues former Section 1355(a) without change, except that the first word is replaced with "a," "title" is replaced with "part," and the defined term "member" is used. See Section 4160 ("member" defined).

[the CC&Rs may say that a "majority" is sufficient. However, "majority" is not a "percentage."]

Subdivision (b) generalizes a rule stated in former Sections 1355(b) and 1357.

☞ **Staff Note.** Proposed Section 4270(b) would provide a default rule on member approval of an amendment where the governing documents are silent on the matter. That rule is drawn from Sections 1355(b) and 1357.

§ 4275 (REVISED). Judicial authorization of amendment

4275. (a) If in order to amend a declaration, the declaration requires members having more than 50 percent of the votes in the association, in a single class voting structure, or members having more than 50 percent of the votes in more than one class in a voting structure with more than one class, to vote in favor of the amendment, the association, or any member, may petition the superior court of the county in which the common interest development is located for an order reducing the percentage of the affirmative votes necessary for such an amendment. The petition shall describe the effort that has been made to solicit approval of the association members in the manner provided in the declaration, the number of affirmative and negative votes actually received, the number or percentage of affirmative votes required to effect the amendment in accordance with the existing declaration, and other matters the petitioner considers relevant to the court's determination. The petition shall also contain, as exhibits thereto, copies of all of the following:

(1) The governing documents.

(2) A complete text of the amendment.

(3) Copies of any notice and solicitation materials utilized in the solicitation of member approvals.

(4) A short explanation of the reason for the amendment.

(5) Any other documentation relevant to the court's determination.

(b) Upon filing the petition, the court shall set the matter for hearing and issue an ex parte order setting forth the manner in which notice shall be given.

(c) The court may, but shall not be required to, grant the petition if it finds all of the following:

(1) The petitioner has given not less than 15 days written notice of the court hearing to all members of the association, to any mortgagee of a mortgage or beneficiary of a deed of trust who is entitled to notice under the terms of the declaration, and to the city, county, or city and county in which the common interest development is located that is entitled to notice under the terms of the declaration.

(2) Balloting on the proposed amendment was conducted in accordance with all applicable provisions of the governing documents.

(3) A reasonably diligent effort was made to permit all eligible members to vote on the proposed amendment.

(4) Members having more than 50 percent of the votes, in a single class voting structure, voted in favor of the amendment. In a voting structure with more than one class, where the declaration requires a majority of more than one class to vote

in favor of the amendment, members having more than 50 percent of the votes of each class required by the declaration to vote in favor of the amendment voted in favor of the amendment.

(5) The amendment is reasonable.

(6) Granting the petition is not improper for any reason stated in subdivision (e).

(d) If the court makes the findings required by subdivision (c), any order issued pursuant to this section may confirm the amendment as being validly approved on the basis of the affirmative votes actually received during the balloting period or the order may dispense with any requirement relating to quorums or to the number or percentage of votes needed for approval of the amendment that would otherwise exist under the governing documents.

(e) Subdivisions (a) to (d), inclusive, notwithstanding, the court shall not be empowered by this section to approve any amendment to the declaration that:

(1) Would change provisions in the declaration requiring the approval of members having more than 50 percent of the votes in more than one class to vote in favor of an amendment, unless members having more than 50 percent of the votes in each affected class approved the amendment.

(2) Would eliminate any special rights, preferences, or privileges designated in the declaration as belonging to the declarant, without the consent of the declarant.

(3) Would impair the security interest of a mortgagee of a mortgage or the beneficiary of a deed of trust without the approval of the percentage of the mortgagees and beneficiaries specified in the declaration, if the declaration requires the approval of a specified percentage of the mortgagees and beneficiaries.

(f) An amendment is not effective pursuant to this section until the court order and amendment have been recorded in every county in which a portion of the common interest development is located. The amendment may be acknowledged by, and the court order and amendment may be recorded by, any person designated in the declaration or by the association for that purpose, or if no one is designated for that purpose, by the president of the association. Upon recordation of the amendment and court order, the declaration, as amended in accordance with this section, shall have the same force and effect as if the amendment were adopted in compliance with every requirement imposed by the governing documents.

(g) Within a reasonable time after the amendment is recorded the association shall deliver to each member, by individual delivery (Section 4040), a copy of the amendment, together with a statement that the amendment has been recorded.

Comment. Section 4275 continues former Section 1356 without change, except that subdivision (g) is revised to specify the procedure for individual delivery of notice and to use the defined term "member." See Section 4160 ("member" defined).

An incorporated association may also petition the court under Corporations Code Section 7511 with respect to actions governed by that provision.

☞ **Staff Note.** Proposed Section 4275(g) is reworded to incorporate the "individual notice" delivery method.

Article 3. Articles of Incorporation

§ 4280 (UNCHANGED). Content of articles

4280. (a) The articles of incorporation of a common interest development association filed with the Secretary of State on or after January 1, 1995, shall include a statement, which shall be in addition to the statement of purposes of the corporation, that does all of the following:

(1) Identifies the corporation as an association formed to manage a common interest development under the Davis-Stirling Common Interest Development Act.

(2) States the business or corporate office of the association, if any, and, if the office is not on the site of the common interest development, states the nine-digit ZIP Code, front street, and nearest cross street for the physical location of the common interest development.

(3) States the name and address of the association's managing agent, if any.

(b) The statement of principal business activity contained in the annual statement filed by an incorporated association with the Secretary of State pursuant to Section 1502 of the Corporations Code shall also contain the statement specified in subdivision (a).

Comment. Section 4280 continues former Section 1363.5 without change, except that a cross-reference to the definition of "managing agent" has not been continued. See Section 4155 ("managing agent").

See also Corp. Code §§ 1502 (annual statement), 7130-7135 (content of articles of incorporation), 7810-7820 (amendment of articles of incorporation), 7150-7153 (content and amendment of bylaws).

Article 4. Condominium Plan

§ 4290 (REVISED). Recordation of condominium plan

4290. (a) The certificate consenting to the recordation of a condominium plan that is required by subdivision (c) of Section 4120 shall be signed and acknowledged by all of the following persons:

(1) The record owner of fee title to that property included in the condominium project.

(2) In the case of a condominium project that will terminate upon the termination of an estate for years, by all lessors and lessees of the estate for years.

(3) In the case of a condominium project subject to a life estate, by all life tenants and remainder interests.

(4) The trustee or the beneficiary of each recorded deed of trust, and the mortgagee of each recorded mortgage encumbering the property.

(b) Owners of mineral rights, easements, rights-of-way, and other nonpossessory interests do not need to sign the certificate.

(c) In the event a conversion to condominiums of a community apartment project or stock cooperative has been approved by the required number of owners, trustees, beneficiaries, and mortgagees pursuant to Section 66452.10 of the Government Code, the certificate need only be signed by those owners, trustees, beneficiaries, and mortgagees approving the conversion.

Comment. Section 4290 restates former Section 1351(e)(3) without substantive change, except that the last paragraph of (e)(3) is not continued in this section and a cross-reference to Section 4120(c) is added to the first paragraph.

☞ **Staff Note.** Proposed Section 4290 would restate the procedural provisions of existing Section 1351(e). Doing so necessitates a number of minor nonsubstantive language revisions.

§ 4295 (REVISED). Amendment or revocation of condominium plan

4295. A condominium plan may be amended or revoked by a recorded instrument that is acknowledged and signed by all the persons who, at the time of amendment or revocation, are ~~the types of~~ persons whose signatures are required under Section 4290 to sign and acknowledge the condominium plan.

Comment. Section 4295 continues the last paragraph of former Section 1351(e) without change, except that language is added to make clear that the persons whose signatures are required for amendment or revocation of a condominium plan are the persons who fall within the groups described in Section 4290 at the time of amendment or revocation.

☞ **Staff Note.** Proposed Section 4295 is revised to make its meaning more clear, as described in the Comment following the section.

Article 5. Operating Rules

§ 4350 (UNCHANGED). Requirements for validity and enforceability

4350. An operating rule is valid and enforceable only if all of the following requirements are satisfied:

(a) The rule is in writing.

(b) The rule is within the authority of the board conferred by law or by the declaration, articles of incorporation or association, or bylaws of the association.

(c) The rule is not inconsistent with governing law and the declaration, articles of incorporation or association, and bylaws of the association.

(d) The rule is adopted, amended, or repealed in good faith and in substantial compliance with the requirements of this article.

(e) The rule is reasonable.

Comment. Section 4350 continues former Section 1357.110 without change, except that the term "board of directors of the association" has been replaced with the defined term "board." See Section 4085 ("board" defined).

§ 4355 (UNCHANGED). Application of rulemaking procedures

4355. (a) Sections 4360 and 4365 only apply to an operating rule that relates to one or more of the following subjects:

(1) Use of the common area or of an exclusive use common area.

(2) Use of a separate interest, including any aesthetic or architectural standards that govern alteration of a separate interest.

(3) Member discipline, including any schedule of monetary penalties for violation of the governing documents and any procedure for the imposition of penalties.

(4) Any standards for delinquent assessment payment plans.

(5) Any procedures adopted by the association for resolution of disputes.

(6) Any procedures for reviewing and approving or disapproving a proposed physical change to a member's separate interest or to the common area.

(7) Procedures for elections.

(b) Sections 4360 and 4365 do not apply to the following actions by the board:

(1) A decision regarding maintenance of the common area.

(2) A decision on a specific matter that is not intended to apply generally.

(3) A decision setting the amount of a regular or special assessment.

(4) A rule change that is required by law, if the board has no discretion as to the substantive effect of the rule change.

(5) Issuance of a document that merely repeats existing law or the governing documents.

Comment. Section 4355 continues former Section 1357.120 without change, except that the terms "board of directors" and "board of directors of the association" have been replaced with the defined term "board." See Section 4085 ("board" defined).

§ 4360 (UNCHANGED). Approval of rule change by board

4360. (a) The board shall provide general notice (Section 4045) of a proposed rule change to the members at least 30 days before making the rule change. The notice shall include the text of the proposed rule change and a description of the purpose and effect of the proposed rule change. Notice is not required under this subdivision if the board determines that an immediate rule change is necessary to address an imminent threat to public health or safety or imminent risk of substantial economic loss to the association.

(b) A decision on a proposed rule change shall be made at a board meeting, after consideration of any comments made by association members.

(c) As soon as possible after making a rule change, but not more than 15 days after making the rule change, the board shall deliver general notice (Section 4045) of the rule change. If the rule change was an emergency rule change made under subdivision (d), the notice shall include the text of the rule change, a description of the purpose and effect of the rule change, and the date that the rule change expires.

(d) If the board determines that an immediate rule change is required to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association, it may make an emergency rule change; and no notice is required, as specified in subdivision (a). An emergency rule change is effective for 120 days, unless the rule change provides for a shorter effective

period. A rule change made under this subdivision may not be readopted under this subdivision.

Comment. Section 4360 restates former Section 1357.130 without change, except that (1) the term "board of directors" has been replaced throughout with the defined term "board," (2) the term "meeting of the board of directors" has been replaced with the defined term "board meeting," and (3) the reference to former Section 1357.130(e) is replaced with references to the provision governing general notice. Delivery of "general notice" under Section 4045 preserves most of the substance of former law governing delivery of notice under this section, except that Section 4045 permits the posting of notices, and requires that individual notice delivery methods be used for a member who has requested that form of delivery. *Cf.* former Section 1350.7. See also Sections 4085 ("board" defined), 4090 ("board meeting" defined).

§ 4365 (REVISED). Reversal of rule change by members

4365. (a) Members of an association owning five percent or more of the separate interests may call a special meeting of the members to reverse a rule change.

(b) A special meeting of the members may be called by delivering a written request to the president or secretary of the board, after which the board shall deliver individual notice (Section 4040) of the meeting to the association's members and hold the meeting in conformity with Section 7511 of the Corporations Code. The written request may not be delivered more than 30 days after the members of the association are notified of the rule change. Members are deemed to have been notified of a rule change on delivery of notice of the rule change, or on enforcement of the resulting rule, whichever is sooner.

(c) For the purposes of Section 8330 of the Corporations Code, collection of signatures to call a special meeting under this section is a purpose reasonably related to the interests of the members of the association. A member request to copy or inspect the membership list solely for that purpose may not be denied on the grounds that the purpose is not reasonably related to the member's interests as a member.

(d) The rule change may be reversed by the affirmative vote of a majority of a quorum of the members (Section 4070), or if the declaration or bylaws require a greater proportion, by the affirmative vote or written ballot of the proportion required. In lieu of calling the meeting described in this section, the board may distribute a written ballot pursuant to Article 4 (commencing with Section 5100) of Chapter 5.

(e) Unless otherwise provided in the declaration or bylaws, for the purposes of this section, a member may cast one vote per separate interest owned.

(f) A meeting called under this section is governed by Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of, and Sections 7612 and 7613 of, the Corporations Code.

(g) A rule change reversed under this section may not be readopted for one year after the date of the meeting reversing the rule change. Nothing in this section precludes the board from adopting a different rule on the same subject as the rule change that has been reversed.

(h) As soon as possible after the close of voting, but not more than 15 days after the close of voting, the board shall provide general notice (Section 4045) of the results of the member vote.

(i) This section does not apply to an emergency rule change made under subdivision (d) of Section 4360.

Comment. Section 4365 continues former Section 1357.140 without change, except for the following changes: (1) Cross-references are updated to reflect the new location of referenced provisions. (2) A reference to former Section 1350.7 is replaced with a reference to the provision governing general notice (Section 4045). (3) A reference to voting pursuant to Corporations Code Section 7513 has been replaced with a reference to the voting provisions of this part. (4) The term "member" is used in place of "member of the association." (5) the term "board" is used in place of "board of directors." See Sections 4085 ("board" defined), 4160 ("member" defined).

☞ **Staff Note.** Proposed Section 4365(d) replaces a reference to the distribution of ballots under Corporations Code Section 7513 with a reference to the member election provisions of this part.

§ 4370 (UNCHANGED). Applicability of article to changes commenced before and after January 1, 2004

4370. (a) This article applies to a rule change commenced on or after January 1, 2004.

(b) Nothing in this article affects the validity of a rule change commenced before January 1, 2004.

(c) For the purposes of this section, a rule change is commenced when the board takes its first official action leading to adoption of the rule change.

Comment. Section 4370 continues former Section 1357.150 without change, except that the term "board of directors of the association" has been replaced with the defined term "board." See Section 4085 ("board" defined). See Section 4180 ("rule change").

CHAPTER 3. OWNERSHIP AND TRANSFER OF INTERESTS

Article 1. Ownership Rights and Interests

§ 4500 (UNCHANGED). Ownership of common area

4500. Unless the declaration otherwise provides, in a condominium project, or in a planned development in which the common area is owned by the owners of the separate interests, the common area is owned as tenants in common, in equal shares, one for each unit or lot.

Comment. Section 4500 restates former Section 1362 without change, except that the references to "common areas" are singularized.

§ 4505 (UNCHANGED). Appurtenant rights and easements

4505. Unless the declaration otherwise provides:

(a) In a community apartment project and condominium project, and in those planned developments with common area owned in common by the owners of the separate interests, there are appurtenant to each separate interest nonexclusive

rights of ingress, egress, and support, if necessary, through the common area. The common area is subject to these rights.

(b) In a stock cooperative, and in a planned development with common area owned by the association, there is an easement for ingress, egress, and support, if necessary, appurtenant to each separate interest. The common area is subject to these easements.

Comment. Section 4505 restates former Section 1361 without change, except that the references to "common areas" are singularized.

§ 4510 (REVISED). Access to separate interest property

4510. Except as otherwise provided in law, an order of the court, or an order pursuant to a final and binding arbitration decision, an association may not deny a member or occupant physical access to the member's or occupant's separate interest, either by restricting access through the common area to the separate interest, or by restricting access solely to the separate interest.

Comment. Section 4510 continues former Section 1361.5 without change, with the following exceptions: (1) The phrase "his or her" has been replaced with "the member's or occupant's." (2) References to the "owner's" separate interest have been revised to omit the word "owner's." This will help to avoid any implication that the reference does not also apply to an "occupant" of a separate interest. (3) The defined term "member" is used in place of "owner" throughout. See Section 4160 ("member" defined). (4) The references to "common areas" is singularized.

☞ **Staff Note.** Although it is clear that Section 1361.5 is intended to protect both owners and occupants of separate interests, that section twice refers to the "*owner's* separate interest," without any reference to an occupant. That could create the impression that the Legislature intended to draw some sort of distinction between owners and occupants, which the staff does not believe to be the case. Proposed Section 4510 would adjust the language of Section 1361.5 to avoid that implication. Note also that the defined term "member" is used in place of "owner" throughout.

Article 2. Transfer Disclosure

§ 4525 (REVISED). Disclosure to prospective purchaser

4525. As soon as practicable before the transfer of title to a separate interest or the execution of a real property sales contract for a separate interest, as defined in Section 2985, the owner of the separate interest, other than an owner subject to the requirements of Section 11018.6 of the Business and Professions Code, shall provide the following documents to the prospective purchaser:

(a) A copy of all governing documents. If the association is not incorporated, this shall include a statement in writing from an authorized representative of the association that the association is not incorporated.

(b) If there is a restriction in the governing documents limiting the occupancy, residency, or use of a separate interest on the basis of age in a manner different from that provided in Section 51.3, a statement that the restriction is only enforceable to the extent permitted by Section 51.3 and a statement specifying the applicable provisions of Section 51.3.

(c) A copy of the most recent documents distributed pursuant to Article 7 (commencing with Section 5300) of Chapter 5.

(d) A ~~true~~ statement in writing obtained from an authorized representative of the association as to the amount of the association' s current regular and special assessments and fees, any assessments levied upon the owner's interest in the common interest development that are unpaid on the date of the statement, and any monetary fines or penalties levied upon the owner's interest and unpaid on the date of the statement. The statement obtained from an authorized representative shall also include true information on late charges, interest, and costs of collection which, as of the date of the statement, are or may be made a lien upon the owner's interest in a common interest development pursuant to Article 5 (commencing with Section 5650) of Chapter 6.

(e) A copy or a summary of any notice previously sent to the owner pursuant to Section 5855 that sets forth any alleged violation of the governing documents that remains unresolved at the time of the request. The notice shall not be deemed a waiver of the association's right to enforce the governing documents against the owner or the prospective purchaser of the separate interest with respect to any violation. This paragraph shall not be construed to require an association to inspect an owner's separate interest.

(f) A copy of the preliminary list of defects provided to each member pursuant to Section 6000, unless the association and the builder subsequently enter into a settlement agreement or otherwise resolve the matter and the association complies with Section 6100. Disclosure of the preliminary list of defects pursuant to this paragraph does not waive any privilege attached to the document. The preliminary list of defects shall also include a statement that a final determination as to whether the list of defects is accurate and complete has not been made.

(g) A copy of the latest information provided for in Section 6100.

(h) Any change in the association's current regular and special assessments and fees which have been approved by the board, but have not become due and payable as of the date disclosure is provided pursuant to this subdivision.

Comment. The introductory clause of Section 4525 restates the substance of former Section 1368(a) without change.

Subdivisions (a)-(h) continue paragraphs (1) to (8) of subdivision (a) of former Section 1368 without change, with the following exceptions: (1) Cross-references are updated to reflect the new location of the referenced provisions. (2) The term "association's board of directors" has been replaced with the defined term "board." See Section 4085 ("board" defined). (3) Subdivision (a) is revised to make clear that all governing documents must be provided. See Section 4150 ("governing documents"). (4) The term "member" is used in place of "member of the association." See Section 4160 ("member" defined).

Former Section 1368(g) has not been continued. It provided that a community association manager is an agent for the purposes of general agency law. That provision was superfluous and included an erroneous cross-reference. There is no need to state the application of general agency law to a common interest development.

☞ **Staff Note.** The first paragraph of proposed Section 4525 restates the first paragraph of Section 1368(a), to improve its clarity.

SAMUEL L. DOLNICK
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April 3, 2010

Mr. Brian Hebert
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Via e-mail:
commission@clrc.ca.gov

Re: Statutory Simplification of CID Law, February 2010

Dear Mr. Hebert:

Recently I was able to review some portions of the tentative recommendations of the Davis-Stirling Common Interest Development Act. I wish to comment specifically on "§5305 (Revised). Review of financial statement" in relation to the current §1365 first paragraph and subparagraph (c).

The first paragraph of §1365 contains the following "Unless the governing documents impose more stringent standards, the association shall prepare and distribute to all its members the following documents:...
"(c) A review of the financial statements of the association…"
Thus, an audit, being more stringent than a review takes precedence.

Your attention is being brought to what I consider to be an oversight in the wording of §5305 (Revised). This states: "A review of the financial statement of the association shall be prepared…"

Many CC&Rs contain the phrase: "The association shall conduct an audit of the financial statements…"

The question arises: Does §5305 mandating a "review" take precedence over the governing documents that state an "audit" shall be prepared? With millions of dollars being collected by assessments in the operating and reserve funds, it appears that the governing documents mandating an audit would take precedence. After all, in a review, an independent auditor accepts whatever financial material the board of directors or management firm presents to him/her. There is no examination to determine if the material presented is accurate or not.

It is suggested that the following be added to §5305 (Revised) so as to clear up any ambiguity or confusion. If I am confused, others must be also.

§5305 (Revised). "Unless the governing documents impose more stringent standards, a review of the association shall be prepared…"

Your consideration of the above is requested. Thank you and the Commission for all the time and hard work in attempting to clarify the Davis-Stirling Act. Eventually it will help all of us.

Respectfully submitted,

Sam Dolnick, Condo homeowner

BERDING WEIL

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April 13, 2010

California Law Revision Commission
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Palo Alto, CA 94303-4739

Re: Comments on the Statutory Clarification and Simplification of CID Law

Dear Members of the Commission:

In response to your tentative recommendation dated February 2010, we submit the following comment and suggestion for change regarding proposed Section 5550 (a). The language of that section remains unchanged from the present Section 1365.5 (e). It is our opinion that the present and proposed language of that section conflicts with the language of Section 4775, which defines the responsibility for maintenance and repair of common areas.

During the past 25 years, Berding | Weil has represented hundreds of community associations and devotes a substantial portion of its law practice to such clients. We have had many opportunities to observe the impact of the present statute on the operations of community associations. It is our opinion that there is an existing conflict between the definition of common area building components which a condominium or planned development project (as defined in proposed Sections 4125 and 4175) are responsible to maintain and repair under proposed section 4775, and the scope of the reserve study required under proposed Section 5550 (a). As a result, necessary inspections do not include all portions of the common area which an association is responsible to maintain and will continue to cause substantial underfunding of reserve accounts, especially in older projects.

Existing law and proposed Section 5550(a) states:

(a) *At least once every three years, the board shall cause to be conducted a reasonably competent and diligent visual inspection of the accessible areas of the major components that the association is obligated to repair, replace, restore, or maintain as part of a study of the reserve account requirements of the common interest development, if the current replacement value of the major components is equal to or greater than one-half of the gross budget of the association, excluding the association's reserve account for that period.*

The existing and proposed limitations of the study to a "visual" inspection of the "accessible" areas of the major components we believe were added to prevent even more casual

investigations of the common areas. The effect, however, was to insure that certain enclosed components of common interest developments would not be inspected in time to identify insipient failure of those components.

In virtually all types of attached common interest developments the association is responsible for maintaining at least the waterproof envelope of the building. A long-term failure of this waterproofing can damage hidden structural components such as framing. Whether that framing was part of common area or separate interest, the association is charged with preventing deterioration due to water intrusion. An inspection limited to solely visible and accessible components would not, in many cases, discover such damage until failure occurred, a point in time too late to reserve sufficient funds for the repair of such damaged components.

This is especially problematic in older common interest developments and condominium conversions which are usually created from apartment projects that can already be 20-30 years old at the time of conversion. In these older developments, a more thorough, in-depth investigation may require removal of portions of the outer skin to adequately assess subsurface damage in otherwise inaccessible components in order to properly reserve for future repairs.

To amend the law to remove the conflict, it is necessary to remove the "visual" and "accessible" qualifiers so as to charge the association with conducting an inspection adequate to assess the condition of *all* components which the association is responsible to maintain and repair. This change could be limited to older projects or extended to all CIDs given that existing and proposed law requires:

Identification of the major components that the association is obligated to repair, replace, restore, or maintain that, as of the date of the study, have a remaining useful life of less than 30 years. (Proposed Section 5550 (b) (1).)

It is impossible to gauge the remaining service life of hidden components without inspecting them, yet the cost of repairing framing or deck supports which have failed due to dry rot could easily exceed that of any other component.

The most direct way of eliminating the conflict would be to delete the existing "visual" and "accessible" limitations on the scope of a reserve study contained in present and proposed law. That would result in the first sentence of proposed Section 5550(a) reading as follows:

(a) At least every three years, the board shall cause to be conducted a reasonably competent and diligent inspection of the major components that the association is obligated to repair, replace, restore, or maintain as part of a study of the reserve account requirements of the common interest development, if the current replacement value of the major components is equal to or greater than one-half of the gross budget of the association, excluding the association's reserve account for that period.

To insure that "flyover" inspections were not permitted, proposed Section 5550(b) (1) should be amended to read:

(1) Identification of the major components that the association is obligated to repair, replace, restore, or maintain, including when appropriate, inaccessible or subsurface components, that, as of the date of the study, have a remaining useful life of less than 30 years.

These amendments to existing and proposed law would leave the scope of the investigation to the association's discretion but would require at a minimum that a representative sample of *all* components, including those not visible or accessible, which have a service life of less than 30 years be identified and accounted for. A subsurface investigation early enough to detect possible deterioration in framing or other structural members would insure that the cost to eventually repair those components would be added to the reserve calculations when necessary. Without this amendment, the scope of the required reserve study will continue to be narrower than the list of components for which the association is responsible.

If the Commission deems the present revision effort as too limited in scope or purpose to address these concerns at this time, we would request that they be added to the agenda for the next round of revisions.

Very truly yours,

BERDING & WEIL LLP

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Sun City Roseville Community Association, Inc.®

April 27, 2010

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Subject: Comment and support of CLRC Tentative Recommendation #H-855
Attention: Brian Hebert, CLRC Executive Director

Dear Mr. Hebert:

As you are aware, Sun City Roseville is a CID of 3,110 homes with over 5,000 residents. The proposed revision of the Davis-Stirling Act, as contained in your Tentative Recommendation, offers a welcome well-organized and consistent statement of the Davis-Stirling Act. After becoming law, it will make it easier for homeowner boards to understand and apply the law to their governing efforts. We plan to offer our support as it makes its way through the legislature.

After reading through the document, we offer a few relatively minor suggestions.

1. We share your concern expressed in Chapter 2 about potential confusion as to what constitutes a quorum and agree with your solution of using "voting power". However, in the proposed law, it may not be as clear to the average member because the several sections that deal with this issue are isolated from one another. This is particularly true of the wording of 4070, partly because a quorum is not in the definitions.

In order to make it more user-friendly, Sections 4065, 4070, 4160, and 5140 could be cross-referenced, along with an added definition for quorum that also defines voting power. Even better, you may want to consider moving 4065 and 4070 to the definitions chapter, along with a quorum definition, with references to 5140. In this way, the reader would have all of the necessary information in one place.

2. Similarly, in Section 4365, regarding obtaining signatures from members, (a) would be clearer if the wording were changed as follows:

(a) Members of an association ~~owning~~ *representing* five percent or more of the separate interests.…

3. Also you may wish to consider a change in voting procedure that may be substantive. In 5115(a) reference is made to the California counties' practice regarding two envelopes. In our county, the identifying information appears on the back of the second envelope. And that has been (and is) our practice. We offer the following change to 5115(a)(1):

(a)(1)…In the upper left hand corner *or on the reverse side* of the second envelope, the voter shall sign the voter's name.…

EX 42

7050 Del Webb Blvd • Roseville, CA 95747 • (916) 774-3880 • Fax (916) 774-3889

4. Finally, we suggest two technical changes:
   4365(d) Delete the word "written" from the last sentence.
   5310(a)(9) Delete the word "alternative" from the sentence.

We appreciate your and the Commission's patience and persistent efforts to bring this revision project to fruition.

Sincerely,

George B. Porter, President

7330 Quill Dr #59
Downey, CA 90242

June 10, 2010

California Law Revision Commission
4000 Middlefield Rd - Room D-2
Palo Alto, CA 94303-4739

Dear California Law Revision Commission,

Subject: Clarification of CID Law

Please make it very clear that when a civil code begins with the words "Unless the declaration otherwise provides..." it means that the reader should refer to the CC&Rs for direction and that the CC&Rs prevail over the civil code. Recently, one of our residents had to file against our Association in Small Claims Court and fortunately the judge ruled that the Association was required to follow the CC&Rs, something our Association and Management Company have been reluctant to do.

Also make it very clear that Associations are also corporations and must abide by corporate law such as Fiduciary Duty and Duty of Care. Some residents have had to live through horror stories, because the Management Company and the Association refused to get involved even though our CC&Rs indicate that the responsibility for leaking pipes in the wall is actually the Association's responsibility.

Bless you for the work that you do.

Sincerely,

Marion Russell

Marion Russell

EMAIL FROM LUCILLE FINDLAY
(JUNE 22, 2010)

Dear Mr. Hebert,

My concern involves Section 5350 which replaces 1365.6. No doubt the section errors have already been corrected but I'll mention them. The reference to Corporations Code Sections 7223 and 7224 in the content should be 7233 and 7234 as stated in the comment and note following the section.

While I agree that the section in the General Corporation Law should not be used when there's a similar one in the Nonprofit Corporation Law, I'm concerned about the statement in the "Comment." repeated in the "Note" that infers that General Corporation Law governs only for profit corporations. I've been advised that, for example, that Sections 1502 and 2205 regarding corporate filing requirements apply to incorporated non profit homeowners associations as well. Could the use of Corporations Code Section 310 rather than be "erroneous" have been initially correct and simply not removed when Sections 7233 and 7234 were added to the Nonprofit Corporation Law?

Although I understand it's no longer necessary, I'm concerned that the phrase in Civil Code Section 1365.6 "whether an association is a corporation as defined in Section 162 . . ." will be disappearing from CID law. It's the one statement in the Davis-Stirling Act that directly acknowledges that a homeowners association could be organized under General Corporation Law.

I live in a large senior citizen CID in Seal Beach California that has been under siege from interests desiring to take the Davis-Stirling rights and protections away from the members of the communities' fifteen stock cooperatives in order, many of us believe, to pave the way for redevelopment. We were all organized in 1962 and 1963 under the General Corporations Code for the purpose of providing housing on a mutual nonprofit basis. Recent elections have removed from office or weakened many of the elected directors (both in the residential associations and the association that administers our trust and has management agreements with the co-ops) who insist we stock cooperative members don't have CID rights. The loss of a lawsuit the administrating/managing association took all the way to the California Supreme Court against shareholders who demanded transparency plus recent changes in CID election rules that force our associations to permit members not chosen by boards the right to be on the ballot and have equal publicity are helping us to take back our community. Please help us at the state level by remembering that stock cooperatives are defined in CID Law. See the red flags when those who think our beach side community should have grander edifices than our simple cottages propose legislative action that would weaken the ownership of stock cooperative members or lobby against legislation that would help us.

Sincerely,
Lucille Findlay
13321 Twin Hills Dr. 58F
Seal Beach, CA 90740

Alec Pauluck
1001 Pine St. #703
San Francisco, Ca 94109-5006

Phone/Fax 415 474 7979

June 22, 2010

California Law Revision Commission
4000 Middlefield Road, Room D 2
Palo Alto, CA 94303-4739

Attention: Brian Hebert

Thank you for the opportunity to submit ideas, recommendations and suggestions to your office for the revision of the Davis-Stirling Act.

I have been an owner of a condominium ever since the condominium law was enacted in California in the 1960's, in the first condominium in San Francisco, and California, as shown in the Condominium Book #1 of Maps in San Francisco, Pages #1 through 20. Through the years I have seen many violations in the Davis-Stirling Act, and disregard for all rules pertaining to condominium concept of living and ownership.

Enclosed are my suggestions. Your legal staff of writers would be best to reword and polish the information, after getting an idea of our problems.

Good luck to you and your staff for doing a most important task for many associations.

Sincerely,

Alec Pauluck

Alec Pauluck

DAVIS-STIRLING REVISIONS

MINUTES OF ALL MEETINGS: Minutes of all association meetings, even if in draft form, should be mailed to each owner of record, addressed to names that are shown in grant deeds, or deed of trust, no later than 15 to 20 days after each meeting takes place. Minutes that are mailed in draft form should be so marked.

Rationale: Absentee and foreign owners, and agents of units need to be kept informed of issues and subjects which confront the association, and action taken at meetings. Some association hold meetings several months apart. If there is no communication in a timely fashion, issues of significance could do harm, or damage, to owners who were not able to respond for lack of information in a timely fashion. Some associations refuse to provide minutes to its members, even in draft form. (Pine Terrace Assn)

INSURANCE: PROOF OF COVERAGE:

Owners of units are required to carry individual homeowners insurance policies to cover contents of the unit, liability coverage, and other coverage, as needed, for the protection of the owners unit, or in the event of any damage to any other unit/s. Proof of such insurance shall be provided with copies to the board of directors.

Rationale: Property managers, and boards of directors, have difficulty resolving property damage due to broken water pipes, mold, floods and fire, when owners do not have any, or adequate, insurance coverage. Similarly to the Department of Motor Vehicles in California, insurance should be a requirement for California condominium unit owners to carry homeowners insurance. Proof of insurance should be provided to the board of directors the same way that automobile owners are required to submit proof of insurance to the Department of Motor Vehicles. Some associations recommend insurance in their bylaws which is not sufficient to mandate this requirement.

ELECTIONS, VOTING, AND NOTICE OF ELECTIONS:

Notices of elections package, sample ballots, and proxy forms (if any), should be mailed to each person named, as shown in grant deeds or deed of trust. When several names are on the grant deed, to avoid any disputes between the several owners owning one unit, a proxy form must be signed by each owner of record, as the name is listed in the grant deed.

Rationale: To avoid any disputes or conflicts between the association and several owners, who own the same unit, all measures should be taken to protect the association by giving each person named the opportunity to have an expression by assigning proxies. Some grant deeds are written with two couples, two different husbands and wives, or three or four students who pooled their funds together as a down payment. A proxy form by each should be signed, allowing only one person to represent the group.

Kazuko K. Artus, Ph.D., J.D.
San Francisco
Kazukokartus@aol.com

25 June 2010

Mr. Brian Hebert
Executive Secretary
California Law Revision Commission

Re: CID Law: Tentative Recommendation

Mr. Hebert:

It is good to see the Tentative Recommendation out. I hope that the recommendations for conforming revisions will draw some attention to the statutes which concern CID associations but remain outside the Davis-Stirling Act. However, I am concerned that the recodified Davis-Stirling Act does not seem to mention those statutes because it would allow the risk to persist that many Davis-Stirling Act users (including some CID lawyers, by my observation) will remain insufficiently aware of them.

I find it also troubling that the introductory note does not reiterate that the Commission should conduct a separate general review of the accounting terminology used in the Davis-Stirling Act (*see* First Supplement to Memorandum 2009-33, p. 7) or that it intends to comprehensively review the financial and accounting provisions (*see* Memorandum 200953, p. 57). The statutory clarification and simplification of CID law would be incomplete until and unless the provisions relating to CID associations' financial management are properly restated.

The Commission should also take up enforcement issues again, as numerous homeowners have urged over the past years. While these issues may fall outside the scope of the present project, I take this opportunity to urge the Commission to focus on financial management and enforcement issues as soon as the present project is handed over to the Legislature.

The rest of this note comments on specific provisions proposed, based on my observations from recent transactions with my association.

Proposed Chapter 1, Article 1 (Preliminary Provisions)

Proposed § 4000 (Short title). The use of the same short title for the recodified Davis-Stirling Act will confuse many association members and CID managers, very few of whom are following this Commission project. The staff noted receiving informal

suggestions to shorten the short title to the "Common Interest Development Act" to make it easier to remember and use, but said that the staff had no opinion on the merits of the suggestion. (*See* First Supplement to Memorandum 2009-33, p. 2.) Merits should be found in any suggestion to make the Davis-Stirling Act (or its successor) easier to use. To my best knowledge the Commission has taken no position regarding whether the short title now in use should be applied to the new law.

I urge that a user-friendly and non-confusing short title be chosen. How about organizing a naming contest for a prize—invitation to the eventual bill signing ceremony, for example? That should draw attention to the new law of those who will otherwise remain unaware of it.

Proposed § 4035 (Delivered to an association). This is unreasonable. In an association having its business office on the project premises, members and third parties ("non-association parties" below) would typically deliver most documents to the office personally and obtain receipts then and there, rather than spending the time and money to mail them and taking the risk of delivery failure. Absent sound policy reasons, the Legislature should codify, rather than interfere with, existing practices.

Personal deliveries to the association's business office should be expressly recognized as a valid delivery method, and associations should be mandated to issue, on members' request, receipts for documents delivered as done for assessment payments in proposed § 5655(b).

Further, non-association parties should be offered a menu as associations are in proposed §§ 4040 & 4045. The decision regarding whether to use personal delivery, messenger service, first-class mail, certified mail, registered mail, express mail, electronic mail, facsimile or other means should be left to the delivering party, who is in a better position than the Legislature to decide what among various means offers, for a given purpose, the best combination of cost, speed and delivery failure risk.

Proposed § 4040(a)(2) (Individual notice). Please review the second sentence. The term "consumer consent" does not seem to appear in Corp. Code § 20; my word search over the Corporations Code has indicated the term appearing only in § 16101(4):

> However, an electronic transmission by a partnership to an individual partner is not authorized unless, in addition to satisfying the requirements of this section, the transmission satisfies the requirements applicable to consumer consent to electronic records as set forth in the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Sec. 7001 (c)(1)).

(Underline added.) I would not recommend importing the quoted sentence into the Davis-Stirling Act; who would bother to look up Corporations Code and then the

Electronic Signatures in Global and National Commerce Act when making an arrangement for a CID association's communications?

I suggest revising the sentence to read:

> Before the first transmission to members, an association shall deliver by individual delivery a clear written notice saying that members have the right to receive the record or communication on paper. The notice shall advise members how and whom the member should communicate the member's withdrawal of the consent to the method and, if applicable, an alternative method to which the member consents.

Proposed § 4045(a) (General notice). This subdivision should start with "Except as provided in subdivision (b)," so as to get the reader's attention to subdiv. (b) at the beginning--before the reader spends her/his mental energy on five phrases of subdiv. (a).

The description of the third method (§ 4045(a)(3)) is a little problematic. It is insufficient to post notices "in a location that is accessible to all members." The word "prominent" in the second sentence of § 1363.05(f) should be retained. The location should not only be accessible to individuals with impaired mobility including those on wheel chairs, but also be well-lit and shielded from human and other traffic to enable interested persons to stop to read and take notes. A considerate property manager would know this, but it is the other kind whom law has to guide.

The words "all members" should be reconsidered. Many (probably most) associations would be unable to find a "location that is accessible to all members" because members do not necessarily reside in or near the project.

Proposed § 4060 (Minimum font size). The proposed expansion of the minimum font requirement is welcome, but it would not help members who are blind. I suggest requiring associations to produce also in Braille, when requested, notices which are important enough to call for mandatory individual delivery.

Proposed Chapter 1, Article 2 (Definitions)

Proposed § 4090 ("Board meeting"). Present § 1363.05(j) represents an unworkable definition; it should be completely recast. The proposed change from "a majority" to "a quorum" is an improvement, but the rest of the text is just as unclear as § 1363.05(j). The opening sentence should define the basic elements in addition to the presence of a quorum; the first verb should not be "includes," it should be "means" as is the case in most of other sections of proposed Article 2.

The text, if it were to be retained, should clarify whether it is a board meeting when directors constituting a quorum:

a) hear, discuss or deliberate on a matter which is not on the agenda of a board meeting—as they would be permitted by proposed § 4930(d) (what does the phrase "scheduled to be heard by the board" mean?); or

b) choose to hear, discuss or deliberate on, in the presence of members in general, a matter which the board is permitted, but not required, to discuss in executive session, such as litigation, contract formation with a third party or personnel matter, and so proceed (what is it if not a board meeting?).

In the Tentative Recommendation of June 2007, proposed § 4090 defined "board meeting" to mean "a congregation of a majority of the directors at the same time and place to hear, discuss, or deliberate upon any item that is within the authority of the board." Comment (1) to that proposed section said:

> The reference to association business "scheduled to be heard by the board" [in the present § 1363.05(j)] has been replaced with a reference to any business within the authority of the board. The requirements of this article apply regardless of whether the matters to be considered have been formally scheduled.

With the exception of "a majority of the directors," the 2007 formulation is far more sensible than the new version. I urge that the text be revised to read:

> "Board meeting" means any congregation at the same time and place, in person or via teleconference, of a number of directors constituting a quorum, either in compliance with the notice requirement of Section 4920 or exempted therefrom by Section 4923, to hear, discuss, or deliberate upon any item that is within the authority of the board.

Board meetings so defined would include executive sessions. Nothing wrong with that. Proposed § 4925(a) recognizes executive session to be a board meeting excepted from some rules regulating board meetings. Concerns were expressed that the then-proposed § 4090 would interfere with ordinary social meetings of directors. (*See* First Supplement to Memorandum 2007-47, p. 29.) The inclusion of the notice requirement in the definition would prevent a social gathering or an unplanned congregation of individuals from turning into a board meeting on account of the accidental presence of a number of directors sufficient to form a quorum.

Proposed § 4163 ("Occupant"). The definition should be tightened, since an occupant is a person with certain privileges: it is a person who is allowed to speak at board meetings (see proposed § 4930(a)), whom an association may not deny physical access to her/his separate interest (*see* proposed § 4510), and for whose misconduct the owner of the separate interest of which he/she is an occupant may be held responsible (*see* proposed §§5725(a) and 5860).

Several issues need clarification:

a) Are owners a subset of occupants? The words "to the occupants and to the owners" in proposed § 4785(b) suggest that there can be owners who are not occupants, since "owners" need not be mentioned if owners are a subset of occupants. I would think that an owner who has no physical contact with her/his separate interest (e.g., an absentee landlord) should not be regarded as an occupant of that separate unit.

b) Who is a "resident"? The ordinary meaning of word "resident" is "one who resides." *See* CHAMBERS 20TH CENTURY DICTIONARAY 1100 (New ed. 1983). If a natural person resides in the common area (probably in violation of the declaration), that person could be an "occupant" by the plain meaning of the proposed text. The words "of a separate interest" should be added after "sublessee." A reader cannot be expected to understand the words "of a separate interest" at the end of the sentence to modify all words preceding "or other person . . .," particularly in the absence of a comma after "in possession of."

c) Who is an "invitee"? Since the word "invitee" is not commonly used, it should be explained (as done for "general ledger" in proposed § 5200(a)(3)(D)) if it is to be retained. Association members including directors should not have to review court decisions or consult property lawyers to determine whether a person is an occupant. I suggest defining "occupant" to exclude invitees. An invitee in a separate unit may be there for a short period of time, e.g., a prospective purchaser or lessee inspecting the separate interest, a customer of a restaurant operated in a separate interest, or a client of a law firm using a separate interest as its office. Associations should not be required to give the privilege to speak at board meetings to persons having only transitory contacts with the CID. For the same reason, I recommend also excluding guests from the definition of "occupant."

d) Is a person an occupant while in possession of a separate interest without the consent or even the knowledge of the owner or the owner's agent (a person who would be guilty of a misdemeanor under Penal Code § 602.5(a) if the separate interest is residential)? An occupant must in some way be authorized to be in possession of the separate interest of which he/she is an occupant. I would revise the last phrase to "other person in lawful possession of a separate interest."

e) How about young children and live-in domestic servants of the owner, lessee or sublessee of a separate interest? While they should not be prevented from accessing their separate interests and the owner should take responsibility for their misconduct, they should not have the privilege to speak at board meetings—except as the owner's designated representative.

Proposed § 4165 ("Operating rule"). I recommend modifying "by the board" to read, "by the board, either memorialized in a resolution or in other writing, that . . . ." The notice-

for-comment requirement of § 1357.130(a), to be restated as proposed § 4360(a), is better known in my association than most other provisions of the Davis-Stirling Act, but the board has adopted by oversight some resolutions which set forth operating rules relating to the use of the common area without following the notice-for-comment procedure, rendering the resulting operating rules technically invalid and unenforceable (*see* § 1357.110). I take the matter personally because I once had overlooked the applicability of the § 1357.130(a) requirement in voting on a resolution. The Legislature should make it easier for boards to comply with law.

Proposed § 4177 ("Reserve accounts"). This definition, copied from present § 1365.5(f), is unworkable. It is unfair to impose such a definition on "volunteer directors who may have little or no prior experience in . . . complying with the laws regulating CIDs . . . " (introductory note, p. 1) and expect them to decipher what the text means. The Legislature should not compel anyone to use the word "account" or "accounts" to mean any kind of money or funds. While the word "account" is used to mean various different things, "money" and "funds" are not among them, to my best knowledge. Copied below are entries for "account" in dictionaries at hand:

> A detailed statement of the mutual demands in the nature of debits and credits between parties, arising out of contracts or some fiduciary relation. A statement in writing, of debits and credits, or of receipts and payments; a list of items of debits and credits, with their respective dates. A statement of pecuniary transactions; a record of course of business dealings between parties; a list or statement of monetary transactions, such as payments, losses, sales, debits, credits, accounts payable, accounts receivable, etc., in most cases showing a balance or result of comparison between items of an opposite nature. BLACK'S LAW DICTIONARY 18 (6th ed. 1990).
>
> Counting: reckoning: a reckoning of money or other responsibilities: a statement of money owing: a business relationship involving the provision of goods or services in return for money: advantage: value: estimation: consideration: sake: a descriptive report: a statement: a narrative: a performance. CHAMBERS 20TH CENTURY DICTIONARY 8 (New ed. 1983).
>
> 1. A recounting of past events. 2. A statement of causes or motives. 3. A precise list of fees or charges. 4. A measure of those qualities that determine merit, desirability, usefulness, or importance. 5. A feeling of deference, approval, and liking. The quality of being suitable or adaptable to an end. A harbored grievance demanding satisfaction. ROGET'S II THE NEW THESAURUS 9 (1980).
>
> Syn. record, report, sum, balance, statement, recital, narrative, relation, explanation, rehearsal. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 13 (2d ed. 1969).

Moreover, "The term 'reserve' is falling into disuse, precisely because it has so many different meanings and led to confusion." TED J. FIFLIS, ACCOUNTING ISSUES FOR LAWYERS 340n (4th ed. 1991). It is not prudent to use a term which accountants are discarding in order to avoid confusion.

Proposed § 5510(a) would read as follows when the proposed definition is substituted for "reserve accounts":

> The signature of at least two persons, who shall be directors, or one officer who is not a director and a director, shall be required for the withdrawal of moneys from the association's moneys that the board has identified for use to defray the future repair or replacement of, or additions to, those major components that the association is obligated to maintain and/or the funds received, and not yet expended or disposed of, from either a compensatory damage award or settlement to an association from any person for injuries to property, real or personal, arising from any construction or design defects.

(Language of the proposed definition underlined.) What does the "withdrawal of moneys from the association's moneys" or the "withdrawal of moneys from the funds . . ." mean? I have tried substituting the proposed definition of "reserve account" in other places as well and got similarly strange statements. I find it easier to decipher proposed §§ 5500(b), (d), (e), 5510(a), 5515(e) and 5550(a) without taking proposed § 4177 into account.

For the reasons given above, I urge that proposed § 4177 be deleted.

Proposed § 4178 ("Reserve account requirements"). Similarly, this section should be deleted.

Proposed Chapter 2 (Governing Documents)

Proposed § 4200 (Document authority). The addition of this section is welcome. However, I believe, based on my experience, that this section should also remind readers that any provision of governing documents which is not consistent with all applicable law, including but not limited to the constitutions of the United States and of the State of California, is invalid and unenforceable.

Proposed § 4360(b) (Approval of rule change by board). The sentence should be revised to read, "A decision on a proposed rule change shall be made at a board meeting, after consideration at a board meeting of any comments made by association members." The board of my association apparently believed that § 1357.130(b) permitted the board to consider members' comments outside open board meetings, and this has triggered a dispute, which may lead to an action for, *inter alia*, injunctive relief. The requirement to consider members' comments in open board meetings may be obvious to those who are familiar with the Davis-Stirling Act. But CID associations are "run by volunteer

directors who may have little or no prior experience in . . . complying with the laws regulating CIDs, ..." (Introductory note, p. 1.)

Proposed § 4365 (Reversal of rule change by members). The second sentence of subdiv. (d) is misleading. Proposed § 5100(a) requires elections regarding amendments to the governing documents to be "held by secret ballot in accordance with the procedures set forth in [Article 4 of Chapter 5]." Since operating rules are governing documents (proposed §4150), reversal by members of a rule change would have to be decided by secret ballot; it cannot be decided by voice vote or show of hand at a member meeting. That election by secret ballot cannot be "in lieu of the meeting described in this section," and the board "shall"--not "may"--call an election pursuant to Article 4 of Chapter 5 and the association's election rules adopted pursuant thereto. The confusing words "or written ballot" should be deleted.

The phrase "a special meeting of members" should be replaced by "a special election of the members" throughout the section. I suggest that it be made clear that an association which has adopted election rules consistent with relevant provisions of Article 4 of Chapter 5 and the Corporations Code, as it should have, need not review the provisions of the Corporations Code.

Proposed Chapter 5 (Association Governance)

Proposed § 4920 (Notice of board meeting). I believe that the first clause of subdiv. (a), "Unless the time and place of meeting is fixed by the governing documents," should be deleted in light of the mandate that the notice shall contain the agenda. Members should have an opportunity to know the meeting agenda at least four days before the meeting, regardless of whether the time and place of board meetings are fixed by the governing documents. I suggest adding a statement that a decision made at a non-emergency meeting of directors held without the required notice is invalid and unenforceable unless and until ratified at a valid board meeting.

A penalty more realistic than the possibility of a civil penalty of up to USD 500 for each violation under proposed § 4955 should be imposed for an association's failure to include the agenda in the notice of a board meeting. Proposed § 4955 is practically meaningless here because almost no member will go through the ADR process and risk possible dismissal by the court to enforce this section. If this subject falls outside the scope of the present project, the Commission should take it up in its review of Davis-Stirling Act enforcement issues.

I object to the reference to the entire Corp. Code § 7211 in subdiv. (b). Readers need to read only Corp. Code § 7211(a) because the rest of Corp. Code § 7211 is irrelevant to board meeting notice. The Legislature should do its best to avoid wasting the people's time.

Proposed § 4923 (Emergency board meeting). In need of tightening. An emergency board meeting should be conditioned on a decision that an immediate board action is necessary "to address an imminent threat to public health or safety or imminent risk of substantial economic loss to the association," which required for exemption of rule changes from the notice-for-comment requirement in proposed § 4360. No emergency board meeting should be allowed on account of the circumstances which the board should have foreseen but has failed to foresee. The words "could not have been reasonably foreseen" are too vague to be effective.

Proposed § 4925 (Board meeting open). I would merge subdiv. (a) with the first sentence of subdiv. (b): "Any member may attend and speak at board meetings except when the board adjourns to executive session." Association meetings are the forum for members to make decisions on matters not delegated to the board. Members' right to speak at association meetings, obvious as it is, should be established either in proposed § 5000 (member meeting) or a separate section of Article 3.

This section should require the board to solicit comments and questions from non-director members before deciding any issue. Volunteer directors "may have little or no prior experience in managing real property, governing a nonprofit association or corporation, complying with laws regulating CIDs, and interpreting and enforcing the restrictions and rules imposed by the governing documents . . . ." (Introductory note, p. 1.) Some of non-director members in attendance may have expertise in the subject matter before the board. It is definitely in the interest of the association to take advantage of their knowledge and expertise. Directors who fail to do so would be in breach of their fiduciary duty (of which they may not be well aware).

It should be expressly stated that a reasonable time limit for all members to speak is the only restriction the board is permitted to impose on non-director members' speech at open board meetings. Such a statement would constitutes no substantive change in law, as it only makes explicit what has been implicit in the Davis-Stirling Act; the existing Davis-Stirling Act contains nothing which allows the board to restrict members' speech in any other way than imposing the "reasonable time limit for all members to speak." Non-director members (and residents or occupants) are permitted by law to speak at board meetings even on issues the board is prohibited from discussing (§ 1363.05(i) and proposed § 4930(a), respectively).

Even in an incorporated CID association, members are not shielded from their association's financial liability arising from the misconduct of the board or personnel hired by the board. *See* Memorandum 2009-38, pp. 28-30 & Exhibit 19-23. Therefore, members must be empowered to act to prevent the board from engaging in misconduct far more extensively than shareholders of typical corporations are. They have to speak before the board makes unwise decisions.

Proposed § 4935 (Executive session). The list of subjects permitted in executive session should include association counsel's advice which has to be withheld from the public or association's agents or employees and procedural or substantive issues in mediation or arbitration involving the association. The proposed text, as does § 1363.05(b), fails to do so. Since mediation and arbitration are alternatives to civil actions, "litigation" cannot be understood to include them, even where they are intended to be a step towards a civil action taken merely on account of proposed § 5930(a) (ADR prerequisite to enforcement action). Failure to enumerate mediation and arbitration entails the risk of creating a "sloppy slope" by compelling the board to make an impossible choice between meeting the confidentiality requirement of alternative dispute resolution on one hand and complying with the open meeting requirement of the Davis-Stirling Act on the other hand.

The agenda for a meeting which is envisaged to be adjourned to executive session should be required to identify the subjects to be considered in executive session. Further, the board should be required to announce on the record, before adjourning to executive session, the subject(s) to be considered in the executive session and to identify the ground on which the board may be permitted or required to do so. Non-director members who disagree with the board's understanding of law should expressly be entitled to question on the record the propriety of prospective board consideration in executive session of any subject. Non-director members should also expressly be entitled to question and demand explanation for past consideration in executive session of any subject noted pursuant to subdiv. (e). As I noted in relation to proposed § 4925, members of CID associations have a more extensive interest in keeping its board from misbehaving than shareholders of typical corporations. Law should make it easier for members to intervene when they perceive that the board may misbehave or may have misbehaved, whether negligently or intentionally.

Proposed § 5200 (Record Inspection: Definitions). A journal (the place where transactions are recorded as they occur, the book of original entry) should be included in the definition of "association records," in addition to a general ledger. As I said earlier, a journal and the corresponding ledger record exactly the same information in two different formats, but for some (perhaps many) readers it is easier to spot bookkeepers' errors by reviewing a journal than the accompanying ledger. It makes no sense to require associations to offer ledgers for members' inspection and not the accompanying journals.

The term "modified accrual basis" should be elaborated. What does it mean? Who sets the standards for accounting on "modified accrual basis"? Reference should be made to the standards, e.g., "in accordance with the standards established by the American Institute of Certified Public Accountants and the Financial Accounting Standards Board (or whatever body)."

Associations should be required to prepare financial statements on cash basis in addition to "modified accrual basis" because it is generally far easier to spot errors in financial

statements prepared on cash basis than on accrual basis. I would not object to the availability of financial statements prepared on accrual basis because they do serve purposes, if prepared properly. But the requirement to prepare balance sheets, income and expense statements, budget comparisons and general ledgers on an accrual or "modified accrual" basis rather than on cash basis makes little sense. These issues may fall outside the scope of the present project, and if so, they should be taken up in the separate review of provisions for CID financial management.

The term "association records" should be defined to include managers' disclosure statements required by Bus. & Prof. Code § 11504. Members should formally be entitled to know whether the property manager employed or retained by their association is a certified common interest development manager since such managers are remunerated from assessments. Members should be able to know what their money is buying, and the law should facilitate it.

I insist that the clarifying note, "Privileged contracts shall not include contracts for maintenance, management, or legal services," be included in subdiv. (a)(4). It properly belongs in the definitional section. Its inclusion constitutes no substantive change in law since it is in § 1365.2(d)(1)(E)(iv). It only clarifies "Executed contracts not otherwise privileged under law" in proposed § 5200(a)(4), thereby facilitating the use of proposed Article 5. It is unreasonable to compel readers to look through proposed Art. 5 to find the meaning of proposed § 5200(a)(4) by reading proposed § 5215(5)(D). The failure of § 1365.2(a)(1)(D) to include the clarifying note costs the people time and money without benefiting anybody. The new law should not repeat the bad drafting. The staff expressed concerns about the possibility that inclusion of the clarifying note in proposed § 5200(a)(4) "might disturb an intended meaning." (Memorandum 2009-44, p. 26.) I have noticed no published comment in sympathy with the staff's concern.

Proposed § 5205 (Inspection and copying of association records). The words "direct cost of copying" and "direct cost of copying and mailing" in subdivs. (a) and (f), respectively, should be clarified. It seems that where an association has the records copied by a third party, the association would be permitted to submit the third party's invoice and request reimbursement from the requesting member. Am I right?

What if the association has its employee copy the records? Would the cost of the paper and ink constitute direct cost of copying? What is the direct cost if the request is for transmission of the specified records by electronic mail under proposed subdiv. (h)? In either case, does the proposed section permit the association to bill for its employee's time spent on copying or transmitting the records? I believe that employee's time, being a part of the association's overhead cost, should be impermissible.

In any case "direct and actual cost" would preclude the association from charging the requesting member for the time spent by an association employee or a third party to

search for the requested records because the association has a duty to stand ready to make the records available for inspection, and hence the cost of searching such records is a part of the association's overhead cost. I urge that a language to that effect be added.

I suggest deleting subdiv. (g) because it represents a bad policy. It would inevitably allow an association to decide what to redact and what not to depending on who requests copies, which is likely to invite the accusation of arbitrariness. An association should establish a policy as to what should be redacted and what should be disclosed to requesting members, and should prepare, before receiving any request, redacted copies of records in accordance with its policy and retain the redacted copies for members' inspection. The cost of redacting records must be born by the association, i.e., by members as a whole, as is the case with any other overhead cost.

Proposed § 5220 (Membership list opt out). What is the consequence of the association's failure to comply with a member's preference? Only the possibility of an action by the injured member pursuant to proposed § 5980?

Proposed Chapter 6 (Finances)

Proposed § 5500 (Accounting: Board review). The meaning of the word "review" should be clarified. Directors should not be required merely to look through a stack of papers; the board needs guidance as to what to do after looking through the papers. This section should require the board at a minimum to adopt at open board meetings resolutions expressing its view of the state of the association's financial position represented by the documents reviewed.

Proposed § 5550(a) (Visual inspection of major components and reserve study). This is one of the most objectionable sections of the proposed law. It should state the consequences of board's failure to comply with the mandate of the first sentence—the loss of board's discretion to increase regular assessments by the combined effects of proposed §§ 5605, 5300 and 5550. That would not violate the drafting style or legislative tradition in California. Present § 1363.6(d) and proposed § 5405(d) clearly state the consequence of noncompliance with the filing requirements of the respective sections. The Legislature should not compel the people to waste their time and/or money when it can avoid doing so by saying clearly what it means.

For the same reason, proposed § 5605 should say what the consequences are of any increase in regular assessments imposed in violation of the prohibition. Associations may violate the prohibition inadvertently (more likely than otherwise if the Legislature fails to show clearly the connection between proposed § 5605(a) and proposed § 5550(a)). They should not be allowed to retain the proceeds from any illegal assessment increase. I suggest that the law expressly permit associations to seek members' ratification of any illegal assessment increase upon finding of violation by oversight, but require refunding of the proceeds in the event members decline to ratify the increase.

Proposed § 5600(b) (Levy of assessment). The court in *Brown v. Professional Community Management, Inc.* (2005) 127 Cal. App. 4th 532 reviewed the language of § 1366.1, which is copied into proposed § 5600(b). Incidentally, I wonder whether it is proper to say in Comment to the proposed subdivision, "Subdivision (b) continues former Section 1366.1 without substantive change." (Underline added.) It seems that "without change" would be more appropriate than "without substantive change" since the text of proposed § 5600(b) is identical to the text of § 1366.1.

Brown said, albeit in *dicta*, "[Section 1366.1] prohibits an "association from charging fees or assessments in excess of the costs for which the fee or assessment is charged," and illustrated:

> [W]e understand the section 1366.1 prohibition . . . to mean, for example, that fees or assessments levied against homeowners for the purpose of defraying the cost of mowing the grass in the common arrears, or of painting the association's clubhouse, or of replacing the deck of the association's swimming pool, or any other of the myriad of the association's management and maintenance responsibilities, may not exceed the cost to the association for providing those services.

The court added that "section 1366.1 prohibits an association from marking up the incurred charge to generate a profit for itself." While that may be obvious to some, a large number of readers who need to use the Davis-Stirling Act are "non-experts." (Memorandum 2009-33, p. 7.) A language to help non-experts should be added.

With respect to an association's service related to a transfer of title or other interest, proposed § 4575 (transfer fee) permits the association to impose only a fee in an amount not to exceed its actual costs to change its records and a fee in an amount based on the association's actual cost to produce, procure and reproduce certain documents requested by the owner; proposed § 5205 (inspection and copying of association records) allows associations to bill members only the "direct and actual cost of copying requested documents." This section should say that it is the general rule.

It seems to me that this section also prohibits associations from retaining any operating account surplus that may be generated during a fiscal year. Assessments for the operating account are not allowed to exceed the recurrent costs of association service--including overhead--which the assessments are levied to finance. Since the amount of aggregate assessments for a fiscal year has to be determined based on the projected aggregate cost, a small surplus or shortfall would be inevitable. But associations should expressly be required to refund any surplus existing at end-fiscal year to members when its magnitude is determined, probably a few weeks after the close of the fiscal year. I suggest that a sentence be added to make that clear.

Proposed Chapter 8 (Dispute Resolution and Enforcement)

Proposed § 5975(a) (Enforcement of governing documents). The word "unreasonable" does not mean anything specific to most people; many believe what they disapprove is unreasonable. However, the Supreme Court of California in *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal. 4th 361 has interpreted Civ. Code § 1354 and concluded that a restriction in a recorded declaration is presumed to be reasonable unless it "is arbitrary, violates a fundamental public policy, or imposes burdens on the use of the affected property that substantially overweigh the restriction's benefits." I suggest that the court's conclusion be codified for the benefit of members and boards.

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June 28, 2010

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email to: bhebert@clrc.ca.gov
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Re: Davis-Stirling Common Interest Development Act
Civil Code §§ 1350 -1378; Revised Civil Code §§ 4000-6150
Specifically Civil Code §1351(a)&(c); Revised §§4080 & 4100

The Commission's Tentative Recommendation is to leave these two Sections unchanged. However, I submit there may be an anomaly between the definition of "Association" and the definition of "A stock cooperative."

§ 4080 (UNCHANGED). "Association"
"Association" means a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development.

§ 4100 (UNCHANGED). "Common interest development"
"Common interest development" means any of the following:
(a) A community apartment project.
(b) A condominium project.
(c) A planned development.
(d) A stock cooperative.

Neither a nonprofit corporation nor an unincorporated association can have stock or shareholders, at least to the best of my knowledge and belief. Corporations Code Title 1, Division 2 and Title 3, respectively. A "stock cooperative" by definition has stock and shareholders as defined in Title 1, Division 1. How can a "Common interest development" have stock and its "Association" not have stock? Would the "Association" governing entity of a stock cooperative form of Common Interest Development need to be a "nonprofit corporation or unincorporated association…" separate and in addition to "a stock cooperative" entity?

Or, has the Legislature created a hybrid entity with characteristics of both a nonprofit corporation or unincorporated association (without stock or shareholders) and a general law corporation (with stock and shareholders)?

In the early lawsuits later consolidated into Golden Rain Foundation v. Franz, 163 Cal.App.4th 1141, 2008 Cal.App.LEXIS 860, the "Association" management and attorneys asserted that the "Mutual" stock cooperatives of Seal Beach Leisure World weren't subject to the Act because they are Division 1 "general law corporations" with stock. Although these "Mutual" corporations' Articles and By-laws all state,"…all on a non-profit basis…" management operates them on a "for profit" basis and then asserts that they do not fit the definition of a "nonprofit corporation or unincorporated association" under Division 2.

That litigation, lasting almost 5 years, at every level in the California Courts, and costing the elderly shareholders more than $1,500,000 in attorneys fees, probably would not have happened but for the above-described anomaly. The irony is that the Shareholders, who prevailed at every court determination, had to pay the entire costs from their mostly fixed incomes, and from money that should have funded their reserve accounts.

The Commission should clarify the definition of an "association" to include Division 1 "stock cooperative" corporations whose purpose is "mutual benefit housing," regardless of whether they have stock and whether management is operating them as "nonprofit corporations or unincorporated associations."

Thank you for your attention,

David Noble
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June 28, 2010

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Re: Comments on the California Law Revision Commission Draft Revisions to the Davis Stirling Common Interest Development Act dated December 2, 2009

Dear Mr. Hebert:

The Stakeholder Attorney Group made its comments on Chapters 1 and 2 of the CLRC Staff Draft by a blackline version of those two chapters under a cover letter Dated March 31, 2010. The stakeholder group has not at this time been able to review the remainder of the staff draft. Since the stakeholder group is not making additional comments at this time, I am sending you the comments I have compiled, with the help of Nathan McGuire of our firm, relating to items not covered by the stakeholder group's previous comments on Chapters 1 and 2. While these comments are strictly from our firm, and not comments of the Stakeholders Group, I have tried to incorporate comments that I have received from others to the extent possible.

General Comment. The use of the word "void" should be eliminated from the draft legislation. It has become common in legislation regarding the Davis-Stirling Common Interest Development Act ("**DSA**") in recent years for the drafters to use the term "void" when trying to provide that governing documents of CIDs cannot contain restrictions on certain improvements or activities or cannot override laws or local ordinances. Unfortunately, the use of "void" can often be read to void entire provisions of documents, even if those provisions have other uses which have nothing to do with the issue for which the provision is being "voided". It is a better approach to just provide that the provisions of governing documents shall not prevent a certain result which is what the CLRC has done in most cases. However, the existing void language has been retained in some provisions. See Section 4725, 4730(a) and 4735(a) for examples. While I believe it is the view of most attorneys practicing in this area that governing documents cannot override laws or local ordinances some of the amendments to the DSA contain the word "void" which indicates that the sponsors of the legislation believed that governing documents could in fact override laws and ordinances. If the CLRC proposal is revised to contain language making it clear that governing documents are subject to laws and ordinances containing mandatory requirements such as was

EX 65 More Than Years of Excellence

discussed at the February 25, 2010 CLRC meeting this revision would probably go a long way to ending what is an obvious concern persons sponsoring amendment to the DSA.

Comments by Section Number.

4015. I would suggest rewording this provision to read: "Nothing in this part applies to a real estate development that does not contain common area." This would make the provision more straight forward. There is no need for the cross-citation to Section 4095 for that is not commonly done in code provisions where there is a defined term.

4030. This is the provision on the creation of a CID. A recent court of appeals case, *Villa Vicenza Homeowners Association v. Nobel Court Development, LLC, (2010) 185 Cal.App.4th 23*, has cast doubt on the ability of an association to act prior to the creation of a CID. The case involved the attempted enforcement of an arbitration provision for construction defects but the court's decision raises much wider issues. The ability of an association to contract and bind the association to security agreements, completion agreements and the like used by the DRE to protect the interests of buyers during the development process is a key element in the existing DRE consumer protection process. It should be made clear in the DSA that Associations can enter into agreements related to the CID prior to the sale of the first separate interest, for purposes related to the CID and its development. The language could be placed in this section or in Section 4800, the provision dealing with associations.

4175. There is a problem of non-residential developments such as shopping centers which are not intended to be planned development being brought under the DSA due to the operation 4175(b) even though these developments do not generally have associations. It would be helpful if this section made it clear that a non-residential development is not subject to the DSA due to 4175(b) unless the declaration expressly states that the development is subject to the DSA.

4220. This provision is too restrictive as related to buildings that have had to be reconstructed due to age or casualty and have been changed due to code and other requirements. Once the physical premises have been changed there is no use in trying to pretend that the boundaries of the unit have not changed. The staff has proposed some changes but those changes are also ambiguous and too restrictive. Perhaps the words, "in substantial accordance with the original plans" could be eliminated for a simple change, and a concept inserted that the boundaries will be presumed to be correct if the unit has been reconstructed in accordance with the procedures set out in the governing documents or approved or contained in the order of a court having jurisdiction. I would eventually like to see a revision in Section 4295 on amendment of condominium plans to allow the board to adopt a plan for a condominium project or projects to reflect changes caused by reconstruction in accordance with these concepts.

4250. Subsection (a) that requires the inclusion of the name of the association raises the issue as to whether the name of the Association can be changed without amending the declaration. A name change sometimes occurs due to the suspension of the corporation or for other reasons. It may be better to word the requirement so that it is clear that it is only the initial association name that is placed in the declaration.

4270. Subsection (b) could be revised to read, "If the declaration does not specify the voting or consent requirements of the owners who must approve an amendment of the declaration, an amendment may be approved by the owners of a majority of the separate interests." The declaration being a real property document rather than a document of the association may refer to the ownership rather than the membership for amendment or termination purposes and may contain different requirements than for membership voting. This still leaves a question where the declaration requires consent of mortgagors or of a governmental agency and perhaps that concept should be added.

4280. Subsection (a)(3). The inclusion of the name and address of the managing agent in the articles of incorporation does not seem appropriate due to the often transitory nature of managers. Perhaps this information should only be placed in the statements filed with the Secretary of State and left out of the articles.

4295. This revised language could be revised by deleting the words, "types of".

4525. Subsection (d) uses the term "true statement". I had previously suggested to the staff that "true" should be deleted as either unnecessary or inferring that other information could be less that accurate. The staff in its memorandum wanted comment on this possible deletion.

4600. This provision on transfer of common area has a major flaw in that it would seem to prevent the association from assigning parking and storage areas on common area even if this practice is provided in the declaration. The staff wanted our group's comment on its revised language contained in pages 50 and 51 of the memorandum. I believe that the language proposed by the staff as Subsection (3)(G) could be improved if it was changed to generally allow assignment by the association of common area as specifically provided by the declaration so that the declaration could provide for any special circumstances of the development. It might be a good idea to make it clear that the type of transfers provided for in Section 4645 are designed to allow transfers by the owners in certain circumstances of exclusive use common areas which have been deeded to them independent of a separate interest. I do not think it is clear why this provision is dealing with different types of exclusive use common area that Section 4600.

4725, 4730(a) and 4755(a) all contain "void" which should be eliminated.

4760. Subsection (a)(2)(D). I am concerned about the "good cause" language in this Subsection. If the documents allow the improvement then "good cause" should not be part of the consideration, only that the improvements meet the criteria of the governing documents.

4765(a)(3). This provision is not needed if the CLRC inserts a provision that generally deals with the primacy of controlling law that is mandatory over governing documents.

4765(a)(5). This provision does not appear to read correctly. It appears that this was intended to allow an appeal to the board of an association where a committee of the same association made the original decision. The way it currently reads it appears that it is a re-review by the same body that made the original decision. Possibly the words, "...by the board that made the decision..." should be deleted.

4780. The provision was evidently drafted on the assumption that condominiums, community apartment projects and cooperatives always consisted of multi-family attached separate interests and planned developments only consisted of single family detached separate interests. This was probably never true and certainly is not true today. Perhaps the provision should be redrafted on the basis of whether the separate interests are attached or detached and not on the basis of the type of CID.

4800. This provision as written leaves open what happens if the development is not managed by an Association. Since the formation is not one of the requirements to form a CID under Section 4030(a) does this mean that a CID can exist without an association, or that an association must be formed or does it mean that the development is not a CID? Since this set of circumstances does in fact come up it should be answered in this or in another provision. This is also the alternative Article to provide that the association can enter into contracts that bind the association and the CID prior to the formation of the CID. See the comments to Section 4030.

4810. The verbiage, "established to manage a common interest development" can be deleted.

4820. This provision would seem to apply when there has been the consolidation of any functions by two or more associations in a third separate "association". If the existing members are not members of the new "association" that "association" may not be a CID and the term "association" becomes ambiguous. Note, could this apply to a mixed use associations of non-residential interests and one or more residential associations?

4935(b). This language should be revised to read, "....or other form of discipline, to discuss the discipline, and the member shall be entitled to attend..."

5105. It would be better practice to provide for a set of default rules and provide that associations can adopt their own rules consistent with the criteria set out in Subsection (a)(1) rather than mandating the adoption of rules which can lead to a void in the required rules.

5105(a)(3). An association's election rules should not be required to be consistent with the governing documents with respect to nomination procedures. For example, many associations are required to use a nominating committee in the governing documents. Use of this procedure should be optional considering any member now has the right to nominate himself or herself. Also given this fact it would seem to make sense to allow the rules to provide for additional qualifications for directors not contained in the governing documents.

5105. Given the fact that any member may self nominate through the nomination process provided in the mandated election rules, an association should be allowed in the election rules to prohibit nominations from the floor of the annual meeting notwithstanding contrary provisions in the association's governing documents. An association could still seek nominations from the floor at a member meeting, but it doesn't make sense to require nominations from the floor of the annual meeting when the ballots are also being counted at the annual meeting. Currently, associations with governing documents allowing nominations from the floor of the meeting are effectively prevented from conducting elections entirely by mail, and disputes due to these

requirements seem inevitable. This seems contrary to the intent of the balloting system (see Section 5115(d).

5110. The language of Subsection (b) does not make sense since an inspector could not be a business entity in any case. The term "business entity" is also not a normal usage and is not defined anywhere. The language was probably intended to read, "An independent third party may not be a person or the employee or agent of a business entity which is currently employed or under contract with the association..." or some such language.

5115. Associations should not be required to mail out ballots if the number of qualified candidates is less than or equal to the number of open seats, provided all members had a reasonable opportunity to nominate themselves. In such cases, the election inspector should be permitted to determine that the candidates have been deemed elected. In order to encourage participation, it could be required that an association notify the membership and extend the nomination period prior to any candidates being deemed elected.

5115(a)(1). The voter should not be required to "sign" the voter's name. This has been the single biggest complaint we have heard about the election process. Members have expressed concern about the privacy of their signature and many have refused to return their ballots as a result. Members should be allowed to "indicate" their name, which would allow for a member to affix a label, type, or write their name without having to place their signature. Any references, including the reference in 5105(a)(6) to verification of "signatures" should be deleted and 5110(c) should be revised to provide that election inspectors shall "determine the authenticity, validity, and effect of ballots".

5115(b). Input should be sought on whether a quorum should be required at all for director elections. We would support a reduced quorum or no quorum for director elections, overriding requirements in governing documents. This may not be as controversial a proposal as it would seem. Many associations face severe apathy and are never able to obtain a quorum for director elections and or to amend the governing documents to reduce the quorum. This effectively allows the board, if so desired, to continue in place indefinitely, with new members only becoming directors by appointment by the existing directors. This is not conducive to healthy debate and self-government.

5115(c). The language requiring associations to utilize cumulative voting if cumulative voting is "provided for" in the governing documents does not make sense. Most governing documents mirror or simply refer to *Corporations Code §7615(b)*, which prohibits cumulative voting unless a member "has given notice at the meeting prior to the voting of the member's intention to cumulate votes." It is not clear in these instances whether cumulative voting is "provided for" or not. This creates a significant problem for associations because it would allow for the possibility that a member may state their intention to cumulate his or her votes at the meeting after all or a majority of the ballots had already been received by mail. This ambiguity should be resolved one way or the other. The least controversial fix would probably be to revise the language to require cumulative voting "if cumulative voting is required in the governing documents or required following a member election to use cumulative voting."

5130. Proxies should not be permitted in director elections. There is no real benefit to using proxies in director elections. The use of proxies under the balloting system is difficult if not impossible. Allowing proxies in director elections under the balloting system will only result in unnecessary fraud and disputes.

5200(a)(3)(D). There are several problems with this and related provisions. I do not think it is appropriate to require accrual accounting (if that is what is being done) by this backhanded method of requiring accrual accounting to be used for record disclosure. Many if not most small associations use cash basis accounting and I personally see no reasonable reason to force associations with little or no property and small budgets to use accrual accounting and incur the inherent costs of such accounting. It is also not rational to require a cash basis association to make disclosures under an accrual system for the disclosures would not be a correct disclosure of the facts, which means in effect the association on a cash basis system is required to make an inaccurate disclosure. This provision also uses the term "modified accrual basis of accounting" which is a type of accounting only used by government agencies and is not appropriate for associations. The use of this term may have been to allow modifications from accrual accounting but whatever was intended in its present form it is ambiguous. Note also Section 5300(b)(1) which requires budget reports to be on an "accrual basis" without mention of any modified accrual basis. None of these sections require any particular accounting system to be used by an association and there is nothing in the accounting provisions such as Section 5500 that say anything about the system of accounting. This is very poor practice and makes the intent of the law not understandable by any ordinary person who could not find answers to the accounting questions under the accounting provisions but under the disclosure provision.

5255. Subsection (b)(3) which requires deeds to be retained permanently should be worded so that the association is not required to retain copies of the deeds to the separate interests which may come into its possession in connection with the transfers of those interests on the association's records. This should probably only refer to common area records. Of course the rationale for retaining deeds is itself an issue for the deeds can be found on the public records and it may be only reasonably necessary to retain recording information as to those deeds and not the actual deed.

5300(a)(7). In the 4th line should "report" be "statement"?

5405. Subsection (a)(4). Perhaps "the daytime telephone number..." should be "a daytime telephone number".

5560. Does the language in Subsection (a) now require full funding of reserves? If not what is its purpose? The disclosure of the amount of the deficiency would be sufficient but unless a specific plan to fully fund reserves has been adopted Subsection (a) makes no sense. In many cases it is not possible to fully fund reserves especially in cases where there have been developer default and substantial common areas have not been completed and there is no rational method by which the owners can fully fund the reserves until the CID has had additional separate interests annexed to it.

5560(b). Subsections (b)(1) and (2) do not make sense without reference to specific times in the future. As currently written they seem meaningless even if we think we know the actual intent of these provisions.

5600. There is no definition of "levy" and no provision for what actually has to be done to "levy" an assessment. While I know the commission will not deal with this at this stage it would be a good idea to make it clear what constitutes a levy and what happens if the association for whatever reason does not act to adopt a budget and a regular assessment. Also there should be a method for an association which has not complied with Section 5300 on time to comply and allow a raised assessment to take place at a later date during the fiscal year.

5600(b). I think that this provision should be changed to make it clear that this limitation relates to compulsory assessments and fees and not to charges for optional services. I have seen cases where this section has been used in a court cases to try to prevent an association from charging for optional services ranging from the boarding of horses to the sale of food and in one case a court held that an association could not charge for the boarding of horses unless it could prove that the charges were its actual costs. This makes no sense for optional services and I do not think this provision was designed for this purpose (although it is somewhat difficult to understand its actual intent). It appears it was designed for regular and special assessments but not for other purposes.

5605(a). This provision makes no rational sense. If an association has not complied with Section 5300 it should be allowed to comply late and then raise assessments for the remainder of the fiscal year. There is no reason to get a vote (which may be impossible) for an action which did not require a vote in the first place, and there is no reason to make a disclosure requirement block the ability of the board to raise needed funds. On top of just timing mistakes on the part of managers or boards we are now running into circumstances where an association cannot comply because the developer who controlled the board failed to comply while going out of business or because a receiver who was in control failed to comply. Once the members get the correct disclosure there should be no reason to go to a vote.

5605(b). This is the famous double negative which should be corrected.

5625. This provision is special legislation designed to protect one association in its method of assessing. However if the provision allows the Proposition 13 tax rate to be used it in effect would allow the private assessment of separate interests at vastly different rates. While the assessment at market value does not seem to me to raise problems, the assessment under private documents using the Proposition 13 tax rates would seem to raise constitution issues and issues under Section 5600(b).

5665. It does not make sense in larger associations to require that the full board meet with each person requesting a payment plan. This punishes the association board for defaults of the members. Since these boards consist of volunteers I would suggest in associations having more than 25 separate interests that the board can delegate this function to a committee.

5715. Note the right of redemption does not provide who can exercise the right. This should be clarified.

5720. Subsection (c)(3). Should the exemption for the declarant be expanded to cover anyone who would be classified as a "subdivider" under the Subdivided Lands Act? Often the builder is not the declarant and defaults of large numbers of separate interest held by builder and developers who are not the declarant have become a problem for associations.

5730. Under "Payments" on page 106, in the first line the language "he or she" should be replaced by "the owner".

5800. Subsection (e) could be a problem for any residential owner serving on the board of a mixed use project as a representative of a residential project.

Very truly yours,

DUNCAN R. McPHERSON

DRM/clm

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Attn: Brian Hebert, Executive Secretary

Re: Statutory Clarification and Simplification of CID Law
Comments on Tentative Recommendations
Comments Due: 7/1/2010

Dear Mr. Hebert and Members of the Commission:

These comments on the Commission's TENTATIVE RECOMMENDATION are hereby submitted in response to the Commission's February 2010 solicitation (http://www.clrc.ca.gov/pub/Misc-Report/TR-H855-2010.pdf). My comments are limited to the Commission's proposed revision of California Civil Code § 1366(b), which would become new Section 5605(b) (see discussion at pages 17 and 124 of the Commission's report).

I. The board's authority to increase assessments without homeowner approval should be reduced from the present 20% to no more than the increase in the CPI.

As originally enacted in 1985, Section 1366(b) limited the board's authority to increase assessments without homeowner approval to 10%. In September 1987, Section 1366(b) was amended to increase this overall limitation to 20% (Assembly Bill No. 279). These limitations were established during a decade that had experienced a high rate of inflation. In recent years, the rate of inflation has been close to zero. Section 1366(b) should be amended to take into account the present state of our economy.

The power of the board to increase assessments by 20%, year after year, threatens the economic security of thousands of individuals, especially the elderly, who have been forced by economic circumstances to purchase homes in common interest developments. With compounding, annual increases of 20% can result in assessments being doubled every four years and tripled every six years. Such steep assessment increases could cause elderly residents living on fixed incomes to be forced to sell their homes, or even lose their homes through non-judicial foreclosures.

The board of directors of a homeowners association may be dominated by the more affluent members of the association. These board members may have little concern about the financial circumstances of their less affluent neighbors. Their pet projects and other considerations my motivate them to drive up assessments beyond what is necessary to maintain the association property. Often the same members serve on the board year after year. Removing an incumbent member of the board can be difficult or impossible. Because board members usually serve

EX 73

staggered terms without term limits, it may be impossible for less affluent members of the association to stop out-of-control spending and the steep assessment increases that result from such spending.

In 2004, Assemblyman Darrell Steinberg introduced a bill to limit the board's authority to impose assessment increases, without homeowner approval, to no more than the increase in the Consumer Price Index (CPI). AB 2598 would have amended Section 1366(b)(1) of the Civil Code to read:

> Notwithstanding more restrictive limitations placed on the board by the governing documents, the board of directors may not impose a regular assessment that exceeds the regular assessment for the association's preceding fiscal year by more than the annual percentage increase over the preceding 12 months established by the California Consumer Price Index for All Urban Consumers, as published by the California Department of Industrial Relations, based on regional data from the United States Department of Labor, or impose special assessments which in the aggregate exceed 5 percent of the budgeted gross expenses of the association for that fiscal year without the approval of owners, constituting a quorum, casting a majority of the votes at a meeting or election of the association conducted in accordance with Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of the Corporations Code and Section 7613 of the Corporations Code. For the purposes of this section, quorum means more than 50 percent of the owners of an association.

This bill ignited a firestorm of opposition by the CID industry and the lobbyists they hired. The lobbyists argued that association costs might increase by more than the increase in the CPI. Homeowners tried to counter this argument by pointing out that, if association costs increased by more than the increase in the CPI, the board should be able to make its case to the homeowners. They are, after all, the ones who have to pay the assessments. The industry lobbyists apparently spoke to the legislature with a louder voice than the homeowners whose financial security should have been protected.

Use of the CPI has also been criticized because it only allows the association to keep up with inflation. Lobbyists argue that it does not give the association the ability to increase assessments for improvements within the community or to create new amenities. The flaw in this argument is that such assessment increases would not be prohibited by the proposed legislation. Assessment increases in excess of the CPI would still be allowed provided the increases were approved by a vote of the homeowners. When the legislature failed to approve the CPI limitation in AB 2598, the interests of the millions of homeowners who reside in common interest developments were ignored.

I urge the CLRC to take a fresh look at this proposal. Social Security benefits increase automatically each year based on the rise in the Bureau of Labor Statistics' Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W), from the third quarter of the prior year to the corresponding period of the current year. Considering that many residents living in common interest developments are elderly and rely on Social Security benefits, I urge the CLRC

to support an amendment that limits assessment increases, without homeowner approval, to no more than the percentage increase in Social Security benefits. This would be accomplished by using the same index (CPI-W) and formula that is used to determine Social Security benefit increases. If the Commission is unwilling to support use of the CPI as a guidepost for requiring a vote of the homeowners, then at least roll back the present 20% limit in Section 1366(b) to something more reasonable. As an alternative to using the CPI as a guidepost, I suggest setting the overall limitation in the statute at 5%. The homeowners could still vote for a larger increase if they were convinced that it was really needed.

II. The Commission's interpretation of Section 1366(b), as presently enacted, is incorrect and should be revised.

Even if the legislature fails to roll back the present 20% limitation in Section 1366(b), associations should be permitted to accomplish this objective by amending their CC&Rs. In particular, associations should be permitted to amend their governing documents to limit the board's authority to increase assessments to no more than the increase in the CPI, unless the homeowners themselves approve a larger increase. Unfortunately, the CLRC Staff has issued various memoranda in which it states that Section 1366(b) permits the board to increase assessments by any amount not more than 20% without homeowner approval, even if the CC&Rs impose a more restrictive limitation. The CLRC Staff's interpretation of Section 1366(b) is incorrect. This statute is clearly a constraint or limitation on the power of the board to act without homeowner approval. It is a logical fallacy to construe this statute as an enlargement or expansion of the power of the board.

A close examination of the text of the statute reveals its true meaning. The text of Section 1366(b) states, in pertinent part, as follows:

> Notwithstanding more restrictive limitations placed on the board by the governing documents, the board of directors may not impose a regular assessment that is more than 20 percent greater than the regular assessment for the association's preceding fiscal year or impose special assessments which in the aggregate exceed 5 percent of the budgeted gross expenses of the association for that fiscal year without the approval of owners, constituting a quorum, casting a majority of the votes at a meeting or election of the association conducted in accordance with Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of the Corporations Code and Section 7613 of the Corporations Code. For the purposes of this section, quorum means more than 50 percent of the owners of an association. This section does not limit assessment increases necessary for emergency situations.

The core of this subsection clearly states that the board of directors may not increase regular assessments by more than 20% without approval of the association's owners. This operative clause is preceded by a "notwithstanding clause" which states: "Notwithstanding more restrictive limitations placed on the board by the governing documents…" The word "notwithstanding" is

a prefatory term that introduces a condition that may exist without defeating the operative clause. A "notwithstanding" clause in a statute should not be construed as transforming the meaning of the operative clause. The notwithstanding clause is properly construed to negate any provision in the governing documents that would permit the board to increase assessments by more than 20% without membership approval. The "notwithstanding" clause does not transform the limitation on the board's authority in this statute into an expansion of the board's authority beyond that contained in the governing documents.

While a "notwithstanding" clause signals the intent of the legislature that the provision referenced in the "notwithstanding" clause does not take precedence over the operative clause, it does not imply that the provision in the "notwithstanding" clause is repealed. Moreover, the "notwithstanding" clause does not expand limitations stated in the operative clause of the statute. Although I have not found any case directly on point, various opinions explaining the function of a "notwithstanding" clause in a statute support this interpretation. See, e.g., Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993); Faulder v. Mendocino County Board of Supervisors, 144 Cal. App. 4th 1362, 1373 (2006); Klajic v. Castaic Lake Water Agency, 121 Cal.App.4th 5 (2004). Given this understanding of the term "notwithstanding", this statute should be construed to leave open the opportunity for an association to impose its own limitations on its board's authority to increase assessments.

Nevertheless, others have construed this statute to mean that the association's governing documents may not prevent the board from increasing assessments, without the owners' approval, by any amount up to and including 20%. This construction takes a statute that was clearly intended to limit the power of the board and expands the board's power by negating limitations in the governing documents.

While acknowledging that § 1366(b) is not stated as clearly as it could be, the CLRC Staff issued a memorandum on August 8, 2006 in which they construed this statute to mean that the board of directors could increase assessments by any amount that does not exceed 20 percent, without owner approval, even if such increase is prohibited by the governing documents of the association. California Law Revision Commission, Staff Memorandum 2006-33, p.101 (Aug. 8, 2006), http://www.clrc.ca.gov/pub/2006/MM06-33.pdf. Some other commentators have concurred with this interpretation of § 1366(b). The Staff Report also cited the legislative history of § 1366(b). While the legislative history of a statute can be used, in some circumstances, as a tool to interpret an ambiguous statute, it should not be used to rewrite a statute under the guise of statutory construction. The Staff Memorandum was issued in connection with proposed legislation that would have revised the statute to expressly permit the board to increase regular assessments by any amount that does not exceed 20 percent, without owner approval, even if the governing documents required owner approval for the increase. This proposed revision of Section 1366(b) was not passed by the California State Legislature. Subsequent attempts to revise this section have also failed.

In Memorandum 2009-18 at page 19 (April 10, 2009), the Staff of the CLRC provided its opinion of the meaning and purpose of Section 1366(b) as follows:

> Section 1366(b) allows a CID board, notwithstanding more restrictive provisions in the CID declaration, to impose regular and special assessments up to certain percentages specified in the section, without owner consent. Regular assessments may be increased to up to 120% of the regular assessments for the previous fiscal year, and special assessments may total up to 5% of budgeted gross expenses of the association for the previous fiscal year. The section also permits assessments to exceed those percentages, again notwithstanding more restrictive provisions in the CID declaration, if a majority of the voting power of the association approves.
>
> * * * * *
>
> Section 1366(b) serves two purposes. It allows a CID board to deviate from an assessment provision in the CID's declaration when necessary, and it also prevents the board from increasing assessments beyond specified percentages without member consent.

In Memorandum 2009-24 at page 18 (May 29, 2009), the Staff of the CLRC restated its interpretation of Section 1366(b) as follows: "That section [1366(b)] allows a CID board, even if expressly prohibited by a governing document, to unilaterally increase assessments by up to 20 percent, without owner approval." The CLRC Staff's interpretation of Section 1366(b), as stated in these memoranda, was incorrect.

Despite the CLRC Staff's apparent certainty regarding the meaning of Section 1366(b) as expressed in these memoranda, the Staff had been far less certain only one year earlier. In two previous memoranda (2008-43 and 2006-33), the CLRC Staff had stated that the language of Section 1366(b) is confusing. In Memorandum 2008-43 at pages 24-25 (July 10, 2008), the CLRC Staff provided this explanation:

> The meaning of the "notwithstanding more restrictive limitations" qualification is not entirely clear from the face of the statute. See J. Hanna & D. Van Atta, California Common Interest Developments: Law and Practice § 19:37 (2008). ("Unfortunately, the language of Civil Code § 1366(b) is confusing. It contains a double negative, and may be read to mean that more restrictive language in a declaration cannot be imposed on a project board.")
>
> The confusing language used in Section 1366(b) was discussed in Memorandum 2006-33, p. 5. It is clear from the legislative history available at the State Archives that the introductory "notwithstanding clause" was intended to override governing documents that place a cap on how much an assessment may be increased in a year. So for example, a provision limiting increases to 5% per year would be overridden. Nonetheless, any increase over 20% would require member approval.

Proposed Section 5580(a)-(b) would restate Section 1366(b) to make its meaning clearer, thus:

> 5580. (a) Subject to the limitations of Section 5575 and subdivision (b), the board may increase the regular assessment by any amount that is required to fulfill its obligations and may impose a special assessment of any amount that is required to fulfill its obligations. This subdivision supersedes any contrary provision of the governing documents.
> (b) In the following circumstances, an assessment increase or special assessment may only be adopted with the approval of an affirmative majority of the votes cast in a member election at which at least fifty percent of the voting power is represented:
> …
> (2) The total increase in the regular assessment for the fiscal year would be more than 20 percent of the regular assessment for the preceding fiscal year.
> (3) The total for all special assessments imposed in the fiscal year would be more than 5 percent of the budgeted gross expenses of the association for the fiscal year in which the special assessment would be imposed.

Proposed Section 5580 has not been enacted.[1]

The acknowledged confusion in Section 1366(b) had been attributed to the presence of a double negative in the statute. Although there are two forms of negation in this statute, they are contained in separate clauses. The first form of negation is the word "notwithstanding" in the prefatory clause; the second form of negation is the word "not" in the operative clause. A negative word affects only the clause in which it is located, not the entire sentence. Because these two negative words appear in separate clauses, the statute does not contain a true double negative. A double negative occurs only when there are two negative words in the same clause. Sabin, William A., The Gregg Reference Manual, McGraw-Hill/Irwin, 2005, pages 299-300. When two negatives appear in the same clause, they are resolved to a positive. See A Short Introduction to English Grammar: with critical notes, by Robert Lowth (2d edition 1763), at page 132 ("Two negatives in English destroy one another, or are equivalent to an affirmative."). If Section 1366(b) contained a true double negative, the word "not" in the operative clause would be removed. Thus, a statute designed to prevent the board from increasing assessments by more than 20% without homeowner approval would be transformed into a statute that permits a unilateral increase of more than 20%. This would be an absurd result. It is well established that statutes must not be construed "in a manner that would lead to absurd consequences." Anaheim

[1] An attorney group had expressed the opinion that the governing documents could trump the 20% overall limitation stated in Section 1366(b), thereby permitting the board to increase assessments without homeowner approval by more than 20%. I do not concur with that view. This statute should not, however, be construed as invalidating a provision in the governing documents that sets a limit below 20% on the authority of the board to unilaterally increase assessments. Section 1366(b) imposes a limitation, not an expansion, on the authority of the board to increase assessments.

Union Water Company v. Franchise Tax Board, 26 Cal.App.3d 95 (1972), citing City of L.A. v. Pac. Tel. & Tel. Co., 164 Cal.App.2d 253, 256-257 (1958).

The CLRC Staff relied on legislative history to support its interpretation of Section 1366(b). Where, as here, the language of the statute is clear, it is not appropriate to resort to legislative history to try to find a different interpretation. Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc., 133 Cal. App. 4th 26 (2005). Even if the Staff's reliance on legislative history had been appropriate, it is still misplaced. The two items of legislative history cited by the Staff are: (1) Senate Housing and Urban Affairs Committee Analysis of AB 279; and (2) Letter from Senate Housing and Urban Affairs Committee to Senator Leroy F. Green. Not every scrap of paper generated during the legislative process is properly recognized as legislative history. Kaufman & Broad Communities, Inc., supra. In this case, the Committee Analysis of the Bill could be cognizable as legislative history but the letter to a single senator does not constitute legislative history. See Crowl v. Commission on Professional Competence, 225 Cal. App. 3d 334, 337 (1990) (Conference Committee Report cognizable as legislative history); California Teachers Association v. San Diego Community College District, 28 Cal. 3d 692 (1981) ("In construing a statue we do not consider the motives or understandings of individual legislators who cast their votes in favor of it." [internal citations omitted]).

Although the Committee analysis is cognizable as legislative history, it is not helpful to the issue presented here. The pertinent portion of that document states as follows:

> This bill would, instead, limit the percentage increase in regular assessments to 20% and would also provide that the regular and special assessment limits may not be exceeded without the approval of owners constituting a quorum, as defined. The bill would also define the emergency situations for which those limitations may be exceeded.

This statement says nothing about whether the CC&Rs may impose a limit on assessment increases based on the CPI, which is precisely the issue discussed in this submission.

The CLRC Staff's misinterpretation of Section 1366(b) may be based on its inability to imagine how to give effect to both the notwithstanding clause and the operative clause. The following example is presented to illustrate the correct construction of the statute. A provision in the CC&Rs that limited the board's authority to increase assessments, without homeowner approval, to no more than the percentage increase in the CPI would be a "more restrictive limitation placed on the board by the governing documents." If the CPI increased by more than 20%, then Section 1366(b) would kick in to limit the board's authority to increase assessments to only 20%. In other words, the statute would take precedence over the governing documents in this hypothetical circumstance. This interpretation gives effect to both the notwithstanding clause and to the operative clause of the statute. The Staff's interpretation of the statute takes a statute designed to limit the authority of the board and construes it as an expansion of the board's authority. This is clearly incorrect.

The CLRC Staff also relied on a treatise authored by C. Sproul and K. Rosenberry, which was written in 2006, and other unidentified treatises on this subject A treatise is nonbinding

secondary authority. Earl W. Schott, Inc. v. Kalar, 20 Cal.App. 4th 943 (1993). It is persuasive only insofar as it is "founded solidly on either authority or reason." Rivas v. City of Kerman, 10 Cal. App. 4th 1110 (1992). It seems likely that this treatise was influenced by the CLRC Staff's earlier interpretation of Section 1366(b). It is also worth noting the one of the authors of this treatise, was a member of an "Attorney Group" whose interpretation of Section 1366 was rejected by the CLRC Staff in Memorandum 2008-43, pages 25-26. The content of treatise cited by the CLRC Staff was not analyzed or even discussed. The others referred to were not even identified. Under these circumstances, little weight should be given to the views expressed in these secondary sources.

Based on the foregoing, I urge the CLRC to propose an amendment of Section 1366(b) that would reduce the overall limitation of 20% on the board's authority to increase assessments without homeowner approval. In addition, I urge the CLRC to correct its erroneous interpretation of this statute, as presently contained in various Staff Memoranda.

Respectfully Submitted,

Paul J. Krug

EX 80

ECHO
Serving Community Associations

June 30, 2010

Mr. Brian Hebert, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Dear Mr. Hebert:

The Legislative Committee of the Executive Council of Homeowners (ECHO) has been monitoring the work of the California Law Revision Commission (CLRC) as it reviews the Davis-Stirling Act and prepares recommendations for its revision. The length and complexity of the Act can be daunting for the volunteer board members serving their associations, many of which are without legal counsel. We applaud the CLRC for taking on the challenge of simplifying the Act and hope the end result will be more approachable for those living in or working with common interest developments and their associations.

The ECHO Legislative Committee has generally reviewed the recommended revisions but will not be providing specific comments. After public comments have been considered by the CLRC and incorporated into the recommendations, as appropriate, ECHO will again review the recommended revisions.

ECHO appreciates the intricacy of the work involved in thoroughly reviewing the Act, re-numbering provisions and simplifying language and respects the time and effort that has gone into the preparation for upcoming legislation. Once legislation is introduced we anticipate a healthy interest by common interest development constituent groups and additional recommendations by them for amendments. At that point ECHO will take a more active role in the legislation.

ECHO welcomes the organizational shift proposed by the CLRC and respects the desire of the CLRC to avoid substantive revisions. While ECHO believes that there is need for substantive changes to the Act, it is our position that the CLRC revisions will serve as a platform from which those changes can be approached in subsequent legislation.

If you should have any questions or wish to discuss this further please do not hesitate to call.

Best wishes,

Oliver Burford

Oliver Burford
Executive Director

EX 81

Executive Council of Homeowners
1602 The Alameda, Suite 101 • San Jose, CA 95126 • T 408.297.3246 • F 408.297.3517 • www.echo-ca.org

Kazuko K. Artus, Ph.D., J.D.
San Francisco
Kazukokartus@aol.com

1 July 2010

Mr. Brian Hebert
Executive Secretary
California Law Revision Commission

Re: CID Law: Tentative Recommendation, Additional Comments

Mr. Hebert:

After sending you my comments on some of the proposed provisions I have noticed a few more matters.

Proposed § 4525 (Disclosure to prospective purchaser). Subdivision sign "(a)" seems to be missing, and "Subdivision (d)" in the Note appears to be meant to read "Paragraph (4) of subdivision (a)." A drafting accident associated with the re-arranging of the section after the August 2009 Staff Draft? Proposed provision in the Disposition of Former Law table corresponding to existing provision 1368(a) would have to be "4525(a)" rather than the "4525(a)-(h)" shown on page 171.

How would this proposed section interact with Assembly Bill 1927 (Knights), if the latter is enacted before the legislation to result from this project? I am disappointed to note that AB 1927 as amended through 9 June 2010 retains the words "the association's board of directors" in Section 3, designed to amend Civ. Code § 1368. Under the proposal, the text of § 1368(a)(8) would read exactly the same as present § 1368(a)(8):

> Any change in the association's current regular and special assessments and fees which have been approved by the association's board of directors, but have not become due and payable as of the date disclosure is provided pursuant to this subdivision.

(Underline added.)

The view that such phrases as "the association's board of directors" and "board of directors of the association" should be replaced by "board" is not new. It was considered already five years ago (*see* proposed § 4085 ("Board") in the July 2005 Staff Draft Tentative Recommendation attached to Memorandum 2005-25), and the Commission approved it (*see* the minutes of the 14 July 2005 meeting, p. 5).

Would the Commission be required to understand that the term "the association's board of directors" in AB 1927 indicates the Legislature's desire to retain that term? I hope not; I hope that the Commission can persuade the drafter of AB 1927 to reconsider the term in light of proposed § 4525. There is nothing to prevent the Legislature from simplifying a statutory text while amending a statute, is there?

Proposed § 5800 (Limitation of director and officer liability). My association manages a CID which is predominantly, but not exclusively, residential--the CID is over 98% residential in terms of the number of units. Am I right to understand that neither § 1365.7 nor proposed § 5800 would shield its directors and officers? The plain meaning of the text indicates that I am, but I wonder about it because the distinction between exclusively residential CIDs and all other CIDs looks rather arbitrary. I fail to see any state interest such a distinction would serve.

Regardless of that question, I would like two terms appearing in the text clarified:

a) "In good faith" in para. (2) of subdiv. (a). Does a director/officer act "in good faith" even when he/she is in breach of the duty of reasonable inquiry imposed by Corp. Code § 7231(a)? What if he/she makes no attempt to find what the Davis-Stirling Act says regarding the act or omission he/she contemplates?

b) "Tenant" in subdiv. (e). The term seems to be defined neither in the present Davis-Stirling Act nor in the proposed law. More specifically, would a volunteer director who owns three separate interests in an exclusively residential CID be protected if the director resides in one of the three separate interests? Would that director be a "tenant" for the purpose of the section? What if that director resides in the three separate interests that have been physically merged into one residential suite?

Outside the scope of the present project, I suggest a reconsideration of two questions in a review of enforcement issues (which I hope is forthcoming):

a) Whether the law should permit any CID association to shield, at the expense of members (i.e., with the insurance premium paid from assessment proceeds), its volunteer directors and officers from personal liabilities that may arise from their own negligence; and

b) Should the findings prove to be affirmative, whether the law should draw a line between CIDs which are exclusively residential and those which are not.

Proposed § 5850 (Schedule of monetary penalties). A statement should be added that a schedule of monetary penalty must conform to proposed Article 5 (operating rules) of Chapter 2. My observations indicate that the Legislature should not expect volunteer directors and officers to have in their minds proposed §§ 4350-4370 when they read (if they read) proposed § 5850.

I would like to see a clarifying statement as to whether proposed § 5600(b) (levy of assessments) binds the amounts of monetary penalties as well. I believe that provisions should be introduced which prohibit associations from imposing any monetary penalty to raise revenues they are not permitted to raise in other ways. Associations should not be allowed to look to monetary penalties in general as their revenue-raising device, while they may be permitted to apply the proceeds for repairing physical damages to the common area or separate interests caused by the misconduct of the person on whom the monetary penalty is imposed.

Proposed § 5920 (Notice [of internal dispute resolution process] in policy statement. The law should impose a realistic penalty on associations for their failure to comply with the mandate. This section would have no effect otherwise since practically no association member would take advantage of proposed § 5980 (enforcement of this part) to bring an action to enforce it. The Legislature, when it imposes a duty on any person, should take responsibility for doing so.

Proposed § 5975(a) (Enforcement of governing documents). I am intrigued by the second sentence. Is it the expression of the Legislature's intent to permit the declaration to prevent the enforcement of covenants and restrictions in the declaration by an owner, by the association or both? Why would the Legislature allow the declaration to prevent the enforcement of the covenants and restrictions in it by any party? I would recommend deleting the second sentence unless its rationale is found in the legislative history.

Proposed § 5980 (Enforcement of this part). I generally welcome and support the proposal to add this provision. I urge, however, that the statement in the Comment, "Relief under this section may include a writ of mandate, an injunction, or other appropriate relief" be elaborated and brought into the text. I further urge that a clause be added to authorize the court to award reasonable attorney's fees and costs to prevailing members.

Sincerely,

Kazuko K. Artus

Ravi Kapoor
15000,Downey Ave, #220
Paramount, CA 90723
(562)-630-2444
E-mail: ravi.kapoor@ca.rr.com

July 1st, 2010
Honorable Mr. Brian Herbert
Re TR –H855
California Law revision Commission,
4000 Middlefield Rd room D-1
Palo Alto, CA 94303
Per fax 650-494-1827

Respected Honorable Mr. Brian Herbert,

Re TR H855- PUBLIC COMMENTS

As an affected Homeowner, I am writing this note in my personal capacity in response to H-855 and would like to congratulate CLRC for working in the improvement of CID laws and all out efforts are being made for CID REFORMS
However I strongly feel in my opinion with due respect that the under noted suggestions may please be considered if deem fit for the proposed final recommendations. And comments are submitted respectfully for your sympathetic review and active consideration.
Sir you shall agree that you are doing a Herculean task for making CID laws more transparent as part of fiduciary duty to all concerned directly and indirectly involved in CID living.
Sir you may also agree that such opportunity shall not come time and again to re-do once again .It lies with CLRC to make it a success and otherwise. That is why your assistance and intervention shall be highly appreciated in view of the growth of state and economy, CID living plays an important role as it has great impact on the State infrastructure and cannot be ignored as I feel.
§ PROSPECTIVE MANAGING AGENT

In addition to what has been stated to provide schedule of rates with the annual report package for copying of documents/mailing cost per first class or hand-delivery viz purchase orders of vendors, minutes of

meeting, resolutions copy for foreclosure/lien signed copies and not computer print –out copies. No retrieving charges/storage charges shall be applicable may be incorporated if deem fit.

§5300 ANNUAL FINANCIAL /BUDGET STATEMENT

(a) Notwithstanding a contrary provision in the governing documents, an
Association shall prepare and distribute an annual budget report, 30 to 90 days before the end of its fiscal year.
(b) Unless the governing documents impose more stringent standards, the annual budget report shall include all of the following information:

(1) A PRO FORMA OPERATING BUDGET, SHOWING THE ESTIMATED REVENUE AND EXPENSES ON AN ACCRUAL BASIS. MAY BE MODIFIED ON CASH BASIS SO THAT EXISTING BOARD MAY BE ACCOUNTABLE FOR THE EXPENSES DURING THE FISCAL YEAR

§ 5380 TRUST FUND ACCOUNT
IT IS STRONGLY SUGGESTED THAT TRUST FUND ACCOUNT MAY ONLY BE OPERATED BY TWO DIRECTORS ONLY INSTEAD OF AS STATED PLEASE.
§ 5510. USE OF RESERVE FUNDS
5510. (A) THE SIGNATURES OF AT LEAST TWO PERSONS, WHO SHALL BE DIRECTORS ONLY INSTEAD.OFFICER WHO IS NOT A DIRECTOR AND A DIRECTOR, SHALL BE REQUIRED FOR THE WITHDRAWAL OF MONEYS FROM THE ASSOCIATION'S RESERVE ACCOUNTS.
(b) The board 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. 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. The association shall, as soon as reasonably practicable, provide 2individual notice in the form of explanatory statement about the use of fund to all members.

THE SUMMARY OF ASSOCIATION'S RESEVES SHALL BE BASED ON ONLY ASSETS HELD IN CASH OR CASH EQUIVALES MAY PLEASEBE ELOBORATED IN DETAILS FOR FUTURE REFERENCE.

In addition to what has been mentioned, reserve study may incorporate details of equipment history date of installation, cost actual at the time of installation and expected future cost with relevant details, which are considered necessary.

This information is very necessary from IRS/FTB viewpoint towards establishing life expectancies and life of equipment. This shall also help in finding out early failure rate if any and future hidden unexpected costs.

§ 5810 NOTICE OF CHANGE IN COVERAGE 1
The association shall, as soon as reasonably practicable, provide Individual notice to all members if any of the policies described in The annual budget report pursuant to Section 5300 have lapsed, been canceled, and are not immediately renewed, restored, or replaced, or if there is a significant change, such as a reduction in coverage or limits or an increase in the deductible, as to any of those policies. If the association receives any notice of nonrenewable of a policy described in the annual budget report pursuant to Section 5300, the association shall immediately notify its members if replacement coverage will not be in effect by the date the existing coverage will lapse.

It may be made mandatory for BOARD to submit annual report duly signed for what has been done, what future jobs to be undertaken as form for budgeted expenses and how the finances shall be met with any other suggestions if any. Forming part of annual package.

Needless to mention I am sure your efforts shall certainly MAKE THE DIFFERENCE.

With kindest regards,

Truly yours,

(Ravi Kapoor)

SPROUL
TROST
REAL ESTATE & CORPORATE
ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

Curtis C. Sproul
(916) 783-6262

July 8, 2010

Brian Hebert
California Law Revisions Commission
U. C. Davis School of Law
400 Mrak Hall
Davis, CA 95616

Sent via e-mail to: bhebert@clrc.ca.gov

Re: Comments and Recommendations from four members of the State Bar Real Property Law Section "Working Group" formed to review, analyze and provide comments and recommendations to the California Law Revision Commission with respect to the Commission's Tentative Recommendation for Statutory Clarification and Simplification of California's Common Interest Development Laws (February 2010).

Dear Brian:

This letter and its enclosure supplement the letter that I previously sent to you on July 1, 2010 conveying comments and recommendations from four members of the Working Group formed by the State Bar Real Property Law Section to review and analyze the California Law Revision Commission's proposal to restate, reorganize and simplify the Davis-Stirling Common Interest Development Act. In that earlier letter I noted that due to time constraints although the four members of the Working Group had completed their review and analysis, lead responsibility for drafting portions of the Memorandum had been assumed by each member of the Group and the other members were in the process of reviewing and commenting on each other's sections.

That internal process of review and comment is now completed and the resulting final draft of the Memorandum is now in your hands for review and consideration by the CLRC Staff.. The members of the Working Group remain available and interested in responding to any comments, questions or requests for further analysis that may result from the Staff's review.

Finally, as mentioned in the July 1, 2010 letter, the accompanying Memorandum is also being presented to the Executive Committee of the State Bar Real Property Law Section for consideration at the EC's July meeting. Although there is no formal Section endorsement of the

EX 88

Memorandum at this time, I am reasonably confident that support and an endorsement will be forthcoming. I will advise you immediately should that occur.

Sincerely,

Curtis C. Sproul
Northern California Co-Chair
RPLS Sub-Section on
Common Interest Developments, individually and on behalf of the Working Group:
Sandra M. Bonato, Esq., Berding & Weil LLP, Alamo (Bay Area)
Mary M. Howell, Esq., Epsten Grinnell & Howell APC, San Diego
Gary A. Kessler, Esq., Adams Kessler LLP, Los Angeles

cc: Mia Weber Tindle, Chair Real Property Law Section Executive Committee

MEMORANDUM
PRESENTING COMMENTS
ON THE CALIFORNIA LAW REVISION COMMISSION'S PROPOSED STATUTORY CLARIFICATION AND SIMPLIFICATION OF CALIFORNIA'S COMMON INTEREST DEVELOPMENT LAW
(Davis-Stirling Common Interest Development Act)

To: **Brian Hebert, Executive Secretary**
California Law Revision Commission

From: **Curtis C. Sproul. Esq. Sproul Trost LLP, Roseville**
Northern California Co-Chair
RPLS Sub-Section on Common Interest Developments
Sandra M. Bonato, Esq., Berding & Weil LLP, Alamo (Bay Area)
Mary M. Howell, Esq., Epsten Grinnell & Howell APC, San Diego
Gary S. Kessler, Esq., Adams Kessler LLP, Los Angeles

Date: **July 1, 2010**

PART I
OVERVIEW OF THE APPROACH TAKEN IN THIS MEMORANDUM IN EVALUATING THE CLRC PROPOSED RESTATEMENT OF THE DAVIS-STIRLING COMMON INTEREST DEVELOPMENT ACT

This Memorandum presents consensus comments and recommendations by Sandra Bonato, Mary Howell, Gary Kessler, and Curtis Sproul (referred to herein as the "Authors") regarding the California Law Revision Commission's ("CLRC" or "Commission") Tentative Recommendation dated February 2010 for statutory clarification and simplification of California's Davis-Stirling Common Interest Development Act (currently found at California Civil Code sections 1350 through 1378; the "Act"). The CLRC Tentative Recommendations for clarifying and simplifying the Act are referred to in this Memorandum as the "**CLRC Proposed Act**." The project that the CLRC has been pursuing to analyze the current Act and to prepare the CLRC Proposed Act is referred to at times in this Memorandum as the "**CLRC CID Project"** or the "**CLRC Proposal."**

The Continuing Education of the Bar (CEB) reference book *Advising California Common Interest Communities* (Sproul and Rosenberry 2003), offers this summary description of the original goals and scope of the Act:

The Davis-Stirling Act (CC §§1350–1378) was the product of the efforts of a Select Assembly Committee and affected interest groups. The Select Assembly Committee decided not to try to solve all the problems that were identified during its deliberations. See Rosenberry, *The Legislature Addresses Problems in the Law of Condominiums, Planned Developments and Other Common Interest Subdivisions*, 2 Real Prop J 24 (Fall 1984). Instead, the Select Assembly Committee decided to address a problem only if all the interest groups represented could agree on a solution. The Committee reached agreement on attempting to accomplish the following four primary purposes of the Davis-Stirling Act:

- To consolidate statutory provisions governing common interest developments;
- To standardize treatment of different types of common interest developments;
- To validate existing practices of developers and community associations; and
- To resolve problems faced by homeowners and associations in the operation of common interest developments, particularly the collection of assessments and amendment of governing documents.

See Rosenberry, *The Davis-Stirling Common Interest Development Act*, 8 CEB Real Prop L Rep 172 (Nov. 1985).

The Davis-Stirling Act has been amended numerous times subsequent to its initial adoption in attempts to deal with such diverse topics as termite infestation eradication (CC §1364(b), (d)), member voting rules (CC §1363.03), members' rights to attend board meetings (CC §1363.05), member inspection rights (CC §1365.2), and director and officer liability protections (CC §1365.7). The many piecemeal amendments to the Act over the past 30 years have resulted in a statute that governs one of the most fundamental property rights (one's ownership of a home) but that is disorganized, poorly drafted and difficult for even experts in the field to understand. Substantive topics that are logically related and should therefore be organized in close proximity within the Act are often scattered about with no apparent logic as they have been added to the Act over the years through a series of legislative amendments.[1]

[1] As one example of the organizational problems that pervade the current Act as a result of piecemeal amendments to the Act over the years, the Authors cite the following sections of the Act , each of which pertain to CC&R restrictions and covenants and yet are not presented in one list of serial provisions of the Act: sections 1352.4 through 1353.8 of the current Act pertain to the content of recorded common interest declarations of CC&Rs; current Civil Code section 1360.5 ("Pets within common interest developments"); current Civil Code section 1368.1 (" Prohibition against association rules or regulations that inhibit an owner's right to market his or her separate interest"); current Civil Code section 1376 ("Restrictions on installation or use of video or television antennas"); and current Civil Code section 1378 ("Architectural regulations"). As another example, the subject of

Because of the large number of Californians who reside in common interest developments and the strong legislative interest in them, the Davis-Stirling Act has been amended frequently and likely will continue to be.

As stated in the introductory portion of the February 2010 Tentative Recommendation, the CLRC Proposed Act is largely intended by the CLRC and its Staff to constitute a proposal for non-substantive reforms of the existing Act, although some substantive changes are included and discussed in the CLRC proposal. One of the principal goals of the CLRC Proposed Act is to address and eliminate the current cacophony of jumbled and disorganized provisions in the Act by giving the Act a comprehensive organizational structure comprised of nine chapters in which related provisions of existing law are grouped together in a logical order. The CLRC Proposed Act also has as its objectives: (i) clarifying sections of the existing Act that are either unclear or confusing, (ii) the creation of several related sections out of existing sections of the Act that are excessively long, and (iii) using consistent terminology for key concepts and terms that are used throughout the Act, as revised.

In the pages that follow, this Memorandum presents comments and recommendations concerning each of the proposed sections of the CLRC Proposed Act. In order to provide room for future expansion of the Act, the CLRC Proposed Act has been relocated from the Act's present section series commencing at Civil Code section 1350 and continuing to section 1378, so as to commence under the CLRC proposal at Civil Code section 4000[2]. Each of the sections of the CLRC Proposed Act are identified below, followed by either a statement of "***no comment***" (meaning that the proposed text is acceptable to the Authors as written), or by comments that the Authors recommend for inclusion in the CLRC Proposed Act to clarify or improve text without making substantive changes in law (these comments are labeled as "***Non-Substantive Comments***"). In some instances described below, ***Non-Substantive Comments*** have been offered to eliminate what the Authors view as inadvertent substantive changes resulting from the CLRC's proposed revisions to the Act.

The Authors have also included a limited number of comments or recommendations that have been designated in this Memorandum as "***Proposed Substantive Changes****"* which are either for future consideration by the CLRC or for inclusion in the CLRC Proposed Act, if, in the

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how covenant and governing document disputes are resolved as among the association and one or more of its owners is addressed in Civil Code sections 1354(c), 1363(h), 1363.810 through 1363,850, and 1369.510 through 1369.590.

[2] Some attorneys, managers, accountants, and residents of common interest communities who deal with the present Act on a regular basis have criticized the CLRC's proposal to relocate the Act within the Civil Code. The Authors do not share those misgivings. Once the decision was made that there are sound public policy considerations in support of clarification and reorganization of the current provisions of the Act, the necessary consequence is that current sections will have to be reorganized and re-numbered regardless of their placement in the Civil Code. By relocating the Act to the 4000 series of Code sections, greater flexibility is afforded to the Legislature and the CLRC to address issues discussed in this Memorandum (and no doubt by other commentators who weigh in on the CLRC Proposed Act) in the future.

CLRC's opinion, the proposals are minor in nature and thus come within the relatively limited scope the Commission has established for the CLRC CID Project. The Authors are cognizant of the fact that it is neither the goal nor the intention of the CLRC in pursuing the CLRC CID Project to propose major substantive changes to the existing Act.

Other comments are presented below that simply raise issues for further consideration by the CLRC. Those comments are labeled as "***Issues for Further CLRC Consideration***."

A final preliminary comment is warranted here regarding the possibility that the opinions and recommendations presented in this Memorandum will receive the endorsement of the Executive Committee of the State Bar of California Real Property Law Section (the "Section"). A letter dated August 19, 2009 was sent to the Commission on behalf of the Common Interest Development Legislative Advisory Committee which was identified in the letter as a "working group" of the Section's Subsection on Common Interest Developments. In the intervening span of almost an entire year, the composition of that working group has evolved due to a number of factors (including the inability of some original working group members to commit adequate professional time and resources to this significant project). As a result, the active members of the working group are now the four Authors of this Memorandum and due to time constraints to complete this review within the Commission's timeframes, this Memorandum has not yet been fully reviewed by the Section's Executive Committee, nor approved as an official statement of the State Bar or the Real Property Law Section of the State Bar. Nevertheless, concurrently with the Authors' submission of this Memorandum to the CLRC, the Memorandum is also being forwarded to Mia Weber Tindle, Chair of the Real Property Law Section's Executive Committee.

When the Authors discussed the status of this Memorandum with Ms Tindle last week she indicated that the Section remained committed to this project and that the Memorandum will be placed on Executive Committee's July agenda for discussion and hopefully for endorsement by the Executive Committee as being a document that represents the position and recommendations of the Real Property Law Section of the State Bar. Should this Memorandum receive the endorsement of the Section's Executive Committee, that endorsement is intended to be in accordance with an important component of the overall mission of the State Bar of California, as stated in Government Code section 8287, to "assist the [California Law Revision] Commission in any manner the Commission may request within the scope of its powers or duties."

PART II
GENERAL OBSERVATIONS, COMMENTS AND CONCERNS REGARDING THE CLRC PROPOSED ACT

General Comments on the Organization of the CLRC Proposed Act:

One of the threshold planning decisions of the CLRC Staff that is reflected in the CLRC Proposed Act was the decision to relocate the entire Act, as reorganized, to a new series of sections in the Civil Code, thereby not only changing the organization of the Act, but also renumbering each section of the existing Act with a goal of giving the Act a more logical outline. As stated in footnote 2 of this Memorandum, the Authors are supportive of this recommendation of the CLRC. In terms of outline, the CLRC's reorganization of the Act has in large part paralleled a series of outlines that the Authors provided informally to the CLRC in 2009 (see attached Exhibit "A"). There are certain organizational differences between the CLRC Proposed Act and the Authors' earlier reorganization proposals that merit comment here.

A noteworthy and important issue with respect to the organization of the CLRC Proposed Act is the lack of any qualitative emphasis in the proposal regarding the creation of common interest developments ("CIDs"). As an improvement to the CLRC Proposed Act the Authors recommend adding a stand-alone Chapter to the proposal, immediately following Chapter 1 ("General Provisions") with a title such as "Formation of Common Interest Developments." That new second Chapter of the CLRC Proposed Act would then serve as the foundation for all that follows as the CLRC Proposed Act logically presents the Chapters and Articles that apply the Act's provisions to CIDs, once they are formed. By adding an introductory Chapter at the outset of the CLRC Proposed Act addressing the formation of CIDs, the CLRC Proposed Act would provide valuable guidance to practitioners who are engaged by developers to create common interest communities, as well as practitioners who are subsequently retained to advise communities and their associations of property owners on whether or not the development and its association are, in fact, subject to the Act.

In their collective practical experience, the Authors have encountered many instances in which a real estate developer, or individuals who are in a leadership position in a community that is subject to recorded covenants (primarily board members or property managers) are uncertain as to whether or not their development has the elements that classify their subdivision as a "common interest development," that is subject to all of the regulations, reporting and record-keeping requirements of the Act.[3] It is often only the most experienced and seasoned attorneys

[3] For example, there are many developments, particularly in rural areas of the State, that are subject to CC&Rs that provide for a voluntary association of property owners while operating pursuant to a plan of development that includes fee simple title in that association of rather significant common facilities (generally, available only to owners who, *of their own volition, elect* to become members, with a corresponding right to resign that membership at any time). There also are many developments that have CC&Rs that present ordinary use

who are in a position to know where to look in the current Act in order to determine whether the structure of a development and its governing documents include the requisite elements of a CID. Providing a reasoned opinion on that issue typically involves review and analysis of not only the Act, but also numerous recorded and unrecorded documents (such as declarations of CC&Rs, easements, Department of Real Estate Public Reports, and deeds), with the result being that resolving the issue can be expensive. Significant legal rights and responsibilities of property owners rest upon a proper and informed resolution of that basic question.

Proposed Section 4030 ("Creation of common interest developments") presents the essential definition and indicia of what forms of real estate development will constitute a "common interest development," yet that proposed section receives no particular emphasis or prominence in the current structure of the CLRC Proposed Act. Instead, proposed Section 4030 is simply another statute in the CLRC Proposed Act's series of General Provisions. The relative obscurity that is accorded to this foundational issue in the CLRC Proposed Act's organizational scheme (proposed Section 4030 is positioned in the proposal following a long section (Section 4025) that addresses nonresidential developments and enumerates the sections of the CLRC Proposed Act that do *not* apply to such developments) is very questionable. Before even defining the universe of subdivided lands that are classified as common interest developments in California, an assumed subset of that universe is being *exempted* from many of the regulations of the CLRC Proposed Act. Further comments on that exemption are presented below).

Section 4015 ("Application of part") is another provision of the CLRC Proposed Act that the Authors would recommend for inclusion in a proposed introductory Chapter on the formation of CIDs because this section offers the threshold analysis that often must be made in determining whether a particular development should (or is intended to) be classified as a CID. Under the present organization of the CLRC Proposed Act, Section 4015 is positioned near the top of the proposal's introductory provisions. However, from a practitioner's perspective, Section 4015's placement is not of tremendous assistance because, analytically, proposed Section 4030 is the more important of the two companion sections and yet the sections are not aligned, one-to-the-other in the orderly progression of sections. Also, Section 4015 is misnamed. While purporting to be the seminal provision of the CLRC Proposed Act that will instruct readers as to which forms of real estate development are subject to the Act, the section in fact only identifies certain developments to which the Act does *not* apply. In summary, proposed Section 4015 is important but must to be read in conjunction with Section 4030, which in our view is primary.

The CLRC's Efforts to "Generalize" Currently Limited-Purpose Definitions is Problematic.

A clear effort is made in the CLRC Proposed Act to take definitions that are currently found in the body of the Act and that have *singular purposes* and to relocate and consolidate

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restrictions, that have no recreational or open space common facilities and provide only for a road maintenance association (incorporated or unincorporated).

those terms in the Definitions section of the CLRC Proposed Act and then to broaden their application to the entire Act. Although the current Act does include a list of defined terms in Civil Code section 1351, the CLRC Proposed Act expands the number of defined terms - an expansion that the Authors consider as a very beneficial navigational tool and aid in understanding the purpose and intent of the Act, as revised. However, the Authors are of the view that generalization of single-purpose definitions has resulted in numerous unintended consequences.

For example, the proposed generalized definitions of "Managing agent," "Member," and "Reserve fund" could result in future interpretative disputes. Our concerns with these and other proposed defined terms are discussed in greater detail in Part III, below.

The Importance of Avoiding Creation of a "Lawyer's Document." Recommended Aids to Non-Lawyers Regarding Navigation and Comprehension of the CLRC Proposed Act.

We recognize that the goals of the CLRC in undertaking this ambitious project are in part to produce a body of law that non-lawyers can reference and navigate more easily when the reader is seeking answers to the problems and issues he or she may be encountering as a developer, resident, property owner, board member, accountant, or property manager of a common interest developments. The Act is perhaps unique among California's statutes in both its prominence and impact on the everyday lives of California residents who must consult the Act's provisions and requirements on a regular basis to determine their rights and obligations as owners of property in common interest communities. Certainly many other laws are designed to protect the rights of ordinary individuals (debt collection laws, tax laws, consumer protection laws, and the Vehicle Code for example), but very few of those laws are consulted regularly by non-lawyers in a way that is similar to the Act's regular audience. That very unique utilization of the Act by persons who are not lawyers presents a special challenge to the CLRC, whose Staff must constantly bear in mind that this effort at better organization and clarity of the Act must be viewed as such not only by lawyers, but also by a broad audience comprised of property owners, managers, accountants, title officers, real estate agents, and real estate developers.

In this Memorandum the Authors offer several suggestions to help make the CLRC Proposed Act more navigable and comprehensible to the Act's broader audience of regular users. We anticipate that there will be many interested advocates and interest groups who may oppose the CLRC Proposed Act due to its relocation in the Civil Code or as being too complex or overly and unnecessarily ambitious. In our view, those criticisms are misguided. Any improvement in the existing Act will necessitate a reorganization and simplification of existing statutory provisions. Those changes, while unavoidable, can be mitigated, in our view, by the suggestions presented in this Memorandum that will make the CLRC Proposed Act more accessible to the diverse interest groups of regular users whose property interests and professional responsibilities depend on a proper interpretation and application of the Act.

Adding More Definitions:. While it seems contrary to basic tenets of proper legal drafting to recommend the use of more words rather than less, the Authors believe that the defined terms presented in Article 2 of Chapter 1 of the CLRC Proposed Act are absolutely essential tools to helping attorneys, developers, board members, managers and (most importantly) owners of property in common interest communities understand and properly apply the important concepts, rules and restrictions presented in the Act. For that reason, the Authors recommend expanding Article 2 of Chapter 1 to include many more defined terms. Defined terms can serve as the starting point for key word searches, which in turn can be very useful combined with simple explanatory context and cross-references to an applicable section or sections of law.

If, for example, an owner or board member has heard of a "meet and confer" program or requirement as a means of dispute resolution, but is uncertain whether that concept applies to the owner or his or her association in a particular context, starting with a definition of the term "meet and confer" that includes a cross-reference to "Sections 5900 through 5920" would be of considerable navigational assistance.

This suggestion to expand the list of defined terms with useful cross-references to portions of the Act where the terms are applied leads to two other suggestions. First, the most difficult stumbling block in the CLRC Proposed Act is managing the hundreds of concepts that intersect in diverse contexts within the Act. For even the Authors and their combined experience with CID law, the sheer number (and multiple layers) of cross-references are exhausting. As a result, we suggest:

Adding Key Term References. The Authors recommend the use of key terms in cross-references, to educate and inform readers as to where the key word reference will lead or next arise in the Act. For example, instead of simply stating that something has to be done "in accordance with Section 5300," the opportunity is presented in that context to more helpfully say "in accordance with the budget preparation and distribution requirements in Section 5300."

Adding Numerical Parentheticals. The Authors recommend more frequent use of numerical parentheticals to enhance what the Act means and intends. For example, the Authors found the CLRC Proposed Act to be beneficially streamlined and improved wherever the proposed text uses a defined term followed by a parenthetical cross-reference to the section where the term is defined such as "This information shall be provided to the members by individual notice (Section 4040)." Such parenthetical shorthand references direct the reader back to a core definition or term that contains added requirements, if needed. Adding these short, crisp references to more contexts in the Act where defined terms are employed would aid interested stakeholders in familiarizing themselves more quickly with the reorganized format of the CLRC Proposed Act. It is the Authors' anticipation that those improvements would, in turn, help to diffuse resistance among stakeholder groups to ambitious changes in current law that are reflected in the CLRC Proposed Act. A significant, yet necessary, casualty of the reorganization of Davis-Stirling that is at the heart of the CLRC Proposal is the loss of abbreviations and short-

hand references that all common interest stakeholders have come accustomed to using on a routine basis, such as "1356 petitions," "1366 limits on assessments," and "1368 disclosures". More numerical parentheticals could more quickly help restore that ease of reference as persons utilizing the revised Act familiarize themselves with the new sequencing and organization of Davis-Stirling Code sections in the CLRC Proposed Act.

Avoiding Esoteric Citations. The Authors recommend that the Commission make greater use in the CLRC Proposed Act of section numbers and the word "through" when a series of related sections are being referenced. We recognize that including cross references that read "Sections 5900 through 5920" in statutory drafting is not as conventional as references to, for example: "Article 2 (commencing with Section 5900) of Chapter 8 of Part 5 of the Civil Code." However, the Authors' proposed cross-referencing style is more clear and simple for non-lawyers to understand.

We Support the CLRC's Interest in Other Reform Projects Related to Common Interest Developments:

The Authors are aware of the Commission's separate on-going projects to consider statutory law reforms related to commercial and industrial (i.e., non-residential) developments that come within the definition of "common interest developments," and possible exemptions from some provisions of the Act for small residential common interest developments. We support these separate initiatives of the Commission and will provide comments in the future as formal proposals and recommendations are presented for public comment.

Many provisions of the current Act (and the CLRC Proposed Act) make little sense in the context of a commercial/industrial development, and other provisions of the Act (current and as proposed) saddle small developments with disclosure and other requirements that many small developments have little if any interest in honoring. Given the current real estate development and sales environment in California, it is likely that many future common interest developments will contain only a small number of separate interests. In that context the small group of affected property owners may be quite comfortable in taking actions by a show of hands in the home of one of the owners and waiving many currently mandated reports, disclosures and studies in an effort to reduce association common expenses.

The issue of application of the current Act and the CLRC Proposed Act to non-residential developments impacts the current Tentative Recommendation in that proposed Section 4025 (entitled "Nonresidential Developments") continues the current text of Civil Code section 1373. Those sections (i.e., existing and proposed) exempt commercial and industrial developments from numerous provisions of the Act. Section 1373 (as currently stated and as proposed) is unwieldy and rife with cross-referencing obscurities yet could be substantially reduced in scope in the future, if the CLRC develops a Chapter in the CLRC Proposed Act (or statutory provisions that are outside the CLRC Proposed Act) for nonresidential developments that meet the definition of what constitutes a common interest development. The current Civil Code

exemption for commercial and industrial projects is also only rarely considered or updated when new sections are added to the Act. Some of these new sections are of little if any utility to non-residential developments.

PART III
COMMENTS AND RECOMMENDATIONS ON EACH OF THE SECTIONS OF THE CLRC PROPOSED ACT

CHAPTER 1. GENERAL PROVISIONS
(Article 1. Preliminary Provisions)

Section 4000 (Short Title): As odd as it may seem, the Authors think the Commission could immeasurably aid comprehension of the CLRC Proposed Act by a simple change in terms. There are repeated references to "this part" throughout the CLRC Proposed Act. However referencing "this part" in-and-of-itself is meaningless to most readers who are not lawyers and is likely to confuse the many users of the Act, as revised, who are not familiar with the conventional references in State statutes that are the everyday parlance of lawyers, legislators and other individuals and interest groups, such as the CLRC, who are regularly involved in the legislative process.

The simple change to proposed Section 4000 (which would then be carried through the rest of the CLRC Proposed Act) that is recommended by the Authors is as follows:

> This part shall be known and may be cited as the Davis-Stirling Common Interest Development Act. ***In this part, the Davis-Stirling Common Interest Development Act is referred to as the Act***.

The term "the Act" is immediately recognizable to everyone, and everyone will know what it means, namely all of the statutory provisions of the Civil Code comprising the Davis-Stirling Common Interest Development Act – not to a particular section or Article or Chapter, but to all of the Act. One of the most frequent questions the Authors have encountered in reviewing the CLRC Proposed Act is: "What does 'part' mean?" Wherever the esoteric legal term "part" is currently found in the CLRC Proposed Act, the clear and simple term "Act" (in this instance, capitalized) is suggested as a beneficial substitution and comprehension key.

The Authors recognize that the Commission operates under certain drafting approaches and established protocols and that the careful use of terminology is important. However, Section 4000's added language would not create ambiguities, would aid greatly in the Commission's goals of clarification and simplification for persons who regularly have a need to access and understand the Act, and would help minimize legal disputes over how to interpret and apply the Act in particular contexts.

Section 4005 (Effect of Headings): If the Authors' suggestion in Section 4000 is adopted, some minor amendment of Section 4005 would be needed, to add the term "Act" to the litany of legal names found in the outline of statutory law.

As for the litany itself, we suggest that it be shortened by eliminating "division" and "title," since neither word is found in headings in the CLRC Proposed Act.

Section 4010 (Continuation of Prior Law): Section 4010 is problematic in that it appears to assume a single prior enactment of law and a static universe of governing documents with respect to "previously existing provision[s]" in the law. Statutes regulating condominium projects, planned developments, and other forms of real estate development that included both separate and common interests already existed when the Act was enacted in 1986 (the Act in part consolidated those existing regulatory provisions, but also made certain choices in developing superseding statutes (innovations concerning the imposition of liens, the pursuit of foreclosure, and rights of redemption come to mind). Given the many potential disputes that could arise in the practical application of this seemingly simple and straightforward principle of law, the Authors are, admittedly, at a loss with respect to what to recommend as an improvement.

The Authors also have concerns with respect to application of proposed Section 4010 in the context of future amendments to the CLRC Proposed Act itself, particularly in the form of substantive law changes relating to subjects presently covered by the Act and reflected in governing documents of whatever vintage. In applying Section 4010, statutory amendments may or may not be (or remain) "substantially the same." The result could be significant ambiguity.

Perhaps proposed Section 4010 would benefit from editing that more directly addresses the variations that we know are going to exist and what the intended effects of this proposed section in many of these situations are expected to be.

To the extent a presently proposed change or future change affects a holding in published cases relating to common interest developments, an express reference to the intended effect (abrogating, not abrogating, not unintentionally abrogating) would be helpful. This standard could be written into proposed Section 4010.

Subdivision (a) of proposed Section 4010 provides that a reference in a restated statute is deemed to include a reference to the previously existing provision "unless a contrary intent appears." Rather than leave it to appearances, the Authors think a clearer expression would be "unless a contrary intent is expressed in the statute." Still, we expect difficulties reconciling later amendments to the CLRC Proposed Act with the principles in subdivision (a) (or, with respect to subdivision (b), later amendments to governing documents that try to stay substantively consistent with the CLRC Proposed Act and its subsequent iterations). The impact on enforceability could be very confusing legally and require litigation and courts to sort it out.

Non-Substantive Comment: Due to the reorganization of sections in the CLRC Proposed Act, the Authors of this Memorandum are concerned with the statement in subdivision (b) of proposed Section 4010 providing that references in the governing documents to former provisions in the Act are deemed to include a reference to provisions in the CLRC Proposed Act. Governing documents for common interest developments often include numerous references to existing Act provisions, and it may not always be clear which provisions of the CLRC Proposed Act totally encompass an existing provision of the current Act that is cited in the Governing Documents. Many proposed provisions of the CLRC Proposed Act represent only portions of existing sections of the current Act. Other provisions of the CLRC Proposed Act are an amalgamation of several sections of the current Act. All of this means that tracing the roots of references in existing governing documents could be legally challenging and not the stuff of lay guesswork.

Proposed Substantive Change: See comment at Section 4235, below ("Correction of Statutory Cross-Reference").

Issues for Further CLRC Consideration: Subdivision (a) of Section 4010 states that a provision in the CLRC Proposed Act that is "substantially the same" as a previous provision in the current Act shall be considered as a restatement and not as a new enactment. Subdivision (b) more narrowly states that a governing document reference to a former provision of the Act that is "restated and continued" is deemed to include a reference to the new provision.

The use of the more restrictive language in (b) indicates that the subdivision only applies to provisions in the current Act that have been "restated and continued" into the new Act, while subdivision (a) applies to any new provision that is merely "substantially the same" as the prior provision. The language in these two paragraphs is totally different and based upon two totally different principles.

Also it is recommended that the Commission consider relocation proposes Section 4235 ("Correction of Statutory References") to follow this proposed Section. Subparagraph (b) of proposed Section 4010 says that references to former provisions of the Act that are "continued" in the CLRC Proposed Act are deemed to be references to the new Act's provisions dealing with the same subject matter and yet proposed Section 4235 offers a means of actually updating the references. At the very lease a reference to proposed Section 4235 should be added to the Staff Comments on this Section.

However, the CLRC comment states that "Subdivision (b) (sic) adapts the general principal of subdivision (a) to a statutory reference in an association's governing documents." Similarly, the CLRC note explains that the intent of subdivision (b) was to "expressly extend" the principal of subdivision (a) into subdivision (b). If this was the intent of the CLRC, then it is suggested that subdivision (b) should be re-written to state:

"A reference in the governing documents to a former provision which is substantially the same as a provision of this part relating to the same subject matter, is deemed to include a reference to the provision of this part that is substantially the same as the former provision.

Section 4015 (Application of part): As noted above, the Authors think this provision is in the wrong location.

Section 4020 (Construction of zoning ordinance):

***Non-Substantive Comment*:** Consider changing the final phrase of Section 4020 to read: "regardless of the form of common interest development as defined in section 4100." Also, some consideration should be given to relocating this statute in the CLRC Proposed Act in terms of its prominence (or lack thereof).

Section 4020 (Construction of zoning ordinance):

***Non-Substantive Comment*:** Consider changing to final phrase of this section to read: "regardless of the form of common interest development as defined in section 4100." Also, some consideration should be given to relocating this statute in the CLRC Proposed Act in terms of its prominence (or lack thereof).

Section 4025 (Application to Nonresidential Developments (i.e., commercial and industrial projects):

Non-Substantive Comments: Please refer to our previous comments on proposed Section 4025. Additionally, we think Section 4025 is an excellent example of where consistently adding topic words in conjunction with the many cross-references and attempting to use an easier citation form would greatly ease use of this section. For example, we note the use of the citation in paragraph (7) as "Sections 5500 through 5560, inclusive." This is an easier read; it could be made even easier by identifying the exemption as being for "quarterly review of financial reports."

Issues for Further CLRC Consideration: In large master planned communities it is common for a particular phase of the overall development to be subject to a Master Declaration and yet have a supplemental declaration, applicable only to a parcel or parcels that are being developed in a particular fashion (such as a planned development phase, condominium phase, or perhaps a commercial area within the overall development). In that context, would the owner(s) of the commercial buildings in a commercial phase of the overall development enjoy the exemption provided by this section or does the inclusion of those commercial owners in the overall development via the Master Declaration take them out of Section 4025? One of many examples of this sort of master planned community is a development in Truckee called "The Village at Gray's Crossing." In the Village there will eventually be condominiums, planned

development townhomes, a hotel, a church, a community center and two commercial areas, with shops, a gas station, and a small market. All of the parcels that will be developed for these uses are included in the Master Association for maintenance of a common road and snow removal. Are the commercial parcel owners encumbered by all of the provisions and requirements of the Act?

Section 4030 (Creation of Common Interest Developments):

Non-Substantive Comment: The reference to "This title" should be to "This part." Please also consider the Authors' previously expressed concerns about the lack of prominence for this seminal provision of the CLRC Proposed Act. See also the Authors' comments at proposed Section 4000 regarding elimination of references to "this part."

Subdivision (c)'s new inclusion of stock co-ops as CIDs despite operating without a recorded declaration is both a clarification that has long been needed, and a major new inclusion of communities under the regulation of the Act. To our knowledge, new categories of communities have not been added to the classification of CIDs since the late 1980s.

Since the Act is retroactively applied, and since we assume the Commission intends the CLRC Proposed Act to be similarly retroactive, particular care must be given to not instantly creating significant liability for communities that would now be "in" but have not complied with the Act previously. The Authors believe that subdivision (c) must be noted as not having retroactive application or creating liability for stock cooperatives that now find themselves unwittingly and newly fitting the definition of a CID. As a collateral observation, failing to clarify the prospective application to stock cooperatives that function without a recorded declaration of CC&Rs could have impacts on previously issued legal opinions advising existing co-ops that they are not subject to the Act.

A remaining significant question pertaining to co-ops is whether cooperatives that are organized as for-profit corporations are CIDs and therefore subject to the Act. The Authors have not analyzed this issue in detail here but wanted to point out that clarification is badly needed in this area. The Commission's intention here is unclear.

The Authors suggest that rather than referring to the lack of having recorded a declaration in a co-op, it be expressed more affirmatively as a co-op "where nothing has been recorded" or words to that effect. Co-ops generally operate with master lease agreements. Master leases may or may not contain "declaration-like" provisions (such provisions are often contained in so-called "house rules").

Section 4035 (Delivered to an Association):

Non-Substantive Comments:

"Delivered to the association" is a phrase that might also be included in the definitions, for further ease of reference, to state:

> §_____ "Delivered to the association"
>
> _____. "Delivered to the association" means the manner of delivering notice to the association, including related issues of receipt, time and proof of delivery, all as more particularly described in Section 4035.

In that same vein, the Authors think that Section 4035 would be more properly protective of associations if certain rules of receipt and proof of delivery were built into it. It would appear that the intent of the provision is to give owners a mechanism to put an association "on notice" of some potentially important fact, therefore including some form of verification of receipt into the statute would be appropriate. To the extent that adding such terms affects disclosures in the "annual policy statement," Section 5310 would need to be appropriately updated.

The Authors have not reviewed all instances in the CLRC Proposed Act where the term "delivered to the association" appears and so are unable to comment comprehensively on whether any such applications are inapt or if Section 4035 would benefit from a different treatment (other than, as noted above, adding "personal delivery" to the accepted methods of delivery to an association).

Issues for Further CLRC Consideration: Why not also permit individual delivery, electronic transmission, or overnight or express mail via a commercial carrier or the United States Postal Service by a member to the person designated by the association for the receipt of communications from members? Many large developments have an onsite management office where communications are no doubt delivered on many occasions by "over the counter" delivery. Many associations have contract management staff in nearby offices where the same delivery options would be sensible. If properly regulated, certain forms of electronic transmission could also be permitted, particularly if the governing documents authorize that form of receipt by the association.

Section 4040 (Individual Notice):

Non-Substantive Comment: The lead-in sentence to this section should begin with a proviso such as: "If a provision of this Act requires "individual delivery" or "individual notice" and no specific method of delivery is specified in the governing documents, the notice shall . . ."

Issues for Further CLRC Consideration: The Authors have these comments for further consideration by the CLRC with respect to proposed Section 4040:

(i) The CLRC should consider adding personal delivery to a member at a designated address for such deliveries as a permissible form of individual delivery.

(ii) Delivery by certified mail [this form of delivery is included in Section 4035, but was omitted from Section 4040], overnight delivery or express mail via a commercial carrier or the United States Postal Service should also be listed.

(iii) Subdivision (a) does not specify who (the association or the recipient) has the right to choose any particular method of delivery. Logically, the sender of the document should have the right to choose from among the authorized methods of delivery. To avoid disputes on this issue, the Authors recommend that the phrase "at the option of the association" (which is the sender) be added after the word "methods" in subdivision (a).

(iv) Because Section 4040 encompasses not only notice documents, but also other documents that are not "notices" and yet must be delivered to members under the Act, would it be more appropriate in the context of this proposed section to replace the word "notice" with a more generic term such as "document." If that change was adopted, subdivision (a) would read:

If a provision of this Act requires "individual delivery" or "individual notice," the document shall be delivered to the member by one of the following methods…

(v) For the same reason, the title of this section should be changed from "Individual Notice" to "Individual Delivery or Individual Notice."

(vi) Additionally, the language in subdivision (a) indicates that the "individual delivery" requirements of that subdivision are intended only to apply to members. ("[T]he notice shall be delivered to the *member*…."; emphasis added.) This interpretation is confirmed by the CLRC Comment, which explains that Section 4040 is intended to specify "acceptable methods of delivery of a notice to an individual *member*." (emphasis added.) Confusingly, however, other provisions of the Act utilize Section 4040's definition of "individual delivery" to mandate delivery of a document to persons other than members. For example, Section 4785(c)(1) [removal of occupants from unit due to termite fumigation] states that notice of termite fumigation must be given by "[i]ndividual delivery (Section 4040) to the *occupant* at the address of the separate interest…" (emphasis added.) Consequently, the Authors recommend that the references in subdivision (a) of Section 4040 which limit its application to "members" should be removed. As an alternative solution, subdivision (a) of Section 4040 could be revised to state that individual notice and individual delivery may also be used to provide notices or documents to occupants under circumstances where such delivery is required or permitted by the Act.

(vii) Paragraph (a)(1) requires the association to deliver documents to a member at the address for the recipient member that is last shown on the books of the association "or otherwise provided by the member." As it currently reads, a member could claim that the member gave the association verbal notice of a new address, and the association could claim that it never received the member's verbal notice. This situation can and has led to disputes and potential litigation or defenses in a litigation context with troubling evidentiary issues. In order to avoid these types of disputes, the Authors recommend that the last clause in paragraph (a)(1) be revised to read: "or otherwise delivered to the association by the member." The use of the phrase "delivered to the association" would require that the member give the association notice of their new address in writing by one of the methods described in Section 4035.

(viii) Similarly, subdivision (b) states that a member "may request in writing that a *notice* to that member be *sent* to up to two different addresses." (emphases added.) As written, this subdivision does not clearly require that a member's request for delivery to two addresses be subject to the delivery requirements of Section 4035. Additionally, the current language unnecessarily limits this subdivision's application to "notices," instead of the broader "documents." And the use of the word "sent" is ambiguous. It should be changed to "deliver," which is the term used everywhere else in Section 4040 as well as in Section 4035. Finally, subdivision (b) should be expressly limited to documents that must be delivered pursuant to the Act.

Therefore, taking these comments collectively, the Authors recommend that subdivision (b) be changed to read:

> A member may deliver to the association a request that any document that must be individually delivered under this Act, must be delivered to no more than two different addresses.

(ix) Subdivision (c) provides that an *unrecorded* provision of the governing documents providing for a particular method of delivery does not constitute agreement by a member to that method of delivery. This suggests, but does not state, that a *recorded* provision could constitute agreement. To minimize future debates about the Commission's intent, the Authors suggest that Section 4040 be clarified in this regard. See also our comments recommending inclusion of a defined term for "recording" and "recorded."

(x) An abiding concern with Section 4040 is that the term "notice" is not defined. If an association does not know what is meant by the term, it cannot know when individual notice is or is not required. The term "notice" is optimally a defined term in the Definitions section.

If it is the intention of the Commission that "notices" are only those notices that are expressly required by a statute in the CLRC Proposed Act to be provided by "individual notice," then that limitation should be clearly noted in Section 4040. As it is currently written, the

notices referred to are not so limited. An appropriate definition (also covering Section 4045's "general notice") might be:

> §_____ "Notice"
>
> "Notice" means any notice required in this Act to be delivered by an association to members either by individual notice (Section 4040) or general notice (Section 4045).

(xi) Section 4040 potentially contains a very substantive "generalization" of a currently limited provision. Specifically, Section 4040 would give members the ability to require an association to send <u>*any*</u> "notices" for "individual delivery" to up to two different addresses. Currently such a right is limited to fiscal disclosures and collection notices, upon a member's request. Not knowing what "notices" means raises clear specters of burdensome and costly compliance. Again, the Authors urge the Commission to clearly define <u>*what*</u> documents are intended to be subject to secondary address requirements.

Section 4045 (General Notice):

Non-Substantive Comment: The lead-in sentence to Section 4045 should begin with a proviso such as: "If a provision of this Part requires "general delivery" or "general notice" and no specific method of delivery is specified in the governing documents, the notice shall . . ."

Issues for Further CLRC Consideration:

(i) In paragraph (a)(4) of Section 4045, the following is suggested as a clarifying addition at the end: ," so long as the periodical is circulated to all members." Under the current text there could be a periodical that is regularly distributed primarily to a particular group or faction in the development, and not to all members, such as an official association publication related to a particular interest group (e.g., members of the community golf club).

(ii) What is the intended meaning of the term "circulated" in paragraph (a)(4)? If a periodical is "circulated" via email to members, would that be sufficient general notice? What about if a periodical is "circulated" to members via the association's website? What about if a periodical is "circulated" to members via an internet blog? Since an association is authorized under paragraph (a)(4) to give general notice via television programming, then should notice by email or website or blog also be sufficient, particularly if made subject to the consent rules in Corporations Code section 20?

(iii) In regard to electronic transmission, there seems to be an inconsistency between two of the CLRC Comments, as follows:

The second sentence in the Comment explains that the use of an Internet website alone is not sufficient to give general notice under Section 4045: "Nothing in this section prevents an association from using supplemental notice methods, such as posting on an Internet website, so long as one or more methods authorized by this section are also used."

However, the last sentence in the second Comment paragraph seems to indicate that use of an Internet website may be sufficient to give general notice under this section: "Thus, in an association that posts general notices to its website, individual members would still have the right, on request, to receive those notices by mail." If the issue is delivering notice by email to individual members of a posting on an Internet website pursuant to Corporations Code section 20, then that cross-reference would be of considerable clarity.

(iv) As the Authors discuss in the comments to subdivision (b) of Section 4040 above, subdivision (b) should similarly be changed to require that a member who wants to receive general notices from the association via individual delivery must make the request in writing "delivered to the association" pursuant to Section 4035. Amended text might read:

(b) Notwithstanding subdivision (a), if a member delivers to the association a request to receive general notices by individual delivery, all general notices to that member shall be delivered pursuant to Section 4040. The option provided in this subdivision shall be described in the annual policy statement, prepared pursuant to Section 5310.

(v) Our comments above on not knowing what "notice" means continue into Section 4045. Again, a definition would be helpful.

(vi) As above, we have not examined every location in the CLRC Proposed Act for the term "general notice" and so cannot comprehensively advise the Commission whether some applications might be problematic.

(vii) Paragraph (3) of subdivision (a) refers to "posting" but it is not completely clear whether the reference is to physically affixing a paper notice to common area, or possibly electronic posting on a designated website. If the latter is included, which the Authors encourage, then Section 4045 will need to include a consent provision (pursuant to Corporations Code section 20) for guidance.

(viii) We further suggest some timeframe be stated for the duration of requests for notices, however defined, being sent to secondary addresses. For example, the request could be required to be renewed annually and noted in the annual policy statement (Section 5310). This would help associations avoid burdensome, accumulating costs and processes when a member no longer wishes to receive all general notices by individual delivery but forgets to let the association know.

Section 4050 (Time and Proof of Delivery):

Issues for Further CLRC Consideration: Would the CLRC Proposed Act benefit from making "electronic delivery" a defined term? As a general comment, in numerous instances in the CLRC Proposed Act, the CLRC Staff has failed to incorporate time-tested functioning provisions and defined terms found in the California Nonprofit Mutual Benefit Corporation Law (the "Mutual Benefit Corporation Law"). In the California Corporations Code the term "electronic transmission" is defined both with respect to transmissions by the corporation to its shareholders or members and by the shareholders/members to the corporation (Corporations Code sections 20 and 21). Finally, if "electronic means" or "electronic transmission" was defined, there are numerous places in the CLRC Proposed Act where the defined term could be used in lieu of the litany so often used in the Proposed Act of: "by e-mail, facsimile, or other electronic means."

If the manner of "delivery to the association" is expanded to include personal delivery (see above), Section 4050 needs to be augmented to reflect the process for time and proof of delivery in that manner.

Section 4060 (Minimum Font Size):

Non-Substantive Comments: We have two non-substantive comments: First, when used in this section, the phrase "deliver to a member" should read "deliver to its members." The current text reference to "a member" suggests that this section only applies to deliveries of so-called "individual notices." Clarifying this now would minimize later disputes.

Second clean-up comment: Why not move the second sentence of the Staff comment that appears at the end of this Section up into the body of the text of the section? If that comment reflects the intent of the section, why not make that express in the section, itself? The comment to which we are referring reads: "This section does not apply to an association record that was not prepared for delivery to a member, merely because the record may be subject to inspection."

Speaking more globally, the Authors question the utility of including this section. Several statutes in the Act (and the CLRC Proposed Act as well) require certain disclosures to be provided in a variety of specified font sizes, depending on the disclosure. The Authors are unaware of any abuse of all other documents or any policy foundation for applying a single provision in a few statutes to every document ("writing") that an association is obligated to prepare and deliver to a member. Compliance with this section would preclude associations from selecting a distinguishing font and print size reflective of its community, from commissioning financial statements from their CPAs, reserve studies, financial reports, and other financial materials in print sizes that are compact enough to allow for effective review and that

do not result in tremendously higher paper, printing, postage and handling costs in every case. Even the size of ordinary footnotes could not be reduced under the terms of Section 4060.

The Authors are probably only among the first to question the rationale for this provision and to wonder how it clarifies or simplifies the law.

Section 4065 (Approved By Majority of All Members):

Issues for Further CLRC Consideration: With respect to this defined term, the Author's overriding comment is similar to the comment made with respect to proposed Section 4050 regarding the definition of "electronic delivery," namely why not use the Corporations Code definition of this same term (Corporations Code section 5034) in lieu of creating a new definition for the same concept regarding statutory provisions that require a particular threshold of member approval? The Corporations Code term is slightly different ("Approval by or approval of the members"), but the concept is *exactly* the same.

To put this issue of consistency between the Act's terms and those used in the Corporations Code in historical context it should be noted that originally the Davis-Stirling Act was drafted to be a law dealing primarily with real property issues, such as the status of CC&Rs as equitable servitudes, unless unreasonable, and the distinctions among the various forms of common interest developments, as defined. After considerable deliberation on the issue, the members of the original Select Committee appointed by the California Legislature to assist the Legislature in drafting the Act decided to avoid creating a totally stand-alone Act for common interest owner associations that would essentially repeat verbatim numerous existing California corporate law rules and concepts related to the operation and governance of owner association (most of which are formed as nonprofit mutual benefit corporations). The concern of the Select Committee was that if many mutual benefit corporation law provisions were simply repeated in the Davis-Stirling Act, over time one set of laws might get amended in ways that were not adequately commented upon.[4] This was a significant concern in the 1980s, when there were few common interest development advocacy groups that had any presence in the legislative process, while every proposed change in the Corporation Code was carefully evaluated and commented upon by the State Bar Business Law Section and other active advocacy organizations interested in corporate law and policy.

Over the years that have transpired since the Act's initial adoption in 1985, the Act has been amended to add numerous provisions that deal with internal corporate governance (such as provisions relating to required notices to members, the conduct of elections, the conduct of

[4] Another issue of the original Select Committee was that some smaller common interest developments were formed with unincorporated associations that would not be subject to the Nonprofit Mutual Benefit Corporation Law. Section 1363(c) of the Act was the Committee's effort to address that issue by stating that, unless the governing documents provide otherwise, an unincorporated association may exercise the powers granted to a nonprofit mutual benefit corporation.

meetings, member inspection rights, association disciplinary procedures, etc). Accordingly, the common interest regulatory scheme has evolved in a direction that was not embraced in the original version and concept of the Act, which was to default to the Nonprofit Mutual Benefit Corporation Law with respect to most issues relating to the internal operations and governance of community associations.

Given the fact that the Act has evolved to include many provisions addressing matters of internal corporate governance, some members of the group of Authors are currently of the opinion that there is no compelling reason to refrain from incorporating into the CLRC Proposed Act (Chapter 1, Article 2; "Defined Terms") terms related to association governance issues that have been time-tested and remained unchanged for many years in the Corporations Code, as applied to other forms of Mutual Benefit Corporations, and to use those same terms, as applied in identical contexts to owner associations (both incorporated and unincorporated) under the Davis-Stirling Act. Certainly there is no sound reason for the CLRC Staff to propose new terms, using language that differs from that used in the Mutual Benefit Corporation Law in identical contexts. Other members of the Authors group prefer the status quo which makes use of cross references to the Mutual Benefit Corporation Law, when appropriate.

This debate places the Commission at the confluence of two opposing sets of legal advocates – those who believe the time has come to acknowledge the fact (but not the clarity or consistency) of ad hoc law making and encourage the *importation of corporate law text* into the Act's list of defined terms and molding the imported corporate law provisions as necessary to address the unique experience or needs of common interest developments and their owner associations, and those who see in this a great jeopardy to carefully crafted legal text in future political battles and who see greater value in applying law and bylaws in time-tested ways through *incorporation by (cross) reference*. Both camps' arguments have merit, and our group has advocates on both sides of this issue.

In either case, the Authors perceive no sound reason for the CLRC to embrace a third approach, namely to propose new terms, using different language, to define the same issues and concepts as applied to identical contexts in community associations. The CLRC is urged to consider that if the CLRC Proposed Act charts its own path with divergent defined terms, the very concern that the original Davis-Stirling Select Committee had in 1985 will have definitely come home to roost. However, that divergence will be by design and without justification, rather than being the result of inadvertence. Public policy and sound legal drafting of statutes (which is the mission of the CLRC) will be served by using the same time-tested terminology, either by importation or incorporation by reference.

Section 4070 (Approved by a Majority of a Quorum of the Members).

Issues for Further CLRC Consideration: The Authors offer two issues for further CLRC consideration:

First, as with proposed Section 4065 (defining the term "approved by a majority of all members"), why not define this concept in the same way as stated in Corporations Code section 5034[5] or incorporate section 5034 by reference (parenthetically, many existing bylaws do the latter, with the concurrence of the DRE). In a common interest context, the issue of determining the required quorum for valid member action may be more difficult to understand or to determine because there are some votes that are, by the terms of the governing documents, limited to approval by a particular class or which require majority approval of a particular class in addition to approval by a prescribed affirmative vote of the members overall. That problem is addressed and resolved in the text of Corporations Code section 5034.

Second, this same issue of the requisite minimum vote of the members that is required to constitute valid member action is resolved and clarified in the Corporations Code definition of what constitutes the "voting power" of the members (Corporations Code section 5078). Voting power is another term that ought to be defined in the CLRC Proposed Act using substantially the same terminology that is found in the Corporations Code. Currently, the term "voting power" is used frequently in the CLRC Proposed Act, without definition. "Voting power" is more than two words; the words have legal significance and that significance ought to be defined in the CLRC Proposed Act.

Third, proposed Section 4070 confuses matters by purporting to address both what constitutes "approval by the members" and what constitutes a "quorum of the members." Again, the issue of what constitutes a quorum of the members is very adequately addressed in Corporations Code section 7512, and a definition of "quorum" is recommended for the CLRC Proposed Act. In other sections of the CLRC Proposed Act, this term is used without specifying current minimum quorum requirements. See for example, Section 5605(b) a section of the Proposed Act that fails to repeat existing law which specifies that the required quorum for a member vote to approve certain assessment increases and special assessments is more than 50% of the members. The citation to existing law is Civil Code section 1366(b)).

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[5] Corporations Code section 5034 reads: "Approval by (or approval of)) the members" means approved or ratified by the affirmative vote of a majority of the votes represented and voting at a duly held meeting at which a quorum is present (which affirmative votes also constitute a majority of the required quorum) or written ballot in conformity with Section 7413 or by affirmative vote or written ballot of such grater proportion, including all the votes of the membership of any class . . . as may be provided in the bylaws . . . for all or any specified member action."

CHAPTER 1. GENERAL PROVISIONS
(Article 2. Definitions)

Section 4075 (Application of Definitions): No comment.

Section 4080 (Definition of "Association"): No comment other than to suggest that the Commission clarify whether a for-profit stock cooperative is or is not a common interest development if all other criteria are met.

Section 4085 (Definition of "Board"): No comment.

Section 4090 (Definition of "Board Meeting"):

Non-Substantive Comments In the third line of this defined term, after the word "business" and before the word "scheduled," add "that is." In the fourth line, the first word is "board." After that word add: "at the time the board meeting occurs."

Comment Opposing Proposed Substantive Change*:* One of the substantive changes the CLRC Staff recommends for inclusion in Section 4090 is to change the number of directors required to constitute a "meeting" from a majority of the members of the board (see current Civil Code section 1363.05(j)) to a "quorum" of the directors on the theory that a quorum for valid board action could be less than a majority. The Authors know of no instance in which the governing documents of an owners' association provide for a minimum board quorum requirement of less than a majority of the members and that is for good reason as discussed below.

As in the case of several other proposed defined terms discussed above, the Nonprofit Mutual Benefit Corporation Law includes a provision (Corporations Code section 7211(a)(7)) that presents a clear and workable definition of what constitutes a quorum of the board. Specifically, that provision of the Corporations Code states that: "A majority of the number of directors authorized in or pursuant to the articles or bylaws constitutes a quorum of the board for the transaction of business." (The Corporations Code section goes on to say that the requisite majority can be required to include a particular director or directors (representing, for example, a particular class of members), a new provision of law that could be problematic in associations. We suggest that the Commission consider the import of this provision and its impact on association governance.) It is recommended that the CLRC Staff draft a provision that adheres more closely to the Corporations Code definition.

With respect to most corporate actions, the board of directors of any corporation, including owners' associations, exercises ultimate power and authority[6]. However, in the exercise of that plenary authority, directors are constrained by their obligations as fiduciaries who are bound to consider and to act in the best interest of all members. Those fiduciary principles are seriously undermined if the board has authority under its governing documents to take actions and bind the corporation with less than a simple majority consenting to, or approving, the action. A fundamental check on abuse of power is the obligation to meet, confer, and deliberate with others who are subject to similar fiduciary constraints so that a diversity of opinions and points of view can be presented.

On the other hand, during the period of early development and sales, the governing documents of a common interest development typically (in fact, routinely) contain provisions that are intended to be for the specific benefit of the developer, including provisions sanctioned by the Department of Real Estate Regulations (see Regulation sections 2792.18, 2792.19, and 2792.32(c)) that give developers more votes than other property owners as well as control of a majority of the positions on the association's board of directors. Those special developer rights would be protected by the Corporations Code definition of what constitutes a quorum of the directors.

Further Comment on this Issue: The three parts of the Nonprofit Corporations Law (Public Benefit, Mutual Benefit, and Religious) include many provisions that are intentionally drafted so as to give considerable latitude to the corporation's board in the way the corporation operates. That makes perfect sense given the fact that the universe of corporations that is governed by the corporate law principles of the Nonprofit Mutual Benefit Corporation Law is so diverse (groups ranging from the American Automobile Association with hundreds of thousands of members, to small neighborhood running clubs and quilting guilds, define the universe of mutual benefit organizations). So perhaps in the context of the Mutual Benefit Corporation Law a scenario can be presented in which it makes sense for less than a majority of the Board to take action – particularly in very large organizations. However, the decision has already been made by the Legislature, by adopting the Act in 1985 and subsequent enactments, that CIDs and their mandated owner associations are a different sub-set of mutual benefit organizations. Open meeting rules are mandated. Member inspection rights are expanded. The ability to act by unanimous written consent is very limited, if it exists at all. And the authority to assess members to support association operations is strictly regulated, unlike the authority of other mutual benefit organization to impose and collect dues from their (generally voluntary) members.

Each of these special CID rules found in the Act and applicable to owner associations speaks to transparency and to a preference for association governance that emphasizes consensus

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[6] In the context of Mutual Benefit Corporations this principal is stated in Corporations Code section 7210 which provides, in pertinent part: "Each corporation shall have a board of directors. Subject to the provisions [of the Mutual Benefit Corporation Law] and any limitations in the articles or bylaws relating to action required to be approved by the members, the activities and affairs of a corporation shall be conducted *and all corporate powers shall be exercised* by or under the direction of the board.

building. Permitting a board to take binding action with less than a majority vote is diametrically opposed to those guiding policy principles. Perhaps another Davis-Stirling modification to the general Corporations Code rules should be that a quorum of the board can never be less than a majority of its members.

Section 4095 (Definition of "Common Area").

Non-Substantive Comments: In subdivision (b) of Section 4095, the text could be clarified by stating that "the common area may consist *solely of* . . . ."

Issues for Further CLRC Consideration: The second sentence of subdivision (a) of Section 4095 states that: "The estate in the common area may be a fee, a life estate, an estate for years or any combination of the foregoing." This sentence is continued from the Act's definition of common area (second sentence of Civil Code section 1351(b)); however, the Authors have never experienced a common interest development in which the ownership interest in common area is a life estate. The Authors know of developments that have been developed on leased land, constituting a situation where the entire development (lots or units and common area) constitute leasehold interests, i.e., estates for years. The sentence simply seems overbroad as currently written.

Subdivision (b) could be made simplified and more easily understandable if it was revised to read along the following lines:

> Notwithstanding subdivision (a), in a planned development ***having the features*** described in subdivision (b) of Section 4175 ***and that has no physical common area***, the common area may consist of mutual or reciprocal easement rights appurtenant to the separate interests.

The Authors are aware of subdivisions with neither physical common area nor reciprocal easements enforceable by lien rights, but where recorded CC&Rs refer to shared maintenance areas as "common area." The CLRC Proposed Act could make it clearer that such communities are <u>not</u> CIDs, notwithstanding common terminology in recorded declarations of CC&Rs.

Section 4100 (Definition of "Common Interest Development"): No comment.

Section 4105 (Definition of "Community Apartment Project"): No comment.

Section 4110 (Definition of "Community Service Organization or Similar Entity"):

Issues for Further CLRC Consideration: Although this defined term is likely to remain unchanged due to resistance by interested lobbying groups, the definition of what constitutes a "community service organization or similar entity" under both current Civil Code section 1368(c) and this proposed Section 4110 remains unclear. The interpretive problem lurks

in the words “to the extent” in subdivision (a). For ease of reference, here is subdivision (a) in its entirety:

> Community service organization or similar entity means a nonprofit entity, other than an association, that is organized to provide services to occupants of the common interest development or to the public in addition to the occupants, to the extent community common area or facilities are available to the public.

The problem inherent in this text is that just about any nonprofit organization operating in a city or town (certainly any IRC 501(c)(3) organization since they must be formed to provide charity or education to the general public) will meet the first prong of this definition. That is, the entity will potentially be established to provide services that will accrue to the benefit of residents of a CID that is located in the organization’s defined jurisdictional area, as well as the surrounding public in general. To compound interpretative confusion, the definition includes the disjointed phrase “to the extent." So, if there is a CID within the intended service area of the nonprofit organization and that CID has common facilities that are open to public access (such as many CID golf courses or village or plaza areas in a resort development such as Squaw Valley or Northstar), is that nonprofit banned from receiving real estate transfer fees even though it was organized by persons who have absolutely no connection or affiliation with the development or its subdivider?

The Authors question whether the proponents of Civil Code section 1368(c)’s prohibition on the payment of real estate transfer fees to community service organizations intended for the provision to have that broad a scope. It is our recollection that the real estate development that caught the attention of proponents of the Civil Code transfer fee restriction was the thousand acre Playa Vista development in Los Angeles. The governing documents for Playa Vista called for a Master Association, any number of sub-associations, a nonprofit organization called “Playa Vista Community Services” and an environmental organization called the “Balona Wetlands Conservancy." The Community Services organization and the Conservancy were funded, in large part, by real estate transfer fees imposed pursuant to the governing documents of the development. It was to protect those established CSO examples that Civil Code section 1368(c) includes a carve-out (from the prohibition on the receipt of real estate transfer fees) for CSOs formed prior to January 1, 2004, the logic for the exemption being that those pre-2004 CSOs had been formed pursuant to then-valid covenants running with the land and thus constituted functioning entities that could not be denied their principal funding source with any ease. Had the two non-profit, non-association entities in Playa Vista been formed after January 1, 2004, the Balona Wetlands Conservancy could probably still receive transfer fees, since it was established to provide environmental protection to wetlands that were adjacent to, but not part of, the Playa Vista common interest development, but not the Playa Vista Community Services entity that was formed to fund and promote civic events in the common areas of the Playa Vista community and would likely fall under the definition of a community service organization..

Another interpretative question inherent in the definition of community service organizations and similar entities under proposed Section 4110 is what constitutes the provision of "services" by a nonprofit entity that may run the risk of being classified as a community service organization? Is a nonprofit organization that is formed to organize an annual jazz festival or a summer concert series providing a "service" to the community? If the concert promoter has absolutely no affiliation with the development or its developer (such as, for example, the Lake Tahoe Music Festival which offers performances at a number of common interest venues (as well as other locations open to the public in the Tahoe-Truckee area) is it a community service organization if it is designated as the recipient of real estate transfer fees to help fund its mission?

A final question for the CLRC to consider is whether the phrase "nonprofit entity," as used in proposed Section 4110, is too broad? There are more than 15 categories of nonprofit organizations that are recognized for exemption under the Internal Revenue Code. So if the developer of a common interest development that is intended to be housing for older persons or a senior citizen housing development forms a nonprofit entity to provide senior advocacy or counseling services to members of the community, is that organization a CSO that cannot receive real estate transfer fees? Does or should it make a difference if the recipient entity was independently established and in operation prior to conception of the common interest development?

The new use of the term "occupant" creates a definition of a CSO that is now even more expansive, largely because the definition of "occupant" has been generalized in Section 4163 in an overly broad way (see discussion below). If the definition of "occupant" is refined, its use in Section 4110 could be reconsidered.

Here is a proposed modification to the text of proposed Section 4110 that addresses some, but not all[7] of the issues noted above:

> (a) "Community service organization or similar entity" means a nonprofit entity, other than an association, that is formed as part of the overall plan of a common interest development[8] in order to provide services within the common areas of the development to occupants and to the public, to the extent that the common areas or common facilities are available to the public.

Section 4120 (Definition of "Condominium Plan"):

Issues for Further CLRC Consideration: As proposed, the definition of "condominium plan" is now more concisely and appropriately stated. Other information in the existing

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[7] This proposed definition does not seek to clarify what constitutes "services."

[8] Inclusion of the phrase "formed as part of the overall plan of a common interest development" is supported by Section 5240(c) of the CLRC Proposed Act which uses the phrase "community service organization or similar entity *that is related to the association*."

definition has been moved to Chapter 2 of the CLRC Proposed Act [Governing Documents], identified clearly as a governing document, and provisions about condominium plans are more properly located.

What is left substantively in Section 4120, however, is also properly moved to Chapter 2, with the definition remaining largely a cross-reference. See the definition of "declaration" for an example of a similar treatment where substantive content is located elsewhere.

Section 4125 (Definition of "Condominium Project"). No comment.

Section 4130 (Definition of "Declarant").

Issues for Further CLRC Consideration: The Authors have two comments and a suggested language change for further consideration by the CLRC: First, as written, the definition of who can be a "declarant" under proposed Section 4130 includes persons who "succeed to special rights, preferences, or privileges designated in the declaration as belonging to the signator(s) of the original declaration." In the Authors' experience, persons who are intended to be "successor declarants" should be designated as such in a recorded instrument. In many large developments, in addition to declarants and successor declarants, builders who acquire an entire phase for development and resale are often designated pursuant to provisions of the Master Declaration as "Participating Builders" or "Merchant Builders." Those builders often are not designated as successor declarants because they do not want the liability exposure that may flow from being a "declarant," but under the terms of the CC&Rs they may be given special marketing rights, exemptions from architectural review and approval, and three-to-one voting rights. Conversely, the master developer (the so-called original Declarant) may not want Participating or Merchant Builders to be *elevated* to the status of "declarants." Under the current definition, those Participating/Merchant Builders become "declarants" regardless. This cannot have been the intended result.

The Authors' second comment with respect to the definition of "Declarant" is that it is not uncommon for persons to sign a declaration who are not declarants and who do not want to be classified as such. That situation could result, for example, when the land subjected to a set of CC&Rs is owned in part by a subdivider (the "Declarant") and in part by other land owners who are simply consenting to having their land encumbered by the CC&Rs as "consenting landowners."

Because successor developers and builders do not automatically succeed to the rights and interests of the original declarant, the two terms "declarant" and "developer" are *not* co-extensive. To minimize future confusion, the following change should, at a minimum, be considered:

> "Declarant" means the person or group of persons designated in the declaration as declarant, or if no declarant is designated, the person or group of persons who

> sign the original declaration or who succeed***, in the manner, if any, specified in the governing documents or otherwise,*** to special rights, preferences, or privileges designated in the declaration as belonging to the signator of the original declaration.

Each instance in which the term "developer" is replaced in the CLRC Proposed Act with the term "declarant" can and will create significant legal consequences, changing important elements of both developer and owner protection. Such a substitution is not universally workable, and each instance must be individually evaluated in light of succession agreements and other legal interests. The Authors recommend restoring the term "developer" in the body of the CLRC Proposed Act, to remain consistent with corresponding references to "developer" in the current Act. Alternatively, each use will need to be separately evaluated for accuracy and application.

Section 4135 (Definition of "Declaration"):

Non-Substantive Comment: The Authors recommend adding at the end of this one sentence definition the following text: "to the extent that those sections apply to the declaration" since some or all of section 4255 may not apply to many common interest developments.

Issues for Further CLRC Consideration: The definition of a declaration in Section 4135 is linked to Section 4250, yet Section 4250 describes only what is required for a declaration recorded on or after January 1, 1986. To address this concern, an additional statement in the definition (or an additional statement in Section 4250) is suggested along the following lines:

> "Declaration" means the document, however, denominated, that contains the information required by Sections 4250 and 4255. ***For declarations recorded prior to January 1, 1986, such declarations shall contain information substantially the same as the information required by Section 4250, which shall at a minimum include a legal description of the real property subject to the declaration and one or more restrictions on the use of that real property.***

It may be preferable to add language similar to this instead in Section 4250.

Section 4140 (Definition of "Director"): No comment.

Section 4145 (Definition of "Exclusive Use Common Area").

Non-Substantive Comment: Considerable clarification of existing law would be helpful in Section 4145. The requirement that exclusive use common area ("EUCA") be designated exclusively in the declaration is, in practice, too limiting. EUCA can be and often is also designated in condominium plans, subdivision maps, and deeds. The Authors recommend that Exclusive Use Common Areas should be capable of being designated in any of these examples

of recorded documents. The current text of this proposed section limits the designation document to the declaration.

Issues for Further CLRC Consideration: Subdivision (b) continues existing law that has long confused actual physical components of a structure or area with the *airspace/easement nature of EUCA*. To the extent that subdivision (b)'s list of components is analyzed to determine who maintains, repairs, replaces these actual components (at the responsible party's sole cost and expense; see existing Civil Code section 1364), confusion in this area is common.

Traditional EUCA is an exclusive easement right. The components themselves are stood upon, opened and shut, visibly enjoyed, etc. by the holder of the EUCA, but the boundaries of EUCA generally do not include the components themselves. Existing law has confused the two concepts of intangible rights and physical property. The Commission might consider clarifying subdivision (b) or simply delete the provision.

On the broader maintenance question, the Commission might consider revising the default provisions in existing Civil Code section 1364 so that an association is expressly responsible for repair and replacement of EUCA components in condominium projects, unless the declaration says otherwise. This would be a clarification of section 1364 as well as a substantive change, but one that is reflective of the Authors' concern about avoiding confusion as to the legal nature of EUCA.

Finally, the Commission is recommending that the subject of control over telephone wiring be expanded to the broader category of telecommunication wiring. This area of law is largely preempted by federal statute and regulations promulgated by the Federal Communications Commission. While the simple nomenclature change that is proposed in Section 4145 seems sensible and modern, the fact that telecommunication wiring today regularly includes cable, not simply telephone wiring, needs to be carefully considered so that Section 4145 does not step outside the bounds of federal law.

In addition to the cable complication, various defined demarcation points that apply to telephone and cable wiring are the subject of considerable regulation. Wiring in a particular location might, as a legal matter, actually be the personal property of either a service provider or an owner (i.e., not of an association or of all owners collectively). The attempt of existing law and its continuation in Section 4145 to simply *declare* such wiring to be common area is (and has been) questionable.

The Authors have differing opinions about the effect of Section 4790 and whether the proposed section (and the corresponding provision in the current Act; Civil Code section 1363.07) should be interpreted as providing a means of creating exclusive use common areas that were not in existence prior to original developer's conveyance of the first separate interest in the common interest development. The concern about concluding that current section 1363.07 creates "EUCA" as a legal matter is strongly influenced by the structure of that statute and its

apparent permissive nature. To conclude that the statute creates something as significant as a permanent use right or possessory interest with respect to common area that, at the time of member approval, is owned in undivided interests by all property owners (or in which they have a beneficial interest through their membership in the association that owns the common area in question) is troubling.

The Authors recommend that the CLRC closely review the legal consequences of Section 4790's drafting on fundamental property rights, title, and recording principles before committing to any particular approach or position on this important issue. Absent that, the conservative approach would be to further revised proposed Section 4790's authority for members to approve grants of quasi-exclusive use of common area to be something less than true "EUCA" as defined and applied throughout the Act and CLRC Proposed Act. Instead, once approved, the areas would be subject to some sort of license that falls short of a true real property interest.

Section 4150 (Definition of "Governing Documents").

Non-Substantive Comment: The Authors recommend removing the words "of the association" after "operating rules," and adding the word "the" before "association" at the end of the text to this proposed definition.

Issues for Further CLRC Consideration: Neither "bylaws" nor "articles" are defined in the CLRC Proposed Act. Further, the definition of governing documents should now be expanded to expressly include condominium plans, which are now discussed as a governing document in Chapter 2. The Authors support including condominium plans among the governing documents.

Section 4155 (Definition of "Managing Agent").

Issues for Further CLRC Consideration: The application of the definition of "managing agent" in subdivision (b) of Section 4155 fails because of generalization. Current law defines managing agents differently in Civil Code sections 1363.1 and 1363.2, because each of those sections has a different purpose and the term "managing agent" applies differently in each case. Taking an amalgam of both definitions and then applying the term generically throughout the CLRC Proposed Act has significant consequences, not the least of which is to exempt *full-time employee managers* from every reference, wherever found and for whatever purpose. This cannot have been the intended result.

Subdivision (b) could work if written with a caveat:

> (b) Solely with respect to prospective managing agent disclosures (Section 5375) and requirements for managing agents who exercise control over the funds of an association (Section 5380), a "managing agent" does not include:

(1) A full-time employee of the association

(2) A regulated financial institution operating within the normal course of its regulated business practice.

(3) An attorney at law acting within the scope of the attorney's license.

Section 4160 (Definition of "Member").

Non-Substantive Comments: In subdivision (b) of proposed Section 4160, the Authors recommend adding "articles of association." In addition, the reference to "paragraph" in (b) of proposed Section 4160 should be "subparagraph." The Authors support inclusion of the Staff comment that accompanies this proposed section.

Issues for Further CLRC Consideration: Subdivision (b) of Section 4160 is problematic and could create considerable potential for disputes over member rights in associations that permit different classes of members, not all of them record owners. The membership of associations subject to regulation under the Act has traditionally extended only to record owners, and the Authors are confused by the Commission's unexplained concern about the entity membership of master associations or whether neighboring communities that share amenities might have a membership interest. In the Authors' view, neither justifies this expansion of the term "member" in the CLRC Proposed Act.

The Authors suggest either deletion of subdivision (b) or considerably more study of the consequences of recognizing non-owners as members for all definitional purposes.

Section 4163 (Definition of "Occupant").

Non-Substantive Comment: The Authors view this definition as being somewhat tortured in that a mere guest or invitee cannot really be characterized as being "in possession" of a separate interest. A possible solution to that problem would be to have that portion of the text read "in possession or enjoying some other right of occupancy."

Issues for Further CLRC Consideration: The term "occupant" is generalized from a single reference in existing section 1364 with respect to notice to occupants (including guests and invitees) when relocation is needed for fumigation purposes. This term (including guests and invitees), extended throughout the CLRC Proposed Act, again has considerable potential for disputes as to an association's rights and, more importantly, newly created duties, to an occupant class of the breadth defined.

If the concern is to recognize a term for "resident" that applies in nonresidential developments, the Commission might consider a specific carve-out for occupants of such developments in the definitions. However, the generalization of this definition from a use with a

single discrete purpose, resulting in it being expanded to apply to all references in the CLRC Proposed Act, is worrisome in its unintended consequences. A possible solution to that problem would be to focus the text on persons "in possession or enjoying some other right of occupancy." Alternatively, a special definition including guests and invitees could be restored solely to Section 4785, the fumigation statute.

Section 4165 (Definition of "Operating Rule").

Issues for Further CLRC Consideration: Section 4165, while continuing existing law, continues a problem. The existing definition of an operating rule, as a practical matter, goes well beyond the Commission's original goal of ensuring owners have the opportunity to be notified in advance of proposed rules that impact their use and enjoyment of their units or lots and the common area and/or that impact the membership rights of owners (fine schedules and voting and election rules are both examples).

Many policies that do *not* impact these interests nonetheless also involve the "management, operation, business and affairs of the association." Such policies, however, generally direct board and staff internally and are not the kinds of operating rules that were intended for regulating the relationship between owners/members and their association. Common examples are employee manuals, policies for how staff is to handle escrow disclosures, instructions on when to open the pool, management of keys policies, vendor selection policies, investment policies, and similar. The original drafting has led to considerable confusion and repeated inquiries of counsel.

The Authors suggest that the CLRC consider a clarifying variation of the operating rule definition, to ease this concern, as follows:

> "Operating rule" as used in this Act means a rule or policy adopted by the board that affects the use of an owner's separate interest or the common area or that impacts the relationship between a member and an association with respect to that member's rights or responsibilities.

With a more tailored definition, all references in the CLRC Proposed Act to "operating rules" would flow more solidly and appropriately and leave the internal business decisions of the board as to an association's general business operations unaffected.

Section 4170 (Definition of "Person"): No comment.

Section 4175 (Definition of "Planned Development").

Non-Substantive Comment: Clarifications would benefit the definition of a "planned development," as follows:

> "Planned development" means a ***common interest*** development (other than a community apartment project, a condominium project, or a stock cooperative) having ***a recorded declaration and*** either or both of the following features:
>
> (a) The common area is owned either by an association or in common by the owners of the separate interests who possess appurtenant rights to the beneficial use and enjoyment of the common area.
>
> (b) A power exists in the association ***pursuant to a recorded declaration*** to enforce an obligation of an owner of a separate interest with respect to the beneficial use and enjoyment of the common area by means of an assessment that may become a lien upon the separate interests in accordance with Article 5 (commencing with Section 5650) of Chapter 6.

The proposed references to a recorded declaration depend on whether suggested changes in the definition of "declaration" would also be made.

Issues for Further CLRC Consideration: With respect to subdivision (a) of this definition of a planned development, is the definition so broad as to inadvertently drag in a development in which there is an owners' association that owns a fee simple interest in recreation facilities and whose membership is limited to owners of lots but membership is voluntary? That is the situation at Bear Valley and a number of other older rural developments, and it is the situation that was addressed in Mt. Olympus Property Owners Assn v Shpirt (1997) 59 Cal App 4th 885, in the negative (voluntary association owning two parcels were entrance monuments were located did not create a CID; see also, Beverly Highlands HOA v The Beverly Highlands HOA (2001) 92 Cal. App. 4th 1247 (open space easements on association-owned lots are not sufficient "common area" to bring the subdivision under the Act] and Golden Rain Foundation v Franz (2008) 163 Cal. App 4th 1141 (trust organized to manage properties owned by other owner associations that are subject to the Act is, itself, subject to the Act). When one circles back to re-read the definition of "association" and "common interest development," there is no clear reflection of prevailing case law. The Authors suggest consideration of a further subdivision under this definition, that would identify this kind of development and confirm its non-CID status.

Section 4177 (Definition of "Reserve Accounts").

Issues for Further CLRC Consideration: The Authors recommend that a distinction be made in the definitions of "reserve funds" (the money held in reserve) and "reserve accounts" (where the reserve funds are deposited). If that bifurcation is embraced by the CLRC, the relevant portion of Section 4177 would be renumbered as Section 4178 and renamed as "Reserve Funds." This recommendation is supported by other provisions of the CLRC Proposed Act which use the term "reserve accounts" without definition (see for example, proposed Section 5510(a)). A new definition for "Reserve Accounts" is recommended which could read as follows:

§ 4177 (NEW) "Reserve Accounts."

> 4177. "Reserve Accounts" means the account or accounts or certificates of deposit, or other instruments established and maintained by an association at banks or other financial institutions that are insured by the Federal Deposit Insurance Corporation.[9]

Subdivision (a) refers to reserve money to defray the "repair or replacement of, or additions to those major components which the association is obligated to maintain." It and each of the following sections, which also relate to reserve funds, should be rewritten (probably all with the phrase "repair, replace, restore or maintain") so that they are consistent wherever the context makes that appropriate. Meanwhile, the inconsistent use of terminology defeats clarity, as the following demonstrates:

- Section 4178 references reserve funds used to "repair, replace, or restore those major components that the association is obligated to maintain."

- Section 5510(b) forbids expending reserve funds for any purpose other than 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."

- Section 5550(a) requires the board to conduct a study of the accessible areas of the major components which the association is obligated to "repair, replace, restore or maintain" as part of the study of reserve account requirements.

[9] NOTE: Neither the Act nor the CLRC Proposed Act specify where reserve accounts must be maintained. As an "Issues for Further CLRC Consideration" the Authors recommend that restrictions be placed on the manner and place in which reserve accounts are maintained.

- Section 5550(b)(5) requires that the reserve funding plan set forth how the association plans to meet its obligation for the "repair and replacement of all major components…"

- Section 5565(b) requires that the summary of association reserves include information about the current estimate of the amount of cash reserves necessary to "repair, replace restore, or maintain the major components."

- Section 5570(b)(4) states that for purposes of preparing the reserve funding disclosure summary, the amount of needed reserves must be computed as the current cost of "replacement or repair multiplied by.."

Terms associated with reserve funding inconsistently include or exclude terms like "maintenance" or "restoration." Such words have deep meaning in this area of the law and, when they alternately appear or are omitted, arguments begin to fester about the Legislature's intent. Who maintains what in CIDs, and can reserves be used to pay for certain work are common questions when it comes to reserve funds. Consistent use of terms (and providing explanations, when terms vary) are critical for directors, managers, members and counsel in using the Act to determine rights and responsibilities. The Authors are concerned about uneven use of terminology in the area of reserves and reserve funding.

Section 4178 (Definition of "Reserve Account Requirements").

Issues for Further CLRC Consideration: Same comment as presented with respect to proposed Section 4177. If the changes recommended here are embraced by the Commission, further changes in text may be required in later provisions of the CLRC Proposed Act which pertain to reserve funds and reserve accounts, to incorporate consistent terminology.

Section 4180 (Definition of "Rule Change"):

Non-Substantive Comment: For clarity, we suggest the following cross-reference:

"Rule change" means the adoption, amendment, or repeal of an operating rule by the board. ***Many rule changes are subject to the provisions of Sections 4355 through 4370.***

Section 4185 (Definition of "Separate Interest").

Issues for Further CLRC Consideration: With respect to subdivision (c) which defines the term "separate interest" in the context of a planned development, the Authors question whether, in that context, a separate interest is ever a "space" or an "area."

Section 4190 (Definition of "Stock Cooperative"): The Authors have no comments to offer with respect to this proposed Section other than to observe that the CLRC has received input from other persons and organizations that are active in the field of stock cooperatives who may have commented on this proposed definition and offered suggestions for revision of their own. The Authors question whether it is absolutely clear that a stock cooperative form of ownership is subject to the Act if the organizational structure of the co-op does not include a recorded declaration of CC&Rs. Civil Code section 1353 specifically states that:

> "This title applies and a common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been conveyed *provided all of the following are recorded : (a) a declaration . . . . "*

If a stock cooperative is formed pursuant to governing documents that do not meet the minimum requirements of a "declaration" as defined in current Civil Code section 1353, there is clearly an issue presented regarding applicability of the Act to that form of stock cooperative.

Another issue is whether a for-profit cooperative is, or should be, subject to the Act.

Proposed Additional Definitions

Presenting definitions of key terms is essential in the drafting of effective and user-friendly governing documents and in the Authors' view the same principle has equal application to the CLRC Proposed Act. Defined terms offer simplicity and clarity to concepts that might otherwise be difficult to understand, they shorten the length of common interest documents (often by eliminating the need to repeat the full text of the term in numerous contexts, and they aid in the comprehension, interpretation and application of important statutory provisions, thereby helping to minimize disputes. In setting up any set of CC&Rs, the drafting begins with a presentation of clearly defined key definitions. Accordingly, the Authors propose that the following additional definitions to Article 2 of chapter 1, to aid in navigating and understanding the CLRC Proposed Act, add clarity, and to minimize misunderstandings:

> **§_____ "Act"**
>
> "Act" means the Davis-Stirling Common Interest Development Act, as contained in this part.
>
> **§_____ "Alternative dispute resolution"**
>
> "Alternative dispute resolution" means the formal processes of mediation, arbitration, conciliation or other nonjudicial proceedings for resolution of

disputes. Statutory procedures for alternative dispute resolution are set forth in Sections 5925 through 5965.

§_____ "Annual budget report"

[Definition to cross-reference to Section 5300]

§_____ "Annual policy statement"

[Definition to cross-reference to Section 5310]

§_____ "Common Expenses"

"Common expenses" means any use of association funds authorized by the governing documents or required or permitted by law.

§_____ "Corporations Code" [Note: this might instead be placed in the Preliminary Provisions. The problem it addresses is applicable law when an association is organized as a nonprofit public benefit corporation rather than a nonprofit mutual benefit corporation. If the Commission later considers the issue of for-profit stock cooperatives and whether they fit within the definition of a CID, that issue could also be dealt with in this definition/preliminary provision.]

References in this Act to the Corporations Code are generally to provisions of the Nonprofit Mutual Benefit Corporation Law, commencing at Section 7110 of the Corporations Code, unless the context clearly indicates otherwise. If an incorporated association is instead organized under the Nonprofit Public Benefit Corporation Law, commencing at Section 5110 of the Corporations Code, the corresponding provisions of the Nonprofit Public Benefit Corporation Law are intended to apply in that circumstance

§_____ "Dispute resolution"

"Dispute resolution" means one of the following means of resolving disputes involving this Act, the Corporations Code, or the governing documents:

(a) An association's meet-and-confer program, as defined in Sections 5905 through 5915.

(b) Alternative dispute resolution, as defined in Section 5925.

§_____ "General notice"

"General notice" means notice provided to all owners by one or more of the methods described in Section 4050.

§_____ "Individual notice"

"Individual notice" means notice provided to the person to be notified by one or more of the methods described in Section 4040.

§_____ "Meet and confer program"

"Meet and confer program" means an association's program of internal dispute resolution that is available to owners and the association, in which the parties meet informally in an effort at early intervention to resolve differences. The statutory requirements for a meet and confer program are set forth in Sections 5900 through 5920.

§_____ "Monetary penalty"

"Monetary penalty" means a fine imposed by an association against an owner and the owner's separate interest for failure to comply with the governing documents or this Act. A monetary penalty may only be imposed if an association has adopted and provided general notice of a schedule of monetary penalties as set forth in Section 5850 and following notice and hearing as defined in Section _____.

§_____ "Nonresidential development"

"Nonresidential development" means a common interest development that is limited [exclusively?] to industrial or commercial uses by zoning or by a declaration recorded for the common interest development. Unless made expressly applicable, this Act does not apply to a nonresidential development. Statutory provisions that apply to the operation of nonresidential developments are set forth in Section _____ [proposed new area of the Act].

§_____ "Notice and hearing"

"Notice and hearing" means the due process procedures for notifying an owner of potential discipline against that owner and providing the owner with an opportunity to meet with the board before such discipline may be imposed, as more fully set forth in Section 5855.

§_____ "Record, "Recordation" and "Recording"

"Record," "Recordation" and "Recording" mean, with respect to any document that is required by law to be recorded with the county recorder in order to have legal effect, the recordation or filing of such document in the office of the county recorder of each county in which any portion of the common interest development is located.

§_____ "Regular assessment"

"Regular Assessment" means an assessment levied by an association on its members and their separate interests to fund the annual common expenses (Section _____) of the association as estimated in the operating budget adopted pursuant to Section 5300.

§_____ "Reserve Accounts"

"Reserve Accounts" means the account or accounts or certificates of deposit, or other instruments established and maintained by an association for the association's reserve funds at banks or other financial institutions that are insured by the Federal Deposit Insurance Corporation.[10]

§_____ "Special assessment"

"Special Assessment" means an assessment levied by an association on its members and their separate interests to fund extraordinary, typically non-recurring common expenses resulting from such factors as unanticipated common expenses (Section ____), uninsured losses, major repair, replacement or restoration projects for which reserve requirements have not been adequately funded, or the acquisition, addition or expansion of common area buildings, grounds or facilities. The foregoing description of the sort of common expenses that may be funded by means of a special assessment is intended to be descriptive and not exclusive. An emergency assessment (Section ____) is a special assessment.

[10] NOTE: Neither the Act nor the CLRC Proposed Act specify where reserve accounts must be maintained. As an "***Issue for Further CLRC Consideration"*** the Authors recommend that restrictions be placed on the manner and place in which reserve accounts are maintained.

CHAPTER 2. GOVERNING DOCUMENTS
(Article 1. General Provisions)

Section 4200 (Document Authority): No comment.

Section 4205 (Record Notice of Agent To Receive Payments):

Non-Substantive Comment: The Authors recommend that the Staff consider relocating this section to Chapter 6, Article 4 (currently entitled "Assessment Setting").

Section 4215 (Liberal Construction of Instruments):

Non-Substantive Comment: The Authors question why this section and its rule of liberal construction should be limited to deeds, declarations and condominium plans. Instead we suggest that the Commission consider replacing the words, "Any deed, declaration or condominium plan for a common interest development" with the phrase, "Any governing document." If that change is made, a more appropriate title for the section would be "Liberal construction of governing documents."

Section 4220 (Boundaries of Units): No comment.

Section 4225 (Deletion of unlawful restrictive covenants):

Non-Substantive Comments: The Authors recommend that in subdivision (c) the phrase "with the Secretary of State" should be added to the text directing the board to file a certificate of amendment to the articles pursuant to section 7814 so that the text would read "file a certificate of amendment *with the Office of the Secretary of State* pursuant to Section 7814 of the Corporations Code." If the CLRC Proposed Act is intended to clarify the law for the many lay persons who use the Act, that change would be helpful.

In subdivision (a), the words "declaration or other" should be deleted, as unnecessary language in light of the definition of governing documents which includes the declaration. Similarly, in subdivision (b), the words "declaration or other" [referenced twice in that subdivision], and "declaration or" should be deleted.

In subdivision (b), the word "restate" should be changed to "amend" in order to avoid any implication that this section requires a restatement of the entire document.

Finally, subdivision (c) only sets forth the procedure to be followed where the declaration is amended pursuant to this section. The Authors recommend that provisions similar to those in

the new Section 4235(b) be added to specify the procedures for amending other governing document provisions with unlawful restrictive covenants.

Section 4230 (Deletion of Declarant Provisions):

Issues for Further CLRC Consideration: The Authors have two issues for further consideration by the CLRC: First, when this same provision was added to the Act in 1992 (Civil Code section 1355.5) the requirement found in subdivision (d) of the CLRC Proposed Act was also included in subdivision (d) of section 1355.5. The Authors are of the opinion that the requirement of a member vote to approve amendments designed solely to delete developer provisions that are no longer applicable eviscerates the beneficial purpose of the balance of the statutory provision. It is extremely difficult to gain member approvals for any governing document amendments and that holds particularly true for amendments relating to provisions that have absolutely no impact on, or importance to, the members. The Authors recommend that this provision be revised to require notice to the members of any proposed amendments relying on the statutory provision permitting amendments to eliminate outmoded developer provisions in governing documents, with a right of the members to challenge the proposed adoption of the amendment, in the same manner as a challenge to an operating rule (see proposed Section 4365). This approach would be consistent with the CLRC proposed Section 4235 dealing with correction of statutory references.

The second issue for consideration is to provide clarification as to the provisions in a developer-drafted set of governing documents to which the section applies. Currently the text states that the section is intended to encompass governing document provisions that are unequivocally designed and intended, or which by their nature can only have been designed or intended *to facilitate the declarant in completing the construction or marketing of the development.*" Does the phrase in italics encompass deletion of the three-to-one voting advantage given to developers pursuant to Department of Real Estate Regulation sections 2792.18(b) or 2792.32(c)? Also, should the section's deletion authority extend to governing document provisions that address the manner in which disputes with the developer over sales or construction quality are to be addressed and resolved (perhaps long after the developer has sold all of its inventory in the development)?

Section 4235 (Correction of Statutory Cross-References):

Proposed Substantive Change: Proposed Section 4235 is new and is considered beneficial by the Authors. However, subdivision (b), which addresses the manner in which board-approved changes in statutory references are documented, seems flawed in that aside from the declaration of CC&Rs and amendments thereto, most governing documents of an association are not recorded (such as the articles, bylaws and operating rules). A possible remedy for that problem would be to revise subdivision (b) to read as follows:

(b) A governing document that is amended pursuant to this section shall be presented in a form that amends the governing document in its entirety, and the action of the board to approve the amendment shall be taken at a meeting of the board that is open to attendance by the members (Section 4925(a)) with the proposed amendment being provided to the members by general notice in the same manner as is required for adoption of an operating rule pursuant to Section 4360. Once adopted by the board, the amendment shall become effective upon its recordation with the county recorder (if the document that is being amended was recorded), or upon its filing with the Office of the Secretary of State (if the document that is being amended was filed in that Office), or upon adoption of a resolution of amendment by the board and inclusion of the restated document in the official records of the association if the document that is being amended was not required to be filed or recorded elsewhere.

Additionally, in subdivision (a) what is the meaning of "continued in a new provision"? For example, does it mean "continued in a new provision without *any* change," or "continued in a new provision without any *substantial* change"? Is this section intended to operate similarly to Section 4010? If so, should the language here be similar to the language in Section 4010? Also, in subdivision (a), should the words "without approval of the members" be added after the words "governing documents," and should the words "but with no other changes" be added after the words "cross-reference" for clarity and to more closely track the similar language in Section 4225?

CHAPTER 2. GOVERNING DOCUMENTS
(Article 2. Declaration)

Section 4250 ("Content of Declaration")

***Non-Substantive Comment**:* In subdivision (b), add at the end "and not otherwise prohibited by law."

Issues for Further CLRC Consideration The Authors have two additional issues to offer with respect to this section: First, the Authors suggest that the section should be clarified as to applicability of the section's minimum requirements for CC&R content as applied to pre-1986 declarations of CC&Rs. The text of the section would be improved to specifically state that pre-1986 CC&Rs are valid so long as they present and include a legal description of the property encumbered by the declaration and restrictions that were intended to be enforceable equitable servitudes. For post-1986 declarations, the document would have to identify the type of CID and also name the association.

The second issue for consideration by the CLRC is whether the reference in subdivision (a) to "restriction on the use or enjoyment of any portion of the common interest development

that are intended to be enforceable equitable servitudes" is too restrictive. Currently Civil Code section 1354(a) states that all covenants and restrictions in a declaration are enforceable as equitable servitudes, unless unreasonable. Many CC&R provisions that are intended to bind both current owners and successors in interest have nothing directly to do with the use and enjoyment of any portion of the common interest development (such as the authority of an association to impose and collect assessments).

Section 4255 ("Special Disclosures").

Non-Substantive Comment: With respect to subdivisions (a) and (d), if a pre-January 2005 set of CC&Rs (for subdivision (a)) or a pre-January 2006 set of CC&Rs (for subdivision (d)) is simply amended in other respects (i.e., a simple discrete amendment), does the act of amending the CC&Rs require the association to include either the notice about airports or SF Bay Conservation, if applicable?

Section 4260 (Amendment authorized): No comment.

Section 4265 ("Amendment to Extend Term of Declaration Authorized").

Non-Substantive Comment: The reference in subdivision (a) to "Members having more than 50 percent of the votes in the association" should be revised to read "if approved by a majority of all members." This same change would also be done to subdivision (b). The change uses the defined term in Chapter 1. If the Commission modifies the defined term in Chapter 1, then the Authors' comment here is similarly changed.

Section 4270 (Amendment Procedure).

Non-Substantive Comments: In the first phrase of subdivision (a), the references to the "governing documents" should be changed to "its terms." In paragraph (a)(1) the reference to "the governing documents" should be "the declaration." In paragraph (a)(3), the word "writing" should be changed to "certification and amendment," and the text should be revised to state that the amendment shall be recorded. Also, in subdivision (b) is the reference to the "governing documents" failing to provide a specific member approval percentage too broad? In the Authors' view, any provision for amending the recorded declaration would need to be stated in the declaration itself, rather than in some other governing document.

Section 4275 (Judicial Amendment of Governing Documents).

Non-Substantive Comment: In paragraph (c)(2) the Authors recommend adding the words "and Sections 5100 et seq." in order to indicate that the voting has to be conducted in compliance with the Act. With respect to subdivision (f) of proposed Section 4275, in the third-to-last line, consider changing the last word from "were" to "was." The reference in the CLRC Comment to Corporations Code section 7511 (Notice of Meeting) may be in error. Finally, with

respect to subdivision (b), the copy that is delivered to the members ought to be a recorded copy of the document.

***Issues for Further CLRC Consideration**:* The current Act (Civil Code section 1356) and this section of the proposed Act provide considerable detail and discussion regarding the manner and circumstances in which an association can seek judicial assistance to adopt necessary and beneficial amendments to an existing set of CC&Rs. Nothing is said in the present Act or in the CLRC Proposed Act about the authority and circumstances under which an association can seek judicial approval of amendments to the articles of incorporation or bylaws of an association when efforts to obtain member approval (as stated either in the Mutual Benefit Corporation Law or by the governing documents) are unsuccessful.

This important issue is addressed in Corporations Code section 7515. Under section 7515, the standard for judicially approved amendments to articles or bylaws is a demonstration that it is "impractical or unduly difficult for the petitioning corporation to call or conduct a meeting of its members . . . or to otherwise obtain their consent in the manner prescribed by its articles or bylaws or this part." One problem that is unique to this issue as applied in the context of common interest developments is that not all associations are incorporated and thus the question is presented as to whether the CLRC Proposed Act ought to specifically address the manner in which judicial assistance may be sought for amendments to the articles of association or bylaws (perhaps by a simple statement to the effect that in accordance with section 7515, associations whether incorporated or unincorporated, may seek judicial assistance to amend their articles and/or bylaws pursuant to that section . Current Civil Code section 1363(c) states that unincorporated associations may exercise the powers of an incorporated association under the Nonprofit Mutual Benefit Corporation Law, thus using section 7515 is covered. The CLRC Proposed Act could clarify this.

CHAPTER 2. GOVERNING DOCUMENTS
(Article 3. Articles of Incorporation)

Section 4280 (Content of Articles): No comment other than to recommend deletion of "a common interest development" before the word "association" as being superfluous. Also the reference to section 1502 of the Corporations Code ought to be changed to reference section 8210 (Mutual Benefit Corporation Law).

The Authors note that no place was left in Chapter 2 for Bylaws. Article 3 could be expanded to create just such a place. The reference to Corporations Code section 7515 in a variety of contexts could be described here (see discussion regarding Section 4275 above).

CHAPTER 2. GOVERNING DOCUMENTS
(Article 4. Condominium Plan)

Section 4290 (Recordation of Condominium Plan): No comment.

Section 4295 (Amendment or Revocation of Condominium Plan):

Issues for Further CLRC Consideration: The Authors have received some comments from other practitioners who specialize in the formation of condominium projects that this section (both in the current Act and in the CLRC Proposed Act) could benefit by making it easier to amend a condominium plan after the project has been formed and there are multiple owners and mortgagees. It is recommended that the CLRC pursue that issue with practitioners who have experienced this problem, as the concern about how to liberalize the current unanimous consent requirement in this State affects both those committed to protecting property rights and those who advocate in favor of providing for the best and greatest use of property. Proper protections, perhaps by fashioning a petition process and the opportunity for judicial scrutiny, also involving title company interests, could be explored.

Another issue related to condominium plans that ought to be addressed in Article 4 of Chapter 2 of the CLRC Proposed Act is whether the condominium plan should trump the declaration for a common interest development in the event of an inconsistency between the two documents. In the Authors' experience, the most common inconsistency is found in the list of defined terms that are often included in the "Owner's Statement" portion of a condominium plan. Those terms as presented in the Condominium Plan, which define key concepts such as the boundaries of "Units," "Building Envelopes," "Building Common Areas," and "Association Common Areas," should be identical in text to the definitions of those same terms as presented in the declaration, and yet there are often variances simply because the surveyor or engineer who prepared the plan did not examine the terms used in the declaration or confer closely enough with the developer's legal counsel.

CHAPTER 2. GOVERNING DOCUMENTS
(Article 5. Operating Rules)

Section 4350 (Requirements for Validity and Enforceability of Operating Rules):

Non-Substantive Comment: Subdivision (b) could be simplified to read: "(b) The rule is within the authority of the board conferred by law or by the governing documents."

Section 4355 (Application of Rulemaking Procedures):

Issues for Further CLRC Consideration: The CLRC should consider adding to the opening part of proposed Section 4355 an exemption for Operating Rules adopted and implemented by the declarant in governing documents prior to the close of escrow in the first sale of a separate interest in the common interest development. Without that express exemption there could be a challenge to the enforceability of operating rules adopted as part of the original plan and scheme of the development on the theory that they were not subjected to the Article 5 process.

Section 4360 (Approval of Rule Change by Board):

Non-Substantive Comment: Consider adding "to the members" after the parenthetical reference to "(Section 4045)" in order for the text of this subdivision to be consistent with subdivision (a) of the same proposed section.

Section 4365 (Reversal of Rule Change By Members):

Issues for Further CLRC Consideration: Existing law (Civil Code section 1357.1430) and this proposed section provide a means for members to challenge a board-adopted rule. However, the vote to reverse the rule is stated to be conducted at a special meeting of the members unless the board, in its discretion, elects to conduct the vote by means of a mailed, written ballot. Both of these are corporate principles that may now well be at odds with the voting and election statute (Civil Code section 1363.03) in the Act, since the rule-change statute predated the latter and relied on corporate voting procedures. Some argue that using the corporate procedures gives the board more decision-making power in the timing and structure of the vote, while others take the position that the voting and election statute's requirement for a mailed secret ballot for governing document amendments supersedes the corporate processes as enacted later. The term "governing documents" is defined currently and in the proposed law to include "operating rules," and therefore a conflict in the approval procedures currently exists. There was no consensus among the Authors on this issue, some believing that the choice of the voting process following receipt of a valid member challenge ought to be left to the discretion of the board of directors.[11] This is an issue that would benefit from Commission clarification.

[11] That view (favoring director discretion in scheduling a meeting to vote on a proposed rule change) is consistent with many provisions of the Mutual Benefit Corporation Law that tend to favor the power of incumbent directors over challengers of the existing order. See for example Corporations Code section 7510 (e) which permits five percent or more of the members to demand that a special meeting be called "for any lawful purpose" and yet Corporations Code section 7511(c) confers broad discretion on the board with respect to setting the time and place of that special meeting.

Section 4370 (Applicability of Article to Changes Commenced Before and After January 1, 2004):

Issues for Further CLRC Consideration*:* The Authors question whether this section is still needed given the fact that any proposed adoption of the CLRC Proposed Act is likely to occur after 2010. However, the protection of this statute is seemingly necessary to avoid liability in enforcing rules made before 2004, before the rule-change statute went into effect.

CHAPTER 3. OWNERSHIP AND TRANSFER OF INTERESTS (Article 1, Ownership Rights and Interests)

Section 4500 (Ownership of Common Area):

Non-Substantive Comment: The phrase "unit or lot" at the end of this Section should be revised to read "separate interest."

Section 4505 (Appurtenant Rights and Easements):

Non-Substantive Comments*:* The Authors question whether the last sentence of subdivision (a) is necessary. The preceding sentence states that the common areas are subject to certain easements. In subdivision (b) the reference to "easement" in the second line should read "nonexclusive easement."

Section 4510 (Access to separate interest property): No comment other than to question whether the reference to "member" and "member's" should be to "owner" and "owner's" since the section is addressing real property interests rather than membership rights resulting from membership in the association.

CHAPTER 3. OWNERSHIP AND TRANSFER OF INTERESTS (Article 2, Transfer Disclosures)

Section 4525 (Disclosure to Prospective Purchaser):

Non-Substantive Comments: In this section's heading and many other headings in the CLRC Proposed Act, singular references to covered constituencies, rather than plural references, are used (here "prospective purchaser" rather than "prospective purchasers"). In each of these contexts the substantive text of the section speaks of a rule or regulation that applies generally to all prospective purchasers, members, owners, etc., as the context requires. The Authors are aware that the actual codified provisions of any state law do not have descriptive headings.

However, the stylized use of singular headings for some imparts the impression of poor grammar.

Another non-substantive recommendation would be for current paragraph (a)(8) to follow paragraph (a)(4) since both paragraphs deal with assessment disclosures.

Section 4530 (Information to be provided by association).

Non-Substantive Comments: See comment immediately above regarding use of the singular in section headings. Second comment: Subdivision (b) could be eliminated if the term "individual delivery" was added after the words "separate interest" in subdivision (a). That change would also clarify the permissible means of delivery when a member has not consented to electronic delivery.

Issues for Further CLRC Consideration: See the Authors' comments with respect to Section 4050 recommending addition of a defined term for "electronic transmission." Use of that term would improve subdivision (b) (if the non-substantive change noted immediately above is not embraced).

Another issue for consideration here would be the addition of "deliver" to the string of recoverable costs as in: "actual cost to procure, prepare, reproduce *and deliver."* There could be mailing or other delivery costs associated with providing the required information.

Section 4535 (Related Requirements): No comment.

Section 4540 (Enforcement of Article): No comment, except to suggest as an ***Issue for further CLRC Consideration*** that it might be possible and productive to have one section (perhaps in either the Chapter 1 General Provisions or the Chapter 8 Dispute Resolution and Enforcement Provisions where all of the several current provisions regarding a member's right to recover penalties and fees for willful violations could be housed as one provision.

Section 4545 (Validity of Title Unaffected): No comment.

CHAPTER 3. OWNERSHIP AND TRANSFER OF INTERESTS
(Article 3, Transfer Fees)

Section 4575 (Transfer fee): No comment here. However, consider comments regarding the definition of community service organizations or similar entities at Section 4110.

Section 4580 (Exemption from Transfer Fee Limitations): No comment other than the one made in the context of Section 4575.

CHAPTER 3. OWNERSHIP AND TRANSFER OF INTERESTS
(Article 4, Restrictions on Transfer)

Section 4600 (Grant of exclusive use).

Non-Substantive Comments: Depending on the Commission's resolution regarding the confusion between the defined term "exclusive use common area" designated in recorded declarations, condominium plans, and deeds, and the grants of exclusive use of common area authorized pursuant to the member approval process set forth in this Section 4600, the provision here may or may not need attention. With respect to subdivision (a), the Authors recommend changing the reference from "member" to "owner" since the issue at hand is a real property/ownership issue, rather than an issue pertaining to a property owner's interest as a member of the association. Finally, in paragraph (b)(1) the reference to "that common area" should read "the common area."

Issues for Further CLRC Consideration: The Authors have two additional comments for further CLRC consideration: First, note that subdivision (c) of proposed Section 4600 only requires disclosures of receipt by the association of monetary consideration for a grant of an exclusive use of common area and owner insurance under circumstances where member approval for the grant is required. Consideration should be given to expansion of subdivision (c) to state, in effect, that any decision by the board to grant to an owner an exclusive use of common area should be taken at a meeting that is open to attendance by the members and that the disclosures regarding the receipt of compensation and the existence to insurance coverage apply to all grants.

The second recommendation of the Authors would be to add a new subdivision specifying the manner in which an approved grant of exclusive use of common area would be documented in the official records of the county recorder (see also earlier recommendation for addition of a term for "recorded" and "recordation". Some Authors were of the opinion that this section should not be construed as being grants of "EUCA" which traditionally cannot be created after the development is initially formed, while other Authors were of the opinion that the creation of "after-the-fact" EUCA (if that is what these grants are) would be acceptable and not inconsistent with long-established real property principles so long as the grants are approved by the requisite vote of the members and the fact of that approval (and designation of the new EUCA area) are documented in a recorded document. This latter view, however, does not take into consideration various special title problems, not the least of which is that in many cases, the association is not a proper "grantor" (because the association is not the legal owner) for purposes of grantor/grantee indexing. A further problem lies in the serious (nigh impossible) process of "undoing" a recorded document if legal challenge is later successfully brought. These are some reasons why "EUCA" as defined is considered capable of being designated <u>*only*</u> in the

development phases of a community when a developer controls title and recordation, and not later.

Given the difference in opinion on this subject among the Authors, the Commission and its Staff are also encouraged to consider any lender/mortgagee requirements that may come into play if general common area (i.e., common area that is open to the use and enjoyment of all owners and residents) is subsequently converted to exclusive use common area on less than a unanimous vote of the members. One possible "fix" to this title problem would be to have this provision of the CLRC Proposed Act state that any new EUCAs created pursuant to this provision of the CLRC Proposed Act are mere licenses that may be challenged in the future by other owners as real parties in interest. However, see considerations in the holding of *Posey v. Leavitt* (1991) 229 Cal.App.3d 1236; no legislative history of Civil Code section 1363.07 suggests that the Legislature intended to abrogate the holding in *Posey* or that of cases that followed.

Section 4605 (Civil Action to Enforce Section 4600):

***Non-Substantive Comment**:* This proposed section seems totally unnecessary because the issue of enforcement and remedies for any violation of Section 4600 is adequately addressed in proposed Section 5145 (Judicial enforcement of member election and voting requirements; see definition of issues requiring a secret ballot vote in proposed Section 5100(a)). See also Comment at proposed Section 4540.

Section 4610 (Partition of Condominium Project):

***Non-Substantive Comment**:* Although the first sentence of subdivision (b) of this proposed section is also found in current Civil Code section 1359(b), the sentence should be clarified – it reads as if it is a fragment of a sentence.

Issues for Further CLRC Consideration: What to do with aging condominium projects across the state that are reaching the end of their useful lives, and the prospective utility of/need for the partition statutes in the Act, coupled with proper judicial oversight, is an emerging, challenging and sophisticated legal issue, for future Commission consideration. Research in other jurisdictions may also prove illuminating.

Section 4615 (Lien for Work Performed in Condominium Project): No comment.

CHAPTER 3. OWNERSHIP AND TRANSFER OF INTERESTS
(Article 5, Transfer of Separate Interest)

Section 4625 (Community Apartment Project): No comment.

Section 4630 (Condominium project):

Non-Substantive Comment: In the second sentence, change the phrase "the separate interest" to read: "an owner's separate interest."

Section 4635 (Planned development):

Non-Substantive Comment: In the first sentence, change the phrase "the separate interest" to read: "an owner's separate interest."

Issues for Further CLRC Consideration: As currently written, proposed Section 4635 does not seem to cover the most common planned development ownership scenario, namely, one in which the common areas of the development are owned in fee simple by the association. Consideration should be given by the CLRC to revising the first sentence to read: "In a planned development any conveyance, judicial sale, or other voluntary or involuntary transfer of the owner's separate interest includes the owner's undivided interest in the common area, if any exists, or the owner's beneficial interest in the common area as a member of the association that holds fee title." This issue should be evaluated and addition drafting considered.

Section 4640 (Stock Cooperative): No comment.

Section 4645 (Transfer of Exclusive Use Common Area).

Non-Substantive Comment: See comment at Section 4600 under "***Issues for Further CLRC Consideration***" recommending a stated method for documenting the creation of exclusive use common areas. A similar provision might be beneficial here with respect to the transfer of EUCAs, even if limited to a statement that any transfer must be effected by a recorded instrument.

Issues for Further CLRC Consideration: At least one Author believes this proposed section poses a dramatic substantive change in established theory, namely that an owner's interest is not divisible and cannot be severed and transferred in pieces. This provision is most troubling. Easements cannot be transferred separately, any more than title to a portion of a condominium interest or lot can be divided. Exclusive easements held by persons other than the owners of the separate interests is a foreign concept and presupposes potentially dozens or hundreds or thousands of separately held interests in a common interest development.

Section 4650 (Severability of Interests): No comment.

CHAPTER 4. PROPETY USE AND MAINTENANCE
(Article 1. Use of Separate Interests)

Section 4700 (Application of Article):

Non-Substantive Comment: The opening sentence to proposed Section 4700 is recommended to be revised to read: "This article includes provisions that limit the authority of an association *or the governing documents* to regulate the use of a member's separate interest." (emphasis added.) The Authors found the list of other limitations, found in Code sections outside of the Act, that are also applicable to rights of members with respect to their ownership and use of separate interests in a CID to be helpful and a beneficial grouping of those other non-Act provisions. However, the Authors question whether the listed non-Act provisions and protections are sufficiently comprehensive. For example, Vehicle Code provisions govern towing from private property; the Health and Safety Code governs family day care homes, swimming pool requirements, and a host of topics relating to property use.

Section 4705 (Display of the U.S. Flag): No comment.

Section 4710 (Noncommercial Sign Displays):

Issues for Further CLRC Consideration: Certain of the Authors are of the view that this proposed provision, which repeats existing law (current Civil Code section 1353.6) reflects misguided public policy. Enactment of this provision followed on the coattails of Civil Code section 1353.5 which has the legitimate objective of permitting owners of separate interests in a CID to display the U.S. Flag. However, this section goes much further to permit the display of "signs, posters, flags, and banners made of paper, cardboard, cloth, plastic, or fabric" from "yards, windows, doors, balconies, or outside walls of an owner's separate interest" with signs and posters being permitted that are up to nine square feet in size and flags and banners that are up to fifteen square feet in size. Some of the Authors find it difficult to imagine a community in which every person posted a cardboard or plastic sign, flag or banner (or multiple signs, flags and/or banners because there is no limit on the number of different signs) of the maximum permissible dimensions on every home in the community.

The legislative history of this statute indicates that certain legislators believed that the language of section 1353.5 permits associations to impose reasonable time, place and manner restrictions on the display of noncommercial signs (i.e., "implicit" in the health and safety reference in the statute). The impact of the reference is lost in its obliqueness, however. The CLRC might fashion a clearer reference to time, place and manner restrictions, and possibly provide examples to aid associations, their boards, managers, members and counsel in understanding the bounds of noncommercial speech..

Section 4715 (Pets):

Non-Substantive Comment: Because the term "governing documents" is defined in proposed Section 4150, subdivision (d) can be eliminated from this proposed section. Due to the passage of time, consider revising current subdivision (e) to read: "This section only applies to governing documents entered into, amended, or otherwise modified on or after January 1, 2001."

Issues for Further CLRC Consideration: If a post 2001 amendment or modification of a declaration, bylaw or rule pertains to some issue or provision that has nothing to do with pets, should that sort of amendment serve to void pet restrictions that would not be permissible under proposed Section 4715? A further question is whether *statutorily-mandated* rule-changes (such as the mandatory adoption of voting and election rules pursuant to Civil Code section 1363.03(a)) triggers the loss of a pre-2001 pet prohibition.

Section 4720 (Roofing Materials): No comment.

Section 4725 (Television Antennas and Satellite Dishes): The Authors recommend deletion of this provision of the Act as it has been preempted by the federal laws relating to the same subject and currently the two laws (State and federal) are in conflict with respect to the permissible diameter of satellite dishes and numerous other elements of federally-permissible dishes and antennas.

Section 4730 (Marketing Restrictions): No comment.

Section 4755 (Low water-using plants): No comment.

CHAPTER 4. PROPETY USE AND MAINTENANCE
(Article 2. Modification of Separate Interests)

Section 4760 (Improvements to separate interest):

Non-Substantive Comments: See earlier comments about use of the singular in headings. The Authors respond to the Staff NOTE by stating that we support expansion of this provision to cover not only condominiums but also other forms of CIDs where the same separate interest modifications may be issues.

Issues for Further CLRC Consideration: Note prior proposed consideration of modifying statutory rules for maintenance of exclusive use common area in *condominiums*, in acknowledgment of the prevalence of air space EUCA, vesting the responsibility for component

maintenance clearly in the association, unless the governing documents expressly provide otherwise.

Section 4765 (Architectural Review and Decision Making):

***Non-Substantive Comments**:* The Authors fully support the relocation of this provision to be part of the proposed Article 2 concerning Modification of Separate Interests, rather than burying the provision in its current location at the very end of the Act.

As another non-substantive recommendation, the Authors request that consideration be given to changing references to "a member" and "a member's separate interest" to read: "an owner" and "an owner's separate interest" for the same reasons stated several times above, namely that this provision of the CLRC Proposed Act relates to an *owner's* right to modify his or her interest.

Issues for Further CLRC Consideration: The Authors have two issues for further consideration by the CLRC. First, the current law (Civil Code section 1378) and this proposed section state that the section's requirements are applicable to any governing document provision requiring association approval to physical changes in an owner's separate interest. Although the text references governing document provisions requiring *association approval of physical changes*, there currently remains an open question as to whether the section (or all portions thereof) should apply to CC&R requirements for architectural or design review and approval requirements during the period in which the Department of Real Estate Regulations (see sections 2792.28 and 2792.32(g) of the DRE Commissioner's Regulations) permit the designated architectural or design review committee to function as a developer-controlled entity that is not a true committee of the association. Paragraphs (a)(1) through (a)(4) of the current and proposed statute express principles of due process and fair procedure that should be applicable to both association and developer-controlled architectural/design review committees.

However, several of the Authors are of the opinion that the requirement of subparagraph (a)(5) that committee decisions must be subject to appeal to and review by the association board runs counter to the very purpose of maintaining developer control in the early years of a common interest development in order to provide greater assurance that the original plan and scheme of development is faithfully executed. The Authors who hold this opinion recommend that subparagraph (a)(5) be amended to begin with the introductory clause stating: "Once the authority to approve owner proposals for physical changes to separate interests is vested solely in an association or a committee appointed solely by an association, if a proposed change is disapproved. . . . " Not all Authors agree with this proposal, some believing that an owner's right to ask the board to reconsider the architectural committee's denial of a request should not be eliminated during the period when the developer has the right to appoint a majority of the committee's members. These members of the Author group believe that the lack of adequate due process (resulting from the elimination of any right of appeal during the early period of developer control of the architectural review process) can lead to frustration in communities and

expensive legal battles. Some of the Authors are of the opinion that from the owner's perspective, whether it is a developer-controlled community or owner-controlled, the persons who comprises the body with the authority to say no to proposed improvement projects on an owner's property is not relevant.

The second issue for further consideration relates to the obligation imposed on associations pursuant to subdivision (c) of both the current and proposed Acts that an association provide its members with an annual "notice of any requirements for association approval of physical changes to property" with the notice including a description of the types of improvements requiring approval and the procedures used to review and approve or disapprove a proposed change." The Authors respectfully submit that any well drafted declaration of CC&Rs or architectural/design guidelines (which are already classified as "operating rules") will address these subjects and are likely to be in place from the inception of the development. To require an additional annual notice is both expensive and duplicative of information that is already readily available to the property owners. At the very least it is recommended that subdivision (c) be amended to begin with an introductory phrase along the following lines: "Unless the governing documents clearly identify the nature and type of improvements that are subject to association review and approval and the procedures that must be followed in the approval process, an association shall annually provide . . . ."This issue also affects proposed Section 5310(A)(10).

CHAPTER 4. PROPETY USE AND MAINTENANCE
(Article 3. Maintenance)

Section 4775 (Maintenance Responsibilities Generally):

***Non-Substantive Comments**:* The Authors have two non-substantive comments. First, the heading should read "Maintenance Responsibilities, Generally," since the section is speaking of the respective maintenance responsibilities (plural) of the association and its members.

Second, in the fourth line of subdivision (a) of the proposed section, the Authors recommend changing the text from "that separate interest" to read: "the owner's separate interest" and to make a conforming change in line five from "the separate interest" to "that separate interest."

Section 4780 (Wood-Destroying Pests or Organisms): No comment.

Section 4785 (Temporary Removal of Occupant to Perform Treatment of Wood-Destroying Pests):

***Non-Substantive Comment**:* Should the authority of associations to mandate the temporary relocation of occupants be restricted to apply only to situations in which the

responsibility for eradicating the pest problem is placed on the association? The Authors have experienced difficult scenarios in attached planned developments where the owners of a row of townhomes cannot agree among themselves on the cost and process for termite eradication. A mandatory arbitration provision for the owners in such circumstances could be salutary, similar to party wall provisions in law.

Section 4790 (Exclusive Use Communication Wiring):

***Non-Substantive Comment**:* Consider whether this section would be better located in Article 1 of Chapter 4 of the Proposed Act.

CHAPTER 5. ASSOCIATION GOVERNANCE
(Article 1. Association Existence and Powers)

Section 4800 (Association):

Issue for Further CLRC Consideration: Although this section repeats current Civil Code section 1363(a) without modification and the second sentence of the section is beneficial is stating that the association may be referred to as a "community association" why not expand that sentence to read: "The association may be referred to as an association, an owners' association or a community association." In the Authors' experience the terms "association" or "owners' association are more typically applied to smaller developments that cannot be comfortably characterized as comprising a "community," whereas "community association" is often the term used when the common interest development is sufficiently large to be identified, in common parlance, as a community that is separate and distinct from surrounding development (rural) or areas of a town or city.

Section 4805 (Association Powers): No comment.

Section 4810 (Standing):

Non-Substantive Comment: Consider relocating this provision to Article 4 of Chapter 8.

Section 4815 (Comparative Fault):

Non-Substantive Comment: Same comment as for Section 4810.

Section 4820 (Joint Neighborhood Association). No comment other than to comment that the Authors have never experienced such an association. What is more typical is for large master planned developments to have multiple associations that a property owner may be a member of, such as a Master Association that performs certain functions for the benefit of all villages or phases of the overall development and a sub-association that has jurisdiction only with respect to property or maintenance obligations within the village or phase in which the owner's property is located.

CHAPTER 5. ASSOCIATION GOVERNANCE
(Article 2. Board Meetings)

Heading for Article 2 of Chapter 5: Consider revising "Board Meeting" to read "Board Meetings."

Section 4900 (Short title): No comment.

Section 4920 (Notice of Board Meeting):

Non-Substantive Comments: The Authors have two non-substantive comments: First, it is recommended that the opening phrase of subdivision (a) be revised to read: "Unless the time and place for board meetings . . . . " Because proposed Section 4090 makes "board meeting" a defined term, the term ought to be used where appropriate.[12]

The second non-substantive comment also relates to subdivision (a). Specifically, it is recommended that the reference to "time and place of meeting is" be revised to read: "time and place of meetings of the board are." In the third line of the proposed section it is recommended that the reference to "a board meeting" be changed to read: "board meetings." Similarly in subdivision (b) it is recommended that the text be revised to read: "(b) If the association is organized as a nonprofit mutual benefit corporation, notice of board meetings shall also be governed by Section 7211 of the Corporations Code."

Section 4923 (Emergency Board Meeting): No comment other than a recommendation for using the plural tense in the heading.

Section 4925 (Board Meetings Open):

Non-Substantive Comment: In the second sentence of subdivision (b), the board is obligated ("shall") to establish time limits for all members to speak to the board. Consider

[12] This comment remains subject to the Authors' opposition to the proposed change in the number of directors that are required to be present in order to constitute a "meeting" under the text of proposed Section 4090.

whether the “shall” should be revised to read “may” in order to make time limits discretionary. The Authors can envision very small associations where board meetings may be conducted on a very informal basis permitting members to offer comments at any time without a set limit.

Issues for Further CLRC Consideration: The title of this Article is "Board Meeting" and the title of this section is "Board meeting open," yet the text in subdivision (b) includes substantive references to the rights of members to speak at *association* meetings. The Authors believe that these references to association meetings should be removed from this section and placed into Section 5000 ("Member Meeting").

Also, subdivision (a) of this proposed section includes the phrase “except when the board adjourns to executive session”. The Authors recommend that this language should be revised to make it clear that the board need not begin each executive session as an open session. That is not practical and does not comport with everyday realities. Also to require that all meetings begin in an open session triggers member notification requirements that (again) may not be feasible under certain emergency circumstances requiring a board to meet in executive session on very short notice. Please also see comments with respect to proposed Section 4935 (Executive Sessions).

Section 4930 (Limitation on Meeting Content):

***Non-Substantive Comments*:** The Authors support the Staff’s proposed revisions to paragraph (d)(2).

Issue for Further CLRC Consideration: The last sentence of subdivision (a) provides that while directors are prohibited from discussing or taking action on matters that are not on the agenda (with some exceptions for emergency matters), “this subdivision does not prohibit a member or occupant who is not a director from speaking on issues not on the agenda.” The Authors question whether this provision might lead to abuse by members who are not on the board and yet have an agenda that they wish to pursue by essentially hijacking the meeting to discuss matters of concern to them. The Authors are unanimous in their view that during the open session (member comment) period of a board meeting, members ought to be able to raise issues that are not on the official agenda for the meeting. However the board ought to have the discretion to duly note the member(s)’ issue or concerns and to schedule that matter for further analysis or for action at a later board meeting.

Also, why should “occupants” who are not members of the association have any rights to speak at association meetings (absent permission to speak being granted by the board)? Allowing "occupants" (defined so broadly now as to include friends and guests of members) to attend and speak at board meetings is also inconsistent with Section 4925(a) [which only authorizes "members" to attend board meetings], Section 4925(b) [which only allows "members" to speak at board meetings], and paragraph (e) of Section 4930 [which authorizes the identification of certain items to the "members" attending board meetings].

Section 4935 (Executive Session):

Non-Substantive Comments: The Authors support the Staff's inclusion of new subdivisions (c) an (d). However, in subdivision (d) the text should read "to foreclose a lien" rather than to "foreclose on a lien".

Issue for Further CLRC Consideration: The phrase "adjourn to executive session" is found in both the current law (Civil Code section 1365.05(b)) and this proposed section. The phrase suggests that the board always has to begin its journey into an executive session at a meeting that is open to the members. That is not realistic. There are many instances in which a "meeting" (as defined in proposed Section 4090) may occur without any ability to convene an open meeting, as when directors meet at a title company to sign documents that need to be recorded or when directors meet with legal counsel at the attorney's office. The text should be revised and clarified to say: "except when the board meets in executive session."

Section 4950 (Civil Action to Enforce Article): No comment.

Section 4955 (Civil Action to Enforce Article):

Non-Substantive Comment: See Comment at Section 4540 about consolidating these enforcement provisions. Also, this section presents what the Authors perceive as an "uneven playing field" that permeates all of these enforcement provisions in the Act (as proposed). The prevailing party, whether that be the association or the member who is challenging an association action, ought to be entitled to a recovery of attorneys' fees. The association should not, as a matter of policy, be denied fees absent a showing of some heightened standard such as demonstrating that the member's action is "frivolous." Under this provision, all other members of the association (absent the availability of insurance coverage that applies to association legal fees) are the persons suffering if an owner brings a suit against the association and is not the prevailing party. Collecting legal fees from an owner is often difficult, and to impose unwise limitations on the association's ability to even obtain a judgment (let along collect on that judgment) only serves to harm other innocent homeowners.

CHAPTER 5. ASSOCIATION GOVERNANCE
(Article 3. Member Meetings)

Section 5000 (Member Meeting).

Non-Substantive Comment: Change the heading to read "Member meetings."

Issue for Further CLRC Consideration: Although subdivision (a) continues current Civil Code section 1363(d) without change, it is really an odd and nonsensical provision. The

law should either require that associations conduct their membership meetings in accordance with some form of recognized parliamentary procedure or drop the matter entirely.

CHAPTER 5. ASSOCIATION GOVERNANCE
(Article 4. Member Elections)

Section 5100 (Member Election; Application of Article):

Proposed Substantive Change: The Authors support addition of subdivision (b) which provides some flexibility via the Operating Rules to identify other matters that must be voted on by use of the secret ballot voting process.

Non-Substantive Comments: The Authors suggest that in line two of subdivision (a) the phrase "elections regarding assessments legally requiring a vote" be amended to read: "elections regarding assessments legally requiring approval by a majority of a quorum of the members (Section 5605) . . ." All changes in assessments require a vote by the board and some require member approval as well.

As a second non-substantive comment with respect to subdivision (a), the word "property" is superfluous following the phrase "exclusive use common area."

Issue for Further CLRC Consideration: While the double envelope, secret ballot voting procedures, complete with inspectors of election, were no doubt added to the Act with the best of intentions, the voting process is overly complicated, costly and burdensome for smaller associations that may be quite content to conduct their affairs with more transparency (to use a much over-used term). The Authors hope that eventually the CLRC will tackle the issue of whether smaller associations (however defined) can be exempted from many of the more onerous and costly Davis-Stirling disclosure and voting requirements. See our comments at the end of Part II, above.

Section 4365 authorizes association members to vote to reverse a rule change. Such votes are often extremely emotional disputes between the board which has adopted a rule and a group of members who are seeking to reverse it. Additionally, as discussed by the Authors in the comments to Section 4365, there is a conflict between existing sections 1357.1430 and 1363.03(b) with regard to whether such a vote can be held during a special membership meeting, rather than by use of the mailed secret ballot process. The Authors recommend that the decision regarding the manner in which a vote on a member-initiated challenge to a rule be left with the board of directors. See our comments at proposed Section 4365.

Section 5105 (Election Rules): No comment.

Section 5110 (Election Inspector):

Non-Substantive Comment: The term "inspectors of election" is derived from Corporations Code section 7614 and is thus a term of art in the context of corporate elections. The Authors suggest that the heading to this section should be revised to read: "Inspectors of Election." The Authors have no objection to the changes made to the text of subdivision (b).

Section 5115 (Voting Procedure):

Non-Substantive Comment*:* The Authors support the addition of subdivision (e). No other comments to this proposed section.

Section 5120 (Counting Ballots): No comment.

Section 5125 (Ballot Custody and Inspection):

Proposed Substantive Change: The Authors question the Staff comment to this section which states that reference to the nine month election contest rule found in Corporations Code section 7527 is an "error." The Authors respectfully suggest that the error may have been committed in calling for a twelve month contest period in current Civil Code section 1363.09. The reason why the Corporations Code provision (which has been part of that law since 1978) puts an outside limit of nine months on election challenges is so that most challenges can be asserted and resolved *before the next annual election cycle begins.* Under the Corporations Code rule there is a greater likelihood that at the time of an annual election the association and its members will know how many seats must be filled and the election at hand will not be marred by continuing conflicts over the outcome of past elections. The Authors suggest that the Commission revisit its comment and consider the legal realities of challenging corporate elections and whether greater simplification is warranted here. This is an excellent example of a provision of the existing Act that could have been improved by more serious consideration to parallel issues (and their time-honored resolution) in the context of the Mutual Benefit Corporation Law.

Section 5130 (Proxies):

Non-Substantive Comments: The Authors have three non-substantive comments: First, with respect to paragraph (a)(1), defining the term "proxy," the Authors question why the text departs from the definition of proxy that is found in Section 5069 of the Corporations Code? The difference is that in proposed Section 5130 the authorization to vote on behalf of a member can be signed either by the issuing member "or the authorized representative of the member" whereas the Corporations Code definition requires any issuing person other than the member to be a person designated to act on behalf of the member as an attorney-in-fact. The Authors suggest that the Corporations Code rule provides greater security and certainty to the authority of a non-member to act on a member's behalf in issuing a proxy.

At least one Author thinks that the definition of "proxy" in the voting and election statute is old-fashioned and much misunderstood by association leaders. Nothing in the Corporations Code requires the use of proxies if the bylaws do not include such a requirement. A prohibition on proxies where mailed secret ballots are to be issued to all members would be a welcome clarification. As between the Corporations Code definition of a proxy and the voting and election statute's definition, if one must be used, at least one Author prefers the simpler one in the Civil Code.

As a second non-substantive comment, although paragraph (a)(2) tracks Corporations Code section 5069 in saying that "signed" by a member includes a "telegraphic transmission," that term seems antiquated and should either be replaced or supplemented by the term "electronic transmission." See also comment at proposed Section 4050 regarding use of "electronic transmission" or "electronic delivery" as a defined term.

Finally, consideration ought to be given to making the final sentence of subdivision (c) into a new subdivision (d) (concerning a members' right to revoke a previously issued proxy). The reason for that recommended change is that some proxies may be issued with respect to matters that are not subject to the Chapter 5, Article 4, secret ballot voting procedures that must involve an inspector of elections.

Section 5135 (Campaign-Related Information): No comment.

Section 5140 (Voting Rights): The issue of how a membership held by more than one person is to be voted is addressed in Corporations Code section 7612 (see also Corporations Code section 7312). Those procedures ought to be referenced as the statutes that address this issue for both incorporated and unincorporated associations.

Section 5145 (Judicial Enforcement):

Non-Substantive Comment: See comment at proposed Sections 4605 and 4955. See also comment at proposed Section 5125 (nine months versus twelve months).

CHAPTER 5. ASSOCIATION GOVERNANCE
(Article 5. Record Inspections)

Section 5200 (Record Inspection; Definitions):

***Non-Substantive Comments**:* The Authors have these non-substantive comments with respect to proposed Section 5200:

(i) One idea that the CLRC should consider is relocating Section 5200, in its entirety, to Article 2 of Chapter 1 of the CLRC Proposed Act, since the section is simply presenting defined terms. Short of making that relocation, the Authors have these additional comments and recommendations:

(ii) Should the list of "association records" include the litigation accounting required by proposed Section 5520 and the documents listed in proposed Section 5250?

(iii) Paragraph (a)(1) requires that the "financial documents" referenced in Article 7, (Annual Reports) or in proposed Section 5565 and in Section 5810 be provided by associations to their members. However, the references to both Sections 5565 and 5810 are unnecessary since they reference documents which are already contained within Article 7. Specifically, Section 5565 merely describes the contents of the Summary of Association Reserves, a document which is specifically included as part of the annual budget report in Article 7 (Section 5300(b)(2).) And Section 5810 merely describes the method of giving the members notice of changes in the association's insurance coverage, which insurance disclosures are also specifically referenced within Article 7 (Section 5300(b)(9).) Therefore, the Authors recommend that the references to Sections 5565 and 5810 be eliminated.

(iii) With respect to subparagraph (a)(3)(D) the Authors question inclusion of the last sentence of the subparagraph in proposed Section 5200 in that the sentence is not part of the list of what constitutes an "association record" but rather a mandate that associations maintain their records in a particular fashion. Such a directive would seem more appropriate for inclusion in Chapter 6 (Finances). The directive in this subparagraph that associations prepare their records in accordance with an "accrual or modified accrual" basis of accounting appears to conflict with proposed Section 5300(b)(1) which requires the proforma budget to be prepared on an "accrual basis". Finally, the Authors assume (in the form of a question) that the reference to "records described in this paragraph" means and is limited to the General ledger (i.e., this subparagraph (D)) and was not intended to extend to the other financial documents listed? If that is not the case, then the reference ought to be clarified.

(iii) With respect to paragraph (a)(9) should the text have a carve out worded along the following lines: "Membership lists . . . *subject to a member's right to opt out of inclusion of the member's information is such a list pursuant to Section 5220."*

(iv) In addition, the Authors suggest that this proposed section would benefit from inclusion of a NOTE explaining why the statute makes a distinction between mere “association records” and “enhanced association records." The distinction is largely related to what charges can be imposed by an association to provide certain records (see proposed Section 5205(g)), but that is not clear in either the current Act or the CLRC Proposed Act.

(v) In the current Staff Note readers are asked to comment on whether the list of documents should be expanded to include the association “journal." The Authors are of the opinion that inclusion of the journal does not add much, since the general ledger is already identified as an association record and the general ledger is a term of art in accounting parlance. In contrast, the term “journal” can apply to many different reports, making the term of little use in terms of informing users of the Act as to what records are intended to be encompassed by that term.

(vi) In paragraph 4 of the Staff Comment, the word "list" should be added after "membership."

(vii) With regard to the last sentence in subparagraph (a)(3)(D) stating that the "records described in this paragraph shall be prepared in accordance with an accrual or modified accrual basis of account," does not seem to be appropriate for the "Definitions" section. It mandates a specific, affirmative action and obligation by the association, and is not merely a passive definition. Additionally, the portion of subparagraph (a)(3)(D) that requires the records to be prepared in accordance with an "accrual or modified accrual" basis of accounting, appears to conflict with Section 5300(b)(1), which requires the pro forma operating budget be4 prepared on an "accrual" basis.

(viii) Should the list of “association records” include the litigation accounting required by proposed Section 5520 and the documents listed in proposed Section 5250?

(ix) With respect to paragraph (a)(9) should the text have a carve out worded along the following lines: “Membership lists . . . . subject to a member’s right to opt out of inclusion of the member’s information is such a list pursuant to Section 5220.”

(x) The CLRC's "Note" requests comment regarding whether the list of documents should be expanded to include the association's journal. The Authors are of the opinion that the answer should be "no." The Act already requires production of a ledger, a term whose definition is generally known. However, a "journal" can apply to many different reports, making the term unclear. Further, it is not clear what the addition of "journal" is intended to accomplish.

(xi) Finally, the Authors suggest that this proposed section would benefit from inclusion of a NOTE explaining why the statute makes a distinction between mere “association records” and “enhanced association records”. The distinction is largely related to what charges

can be imposed by an association to provide certain records (see proposed Section 5205(g)), but that is not clear in either the current Act or the CLRC Proposed Act.

Section 5205 (Inspection and copying of association records):

Proposed Substantive Changes*:* Both the current law (Civil Code section 1365.2(b)(2) and subdivision (b) of this proposed section permit a member to designate another person to conduct an inspection on behalf of the member. In the Authors' view, that broad authority to delegate inspection rights is potentially capable of abuse, as a member could designate a person who is hostile to the association and who really has no legitimate reason (aside from the member's designation) to have access to the private records of the association.

As a second substantive comment the Authors note that the $200 cap for redaction per written request for enhanced records is unrealistic. In one known instance a member demanded several years of billing statements tendered to the association by its legal counsel. Redacting such statements to delete potentially privileged entries can be time consuming and it is not the sort of work that can safely to delegated to others. The Authors suggest that it would be better for the provision to simply place the limit at the actual cost of making necessary redactions.

Non-Substantive Comment: The Author's first non-substantive comment is that it appears that subdivision (f) of the proposed section repeats matters already stated in subdivision (a). The two subdivisions should be combined.

Second non-substantive comment: In subdivision (g) the following sentence is confusing: "If the enhanced association record includes a reimbursement request, the person submitting the reimbursement request shall be solely responsible for removing all personal information . . . " Why would a record of any kind include a "reimbursement request?" Who is intended to be the "person submitting the reimbursement request?" Wouldn't that be the person who is representing the association in compiling and providing the requested information? Finally, what does reimbursement, or the lack thereof, have to do with the redaction of personal information?

Third non-substantive change: In subdivision (h), consider replacing "Requesting parties' with "A member or designee of a member." See proposed Section 5215(d) where the term "requesting member" is used.

The reference to Section 5206 in the note was probably intended to be a reference to Section 5205.

Issues for Further Clarification. At present the draft statute mentions payment by the homeowner-requester twice, in (a) and (f). But in neither case does the statute recite specifically that the homeowner must pay, only that the homeowner must agree to pay. The statute should recite that the homeowner must deliver payment to association before the records are delivered.

Also, the cap of $200 for redaction of privileged documents is too low. The only person who realistically can make the call as to whether a document is privileged or not, or whether and what to redact, is counsel, and for the typical document demand, that's not high enough. It should be changed to amounts charged to Association for review and redaction.

Section 5210 (Time Periods):

Non-Substantive Comments: Section (b)(5): Approval "of the minutes" (of decision-making committees) should be "approval of the minutes by the committee."

Possible Substantive Change: With respect to paragraph (b)(5), the Authors note that it is not always crystal clear to identify committees that have "decision making authority." Under the Mutual Benefit Corporation Law (Corporations Code section 7212, the term of art that is used in "committees exercising the authority of the board." In subdivision (b) of Section 7212 (which was amended in 2009) this rule is stated:

> (b) A committee exercising the authority of the board shall not include as members persons who are not directors. However the board may create other committees that do not exercise the authority of the board and these other committees may include person who are not directors.

It is respectfully suggested that this Corporations Code rule is simple to understand and should be applied to owner associations and to committees appointed by the board of such associations. In the typical association, an architectural committee arguably has "decision making authority" in that it grants architectural consents on behalf of the association. However, under the Act the Board has the right and duty of reviewing the decision and making a final determination when the applicant is denied and an appeal of the decision is made. Under those circumstances does the Architectural Committee have "decision making authority" in the sense envisioned by the Act? That would not be the case under the Corporations Code definition. What about, *e.g.*, "Enforcement Committees" which are responsible for doing site inspections, reporting violations, and (occasionally) convening penalty hearings and either imposing penalties or recommending such action to the Board?

For those associations whose governing documents provide for the creation of an Enforcement Committee, it is respectfully suggested that minutes maintained by such a committee should be privileged. Just as a board's minutes of disciplinary hearings are executive session items and not producible, so should the minutes of an Enforcement Committee.

Issues for Further CLRC Consideration: The Authors request that the CLRC consider whether minutes and records of the architectural review or design review committee relating to individual owner submissions should be open to general inspection by all property owners. It is noted that those files may include architectural plans that are actually the property of the architect, rather than the owner who is requesting committee approval.

It is recommended that the Commission consider whether this proposed section should note that some minutes of committees may include material that is privileged and thus not available for inspection. That is likely to often be the case if the Commission embraces the Corporations Code definition of what constitutes a committee that has "the authority of the board" (see the discussion above).

At some point, the term "decision making authority" should be defined. In the typical association, an architectural committee arguably has "decision making authority" in that it grants architectural consents on behalf of the association. However, the Board has the right and duty (by statute) of reviewing the decision and making a final determination when the applicant is denied. Does the Architectural Committee have "decision making authority" in the sense envisioned by the Act? What about, e.g., "Enforcement Committees" which are responsible for doing site inspections, reporting violations, and (occasionally) convening penalty hearings and either imposing penalties or recommending such action to the Board? Nominations committees?

For those associations with Enforcement Committees, it is respectfully suggested that those minutes should be privileged. Just as a board's minutes of disciplinary hearings are executive session items and not producible, so should an Enforcement Committee's minutes be privileged.

The time periods in subparagraphs (b)(1) and (2) currently commence upon the association's receipt of the member's document request. Section 5205 states that the association is not obligated to copy and send the requested documents until after the member agrees to pay the specified copying and redaction costs. Unfortunately, in some instances the requesting member does not agree to pay for these costs until the day before the statutory time period expires. This effectively gives the association only one day to produce and redact all of the requested documents, or face potential monetary penalties under section 5235. Therefore, the Authors suggest that the time periods should only begin to run upon the requesting member's agreement to pay the statutory costs pursuant to section 5205.

Section 5215 (Withholding and redaction):

Non-Substantive Comments: Subparagraph (a)(5)(D) repeats existing law to the effect that members have the right to review "executed contracts not otherwise privileged." The CLRC should consider making a clarification as to whether the quoted phrase means "fully performed" or "signed by all parties." The Authors would prefer clarification, and would favor the legal definition, so that the language would read, "...except for contracts which have been fully performed and are not otherwise privileged."

The Authors are of the opinion that subdivision (c) is poorly drafted. The subdivision immunizes the association and management from damages claimed by a member "or any third party" for identity theft/breach of privacy. But whereas it says in the first clause that these

parties are immune to claims from a member ***or third party***, the second clause only refers to failure to withhold or redact "that member's" information (the provision should include a reference to "the third party's" information.) This section also requires the association to disclose private information re salaries of employees, to homeowners. It is not a stretch to think that some of this private information is going to be put to improper purposes or even posted on the Internet. If you're going to force the association to cough up private information about third parties (such as employees and vendors) then immunize the board which complies with the law.

Issues for Further CLRC Consideration: Subdivision (h) provides the requesting parties with the option of receiving the records in electronic form, and states that: "The cost of duplication shall be limited to the direct cost of producing the copy of the record in that electronic format." Although not explicitly stated, presumably the requesting parties are required to pay for the costs of such duplication pursuant the same processes described in paragraphs (a), (f) and (g) relating to payment for copying the requested documents. In order to clarify this issue, wherever the word "copying" is found in paragraphs (a), (f) and (g), consider adding the word "duplicating." (e.g., "The association may bill the requesting member for the direct and actual cost of copying or duplicating requested documents. The association shall inform the member of the amount of the copying or duplicating costs before copying the requested documents.")

The second sentence of paragraph (g) places the responsibility for redacting personal information from a reimbursement request "solely" upon the third party who originally submitted the request. This would appear to be in direct conflict with section 5215(a), which authorizes the association to redact personal and other confidential information from association records. Additionally, as a practical matter requiring the third party who actually requested reimbursement to personally perform the redaction is somewhat unworkable, since the association may not be able to contact that person, especially within the strict time limits in the statute. Moreover, if the association is not authorized to redact any confidential or private information from a third party's reimbursement request, and consequently it is required to turn over unredacted private or confidential information to a member, the association could potentially face liability for violating that third party's privacy rights. Therefore, the Authors respectfully suggest that the second sentence of paragraph (g) be deleted.

Proposed Substantive Changes: The Authors suggest that consideration ought to be given to adding the following text at the end of paragraph (a)(2): "*or with respect to a member whose personal information is included in requested association records.*" The risk of fraud extends not only to the association and its affairs, but also with respect to a member whose personal information is disclosed. In making this suggestion the Authors wish to emphasize that they do not favor any revision of this text that will imply or expressly provide that an association has a duty to redact personal information of members by allowing the association to withhold information on that basis. Instead the Authors support the current status of the law, namely that a member is responsible for redacting his/her personal information. The board is usually in no

position to make the call as to whether to redact (or even to identify) what may constitute "personal information."

Subdivision (b) repeats existing Act provisions that prohibit most redactions of compensation so long as compensation information for individual employees is presented not by the employee's name or personal information, but rather by job classification. Since most owner associations have very few employees, that "protection" is meaningless as a practical matter. Under California law it has been held that employees have a reasonable expectation of privacy in terms of their compensation and this statute rides rough shod over that principle.[13]

Finally, it is noted that the subdivision (c) liability protections only come into play if the action of the director, officer, employee, agent or volunteer when the failure to redact information was not "intentional, willful, or negligent." If subdivision (c) is going to be anything more than an illusory protection, negligence ought to be deleted from the quoted list. Also with respect to subdivision (c) the Authors recommend that the language should be changed to include a failure to redact a third party's personal information, so that the section's clauses are consistent (*i.e.*, "No association ...shall be liable for damages to a member ... or any third party as the result of ...failure to withhold or redact that member's ***or third party's*** information...").

Issues for Further Clarification: Should architectural plans be available to members who are not the owners of the property for which the plans were prepared? The proposed section [(a)(5)(F)] suggests that all plans except interiors should be available, but is it good policy to open the files to strangers to the improvement project (including architect's plans, which are the property of the architect, rather than the owner)?

Section 5220 (Membership List Opt Out):

Non-Substantive Comment: The CLRC should consider requiring that any revocation of a previously made opt-out request be in writing since the initial request to be excluded must be in writing.

Issues for Further Clarification: Consider requiring a member's revocation of the opt-out to be in writing (the initial opt-out request is already required to be in writing.)

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[13] The CEB reference book entitled "*Advising California Employers and Employees"* states in section 13.77:

> There is little or no regulatory guidance on the internal dissemination of employee records by an employer in California. A suggested policy is to allow only executives, directors, and other decision-makers access as necessary, and to prohibit access by others. This reduces the likelihood of claims of invasion of privacy and defamation.

See also: *Operating Engineers v Johnson* (2003) 110 Cal.App.4th 180, 189 fn. 6, where the court noted:

> "We emphasize that defendants do not dispute that the intentional disclosure of Vinson's reprimand to co-employees with no need to know is sufficient to constitute a violation of the constitutional right to privacy…."

Section 5225 (Membership List Request):

Issues for Further CLRC Consideration: The Act and the CLRC Proposed Act depart from the Mutual Benefit Corporation in failing to enable an association to offer a requesting member an alternative to actual delivery of the association's membership list (see Corporations Code section 833(c)). The right to offer an alternative to actual access is an important means of protecting from abuses in the use of membership lists.

Section 5230 (Restriction on use of records):

Issue for Further CLRC Consideration: Corporations Code section 8338 presents a specific list of improper uses of membership lists. It would be beneficial to add a similar "without limiting the generality of the foregoing" list in subdivision (a) of proposed Section 5230.

Section 5235 (Enforcement):

Non-Substantive Comment: See comments at proposed Sections 4605, 4955, and 5145. Also, subdivision (a) permits an award of a civil penalty of up to $500 "for the denial of *each separate written request."* The Authors respectfully suggest that it is not clear what constitutes a "separate written request." If an owner requests the same document ten times are those ten separate requests. Suppose that an owner's request for documents lists ten items or records and the board produces six. Is the fine 4 times $500 or simply $500?

Issue for Further CLRC Consideration: In the Authors' experience it is not uncommon to encounter homeowners who are at odds with their association and who are forever sending long, repetitive or overlapping lists of demands for documents and information. The manager/board has to carefully review any and all requests to see what has already been produced, and that's problematic. Nevertheless, under this provision, the association can recover its "costs" (presumably including its attorney fees if the action is not brought in small claims court) only when the court finds the member's actions to be "frivolous, unreasonable, or without foundation." That high standard creates an unlevel playing field. The Association should be entitled to its fees and costs as a prevailing party, without the additional showing. This statute presumes that the association is the bad guy, until proven innocent.

This section also presents an opportunity for the CLRC Proposed Act to clarify what constitutes a "separate written request". For example, if the request has 10 line items, and the board produces 6 of them, is the potential fine 4 x $500, or $500? Also, associations often receive long, overlapping and repetitive demands for documents, often before the time limit for production of the preceding request has expired. The manager/board have to review the demands to see what has already been produced, and what needs still to be produced, and in a timely fashion. Yet, the Act requires an additional showing by the association before it can

recover its costs in a court action based on the demand (that is, the homeowner need merely prevail to recover its fees, while an association must show that the action was "frivolous, unreasonable or without foundation.") This uneven playing field is simply not fair to associations. Costs should be awarded to the prevailing party, period.

Section 5240 (Application of Article):

Non-Substantive Comments: Subdivision (b) reiterates the owner's rights to documents under Corporations Code sections 8330 and 8333. However since the inspection rights of members are broader under the Act, as well as more specific, why carry those references to the Corporations Code over? The section should simply state that the members' rights of inspection are as defined in the Act (paragraph (a) of this section already does that for the 8330/8333 rights.)

As a second comment the Authors request that the CLRC consider revising the final sentence of subdivision (d) to read: "Notwithstanding the foregoing, this article shall apply to common interest developments in which the association board continues to be comprised of a majority of subdivider designees no later than 10 years after the close of escrow for the firs sale of a separate interest to a member of the general public pursuant to the public report issued for the first or only phase of the development."

Issues for Further CLRC Consideration: With respect to the preemption provision found in subdivision (a), consider the comment made with respect to proposed Section 5225.

Since the document production provisions of the Act are more detailed and broad than the Corporations Code provisions, why recite "Except as provided in subdivision (a)" in proposed Section 5240(b)?

Proposed Section 5240(c) states the document production obligation applies to "any community service organization or similar entity that is related to the association". What does "related to the association" mean? This is an important issue that needs to be clarified. See our comments to proposed Section 4110.

CHAPTER 5. ASSOCIATION GOVERNANCE
(Article 6. Record Keeping)

Section 5250 (Duty to Maintain Records):

Non-Substantive Comments: Consider revising paragraph (a)(6) to read: "Association tax returns or other tax-related record" and revising paragraph (a)(7) to read: "A deed or deeds or other matters of record that relate to title to real property within the common interest development that is owned by the association." With respect to the proposed revised text for

paragraph (a)(7) also consider the suggestion that “record” and “recordation” be added as defined terms in the CLRC Proposed Act.

Paragraph (a)(15): The Act currently uses the word "election" to apply not only to director elections, but CC&R amendment votes, votes on assessments, etc. Is the intent here to require retention of all these categories of votes, or only as to director elections?

Finally, paragraph (a)(17) seems overly broad (“A record that relates to enforcement of a restriction”). Does that mean that associations need to retain copies of each and every compliance request, no matter how minor or should the provision be modified to clarify that the record must relate to some sort of formal enforcement action pursuant to Article 6 (assessment collections) or Chapter 8 proceedings?

The Note asks for comment on whether the list of documents required to be produced by the association should be expanded. In the opinion of the Authors, answer is "no."

Section 5255 (Record retention periods):

Non-Substantive Comment: The term “operational effect” that is found in subdivision (a) seems vague, particularly to a lay person serving on the board.

With respect to paragraph (b)(3) consider the same change as recommended with respect to proposed Section 5250(a)(7).

Paragraph (a)(8): The Authors question the utility or purpose to be served by requiring that records pertaining to design, construction or physical condition of the CID be retained permanently, particularly if that statement extends to each and every owner request for architectural approvals pursuant to architectural or design review requirements imposed by a declaration.

Subdivision (d): This section implies there IS liability for a record "discarded or destroyed" after January 1, 2013. The fact of the matter is that records are often lost, or destroyed, without the knowledge or consent of the all-volunteer board. When an association changes management companies, records may be lost. Occasionally records are retained by the volunteers themselves, and are lost over time. The Authors suspect the intent is not to punish these inadvertent losses of records, rather to address those situations in which the records are intentionally discarded or destroyed. The Authors recommend adding language to clarify that the Association and its volunteers are not liable for the unintentional loss or destruction of records after January 1, 2013.

The Authors question the utility or purpose to be served by requiring that records pertaining to design, construction or physical condition of the common interest development be retained permanently, particularly if that statement extends to each and every owner request for

architectural approvals pursuant to architectural or design review requirements imposed by a declaration.

CHAPTER 5. ASSOCIATION GOVERNANCE
(Article 7. Annual Reports)

Chapter 5, Article 7 (Annual Reports), Generally:

***Non-Substantive Comment**:* The CLRC staff should consider moving this entire Article to Chapter 6 (Finances).

Section 5300 (Annual Budget Report):

Non-Substantive Comments: The Authors have four non-substantive comments to offer to the CLRC:

First, the term "annual budget report" is new (not a term that is found in current Civil Code section 1365). The Authors are not experts in accounting terminology; however, typically corporations prepare annual budgets, quarterly financial reports, and a year-end annual report. If the term "annual budget report" has been coined by the staff because the beginning-of-the-year disclosures include information that goes beyond the information that would be presented in a pro forma budget, then perhaps "annual budget report" ought to be made a defined term in Chapter 1, Article 2. Further, the language requires *preparation* of the budget report, as well its *distribution*, to take place 30-90 days before fiscal year end. In fact, preparation may begin long before the 90 day period specified by this section. Perhaps it would be better to simply require distribution within this period.

A second non-substantive proposal would be to revise paragraph (b)(3) to read:

> (3) A summary of the reserve study and reserve funding plan commissioned and adopted by the board, as specified in paragraph (5) of subdivision (b) of Section 5550. The summary shall include notice to members that the full reserve study and reserve funding plan is available upon request, and the association shall provide the full reserve study and reserve funding plan to any member upon request.

The justification for this recommended change is that proposed Section 5550 speaks of a reserve study that *includes, as one of its elements, a reserve funding plan.*

Third, is paragraph (b)(4) in the penultimate line consider adding "or to defer" after the phrase "decision not to undertake.

The cross reference in paragraph (b)(5) to Section 5560 should be to "5550(b)(5). The reserve funding plan is not adopted pursuant to the currently referenced section.

Finally, in paragraph (a)(6) the board is required to include in the budget report a statement of the mechanism by which reserves are to be funded (this is a carry-over from the existing Act). In light of the subsequently enacted requirement that the board undertake a reserve funding study (see proposed Section 5550(b)(5), why should the CLRC Proposed Act state this twice?

Issues for Further Clarification: There's overlap between 5300(b)(3) and 5300(b)(6). Paragraph 5300(b)(6) requires the board to include in the budget report a statement of the mechanism by which reserves are to be funded (as set forth in existing law.) However, the reserve funding plan (5550(b)(5)) is going to be part of the annual budget report (5300(a)(3)) and that contains a statement of the mechanism by which reserves are to be funded. The dual reference is redundant.

Section 5305 (Review of Financial Statement): No comment.

Section 5310 (Policy Statement):

Non-Substantive Comments: The term "annual policy statement" seems inappropriate in this context, in that many of the listed disclosures in this proposed sections are not policies at all. The Authors' second comment is why the section fails to include the 5570 annual assessment and reserve funding disclosure?

The Authors view the concept behind this new section to be meritorious, namely listing or enumerating all the various annual disclosures in one section. However it would make more sense to have the disclosures timed to go out with the budget (i.e., 30-90 days before the end of the fiscal year) so that the association needs only to pay for one mailing.

With respect to paragraph (a)(9), the information is described as "a summary of alternative dispute resolution." This is inaccurate. The Act now presents two types of dispute resolution --one is "internal dispute resolution" and the other is "alternative dispute resolution." Since they are different, both terms should be used or the word "alternative" should be deleted since the Act requires disclosure of information about both modes of dispute resolution.

The Authors are also of the opinion that it is a bad idea to require the board to promptly deliver a copy of the most recent annual policy statement "to any new member" at no cost (subdivision (b) of the proposed section). First it is noted that not every property sale/transfer goes through escrow, nor is the Association notified of every sale. Requiring the association to provide new members something where no request has been made for the information is unrealistic. A better approach would be to require the association to provide documents in

response to a written request from a new owner, and further to allow the association to charge for the cost of such documents. Remember, the duty to provide such information to a buyer is statutorily imposed on the seller, not the Association (current section 1368 of the Civil Code and the CLRC Proposed Act at Sections 4525, 4530). The seller always knows when a sale has taken place, whereas the Association does not. And the Act (old and proposed) already requires associations to provide this paperwork to an owner who requests it. Finally, should the Act obligate associations to provide the information without charge? The Authors are of the opinion that associations should be able to charge for this service, since this is essentially an extra copy to an owner.

Section 5320 (Notice of Availability):

Non-Substantive Comment*:* Although this provision is a well-intentioned effort to reduce association mailing and copying costs by permitting a summary to be distributed, rather than the full reports required by proposed Sections 5300 and 5310, the Authors question the feasibility of preparing a summary report under either section, given the detail that is required to be disclosed. For example, how does an association summarize its Section 5730 collection policy? Perhaps the summary should be limited to the Section 5300 documents. Also, subdivision (b) should be amended to require the owner's request for a full report to be in writing.

Issues for Further Clarification: The Authors question the wisdom of allowing the member to initially designate whether he/she will receive a full report or a summary. The association should be able to routinely distribute summaries, subject to the owner's right to make a written request and receive the full version of the document.

CHAPTER 5. ASSOCIATION GOVERNANCE
(Article 8. Conflicts of Interest)

Section 5350 (Interested Directors):

Non-Substantive Change: The references to Corporations Code section 7223 and 7224 are in error and do not cover the same topic as Corporations Code section 310. The cited sections concern the removal of directors. The correct citations would be to section 7233 and 7234 of the Corporations Code.

Also, under sections 7233 and 7234 of the Corporations Code, an interested director may participate in debate on the issue, indeed, may even vote on the issue, though the burden is thereafter on the interested director to prove the propriety of the transaction. Under the proposed language of Section 5350(b), it is unclear whether the interested director may participate in the debate, or be present at the time the vote is taken by disinterested directors. Do you wish to

clarify that director's rights of participation in debate and the right to attend a meeting wherein the vote on the issue is taken?

Recommended Substantive Change: The Authors strongly recommend that a new 5350(b)(7) be added, *viz*., "Whether or not to censure or sanction a director for intentional disclosure of confidential information or other breach of fiduciary duty."

CHAPTER 5. ASSOCIATION GOVERNANCE
(Article 9. Managing Agents)

Section 5375 (Prospective Managing Agent Disclosure): No comment.

Section 5380 (Trust Fund Account): No comment

CHAPTER 5. ASSOCIATION GOVERNANCE
(Article 10. Government Assistance)

Section 5400 (Director Training Course): No comment.

Section 5405 (State Registry): No comment.

CHAPTER 6. FINANCES
(Article 1. Accounting)

Section 5500 (Accounting): No comment.

CHAPTER 6. FINANCES
(Article 2. Use of Reserve Funds)

Section 5510 (Use of Reserve Funds):

Issues for Further Clarification. Often a situation arises where there is an unforeseen and pressing need to spend reserve funds on a reserve item which is not adequately funded. Is it permissible to use reserve funds allocated to one line item for another line item repair? Also, at what point do funds assessed as reserves actually become reserves? If the budget called for a certain portion of the assessment to be contributed to reserves, and yet prior to the established assessment coming due there is a precipitous increase in the association's operating expenses, is

it permissible to use the portion of the future assessments that were originally intended as reserves for operating expenses? Or must the association treat this as a loan of reserves for operating expenses (Section 5515)?

Section 5515 (Temporary transfer of reserve funds): See comment to 5510 above.

Issues for Further Clarification: "Supported by documentation" (as used in (d)) is not clear.

Section 5520 (Use of reserve funds for litigation):

Nonsubstantive Change. Subdivision (a) should be clarified to read, "When the decision is made to use reserve funds, or to temporarily transfer moneys from the reserve fund, to pay for litigation as provided in Section 5510(b)..." In the existing Act, this language appears in the same section as the limitation on uses of reserve funds. By separating the two sections in the CLRC Proposed Act, it appears that the board could use reserve funds for any kind of litigation, rather than reserve-related litigation. This change would resolve that ambiguity.

CHAPTER 6. FINANCES
(Article 3. Reserve Planning)

Section 5550 (Visual inspection of major components and reserve study): No comment

Section 5560 (Reserve funding plan):

Nonsubstantive Change. Subdivision (a) should be amended to read, "The reserve funding plan required by Section 5550 shall include a schedule of the date and amount of any change in regular ***assessments,*** or special assessment***s,*** that would be needed to sufficiently fund the reserve funding plan."

Section 5565 (Summary of association reserves):

Nonsubstantive Change. The last sentence of (b)(3) should read, "Instead of complying the with the requirements set forth in this paragraph, an association that is obligated to issue a review of ***its*** financial statement..."

Subdivision (c) continues to be poorly worded ("The percentage that the amount determined for purposes of paragraph (2) of subdivision (b) equals the amount determined for purposes of paragraph (1) of subdivision (b)"[14]). What the section is *trying* to say is that the report should contain the percentage of the amount projected to be necessary to repair, replace,

[14] That one sentence should probably receive the top award for an esoteric citation (see page 8, above).

restore, or maintain the major components of the development for which the association is responsible (5565(b)(1)) which is represented by the amount actually set aside (5565(b)(2)). Somehow that concept should be stated more simply and more clearly.

Section 5570 (Assessment and reserve funding disclosure summary):

Issues for Further Clarification: Proposed Section 5570(a)(3) asks this question: "Based upon the most recent reserve study and other information available to the board, will currently projected reserve account balances be sufficient at the end of each year to meet the association's obligation for repair and/or replacement of major components during the next 30 years? Yes _____ No _____" In the Authors' opinion, this question is meaningless. The Authors consistently advise associations to answer this query as "No." No matter how well funded an association's reserves may be or how precise and professional the association's reserve funding study may be, no one can possibly predict whether the projected reserve balances will be sufficient over a span of 30 years. There are too many variables. In fact, it would be difficult to accurately respond to this question in the affirmative if the stated time frame were only 5 years.

Section 5580 (Community service organization report):

Issues for Further Clarification: Per the Note, the Authors agree that there are ambiguities, but we do not know what the Legislature intended by the references to Section 1365.2 [5200 *et seq*.] or the report of noncompliance.

CHAPTER 6. FINANCES
(Article 4. Assessment Setting)

General Observations

Organization of the Chapter

The portion of the proposed new law addressing assessments and assessment collection is currently located under "Chapter 6 Finances." While, theoretically, assessments and their collection are properly financial, the Chapter starts with reserves and reserve funding, leaving it hard and not particularly intuitive, particularly to a lay reader, to find assessments and collections under the same heading.

Given the fundamental importance of assessments and in the interests of simplifying the process of navigating the proposed new law, we strongly encourage the CLRC to address the subjects of the right of associations to assess their members and the powers of associations (and limitations thereon) to collect assessments in a separate, stand-alone Chapter of the CLRC Proposed Act (entitled simply: "Assessments and Assessment Collection"). Another alternative would be to move the discussion of reserves and reserve funding to a more appropriate location

in the CLRC Proposed Act and re-name Chapter 6. See previously submitted Outlines in Exhibit "A."

Problems Associated with Generalizing

As noted in other parts of this Memorandum, generalizing existing law in an effort to make the Act more accessible to a broader audience can have difficult practical and legal consequences. In the area of assessments and assessment collections, generalizing occurs in at least two locations within the CLRC Proposed Act, with disquieting results.

Current law, negotiated carefully in 1985, permits boards to increase regular assessments over a prior fiscal year if certain prerequisites – specifically, complying with the budget content and distribution requirements in section 1365(a) – are met. This requirement for timely providing members with a budget and other financial information for the next fiscal year in order to increase assessments has an understandable policy link. For what might now be merely drafting economies, the CLRC is considering *a significant substantive change* that raises drastic new impediments for boards and their ability to raise funds to operate their communities. Specifically, the CLRC is proposing that the ability to increase assessments would also require (1) compliance with a highly detailed insurance disclosure requirement (including even a specific statutory statement that must be included *verbatim*) and (2) a highly detailed assessment and reserve summary of information already in the budget (prepared on a specific statutory *form* and no other). The CLRC Staff refers to this proposed substantive change as merely "broadened slightly to simplify its application." [Note #2 to Section 5605.] New impediments do not "simplify."

We are unaware of a basis in policy for putting significant new financial reporting trip hazards in front of volunteer boards working to meet their assessment responsibilities in Section 5600. If the issue is ease of drafting, the insurance disclosure could easily be moved to the "annual policy statement" (proposed Section 5310) and provided to the members after the new fiscal year commences. Distribution of the summary of association reserves (proposed Section 5300(b)(2)) could still be part of the annual budget report but in a separate subdivision so that referring to subdivision (a) would still allow boards to raise assessments so long as the board is in timely compliance with traditional budget disclosure obligations.

Another generalization proposed by the CLRC Staff would take an owner's current right to request a secondary address for distribution of specified financial and assessment information, and extend the right to *all notices*. As discussed above, the Authors remain very uncertain what is meant by "notices." Given that uncertainty, extending an association's duties to keep track of dual addresses for owners for an unknowable number of documents raises considerable practical and legal concerns. The principle behind the current provision of the Act enabling an owner to provide the association with a secondary address for assessment collection notices (Civil Code section 1367.1(k)) was to protect owners in their most vulnerable relationship with their association, namely the potential loss of their home in foreclosure if assessments become

delinquent. Specific authorization to send collection notices to third parties raises troublesome legal issues, since assessment dunning notices can trigger all kinds of privacy, fair debt collection practices, and even bankruptcy stay issues, some of considerable legal exposure. To extend such information to third parties on a blind and blanket basis and in an unknown number of contexts (violation notices involving an owner's personal conduct in or about their home; meet-and-confer dispute notices; payment plan notices; architectural review procedural notices; litigation notices) is a significant expansion of current law, bound to be expensive, and rife with legal risk for owners and associations alike.

Secret ballots that are distributed to members to vote on assessment increases and special assessments requiring member approval certainly cannot be sent to multiple addresses provided by an owner -- not without losing ballot control and encouraging voting irregularities.

We urge the CLRC to reconsider these far-reaching substantive changes to existing law.

Effect of Breaking Apart Statutes

The assessment and collection statutes in the current law are among the most misshapen and convoluted elements of the Act due to their constant addition, repeal and amendment over the years. The breaking up of sections 1366 and 1367.1 in the text of the CLRC Proposed Act results in some lost connectivity, however, and the new organization for these important topics is not efficacious in all attempts. Below the Authors suggest some revisiting of numbering and the ordering of statutes, as in some cases we anticipate future disputes over legal interpretation and application.

Non-Substantive Comments
"Assessment debt"

We suggest a definition be drafted for "assessment debt" and that this term then be consistently used in all places where a long litany of words ("assessments, late charges, collection costs, attorney's fees, and interest" or words to that effect) now exists. This is both to reduce and simplify text but also to clarify the legal nature of the obligation that owners and their property owe when assessments are levied but unpaid. Where just the unpaid assessment is referred to, the term "delinquent assessment" suffices. In all other contexts, however, the inconsistent use of words and applications can result in disputes that can now be smoothed out with the consistent use of a defined term.

"Regular assessment"
"Special assessment"
"Notice of delinquent assessment"

These terms should be defined for clarity. Under existing law, they are not.

Specific Observations / Recommendations

Non-Substantive Comment On Name of Article 4: The Authors recommend that the name of Article 4 of Chapter 6 be changed to something more descriptive such as: "Establishment and Imposition of Assessments."

Section 5600 (Levy of Assessments):

Non-Substantive Comments:

The phrase "[e]xcept as provided in Section 5605" in Section 5600 of the proposed new law is a variation on existing text in section 1366 that has long been a puzzle for practitioners. The phrase now linked only to Section 5605 (which is currently a portion of Civil Code section 1366) is even more confusing. This could be an opportunity for clarification.

The word "title" at the end of Section 5600 is old form and should be corrected to read "Part" or "Act."

Section 5605 (Assessment Approval Requirements):

Non-Substantive Comment: The word "Annual" at the opening of subdivision (a) is unnecessary and confusing and should be deleted to minimize disputes.

The fourth item under the comment section for subdivision (a) references "former Section 1366(a)" and "former Section 1366(a)-(b), and (f)" in aligning that subdivision with new Section 5300. Section 5300 continues *section 1365(a)*, however, and the references in the comment should be corrected.

Subparagraph (b) of this proposed section continues text currently found in Civil Code section 1366(b): "Notwithstanding more restrictive limitations placed on the board by the governing documents, the board of directors may not impose a regular assessment . . . ". That sentence, with its double negative, has, from its inception, been the subject of interpretative debate that should be resolved once and for all in the CLRC Proposed Act.[15] A recommended revision of the text could read as follows:

[15] The quoted language that is currently found in Civil Code section 1366(b) was not included in the Act as initially adopted in 1985 and therefore until the section was amended in 1987 to add the "Notwithstanding" introduction, fierce debates ensued in the common interest community over the issue of whether the Act's assessment provisions trumped and superseded older governing document provisions that often included very severe limitations on the board's discretion to increase assessments. The 1987 revisions to Civil Code section 1366 have traditionally been interpreted to mean that the 20% and 5% statutory authority given to boards for assessment increases and special assessments, respectively, control even if a particular development's CC&Rs include provisions that were drafted with the intent of imposing greater restrictions or limitations on the board's authority to increase regular assessments or to impose special assessments in the absence of member approval. The CLRC CID

> Notwithstanding more restrictive limitations placed on the board in the governing documents, a board may increase regular assessments by an amount not to exceed 20 percent of the regular assessment for the association's preceding fiscal year, and may impose special assessments which in the aggregate do not exceed 5 percent of the budgeted gross expenses of the association for the fiscal year in which the special assessment is levied. Proposed regular assessment increases and special assessments that are in excess of these percentages may only be levied if approved by owners, constituting a quorum, . . . [etc].."

Proposed Correction of Substantive Changes Resulting from CLRC Proposed Text: Both subdivision (a) and (b) of proposed Section 5605 refer to approval "at a member meeting." Pursuant to section 1363.03, member approval of assessment increases and special assessments are one of the five categories of member actions/decisions that must be done by mailed secret ballot over a minimum 30-day period. Such decisions are not, and cannot be, made "at a member meeting." Staff's emphasis in its accompanying comment is to eliminate confusion with respect to former prevailing law in the Corporations Code. This is correct, but only goes part way. To minimize confusion for associations that aren't aware of the mailed secret ballot requirement or for practitioners who wonder if the CLRC instead intended by the reference to a member meeting to supersede Civil Code section 1363.03, the phrase "at a member meeting" should be deleted from both subdivision (a) and (b).

Another perhaps inadvertent substantive change is found in subdivision (b) of proposed Section 5605 where the text states that the requisite member vote to approve assessment increases and special assessments requiring member approval is "a majority of a quorum of the members (Section 4070)." Use of that defined term in this context results in a change in current law (specifically Civil Code section 1366(b), unless the following text is added after the parenthetical reference to Section 4070: "For purposes of this section, the required quorum is more than 50% of the members."[16]

See above for discussion regarding substantive new prerequisites to board authorization to increase regular assessments for the fiscal year. [Note #2 to Section 5605.] The Staff's Note to proposed Section 5605 also mischaracterizes the added requirements as including the "reserve

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Project affords an excellent opportunity to express this concept of board assessment authority and discretion more clearly.

[16] The current text of Civil Code section 1366(b) actually reads: "For the purposes of this section quorum means more than 50 percent *of the owners of an association.* The Authors are of the opinion that use of the word "owners" in this context is less appropriate than "members" since the vote is being taken by owners in their capacity as members of the association. Another matter to note with respect to the voting requirements as presently stated in Civil Code section 1366(b) is that in a member vote on assessments, apparently all members have a right to vote, whether or not they are delinquent in the payment of assessments and have otherwise had their voting rights suspended. That ambiguity results from use of the word "owners," rather than "members" and the failure to include the phrase "voting power of the members" in stating the minimum quorum requirements.

funding plan distributed pursuant to Section 1366(b)." This is incorrect. The reference should be to the assessment and reserve summary form in section 1365.2.5. [See Section 5300(e).]

Note #3 to Section 5605 refers to a quorum that is based on "a majority of the *voting power* (excluding those who own more than two units)." (emphasis in original.) This is likely an error, in that nothing in proposed Section 5605 excludes owners of multiple units from voting on an assessment increase or special assessment that is beyond the authority of the board to approve.

Section 5610 (Emergency Exception to Assessment Approval Requirements): No change.

Section 5615 (Notice of Assessment Increase):

Non-Substantive Comments: Section 5615 perpetuates a terminology problem in the current law, namely that special assessments are not "increased." The following text would clarify it:

> "The association shall provide individual notice (Section 4040) to the members of any increase in the regular ***assessments*** or ***levying of*** special assessments of the association, not less than 30 nor more than 60 days prior to the increased ***regular*** assessment ***or special assessment*** becoming due."

Section 5620 (Exemption for Execution): No comment. However the Authors agree with the CLRC's interpretation of the voting/quorum requirement for consensual pledges, liens or encumbrances – i.e., that the quorum for such votes is whatever quorum is determined in the governing documents, not the statutory (more than 50%) quorum that is currently required for assessment increases and special assessment votes. See our comments with respect to proposed Section 5605(b).

Section 5625 (Property Tax Value as Basis for Assessments): No comment.

CHAPTER 6. FINANCES
(Article 5. Assessment Payment and Delinquency)

Section 5650 (Assessment Debt and Delinquency):

Non-Substantive Comments:

A logical and appropriate order of principles would be to move subdivision (a) of Section 5650's single expression of the *personal obligation* of owners for "assessment debt" (see discussion of this term above and below) to a new section to be located immediately in front of Section 5660 (Pre-lien notice). That new section would define "assessment debt," then incorporate the *personal obligation* of owners in current subdivision (a) of Section 5650 and the

property obligation of the separate interest that can be the subject of a lien if unpaid, from and after the time the association causes a notice of delinquent assessment to be recorded. The new section might look something like:

> **§____. Obligation for Assessment Debt.**
>
> ____. (a) "Assessment debt" shall mean any regular assessment and special assessment, plus late charges, reasonable fees and costs of collection, reasonable attorney's fees, and interest as determined in accordance with subdivision (a) of Section 5650.
>
> (b) Assessment debt shall be the personal obligation of the owner of the separate interest in the common interest development at the time the assessment or other sums are levied.
>
> (c) Assessment debt shall be a lien on the owner's separate interest in the common interest development from and after the time the association causes to be recorded with the county recorder a notice of delinquent assessment that contains the information specified in subdivision (a) of Section 5675.

One advantage of defining "assessment debt" as shown above is to make consistent the repeated *but varied* litanies of references in the current and proposed new law to late charges, collection costs, attorney's fees and interest. At least six different variations exist, which suggests different meanings are intended. Another advantage is to reduce the sheer numbers of words in the statutes when referring to an assessment obligation. Such references repeatedly dot the proposed assessment collection portion of the new law, while use of the definition would streamline the references and aid in clarifying for owners, boards and practitioners exactly what is meant.

In places where only a specified portion of the assessment debt is intended to be referenced, the longer litany would be retained, but the overall result would be far clearer.

Section 5655 (Payments):

Proposed Substantive Changes: This application of payments provision doesn't work and never can work in an environment where an obligation is accruing yet services cannot be withheld. The real-life incidents of payment abuse (coupled with what some believe is a "re-setting" of the $1,800 or 12 month delinquent status when payments are applied first to assessments) are truly problematic. Collection counsel throughout the state will confirm that this provision (which defeats any legislative encouragement of payment plans in Section 5665) does not work.

For better clarity for the lay reader, subdivision (c) might instead read:

> (c) The association shall provide a mailing address for overnight payment of assessments ***in the assessment collection policy prepared and distributed as part of the annual policy statement in accordance with paragraph (6) of subdivision (a) of Section 5310***.

Non-Substantive Comment*:* The Authors question the explanation in the accompanying Note for Section 5655 for why the phrase "set forth, as required in subdivision (a)" was deleted when section 1367.1(b) was otherwise continued. While there could be good reasons for eliminating it, we are unaware of any instances where it's been argued that an association's own technical mistake in describing assessment debt might somehow relieve it of the obligation to apply payments as set forth in the statute. Is there a less reaching reason why the phrase is proposed for deletion?

Section 5658 (Payment under protest):

Non-Substantive Comment: This proposed section provides an easy opportunity for greater clarity for the lay reader. So that the reader has some context for what is meant by an otherwise obscure cross-reference, Section 5658 might read:

> 5658. (a) If a dispute exists between the owner of a separate interest and the association . . . , and the amount in dispute does not exceed the jurisdictional limits ***of small claims court*** stated in Sections 116.220 and 116.221 of the Code of Civil Procedure . . . .

Section 5660 (Pre-Lien Notice):

Non-Substantive Comments: Subdivision (d) provides another opportunity to be clearer in using a cross-reference:

> (d) The right to request a meeting with the board ***to discuss a payment plan, subject to a limited time period for making the request***, as provided by Section 5665.

The Note accompanying Section 5660 suggests that the change from referencing Corporations Code section 8333 to referencing the broader records inspection rights in current section 1365.2 is merely a change in a cross-reference. However, the Note might point out that Section 5660's change will require associations to affirmatively update assessment collection policies, the statutory assessment disclosure form provided in accordance with current section 1365.1, pre-lien letters, and any other document in which Corporations Code section 8333 is currently referenced with respect to assessment collection.

This is a statute where the CLRC should make very clear that the proposed new law will not apply retroactively to create liability for currently-compliant collection steps taken and references made before the new law is in effect.

Section 5665 (Payment Plans):

Non-Substantive Comments: The Authors have several non-substantive comments to offer. First, subdivision (a) continues a poorly-crafted paragraph regarding payment plan requests that opens with a long and obscure reference to an exception for time share owners. To simplify the provision, the exception should be moved to a new subdivision (f) at the end of Section 5665 and, to enhance understanding, the reference to time shares shortened and made clearer, as follows:

> (f) ***This section does not apply to*** an owner of any ***time share*** interest ~~that is described in Section 11212 of the Business and Professions Code that is not otherwise exempt from this section~~ pursuant to subdivision (a) of Section 11211.7 of the Business and Professions Code.

Subdivision (a) (if shortened by moving the time share reference to a new subdivision (f) as suggested above) could more clearly be drafted to enhance the understanding of the lay reader, as follows:

> 5665. (a) An owner may submit a written request ***within the time period described in subdivision (b)*** to meet with the board to discuss a payment plan for the ***assessment*** debt ~~noticed~~ ***described in the pre-lien notice given*** pursuant to Section 5660. ***In scheduling the meeting,*** ~~The~~ ***the*** association shall provide the ~~owners~~ ***requesting owner with a copy of*** the ***association's*** standards for payment plans, if any exist.

Second, the Authors recommend that numerous references in Section 5665 to "delinquent assessments" should be changed to "assessment debt," as more than just unpaid assessments are the subject of the owner's obligation and payment plan request.

Section 5670 (Pre-Lien Dispute Resolution):

Proposed Substantive Change: One problem that the Authors find imbedded in the collection process that is currently presented in Civil Code section 1367.1 is the lack of clarity regarding the number of occasions when specific notices must be provided to a delinquent owner. Current Civil Code section 1367.1(c)(1)(A) (now this proposed Section 5670) is a good example. The pre-lien notice that is required to be provided to a delinquent owner pursuant to proposed Section 5660 is mandated to include notification of the recipient owner's right to request a "meet and confer" with the board. Does inclusion of a statement of that right in the pre-lien notice satisfy the requirements of this proposed section or does the board have to send a

second notice of the right to request a "meet and confer" before the board? The Authors would recommend deleting this proposed section as being duplicative.

Section 5673 (Decision to Lien):

Proposed Substantive Change: The decision of the board to record a lien to secure payment of assessment debt should be clarified to state that the decision may be made by a majority vote of directors who are present in an open meeting *at which a quorum has been established*. As currently drafted, the proposed new law raises a question whether a majority of all directors is required to authorize a lien. Such an interpretation would be inconsistent with the corporate principles upon which board decision-making is based and not necessary to promote the policy underpinnings that boards may neither delegate away their responsibility to authorize liens nor approve liens secretly.

Non-Substantive Comment: Is the opening reference to "liens recorded on or after January 1, 2006" still important to include at this late date?

Section 5675 (Notice of Delinquent Assessment):

Non-Substantive Comments. The Authors have several non-substantive comments: Assuming that the definition of assessment debt and the statement of dual obligation for assessment debt is inserted as a new section, Section 5675 could then simply refer to that statement in reciting the required content for a notice of delinquent assessment. Other simplifications could also be applied to what has become a much-amended and out-of-shape statute.

Subdivision (a) could read:

> 5675. (a) The notice of delinquent assessment specified in subdivision (c) of Section ____ shall state the amount of the assessment debt, a legal description of the separate interest against which the assessment debt has been levied, and the name of the record owner or owners of such separate interest.
>
> (b) The itemized statement of the ***assessment debt provided with the pre-lien notice required*** in subdivision (b) of Section 5660 shall be recorded together with the notice of delinquent assessment.

No changes are suggested to subdivisions (c) or (d). We agree in subdivision (e) with the CLRC's clarification that the notice of delinquent assessment sent by certified mail to the delinquent owner(s) should be a copy of the recorded notice. Additional drafting improvements to the readability of subdivision (e) might be:

(e) A copy of the recorded notice of delinquent assessment shall be mailed by certified mail ***no later than 10 calendar days after recordation*** to every person whose name is shown as an owner of the separate interest in the association's records~~, and the notice shall be mailed no later than 10 calendar days after recordation~~.

Subdivision (f) appears to be overly detailed and out of place and perhaps could be made its own section following Section 5675.

Subdivision (g) relates to the pre-lien period and is misplaced in Section 5675. It should become a new section immediately following Section 5660.

Finally, please consider the comments already presented above regarding the secondary address issue.

Section 5680 (Lien Priority):

Non-Substantive Comment*:* The Note to Section 5680 points out that current section 1367.1(f) refers to the "notice of assessment" and suggests that this was simply an error in the established term "notice of delinquent assessment." That may be true but in fact, many pre-1986 declarations did (and do) refer to "notices of assessment" as part of a legally acknowledged continuing lien program used in many associations. Davis-Stirling settled on a lien approach seen in other declarations – based on recordation of a notice of <u>*delinquent*</u> assessment – and in 1986 the Act superseded "notices of assessment" and continuing lien programs in older declarations.

Section 5685 (Lien release):

Non-Substantive Comments: The three subdivisions in Section 5685 are uneven. In particular, subdivision (b) inexplicably refers to "the party who recorded the lien" rather than simply "the association" as responsible for recording a lien release and sending the owner a copy.

The Authors suggest these additional edits as well:

5685. (a) Within 21 days of ~~the~~ payment ***or satisfaction in full*** of the ~~sums specified in the notice of delinquent assessment~~ ***assessment debt,*** the association shall record or cause to be recorded ~~in the office of~~ ***with*** the county recorder ~~in which the notice of delinquent assessment is recorded~~ a lien release or notice of rescission ***sufficient to indicate that the assessment debt has been satisfied*** and provide the owner of the separate interest ***with*** a copy of the ***recorded*** lien release or notice ***of rescission*** ~~that the delinquent assessment has been satisfied~~.

(b) If it is determined that a lien previously recorded against the separate interest was recorded in error, the ~~party who recorded the lien~~ ***association*** shall, with 21 calendar days, record or cause to be recorded ~~in the office of~~ ***with*** the county recorder ~~in which the notice of delinquent assessment is recorded~~ a lien release or notice of rescission and provide the owner of the separate interest with ***both*** a declaration that the lien filing or recording was in error and a copy of the ***recorded*** lien release or notice of rescission.

(c) If it is determined that an association has recorded a lien for ~~a delinquent assessment~~ ***assessment debt*** in error, the association shall promptly reverse all late charges***, costs of collection (including costs imposed for the pre-lien notice prescribed in Section 5660 and costs of recordation and release of the lien authorized under subdivision (b) of Section 5720), attorney's fees, and interest*** ~~fees, interest, attorney's fees, costs of collection, costs imposed for the notice prescribed in Section 5660, and costs of recordation and release of the lien authorized under subdivision (b) of Section 5720~~, and pay all costs ~~related to~~ ***for*** any related dispute resolution or alternative dispute resolution.

CHAPTER 6. FINANCES
(Article 6. Assessment Collection)

Section 5700 (Collection Generally): No comment.

Section 5705 (Decision to foreclose):

Non-Substantive Comments*:* As with virtually all sections relating to assessments and their collection, Section 5705 has many uneven references to the assessment obligation. The description of what is owed can be simplified and made uniform by substituting in the term "assessment debt."

In subdivision (c), the CLRC could clarify again that it is the decision of the majority of directors *who are present* in an executive session *at which a quorum has been established* that permits initiating foreclosure.

With respect to subdivision (d), the drafting continued from existing law could be clearer, if made to read in part:

(d) ***If the board votes to foreclose upon a separate interest,*** ~~The~~ ***the*** board shall provide notice ***of that decision*** by personal service ***to the owner of the separate interest if the owner occupies the separate interest or, if one has been identified, to the owner's legal representative,*** in accordance with the manner of service of summons in Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 of Part 2 of the Code of Civil Procedure ~~to an owner of a separate interest who~~

~~occupies the separate interest or to the owner's legal representative, if the board votes to foreclose upon the separate interest~~. ***An owner's legal representative is defined in subdivision (b) of Section 5710.*** . . . .

Issues for Further CLRC Consideration:. There is continuing debate among practitioners as to the meaning of subdivision (c)'s reference to "initiating" foreclosure. Central to the confusion is the inapposite requirement at the end of subdivision (c) that the decision to initiate foreclosure "shall take place at least 30 days prior to any public sale." This time frame does not fit any recognized period in a nonjudicial foreclosure.

If the reference to initiating foreclosure is intended to predate a trustee's recordation of a notice of default (and a statutorily mandated three month hold on collection activity), then the decision would perforce be made at least 111 days prior to the auction (approximately 90 days plus a minimum period of 21 days before sale), not 30 days. If the reference to initiating foreclosure means the minimum period between expiration of the notice of default and the sale, this period is less than 30 days. If the reference is to require the board to decide on proceeding to sale while the collection is still in the notice of default grace period, that too makes little sense.

We think the confusion and legal risk to associations can be eliminated if the CLRC clarifies the meaning of (or changes it to something comprehensible) the term "at least 30 days prior to any public sale."

Section 5710 (Foreclosure):

Non-Substantive Comments*:* The provision in proposed Section 5710 continuing section 1367.1(j) regarding an owner's legal representative is confusing and will create significant legal jeopardy for any association trying to comply with the requirements of this section.

Essentially, the proposed section appears to say that unless the owner has identified *another* person as his or her legal representative, the owner's legal representative for purposes of personal service <u>*is*</u> the owner (or possibly a co-owner). This language creates a messy situation in that only owners who occupy their units are subject to personal service of a notice of default (or decision to foreclose pursuant to Section 5705), while owners *qua* legal representatives must be served in *all* cases, regardless of what residence they occupy.

Another troubling vagueness is that a "legal representative" might also be "the owner of <u>*a*</u> separate interest" (emphasis added to the indefinite article, to show that no particular separate interest is indicated and thus might be referring to the owner of <u>*any*</u> unit). We hope the CLRC can help untangle this drafting problem and fashion a provision that counsel and directors can understand.

Section 5715 (Right of Redemption After Trustee's Sale): No comment

Section 5720 (Limitation of Foreclosure):

Non-Substantive Comments: Again, the substitution of "assessment debt" for the varieties of terms in this Section regarding limits on foreclosure rights would help provide conformity and minimize disputes.

A central problem in Section 5720 is the open question of whether, once assessment principal *first* reaches the $1,800 mark, an owner can again limit an association's foreclosure remedy by bringing that principal again below $1,800 (including by a payment plan that both parties agree to). Public policy would seemingly support payment plans, yet Section 5720 would strongly discourage them if re-setting is possible. A solution would be to apply the limitation only until the delinquent assessments *initially* reach $1,800.

A second question is whether it is only regular assessments (for the remainder of that fiscal year) that may not be accelerated in a collection. Modernly, associations in need of significant capital for repairs have obtained member approval of large special assessments that typically can be paid off over time. These beneficial payment arrangements can't be made available if an association can't call the full amount in the face of a delinquency. The nature of a special assessment, its amount and purpose clearly distinguish it from regular annual assessments. We can discern a policy basis in the context of not permitting acceleration of unpaid regular assessments to artificially reach an $1,800 mark sooner, but not a similar basis for a special assessment that is large in amount and whose payment is offered to extend over a considerable period time. We recognize that all assessments, however characterized, are simply part of an owner's single obligation to his or her association, but believe the restriction on accelerating an assessment balance rationally applies only to regular assessments.

References to acceleration of assessment balances are found in subdivision (b)'s opening provisions and in its paragraph (2). Clarity dictates that the term "assessment" be modified by the term "regular."

In paragraph (2), we discern several references to recording a "lien" rather than a "notice of delinquent assessment." Only the latter is correct. To minimize legal confusion in applying Section 5720's provisions (which also discusses legal actions), references to liens should be substituted with accurate terms.

In subparagraph (1)(A), a complaint in small claims court is properly referred to a "claim."

In subparagraph (1)(B), we are finding small claims courts surprisingly reluctant to grant judgments that also cover accruing assessment debt. When this provision was being negotiated, it was in the context of judicial economy and minimizing multiple or repeated claims, hearing dates and appearances as assessment debt grows each month beyond the original amount of the judgment (as it almost assuredly will if not quickly resolved). We suggest stronger verbiage consistent with the policy debated at the time, as follows:

> (B) ~~In the discretion of the court, an~~ ***An*** additional amount to that described in subparagraph (A) equal to the amount owed for the period from the date the ~~complaint~~ ***claim*** is filed until satisfaction of the judgment, which total amount may include accruing ~~unpaid assessments and any reasonable late charges, fees and costs of collection, attorney~~'s fees, ~~and interest~~ ***assessment debt, if any***, up to the jurisdictional limits of the small claims court.

Paragraph (2) is unusually redundant, unlike other drafting that has neatly consolidated many repetitive provisions in current section 1367.1 et seq. Specifically, it repeats the limitation on foreclosure of assessment principal of less than $1,800 or 12 months delinquent and the entire requirement for offering dispute resolution before a notice of delinquent assessment can be recorded.

We suggest the following simplifying and clarifying edits that communicate concepts using more direct and fewer words:

> (2) By recording a ~~lien~~ ***notice of delinquent assessment*** on the owner's separate interest***, creating a lien that may not be foreclosed*** ~~upon which the association may not foreclose~~ until the ~~amount of the~~ delinquent assessments secured by the lien, exclusive of any accelerated ***regular*** assessments ***for the current fiscal year, late charges, costs of collection, attorney's fees, or interest***~~, late charges, fees and costs of collection, attorney~~'s ~~fees, or interest, equals or exceeds~~ ***initially equal or exceed*** one thousand eight hundred dollars ($1,800) or ~~the assessments secured by the lien~~ are more than12 months delinquent. An association that chooses to record a ~~lien~~ ***notice of delinquent assessment pursuant to this section shall first comply with the procedural prerequisites specified in Sections 5660, 5670 and 5673 for a pre-lien notice, offer of pre-lien dispute resolution, and authorizing the lien in an open meeting of the board*** ~~under these provisions,~~ prior to recording the ~~lien, shall offer the owner and, if so requested by the owner, participate in dispute resolution as set forth in Article 1 (commencing with Section 5900) of Chapter 8~~.

With respect to subdivision (c), the exception in paragraph (1) for assessments more than 12 months delinquent becomes a bit redundant in light of the edits above, but the clarity is welcome. The exception in paragraph (3), assessments owed by the "declarant," is very problematic. As discussed previously, the class of declarants is not co-extensive with the class

of developers, and it is not at all unusual to find developers who never succeed to the rights and privileges of the declarant. To the extent that the exception for *developers* (who are deemed to be more sophisticated than other owners, own many units for which unpaid assessments may be owed, and whose lack of contribution to the association's financial health can be devastating) was understood and intentionally written into existing law. The change from "developer" to "declarant" in Section 5720 should be reversed. Note #3 is an unclear assumption and should similarly be dropped.

Section 5725 (Property Damage and Fines):

***Non-Substantive Comments**:* The Authors recommend changing the heading for this proposed section to be more descriptive, such as: "Limitations on Authority to Foreclose Liens for Monetary Penalties."

Commission Staff Note #2 to Section 5725 suggests that nothing is lost by dropping the opening phrase "[e]xcept as indicated in subdivision (d) [of section 1367.1]" between the provisions for reimbursements and disciplinary penalties. Unfortunately the line is sometimes blurred, particularly due to other references in the existing law to "schedules of monetary penalties" and similar provisions that suggest there could be a punitive element to reimbursements, given the structure of the Act. Removing the phrase is probably acceptable, but the CLRC might want to be prepared that others may disagree and find the deletion a matter of concern.

Proposed Substantive Change: Commission Staff Note #1 to Section 5725 suggests that vicarious liability exists for all sorts of persons associated with an owner and the owner's unit and then broadens the list of persons for whom an owner would be financially responsible. As drafted, the section does not so much declare that owners are responsible for others but instead simply supplies a remedy assuming it to be so. Even with its limitations, the section in existing law aids in obtaining fair contribution for damage claims in CIDs, and the expansion to other persons is both appropriate and beneficial in resolving legal disputes. A clear declaratory statement of vicarious liability inserted elsewhere in the Act would be even better.

Finally, depending on the circumstances some damages to the common area or common facilities may not be repaired. The association should be entitled to reimbursement for "damage to the common area and facilities" rather than simply reimbursement for "repair of damage." See comment at proposed Section 5855, below.

Section 5730 (Statement of Collection Procedures):

***Non-Substantive Comments**:* In terms of clarity and communication with lay readers, the statutory notice regarding assessments and foreclosures fails in numerous places. This is largely (but not exclusively) the result of inserting legally pristine but incomprehensible phrases in a notice that is intended to explain important rights in plain English.

One example is the following statement: "For delinquent assessments or dues in excess of one thousand eight hundred dollars ($1,800) or more than 12 months delinquent, as association may use judicial or nonjudicial foreclosure subject to the conditions set forth in Article 6 (commencing with Section 5700) of Chapter 6 of Part 5 of Division 4 of the Civil Code." There's nothing explanatory in the sentence, only that there are mysterious "conditions" in an area of the Code that few lay readers have any idea how to find. We strongly recommend that these impenetrable chains of citations be dropped in favor of ordinary language that more easily directs the reader to other related provisions of the Act, as amended. Most of the references are to the Davis-Stirling Act. Accordingly, most of the long cross reference chains can become shortened by cross-references to principles or provisions in the "Act."

In the statutory assessment and foreclosure notice is a reference to accelerated assessments that, if there is agreement on the type being referred to, would need to be updated by adding the word "regular." References in places to "dues" are inapt, as there is no such term in the Act, existing or proposed. "Assessment debt" may be too much shorthand, so this may be a location in the Act where the longer litanies are appropriate.

Some statements are too broad in its generalized terms: "The association must comply with the requirements of Article 5 (commencing with Section 5650) of Chapter 6 of Part 5 of Division 4 of the Civil Code when collecting delinquent assessments. If the association fails to follow these requirements, it may not record a lien on the owner's property until it has satisfied those requirements." Since these references are to pre-lien notices, dispute resolution offers, and open meeting decisions, these principles should be capable of being described using common words, including explaining that they only apply where an association wants to collect delinquent assessments *by lien*.

A number of updated cross-references are not included. Under "Payments," the second paragraph regarding payment of assessments under protest, the citation should be to Section 5658. The third paragraph regarding dispute resolution and ADR should cite to Section 5705. Under "Meetings and Payment Plans," the second paragraph incorrectly provides that: "The board must meet with an owner who makes a proper written request for a meeting to discuss a payment plan when the owner has received a notice of a delinquent assessment." The statement should refer to a "*timely* proper written request" when the owner has received "*a pre-lien notice*." (emphases added.)

If the overly-expansive secondary address provision is un-generalized, as suggested, the statutory notice in Section 5730 will need to be similarly coordinated and Note #3 dropped or corrected.

Section 5735 (Assignment or Pledge):

Non-Substantive Comments: In terms of logical order, proposed new Section 5625 seems a better fit if it was repositioned to come before Section 5620. Also, the bill that led to Section 5735 (or at least its subdivision (a)) was negotiated concurrently with new Section 5620, which should thus logically and contextually follow it. If the CLRC agrees, the revised order would be: Section 5625, then Section 5620, then Section 5735 (or at least its subd. (a)).

As noted above, this provision (or at least its subdivision (a)), belongs behind Section 5620 that similarly references pledges and that was negotiated at the same time. If subdivision (b) remains in Section 5735 (which is feasible, it can stand alone), it should cross-reference the new location of subdivision (a).

Section 5740 (Application of Article):

Non-Substantive Comments: Instinctively, the Authors are of the opinion that a better location for this proposed section would be at the beginning of Article 6, not at its end.

The Authors note that existing section 1367 (for enforcement of pre-2003 liens) would be repealed and not continued in the proposed new law. Instead, subdivision (b) would refer generally to "law in existence at the time the lien was created." Issues related to this approach are (1) locating such law once it's been repealed and not continued, (2) requiring counsel to do this, (3) the potential that the law in existence "at the time the lien was created" could be pre-1986, pre-Davis-Stirling, and pre-section 1367. The authority in that case would arguably be very old declarations with potentially anomalous lien provisions.

These concerns may be purely theoretical as a practical matter. However, we wanted to point out the consequences of the uncertain phrase "law in existence at the time the lien was created."

CHAPTER 7. INSURANCE AND LIABILITY

Section 5800 (Unchanged). Limitation of Director and Officer Liability [former 1365.7].

Issues for Further CLRC Consideration:

Proposed Section 5800(a) carries over the clause from former section 1365.7, limiting its applicability to common interest developments which are "exclusively residential." We wonder if there a good policy reason to continue that limitation? For example, why should volunteer

directors of mixed-use developments be denied the benefit of this section? Since one of this section's purposes is to encourage owners to serve as association officers and directors, why not protect officers/directors of all CIDs which are subject to the Act?

Additionally, the Authors question the use of the term `"exclusively residential," since it is not a defined term and is not used elsewhere in the CLRC Proposed Act. For example, is a live-work CID one that is "exclusively residential"?

The Authors note that proposed Section 4025 lists provisions of the Act which do not apply to "nonresidential" developments. Is the intent of this Section simply to exclude nonresidential developments from its protections, as per proposed Section 4025? If so, then we suggest that the term "nonresidential" should be used instead of "exclusively residential," and proposed Section 4025 should similarly be changed to include a reference to Section 5800.

Currently there are procedural protections for volunteer officers and directors of other nonprofit organizations, contained in Code of Civil Procedure 425.15. Specifically, before a cause of action may be stated against a volunteer director or officer of the nonprofit organizations listed in that section of the CCP, a claimant must be reviewed by a court, prior to filing, to assure that plaintiff "has established evidence that substantiates the claim." The Authors submit that the same policy considerations supporting the current statute (viz., encouraging volunteer participation in service organizations and avoiding waste of judicial resources attributable to the filing and prosecution of insupportable claims) would be served by extending the protections of 425.15 to the volunteer officers and directors of common interest owner associations.

Proposed Section 5800(e) carries over the clause from current Civil Code section 1365.7 limiting its applicability to officers or directors who own no more than two separate interests. Again, what is the policy reason for this limitation? If a volunteer director happens to own three units in a 300 unit CID, why should he or she be denied the protections of this section?

Section 5805 (Unchanged). Limitation of Member Liability [former 1365.9].
No comments.

Section 5810 (Revised). Notice of Change in Coverage [former 1365(f)(2)].

Non-Substantive Comment:

There is a typographical error in the Note – the word "revised" should be changed to "revise."

Issues for Further CLRC Consideration:

This proposed section relates to the association's insurance disclosures, which Section 5300 requires to be included in the annual Budget Report. Although this is discussed in our comments to proposed Sections 5300 (Annual Budget Report) and 5310 (Policy Statement), we restate our belief that it is more logical to make the summary of the association's insurance policies part of the annual Policy Statement disclosures (proposed Section 5310) rather than the annual Budget Report (proposed Section 5300).

CHAPTER 8. DISPUTE RESOLUTION AND ENFORCEMENT
(Article 1. Disciplinary Action)

Article 1. Disciplinary Action

Section 5850 (Revised). Schedule of Monetary Penalties [former section 1363(g)].

Non-Substantive Comment:

We have no problem with the new requirement that the schedule of monetary penalties must be distributed to the membership annually, or with moving to proposed Section 5860 (new) the provision making a member responsible for governing document violations by the member's guest or invitee.

Section 5855 (Revised). Disciplinary Process [former 1363(h)].

Non-Substantive Comment:

This section adds a requirement that a board hearing be held before the board can "assess costs for damage to the common area" against a member. As the language of proposed Section 5855 acknowledges, a board decision to seek reimbursement from a member for the association's costs to repair common area is technically not a "disciplinary" matter. ("When the board is to meet to consider or impose discipline upon a member, ***or*** to assess costs for damage to the common area, the board shall notify….") Rather, imposing an assessment to obtain reimbursement of such costs is a non-disciplinary attempt by the association to enforce the governing documents. Therefore, we suggest that the title of this Article be changed from "Disciplinary Action" to "Disciplinary Action and Enforcement," and the title of this section be changed from "Disciplinary Process" to "Disciplinary Process and Enforcement."

Issues for Further CLRC Consideration:

This proposed section expands the scope of the statutorily required hearing process to include board actions to "assess costs for damage to the common area." We do not have any problem with the general concept underlying this extension, since it is a good practice for the

board to allow a member to be heard before deciding whether to assess costs or other disciplinary action with respect to that member.

However, this proposed section deals with the same general subject (the association's right to obtain reimbursement from members for damage to the common area) as proposed Section 5725(a). Thus, we believe that the new phrase in Section 5855 authorizing the board to board to "*assess costs for damage to the common area*," should be consistent with proposed Section 5725(a), which authorizes the board to impose a monetary charge (and a lien if authorized by the governing documents) to reimburse the association for costs incurred to repair common area damage:

> A *monetary charge imposed* by the association as a means of reimbursing the association for costs incurred by the association in the *repair* of damage to common area *and facilities* caused by a member, an occupant of the member's separate interest, or the member's guest, invitee, or tenant may become a lien against the member's separate interest.

There are several significant inconsistencies between the language in Section 5855 and the language in proposed Section 5725.

Proposed Section 5855 allows the association to "assess" costs against a member for common area damage, while proposed Section 5725(a) allows the association to "impose [a] monetary charge" against a member for common area damage.

Proposed Section 5855 authorizes the association to collect from members the costs for all "damage" to the common area. This would include the association's right to collect the costs to repair, replace or restore damaged common area. However, proposed Section 5725(a) <u>limits</u> the association to obtaining reimbursement only for the costs to "repair" damage to the common area. Occasionally there are disputes about the destruction of community property/damage to common areas, which will not result in a repair or replacement. More specifically, on several occasions, homeowners have destroyed mature trees on the common area because they dislike the tree for some reason. The association may decide not to replace the tree for many reasons, but the fact is that the homeowner has destroyed association property. Thus the right to recover should not be limited to the repair of damage, but to the damage itself, whether measured by cost to repair or fair market value of the destroyed item.

Proposed Section 5855 authorizes the association to assess the costs for damage to the "common area." However, proposed Section 5725(a) authorizes the association to obtain reimbursement for the costs to repair damage to the "common area and facilities." The phrase "and facilities" was included in the current Civil Code section 1367.1(d) and was carried over into proposed Section 5725(a). We are not sure what the words "and facilities" add, since it would seem that any association "facilities" would also be part of the association's common area.

Therefore, the Authors propose that these two sections be rewritten so that they are consistent.

Proposed Substantive Change:

The Authors ask the Staff to consider adding language authorizing the association to recover from members, after a hearing, its compliance and legal costs relating to the violation or common area damage.

Section 5860 (New). Responsibility for Guest, Invitee, Tenant or Resident. (former 1363(g)).

Issues for Further CLRC Consideration:

Former section 1363(g) provided that if an association adopted a policy imposing any monetary penalty on any association member for a violation of the governing documents "including any monetary penalty relating to the activities of a guest or invitee of a member," then the board must adopt and distribute a schedule of the monetary penalties.

This new Section 5860 states that a member may be "held responsible" for a governing document violation or damage to the common area which is caused by the member's "guest, invitee, or tenant, or occupant of the member's separate interest."

Curiously, proposed Section 5860 does not specifically authorize the imposition of fines, discipline, monetary penalties or reimbursement costs/ assessments. Rather, it merely states that a member may be "held responsible" for governing document violations or common area damage caused by the member's guests, invitees, etc. We are not certain why that general phrase was utilized, nor do we know why there is no reference in proposed Section 5860 to the imposition of discipline, fines, etc. Therefore, we suggest that first phrase in proposed Section 5860 should be changed to read:

> "For the purpose of this article, a member may be disciplined, fined, or otherwise held responsible for a violation of the governing documents or damage to the common areas caused by the member's guest, invitee, or occupant of the member's separate interest. A member's responsibility under this section shall include responsibility for costs assessed and reimbursement assessments imposed on the member for damage to the common area caused by the member's guest, invitee, or tenant, or occupant of the member's separate interest. "

This section uses the same phrase "damage to the common area" discussed above in connection with proposed Sections 5855 and 5725(a). All three should be rewritten for consistency.

Section 5865 (Revised). No effect on authority of board. (former 1363(j)).

Issues for Further CLRC Consideration:

This section states that nothing in Sections 5850 or 5855 "shall be construed to create, expand, or reduce the authority of the board to impose monetary penalties on a member for violation of the governing documents."

But it seems that is exactly what Section 5855 does. In fact, the CLRC note to that section explains:

> "Proposed Section 5855 would *expand the scope of the existing disciplinary process* to also encompass board action to assess a member for damage to the common area."

We recommend that the reference to Section 5855 should be eliminated from this section.

CHAPTER 8. DISPUTE RESOLUTION AND ENFORCEMENT
(Article 2. Internal Dispute Resolution)

Section 5900 (Unchanged). Application of Article. (former 1363.810). No comments.

Section 5905 (Unchanged). Fair, Reasonable and Expeditious Dispute Resolution Procedure Required. (Former 1363.820).

Issues for Further CLRC Consideration: .The Authors have concerns regarding inclusion of subdivision (b) of this section. Subdivision (a) establishes the salutatory principle that owner associations must provide their members with a fair, reasonable and expeditious procedure from resolving disputes that fall within the scope of Article 2 (Internal Dispute Resolution). Proposed Section 5910 then presents a list of minimum requirements for a fair dispute resolution procedure and proposed Section 5915 presents a statutory "default" procedure if the association has failed to otherwise adopt and promulgate its own procedure, consistent with the minimum requirements of Section 5910.

Those sound guidelines for a fair and expeditious internal dispute resolution process bring the reader back to proposed subdivision (b) of Section 5905 which instructs that in the course of developing a fair procedure for the resolution of disputes associations "shall make maximum, reasonable use of available local dispute resolution programs involving a neutral third party, including low-cost mediation programs such as those listed on the Internet Web sites of the Department of Consumer Affairs and the United States Department of Housing an Urban Development." What is actually intended or required by subdivision (b)? Since the meeting is between a director and the member, does this provision mean that owner associations are

obligated, to the maximum extent possible, to involve a neutral dispute resolution service provider? Since the association has to pay the costs, unless it's mandatory, why would the association pursue that dispute resolution alternative? Is the procedure flawed if a neutral party is not enlisted in the process? Given the fact that the Code's default procedure (proposed Section 5915) makes no mention of enlisting the services of a neutral, the answer is apparently "NO". The Authors have each encountered association/owner disputes in which the focus rapidly shifts from the merits (or lack thereof) of the underlying dispute to claims that the association has not accorded the disputing member with procedures that satisfy the requirements of the Act's IDR provisions. Subdivision (b) contributes to that sort of sideline argument that can be time consuming and expensive to resolve.

Section 5910(Unchanged). Minimum Requirements of Association Procedure. (former 1363.830). No comments, other than to consider what is actually meant by subdivision (d)'s reference to disputes being resolved "other than by agreement of the member". How can the dispute be resolved without the member's agreement or consent?

Section 5915 (Unchanged). Default Meet and Confer Requirements. (Former 1363.840). No comments.

Section 5920 (Revised). Notice in Policy Statement. (Former 1363.850). No comments.

CHAPTER 8. DISPUTE RESOLUTION AND ENFORCEMENT

(Article 3. Alternative Dispute Resolution Prerequisite to Civil Action. (Former 1369.520).

Section 5925 (Unchanged). Definitions. No comments.

Section 5930(Unchanged). ADR Prerequisite to Enforcement Action. (former 1369.520). No comments.

Section 5935 (Unchanged). Request for Mediation. No comments.

Section 5940 (Unchanged). ADR Process. No comments.

Section 5945. (Unchanged). Tolling of Statute of Limitations. No comments.

Section 5950 (Unchanged). Certification of Efforts to Resolve Dispute. No comments.

Section 5955 (Unchanged). Stay of Litigation for Dispute Resolution. No comments.

Section 5960 (Revised). Attorneys Fees. (Former 1369.580.)

Issues for Further CLRC Consideration.

The former section 1369.580 limited the authority of the court to award attorneys fees to actions where fees and costs may be awarded pursuant to section 1354(c). This revised section eliminates that limitation, and now attorney's fees could be awarded in "any enforcement action in which fees and costs may be awarded." We believe that this is too broad, and that the applicability of this section should be limited to enforcement actions which are "subject to this article."

Section 5965 (Revised). Notice in Annual Policy Statement. No comment.

CHAPTER 8. DISPUTE RESOLUTION AND ENFORCEMENT
(Article 4. Civil Actions)

Section 5975. (Unchanged). Enforcement of Governing Documents. (Former 1354).

Issue for Further CLRC Consideration: Subdivision (c) of this section states that in an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs. This provision is the principal provision of the Act addressing the right to recover attorney's fees. The Authors recommend that the Commission consider clarifying the provision to cover not only enforcement of the governing documents, but also actions to declare the effect of the governing documents (i.e., declaratory relief actions).

Section 5980 (New). Enforcement of this Part.

Issues for Further CLRC Consideration.

This new section is extremely troublesome, greatly expands existing law and may have significant unintended consequences. It states: "In addition to any other remedy provided by law, a member may bring an action in superior court to enforce a provision of this Part."

The CLRC note states that the new section would "make it clear that a member may bring a civil action to enforce <u>any</u> requirement of the Davis-Stirling Act." We do not think it is by any means "clear" that currently members may bring such civil actions. For example, members <u>do not</u> currently have the right to enforce the Association's assessment collection rights, lien and foreclosure rights, Calderon rights, section 1356 petitions to amend the governing documents, and right to discipline members, among many others. Furthermore, are the new rights created by this section enforceable by derivative actions or by personal lawsuits? And, does this section give member s a new right to sue associations for damages?

This is a very problematic new section which will have a negative effect on the entire administration of the revised Davis-Stirling Act. Its addition is totally inconsistent with the CLRC's mission to merely "clarify and simplify" the Act. Consequently, the Authors strongly recommend that the proposed new provision be eliminated from the CLRC proposal.

CHAPTER 9. CONSTRUCTION DEFECT LITIGATION

Section 6000 (Actions for Damages):

Issues for Further CLRC Consideration in connection with a separate project, perhaps dealing solely with construction defect statutes, that this provision of the Act (and the CLRC Proposed Act, if adopted) ought to perhaps be grouped with, or somehow melded into the so-called Builder's Right to Repair Law (Civil Code section 895 et seq.). Currently the two statutes are loosely and awkwardly tied together by Civil Code section 935 which states that "to the extent that the provisions of the [Right to Repair Law] are enforced and those provisions are substantially similar to provisions in Section 1375 of the Civil Code the parties are excused from performing the substantially similar requirements under section 1375." Also, there needs to be clarification regarding the commencement periods and their applicability to claims based on association-owned property (currently the Right to Repair Law only addresses homeowner claims and does not clearly apply to claims by the association for the same types of defects).

Subdivision (b) of proposed Section 6000 discuses service of the 'Notice of Commencement of Legal Proceedings" on the "developer" et al. This should be clarified to require service only on the "developer" named in the recorded governing documents. Often there may be entities who claim to be a 'successor developer' but nothing is recorded to document that status.

In subdivision (c), the tolling period should be longer, perhaps increased to 270 days. Also, extensions should apply to both peripheral parties and non-peripheral parties, because the tolling period currently cannot be effectively extending without suing the non-peripheral parties. It is unrealistic to assume you can identify the non-peripheral parties within the current 180 days..

With respect to subdivision (e), respondents very often violate the requirement to provide documents in a timely fashion. Accordingly the Authors suggest that the Commission should consider adding a penalty for failure to comply with this requirement (including, perhaps, an award of attorney's fees).

Finally, the Commission should consider adding a mechanism requiring the respondent to notify the association/petitioner of any objections (whether as to content or service) regarding the "Notice of Commencement of Legal Proceedings," within 30 days of the date of service.

Section 6050 (Action Following Pre-Filing Dispute Resolution): No comment except that this Section of the current Act (Civil Code section 1375.05) potentially could expire by its own sunset provisions before the CLRC Proposed Act becomes law.

Section 6150 (Notice of Civil Action): No comment.

EXHIBIT "A"
PROPOSED OUTLINE OF RESTATEMENT OF DAVIS-STIRLING COMMON INTEREST DEVELOPMENT ACT

STATE BAR OF CALIFORNIA
REAL PROPERTY LAW SECTION
SUB-SECTION ON COMMON INTEREST DEVELOPMENTS
ADHOC SUBCOMMITTEE ON RESTATEMENT OF THE ACT
Draft dated May 13, 2009

PART 6. COMMON INTEREST DEVELOPMENTS

CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

Article 1. Preliminary Provisions
Article 2. Definitions
Article 3. Miscellaneous Provisions
Article 4. Notice and Delivery

CHAPTER 2. FORMATION OF COMMON INTEREST DEVELOPMENTS

CHAPTER 3. COMMERCIAL AND INDUSTRIAL DEVELOPMENTS

CHAPTER 4. RIGHTS AND OBLIGATIONS OF OWNERS OF SEPARATE INTERESTS

Article 1. Upon Transfer; Easements; Restrictions on Partition
Article 2. Common Area
Article 3. Restrictions
Article 4. Maintenance

CHAPTER 5. GOVERNING DOCUMENTS

Article 1. Declaration
Article 2. Articles and Bylaws
Article 3. Condominium Plans
Article 4. Operating Rules

CHAPTER 6. ASSOCIATION GOVERNANCE

CALIFORNIA LEGISLATIVE
ACTION COMMITTEE
community
ASSOCIATIONS INSTITUTE

Serving 3,000,000 California Households in Condominiums and Homeowner Associations

July 15, 2010

Mr. Brian Hebert, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Dear Brian,

1. Since my letter of July 6, 2010 re Civil Code §1375(s) and §1375.05, I have received further correspondence, from Duncan McPherson, which I would like to share with you. He brings up issues, other than insurance and the sunset clause, which are pertinent.

"*At the time it was enacted I am sure there was no discussion of the application to mixed use developments and the proponents did not want to extend the protection to non-residential CIDs. This section has always had some problems apart from the limitation to purely residential CIDs. The first is subsection (c) which could exclude an employee of the declarant or of a financial institution involved with the CID even through the employee is not acting for the declarant or the financial institution and just purchased a house or unit in the subdivision as his or her home and has had nothing to do with representing the declarant or financial institution with regard to the development of the subdivision. I have known many cases where trade workers purchase in subdivisions developed by their employers but who have nothing to do with the development. If they served on a board the 1375.05 would not cover them. Also the use of the term "declarant" is a problem for often the declarant in these large subdivisions is not necessarily the party who is doing the development and the development may be controlled by builders who have purchased property within the development. A bank teller in a bank that had happened to purchase lots or houses in the subdivision at foreclosure if the teller was serving on the board would not be protected. It makes no sense. Also if a director is the owner of more than two separate interests the director is not covered. That seems like a low threshold of ownership to treat a person as if they were a developer and not apply the protection.*

The issue with mixed use is more complex. As I have mentioned before, depending on how the mixed use project is set up the master association for the project may not be a CID since it may not have separate interests - this would be the case if only commercial associations and the residential association were the members perhaps along with the owners of commercial properties. Some of these associations may also not carry the insurance required by 1365.7 if the master association owns no common area. The overall result of the existing exemptions and the problem of mixed use developments make this section one that is probably ripe for re-examination and revision. The statute should cover all persons who are representing residential projects or the owners of residential projects on the residential project board and on any master association board. The excluded persons should only be for persons who are actually representing the developer or a controlling financial institution on the board, not persons who just happen to be employees of such a person but are serving because they own a house or unit in the development."

EX 198

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It appears considerable rewrite is needed.

2. There were a number of issues in Elections, CC §1363.03 that we would like changed. Such as (1) reduced quorum to conclude the election process, and (2) acclamation where the number of candidates for election to the board is equal to or less than the number of open seats. Also, (3) cumulative voting, (4) nominations from the floor, (5) statute of limitations, (6) signatures on envelopes and proxies, (7) variable voting power, (8) opt-in for electronic voting, (9) additional notices to members and excessive timing problems, and (10) statutory issues related to whether the Civil Code or the Corporations Code should prevail. We hope some of those issues will be legislatively resolved this Session.

The remaining issues will be addressed when the Clarification and Simplification of the DSA Act is introduced this fall.

3. The issue of foreclosures in associations, and the extended time from Notice of Default until Sale to the Trustee Sale, continues to climb. In June 2009 it was 173 days; in June 2010 it was 234 days. The California inventory of homes that have had a Notice of Default filed was 158,874, of which 25% to 30% and in CIDs, and the months that the HOA assessments have been unpaid is now over eight on average. There is no teeth left in the nonjudicial foreclosure in CC §1365.1, as the owners are "upside down", and there is no value in the unit for the association to recoup. Legislative help is sorely needed.

a. An improvement gained was in an amendment to Civil Code §2924b which requires ten day notice of address after Trustee Sale, so CIDs know who is the financial institution taking title, so assessments can be collected from them.
b.That is a small tip of the iceberg of needed change. Impound accounts or some other vehicle of having the assessment money available to other than the first lien holder is one possibility.

4. Even though §1363.005 *Distribution of Disclosure Documents* was added to the DSA in 2010, we hope you can continue working on changes which would eliminate this unnecessary, redundant list of fourteen reports that members can request.

5. §1371 (Proposed §4220) is unchanged. We would still like to see the following changes.

a. Expand the definition of unit boundaries to include deviations from the original plans when:
   1. The original plans are not available
   2. Allow for reconstruction to current building codes
   3. Allow use of currently available building materials

b. Older associations, such as Laguna Woods Village, have tried to introduce Bills to have this done, as the materials used in the original construction are not available, but the bill failed.

Unfortunately, I am unable to complete our Report, but fortunately, our letter to you on December 16, 2009 captured the changes we felt were needed at that time. And not too many items need be added since. That Report is attached.

The purpose of this letter is to remind ourselves of changes we still desire, and when the **CLARIFICATION AND SIMPLIFICATION OF THE DAVIS-STIRLING ACT** becomes a Bill this fall, we can go to these two reports to determine what Sections we would like changes made to, prior to its becoming approved Code.

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We are pleased to announce that CIA-CLAC now has a Webinar for CID members, available at http://webinars.caionline.org **California: What Board Members Need to Know**
Specific to California - Duration: 3 Hours
Presented By: Kelly Richardson, Esq., first presented on June 30, 2010. I was fortunate enough to have taken this excellent course. Powerpoint© presentations of this same material are available through the eight Chapters.

Civil Code §1363.001 calls for board of directors education, and this, plus other courses available through the CAI Chapters, fulfill that requirement.

We appreciate the cooperation that our Legislative Committee, comprised of homeowners, Community Managers, Attorneys and vendors from the eight California Chapters of Community Associations Institute, have received during the seven year review of the DSA, and the many meetings, emails and letters we have shared with the California Law Review Commission.

Respectfully,

Earl “Dick” Pruess
Vice Chair, CAI-CLAC Executive Committee

Cc: Skip Daum, Kelly Richardson
2010 CLRC Review Committee

EX 200

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CALIFORNIA LEGISLATIVE
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Serving 3,000,000 California Households in Condominiums and Homeowner Associations

December 16, 2009

Mr. Brian Hebert
Executive Secretary
California Law Review Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Brian,

I know these comments are too late to be part of the December 17, 2009 Commission's review of CID Law, but wanted to get them in your hands before the "revisions proposed in this memorandum be the last round of revisions prior to the approval and release of a tentative recommendation", as indicated in MM2009-53, pg. 1. The Title of Memorandum 2009-53 **Statutory Clarification and Simplification of CID Law (Proposed Legislation)**, is difficult to accept, based on some of the convoluted language still existing in the proposed Legislation.

One of the purposes of the proposed legislation was to make it easier for self-managed CIDs to be able to comprehend and understand what the bill meant, and while the restructuring and organization is an improvement, the language is most difficult for a layperson to comprehend. For example, page 4 Proposed Section 4365 (f) *A meeting called under this section is governed by Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of, and Sections 7612 and 7613 of, the Corporations Code.*

Is it appropriate to believe that a self-governed board will take the time to look up this many references in the Corporations Code, when they are struggling to comply with the complexity of the Davis-Stirling Act? Simplifying the election procedure for small associations is necessary. I know you have previously looked at this recommendation, but until a set of laws governing associations is written so the some sixty-six percent or so of all the associations, which are the self-governed ones, can comply without the complexity of the Proposed law, they will just ignore it, and have elections they can handle internally that the members take as acceptable, because they are unaware they are not in compliance.

We concur with your proposed changes due to the passage of AB 899. We have been opposed to the Disclosure Document Index since introduction of the Bill, as being redundant, a conclusion you have also reached.

We also agree with the changes to § 4755, based on the passage of AB 1061 regarding water use restrictions.

Proposed § 5115 (e) was added, and is acceptable as written. Previously, the language would have required the proposed amendment to be part of the ballot, a cumbersome and unnecessary proposal, which would have added substantially to the cost of mailing the ballots back to the association after casting it by the member.

We concur with your recommendation not to revise §4025, as we believe that non-residential associations should have the same right to the emergency exemption as do residential CIDs.

It is our recommendation that the *parenthetical references* **not be removed.** Since one of the purposes of the **Clarification and Simplification** was to make it easier for self-managed associations to use, to not have these *parenthetical references* would seem to do the opposite.

SUBSTANTIVE CHANGES

§5500(e) the proposed change is acceptable.

§4065 and 4070. Deleting the former language could create as many problems as it solves. If an associations' CC & Rs do not define classes of voters, and there are classes in that association, without the prior language in §4065 and §4070, what determines who has the voting power? Therefore, we would recommend leaving the language as originally written.

§1363.09 We agree with the staff analysis and recommendation.

§5500 and §5555. The recommendation to combine the sections makes sense.

Mr. Duncan McPherson is to be commended for the thoroughness of his review of "terms" used in the rewrite. Subsequently the Staff is to be commended for the analysis made of his recommendations, and the approach taken on some issues that may require further study or comment.

We concur, in general, with the staff position on the Sections referred to in pages 17 through 51 of MM2009-53. Following are comments on a few specific Sections where we raise comment when comment was requested, or question if the Staff recommendation is the best solution.

§4295. The proposed Section, as amended, would appear to be a clear definition of the required signatories, and therefore is acceptable as written.

§ 4525. The suggested change, with (a) and (b) Sections, is a clearer statement of the owner who shall provide documents. No substantive change can be thought of that would cause change in the sections' meaning.

§4525(d). Striking the word *true* in the tentative recommendation makes sense, as no one has felt it added importance or clearer meaning to the Section.

§5605(b) The decision, stated on page 42 of MM2009-53, to not change the phrasing of Section 1366(b) is regrettable. Not only are Mr. McPherson's observations correct, a further problem exists in annually having the Budget approved without the approval of a majority of a quorum of members (Section 4070) at a member meeting or election.

Obtaining quorum, whether in person or by written ballot, or a combination of the two, has become an unfortunate reality of homeowner apathy. When an association has been unable to pass an annual budget, or hold an annual election, there should be language that spirals downward the percentage of owners present, either in person or by written ballot or proxy, that is needed for approval. With the high percentage of foreclosures or homes in the predisclosure phase, the owners, even if still living in the unit, are disinclined to take an active role in the association, so do not vote. There is an urgent need to find a solution to this problem.

§5655(c). Most management companies have assessment payments mailed by the owner directly to a financial institution, or provide for an owner to have the payment sent automatically to a financial institution, by deducting the payment from the bank account of the owner. Many owners object to this latter procedure, although it is the best alternative to avoid paying late.

Since most financial institutions use P.O. boxes in their mailing addresses, overnight delivery by a service such as Fed EX or UPS is not possible, as they do not deliver to P.O. boxes.

A possible alternative is delivery of the payment to the address of the management company, but there is no guaranty they have a mail handling system that would guarantee the opening of the mailing, and their posting the payment to the account of the owner before it would become delinquent.

Therefore Mr. McPherson's statement that "Whatever was intended, this provision does not make complete sense", makes sense. Striking §5655(c) perhaps makes the most sense.

§4220(b) Adding this subsection is an improvement, although not referencing changes in materials to meet changing Building Codes, is likely a serious flaw.

Regardless, the addition of (b) is a start to unraveling a problem that has existed for a substantial period. Therefore, **the change should be made.**

§4235. The addition of (b) would strengthen an association's ability to inexpensively revise its governing documents, **and the change should be made.**

§4270. We agree with the change to this Section, but is the exception in §4275 such a potential cause of potential change to the declaration, that it should somehow be highlighted?

§4600. The addition of (3)(F) and (G) improve the Section substantially, **and the change should be made.**

There are a number of issues cover in the [CONSENT] Section starting on page 51, that we would have liked to have been included in the Commission Staff's recommendations for change included with Memorandum 2009-53. However, they were not, and we will continue to seek ways to have these items included in the legislation forthcoming from this recommendation.

We appreciate the tremendous effort put forth by the Staff in drafting, analyzing and cross referencing a body of law that has seen many changes since its adoption in 1985.

One change that was not addressed in MM2009-53 was the name of the Act that will come from this memorandum. We again recommend that Davis-Stirling not be included in the new title. There is too much that is different for the Act to carry the same title, and the **Common Interest Development Act** will suffice.

Respectfully,

Dick Pruess,
Executive Committee Co-Chair

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July 19, 2010

California Law Revision Commission
c/o Mr. Brian Hebert
4000 Middlefield Road, Room D-2
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Via email: bhebert@clrc.ca.gov

Dear Mr. Hebert and Commissioners:

The California Association of Community Managers respectfully submits the following comments in regard to the Statutory Clarification and Simplification of CID Law (February 2010). The comments reflect the review of the members of CACM's Legislative Committee comprised equally of managers of CID's and legal counsel. Cumulatively, these parties represent thousands of community associations throughout California.

CHAPTER 1. GENERAL PROVISIONS. SECTIONS 4000-4190

4025(a). This section, formerly Section 1373, pertains to a "common interest development that is limited to industrial or commercial uses by zoning." CACM has provided input and been in regular communication with "The Stakeholders Group" in regard to the changes in the Davis-Stirling Act for non-residential CID's. CACM is in agreement with their recommended changes.

4035. This section is new law specifying that the individual to receive notice on behalf of the association is to be identified in a new "annual policy statement." This is a new requirement for associations, and is unlikely to be developed absent a professional community manager, likely with review of legal counsel. This presents a significant cost to larger associations and will likely be disregarded by smaller associations. We recommend that the annual policy statement provision be removed.

4040(a). This section, revised from former Section 1350.7, specifies "personal notice." CLRC has omitted *personal delivery*. This is a substantive change. Personal delivery is standard operating procedure in most small associations and high rise communities. Why legislate that membership spend hundreds or thousands in postage annually when mail can be slipped in mail slots or under the door? We recommend that the *personal delivery* option be retained.

4040(b). This section, revised from Section 1350.7, now provides "A member may request in writing that a notice to that member be sent to up to two different addresses." This is a substantive change from "alternate address" to "additional address." This means additional record keeping, software revisions, management time and all other owners in the association must bear the additional cost of this mailing. We recommend that owners continue to be allowed one alternate address instead of multiple addresses to avoid miscommunication between the members and the association and to limit additional costs. Our request is to retain existing language.

4045(b). This section is new law specifying that individual members have the right to require the association to provide them personalized individual notice every time that the association sends general notice (See 4040 above). This is a substantive change. Going forward, when the association posts notice for a board meeting or pool party it must now mail personal notice to individual owners who have so requested, at up to two addresses. Setting aside the fact that other owners must pay for this, it necessitates an additional list of owners who must now be mailed personalized notice each time the association sends general notice. There is concern that there is a legal implication if this does not occur which could adversely impact the association, the board, and community manager. Meetings might then become challengeable in small claims court if someone does not "receive" their personalized notice. We recommend that the ability to receive personalized, individual notice for general notices be removed.

4060. This section, revised from Section 1365(d), specifies that all notices shall be printed in a 12 point font or larger. In our industry, annual audits are generally shrunk 50% to get 2 pages to a page, with a notice that owners may request a full size original. Also the tax resolution Section 70-604 language on ballots would now be 4 pages long. 10pt font was the old standard. We recommend that no type font size be specified so associations can continue to save costs and be environmentally conscious by reducing materials for printing as needed. If the CLRC wishes to ensure that type fonts are big enough to read for people with poor vision, it would be understandable to include language in the notice that "full sized copies are available upon request at no cost to the member making the request."

4065. This section, which is new law, defines a majority of members as "more than 50 percent of the total voting power of the association." Setting aside the anomaly, condominium conversions with 45% delinquency, associations commonly have up to a 25% delinquency, most of which owners no longer participate in voting, making quorum far more difficult to achieve. We suggest that this read: "total voting power of the association *in good standing*."

4070. This section, which is new law, defines the concept of approval by a majority of a quorum. We suggest the same change as in Section **4065**.

4075. This section, formerly Section 1351, pertains to interpretation of the Act. Our comment pertains to changes within the Act which specifically disregard the Corporations Code, and with it the significant body of law pertaining to the operational aspect of these corporations relied upon by practitioners in this industry. It is difficult to predict the unintended consequences of this approach. Nor do these substantive changes clarify the law. Just the opposite, if we are no longer applying these old areas of settled law, practitioners will now apply their own interpretations of these provisions, presumably because the legislature has decided to distinguish CID's from other corporations. CACM invites caution in the use of these revisions and invites the CLRC to be more specific than using "to the extent this conflicts, the Act controls" language.

4095(b). In this section, formerly Section 1351(b), CLRC has adopted the definitional references for a PUD found at 1351(k), including the defining of these easements as "common area." The unintended consequence of this has always been the possibility that, absent proper CC&R drafting, it could obligate the association to certain default maintenance, insurance and management responsibilities of these common areas when within the separate interests (See Sections 1364/4775(a)). The CLRC should consider clarifying this issue to more clearly state these responsibilities.

CHAPTER 2. GOVERNING DOCUMENTS. SECTIONS 4200-4235

4200. This section, which is new law, provides a priority amongst articles, bylaws, declaration and operating rules. Subsection (d) states that such priorities do not apply to a stock cooperative. Although most of us do not represent stock cooperatives, we still do not understand why the priority section does not apply to all common interest developments. Of the few stock cooperatives we do represent, many have a declaration, bylaws, articles of incorporation as well as operating rules, and we believe they too would benefit from the prioritization of the controlling documents as identified in Section 4200. As a result, we recommend that subsection (d) be removed.

4225(c). This section, which is new law, provides that "…the board shall record the restated declaration in each county in which the common interest development is located." As presented, subsection (c) creates an ambiguity suggesting whenever the declaration is amended, an entire restated declaration needs to be recorded to reflect the amendment. We believe that if only a section or sections are amended, and an entire restated declaration is unnecessary, that only the amendment need be recorded. We propose "…*the board shall record the amendment to the declaration or, if applicable, the restatement of the declaration in each county in which the common interest development is located*."

4365(b). This section, formerly 1357.140, allows members to call a special meeting to reverse a rule change, after which the board is obligated to notice and hold a meeting of members (by general notice per Corporations Code Section 7511.) This requires this notice to be given by individual notice (Section 4040). As long as "personal delivery" is reincorporated into Section 4040, this should not be an issue.

CHAPTER 3. OWNERSHIP AND TRANSFER OF INTERESTS. (4500-4605)

4510. This section, which continues Section 1361.5, includes references to an occupant's separate interest. An association cannot bar an owner from access to their property. The tenant or occupant receives his or her right of access through the owner. The occupant does not own a separate interest. This change introduces association involvement in landlord-tenant matters outside the purview of the association's authority. We recommend that the language be amended to eliminate "or occupant('s)".

4525. This section restates those portions of 1367 and 1368 pertaining to disclosure to prospective purchasers. It specifically omits existing Section 1368(g), which provides that a person who acts as a community association manager is an agent for purposes of general agency law. Why? This is a substantive change. Owners, contractors and third parties rely upon this when they receive correspondence or perform work on behalf of the association. Without this expressly provided for in the statute, it could raise consequential issues regarding the extent to which, if any, a community association manager has authority to bind the association. This is especially problematic in emergencies, when a manager often acts before a meeting can be held. Its express deletion certainly supports that argument. CACM opposes this change and wholly disagrees with the statement in the comment that "There is no need to state the application of general agency law to a common interest development." We request that Section 1368(g) be reinstated as Section **4525(c).**

4525(b). This section, which is new law, ultimately excepts application of the section to those selling under a public report. We recommend that the language be clarified by stating "This section does not apply to anyone selling under a public report."

4600(a). This section, previously Section 1363.07, relates to an association's grant of exclusive use rights over common area. Subsection (a) clarifies the association's right to grant exclusive use over common area owned by owners as tenants in common. This was generally understood to be the law based upon the "or any easement right over" language in the original code, Therefore, we recommend that the previous language be reinstated.

4600(b)(3)(G). This section enables an association to grant exclusive use rights over a parking space, storage unit or other area designated in the declaration as a EUCA, but not assigned therein. The potential problem is that, in many declarations, such EUCAs are only numbered, and those numbers do not necessarily correspond to a particular separate interest; rather, the actual assignment of the EUCA is done in the deed. For example, in the legal description for a condominium, Parcel 1 would be the unit, Parcel 2 would be the undivided interest in the common area, Parcel 3 would be the miscellaneous easements (access, ingress, egress, etc.), and Parcel 4 would be EUCA rights over Storage Unit No. 15 as identified on Exhibit C to the declaration. Here, the declaration doesn't "assign" the EUCA; rather, the declaration only identifies the EUCA space - the space assigned to the owner (and presumably made appurtenant to the unit) in the deed. As a result of the way this section has been written, it is arguable that a EUCA space, deeded as we have described above, would be eligible for "re-deeding" by the association because it is a EUCA space not assigned in the declaration. We suggest revision to state "…but is not assigned to the separate interest in the declaration *or a deed*."

4600(c). This section, formerly 1363.07(c), does not clarify whether an association may make this grant of exclusive use rights over common area if the declaration for the project does not already confer general common area transfer authority on the board. Does 1363.07 give new power where such power did not previously exist, or does it only set forth the requirements that must be satisfied if the association has already been given authority to grant EUCA use? The re-write of the Davis-Stirling Act seems like an ideal opportunity to clarify this issue. Suggested revision "*Unless precluded in the governing documents, or unless the governing documents specify a different percentage, the affirmative vote…"*

4605(b). This section, previously Section 1363.09, allows an owner to challenge the grant of EUCA under 4600, but continues a disturbing trend. Although existing law, this creates an unfair playing field, where owners have nothing to lose by challenging these grants and the association is largely stopped while the member's vote is determined by the court. The association should be entitled to its fees and costs as a prevailing party, without the additional showing frivolous or unreasonable behavior. Owners who acknowledge the law, but want to "hear it from a judge" tie up time, association assets, and energy. Courts often sympathize with the owner, and the final sentence, requiring a court finding of frivolous or unreasonable behavior before awarding prevailing parties fees, is unfair to the other owners who paid for the creation of the ballots, mailings, count, the manager's appearance at small claims court and the time of those who donate their time to serve as the board of directors. We would like to see the last sentence removed.

4610(b). This section, a revised version of Section 1359, pertains to partitioning the common area in a condominium project. It generally repeats existing statute except the word "such" (which is apparently disfavored in drafting circles). Here, in Section 4610(b)(4), "such" is replaced with "under the circumstances described in this subdivision." The note invites comment on whether the changed wording

would cause a substantive change. In our view, the word "such" in the existing statute refers to a common area partition sale. As revised in Section 4610, we are not sure that this same meaning is preserved. Does the new Section 4610(b)(4) refer to any additional requirements that the declaration imposes for partition sales of the common area when the requirements of subparts (b)(1) through (3) have already been satisfied? It's unclear, and our view, does not simplify the statute. We recommend that "such" be reinstated and the longer phrase be removed.

4615. This section, previously Section 1369, pertains to mechanics liens against the common areas and other condo units not worked on. We recommend changes to address two issues: (a) the exception for the common area should only apply to undivided interest common area -- there's no need to file a lien against any unit if the work was done to common area property owned outright by the association (so the exception should be limited to being able to lien units to which an undivided interest in the common area on which work was performed is appurtenant), and (b) there should be substantial monetary penalties imposed against any contractor who fails to release any association-owned property from a mechanics lien where the work was only performed for a single unit. For example, situations where a subcontractor only performed work in an individual unit, but filed mechanics liens against the entire high rise (owned in fee by the association, except for the individual units), and refused to release the mechanics lien even after having had it explained to his lawyer that he was not entitled to lien.

CHAPTER 5. ASSOCIATION GOVERNANCE. SECTIONS 4800-5405

4930(a). This section, formally section 1363.05(i), references an existing error in the code allowing an occupant to speak at a meeting of the board. Tenants do not have a legal right to attend a meeting of the board unless invited, as they are not members of the association. These rights arise through ownership. The occupant has no jurisdiction absent ownership and this should be deleted.

4935(a) This section, formerly 1363.05(b), allows the board to adjourn to executive session… "Adjourning" requires a meeting, with 4 days notice and agenda, only to immediately adjourn to executive session. We recommend "The board may *convene* an executive session…"

4935(d) This section is new law. It errantly references "… foreclose on a lien…" Please revise to state …"*foreclose a lien*…"

4955(a) This Section, formerly Section 1363.09, allows a member of an association to bring a civil action for declaratory or equitable relief for a violation of the article (notice of the meeting or distribution of minutes?) by the association, "within one year of the date the cause of action accrues." We would like to see

this section aligned with Corporations Code Section 7527 (9 months). There is no need to wait a year to challenge notice of a board meeting or a request for minutes. We recommend that the CLRC simply create one period under which all these challenges fall which would be nine (9) months.

4955(b) This is similar to Section 4605. Although existing law, continuance of this creates an unfair playing field, whereby owners have nothing to lose by challenging these notices and the association is largely stopped while the validity of the meeting (and all business there under?) is determined by the court. The association should be entitled to its fees and costs as a prevailing party, without the additional showing of frivolous or unreasonable behavior. Even owners who acknowledge the law, but want to "hear it from a judge" tie up time, association assets, and energy. Courts generally sympathize with the owner even when the court does not find in his or her favor, and the final sentence, requiring a court finding of frivolous or unreasonable behavior before awarding prevailing parties fees, is unfair to the other owners who pay for the manager's appearance at small claims court and completely disrespects the time of those who donate their time to serve as the board of directors. We request that the last sentence be removed.

5000(c). This section is new law. This provides, at least, a direct conflict between the voting procedures of 1363.03 and the voting procedures of Corporations Code Section 7513. We recommend that it be removed or that clarifying language be added.

5115(e) This section is new law. It requires an association, when amending the governing documents, to deliver the proposed amendment together with the ballot. However, in certain master associations which use delegate voting, amendments are voted upon by the delegates, making distribution of a ballot an unnecessary cost. Clarifying language needs to be added.

5120(b) This section, previously 1363.03(g), requires notice to owners of election results within 15 days. Please revise this to read 30 days so it can be included in the association's next monthly billing, rather than requiring a separate mailing. Members who attend the annual meeting will know the results right away, and those who do not attend are always welcome to contact the managing agent (or the board in the absence of an agent) to determine the outcome of an election before the results are mailed. This will keep costs down to both the association and the owners who pay assessments.

5125(b). This section, formerly 1363.03(h), pertains to the inspector of election holding ballots for the time to challenge an election. The Corporations Code provides that such challenges should occur in 9 months, which the CLRC extended to 1 year. There is a reason for a 9 month period, and it has everything to do with noticing and holding the next year's annual election. By the time the owner challenges the old election one year out, a new one has already been noticed and likely held. By keeping the period at 9 months, the Corporations

Code allows the courts to dictate who is on the board and the number of seats remaining prior to the next election, rather than potentially upsetting two elections, and *de facto* requiring a third annual election to fix the fallout. We recommend leaving the time to challenge an election at nine (9) months.

5140(a). This section, which is new law, is loosely worded, but could be interpreted more completely by referencing Corporations Code Section 7612.

5145(a) See comment to Section 5125 pertaining to 9 months.

5145(b) This section, formerly 1363.09(b), provides a right of an owner to challenge an election. Although existing law, this creates an unfair playing field, where owners have nothing to lose by challenging these elections and the association is largely stopped from doing business while the member's vote is determined by the court. (If the Court invalidates a board, were their decisions as a board (contracts entered) enforceable?) Owners who acknowledge the law, but want to "hear it from a judge" tie up time, association assets, and energy. The association should be entitled to its fees and costs as a prevailing party, without the additional showing. Courts generally sympathize with the owner, and the final sentence, requiring a court finding of frivolous or unreasonable behavior before awarding prevailing parties fees, is unfair to the other owners who paid for the creation of the ballots, mailings, count, those paid inspectors of election, managers appearance at small claims court and the time of those who donate their time to serve as the board of directors. For a hundred dollars, a losing candidate can undo a ten thousand dollar master association election, and potentially all of the board's business for a year, largely without repercussion. We request that the last sentence be removed.

5200(a). This section generally continues Section 1365.2(a), but raises a conflict with Sections 8330 and 8333 of Corporations Code. It retains the requirement that financial records must be kept in an "accrual or modified accrual basis of accounting." If the intent of the Commission is to make the Act more user friendly then the reference to "accrual basis" should be removed or revised to read "or modified accrual", which is the only way most homeowner board members interpret financials. Additionally, in accordance with the Commission's "note" they are requesting comment as to whether the list of documents should be expanded to include the association's "journal." The statute already requires production of the "ledger" (presumably the general ledger). There is no indication what "the journal" adds to this, or really which journal is intended to be included. We recommend that "or modified accrual" be added back in or that the code even permit "accrual basis, modified accrual basis, or cash basis" as many association board members (who are typically non-accounting laymen) prefer to receive their financial statements using a cash basis method of accounting.

5205(a)&(f) This language, based upon Section 1365.2, retains the current overlap on informing member of the costs of copying, and the member having to agree to pay the costs. (a) (f) and (g) are duplicative regarding the owner's obligation to pay costs. (f)'s language is sufficient and should be revised to

require the member to **actually pay** the costs to the association, rather than just "promise" to pay.

5205(g). This language is based upon 1365.2. While largely unchanged, the fact remains that the whole "removal of personal identification" concept is unworkable. The relevant language ("If the enhanced association record includes a reimbursement request, the person submitting the reimbursement request shall be solely responsible for removing all personal information from the request.") disregards how such person could ever know when/if another owner has requested this record, and that he should drive to the offices of the managing agent and delete the confidential information before the document request is honored. We suggest "The association shall have no liability for production of such a request if the person submitting the reimbursement request fails to remove confidential information."

The cap of $200 for redaction "per written request" for enhanced records is unrealistic. A recent owner demand for all legal billings over a number of years required hours of redaction by an attorney to protect the rights of other members referenced therein. This should be limited to "the association's actual cost of redaction."

5210(b)(1) Existing Code section 1365.2(j)(2) requires requests for association records, as specified, to be provided to a requesting member within 10 business days following the association's receipt of the request. Our manager members have indicated to CACM that this time frame can be challenging, especially if the request is for a large amount of association documents that may have to be redacted or relocated from an off-site storage facility to the association's office or the office of the managing agent. We would request consideration for a revision to the time frame of 15 business days.

5210(b)(5). This section, based upon Section 1365.2, requires minutes of committee meetings be available within 15 days of their approval. Please add "*by the committee*" to the end of this sentence. This clarifies reoccurring questions that the committee itself, and not the board, is to approve its own minutes. Also, this statutory clarification does not address whether portions of the committee's minutes can be privileged. Obviously, if we're talking a "committee of the board" *a la* 7212, they are entitled to executive sessions. But in theory you could have an enforcement committee, with authority granted under the documents to decide disciplinary matters (with an appeal to the board). We believe that the minutes of such committees should be privileged and that the code should allude to that.

5215(b). This section continues 1365.2 precluding redaction of information regarding "compensation paid to employees..." Since associations rarely employ more than one or two employees, stating compensation by "job classification or title" is a charade, and with the Internet, this information becomes immediately accessible to the general public. An employee has a reasonable expectation of

privacy in terms of the amount of compensation, which this provision disregards. The unit owner is not the employer; the association is the employer, and this law should be amended to protect the privacy of association employees.

5215(c). This section continues 1365.2 regarding immunities for failure to redact information. This immunizes the association and management from damages claimed by a member "or any third party" for identity theft/breach of privacy. But whereas it says in the first clause that these parties are immune to claims from a member ***or third party***, the second clause only refers to failure to withhold or redact "that member's" information (it should include a reference to "the third party's" information.) As noted in the previous column, this section requires the association to disclose private information regarding payment to vendors to homeowners, which private information is going to end up on the internet. If you're going to force the association to produce private information about third parties (such as employees and vendors) then it is appropriate to immunize that board which complies with the law.

5220. This Section, previously 1365.2(a)(1)(I)(iii), regards membership list opt out. Please consider that revocation of an opt out request should be required to be in writing, since the initial request is already required to be in writing.

5235. This section continues Section 1365.2(f) regarding enforcement and we look forward to this chance to make this section better. It is unclear what is meant by "a separate written request." If an owner asks for the same document 10 times, is that 10 separate requests? If the association produced it 10 times before, are they liable for failing to produce it the 11th through 15th time? Suppose one request has 10 line items, and the board produces 6. Is the fine $500, or $2000? We believe that the CLRC should seize this opportunity to clarify “separate written request” and to put reasonable restrictions on requests for documentation that become excessive.

5235(c). This section continues Section 1365(2)(f), which allows associations to recover their costs of defending a legal action only if such action is frivolous, etc. Homeowners often send long, repetitive or overlapping lists of demands. The manager/board has to carefully review any and all requests to see what has already been produced, and that's problematic. Yet the association can recover its "costs" (presumably including its attorney fees if the action is not brought in small claims court) only when the court finds the action to be "frivolous, unreasonable, or without foundation." The association should be entitled to its fees and costs as a prevailing party, without the additional showing. This statute presumes that the association is the bad guy, until proven innocent. We request that the section be removed.5240(b). This Section previously 1365.2(g), (l), and (m), reiterates the owner's rights to documents under Corp Code 8330 and 8333. The Davis-Stirling Act is broader in some areas as well as more specific in others. So it is unclear when to apply the Davis-Stirling Act and when to apply 8330. Please state that the members’ rights of inspection are as defined in the Act.

5250. The section is new law which establishes rules on how long corporate documents should be kept. In response to the Commission's Note requesting comment, we believe this is essentially a good idea, although it creates some unanswered questions and intrudes on the board's business judgment as to what records should be kept and for how long. This would be a good candidate for separate legislation, with further consideration of the time frames and document categories. There is no reason to create potential liability for a board that fails to keep such documents, or inadvertently destroys them, after 1/1/2013. Additionally, the association is responsible for the payment of costs to store records, which in turn will drive up assessments for all owners. We suggest that the association should be allowed to rely upon their CPA, or legal counsel, to assist them in developing a record retention policy.

5250(a). This section essentially requires records to be kept for 4 years "except that a record with continuing legal or operational effect shall be retained during the period of its effect and for at least four years after the termination of its effect." We probably understand the intent behind that language, but we believe that not many board members will be equipped to make that determination. And what about potential litigation where the four year statute of limitations might be extended due to the discovery rule, or estoppels? There really isn't a "one size fits all" kind of rule, and we can foresee this language embroiling associations in breach of fiduciary duty litigation.

For example, if an association has to maintain "at least one copy" of the "membership list, including the name, address, and membership class of each member" and 5250(a) cites 5255 for the duration that the record is to be kept which says it needs to be kept for at least four years; then does an association now have to keep and track former member information for at least four years? Put another way, is there now a requirement to, on a monthly basis, print out a new membership list which is then stored for four years? 5255(a) goes on to state that the section doesn't apply to a "record with continuing legal or operational effect", which apparently must be kept forever. So are we now printing out a monthly membership list which must be stored forever?

Finally, records are lost all the time, through no fault of the board, when there are changes in management and legal representation. We request that this statute be phrased in terms of a guideline, rather than a requirement, to protect the board from a liability beyond their control.

5310. This section is new. It appears to introduce a second annual mailing, called a "policy statement" to be distributed with the audit. At this time, the audit is simply received from the auditor and mailed with the monthly billing. Creation of a second annual mailing is an unnecessary cost and duplication. This policy statement is a new requirement for associations, and is unlikely to be developed absent a professional property manager, likely with review of legal counsel. This presents a significant cost to larger associations and will likely be completely disregarded by smaller associations. We suggest all such information continue to be distributed with annual packet 30 – 90 days prior to fiscal year end.

5310(a)(9). This section, pertaining to distribution of ADR materials, should be revised to include IDR provisions as well.

5320(b). This section is new law. It requires development of a summary of the budget report. The budget report is a summary. We recommend that this be removed or if the CLRC has a specific objective in mind, the summary should be more clearly defined.

5350. This section expands on previous 1365.6, regarding conflict of interest of an interested director. Paragraphs (b) and (c) attempt to define for an association those areas in which a director may be held to have a conflict of interest. At present, the only "conflict" is taken from Corporations Code Section 7223, which involves a director voting on a transaction in which he has a "material financial interest." Except for those rare cases in which the director is going to vote on a contract going to a company he/she owns, or when the director is going to receive compensation for the vote, Corporations Code 7223's definition isn't very relevant. So defining the problem areas is appropriate. But, we believe that this new law would instead, benefit from the legislative process.

For example, the section expands the class of those in governance who have a conflict to committee members, and not just to "committees of the board," but all committees. This section also limits the director in a way not currently provided by law: Under Section 7233, an interested director may participate in the debate and discussions, although he/she is well-advised not to vote on the underlying resolution. Why should the director be precluded from participating in the discussion on the cited areas?

CHAPTER 6. FINANCES. SECTIONS 5500-5740

5500. This section continues Section 1365.5(a) without change. Consider simplifying the statute by revising the first sentence as follows: "Unless the governing documents impose more stringent standards, the board shall do all of the following "*on at least a quarterly basis."* Then delete the same from a, b, c, and e. Note there's no time on (d) and this resolves the issue.

5550(b)(5). This section continues Section 1365.5 regarding the reserve study report. Though unchanged, this rewrite highlights the discrepancy within the internal language which generally requires "less than 30 years," then in subparagraph (5) "30 years or less". This should be made consistent.

5610. This section continues Section 1366(b) regarding emergency (or extraordinary) assessments. The term should be used consistently throughout the statute, whether "emergency or "extraordinary." The language in this section creates confusion. This section is typically interpreted as meaning that the board can levy a special assessment under extraordinary circumstances; however, the

code section uses “assessment increase.” CACM would like to see this language clarified that it can be both an assessment increase and special assessment.

5620(a). This section continues Section 1366(c) regarding interpretation of “essential services.” This is an appropriate time to interpret “essential services” and expand existing provisions for utilities and insurance to include health and life/ safety issues.

5685(c). This section continues Section 1367.5 requiring an association to reverse all late charges, fees, interest, attorney's fees, costs of collection, etc. in the event of an “error.” An error can be as simple as a typo in the owner’s deed or it could be the owner's bank’s error. Since this creates fee shifting in favor of the owner, this section should be clarified to read “…*in the event of an error by the association*, …”

5650(b). This section continues Section 1366(e) regarding delinquent assessments. We suggest this provision be revised to state: “…are delinquent *if not paid within* 15 days after…”

5655. This section continues Section 1367.1(b) regarding application of assessments. We suggest this section be revised by adding the following subparagraph (d): “This section will not apply to payments made after the owner is late and as part of a payment plan agreement.”

5665. This section continues Section 1367.6. We request that the CLRC consider revising this section to respond to how this plays out. Owners rarely request a meeting, and when they do, they do not show up. Instead, they generally make a request for a payment plan. If the payment plan request is denied (and there probably should be some time limits put into this as to the time period for the board's rejection or approval), they can ask for a meeting with the board of directors to reconsider their payment plan proposal.

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We recognize that the Commission has completed extensive analysis and work on this project and thank you for your efforts. We also recognize how much work is yet to be performed to bring this Tentative Recommendation to active legislation.

Although we may be ahead of ourselves for the moment, our concern continues to look to the future and how practical implementation of the legislative revisions will be identified. For example, over 46,000 sets of common interest development governing documents, including, but not limited to the Declaration, Bylaws, Operating Rules, etc., should be revised once these revisions are codified. This process will be a challenging one and an expense to the associations. Others significantly impacted include various practitioners, service providers and over 9 million consumers living in CIDs. We look forward to discussing this with the Commission and continue to offer our assistance with this endeavor.

Respectfully submitted,
/s/
Karen D. Conlon, CCAM
President & CEO

cc: CACM Board of Directors
CACM Legislative Affairs Committee
Jennifer Wada, The W Group